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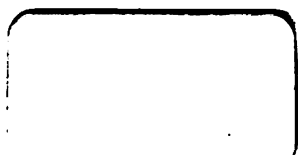
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A DIGEST

OF THE

DECISIONS OF THE COURTS OF LAST RESORT
OF THE SEVERAL STATES,

FROM THE EARLIEST PERIOD TO THE YEAR 1838.

CONTAINED IN THE

ONE HUNDRED AND SIXTY VOLUMES

OF

THE AMERICAN DECISIONS
AND
THE AMERICAN REPORTS,

AND OF THE

Notes therein Contained.

BY

STEWART RAPALJE.

VOL. III.

PART OWNERS—YEAR.

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DIGEST

OF THE

AMERICAN DECISIONS AND THE AMERICAN REPORTS,

WITH
REFERENCES TO THE NOTES THEREIN CONTAINED.

For Index to Notes in American Decisions and American Reports, see Volume I.

PART OWNERS.

Insurable interests of, see **INSURANCE**, 85.
Of vessels, rights and liabilities of, see **SHIPPING**, 5.

PART PAYMENT.

Effect of, generally, see **PAYMENT**, 9.
Effect of, on computation of interest, see **INTEREST**, 23.
Effect of, to discharge debt, see **ACCORD AND SATISFACTION**, 3, 4.
When revives statute of limitations, see **LIMITATIONS OF ACTIONS**, 90, 91.
When satisfies statute of frauds, see **SALES**, 21.

PART PERFORMANCE.

Effect of, to satisfy statute of frauds, see **CONTRACTS**, 59.
Of contracts, effect of, see **CONTRACTS**, 125.
When takes contract out of statute of frauds, see **SPECIFIC PERFORMANCE**, 22.

PARTIAL DELIVERY.

Of goods sold, see **SALES**, 38.

PARTIAL LAWS.

Constitutionality of, see **STATUTES**, 17.

PARTIAL LOSS.

Adjustment of, in marine insurance, see **INSURANCE**, 165.
When limit to recovery on marine policy, see **INSURANCE**, 147.

PARTIES.

[Includes the rules at law, in equity, and under the reformed systems of practice introduced by codes of procedure and practice acts as to who may or must sue, and who may be made defendant, or joined in the defense or prosecution of an action or suit. Changes of parties, and the consequences of non-joinder and misjoinder, are also treated.]

Bringing in new parties, see also **INTERVENTION**.

Conclusiveness of judgments as respects, see **JUDGMENT**, 45-54.

Construing a grant in respect to, see **GRANTS**, 7.

Demurrer for defect of, in equity, see **PLEADING**, 84.

Describing, in code pleadings, see **PLEADING**, 94.

Errors as to, when ground for reversal, see **APPEAL**, 29.

Examination of, at instance of adverse, see **WITNESSES**, 28.

In action on the case, see **CASE**, 3.

In actions against carriers, see **CARRIERS**, 106, 107.

In *assumpsit*, see **ASSUMPSIT**, 19.

In attachment, see **ATTACHMENT**, II.

In bankruptcy proceedings, see **BANKRUPTCY**, 5.

In ejectment, see **EJECTMENT**, 17-20.

In replevin, see **REPLEVIN**, 13.

In suits for dower, see **DOWER**, 49.

In trespass, see **TRESPASS**, 39.

In trespass *de bonis*, see **TRESPASS**, 29-31.

In trover, see **TROVER**, 3-6, 15.

Joinder of, in actions by tenants in common, see **COTENANCY**, 51.

Joinder of, in error, see **ERROR**, 10.

Multifariousness as to, see **PLEADING**, 60.

Naming and describing in declaration, see **PLEADING**, 12.

Naming, in bill in equity, see **PLEADING**, 58.

Non-joinder, death, or misnomer of, as grounds of abatement, see **ABATEMENT**, 4-8.

On appeal, see **APPEAL**, 79.

Partition by act of, see **PARTITION**, 1-5.

Plea in abatement for defect of, see **PLEADING**, 24.

To actions at law, for fraud, see **FRAUD**, 17, 18.

To actions for breach of contract, see **CONTRACTS**, 158, 159.

To actions for rent, see **LANDLORD AND TENANT**, 44.

To actions for trespass on land, see **TRESPASS**, 16.

For Index to Notes in American Decisions and American Reports, see Volume I.

To actions on bonds, see BONDS, 30, 31.
 To actions on negotiable paper, see BILLS AND NOTES, 259-263.
 To bill for discovery, see DISCOVERY, 6.
 To bill of interpleader, see INTERPLEADER, 4.
 To bill to set aside fraudulent conveyances, see FRAUDULENT CONVEYANCES, 2L.
 To civil action for causing death, see NEGLIGENCE, 38, 39.
 To creditor's suits, see CREDITORS' SUIT, I.
 To deeds, see DEEDS, 7-10.
 To fire policy, rights of, generally, see INSURANCE, 39.
 To foreclosure of mechanic's lien, see MECHANIC'S LIEN, 21.
 To foreclosure suits, see MORTGAGES, 76.
 To judgments, rules relative to, see JUDGMENT, I.
 To negotiable paper, see BILLS AND NOTES, II.
 To negotiable paper, competency of, as witnesses, see WITNESSES, 52.
 To negotiable paper, declarations of, see EVIDENCE, 142.
 To penal bonds, see BONDS, 1.
 To suits against corporations, see CORPORATIONS, 205.
 To suits against personal representatives, see EXECUTORS, etc., 167.
 To suits by or against husband and wife, see HUSBAND AND WIFE, 99-107.
 To suits by or against infants, see INFANTS, 40.
 To suits for forcible entry, see FORCIBLE ENTRY, 5-8.
 To suits for libel, see LIBEL, 8.
 To suits for partition, see PARTITION, 8, 9, 11.
 To suits for slander of title, see SLANDER, 44.
 To suits for wrongful attachment, see ATTACHMENT, 137, 138.
 To suits on guaranties, see GUARANTY, 31.
 To suits on guardian's bonds, see GUARDIAN AND WARD, 45.
 To suits on insurance policies, see INSURANCE, 185.
 To suits on official bonds, see OFFICERS, 48.
 To suits on stock subscriptions, see CORPORATIONS, 214.
 To suits to enforce contracts, see SPECIFIC PERFORMANCE, 31-33.
 To suits to enforce trusts, see TRUSTS, 61.
 To suits to redeem mortgaged land, see MORTGAGES, 127.
 To suits under civil damage laws, see INTOXICATING LIQUORS, 17, 18.
 To suits upon covenants, see COVENANTS, 38-40.
 To the record, competency of, as witnesses, see WITNESSES, 20-23.
 To will contests, see WILLS, 94.
 Validity of fraudulent conveyances as between, see FRAUDULENT CONVEYANCES, 17, 18.
 Waiver of objections as to, see APPEAL, 53.

Who may intervene, see INTERVENTION, 1, 2.

Who may sue, generally, see ACTIONS, 4.

When person for whose benefit promise is made may sue, see ACTIONS, 5.

I. IN ACTIONS AT COMMON LAW.

II. IN SUITS IN EQUITY.

I. IN ACTIONS AT COMMON LAW.

1. Who may sue. — The same person cannot be both plaintiff and defendant, although he is the representative of conflicting rights. *Livingston v. Livingston*, 12 D. 684; *Burley v. Harris*, 29 D. 650; *Allin v. Shadburne*, 25 D. 121; *Hill v. McPherson*, 55 D. 142. But this rule is confined to natural persons. *Connell v. Woodard*, 37 D. 173.

An action to recover damages for the breach of a covenant for the conveyance of land must be brought by the administrator, and not by the heir. *Watson v. Blaine*, 14 D. 669.

A note given to the trustees of a corporation is properly sued on in their name, they having the legal interest therein; otherwise where a note is given to corporation agents or servants. *Binney v. Plumley*, 26 D. 313.

Trustees of schools constitute quasi corporations, and may, in their corporate character, sue their own members. It will not affect the rule that the action is brought in the names of the individual trustees, instead of under the general title of trustees of schools. *Connell v. Woodard*, 37 D. 173.

The right of a survivor to sue alone on a contract, without joining the representative of the deceased, is not limited to cases of partnership. *Smith v. Salomon*, 91 D. 711.

One described in a contract of carriage as consignor, consignee, and sole owner, is "a trustee of an express trust" within the statute of parties, and may maintain an action to recover overcharges paid. *Waterman v. Chicago etc. R'y Co.*, 50 R. 145.

2. When the real party in interest must sue. — An action at law must be brought in the name of him to whom the promise is made, or in whom the legal right of action exists. *Carter v. Darby*, 50 D. 156.

The real party in interest must bring action under the statute of Indiana, except where the statute has otherwise provided. This was formerly the rule in equity. *Swift v. Ellsworth*, 71 D. 316.

Action may be brought in the name of a party who has no interest, if there is a cause of action and he appears to have the legal title. *Berry v. Gills*, 43 D. 584.

Real party in interest who may sue on written contract may be ascertained by proof *alunde*, where the agency or trust of the nominal party appears upon the face of the contract. *Michigan State Bank v. Peck*, 65 D. 234.

Objection that plaintiff is not real party in interest will not avail where a recovery in

For Index to Notes in American Decisions and American Reports, see Volume I.

the action will bar another action for the same cause. *White v. The Mary Ann*, 65 D. 623.

3. Joinder of parties plaintiff. — All parties in interest as plaintiffs should be joined. *Whitney v. Stark*, 68 D. 360.

Old equity rules for joinder of parties are substantially re-enacted by Indiana code: See R. S. 1852, pp. 30, 31, secs. 17-19. *Tate v. Ohio etc. R. R. Co.*, 71 D. 309.

Separate creditors cannot join in action against their debtor, unless there is a joint interest in the thing demanded, or a privity of contract which authorizes the joinder. *Dyas v. Dinkgrave*, 77 D. 196.

Joint contractors must all sue upon their joint contract, although one of them has been settled with, unless all of the parties agree to the severance of the joint interest, and the obligor promises to pay each his several share, and the suit is based upon the new promise. *Angus v. Robinson*, 59 R. 753.

4. Misjoinder of plaintiffs. — A false and fraudulent affirmation made by a seller to two or more purchasers is, in its nature, a several tort to each, and they cannot join in an action therefor. *Baker v. Jewell*, 4 D. 162.

5. Non-joinder of plaintiffs is to be taken advantage of in two ways when the defect does not appear upon the face of the complaint; namely, by answer or by apportionment of the damages at the trial. *Whitney v. Stark*, 68 D. 360.

Under the Indiana statute, if all persons interested as plaintiffs should not be joined as such, and the fact should be developed upon the trial, it would perhaps be available as a bar to the action, or might be taken advantage of by plea in abatement. *Macy v. Combs*, 77 D. 103.

Where a person, answerable in contract to two jointly, settles with one of them so that one has no longer any real interest in the matter in dispute, it is a severance of the cause of action, and the debtor is liable in an action at law to the other alone. *Boston & M. R. R. v. Portland etc. R. R. Co.*, 20 R. 333.

6. Who may be sued, generally. — If one joint contractor die, the survivors only can be sued at law; and when all have died, the action must be against the representative of the last survivor. *Ayer v. Wilson*, 12 D. 677.

An action may be maintained against one obligor, upon a joint bond of himself and another; and such bond is sufficiently described in the declaration, either as the bond of the defendant alone, or as the bond of both. *Allis v. Shadburne*, 25 D. 121.

An individual may be joined as party defendant in an action against a corporation for trespass. *Brokaw v. New Jersey R. R. etc. Co.*, 90 D. 659.

Object of making a person a party to a legal proceeding is to enable him to be heard in the assertion of his rights, and failing to set them up, that he may be concluded from again litigating them. *Wright v. Dunning*, 92 D. 257.

Tenants in possession may be sued jointly in an action for trespass committed by animals kept by them in common upon the premises, although the several animals are owned by them separately and individually. *Jack v. Hudnall*, 18 R. 293.

7. Who are necessary parties defendant. — The law of the forum determines who shall be parties to an action. *Kirkland v. Lowe*, 69 D. 355.

Encumbrancers must be made parties to a suit where their claims arose before the commencement thereof, but not where they arose *pendente lite*. *Miller v. Kershaw*, 23 D. 183.

Neither the remote grantor, from whose vendee the contending parties both derive title, nor his heirs, are necessary parties to a suit between such contending parties affecting the title to the land. *Hanly v. Blackford*, 25 D. 114.

Bankrupt joint contractors must nevertheless be joined as defendants in an action on the contract. *Roberts v. McLean*, 42 D. 529.

A person having an interest in lands prior to suit brought to recover them must be made a party thereto, and if not made a party, will retain the right to clothe his equity with the legal title, as though no suit were in existence. *Trimble v. Boothby*, 45 D. 526.

Under the Indiana statute, all parties interested as defendants should be joined; if not, a plea in abatement may be available. *Macy v. Combs*, 77 D. 103.

A person having no interest in a proceeding need not be made a party thereto. *Coolley v. Scarlett*, 87 D. 298.

Persons who will not be affected by judgment are not necessary parties. Thus in an action upon promissory notes, upon which plaintiff agreed, in consideration of the promise of a third person to pay them upon the confirmation of the title of his grantor to certain lands, to forbear suit until the decision of the question of such title, — held, that neither such third person nor his grantor were necessary parties to the action. *Smith v. Lawrence*, 99 D. 344.

As a general rule, in actions in form *ex delicto*, for a tort committed by several, the plaintiff may sue any of them, and the non-joinder of others cannot be pleaded in abatement; but where the action relates to real property, if it be such as to draw in question the title, all those jointly concerned should be made co-defendants. *Low v. Mumford*, 7 D. 469.

There is a settled distinction between mere personal actions of tort and such as

For index to Notes in American Decisions and American Reports, see Volume L.

concern real property. *Southard v. Hill*, 69 D. 85.

Plaintiff in an action *ex delicto* should not be required to include all tort-feasors, because he may not know them, or be able to find proof against them; but where the gist of the action is that the defendants are proprietors of the land, and have neglected a duty incident to their title, it is otherwise. *Id.*

8. Proper though not necessary parties. — Plaintiff in execution may be joined with the sheriff and his deputy, in an action of trespass for seizing and selling partnership property on execution against one of two partners, where such plaintiff was present at the sale and purchased a portion of the property. *Deal v. Bogue*, 57 D. 702.

9. Improper parties defendant. — A declaration in *assumpsit*, or in case *ex quasi contractis*, must unite all the joint contracting parties as defendants, but it must not unite any whose liability is not strictly and absolutely joint. *Patton v. Magrath*, 33 D. 98.

10. Misjoinder of defendants. — Courts of law will not take cognizance of distinct and separate claims or liabilities of several persons in one action, though standing in the same relative situations. Hence, where two persons have covenanted with another, by distinct and separate writings, the one for the performance of several duties, and the other becoming surety for him, they cannot be joined in the same action to recover for a breach. *Childress v. McCullough*, 30 D. 549.

A joint action against separate owners of animals cannot be sustained for damages inflicted by the joint act of such animals. *Van Sternburgh v. Tobias*, 31 D. 310.

Several persons being united as defendants in an action for damages arising from the commission of a tort not joint, it being alleged that one of the defendants was the owner of a lath-mill, from which rubbish had been thrown into a river and carried down to the plaintiff's mill, contributing to the injury complained of, and that the remaining defendants were also the owners of a mill from which rubbish had been carried down the river to plaintiff's mill, also contributing to the injury complained of, whether such defendants were properly joined, discussed, but not decided, it appearing that the defendant who owned the mill alone had died during the pendency of the action, and it was consequently held that as to such defendant the action had abated, and that the remaining defendants were liable. *Simpson v. Seavey*, 22 D. 228.

The agents of a corporation leased a wharf belonging to the corporation, and covenanted to keep it in repair. By reason of their neglect so to do, a person was injured while lawfully on the wharf. Held, that an action

lay against either the agents or the corporation, but that a joint action against both would not lie. *Campbell v. Portland Sugar Co.*, 16 R. 503.

11. Non-joinder of defendants. — Non-joinder of a joint contractor still living, if it appears on the face of the declaration, may be taken advantage of by demurrer, motion in arrest of judgment, or writ of error. *Roberts v. McLean*, 42 D. 529.

In actions upon partnership contracts, all partners ought to be made defendants, as a general rule; but the omission to do so can only be taken advantage of by plea in abatement. In default of such plea, a joint contract may be offered in evidence in support of the separate contract declared on. *Smith v. Cooke*, 100 D. 58.

12. Bringing in new parties. — At common law, where the defendant insists that a third person should be the sole defendant, the court may order him to be brought in by amendment. *Owen v. Weston*, 56 R. 547.

An amendment purporting to bring in a new plaintiff (here the attorney-general) in place of an individual who began the suit, but has been judicially found not to have a right of action, is not authorized by New York code of procedure. *Davis v. Mayor etc. of New York*, 67 D. 186.

According to common-law rules, parties not sued in an action of trespass cannot be brought in by mere notice, where there is no pretense that they were trespassers. They must have legal notice, which is the notice required by statute, or make voluntary appearance as parties to the record. *Pico v. Webster*, 73 D. 647.

Omission to demur for want of parties does not affect the power of the court, under section 17 of the California Practice Act, to direct other parties to be brought in, if it finds it impossible to completely determine the controversy without them. *Grain v. Aldrich*, 99 D. 423.

13. Substitution. — An amendment substituting different plaintiffs in a complaint from those in whose names the suit was brought, but without changing the cause of action, may be allowed in the discretion of the court, without entitling the adverse party to a continuance. *Hubler v. Pullen*, 68 D. 620.

An amendment to a petition substituting the principals as plaintiffs, in an action brought by their agent, affords the defendant no ground of objection, unless he was thereby deprived of some substantial right. *Price v. Wiley*, 70 D. 323.

Such substitution is not making a new party, where it is done with the consent of the agent, and upon his allegation that he has no interest in the note sued on, but is merely the agent of the new plaintiffs. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

The principals cannot be substituted as plaintiffs in an action by an agent after the agent's death, where the fact that he sues for their use does not appear from the petition, but the suit must be revived in the name of his representatives, and the principals claiming to be the real parties in interest may contest their rights with the representatives and claim judgment in their names, if the defendant is not thereby deprived of any substantial defense. *Id.*

14. Time and manner of objecting for defect of parties. — Where an action is brought in the name of one person for the benefit of another, if unauthorized, the proper practice to obtain a dismissal thereof is by affidavit of the defendant showing that fact, and a rule on the plaintiff to show cause why it should not be dismissed. *Cage v. Foster*, 26 D. 265.

Defect of parties may be taken advantage of in an action of account by two tenants in common against their co-tenants, under the plea that the defendants are not the bailiffs of the plaintiffs in the manner alleged in the declaration. *McPherson v. McPherson*, 53 D. 416.

Real party in interest being plaintiff, an objection that the contract in question was made by him as agent for others will not be considered. *Salmon v. Hoffman*, 56 D. 322.

Defect of parties plaintiff is good ground for demurrer when it appears upon the face of the complaint; when it does not so appear, it may be taken advantage of by answer; but if the objection be not taken either by demurrer or answer, it is deemed to be waived by the defendant. *Alvarez v. Branson*, 68 D. 274.

Objection that no person, natural or artificial, is named as plaintiff cannot be made by demurrer, on the ground that there is a "defect of parties," or that "plaintiffs have not the legal capacity to sue." Objection should be made by motion to dismiss. *Proprietors etc. v. Yellow Jacket S. M. Co.*, 97 D. 510.

The objection to the misjoinder of the parties to a real action, if the misjoinder do not appear from the record, must, if not pleaded in abatement, be taken advantage of by a motion for a nonsuit; it will be too late to urge the objection after a verdict. *Campbell v. Wallace*, 37 D. 219.

A want of proper plaintiffs, in actions on contract, is an exception to the merits, and should be taken advantage of, either upon demurrer, in bar, or on the general issue, but not in abatement. *Baker v. Jewell*, 4 D. 162.

The non-joinder of a co-debtor, to be taken advantage of, must be pleaded; but where, after issue joined, the case is, as to certain of the proper parties, discontinued, there that fact can be taken advantage of on the trial. *Mayor of New Orleans v. Ripley*, 25 D. 178.

Non-joinder of a corporation as a party

defendant is not so apparent as to be reached by demurrer, where the complaint, though it shows that such corporation once existed, and was a proper party, does not show that such existence continued up to the filing of the complaint. *State v. Woram*, 40 D. 378.

Non-joinder of plaintiffs need not be taken advantage of by plea in abatement or by demurrer, but may be given in evidence under the plea of *non assumpsit*. *Hoffar v. Dement*, 46 D. 628.

Objection of non-joinder of parties must be taken advantage of by demurrer, and comes too late on appeal from the final judgment. *Beard v. Knox*, 63 D. 125.

Objection on ground of non-joinder of a partner, in an action by the other members of a firm for deceit practiced upon them, must be taken, under the New York code of procedure, by demurrer or answer; if not pleaded, it is waived, and cannot be proved in diminution of damages. *Zabriskie v. Smith*, 64 D. 551.

Non-joinder of necessary parties plaintiff in an action of tort arising *ex contractu* may be taken advantage of by defendant by plea in abatement or under the general issue on the trial. *Scott v. Brown*, 67 D. 256.

Non-joinder of necessary parties plaintiff in an action on contract may be taken advantage of by defendant, under the general issue, by motion in arrest of judgment, or by writ of error, when the defect appears upon the record. *Id.*

Where a part owner sues *ex delicto*, and objection of non-joinder of a co-owner is not made by plea in abatement, a motion for nonsuit is properly refused, since the damages may be apportioned, and the other part owner may afterwards sue alone. *Whitney v. State*, 68 D. 360.

An objection to a complaint for want of parties is waived if not taken advantage of by demurrer on that ground, though sought to be reached by a demurrer for want of facts sufficient to constitute a cause of action. *Grain v. Aldrich*, 99 D. 423.

II. IN SUITS IN EQUITY.

15. Who may sue, generally. — The real party in interest must sue, when suit is brought in equity. *Thompson v. Cartwright*, 46 D. 95.

A bill in equity to enforce performance of a public duty by a corporation cannot be maintained by a private person, in the absence of a special right or authority; nor, in such a case, has the complainant a right to a decree compensating him for any damage suffered. *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.*, 88 D. 534.

A bill in equity to compel a corporation to observe its charter obligations can be maintained, it seems, on behalf of the state, by the attorney-general. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

Private individuals cannot sustain a bill in chancery against the county officers, to enjoin them from making a use of a public square, which, it is alleged, would result in a forfeiture of the property and an injury to the complainants. *Smith v. Houston*, 25 D. 741.

16. All parties in interest should be joined either as plaintiffs or defendants.*—It is general rule in equity pleading that all persons are necessary parties to a suit whose interests are to be affected by it. *Allison v. Shilling*, 86 D. 622; *Howell v. Harvey*, 39 D. 376; *May v. Smith*, 59 D. 594; *Moore v. Hood*, 70 D. 210. But although this is a general rule, it is subject to the discretion of the court. *New London Bank v. Lee*, 27 D. 713. An exception to the rule exists where it is not in the power of the complainant to make them parties. *Michigan State Bank v. Hastings*, 41 D. 549.

Where several persons have a common interest, arising out of the same transaction, although their interest is not joint, even the defendant may sometimes insist that they shall all be made parties, that he may be subjected to the trouble and expense of but one litigation. *Robinson v. Smith*, 24 D. 212.

A bill filed prior to the revised statutes, by the stockholders, against the directors of an incorporated company, for fraud and mismanagement, should make the corporation party either plaintiff or defendant. *Ib.*

Where there are several creditors or legatees who have a common interest, and are entitled to share in a fund insufficient to pay all in full, they should be made parties, or the suit should be brought by some on behalf of themselves and of all others similarly situated, and it should be so stated in the bill. *Egberts v. Wood*, 24 D. 236.

All parties in interest should be made defendants to a bill in chancery, where it can be done without extraordinary difficulty, or where the defendants are not very numerous, and do not reside in remote and distant countries. *Herrington v. Hubbard*, 33 D. 426.

All parties need not have an interest in all matters contained in the suit to sustain the bill against the charge of multifariousness; it being sufficient if each party has an interest in some matter common to all the parties. *Worthy v. Johnson*, 52 D. 399.

All persons immediately interested should be made parties to a suit, and when this is the case the court will go on and try the cause, even though it appear that persons having more remote interests are not represented. *Boff v. Fisher*, 55 D. 627.

17. Joinder of parties complainant.—Parties seeking redress in chancery may join in the same complaint, and maintain their action together, where there is unity

in interest as to the object to be attained by the bill. In such a case, it is within the province of a court of chancery to mete out to each and all of the complainants their rights, on the principle of sound equity. *De Louis v. Meek*, 50 D. 491.

Two persons are properly joined as plaintiffs in a bill in equity when both are interested in the property to be recovered, although their interests are not co-extensive. *Blackwell v. Blackwell*, 70 D. 556.

The joinder of several creditors of a decedent in a creditor's bill to vacate a fraudulent conveyance is proper. *Dugan v. Vattier*, 25 D. 106.

Different judgment creditors may join in one bill if they have a common, though not a joint, interest in the relief sought. *Murray v. Hay*, 43 D. 773.

An individual may join with the municipality to prevent the erection of buildings on lands dedicated to a public use. *Watertown v. Cowen*, 27 D. 80.

18. Misjoinder of complainants.—Parties having conflicting interests cannot be joined as complainants. *Grant v. Van Schoonhoven*, 37 D. 393.

Generally, complainants cannot unite when their claims to relief are distinct and independent; but this rule is not inflexible. *Murray v. Hay*, 43 D. 773.

Where a party is improperly made co-plaintiff without his privity or consent, the proper course is to move that his name be stricken out, not that the bill be dismissed even as to him. *Southern Life Ins. & T. Co. v. Lanier*, 58 D. 448.

Demurrer on ground of misjoinder of party plaintiff must be presented *in limine*, and if not so presented, the right to demur will be deemed waived. *Ib.*

A bill is demurrable on ground of misjoinder of parties where the complainants are owners of several and distinct parcels of land, and have no common interest, but each seeks relief for special injury to his own property, under the impression that the nuisance complained of is a grievance common to all of the land-owners, and therefore that all might be properly joined. *Hickman v. Paterson Horse R. R. Co.*, 86 D. 252.

19. Non-joinder of complainants.—When the parties interested are numerous, and the suit is for an object common to all of them, some of the body may maintain a bill in equity in behalf of themselves and others having a like interest; but in all cases where one or a few individuals of a larger number institute a suit on behalf of themselves and others, they must expressly state in their bill that it is filed as well on behalf of other members of the body as of those who are really made complainants. *March v. E. R. R. Co.* 77 D. 732. S. P., *New London Bank v. Lee*, 27 D. 713.

* See note on joinder of parties in equity, 71 D. 311-316.

For Index to Notes in American Decisions and American Reports, see Volume I.

A bill in equity may be sustained by several plaintiffs on behalf of others jointly interested with them, when it is alleged in the bill that the persons not made parties to the action are unknown or not within the jurisdiction of the court. *Vana v. Hargett*, 32 D. 689.

A decree upon a bill brought by several plaintiffs on behalf of a greater number having a joint and equal interest in the subject of the action will bind the persons who are not parties to the bill, so far as to determine the validity of their claim as a just demand, but such parties will not be bound by an account taken in the action, until they have been allowed an opportunity to be heard. *Id.*

20. Who are necessary parties defendant.* — No one need be made a party to a suit in equity against whom no decree can be made. *Bowden v. Schatsell*, 23 D. 170.

The vendee, or his legal representatives, ought to be parties to a suit in chancery brought by the vendor against his subsequent purchaser, to recover a balance alleged to be due from the vendee. *Dual v. Babb*, 4 D. 506.

If a defendant in execution makes the plaintiff and the officer both parties to a bill for an injunction where both do not participate in the levy, the answer of the officer alone is sufficient. *Beard v. Foreman*, 12 D. 197.

When the court, on the application of creditors, opens a judgment for the purpose of trying whether the bond sued upon was given to defraud creditors, it is not necessary that the latter be made parties to the action. *Whiting v. Johnson*, 14 D. 633.

Executors of an obligee of a bond for a conveyance of land who dies before the time fixed in the condition for the conveyance, must be parties to a bill brought for rescission on the ground of fraud on the part of the obligor in misrepresenting boundaries, and in selling land to which he had no title; or where a part of the purchase-money remains unpaid. *Rice v. Spotswood*, 17 D. 115.

The assignor of a judgment should be made a party to a bill brought by an assignee against a husband, to apply certain property to the satisfaction of the judgment; and when the property sought to be so applied is the wife's distributive share in her father's estate, she should also be a party. *Elliot v. Waring*, 17 D. 69.

The assignor of land affected by a trust is not a necessary party to a bill against his assignee, in an action by a surety of the former to charge lands in the hands of the latter for the payment of the purchase price

for which the surety was bound, when the bill sets out that the defendant is the assignee of the entire interest in the land. *Polk v. Gallant*, 34 D. 410.

The appointee is a necessary party in an action to subject the property appointed to a debt due the complainant, though the property is in the hands of those to whom it was ultimately given. *Leigh v. Smith*, 42 D. 182.

Where it is sought to charge the heirs upon the bond of their ancestor, the personal representative is a necessary party for their protection, and in order that the personal assets should be applied for their relief, as far as they may go, towards the extinguishment of the debt. *Beall v. Taylor*, 44 D. 398.

Where a bill by B's heirs against A alleges that A purchased land with the money of A, B, and C, taking a conveyance to himself; that A and B were to be the owners in fee and tenants in common of the land; and that C was to have wood from the premises during her life, — she should be made a party to the bill, that her interests may be determined. *Dow v. Jewell*, 45 D. 371.

In an action brought to restrain an administrator from selling property to pay debts of a deceased person and to set up a lost deed, it is sufficient if the administrator and the heirs are brought before the court, as they fully represent the property and are liable for all demands against it. *Kennerly v. Shepley*, 57 D. 219.

The state is not a necessary party to a suit against commissioners engaged in prosecution of a public work, though the acts complained of be within the scope of their authority, for they must defend under the law and their authority; and even if made a party, it might be that the only way to afford the relief sought would be to enjoin her agents or officers. *Ex parte Martin*, 58 D. 321.

The assignor of a bond must be made a party in an action against the assignee, calling him to account for it by one claiming to be entitled to the bond. In such a case it is not a sufficient answer that the assignor is dead and that there is no personal representative, as it is the duty of the party seeking relief to procure a representative, and it is therefore no answer for the plaintiff that he is the representative. *May v. Smith*, 59 D. 594.

Where a debtor assigns his property to trustees to be sold, and the proceeds to be divided *pro rata* among the creditors, in an action by one creditor against the trustees for an accounting and for judgment for his *pro rata* share, he must make the other creditors parties and the assignor a defendant. *McPherson v. Parker*, 89 D. 129.

21. Proper though not necessary defendants. — A bill is not demurrable

*See note on joinder of defendants in equity, 15 D. 427-430.

Holder of prior lien, when necessary or proper party, see note, 80 D. 714-717.

For Index to Notes in American Decisions and American Reports, see Volume I.

because of misjoinder of parties, where the defendants, though not all necessary, are not improper parties. *Whittemore v. Coates*, 41 D. 740.

One to whom land has been conveyed to escape a levy under the executions of the grantor's creditors and to enable the grantor to convey to the plaintiff when he has paid the purchase-money under a contract for the purchase of the land, is a proper party defendant. *Pringle v. Samuel*, 13 D. 214.

If property be fraudulently conveyed and parceled out by its owner to several persons, they may be joined in one bill to vacate the transfers. *Fellows v. Fellows*, 15 D. 412.

A bill against several persons must relate to matters of the same nature and having a connection with one another; and all of the defendants must be more or less concerned, though their rights in respect to the general subject of the cause may be distinct. *Ib.*

An individual holding funds for an absent party may be made a party to the suit, because he is compellable to perform the decree with respect to those funds. *Bowden v. Schatzell*, 23 D. 170.

The attorney-general may be joined as a defendant in equity, representing the rights of the state, where those rights are connected with the relief sought against some other defendant, but not otherwise. *Varick v. Smith*, 28 D. 417.

A merely formal party to the original bill need not be made a party to the supplemental bill, where the new matter charged therein does not affect his rights. *Allen v. Taylor*, 29 D. 721.

A party compelled to resort to a court of equity to make out a case may properly join all the parties nominally or really interested in the transaction, and the court will, under such circumstances, retain the suit until all matters are finally disposed of. *Beardsley v. Knight*, 33 D. 193.

Complainant need not make parties of persons unknown to him, claiming an interest in the suit, nor of persons collaterally interested, who are exceedingly numerous. Therefore, a mortgagee need not join as defendants in a suit to foreclose the mortgage the creditors of one who has purchased the premises with notice of the mortgage, and has made a voluntary deed of the same for the benefit of his creditors, there being nothing to show who the creditors are or how many of them there are. *Willis v. Henderson*, 38 D. 120.

An unsworn answer to a bill is not evidence for any purpose, but performs merely the office of a pleading, and the complainant is not required to make parties of persons stated in such answer to have an interest in the controversy, there being no other evidence of that fact. *Ib.*

A statutory refunding bond may be dispensed with where the non-resident defend-

ant is represented by a resident trustee, for he is not an indispensable party to the bill. *Montandon v. Deas*, 48 D. 84.

Persons having different and opposite interests to be affected by a judgment may properly be made parties defendant in a suit to set aside a sheriff's sale for fraud. *Teas v. McDonald*, 65 D. 65.

22. Improper parties defendant.—A clerk of a court in possession of a fund belonging to an absent party, which has been paid into court, does not hold it as an individual, but as an organ of the court, and cannot be made a party to a suit in equity in respect of that fund, because neither he nor the court of which he is clerk can be controlled by the decree as to the disposition of the fund. *Bowden v. Schatzell*, 23 D. 170.

Where parties are improperly made defendants, the bill should be dismissed as to them, with costs. *Covenhoven v. Skuler*, 21 D. 73.

23. Non-joinder of defendants.—Parties to a bill to enforce a lien should include all the owners of the subject of the lien; but the non-joinder of one of the owners ceases to be objectionable if the lien is released, and no decree is made affecting his interest. *Case v. Woolley*, 32 D. 54.

Courts will notice the omission of proper defendants in the bill, although no demurrer is interposed, when it is manifest that the decree will have the effect of depriving them of their legal rights. *Harrington v. Hubbard*, 33 D. 426.

Where a bill is filed for specific performance of a contract for the conveyance of lands, the court is not warranted in making an order requiring the defendants before the court to defend for all the defendants in the cause. *McQueen v. Chouteau*, 64 D. 178.

24. Bringing in new parties.—Where an answer objects to the want of proper parties, the complainant should amend his bill before any further proceedings are had in the cause. *Van Wyke v. Van Deusen*, 25 D. 516.

If he neglects to do this, the court may, at the hearing, permit the cause to stand over for the purpose of bringing the proper parties before the court, on payment of costs to the adverse party, or dismiss the bill, with costs. *Ib.*

The proper course in such case, if the cause is not permitted to stand over, is to dismiss the bill without prejudice to the claim, or right of the complainant, in any future litigation. *Ib.*

If the objection of want of proper parties is raised at the hearing for the first time, the bill should not be dismissed, where the defect can be remedied by an amendment or a supplemental bill, and the complainants elect so to do within a reasonable time; provided that necessary parties were not left

For Index to Notes in American Decisions and American Reports, see Volume I.

out of the bill, by the fraudulent or willful omission of the complainant, or in bad faith. *Ib.*

Where the answer to a bill in chancery discloses an interest in the subject-matter of the suit in a third person, he should be made a defendant in the bill, so that he may protect his interests. *Harrington v. Hubbard*, 33 D. 426.

New parties may be brought in after a final decree, and a reference to the master to take an account, if they affect only the account, and not the merits of the action. *Bank of Mobile v. Hall*, 41 D. 41.

An amendment limited to bringing in new parties to a bill may be made at any time upon leave of the court, in case the plaintiff discovers they are necessary. *Dow v. Jewell*, 45 D. 371.

Upon a bill by certain creditors of a decedent's estate seeking to charge their claims upon the realty in the hands of devisees, other creditors should have an opportunity of coming in, and of sharing in the equitable assets. *Kinney v. Harvey*, 21 D. 597.

25. Rule as to parties beyond the jurisdiction. — A court of equity cannot dispose of the interests of an absent party, according to the English practice, unless some of the parties and the property are within its jurisdiction. *Bowden v. Schatwell*, 23 D. 179.

An absent person who has property within the state may be made a party to a suit in equity in respect of that property, under our statute, though there be no other party in the state. *Ib.*

Absent attaching creditors of individual partners who have received payment out of a fund paid into court by a garnishee, upon giving a bond to refund if found not entitled thereto, may be made parties in respect of their interest in that fund, to a suit in equity brought by a partnership creditor to establish his demand for the purpose of obtaining payment out of that fund, where the only surviving partner is also without the state. *Ib.*

Non-residents may maintain a suit in chancery against non-resident defendants, provided there is one resident defendant. *Comstock v. Rayford*, 40 D. 102.

A citizen of a foreign state can be made a party only by voluntary appearance, to a suit in Georgia, so as to be bound by a judgment or decree *in personam*, either by the statute or common law. *Dearing v. Bank of Charleston*, 48 D. 300.

In England, in a suit against joint obligors, both must be sued, or if one is within the realm, but cannot be found, he must be prosecuted to outlawry. In Georgia, however, if the sheriff returns one party not found, the plaintiff may proceed against the party served. *Raney v. McRae*, 60 D. 660.

26. How objections for want of parties should be taken. — The objection

that parties have been made defendants in a suit who should have been joined as plaintiffs goes only to a matter of form, and will not be regarded by the court at the hearing, where the parties thus made defendants have accepted that character, and have filed their answer. *Osgood v. Franklin*, 7 D. 513.

Defendants to a bill in equity cannot be stricken out as parties on their own motion. If improperly made parties, they must demur or plead. *Lyne v. Guardian*, 13 D. 509.

Where it is not apparent from a bill itself that necessary parties are omitted, it can be taken advantage of only by plea or answer, showing who are the necessary parties, and making the objection of a want of parties in a plain and explicit manner. *Robinson v. Smith*, 24 D. 212.

Defendants can demur for non-joinder of parties only when it is apparent from the bill itself that there are other persons who ought to have been made parties. *Ib.*

The objection of non-joinder comes too late after an answer to the merits. *Pascal v. Ducros*, 41 D. 294.

Misjoinder must be taken advantage of by demurrer or by answer; the objection comes too late at the hearing. *Watertown v. Cowen*, 27 D. 80; *Hinchman v. Paterson Horse R. R. Co.*, 86 D. 252.

The objection of a want of proper parties, after answer filed, and a report of the facts of the case by a committee, is unsustainable. *New London Bank v. Lee*, 27 D. 713.

Unnecessary joinder of a party as defendant does not afford ground for a demurrer to the bill by another defendant, unless there is some valid claim against the unnecessary party, in which the party demurring is not interested. *Varick v. Smith*, 23 D. 417.

The objection that a party was improperly joined in a bill for specific execution of a contract of sale, and that the bill ought to be dismissed as to him, is premature, where there was not a final decree in the cause. *Clarke v. Curtis*, 37 D. 625.

One unnecessarily made a party to a suit in equity may demur, if that fact appears on the face of the bill. *Bowden v. Schatwell*, 23 D. 170.

In a motion to dismiss, where the bill contains equity, the question of proper parties could not come up; for the plaintiff should have an opportunity to perfect his bill, which would not be allowed him if it was dismissed. *Stone v. Hale*, 52 D. 185.

Objection of want of proper parties cannot be raised on motion to dismiss a bill for want of equity. *Hightower v. Thornton*, 52 D. 412.

A bill in chancery is never dismissed for want of parties, provided necessary parties can be made, but stands over on payment of costs. *Ib.*

Where necessary parties cannot be made, the bill must be dismissed. *Ib.*

For Index to Notes in American Decisions and American Reports, see Volume I.

In equity, if there is a misjoinder of parties plaintiff, all the defendants may demur; but if the misjoinder is of parties defendant, those only can demur who are improperly joined. *Christian v. Crocker*, 99 D. 223.

Objection of misjoinder of parties defendant in a bill is a merely personal privilege. *Id.*

PARTITION.

[Includes the division of real property among co-owners, either by their voluntary agreement and deed, or by means of a suit for partition, and whether the land be actually divided and set off in severalty, or sold, and the proceeds divided.]

Between tenants in common, see also CO-TENANCY, 34, 35.

When bars dower, see DOWER, 27.

I. BY ACT OF THE PARTIES; PAROL PARTITION.

II. BY SUIT.

I. BY ACT OF THE PARTIES; PAROL PARTITION.

1. Power to make partition. — In general, a valid partition of lands held in common cannot be made by parol, because of the statute of frauds; but the case of a resulting trust is not within the provisions of the statute, and a parol partition of such lands is valid. *Dow v. Jewell*, 45 D. 371.

Parol partition, valid between the parties to it, may be ratified by the other parties interested. *Id.*

Heirs may make a valid parol partition of land among themselves, where they are all of age, and if one is not of age at the time of the partition, it is nevertheless valid, if acquiesced in and confirmed by such heir after coming of age. *Lynch v. Baxter*, 51 D. 735.

A verbal partition of land was binding under the Mexican law, where possession was taken. *Id.*

Parol partition of lands among tenants in common, when followed by a several possession in conformity with the terms of the partition, gives to each co-tenant the rights and incidents of an exclusive possession of his property. *Tomlin v. Hilyard*, 92 D. 118.

2. What is a valid partition. — A parol partition made between tenants in common, by marking a line of division on the ground, and followed by a corresponding separate possession, is good, and not within the statute of frauds. *Ebert v. Wood*, 2 D. 436; *Jackson v. Harder*, 4 D. 262; *Brown v. Wheeler*, 44 D. 550; *Wood v. Fleet*, 93 D. 523. Yet where the evidence of a separate possession is vague and slight, there can be no presumption in favor of a partition. *Haughabaugh v. Donald*, 5 D. 548.

Partition of a tract of land owned by two or more persons jointly may be shown by a map or plat signed by all the owners, on which the division lines of the several co-

owners are traced, and the same is as effectual as if the lines had been actually run and marked by a surveyor. *Compton v. Mathews*, 22 D. 167.

Partition, to be effectual, need not be made upon the land, but the same may be made on a map, although the lines there traced merely existed in the mind. Actual separation of parts is not necessary, and the acts of the co-owners allotting to one and another a portion of the joint property which each is entitled to, and which each enjoys without interruption, are sufficient. *Id.*

Parol partition by a grantee of the husband who is tenant by curtesy, the wife not having acknowledged the deed so as to pass her interest, though not binding on the wife, is good in ejectment against a stranger. *Ryeres v. Wheeler*, 37 D. 243.

Tenants in common making mutual deeds of bargain, sale, and release, expressing nominal considerations, do not thereby acquire or lose any title, but obtain defined boundaries to the land they previously held in common. Such deeds operate as deeds of partition only. *Dawson v. Lawrence*, 42 D. 210.

Parol partition, if fair and equal, and executed by corresponding possession, is good, though some of the tenants be under coverture, and others of them elect to hold their purparts as before, by community of possession. *McMahan v. McMahan*, 53 D. 481.

An absent co-tenant not assenting to a partition may repudiate it by demanding a new partition of the whole tract, or he may adopt it by ratifying the acts of one who has assumed to act for him in such partition. *Id.*

Where parties owned a tract of land jointly, and afterwards married and made subsequently a deed of partition of the same, and held it in severalty afterwards, the partition so made will be binding on the parties, even though no certificate of privy examination of the wives appears in the deed. *Bryson v. Stump*, 56 D. 139.

A partition made by release deeds between grantee of tenant in common and co-tenants is valid, when it is in the power of any co-tenant to compel a partition by legal proceeding; and a creditor of the grantor, before any interference on his part to obtain payment of his debt as against the property, has no legal interest therein requiring recognition in the partition proceedings. *Staples v. Bradley*, 60 D. 630.

Partition may be treated as legal by creditor of tenant in common when he levies his execution, where it is made by release deeds between the grantee of such tenant and his co-tenants, although the creditor at the same time insists that the deed of the tenant is void, so far as it was designed to defraud his creditors. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

3. What is not.—A partition by parol is void, being within the statute of frauds, and a deed of partition by tenants in common will not be presumed merely from the fact of their several possession. *Porter v. Perkins*, 4 D. 52.

Where a tenancy in common is admitted, a parol partition, followed by possession under it, will be valid; yet, where the whole right or title of the party setting up the tenancy in common and parol partition is denied, a parol partition and subsequent possession will not be sufficient to transfer the title. *Jackson v. Vosburgh*, 6 D. 276.

Partition of land by parol is not valid, notwithstanding the division line was marked and monuments set up, and the parties for several years occupied in accordance with the division so made. *Ballou v. Hale*, 93 D. 438.

4. How construed.—An implied warranty is by law annexed to every partition of land, even where no warranty is expressed in the deed; hence parties to a partition are thereafter subject to the same rule in regard to the purchase and use of an outstanding title as they were before the partition. *Venable v. Beauchamp*, 28 D. 74.

A grantee of one of the parties to a deed of partition which was made under his direction, and at a time when he had an executory contract with his grantor for the purchase of his share of the land when partitioned, is, in equity, regarded as the real tenant in common with the other owner, and although not bound by the express covenants of the deed of partition, nor a formal party thereto, is, nevertheless, a party to the partition itself, and is as fully bound, in equity, by the deed, so far as it is merely a deed of partition, as if he executed it as a party. *Id.*

Such grantee is bound by the implied warranty in the deed of partition, which estops him from evicting the other tenant by adverse title. *Id.*

There is no implied warranty in a partition deed between tenants in common under a will, though there is, it seems, an implied special warranty annexed to every partition between coparceners. *Weiser v. Weiser*, 30 D. 313.

An express special warranty limits an implied general warranty in a deed, except, perhaps, where the implied warranty is a necessary consequence of tenure, which is not the case in a partition deed. *Id.*

In partition of real estate between co-tenants there is an implied warranty that in case of an eviction from any portion, by paramount title, the party evicted shall have a right of contribution against the other for the loss sustained; and this remedy exists against alienees, though not in their favor. *Sawyers v. Oator*, 47 D. 608.

The forum in an action on implied war-

ranty in partition is a court of chancery, which is peculiarly adapted to give relief, either by setting aside the partition or by contribution. *Id.*

A right to contribution of co-tenants for eviction from partitioned estate accrues only when eviction takes place, and then the statute of limitations begins to run. *Id.*

Conveyances between tenants in common must contain words of perpetuity to pass a fee, as one tenant in common cannot convey to another in any other way, or by a conveyance whose operation is different from those used by feoffers between whom no such relationship exists; and if no words of perpetuity are used, an estate for life merely passes. *Rector v. Waugh*, 57 D. 251.

On conveyance between co-tenants with warranty, the warranty continues during the life of the grantee only if the deed contained no word of perpetuity; and if the title of the co-tenants proves to be bad, and subsequent to the conveyance the co-tenants making it obtain title to the land, this title will not, by virtue of the warranty, inure to the benefit of the grantee's heirs. *Id.*

The common law implied no warranty when partition was made between joint tenants and tenants in common. *Id.*

Partition of slaves by husband of remaindermen during life of life tenant, with the consent of the latter, will be presumed to be a partition of the life estate alone in the slaves, not of the life estate and remainder, since they could not completely divide the remainder until the death of the life tenant, owing to the existence of the wives' equities until that event. *Pool v. Morris*, 74 D. 68.

5. Conclusiveness and effect.—A partition deed in which all the heirs join constitutes as valid a division as one made by the order of the probate judge, provided all the grantors are of age, and the estate is in a condition to be legally divided. *Hubbard v. Ricart*, 23 D. 193.

Every partition as well as every exchange implies not only a warranty at the election of the party, but a condition entire, the breach of which gives an entry into the whole; with this difference, however, that a voucher to warranty of the part evicted affirms the partition by the acceptance of a compensation, while an entry for the condition broken defeats it. *Feather v. Strohecker*, 24 D. 342.

A minor to whom a tract of land has been devised is not bound by a partition made by other devisees of the same testator of land devised to them, and of his land, by which a portion of both tracts is set off to him, although upon attaining majority he exercised acts of ownership over the part so set off to him. *Hemmick v. High*, 27 D. 295.

Partition made by tenants of estates for

* Partition by parol, validity and effect of, see note, 92 D. 121-123.

For Index to Notes in American Decisions and American Reports, see Volume L.

Life is not binding on those entitled to estates in remainder. *Boot v. Mix*, 31 D. 235.

Mere coverture of one of the parties to an agreement for partition of real estate is not sufficient to invalidate it, where such agreement was made in the presence of her husband, assented to by him, consummated by an actual division, and possession taken and held according to it for fourteen years. *Hardy v. Summers*, 32 D. 167.

A parol partition carried into effect by possession in accordance therewith is binding between tenants in common whose titles are distinct. *Ryeres v. Wheeler*, 37 D. 243.

If A and B execute deeds of partition, and A is partially evicted by C, the partition fails as to C, and he holds in common with A and B; but purchasers from B may, in equity, compel C to accept his share from the land allotted to A, if sufficient in amount. *Dawson v. Lawrence*, 42 D. 210.

A parol agreement for partition of lands acquired by descent is good, if carried into effect; and if fair and equal, is binding upon all the parties thereto, even upon those who are *femes covert*, if their husbands join. And therefore, evidence tending to show that such an agreement was carried into execution is admissible in an action brought by one party to such partition against another party thereto, to recover an undivided part of the property alleged to have been so partitioned. *Calhoun v. Hays*, 42 D. 275.

Release by parties to alleged partition, executed to defendants in an action of ejectment brought against the latter by other parties to such partition, is admissible to show that such partition was carried into effect, although the parties who executed the release are not parties to the action. And it is also admissible as secondary evidence of the contents of another release, alleged to have been of the same tenor, and to have been executed by the plaintiffs, but to have been since lost. *Id.*

Where two tenants in common have partitioned their land by parol, and each has taken possession of his allotment, one of the co-tenants may, by a bill in chancery, compel a conveyance of the legal title, according to the terms of the partition; because, while the legal title might not be considered as having passed, unless after a possession sufficiently long to justify the presumption of a deed, yet such parol partition followed by a several possession would leave each co-tenant seized of the legal title of one half of his allotment, and the equitable title to the other half. *Tomlin v. Hilyard*, 92 D. 118.

Several occupation, in accordance with parol partition between tenants in common, is not assent by one tenant to a conveyance by his co-tenant, by metes and bounds, of the portion of the land thus assigned to the latter as his share; although if continued for twenty years, and under such circumstances

as to make it adverse, it would establish the title. *Ballou v. Hale*, 93 D. 438.

Hills containing iron ore were held in common by two persons and the minor heirs of another former owner, a right to take ore therefrom for one furnace, existing in another person, his heirs and assigns. These owners were at the same time tenants in common of certain forges and furnaces, to which the ore-hills were appurtenant, from which ore was obtained for the manufacture of iron at the forges and furnaces. In 1786, the two owners and the guardians of the minor heirs of the other entered into a written agreement that amicable actions for partition of said furnaces, forges, and ore-hills be entered, and appointing certain persons to make the partition. The persons appointed to make partition reported that the agreement could not be carried out without great injustice. Afterwards, in 1787, the same parties entered into another agreement in writing, in which they designated certain persons to make partition of the forges and furnaces, and other real estate held by them in common, but providing that the ore-hills "shall remain together and undivided as a tenancy in common," one of the parties to be entitled to three sixths parts thereof, another to one sixth, and the said minors to the remaining two sixths parts thereof, and declaring that neither of the parties, their agents or workmen, should interfere with or interrupt either of the other parties at any mine-hole by them opened and occupied for the purpose of raising iron ore. The entry of amicable actions of partition to carry out the agreement was provided for, and they were entered. The persons appointed made report allotting the furnaces and forges, and reporting that a certain tract of land and said ore-hills do still remain undivided, to be held by the parties as tenants in common, according to their respective shares, and the covenants and articles of said agreements. The court, in 1787, confirmed this report, and the parties entered on the purparts respectively assigned to them, and they and those claiming under them have since held the same, the right reserved to ore for one furnace being also exercised at the time of the institution of this action. An action of partition to divide the ore-hills was brought in 1851, and the court *held*, — 1. That the partition thus made in 1787, by the agreement of the parties in interest, with the sanction of the court having jurisdiction, is binding on the successors in the title, not only because of the judgment of a court in partition under which they claim, but because the covenants in the agreement of 1787 were real and ran with the land, though the words "heirs and assigns" were not used; 2. That the agreement of 1787, and the judicial proceedings had pursuant to it, constitute an insuperable bar to this action;

For Index to Notes in American Decisions and American Reports, see Volume L.

3. The keeping of the mine-hills in common was the consideration for submitting to the partition of the rest of the estate, and the partition of the mine-hills in this action would destroy the foundation on which the former partition rests, and this cannot be permitted without a redivision of the whole of the estate; 4. While the laws of Pennsylvania now provide for the partition of any mineral lands held in common, whatever the peculiarities of their structure, neither the letter nor the policy of those laws demands the partition of an estate in circumstances such as attend these hills of ore. *Coleman v. Coleman*, 57 D. 641.

II. BY SUIT.

6. Jurisdictional questions. — 1. *In general*. — A proceeding for partition is analogous to a proceeding *in rem*. *Pillsbury v. Dugan*, 34 D. 427.

A county court has no power to divide real estate of a decedent, except in cases where the parties entitled cannot agree upon a division thereof. *Hardy v. Summers*, 32 D. 167.

A proceeding for partition is a special proceeding whose course and effect are prescribed by the statute, and although, after jurisdiction has attached, errors in the course of the cause cannot be collaterally shown to impeach the judgment therein, yet so far as the rights of an infant defendant are involved, the court has no jurisdiction except over the matter of partition, and has no power to render a decree divesting the infant's estate, not for the purpose of partition, but upon an adverse claim in the plaintiff, in a suit brought against such infant merely for partition. *Waterman v. Lawrence*, 79 D. 212.

The court has no jurisdiction to order partition of lands between heirs of a father, where the petition alleges that one heir is alive and that the mother is pregnant by the father. *Gillespie v. Nabors*, 31 R. 20.

Partition cannot be had of an estate in remainder. *Wood v. Sugg*, 49 R. 639.

2. *Concurrent jurisdiction of law and equity*. — Jurisdiction in making partition between tenants in common is concurrent at law and in equity. *Beeler v. Bullitt*, 13 D. 161.

Equity does not ordinarily possess concurrent jurisdiction with law, in cases of partition, in Georgia. If the remedy at law is full and complete, the party must resort to that forum. *Rutherford v. Jones*, 60 D. 655.

Partition is one of the subject-matters of concurrent jurisdiction of equity in England, and in such cases our courts are reluctant to oust the jurisdiction of equity. *Id.*

3. *Jurisdiction of equity* in partition is undoubted, and in many cases is indispensable. *Howey v. Goings*, 54 D. 427.

Jurisdiction of chancery is unquestionable in partition cases, where, in order to perfect

the partition, it will be necessary to decree pecuniary compensation. *Rutherford v. Jones*, 60 D. 655.

Partition in equity is a matter of right, and not of discretion, in all cases where the complainant is entitled to partition at law, and can show a clear legal title. *Wiseley v. Findlay*, 15 D. 712.

Courts of equity will assume jurisdiction in cases of partition, and if in the exercise of that jurisdiction it becomes necessary to put a construction upon a devise in order to determine the case, the court will do so. *Simmons v. Hendricks*, 55 D. 439.

A party owning an undivided half-interest in land, but occupying the whole tract, and receiving all the rents and profits, cannot be compelled, in a suit in equity by a party owning half the property in severalty, to convey to the latter an undivided half of the premises, nor such portion thereof as he is entitled to possess in severalty; nor can the owner of the undivided half be coerced in equity to sue for partition and to account for the rents and profits, at least not by a court not possessing general equity powers, and among whose special powers this is not included. *Soutter v. Atwood*, 56 D. 647.

If it appears from the bill for partition that the owner of an undivided quarter of the property sought to be partitioned is deceased, and leaves him surviving a widow, it is a circumstance tending to induce the chancellor to retain the bill, as the widow may have a claim for dower which will require an adjustment in the course of the proceeding which could not be afforded by a court of law. *Rutherford v. Jones*, 60 D. 655.

A legislative act empowering a court of equity to decree partition of real property in a particular case is constitutional and valid in Maryland. *Davis v. Helbig*, 92 D. 646.

Two tenants in common, one of whom gave a mortgage of his undivided half for its purchase price, divided the common property by metes and bounds, executing mutual deeds. The owner of the unmortgaged half conveyed his share in severalty to the plaintiff, and also executed to him a deed of an undivided half of the whole tract. The mortgage of the undivided half was foreclosed, and under the foreclosure the defendant claimed. *Helbig*, the plaintiff became owner of one half by metes and bounds. The defendant is owner of an undivided half-interest. The plaintiff failed to secure a title sufficient to enable him to dispossess the defendant, who occupies the whole tract. The defendant is guilty of no fraud, and the court has no jurisdiction on that ground to compel them to partition the property and account for the rents and profits. *Soutter v. Atwood*, 56 D. 647.

4. — *of probate courts, generally*. — The authority conferred by statute upon the probate court to make partition of the real

For Index to Notes in American Decisions and American Reports, see Volume I.

estate of a decedent whose estate is in course or settlement is merely incidental to the general probate jurisdiction over the estate; and if the grant of administration is void for want of jurisdiction, an order of partition is likewise void. *Sigourney v. Sibley*, 32 D. 248.

A court of probate having no jurisdiction over an estate, but in which a special administrator has been appointed by a decree appealed from, and who acts by force of the statute during the appeal, is not the court of probate in which "the estate is settled, or in the course of settlement," within the meaning of the statute. *Id.*

A probate court may partition real estate among heirs and devisees under the Maine statute, and may set off to a devisee of net profits his portion of the land devised. *Earl v. Rowe*, 56 D. 714.

The power of the probate court to partition decedent's realty among heirs and devisees, under that statute, is not limited to any particular time or number of years after the estate is settled. *Id.*

Jurisdiction of the probate court to partition decedent's realty is not restricted, under that statute, because the share or proportion may be uncertain, depending upon the construction or effect of any devise, unless it shall appear to the judge to be uncertain. *Id.*

Where a devise in trust for the benefit of a person *non est juris* is deprived of its beneficial character by circumstances or the inability of the courts to effectuate the trust in accordance with the testator's intent, the legislature may enact a law authorizing the probate court to make partition or sale of the lands for the benefit of the beneficiary, upon his petition setting forth the necessity of such a course, and giving such court, for that special purpose, the jurisdiction of the court of chancery; and although the probate court could not decree a sale in direct violation of the terms of the will, yet when it has brought all the interested parties before the court, the decree of such sale cannot be collaterally attacked for that reason, but the remedy is by appeal. The jurisdiction of the court of probate, however, is restricted to the exact powers conferred by the statute, and where that court neglected to order a conveyance under a sale in pursuance of its decree, and more than twelve years elapsed, and the purchaser conveyed to third persons, and conflicting claims to the purchase-money arose, — *held*, that the subpurchaser could come into the court of chancery to compel a conveyance and determine such conflicting rights. *Todd v. Flournoy*, 28 R. 753.

5. — *of the orphans' court.* — The orphans' court has not jurisdiction to decree a partition between the children and their father's co-tenant, and then between the

children themselves. *Feather v. Strohoecker*, 24 D. 342.

An orphans' court has jurisdiction to decree partition of decedent's realty, notwithstanding a lapse of twenty-six years since his death, if there has been no adverse possession. *Merklein v. Trapnell*, 75 D. 634.

It is no objection to a decree of partition of decedent's realty that the heirs were not in the actual possession of the premises at the time of partition awarded, if the possession was vacant in fact; for in such case the possession is deemed to be in the heirs. *Id.*

The jurisdiction of the orphans' court in partition is limited by statute to the partition of a single estate. *Snyder's Appeal*, 78 D. 372.

Such jurisdiction operates on the title of decedent only, and not upon that of the heirs. It is because it is the land of a decedent, and not because it is the land of heirs, that this court is empowered to make partition. *Id.*

The orphans' court has no jurisdiction to decree partition, in one proceeding, of two estates held in common by the same parties, and as the heirs of two different persons. *Id.*

Jurisdiction of orphans' court over settlement of decedent's estate is not to be ousted or diminished by partition between the heirs. *Dresher v. Allentown Water Co.*, 91 D. 150.

7. Jurisdiction where title is disputed.* — Partition is not a proper action to try title to land. *Manners v. Manners*, 35 D. 512; *Brock v. Eastman*, 67 D. 733. Contra, see *Brownell v. Bradley*, 42 D. 498.

In a partition suit the title is not meddled with, but the plaintiff must show a clear legal title; hence, if he prays a settlement of boundary and a decree for the delivery of land in the defendant's possession, it is not a proper case for partition in equity. *Stuart v. Coalter*, 15 D. 731.

Partition and adjustment of boundaries cannot be prayed in the same suit, where the defendants against whom the latter relief is sought are merely coterminous land-owners, not affected by the equity as to partition. *Id.*

Where parties bring partition before they have established their title to the premises to be divided, the court of equity in which the action is brought will retain the suit until a determination of the rights of the parties in an action at law. *Manners v. Manners*, 35 D. 512. S. P., *Hovey v. Goings*, 54 D. 427; *Campbell v. Lowe*, 66 D. 339; *Hassam v. Day*, 77 D. 684.

Equity will not proceed with partition when the defendant denies the legal title of the plaintiff, or claims a sole and adverse possession, until the plaintiff has re-established the unity of his possession with the defendant as a tenant in common. *Ramsay v. Bell*, 42 D. 163.

* Raising question of title to land in partition. see note, 30 D. 432.

For Index to Notes in American Decisions and American Reports, see Volume I.

A bill for partition will be retained while complainant tries legal title; but this rule applies only when the complainant states a case in his bill entitling him to the aid of the court, and does not apply where the bill denies the defendant's title, alleges that if he has any he is a tenant in common, and admits that defendant has for many years been in sole possession of the premises. *Ib.*

Where a party petitions, under the intestate act, for an inquest, his allegation of title as a tenant in common, if disputed, must be first established by ejectment in the common pleas; but if it be admitted, the decree founded on it must necessarily be conclusive. *Herr v. Herr*, 47 D. 416.

Possession of land by co-tenants is necessary before partition will be decreed by a court of equity. *Weeks v. Weeks*, 47 D. 358.

In partition of slaves, equity may try title as well as decree partition, if the tenants in common have possession among themselves. *Ib.*

To enable defendants in an equitable proceeding, such as a suit for partition, to defeat plaintiffs' title on ground of resulting trust, or equitable title in third person, it seems necessary for them to show such title to be in themselves, or that they have some valid defense to urge against it; in which latter case the holder of the title must be made a party to the suit before the aid of equity can be invoked. *Portis v. Hill*, 65 D. 99.

In a suit for partition, defendant cannot impeach plaintiff's title for fraud if his own title is tainted with same fraud. Thus where A sued B for partition of land, an undivided one half of which had been conveyed by B's ancestor to A's ancestor, and B's defense was, that the purchase-money was paid by C, who was *empresario* of the colony, and that the conveyance was taken to the ancestor of A to avoid the law which forbade said *empresario* to take or receive any portion of said lands, and that the same was fraudulent and void, B could not impeach the title on the ground of fraud, in which, if it had been made to appear, his ancestor was equally implicated with his vendee. *Ib.*

When in a petition for partition, filed in a court of law, the defendant pleads sole seisin in himself, the court may proceed and try the issue thus arising. It is only when the petition is filed in a court of equity that the action of ejectment becomes necessary. *Purvis v. Wilson*, 69 D. 773.

Equity will not decree partition where the alleged titles of the parties are not clear, and much less set aside a prior partition, made in behalf of a party who has a clear title, at the instance of another party claiming a doubtful and controverted title. *Hassam v. Day*, 77 D. 684.

Formerly, if the legal title was disputed, chancery would send plaintiff to a court of law to have it established before decreeing a

partition. But in Indiana, the distinction between actions at law and suits in equity is now abolished by the code which governs actions for partition, and under the code all questions of title, and perhaps of possession, may be settled in a suit for partition. *Godfrey v. Godfrey*, 79 D. 448.

Proceedings in partition do not decide title or create any new title; and parties to such proceedings, made such by publication, and without actual notice, are not thereby estopped from setting up their legal title. *McBain v. McBain*, 86 D. 478.

8. Who may sue.*—Actual corporeal seisin is not necessary to enable a tenant in common to maintain a suit for partition; constructive seisin is sufficient, unless there is proof of an ouster. *Barnard v. Pope*, 7 D. 225.

Judgment against a tenant in common does not prevent partition; but such tenant, or any of the others, may sue for partition, and have the respective shares set out in severalty. *Bavington v. Clarke*, 21 D. 432.

Judgment, in such a case, binds only the part afterwards set out to the judgment debtor. *Ib.*

Partition without suit, in such a case, if fair, is valid. *Ib.*

The mortgagor's possession is not a disseisin which will bar the mortgagee's right to file a petition for a partition. *Colton v. Smith*, 22 D. 375.

A premature bill for partition was retained, with leave to apply to the court when the parties should become entitled thereto. *Cole v. Oregon*, 26 D. 208.

A tenant in common is entitled to a partition, however inconvenient or injurious it may be to make it. *Hanson v. Willard*, 28 D. 162; *Higginbottom v. Short*, 57 D. 198; *Campbell v. Lowe*, 66 D. 339.

Partition by metes and bounds, however, is not to be made in all cases. *Hanson v. Willard*, 28 D. 162.

Coparceners had a right to partition at common law; such right was given to joint tenants and tenants in common by statute. *Purvis v. Wilson*, 69 D. 773.

The executor and devisees of a deceased tenant in common, not asking for partition among themselves, may jointly file a bill in chancery to have their interests in the land set off from that of the co-tenant. *Page v. Webster*, 77 D. 446.

The distinction between joint tenancy, tenancy in common, and estate in coparcenary has been abolished in Texas, and the tenants are there treated all alike, simply as "part owners," and are all alike entitled to compulsory partition, and the rights of all are preserved upon any previous warranty of the title under which the tenants hold. *Ross v. Armstrong*, 78 D. 574.

* See monographic note on who may compel partition, 67 D. 708-712.

For Index to Notes in American Decisions and American Reports, see Volume 1.

The word "holding," as used in the Indiana statute concerning partition of lands, does not require actual occupancy, but is equivalent to owning or having title to lands, etc.: See 2 R. S., p. 329, sec. 1. *Godfrey v. Godfrey*, 79 D. 448.

One may have partition without having possession, or may have it even against an adverse claimant. *Id.*

Any person, not made a party, may appear and set up title in himself to premises sought to be partitioned, and where such title is set up, and found against such person, there seems to be no good reason why partition should not be made among those to whom the land belongs, although such person may have been in possession. *Id.*

Under the California practice, actions should be brought in the name of the real party in interest, and this applies to actions for partition; and a holder under a conveyance by one tenant in common of a specific parcel of the common lands, as well as the co-tenants of his grantor, should be made a party to such action. *Gates v. Salmon*, 95 D. 139.

A lessee of lands, the reversion in fee of which is in tenants in common, may, upon purchasing a part of the reversion, demand a partition even though it will necessarily result in a sale of the premises. *Hill v. Reno*, 14 R. 222.

The owner of land conveyed an undivided share of it by warranty deed which contained, after the description and before the habendum, this clause: "To remain in common and undivided." Held, that the clause was neither a condition nor a covenant, and that the vendor was not estopped to sue his grantees for partition. *Spaulding v. Woodward*, 16 R. 392.

9. Who may not. — Devisees cannot have partition of the present interest in the land devised, where it is vested in the executors in trust to pay them the rents and profits. *Striker v. Mott*, 22 D. 646.

Devisees cannot have partition of a future contingent estate in land which it is not certain will belong to them on the termination of the particular estate vested in the executors. *Id.*

A tenant in common of a reversion cannot apply for partition without the concurrence of the owners of the present estate. *Id.*

Heirs are not entitled to partition among themselves while the lien of the administrator for the payment of the intestate's debts remains upon the land; nor can they, until the lien is satisfied, convey the land so as to entitle their grantees to immediate possession. *Hubbard v. Ricart*, 23 D. 198.

One holding under a deed of an undivided half of a certain farm, in which deed the grantor reserves a life estate, cannot, during the life of the latter, compel partition against a grantee of the other undivided half of said

farm, as a right of immediate possession is necessary to the maintenance of this proceeding. *Nichols v. Nichols*, 67 D. 699.

One who causes execution to be levied upon an undivided portion of a piece of property of which the owner is in the possession, claiming adversely to any title under the levy, cannot maintain partition, as, if the levy was valid, it could only give a right of entry, which is not sufficient to maintain a petition for partition. *Brock v. Eastman*, 67 D. 733.

Partition proceedings cannot be maintained, in Massachusetts, by a judgment creditor who levies his execution on real estate of the debtor, held in common with others, before the debtor's right of redemption has expired. *Pelphs v. Palmer*, 77 D. 378.

Partition will not be made of a reversionary interest in land covered by a license held by one of the tenants in common. *Baldwin v. Aldrich*, 80 D. 695.

A tenant for life cannot ask partition where he is in lawful possession, and has the permanency of the rents and profits of the entire estate. *Johnson v. Johnson*, 83 D. 676.

The Massachusetts statute provides that a petition for partition shall not be maintained by one who has only an estate in remainder or reversion, and of course his grantee cannot ask it. *Id.*

Where land is jointly held by one and his wife for their joint lives and the life of the survivor of them, a conveyance to the husband, by the children, during the life of the wife, of an undivided share in the remainder, will not merge his life estate, or give him such a title as will enable him to maintain a petition for partition. *Id.*

10. What premises may be partitioned. — Partition may be had of a mill and mill privilege. *Hanson v. Willard*, 28 D. 162.

A saw-mill, mill-yard, and mill-pond are not partible, and therefore are not proper subjects for partition. *Brown v. Turner*, 15 D. 696.

Partition cannot be had in one suit of several tracts, by a tenant in common of all, where the ownership therein other than his is vested in persons who have, between themselves, no common interest in the separate tracts; therefore, where a tenant in common, owner of one third of an estate, brought suit to obtain partition, and it appeared that the other two-thirds interest had come to several, each of whom was owner of such interest in separate and distinct parts of the estate, his suit was dismissed. *Matter of Prentiss*, 30 D. 203.

Partition cannot be had of lands purchased with partnership funds and held as partnership assets, prior to a settlement of the partnership accounts. *Baird v. Baird*, 31 D. 399.

Courts of chancery cannot decree partition

For Index to Notes in American Decisions and American Reports, see Volume I.

of personal chattels held in joint tenancy or tenancy in common. *Gudgell v. Mead*, 40 D. 120.

The whole tract of real estate held in common must be partitioned at one time, where partition of the same is sought to be enforced by legal process. *Bigelow v. Littlefield*, 83 D. 484.

One tenant in common cannot enforce partition of part only of the common estate. *Ib.*

A conveyance by one tenant in common of his interest in a part only of lands held by him in common does not authorize a co-tenant to enforce partition of such part against the grantee, leaving the residue of the estate unpartitioned. *Ib.*

It is always indispensable that the subject of every compulsory partition should be held in co-tenancy. Therefore, premises belonging in severalty to two, and no portion of them belonging jointly to both, are not subject to partition, either in equity or under the statute. *McConnel v. Kibbe*, 92 D. 93.

Partition of land, valuable chiefly as an acre-bed, refused, because the court could not ascertain the value of the different parts, and because the parties could obtain a less hazardous and more adequate remedy in chancery. *Conant v. Smith*, 15 D. 669.

11. Proper parties defendant. — In a partition suit, all persons interested are necessary parties. *Batterton v. Chilca*, 54 D. 539; *Portis v. Hill*, 65 D. 99; *De Uprey v. De Uprey*, 87 D. 81.

Judgment of partition in a suit by a tenant against his co-tenant who has mortgaged his interest is not binding on the mortgagee not party to the suit. *Colton v. Smith*, 22 D. 375. Compare *Whitton v. Whitton*, 75 D. 163.

A reversioner must be a party when the complainant is an owner of an undivided interest in the present estate, and also in the reversion, or when some of the other reversioners have also an undivided present estate in fee. *Striker v. Mott*, 22 D. 646.

Vendees of one who, upon taking under a will, was compelled to relinquish the land which he had sold as his own, but which the testator had devised to others, will not be affected by any partition among the devisees to which they, the vendees, were not parties. *Gore v. Stevens*, 25 D. 141.

The husband need not be joined in a proceeding for partition of his wife's land in order to bind her interest. *Pillsbury v. Dugan*, 34 D. 427.

A co-tenant against whom partition is demanded is not strictly a party to the proceeding. *Ib.*

A petition for partition of several tracts against several defendants, all of whom are not interested in all the tracts, is bad for misjoinder, and will be dismissed on motion of one of the defendants. *Brownell v. Bradley*, 42 D. 498.

Infants may be made parties under the Missouri statute. *Thornton v. Thornton*, 72 D. 266.

If the owner of an undivided interest in real estate devise his interest in part of the land to one and in another part to another, both devisees are proper parties to a bill for partition. *Whitton v. Whitton*, 75 D. 163.

Where the wife claims a homestead right or an interest in the premises, she is not only a proper but a necessary party to the proceedings. *De Uprey v. De Uprey*, 87 D. 81.

12. Matters of defense. — The real owners of land sought to be partitioned may come in and resist the demandant's claim for partition, although he may have misdescribed them in his petition. *Harman v. Kelley*, 45 D. 552.

13. Adverse possession as a defense. — Evidence of an adverse possessory title to part of the premises sought to be partitioned is admissible to defeat the partition. *Harman v. Kelley*, 45 D. 552.

If one or more of many tenants in common be barred by the statute of limitations, and others be within the saving of the statute, it shall not operate against those who are within the saving of the statute to bar them; nor shall the partition given by those within the saving of the statute prevent the operation of the bar as to those without the saving of the statute; each one shall recover or be barred, as to his aliquot share or portion of the land, as he may be within or without the saving of the statute. *Wade v. Johnson*, 42 D. 422.

Tenants in common barred by statute of limitations as to part of the property cannot remove the bar as to such part by allotting it in partition to one of their number who is within the saving of the statute, and therefore not barred. *Ib.*

A bill in chancery lies for partition, notwithstanding adverse possession, unless it has been continued sufficiently long to bar a recovery under the statute of limitations. *Howey v. Goings*, 54 D. 427.

The defense of limitation is competent to show an adverse claim and holding as against any right or title in plaintiff. *Portis v. Hill*, 65 D. 99.

Sole seisin in respondent may be established by a possession commenced twenty years before the trial, although less than twenty years before the commencement of the suit. *Brackett v. Persons Unknown*, 87 D. 548.

14. Process, notice, etc. — Partition among coparceners, made under an order of a county court, without legal notice to all interested, is invalid. *Newby v. Perkins*, 25 D. 160.

The statute requiring that before a partition of land can be had among heirs, written notice thereof must be given to all persons interested therein, and that the service of

For Index to Notes in American Decisions and American Reports, see Volume I.

such notice shall be proved by affidavit, must be strictly pursued, and the sheriff's return, that he has "executed" such notice, cannot be substituted for such affidavit. *Id.*

Notice must be given, in case of partition among heirs and devisees, to all who do not join in the petition, or they will not be bound by the acts of the court. *Vick v. Mayor etc. of Vicksburg*, 31 D. 167.

A writ of partition will be granted, whether the subject-matter is susceptible of division or not. *Steedman v. Weeks*, 49 D. 660.

Actual partition by sale under judgment of partition may, under New York statutes (see 3 R. S., 5th ed., 602-620), bar future contingent interests of persons not in case without publication of notice to bring in unknown parties, and even where the claim of such future owners is as purchasers by grant or devise, not under any party to the suit. So held where the question was whether a purchaser at such sale should be required to take title. *Mead v. Mitchell*, 72 D. 455.

A grantee of one of the heirs, whose deed has not been recorded, is not entitled to notice of partition proceedings; nor is the record of a mortgage from the grantee to his grantor constructive notice of title in such grantee. *Merklein v. Trappell*, 75 D. 634.

A summons addressed "to the above-named defendants" is a sufficient compliance with the requirements of the Minnesota statute, where the names of the defendants are stated in the title of the case in the summons, and the complaint alleges that the defendants named are the only persons, except the plaintiffs, having or claiming any interest in the property. *Martin v. Parker*, 100 D. 188.

15. Petition.—In a petition for partition of lands, it need not be averred that the land lies in the county where suit is brought, if such suit is brought in a court of general and unlimited jurisdiction, as in a circuit court of Indiana. *Godfrey v. Godfrey*, 79 D. 448.

An objection to the petition on account of indefinite description of land sought to be partitioned cannot be taken by demurrer. Such uncertain description may, however, be obviated by a motion to require the pleading to be made definite and certain by amendment. *Id.*

Demandant in partition must set forth the ownership, and the state of the title, according to the truth, so that every person interested as owner of the land of which partition is demanded may have an opportunity to be heard. *Harman v. Kelley*, 45 D. 552.

16. Bill.—A bill in equity for partition must state the complainant's own title, and the title of the defendant, whereby it shall appear that they do claim to hold the land as co-tenants. *Ramsay v. Bell*, 42 D. 163.

Plaintiff need not set forth his title to the land in full. Defendant may, if necessary, in

his plea or answer, deny his title to the whole or any part of the land, or he may deny the co-tenancy, in which case a preliminary trial would have to be had. *Rutherford v. Jones*, 60 D. 655.

A bill for partition of lands held in common is not multifarious, where it sets forth that defendant purchased the lands at a sale for taxes; that such sale is void; and prays discovery with respect thereto, and that the same be declared void. *Page v. Webster*, 77 D. 446.

A bill by executor and devisees, who ask no partition as between themselves, contains a sufficient statement of the respective interests of complainants where it sets forth that the undivided interest was devised to the latter in common, with the power, nevertheless, in the executor to sell and dispose of the same. *Id.*

An allegation as to "unknown owners" is sufficient if in the following words: "That such portions of said tract as do not belong to defendants and to your orators belong to unknown owners." *Nash v. Church*, 78 D. 678.

17. Complaint.—A complaint is good which contains only general allegations that the premises cannot be divided by metes and bounds without prejudice, and does not state the facts showing why such partition cannot be made. *De Uprey v. De Uprey*, 87 D. 81.

A complaint is good which is silent as to the particular mode of partition sought. *Id.*

Whether partition can or cannot be made by metes and bounds is the only necessary averment in a complaint for partition, as that is purely a question of fact and the ultimate fact to be found. The constituent facts, or those which lie behind, are probative, and need not be averred. *Id.*

Where the complaint alleges that the parties are co-tenants, the findings of the court must correspond with the allegations of the complaint only so far as to show that the parties hold and are in possession of the land as joint tenants or as tenants in common, and that one or more of them has an estate of inheritance, or for life or lives, or for years. Partition may be had, although either of the parties may have set forth his interests incorrectly. *Id.*

An allegation in the complaint, that one of the defendants had cut and converted to his own use a large amount of timber growing on the land, may be stricken out on motion, for the reason that it was directed against one only of the defendants. *Oram v. Waggoner*, 89 D. 493.

18. Plea or answer.—A plea that the respondent held an unexpired lease of the petitioner's interest for a term of years is not a sufficient answer. *Hunt v. Hamilton*, 20 D. 575.

A plea that the respondents, at the time

For Index to Notes in American Decisions and American Reports, see Volume I.

of filing their plea, were not tenants in common with the petitioner is insufficient. *Ib.*

A plea that the premises are not partible is no sufficient defense to a petition which prays not only for partition, but that if the premises are not partible, that they may be assigned or sold pursuant to statute. *Baldwin v. Aldrich*, 80 D. 695.

Where a party sued in partition disclaims, in his answer, all interest in the land, except a homestead interest held by himself and wife, such disclaimer is not sufficient to entitle him to a dismissal of the action. *De Uprey v. De Uprey*, 87 D. 81.

Defendant cannot defeat the action, nor is he entitled to have it dismissed, by the mere force and effect of his answer, no matter what it contains. *Ib.*

Any question affecting the right of the plaintiff, or the rights of each and all of the parties in the land, may be put in issue, tried, and determined in the action. *Ib.*

19. Rules of evidence. — Demandant, to maintain his suit, must prove joint ownership of all the tenants, in the whole of the premises of which partition is sought. *Harman v. Kelley*, 45 D. 552.

Evidence that a certain deed under which petitioner claims is void for want of proper delivery is admissible for the purpose of defeating his title and right to maintain the proceeding. *Nichols v. Nichols*, 67 D. 699.

20. Appointment and powers of commissioners, or masters. — Where commissioners have been appointed to make partition between co-tenants, and they divide the property, but neglect to report to the court, and have the partition confirmed, and the co-tenants take possession of their allotted shares, and make improvements in pursuance of the partition, the title of each is complete, and it is error to instruct the jury that such possession must continue for the full period of the statute of limitations. *Welch v. Thompson*, 99 D. 470.

A party dissatisfied with the appraisal by commissioners, in partition of land to be assigned to another, may bring the property to a sale by securing and making a bid, offering a material advance in price over such appraised value. *Moore v. Williamson*, 73 D. 93.

21. Their report, and proceedings thereon. — Where the rights of infants appear upon the face of the master's report as to title, the court will correct an error into which the master has fallen as to the extent of their interests in the premises partitioned, although no formal exception has been pleaded to the report by their guardian *ad litem*. *Safford v. Safford*, 32 D. 633.

The filing of the petition and appointment of commissioners under the act of descents, is an *ex parte* proceeding, and the proceeding of the county court, in confirming or rejecting their return, is summary; and neither

law nor custom requires the proofs exhibited by the parties to be reduced to writing, or in any way introduced into the record of the proceedings, so that an appeal to the court of last resort, even if permitted, would not avail the appellant. *Hardy v. Summers*, 32 D. 167.

The report of commissioners may be approved or disapproved by the court. *Riggs v. Dickinson*, 35 D. 113.

Inequality in value is a good ground for disapproving and setting aside the report of commissioners. *Ib.*

Parol evidence is admissible to show that the partition reported by commissioners is unequal and ought to be disapproved. *Ib.*

Commissioners, in partitioning the estate of a decedent, are presumed to have appreciated advantages and disadvantages accruing from the fact that a dike upon one part of the property caused water, in time of flood, to overflow another part, and the dike may be maintained by the heir to whom the land is allotted, and by those claiming under him. *Burwell v. Hobeon*, 65 D. 247.

Where a chattel has, with assent of all concerned, been allotted to a party, who takes possession of it, a subsequent confirmation of the return of the commissioners has relation to the time of actual allotment completed, so as from that time to ratify in that party a title to the chattel which he then acquired. Whether before confirmation his title is ever more than inchoate, *quere*. *Jackson v. Jennings*, 94 D. 160.

Where a number of slaves have been partitioned among several heirs, and where, pending confirmation, the slaves are held by the administrator, and a slave allotted to one of the heirs dies, the loss should fall proportionately upon all the heirs, and a confirmation of the partition as originally made is erroneous. The measure of equalizing the allotment would be interest on the value of the slave as reported up to the time of the emancipation of all slaves, which in the mean time had occurred. *Ib.*

22. Rendition and effect of judgment or decree.* — A decree in partition binds a co-tenant who is beyond the jurisdiction of the court, if notice be given him of the pendency of the proceeding. *Pillsbury v. Dugan*, 34 D. 427.

The judgment is neither void nor voidable from the fact that it includes a parcel of land to which the tenants in common had no title. *Austin v. Charlestown Female Seminary*, 41 D. 497.

Although partition made under a decree by commissioners appointed for that purpose is invalid, still the decree without partition vests in the party named therein the exclusive title in the land set apart and conveyed to him by it, and constitutes him a tenant in

* Effect of judgment in partition, see note, 40 D. 640-642.

For Index to Notes in American Decisions and American Reports, see Volume I.

common with the original grantee, and as such he has sufficient title to enable him to maintain an action of trespass to try title against a stranger. *Grassmeyer v. Beeson*, 70 D. 309.

The office of a decree in partition in the orphans' court is not to transfer title of lands from the decedent to his heirs, but merely to divide what descends to the heirs. *Dresher v. Allentown Water Co.*, 91 D. 150.

The decree does not operate upon creditors of decedent, for they are not parties to the proceeding, but only upon the heirs. *Ib.*

The decree affects merely rights of parties to the proceeding, and establishes no more than that he to whom the land has been adjudged shall hold it in severalty as against his co-heirs. *Ib.*

A decree directing a sale of the property, instead of setting it off to one of the co-tenants upon his paying to the other the value of his interest, is proper. *Horton v. Maffit*, 100 D. 222.

23. Conclusiveness of judgment or decree.—Judgment of partition is a bar to a subsequent petition for a partition, where the parties and the questions put in issue are necessarily the same. *Colton v. Smith*, 22 D. 375.

A decree of partition cannot be collaterally impeached by a stranger. *Grassmeyer v. Beeson*, 70 D. 309.

Where a partition of real estate by a probate court has been acquiesced in by the heirs for twenty years, the proceedings of the court will be presumed to have been regular, and be held conclusive. *Campbell v. Wallace*, 37 D. 219.

A decree of partition by the orphans' court is as conclusive as a judgment of partition by a court of law. *Herr v. Herr*, 47 D. 416.

A decree of the orphans' court in partition of a decedent's realty awarding the land to one of the heirs is conclusive as to the title, and cannot be collaterally impeached, if the court had jurisdiction of the subject-matter, and there be no fraud. *Merklein v. Trapnell*, 75 D. 634.

In a suit for partition, the finding and determination of a court of general jurisdiction, as to the existence and interests of parties unknown, as well as to the sufficiency of an affidavit authorizing the publication of notice under the statute, is binding in all collateral attacks upon the judgment, especially when the allegations of the complaint and the statement of facts in the affidavit are in substantial conformity with the statutory requirement. *Nash v. Church*, 78 D. 678.

An unknown owner, proceeded against by advertisement, in an action of partition, is bound by judgment therein, though in possession of the premises, claiming in severalty by paramount title, not a party by name,

and without actual notice, where the statute makes the judgment binding and conclusive on unknown owners who have been served by publication. *Ib.*

Judgment in partition will bind one who claims title, unless he previously comes in and sets up his claim, if he has any. To demur is insufficient. *Godfrey v. Godfrey*, 79 D. 448.

The whole scope and tenor of the California statute relating to partition of lands show that the intention was to make the one judgment of partition final and conclusive on all persons interested in the property, or any part of it, of whom the court could acquire jurisdiction. Such actions, though regulated to a great extent by the statute, partake more fully of the principles and rules of equity than those of law, both in respect to the mode of procedure prescribed and the remedies provided. *Gates v. Salmon*, 95 D. 139.

A decree in partition is not a settlement of a title, and will not estop the defendant from having a legal investigation of his title in an action of ejectment. *Nicely v. Boyles*, 40 D. 638.

The statute of Iowa in reference to partition of lands, section 36, providing that all persons notified to appear are bound by the judgment, applies with its legitimate force and effect only where the proceedings are *bona fide*, and it was never intended to cover up proceedings *mala fide*. *De Louis v. Meek*, 50 D. 491.

A petitioner in partition proceedings alleging that a certain share of the premises is owned by persons therein described, who in fact are not the owners thereof, is not prevented thereby from subsequently purchasing such share from the true owner, and making a valid conveyance thereof, though the partition be made in accordance with the allegations of his petition. *Richardson v. City of Cambridge*, 79 D. 767.

24. When set aside.—Persons interested in land as tenants in common may make division thereof by consent and agreement among themselves, *bona fide*, so as to sever their interests, and thereupon, waiving the ordeal of trial by proof in court as to title, procure a decree of partition; but if there are owners who are not personally present, and do not participate in such consent, or who are not legally represented in the transaction, and whose interests or just rights may be injuriously affected or lost thereby, such persons may seek and find redress in equity. *De Louis v. Meek*, 50 D. 491.

Fraud in procuring a decree of partition will be relieved against in equity. *Ib.*

Negligence is no ground for refusing equitable relief against fraud of attorneys and petitioners in a petition for partition, in making a compromise and procuring a

For Index to Notes in American Decisions and American Reports, see Volume I.

decree of partition to be entered and confirmed by practicing deception on the court. A party is not required to be on his guard against such fraudulent acts, so as to be liable for negligence in failing to prevent them. *Id.*

A bill for relief against a decree of partition on ground of fraud need only state every material fact upon which the complainants intend to offer evidence distinctly and clearly. A general and substantial charge of such a fact is sufficient. It is not necessary to charge minutely all the circumstances which may conduce to prove the general charge. These circumstances are for the matter of evidence, which need not be charged, to let them in as proofs. *Id.*

A judgment or decree in partition obtained by fraud may be impeached by an original bill filed without the leave of the court. *Id.*

A decree of the orphans' court for the partition of land may be impeached for fraud in an action between one who claims as a purchaser under such decree, with notice of the fraud, and an heir of the deceased. *Mitchell v. Kintner*, 47 D. 408.

Where there has been a partition between tenants in common in Texas, and there is failure of title, the remedy is in a court of chancery, either by setting aside the partition when improperly made, and it can be done without injustice to others, or by contribution when it is most proper. *Ross v. Armstrong*, 78 D. 574.

25. Necessity of a sale. — Where equitable partition cannot be made, owing to the nature of the property, equity will grant relief by decreeing a sale of the property and dividing its proceeds among the co-tenants. *Higginbottom v. Short*, 57 D. 198.

A sale of the premises is merely incidental, when permitted, and is resorted to only to prevent a sacrifice of the property by a division. *Striker v. Mott*, 22 D. 648. S. P., *Dall v. Confidence S. Mfg. Co.*, 93 D. 419.

Where division in partition cannot be made without manifest injustice, the commissioners may recommend a sale, and the court will judge of the propriety of confirming such return. *Steedman v. Weeks*, 49 D. 680.

Plaintiff may be permitted to take the land at the valuation, after a judgment by default against non-resident defendants, and the court is not bound to order a sale. *Dewar v. Spence*, 30 D. 241.

In a partition proceeding at law, under the statutes of Georgia, the court cannot decree the threefold relief of subdividing some lots, allotting others entire, with or without pecuniary compensation, and ordering a sale of others. One of those methods contemplates a division in kind, and the other a sale, which two modes cannot be combined at law. *Rutherford v. Jones*, 80 D. 655.

Complainant on a bill averring that the land was incapable of division, that defendant refused to divide or unite in a sale, and that it was for the interest and advantage of the parties to have the same sold, and praying for a sale and for general relief, on proof of his title as tenant in common, is entitled to either a decree for a sale or for a partition, according to the evidence, and in such case, a dismissal of the bill because there was no proof that a sale would be advantageous to the parties is erroneous, and the party is entitled to relief under the general prayer, notwithstanding the averment that defendant refused to divide the property was inappropriate, in view of the averment that it did not admit of partition, and the case made by the bill is not vitiated thereby. *Campbell v. Lowe*, 66 D. 339.

Assignment or sale of premises owned in common will not be refused when they cannot be partitioned without great inconvenience to the parties interested, because the petitioner has not been hindered in the enjoyment of his share. *Baldwin v. Aldrich*, 80 D. 695.

Partition, assignment, or sale may be made of that part of premises owned in common, in Vermont, where upon the trial of a petition for partition, it appears that the parties are tenants in common of only a part of the premises described in the petition. *Id.*

Under the Nevada statute, if one of the co-tenants files an affidavit showing that the sale of an entire mining claim would be injurious to him, the court must divide the claim as prescribed by the statute. A sworn answer setting up the same matter takes the place of such affidavit, and is sufficient. *Dall v. Confidence S. Mining Co.*, 93 D. 419.

In a suit for partition against a co-tenant who has removed an encumbrance from the common property, and has set up and proved such fact without filing a cross-bill for affirmative relief, a decree for sale of the premises, in the event of non-payment of his claim, cannot properly be rendered, but the decree should, under the Illinois statute of 1861, be that the petitioner take his allotment subject to the defendant's lien for one half of the money paid for the removal of the encumbrance. *Tinsworth v. Stout*, 95 D. 577.

26. Validity and effect of the sale.

— A sale in a partition suit will pass nothing but the title which was vested in parties to the proceeding. *Allen v. Gault*, 67 D. 485.

A sale of land for partition, by commissioners appointed by the probate court, is a judicial sale requiring confirmation, and within the statute of frauds until such confirmation takes place. *Hutton v. Williams*, 76 D. 297.

A note or memorandum of such sale made by one of the commissioners, not the auctioneer, and not thereunto lawfully authorized in

For index to Notes in American Decisions and American Reports, see Volume I.

writing by the purchaser, is not sufficient to take the sale out of the statute of frauds, as defined by sections 1551 and 1552 of the code of Alabama. *Ib.*

A sale of a deceased person's estate, to carry out partition thereof, must be made by the administrator, and if made by a commissioner appointed by the county court for the purpose, conveys no title. *Rose v. Newman*, 80 D. 646.

If a sale of lands for partition among heirs becomes necessary, and there be no administrator, there can be no sale until one is appointed. The estate is vested in the heirs, subject only to such disposition of it as may be necessary to be made by the administrator, under the orders of the court, to pay debts, make partition, and the like. *Ib.*

Commissioners for partition have power to sell one parcel of land with an easement in another part annexed to it, and to sell the servient parcel subject to the servitude. *Rosenkrans v. Snover*, 97 D. 668.

27. Deed to purchaser.—In a sale of property under the Ohio partition act of 1820, 2 Chase Stat. 1162, a deed of conveyance from the sheriff, duly executed, was made necessary to a complete execution of the power of sale, and indispensable to invest the purchaser with the legal title. And it must have been signed and sealed by the sheriff in the presence of witnesses, and such signing and sealing acknowledged by him in open court. *Merritt v. Horne*, 67 D. 298.

28. Rights of purchasers.—Partition by suit, or by agreement and interchange of deeds, in either case makes the partitioners in effect purchasers of their respective lots, and entitled to hold them as any other purchasers. *Burwell v. Hobson*, 65 D. 247.

Purchasers under an order of sale in partition take the land discharged from lien of a judgment rendered after the order of sale, although the judgment creditor may have the proceeds of the sale appropriated, upon due application to the court, to the payment of the judgment. *Cradlebaugh v. Pritchett*, 72 D. 610.

The title acquired under an order of sale for payment of decedent's debts will prevail over that of an heir under a decree in partition. *Dresher v. Allentown Water Co.*, 91 D. 150.

Where commissioners, to make partition, give a deed for one parcel of land, containing a provision that no buildings shall be erected thereon to darken the windows of a building standing along the line upon an adjoining parcel, sold and conveyed by them at the same time, the purchaser takes subject to the easement for the benefit of the adjoining parcel, although the condition was not in the conditions of sale, and he objected to its being inserted in the deed. If he accepts the deed, he will be bound by the condition. *Rosenkrans v. Snover*, 97 D. 668.

29. Compelling purchaser to take title.—A right of action against a purchaser for the difference in amount of his bids is in the owners of the land, as well as in the commissioners, where land has been sold for partition by commissioners under an order of the probate court; and upon a failure of the purchaser to comply with his contract, the land is resold. *Hutton v. Williams*, 76 D. 297.

Where a *feme covert* is one of the joint owners of land sold for the purpose of partition, and upon a failure on the part of the purchaser to comply with his contract the land is again sold, whereby a right of action accrues to recover the difference in amount between the first and second sale, she is the sole party having such right of suit, as far as her interest is concerned; for her share in the recovery which may be had will belong to the *corpus*, and not to the income or profits, of her separate estate. *Ib.*

The right to resell at risk of purchaser failing to comply with his contract is an implied condition of a sale of land for partition by commissioners; and the difference between the greater price bid at the first sale and the less price realized at the second is, in the nature of damages, stipulated by the parties. *Ib.*

Where land is sold for partition, the Alabama statute does not make it the duty of commissioners conducting such sale to tender to the purchaser a bond or certificate of purchase. *Ib.*

30. Setting aside sale.—A sale of lands by the sheriff under an order of a court of record in an action of partition is in pursuance of a judgment of such court, and can be confirmed or set aside by the judgment of that court alone; and if the purchaser to whom the property is sold under such proceedings claims to have reason for setting aside the sale, he must apply for relief to the court having jurisdiction of the case, and by whose order the sale was made. *Allen v. Gault*, 67 D. 485.

After confirmation of a partition sale at which plaintiff became purchaser, the bid-dings will not be opened upon the offer by one of the defendants of double the price bid by the purchaser, on the ground that notice of the suit was given by publication, and that some of the defendants were minors. *Houston v. Aycock*, 73 D. 131.

31. Rents and profits, improvements, etc.—Co-tenants having made improvements are entitled to have the portions of the premises including the improvements set off to them if practicable, and if the premises must be sold, are entitled to the actual increase of price received at the sale in consequence of the improvements. *Howey v. Goings*, 54 D. 427. *S. P.*, *Nelson v. Clay*, 23 D. 387; *Louville v. Menard*, 41 D. 161; *Robinson v. McDonald*, 62 D. 480; *Martin-*

For Index to Notes in American Decisions and American Reports, see Volume I.

dale v. Alexander, 89 D. 458; *Buck v. Martin*, 53 R. 702; *Appeal of Kelsey*, 57 R. 444.

Upon such partition, if a portion of the improved land is allotted to the party not making the improvements, he is not liable to his co-tenant for the value of such improvement, nor is the latter liable to the former for rent of the improved land allotted to the former. *Nelson v. Clay*, 23 D. 387.

Proceedings for partition of realty under the Illinois statute of 1827 are summary and *in rem*, and act only on the legal rights of the parties in dissolving the tenancy, and the equitable right of one of them to the value of improvements erected on the common land is not thereby affected. *Louville v. Menard*, 41 D. 161.

Omission to dispose of a cross-bill claiming compensation for improvements, at the same time the decree for partition is made, is not error. *Howey v. Goings*, 54 D. 427.

Improvements are not allowed for accords to their cost, but according to the value which they have imparted to the premises. *Moore v. Williamson*, 73 D. 93.

Under the Indiana statute, equitable as well as legal rights of parties to partition are allowed to be settled in a single action. If several tenants in common are sued under that act by a co-tenant for partition, any one who has made improvements on the estate may set up, by cross-complaint, his equity for an allowance. *Martindale v. Alexander*, 89 D. 458.

On partition in equity, it does not appear to be necessary, to entitle a tenant in common to allowance for improvements, to show the assent of his co-tenants to such improvements, nor a promise on their part to contribute their share of the expenses, nor that they were requested to join in the improvements, and refused. *Id.*

Compensation cannot be allowed in a partition suit for cost of improvements on adjoining property, which incidentally enhance the value of the common property. *Dall v. Confidence S. Min. Co.*, 93 D. 419.

Items of expense incurred by a tenant in common to gratify his taste, and to contribute to his convenience, but not for the preservation of the common property, cannot be allowed to him as an equitable lien upon such property on the hearing of a bill for a partition or sale of it. *Israel v. Israel*, 96 D. 571.

32. Owelty of partition.—A court of equity, in decreeing partition, may direct an accounting in a proper case, and require each of the co-tenants to pay his equitable proportion of the expenses incurred in the development or improvement of the joint property. *Dall v. Confidence S. Min. Co.*, 93 D. 419.

Where there had been two partitions, and on final judgment the former was re-established, and it then appeared that the distributees under the second and rejected partition had alienated or sold a portion of the prop-

erty, — *held*, that the distributees under the second partition should give an equivalent to the distributees under the first partition for the property so alienated or sold. *Dunman v. Hartwell*, 60 D. 176.

On a bill in equity for partition between two tenants in common, the estate of one being unencumbered, and that of the other being subject to various mortgages covering the mortgagor's undivided interest in various parcels, — *held*, 1. That a decree of partition could not extend any mortgage to property not described and included in such mortgage; 2. That the aggregate parcels covered by each single mortgage of the one tenant in common must, for purposes of partition, be considered as one separate estate. *Green v. Arnold*, 23 R. 466.

One of two tenants in common mortgaged his interest in the common estate to the other, and no entry or foreclosure has taken place. *Held*, the mortgagee can have partition in equity. When owelty is required to equalize partition between two tenants in common, the estate of one being mortgaged, it should, if to be paid by the unencumbered owner, be paid to the mortgagee of the other, and credited on the mortgage note. *Id.*

33. Incidental matters of practice. — Upon the partition of a tract of land among coparceners, by an order of a county court, no judgement for costs can be given for or against any of them, there being no contest. *Newby v. Perkins*, 25 D. 160.

Equity may, in a partition proceeding of numerous lots, if necessary, appoint a receiver to rent out the property in whole or in part, and pay the rent over to the co-tenants according to their respective rights, or may order the lots to be held and enjoyed by one for a certain length of time, and then by the others successively. *Rutherford v. Jones*, 60 D. 655.

A suit for partition is not properly tried, except by consent of parties, at the term at which the defendant is first bound to appear. And, where the defendant never appeared, his consent to the trial cannot be presumed. *Thornton v. Thornton*, 72 D. 266.

34. Review. — Under a statute permitting reviews in "civil causes," a petition for partition cannot be reviewed, as those words have reference only to those suits or actions which are commenced and prosecuted according to the course of the common law. *Nichols v. Nichols*, 67 D. 699.

Parties are entitled on a new trial of an action for partition of lands ordered by the court on appeal, to avail themselves of the documentary evidence used at the former trial, and on file in the court below, including the referee's report of the testimony, and the deeds, exhibits, etc., subject, however, to objection as when first offered. *Gates v. Salmon*, 95 D. 139.

For Index to Notes in American Decisions and American Reports, see Volume I.

PARTNERS.

- Assignments for creditors by, see ASSIGNMENTS, etc., 5.
- Competency of, as witnesses, see WITNESSES, 55.
- Declarations of, as evidence, see EVIDENCE, 144.
- Sales of good-will by, see GOOD-WILL, 2, 3.
- Set-off in actions by or against, see SET-OFF, 18.
- Submission of disputes between, see ARBITRATION, etc., 6.
- When limitation begins to run for or against, see LIMITATIONS OF ACTIONS, 25.

PARTNERSHIP.

[Includes the creation, nature, incidents, and termination of partnerships for business purposes; the rights, powers, and liabilities of partners, both *inter se* and as regards third persons; proceedings for accounting and dissolution; and the rules relative to limited partnerships.]

- Bankruptcy, proceedings peculiar to, see BANKRUPTCY, 49.
- Entries in books of, as evidence, see EVIDENCE, 237.
- For mining purposes, see MINES AND MINING, 15.
- Insolvency proceedings peculiar to, see INSOLVENCY, 31.
- Liability of property of, to execution levy, see EXECUTION, 32.
- Property of, when exempt from levy, see EXECUTION, 160.

I. THE RELATION, AND HOW CONSTITUTED.

1. *In General.*
2. *Rights of Partners, and Herein of Partnership Property.*
3. *Interpretation of Partnership Articles.*
4. *The Firm Name.*

II. RIGHTS OF CREDITORS.

1. *In General.*
2. *Power of One Partner to Bind Another, or the Firm.*
3. *What Acts of One Partner will Release the Firm.*

III. SUITS BETWEEN PARTNERS.

IV. DISSOLUTION.

1. *How a Partnership may be Dissolved.*
2. *Consequences of Dissolution.*
 - a. *In General.*
 - b. *Rights and Liabilities of Surviving and Liquidating Partners.*
 - c. *Application of Assets to Debts.*

V. LIMITED PARTNERSHIP.

I. THE RELATION, AND HOW CONSTITUTED.

1. *In General.*

1. What constitutes a partnership, generally. — 1. *Definition, and general*

*rules.** — A partnership, in its most significant and extended sense, is a voluntary contract of two or more persons for joining together their money, goods, labor, and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionably between them, and having for its object the advancement and protection of fair and open trade. *Howell v. Harvey*, 39 D. 376.

To constitute a partnership, there must be some joint adventure and an agreement to share in the profit of the undertaking. *Loomis v. Marshall*, 30 D. 596. But persons not partners as between themselves may become liable as such to third persons, by holding themselves out as such. *Ellsworth v. Tarts*, 62 D. 749.

Property jointly owned by the partners is not required to constitute a partnership. *Champion v. Bostwick*, 31 D. 376. Yet each partner must bring into the common stock something that is valuable. *Bromley v. Elliot*, 75 D. 182.

To constitute a partnership between the parties, there must be a joint ownership of the funds, and an agreement to participate in the profits or losses of the business. *Price v. Alexander*, 52 D. 526.

The two leading principles of the contract of partnership are, a common interest in the stock of the company, and a personal responsibility for the partnership engagements. *Bromley v. Elliot*, 75 D. 182.

Partnership is not confined to commercial business. It may exist between attorneys, conveyancers, mechanics, stage-line proprietors, artisans, or farmers, as well as between merchants. It may as well exist between brokers and factors or agents, whose sole employment relates to the property and business of third persons, as among those who jointly own the property in which they deal. *Id.*

There must be a community of interest in the profits, and it must be mutual, by which is meant that each party has a specific interest as principal. *Macy v. Combs*, 77 D. 103.

Community of loss and profit is the test of a partnership, even as between the partners. *Houze v. Patterson*, 25 R. 607.

What constitutes partnership, in view of the rights of purchasers, considered. *Fascetti v. Osborn*, 83 D. 278.

2. *Effect of intention.* — Whether a partnership exists *inter se* depends on the intention of the parties. *Price v. Alexander*, 52 D. 526.

A partnership relation exists, although the conditions of partnership are not understood alike by the partners, when persons agree to become partners, and actually proceed to carry into execution the joint undertaking or business. *Cook v. Carpenter*, 80 D. 670.

* Contract to raise crops on shares, when constitutes partnership, see note, 57 R. 609-612.

For Index to Notes in American Decisions and American Reports, see Volume L.

3. *Capital furnished by one, and services by the other.* — Where one furnishes the capital for an undertaking, and another puts in his services in consideration of a share of the profits indefinitely, there is a partnership between them, as regards the parties themselves, as well as third persons. *Dob v. Halsey*, 8 D. 293; *Miller v. Hughes*, 10 D. 719; *Bromley v. Elliot*, 75 D. 182.

An agreement to carry on a farm, one furnishing the land, outfit, and necessary money, the other furnishing laborers and superintending, half the money furnished to be repaid and the profits to be divided between them, constitutes a partnership. *Reynolds v. Pool*, 37 R. 607. S. P., *Brown v. Higginbotham*, 27 D. 618.

2. *What does not.* — It does not constitute partnership, where by express understanding between the parties they are not to be partners, do not hold themselves out to the public as such, and the business is conducted in the name of one, while the other is to receive one half of the net profits, and in consequence is, in the calculation of such profits, to bear one half of the losses so long as they do not exceed the profits. *Macy v. Combs*, 77 D. 103.

Persons associated for the purpose of doing a commission business as factors do not constitute "a particular partnership." *Ward v. Brandt*, 13 D. 352.

Several independent railway companies, whose lines connected, agreed each to carry over its own road the freight-cars of the others, marked "Green Line," without breaking bulk, at certain rates, each fixing and collecting its own rates over its own road, and having no interest in other freights. In fixing its own rates, on through freight, each company would ascertain the rates charged by the other companies, and add them to the rates for its own line. These were called "Green Line rates." There was no joint expense, or loss or profit, but if a loss could not be traced to any particular road, it was borne by all the carrying roads. Held, that this did not constitute a partnership, and the use of the words "Green Line," on bills of lading and a wharf-boat, did not estop the companies. *Irvin v. Nashville etc. R. R. Co.*, 34 R. 116.

An agreement in a particular case construed, and held not to constitute a partnership. *Chapline v. Conant*, 100 D. 766.

The following agreements and acts have been held not to amount to a partnership: An agreement by a contractor for carrying the mail, with a subcontractor, that he shall perform one half the service, and be entitled to one half the compensation. *Wilkinson v. Jett*, 20 D. 493.

A joint indorsement of a promissory note. *Sayre v. Frick*, 42 D. 249.

An arrangement by which one party agrees to furnish the goods and pay all ex-

penses, and another party agrees to transact the business for one half of the profits as compensation. *Bradley v. White*, 43 D. 435.

An agreement by the lessee of a hotel to pay one tenth of the gross receipts for rent. *McDonnell v. Battle House Co.*, 42 R. 99; *Beecher v. Bush*, 40 R. 465.

An agreement to lend money and indorse to a certain amount for the purpose of the borrower's business, in consideration of a certain percentage of the net profits of that business. *Boston & C. Smelting Co. v. Smith*, 43 R. 3.

Where one raises a crop on another's land, the landlord furnishing teams and feed, and the tenant supplying the labor, with the agreement to divide the gross product equally. *Day v. Stevens*, 43 R. 732.

The loan of money, to be invested in trade, the borrower to have one half the net profits therefor. *Culley v. Edwards*, 51 R. 614.

3. *Who will be deemed to be partners.* — 1. *In general.* — To charge a person as a partner, it must appear either that he has permitted the use of his name as one of the firm, to give it credit, or that he has shared in the profit or loss. *Osborne v. Brennan*, 10 D. 614.

Persons may have all the rights and be subjected to all the responsibilities belonging to partnership, if there be such a joinder or union of interest and action as the law considers the equivalent of partnership. *Jacobs v. Shorey*, 97 D. 586.

Unincorporated persons taking a certain number of "shares," "for the purpose of starting a grocery store," are partners between themselves, although they called themselves "stockholders," and their opinion was, that there was no liability for losses beyond the amount paid for the shares. *Farnum v. Patch*, 49 R. 313.

2. *As towards third persons.* — Individuals may be liable as partners as to third persons, while as between themselves they are not. *Allen v. Dunn*, 33 D. 614; *Grieff v. Boudousquie*, 89 D. 698.

Persons transacting business together may be charged as partners for all debts contracted within the apparent scope of their business, whatever may be their contracts or stipulations with each other, by those dealing with them, and who have no knowledge of their agreements, or knowledge of any fact or circumstance which ought to put them on inquiry. *Bromley v. Elliot*, 75 D. 182.

The question whether two persons are partners as to third persons will be superseded by a determination of the fact that they are to be regarded as partners between themselves. *Id.*

The broad rule that "no partnership will be created as to third persons, if the whole

For Index to Notes in American Decisions and American Reports, see Volume L

transactions are clearly susceptible of a different interpretation, or exclude some of the essential ingredients of a partnership," is not law, because it falls little short, if at all, of the doctrine that no persons will be liable to third persons as partners unless they are partners as between themselves. *Id.*

One is responsible to third persons as partner if he lends his name as partner, or suffers his name to be used in the business, for he may induce third persons to give that credit to the firm which otherwise it would not receive nor perhaps deserve. *Grieff v. Boudousquie*, 89 D. 698.

A contract by which the owners of certain vessels unite in an association to carry passengers and freight for hire, each furnishing a certain capital to the association, and each receiving a certain proportion of the profits, constitutes the owners, as to third persons, commercial partners, and, as such, liable *in solido* for the debts of the association, although the contract provides that it is not a partnership, and that the associations shall not be bound for the debts of each other. *Cooley v. Broad*, 29 R. 332.

3. *Illustrations.* — Where three persons run a line of stages between two given points, and divide the line into three parts, each person owning and maintaining all the stock, and having absolute control of his part, but all agree that the moneys received on any part of the whole line shall be put into a common fund, and after deducting the expense of tolls, shall be divided between the three in proportion to the number of miles of the line operated by each, they are, as between themselves and third persons, partners, and are jointly liable for an injury to a passenger happening on any part of the line. *Champion v. Bostwick*, 31 D. 376.

N. and L. agreed that L. should advance twelve thousand dollars to commence erecting a house on land held by N. under lease; that N. should then convey a half-interest in the property to L.; that both should finish the building at a cost of eighteen thousand dollars each, and should divide the rents received from it thereafter. *Held*, that N. and L. were copartners. *Laffan v. Naglee*, 70 D. 678.

L. bought a stock of goods, hired a shop in which to carry on business, and permitted W. to carry it on in W.'s name, under an agreement that W. should pay all expenses of the business, and always keep a stock of goods on hand equal in value to the amount paid by L., and ultimately pay to L. that amount, and that L. should receive one half of the net profits of the business, and should have a right to secure himself by taking possession at any time. *Held*, that L. was liable for a debt incurred by W. for goods used in carrying on the business, to one who had sold them relying on the belief

that L. was a partner in the business with W. *Pratt v. Langdon*, 93 D. 61.

Defendant loaned money to A, and took therefor a promissory note, payable, with interest, in three years, and an agreement that in consideration of the trouble and expense in procuring the money loaned, A would pay him, defendant, such further sum annually as, with the interest, would be equal to one sixth of the annual net profits of A's business. *Held*, that defendant was liable as partner to a business creditor of A. *Parker v. Canfield*, 9 R. 317.

Where two persons entered into a contract jointly, for the keeping of sheep for certain shares of the wool, — *held*, that they would be so far regarded as partners that a settlement made by one of them, in the name of both, would bind both. *Stapleton v. King*, 11 R. 109.

H. loaned money to a firm to be used in its business on the agreement that he was to receive one third of the profits half-yearly, and at the end of the year become a partner, if agreeable to the parties. He had no control over the business, and never in fact received any profits or interest on his loan. *Held*, that he was a partner as to creditors of the firm, and liable for its debts. *Leggett v. Hyde*, 17 R. 244.

Where several persons associated in a single joint adventure for the purchase and sale of goods on joint account, *pro rata*, purchasing such goods separately or jointly according to their convenience, and finally leaving all of the goods with one of their number for sale, and the latter afterward borrowed money, executing a note therefor in the name of the joint adventurers, as "A, B, & Co." by "C, as partner," and used the money so borrowed in the purchase of other goods for the common stock, and for expenses, — *held*, in an action on the note, that all were liable as partners, although, on a settlement and division of the profits of the adventure, C had received from the others a sum intended and sufficient for the payment of the note. *Howze v. Patterson*, 25 R. 607.

H. agreed to "loan and advance" to M. and L., under the firm name of N. Bros., five thousand dollars, from time to time, as the business might require; the money to remain a permanent fund not less than one year nor more than five years. In consideration of this, N. Bros. agreed to devote their time and skill to the business, to keep accounts, open to H.'s inspection, and pay him semi-annually three fifths of the profits, guaranteeing that they should amount to at least three thousand dollars annually. For security, H. was given a lien on all the firm property. The agreement might be continued by H. for ten years. N. Bros. were to contract no debts outside of the business, and not to draw on the firm property except for necessary support. A violation of the con-

For Index to Notes in American Decisions and American Reports, see Volume I.

tract was to be "regarded as an end of the loan," and H. might then seize all the firm property to satisfy his advances. *Held*, that H. was a partner as to third persons. *Rosenfeld v. Huight*, 40 R. 770.

On a petition averring a joint adventure in real estate, by parol agreement, and that the deeds were to be taken in the name of the plaintiff, and to be held in trust for both parties, "who should have equal interests and share in the common venture," the plaintiff's investment, with interest, to be first returned to him, — *held*, that the parties were partners. *Richards v. Grinnell*, 50 R. 727.

4. Who will not be so considered. — If persons are not partners as between themselves, they cannot be so charged by a third person having knowledge of the fact, or having such knowledge that he is bound to inquire concerning it. *Bromley v. Elliot*, 75 D. 182; *Pratt v. Langdon*, 93 D. 61.

An agreement to furnish a full supply of wool to a manufacturer for a specified period, to be manufactured into cloth in a workmanlike manner, providing that the manufacturer is to devote his factory exclusively to that work for the prescribed period, and that the net proceeds of the goods, after deducting incidental expenses and charges of sale, are to be divided between the parties in a certain proportion, each of the parties to pay a certain proportion of the cost of the warp of certain kinds of cloth, and to bear the expense of insurance in proportion to their interest in the division of the profits, and also to share in any insurance paid upon a loss, according to the loss which each should sustain, does not constitute such parties partners so as to be liable as such to a laborer suing for compensation for services in the factory. *Loomis v. Marshall*, 20 D. 596.

Proprietors of several stage lines forming a continuous line of travel, who employ a common agent at each end of said route to receive money and give a through-ticket over the entire line, under an agreement with each other that each is to receive his fare for his part of the route out of the money paid to such common agent for such through-ticket, do not thereby become partners, either *inter se* or as to third persons, so as to render each of them liable to a person who loses a trunk upon any portion of said route. *Ellsworth v. Tartt*, 62 D. 749.

A manufacturing corporation cannot enter into partnership for any purpose with a private individual; much less could it enter into a partnership for the transaction of business other than that for which it was created. *Whittemore Mills v. Upton*, 71 D. 681.

Farmers are joint-owners, and not partners, where they purchase a thrashing-machine in common, which they use and operate together, and for which they give the vendors

a note, signed by both individually. *Iliff v. Brazill*, 99 D. 645.

One who has not been held out as a partner cannot be chargeable as such, unless he has some ownership in or control over the profits as they accrue, and are not ascertained or divided into portions or dividends. *Chapline v. Conant*, 100 D. 766.

An agreement between two members of a partnership and a third person, with the knowledge and assent of the other partners, that the third person should share in a certain proportion in the profits and losses of the two contracting partners in the partnership business, does not make such third person a partner or liable for the partnership debts. *Burnett v. Snyder*, 37 R. 527.

The members of a Masonic lodge are presumptively not partners. *Ash v. Guse*, 39 R. 818.

An advance of money to purchase and erect buildings, for interest and one half the profits of sale, which the receivers guarantee at a certain amount, the advances and profits being secured by mortgage, does not constitute the party advancing a partner as to third persons. *Curry v. Fowler*, 41 R. 343.

Renting a saloon for a share of the profits of the business does not make the parties partners. *Thayer v. Augustine*, 54 R. 361.

A agreed to advance money to B from time to time, up to a certain amount, to enable B to carry on business, and B agreed to pay interest to A on the average balance advanced, and also to divide the profits after deducting a fixed sum for expenses; but A was not to bear any losses. *Held*, that A and B were not partners as to third persons. *Smith v. Knight*, 22 R. 94.

A partnership agreed with H. to manufacture two hundred wagons for him, he advancing fifty dollars on each, the wagons to be sold, and H. to receive one fourth of the profits, and interest on the advances at five and a quarter per cent. *Held*, that this did not make H. a partner. *Richardson v. Hughitt*, 32 R. 267.

5. Effect of agreements to share profits.* — Sharing the profits of a business constitutes partnership, ordinarily, though it gives no title to the capital stock. *Bartlett v. Jones*, 49 D. 606. *Contra*, *Parchen v. Anderson*, 51 R. 65.

One who shares in the profits of a partnership must also share the losses. *Miller v. Hughes*, 10 D. 719; *Simpson v. Feltz*, 16 D. 602.

Those who share the profits of a business are liable as partners to third persons under all agreements within the apparent scope of the business in which they are engaged, unless the limitations of their contracts are known to those with whom they deal, or are such as, from the facts known to them, they

* When a partnership may be implied from sharing in profits, see note, 49 R. 255, 254.

For index to Notes in American Decisions and American Reports, see Volume L.

are bound to inquire. No other exception to the general rule can safely be admitted. *Bromley v. Elliot*, 75 D. 182. S. P., *Price v. Alexander*, 52 D. 526; *Sheridan v. Medara*, 64 D. 464; *Pratt v. Langdon*, 93 D. 61.

Two men must be considered partners as to third persons, where they are jointly concerned in a transaction under an agreement to share between them indefinitely the profits of the business. *Bromley v. Elliot*, 75 D. 182.

One having no knowledge of any partnership, and dealing with a party who shares the profits with a third person, may charge such third person as a partner for all debts contracted within the apparent scope of the business of the party with whom they deal. *Id.*

A person participating with one partner in his share of the profits of a firm, as profits, under an agreement with him, is liable to the creditors of the firm as a partner, although, as regards the other members of the firm, he is not their copartner; but if such person, by his agreement, is only to receive from one partner compensation for his labor and services in proportion to the profits of the business of the firm, without any specific lien on the profits to the exclusion of other creditors, he is not liable for the debts of the firm. *Fitch v. Harrington*, 74 D. 641.

If a person transacts business apparently on his own account, and for his own benefit, another person, who is found to share the profits of the business with him, may be charged as a partner for all debts contracted by the former within the apparent scope of his business, without regard to any private agreements between them. *Bromley v. Elliot*, 75 D. 182.

The essence of the contract of partnership is that parties should be jointly concerned in profits and loss, or in profits only, in some honest and lawful business; the relation of partnership being established by the fact that they share the profits between them. *Id.*

That parties must share profits as profits, to render them liable as partners, is a distinction too thin to be satisfactory. *Id.*

The term "net income" cannot be understood to mean gross profits. *Id.*

Mere payment, or promise to pay, out of profits of a business enterprise a sum of money as a specific proportion of the profits does not necessarily constitute the payee a partner, and gives him no interest in the profits or right thereto, but only a personal claim for such share thereof after they are ascertained and may be divided. *Chapins v. Conant*, 100 D. 766.

An agreement to share in the losses as well as the profits of the business is not necessary to constitute a partnership as to third persons; an agreement to share in the profits alone is sufficient. *Manhattan Brass etc. Co. v. Sears*, 6 R. 177.

The question of liability of one sharing profits is a question of agency, whether he stands in the relation of principal to the one who contracted the obligation. *Eastman v. Clark*, 16 R. 192.

A loan of money to be used in the business of a firm, with an agreement that the lender shall share in the profits, renders him *per se* a partner as to creditors of the firm. *Leggett v. Hyde*, 17 R. 244.

A contract for a loan of money at legal rate of interest, six per cent, but in case debtor's business succeeds, the rate to be paid by him to be twenty-five per cent, is a usurious contract as to the borrower, but as to third persons raises between the debtor and creditor the relation of partners. *Sheridan v. Medara*, 64 D. 464.

In *assumpsit* against three, only one defended, and the question tried was whether he was a partner of the others. The jury was instructed to find that he was so, if he did business with them under an agreement either to share the profits or the gross receipts. *Held*, that the instruction was wrong. *Eastman v. Clark*, 16 R. 192.

6. Effect of agreements to share profits and losses. — Where two persons have a common interest in the profit and loss of the business carried on by them, they are partners as between themselves. *Griffith v. Buffum*, 54 D. 64; *Brown v. Higginbotham*, 27 D. 618. And such is the effect of an agreement, and the parties thereto become liable as partners, whereby one L. agrees to lease to W. & T., for eleven months, a steam saw-mill in which the latter are to make certain improvements and repairs, and to run the mill with due diligence, L. to advance one thousand dollars for making such improvements and repairs, and to bear one third of the expense of the same above that sum, the lumber when manufactured to be shipped to Chicago, to some one whom L. designates, to be sold, and the proceeds, after paying freight, to be applied as follows: Seventy-five cents per M. to be paid to L. on account of rent of the mill; one dollar and seventy-five cents per M. to be paid to W. & T. as expenses of manufacturing the lumber; from the residue, L. to be paid any expenses made by him for logs to stock the mill, with interest; and after all expenses for logs, and for manufacturing, shipping, and selling the lumber are paid, W. & T. are to pay L. one fourth of the net proceeds of the business. *Whitney v. Ludington*, 84 D. 734.

Several parties hired a theater for a term of years and carried it on under an agreement to divide the profits in a specified proportion at the end of each year, reserving a certain proportion to meet contingent losses. One of the parties mortgaged his interest in the leasehold to secure his private debt. *Held*, that the arrangement was a partner-

For Index to Notes in American Decisions and American Reports, see Volume L.

ship, and the mortgage was subordinate to the partnership debts, and that the mortgagee, having notice of the equitable rights of the other parties, should not be protected as against their claims. *Priest v. Chouteau*, 55 R. 373.

A mere participation in profit and loss does not necessarily constitute a partnership as to antecedent creditors, but the parties must have an interest also in the property which is the subject of the business association. *Clifton v. Howard*, 58 R. 97.

7. Interest in profits in lieu of salary. — If a person is to receive for his services emoluments depending upon the profits and losses of the trade, he is to be considered a partner; but if he is to receive a certain and definite portion of the profits, he is not a partner. *Simpson v. Feltz*, 16 D. 602; *Sodiber v. Applegate*, 49 R. 252.

Sharing in the profits is the test of a partnership, but the party must share in such profits as a principal; for a stipulation to receive a sum of money in proportion to a quantum of the profits as a reward for one's services will not make him a partner. *Loomis v. Marshall*, 30 D. 596; *Champion v. Bostwick*, 31 D. 376; *Macy v. Combs*, 77 D. 103.

An agreement with a clerk that he shall receive a proportion of the profits of a business, as a compensation in addition to a fixed salary, does not constitute him, as between the parties, a partner in the business, and he may therefore be sued at once, for funds of the house in his hands, which he refuses to turn over. *St. Victor v. Daubert*, 29 D. 447.

Interest in profits, as compensation, creates no partnership in the case of the superintendent and clerk of a firm so compensated, and the goods of the firm are not subject to execution for his individual debts. *Bartlett v. Jones*, 49 D. 606.

An agreement by a laborer to receive half the profits in lieu of wages does not necessarily constitute him joint owner or partner. Thus a miller employed by a mill-owner to care for, tend, and run the mill, and to receive half its profits as compensation, but with no agreement as to any definite time, has no such title or possession as to require him to be joined in an action by the owner for an injury to the mill, and plaintiff can recover the whole damages in his own name. *Chandler v. Howland*, 66 D. 487.

A person who receives a share of business profits, by way of salary, or compensation for services, is liable as a partner to third persons, unless the true character of the agreement is known, or the apparent relations of the parties is such as should put parties dealing with them upon inquiry. *Bromley v. Elliot*, 75 D. 182.

The weight of authority seems to establish that to constitute a partnership even as to

third parties, each person must have an interest in the profits as profits, and not a stipulated portion of the profits as compensation for his labor, unless in cases of fraud, or where the parties, at least the one sought to be charged, have held themselves out as partners to third parties. *Mary v. Combs*, 77 D. 103.

An agreement between a partnership and laborers, that the latter are to have a share of a crop to be raised, as compensation for their services, does not make them members of the partnership, nor give them any right to contract debts against it; they need not, therefore, be made parties to a bill against it. *Christian v. Crocker*, 99 D. 223.

A person who is to receive a part of the profits of a business, either in whole or part pay for his services, may maintain a bill in equity for an account of these profits. *Bentley v. Harris*, 14 R. 695.

Where one furnishes money to be used in a certain business by the receiver for the former's benefit, the receiver to have part of the net profits as compensation for his services, this does not constitute them partners. *Buzard v. Bank of Greenville*, 60 R. 7.

A and B, copartners, agreed with their salesman C to associate his name with the firm, and to give him a percentage of the sales for his compensation, and that he should not be liable for the debts. They advertised in a newspaper that C was to have an interest in the establishment. Held, that a creditor of the firm could not recover against C without proof that previously to giving credit he knew of the publication, or that defendant held himself out as a partner, and that plaintiff trusted him as a partner. *Vinson v. Beveridge*, 36 R. 113.

8. What is a partnership transaction. — If goods be sold to and charged against one of the members of a partnership, the existence of the partnership not being disclosed, the firm is liable to the vendor, if the goods were furnished to it and for its benefit, and this although there be an agreement in writing with the vendor signed by the individual partner only. *Reynolds v. Cleveland*, 15 D. 369.

The fact that a draft drawn by a firm is payable to the order of one partner, and by him indorsed, is not evidence that it was not drawn by the firm in the usual course of business. *Haldeman v. Bank of Middletown*, 70 D. 142.

The presumption is that the drawing of a draft or bill in the name of a firm by one partner, and offering the same for discount, is a partnership transaction, even though the draft or bill was made payable to the order of one of the members of the firm. *Id.*

The presumption is not affected because the paper was discounted at the request of the partner who drew it in the name of the

For Index to Notes in American Decisions and American Reports, see Volume I.

firm, and whose name was inserted as payee, and who indorsed it and drew the proceeds. *Id.*

Where a partner borrows money on the credit of his individual note, which is signed also by a surety, such borrowing does not create a partnership debt, though the money be applied to partnership purposes; and the principal of such surety is the individual partner, with whom he joins in the execution of the note, and not the partners generally. *Peterson v. Roach*, 30 R. 607.

9. What evidence is sufficient and admissible to prove partnership. — The existence of a partnership is best established by the production of the letters constituting it, but may be proved otherwise; yet if the partners themselves are seeking to prove the partnership, they should be required to bring forward the letters, unless they show a legal excuse for their non-production. *Bonaffe v. Fenner*, 45 D. 278.

An interlocutory decree on a bill for an accounting between partners is decisive as to the existence of the partnership, that being the point in issue, but not as to the extent of the liability. *Reybold v. Dodd*, 26 D. 401.

Whether the existence of certain facts constitute a partnership often depends upon the intention of the parties as between themselves, and evidence of such intent should be received when any doubt exists, in order to ascertain the rule applicable as to third parties. *Macy v. Combs*, 77 D. 103.

Where two parties, sued as partners, ask instructions segregating the two instances tending to disprove a partnership, and excluding other evidence which might have led the jury to believe that a partnership existed, it should be refused, as calculated to mislead the jury. *Folk v. Wilson*, 83 D. 599.

Participation in the profits of a business, though cogent evidence of a partnership, is not necessarily decisive of the question. The evidence must show that the persons taking the profits shared them as principals in a joint business, in which each has an express or implied authority to bind the other. *Harvey v. Childs*, 22 R. 387. But such participation is competent evidence to show the relation of principal and agent between the persons taking the profits, and those carrying on the business. *Eastman v. Clark*, 16 R. 192.

To prove a partnership, the partnership-books alone are not competent evidence, but in connection with evidence tending to prove the partnership, an access to and knowledge of the books are competent. *Bryce v. Joyns*, 49 R. 94.

10. What evidence is insufficient. — General reputation is not sufficient to charge a particular person as a partner; there must be some admission of his or some overt act

to prove it. *Hunt v. Jucks*, 1 D. 555; * *Smith v. Griffith*, 38 D. 639; *Grafton Bank v. Moore*, 38 D. 478; *Inglebright v. Hammond*, 53 D. 430; *Macy v. Combs*, 77 D. 103; *Bowen v. Rutherford*, 14 R. 25.

Where the question before a jury is whether B is liable as partner on a note signed by A & Co., evidence that A's credit was bad until he commenced business under the firm name of A & Co. is entirely irrelevant. *Dutton v. Woodman*, 57 D. 46.

Evidence admissible only on the assumption of the existence of a copartnership is clearly incompetent when offered for the purpose of proving the existence of the partnership. *Id.*

A newspaper paragraph stating that a certain person is a member of a certain partnership, but not purporting to be inserted by the partnership, is not admissible in evidence to charge such person as such partner, merely on proof that he was a subscriber to the paper at the time, and had made no public contradiction of the statement. *Potter v. Greene*, 69 D. 290.

In an action against two persons as partners to recover for goods sold, evidence that other persons, in selling the same class of goods, at the same place, had dealt with but one of these persons as an individual, and had never known the other in the transaction, where there is nothing to show that the plaintiff had knowledge of this dealing, is inadmissible, as such dealings do not constitute such a reputation as would affect others making contracts with them. *Folk v. Wilson*, 83 D. 599.

The existence of a partnership cannot be proved by reports of a mercantile agency or the oral declarations of third persons. *Cool v. Slate Co.*, 38 R. 568.

Where a defendant proved that a person was frequently seen in the counting-house of the plaintiff, transacting business as a principal, and was generally supposed, believed, and understood to be a partner in the house of the plaintiff, which was carried on in the name of the plaintiff only, — *held*, that the evidence was not sufficient to prove that such person was a partner of the plaintiff. *Bryden v. Taylor*, 3 D. 554.

11. Declarations and admissions of person sought to be charged as partner. — Persons may be made liable as partners so far as third persons are concerned, by conversations, assertions, admissions, and acts tending to show that they are such, although such evidence might be insufficient to prove a partnership as between the parties themselves. *Jacobs v. Shorey*, 97 D. 586.

One obtaining goods from another on the representation that he is a member of a firm is liable therefor as a partner, without regard to the terms of the partnership, and

* Proof of partnership by general reputation, see note, 88 D. 451, 452.

For Index to Notes in American Decisions and American Reports, see Volume L.

even although there is no partnership. *Reed v. Cremer*, 56 R. 295.

Acts and declarations of a person not a partner are not admissible to charge him as a partner, without proof that they were brought home to the plaintiff's knowledge, and induced the giving of credit to the firm on the belief that he was a partner therein. *Fitch v. Harrington*, 74 D. 641.

A partner entering into a contract in the name of the firm cannot be admitted to say that he was not authorized to make it. *Smith v. Kemper*, 6 D. 708.

A declaration by defendant to plaintiff, in relation to a transaction of the company, that he knew nothing of it, as Little (one of the company) had transacted the business, is not sufficient as evidence of the partnership. *Grafton Bank v. Moore*, 38 D. 478.

13. — of his alleged copartners. — Declarations of one partner are admissible only to charge himself, and are incompetent to prove that any other person is a member of the firm. *Grafton Bank v. Moore*, 38 D. 478; *Dixon v. Hood*, 38 D. 461; *McCorkle v. Doby*, 47 D. 560.

Representations of a party who has made a sale that he was in partnership in the transaction with another person may be admitted in evidence, after it has been shown that the latter received the purchase-money and recognized and ratified the contract of sale. *Drumright v. Philpot*, 60 D. 738.

Testimony of a partner is incompetent to prove the existence of a partnership as between himself and his copartner, on the ground of interest, when, though joined as defendant, he is not a party to the suit, not being served with process. *Wright v. Boynton*, 72 D. 319.

Where certain evidence has been introduced, tending to establish a partnership between defendants, the declarations of one of them, out of the presence of the other, and not communicated to him, may be given in evidence to bind the latter. *Folt v. Wilson*, 83 D. 599.

A person cannot be estopped from denying that he is a member of a firm by the representations of one who is merely the agent of the firm. *Phemer v. Lord*, 85 D. 773.

Where parties are, or assume to be, partners, and jointly interested in the subject-matter in suit, declarations made by one relating thereto is evidence against both. *Simons v. Vulcan Oil & M. Co.*, 100 D. 628.

13. Holding out, when constitutes partnership. — A person holding himself out as a partner, though in fact no partnership exists, is liable to a creditor who contracts with the firm. *Crosier v. Kirker*, 51 D. 724.

Persons who, by their dealings with others, and in other respects, hold themselves out to the world as partners, will be liable as such, notwithstanding private articles of dis-

solution of partnership entered into between the parties. *Spears v. Toland*, 10 D. 722. And the partnership may be established by any evidence showing that they so hold themselves out to the public, and were so regarded by the trading community, although one of them never received any part of the profits or sustained any of the losses incurred by the firm. *Burr v. Byers*, 52 D. 239.

In proceedings in insolvency by one person against another, alleging partnership between them, under the Massachusetts statute of 1838, chapter 163, section 21, petitioner must show the existence of an actual partnership *inter sese*. It is not sufficient to show that the parties had so held themselves out as to be liable to third persons as such. *Whittenton Mills v. Upton*, 71 D. 681.

A party is liable as a partner who, knowing that a partnership has been formed in his name by his agent, does not object, but acts as a partner, and the agent's acts will bind him, though contrary to instructions or beyond the limits of his authority. *Wright v. Boynton*, 72 D. 319.

Persons holding themselves out as partners are liable only to those who have acted upon the faith of the appearance thus produced. *Bowie v. Maddox*, 74 D. 61.

If one permits another to hold him out as a partner, or to use his name in business as such, he is liable as a partner on contracts thus made, although in fact he has no interest in the business of such partnership. *Smith v. Hill*, 12 R. 189.

One Harrington gave the plaintiff a note signed "Hill & Co., by Harrington." There never existed any such firm as "Hill & Co.," nor were Hill and Harrington ever partners; but some time before the note was given, Hill was informed that Harrington was using his name, and he thereupon told Harrington that he "must not use that name to injure him," and Harrington said he would not. Hill did not know of the giving of the note to plaintiff, nor did plaintiff know of the previous use by Harrington of Hill's name. *Held*, that Hill was liable on the note. *Id.*

2. Rights of Partners, and Herein of Partnership Property.

14. Rights of partners *inter sese*.*

1. *Generally*. — Partnership creates a several liability, and no two partners are jointly responsible to another. *Portsmouth v. Donaldson*, 72 D. 782.

Each partner contracts with the other for himself alone. (Affirming *Whelan v. Watmough*, 15 Serg. & R. 153.) *Id.*

The only restriction which the law places upon control of partnership affairs by a majority of the members of the firm is, that they act in good faith. *Western Stage Co. v. Walker*, 65 D. 789.

* Confidential relations of partners, see note, 30 R. 461-463.

For Index to Notes in American Decisions and American Reports, see Volume I.

A sole managing partner's relation to the copartner is one of great confidence, and requires the utmost good faith; and proof must be clear to show that the copartner has waived any of his rights to property legally inuring to the partnership. *Laffan v. Naglee*, 70 D. 678.

One partner has no right to convert the partnership goods to his own purposes. *Morrison v. Blodgett*, 29 D. 653.

A partner taking goods of the firm by force, and delivering them to a third person, is not liable therefor to a copartner. *Dana v. Gill*, 20 D. 255.

Partners in a copyright may contract between themselves for the printing of the book by one of them in a particular manner, and the existence of such partnership cannot be set up to defeat a right of action growing out of the contract. *Gould v. Banks*, 24 D. 90.

Where a partnership is sued on an account for some items of which one member only is liable, and a separate judgment has been previously obtained against him on a security given by him alone for the amount of the entire account, upon which judgment a sum has been collected, credit may be so applied as to first extinguish the items with which he alone was chargeable. *Lee v. Fontaine*, 44 D. 505.

Where two, owning adjoining parcels of land, agree to erect a mill in partnership, the one furnishing the site, the other the water-power, and both contributing equally to the expense, and such agreement is carried into effect by the erection of the mill, and its use for some time on joint account, the proprietor of the site cannot afterwards keep the owner of the water-power out of a participation in the business and profits, and if he attempts to do so, the other may maintain ejectment for a moiety of the mill and the ground used along with it. *Swarts v. Swarts*, 45 D. 697.

One partner, by consent of his copartners, may have a separate exemption out of partnership property seized on execution against the firm. *O'Gorman v. Fink*, 46 R. 58.

2. *Subrogation—Contribution—Indemnity.*—A partner paying the partnership debts is subrogated to the rights of the creditors thus paid. *Roulett v. Grieve's Syndics*, 13 D. 296.

Where partners settle their business, and each takes certain firm accounts, and agrees to pay certain firm debts, and one is compelled to pay debts assumed by the other, the party paying may recover of the other without proving that he himself has paid all the debts which he assumed by his agreement. Such payment is not a condition precedent to his right to repayment from his partners. *Martin v. Good*, 74 D. 545.

A partner is bound to indemnify his copartner for any loss arising from his breach of their partnership contract, unless such

contract is superseded or waived, in the course of their business, with the express assent of the copartner. *Murphy v. Crafts*, 71 D. 519.

3. *Contributions to capital—Partner's lien.*—Each partner has a lien on the property of the partnership for the amount of his interest in the partnership stock, and for advances made by him for the use of the firm. *Allen v. Hawley*, 63 D. 198.

Advance of the whole capital by a partner is not a fact from which the law will imply a promise of the other to repay any part of it during the continuance of the partnership. *Williams v. Henshaw*, 22 D. 366.

Where, in joint adventure, one furnishes money, and another labor, they are not partners *inter se*, in the technical sense, merely because they have a mutual interest in the profits. And he who contributes the labor is not liable to him who advances the money for any part of the capital lost in the venture. *Heras v. Hall*, 35 D. 178.

No lien exists in favor of a partner purchasing partnership real estate, to secure to him the excess over his share of the purchase-money that he may have paid therefor. *Engles v. Engles*, 38 D. 37.

Partners in lands have an equity against each other for the purpose of producing equality among themselves. This equity fastens itself to, and is a lien upon, their respective interests in the partnership lands; and neither partner, nor a creditor of his, nor a purchaser from him with notice, can deprive his copartner of such lien. *Williams v. Love*, 73 D. 191.

Where one partner furnishes the capital and the other his services and experience, the profits and losses to be shared equally, the latter partner is not entitled on dissolution to any part of the original capital. *Shea v. Donahue*, 54 R. 407.

One partner has no lien on a copartner's interest in the partnership property for a debt due to him from the copartner. *Evans v. Bryan*, 59 R. 233.

4. *Sharing profits and losses.*—Losses of a partnership must be equally borne, and profits equally divided, in the absence of any facts requiring a different division. *Pirtle v. Penn*, 28 D. 70.

Where one partner furnishes the manuscript of a book, and the other agrees to print and bind it, each is entitled to an equal share in the gross proceeds of the sale thereof. *Id.*

5. *Right of one partner to deal on his own account.*—A partner in a leasehold purchasing the fee in his own name, with his own money, the lessees being entitled to a refusal of the property, purchases for both, and the other partner becomes entitled to his share upon payment of his proportion of the purchase-money. *Laffan v. Naglee*, 70 D. 678.

For Index to Notes in American Decisions and American Reports, see Volume I.

If a partner in his own behalf enter into a transaction which is within the scope of the partnership business, his copartner may insist that it is a fraud upon him, and claim the benefit resulting from it; but this is a right which the partner alone can assert, and is not available to third parties for the purpose of fixing a liability upon the partnership when such claim has not been asserted. *Lockwood v. Beckwith*, 72 D. 69.

Partners are entitled to share in profits realized from an adventure of one member of the firm, in investing a large sum of Confederate currency belonging to the firm, but supposed to be worthless, in the purchase and shipping of cotton. *Anderson v. Whitlock*, 92 D. 489.

A bank may not set off an individual deposit against a partnership debt, and the partner may lawfully appropriate such deposit to a *bona fide* creditor by check. *International Bank v. Jones*, 59 R. 807.

15. Interests in firm property. — 1. *General rules.* — Partners by the contract of partnership acquire a joint interest in the effects of the partnership, and are constituted mutual agents for all purposes within the scope and objects of the partnership. *Kinder v. McCants*, 53 D. 711.

In a partnership existing without an agreement regulating its terms, partners are presumed to be equally interested. *Reynold v. Dodd*, 26 D. 401.

Where tenants in common of timber land are partners in the lumber business, they are partners in the timber on such land when converted into logs. *Baker v. Wheeler*, 24 D. 66.

Partnership effects are a fund to be applied first to the payment of the partnership debts; and the interest of a partner therein is only his share of the surplus after they are paid. *Morrison v. Blodgett*, 29 D. 653; *Dyer v. Clark*, 39 D. 697; *Sutcliffe v. Dohrman*, 51 D. 450; *Nixon v. Nash*, 80 D. 390; *Arnold v. Wainwright*, 80 D. 448; *Penn v. Whitehead*, 94 D. 478; *Manhattan I. Co. v. Webster*, 98 D. 332.

The relative interest of partners in the partnership fund is determined at the time of dissolution. *Dyer v. Clark*, 39 D. 697.

Possession of any part of the assets by either partner does not sever the joint property, nor vest a separate interest in him. *Kinder v. McCants*, 53 D. 711.

Evidence of the manner of doing business is competent as tending to show that the interests of the parties in the business were separate and that no partnership existed. *Foye v. Leighton*, 53 D. 231.

Steamboats owned by two or more parties are usually held by them as tenants in common, and are therefore not ordinarily subject to the law of partnership; but where owned by parties who are copartners, doing a general partnership business, they are, without

express agreement or circumstances showing the contrary, partnership property, and within the jurisdiction of the court of chancery in a suit by one partner against his copartner for an accounting, dissolution, and sale. *Allen v. Hawley*, 63 D. 198.

The ownership of goods in which a partnership deals may belong to one of the partners exclusively, just as well as to a stranger, without in any way affecting the validity of the partnership. *Bromley v. Elliot*, 75 D. 182.

Persons may be partners as to profits of business carried on by them jointly, though as to all the property employed in the business they may be several owners. *Id.*

Each partner has a lien upon partnership property, to the end that he may insist that it be first applied to the payment of the firm debts. This interest of the individual partner in the firm assets is assignable, and may be taken in execution. *Arnold v. Wainwright*, 80 D. 448.

One party cannot, without the assent of his copartners, acquire for himself the exclusive ownership of firm property. *Crosswell v. Lehman*, 25 R. 684.

2. *Transfers of one partner's interest.* — A partner cannot, by selling his interest in the partnership to a third person, make him a partner against the will and consent of the other partners. *Murray v. Bogert*, 7 D. 466.

Property conveyed to a partnership vests in the company, and not in the individual copartners; and the transfer of such property by one of the partners passes only a contingent right to a part after the debts are paid and the copartnership is ended. *Donaldson v. Bank of Cape Fear*, 18 D. 577; *Doner v. Stauffer*, 21 D. 370; *Coover's Appeal*, 70 D. 149.

An interest in a partnership only passes to a person coming in right of a partner, be the transfer effected by whatever mode, and such interest cannot be tangible, cannot be made available, or be delivered but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the partnership debts. *Baker's Appeal*, 59 D. 752.

The interest of a minority of the members of a firm in partnership property does not pass by a sale thereof by the majority, if the latter do not act in good faith. The latter's interest alone passes, and the purchaser would become tenant in common with the former. *Western Stage Co. v. Walker*, 65 D. 789.

Where a partner mortgaged his interest in partnership premises to a *bona fide* mortgagee, without notice of any existing partnership debts, — held, that the mortgagee could hold as against creditors of the partnership. *McDermot v. Lawrence*, 10 D. 468. Compare *Menagh v. Whitwell*, 11 R. 683.

16. *Rights of incoming partner.* — Where an incoming buys out an outgoing partner, and agrees to pay the debts of the

For Index to Notes in American Decisions and American Reports, see Volume I.

old firm, the former only, and not the creditors, can sue for a breach of such agreement. *Lee v. Fontaine*, 44 D. 505.

Partners cannot escape the effect of their contract not to carry on a certain trade, if the contract is otherwise valid, by merely taking in an additional partner. *Beard v. Dennis*, 63 D. 380.

A partnership cannot maintain an action for goods delivered in payment of an article sold to one partner for his private use, although the firm is thereafter, but before the goods were ordered and delivered, changed, without the knowledge of the defendants, by the introduction of a new partner, who was ignorant of the agreement. *Tay v. Ladd*, 77 D. 364.

17. — his liability upon previous contracts of the firm. — One who buys out the interest of one of the members of a partnership, and forms a new partnership with the remaining members, is not liable at law or in equity for debts previously contracted, unless he agrees to pay them, even though such debts be for goods forming part of the stock of the new partnership, the creditor having no lien upon the goods. *Poindexter v. Waddy*, 8 D. 749.

The managing member of a partnership agreed with an outside person that if he would take a retiring partner's interest and pay a balance due for his share of the capital stock, he should have a certain interest in the firm property free from liens. The money was so paid, but the other partners had no knowledge of the agreement for an unencumbered title. Afterward the partnership property was all sold under a prior mortgage. Held, that the new partner had no remedy against the firm. *Love v. Payne*, 38 R. 111.

18. Rights and liabilities of dormant partner.* — A judgment against one partner is a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. *Smith v. Black*, 11 D. 686; *Moale v. Hollins*, 33 D. 684; *Hov v. Kane*, 54 D. 152.

Action in the case of a dormant partnership may be brought in the name of the acting partner, or in the name of all the partners; but the action in either form is without prejudice to the defendant's defense by offset or otherwise. *Hiliker v. Loop*, 26 D. 286.

A dormant partner is an allowable but not an essential party to an action. *Desha v. Holland*, 48 D. 261.

Partnership property received by a dormant partner from an ostensible partner is subject to judgments against the latter alone, and the dormant partner is bound to disclose and account for it, and may be restrained from

disposing of it in the mean time. *Hov v. Kane*, 54 D. 152.

A dormant partner to whom a vendor gives no credit, and whose responsibility constituted no part of the consideration moving him to sell, is liable to the whole extent of engagement in matters which, according to the usual course of dealing, have reference to the business transacted by the firm. *Brooks v. Washington*, 56 D. 142.

Third persons entering into a secret agreement between members of a firm to share profits are liable as partners. Thus dormant partners who participate in the profits of trade and conceal their names are equally liable, when discovered, as if their names had appeared in the firm, although they were not known to be partners at the time of the creation of the debt. *Bromley v. Elliot*, 75 D. 182.

Where there is a dormant partner, a credit will not be presumed to have been given on the sole and separate responsibility of the ostensible partner, but will bind all for whom the partner acts, if done in their business and for their benefit, and the dormant partner may be sued when discovered. *Richardson v. Farmer*, 88 D. 129.

19. Real estate as partnership property. — 1. *In general*.* — Lands may be held in partnership. *Sumner v. Hampton*, 32 D. 722.

There is no partnership in realty, but partners are tenants in common in land. *Baker v. Wheeler*, 24 D. 66.

Partners, though owning real estate as partners, still own it as tenants in common. *Dillon v. Brown*, 71 D. 700.

A court of equity leaves legal title of partnership realty undisturbed, except so far as necessary to protect the equitable rights of the partners. *Buchan v. Sumner*, 47 D. 305.

Partnership realty is treated as personality in equity, if the partners have, by agreement or otherwise, impressed upon it that character. *Roberts v. McCarty*, 68 D. 604; *Arnold v. Wainwright*, 80 D. 448; *Summey v. Patton*, 86 D. 451; *Ware v. Owens*, 94 D. 642.

Where two purchase land in equal partnership, although one pays more than half the money, he is not entitled to a conveyance of more than half the land. *Farmer v. Samuel*, 14 D. 106.

A partner purchasing partnership land under execution against the partners does not thereby extinguish his copartner's interest therein, but the purchase is no more than a bare payment. *Id.*

Realty purchased by two jointly is not partnership property, though they are to carry on the business of milling therewith. *Wheatley v. Calhoun*, 37 D. 654.

* Dormant partners, who are, powers and liabilities of, see note, 56 D. 147-151.

* Real estate, when impressed with characteristics of partnership property, see notes, 18 D. 646-648; 86 D. 197-201.

For Index to Notes to American Decisions and American Reports, see Volume I.

The purchase being on individual responsibility in such a case, the payment of one of the installments out of the partnership funds does not convert the realty into partnership property. *Ib.*

The legal title of realty conveyed to partners for the benefit of the firm, or in payment of debts, vests in the grantees as joint tenants, in England, and as tenants in common in New York. *Buchan v. Sumner*, 47 D. 305.

Land standing on books of an old partnership as partnership property, and carried into a new firm formed from the old as a part of its capital, is partnership property of the new firm. *Andrews v. Brown*, 56 D. 252.

Partnership realty is held by partners as tenants in common, and the estate of one of the partners therein may be encumbered by a mortgage given by him for his separate debt and sold on an individual judgment, the purchaser taking a title discharged from the partnership debts. *Cummings's Appeal*, 64 D. 695.

A mill and lot are partnership property, though purchased with individual funds of two persons, each paying half and taking a conveyance to himself of his undivided share, if it is bought with a view to a partnership between them, which is subsequently formed, and is brought into and used by the firm and repaired and improved at the joint expense of the partners. *Roberts v. McCarty*, 68 D. 604.

The owner of the legal title to partnership lands cannot be forced to part with it until the copartner's debt to him is paid and he is freed from liability for him. If two persons are joint owners of lands, — one having the legal title, the other a mere equity in the land, — and the latter is indebted to the former, the one who has the legal title cannot be forced to part with it until his debt is discharged and he is freed from liability for his copartner. *Williams v. Love*, 73 D. 191.

A purchaser, mortgagee, or attaching creditor of an equitable interest in partnership lands must take it encumbered with the equity existing against the person having such equitable interest; for the purchaser of an equitable title must always abide by the case of the person from whom he buys. *Ib.*

Where the holder of an equitable interest in partnership land mortgages it to a third person, and the mortgagee becomes indebted to the holder of the legal title, and assigns his claim upon the mortgagor, together with his lien, the land becomes subjected to an additional equity against the mortgagee by reason of his indebtedness, and his assignee, occupying the same ground, must yield to the superior equity of the person holding the legal title. *Ib.*

Real estate acquired by a partnership is held by partners as tenants in common; but the surviving partners may dispose of it so

far as necessary to pay the debts of the firm, and to discharge any balance due them on final settlement. *Buffum v. Buffum*, 77 D. 249.

Whether land is to be deemed part of partnership stock depends upon the agreement of the partners, which agreement may be either express or implied. *Arnold v. Wainwright*, 80 D. 448.

Lands may be converted into partnership stock by parol agreement of the partners, or by such facts and circumstances attending its acquisition or use as will raise an implication that the partners so intended. The legal estate will be controlled by the terms of the conveyance, but equity will subject the lands to the same liabilities imposed upon the other partnership estate, and restrict the partners to the same extent in their disposition of them as obtains in regard to personality. *Ib.*

If land is acquired as a substratum of partnership, or is brought in and used by it for partnership purposes, there will be a trust by operation of law for the partners as tenants, in common although a trust may not have been declared in writing, and the ownership may not be apparently in all the members of the firm, or if in all, may apparently be in them, not as partners, but as joint tenants. *Ib.*

Each partner is entitled to regard the entire partnership estate as held for his indemnity as against the joint debts, and as security for the ultimate balance which may be due him for his own share of the partnership effects. *Ib.*

The rule that equity regards land held by partnership as personal estate prevails, notwithstanding the legal title may, by the death of the party holding it, have been cast by descent upon his heirs at law, or that the estate may have been conveyed to the partnership by such deed as would, under the statute, make them tenants in common; nor does it make any difference that the deed makes no reference upon its face to the grantees as partners. *Ib.*

Under the Minnesota statute, a trust arises in favor of a partnership when lands are conveyed to the individual members of the firm as tenants in common, or otherwise than as partners; nor does the recognition and enforcement of such trust conflict with the statute of frauds. *Ib.*

Under that statute, if a conveyance of land to partners makes no reference to the land as partnership stock, but vests the title in several of the members as tenants in common, then the trust which arises between the partners cannot be enforced against a bona fide purchaser or mortgagee without notice, but will be enforced against a purchaser or mortgagee from one partner, or his representative, who has notice, actual or constructive, that the land is partnership property. *Ib.*

For Index to Notes in American Decisions and American Reports, see Volume I.

No title to land passes, either in law or equity, by parol agreement made before a firm exists, to put it into the firm or to consider it as firm property. *McCormick's Appeal*, 98 D. 191.

A firm are estopped from claiming that a lot is firm property, a lease of which they took from one of the partners, who had purchased the lot in his own name, and on which the firm erected buildings for the purpose of carrying on their business. *Stemmer's Appeal*, 98 D. 255.

2. *Land purchased with partnership funds.* — The title to real estate bought with partnership funds vests in the separate partners as joint owners, and any one may sell his undivided share. *Baca v. Ramoe*, 29 D. 463.

Partners are joint tenants, and not tenants in common, of lands purchased with partnership funds. *Baird v. Baird*, 31 D. 399.

Realty conveyed to partners as co-tenants is partnership property, in equity, where it is purchased with partnership funds for the use of the firm. *Tillinghast v. Champlin*, 67 D. 510. S. P., *Buchan v. Sumner*, 47 D. 305; *Lang v. Waring*, 60 D. 533; *Roberts v. McCarty*, 68 D. 604; *Willis v. Freeman*, 82 D. 619. In such a case it is unnecessary that there should be an agreement among the partners that the land should be partnership property. *Jarvis v. Brooks*, 59 D. 359.

Land purchased with partnership funds, by one partner in his own name, is held in trust for the partnership. *Evans v. Gibson*, 77 D. 565. S. P., *Moreau v. Safarans*, 67 D. 582; *Dyer v. Clark*, 39 D. 697; *Arnold v. Wainwright*, 80 D. 448.

Lands purchased with partnership funds are subject to a right of dower where the purchase of the lands was not in pursuit of the partnership business, and it is not necessary to have recourse to the land in order to pay the firm debts, and where, moreover, there is no special agreement between the parties that the land shall be considered as personalty. *Markham v. Merrett*, 40 D. 76.

A decree concerning real estate, held by one partner as trustee for firm, will not be set aside as irregular and void because the other partners were not made parties; but such decree operates upon the trustee alone, and will be modified, if otherwise, to that effect. *Moreau v. Safarans*, 67 D. 582.

A partnership may have a resulting trust in real estate when firm funds have paid for it, or a constructive trust in it, when it has been acquired after the formation of the partnership. *McCormick's Appeal*, 98 D. 191.

3. *Proving a partnership in land.*† — Real estate can only become partnership property

by deed, or other writing properly recorded, indicating an intention to make it such. *Hale v. Henric*, 27 D. 289; *Ridgway's Appeal*, 53 D. 586; *McCormick's Appeal*, 98 D. 191.

It is not competent to show by parol that real estate conveyed to two persons as tenants in common was purchased and paid for by them as partners, and was partnership property. *Ridgway's Appeal*, 53 D. 586.

4. *Effect of the death of a partner.* — The title to land obtained in the name of one of the partners, the other having died, and a sale made by him, to persons with notice, does not affect the rights of the heirs of the other partner; the right does not survive. *Hart v. Hawkins*, 6 D. 666.

A deceased partner's share of the surplus of partnership realty, after the payment of the firm debts and the adjustment of the mutual equities of the partners, is regarded in American courts of equity as realty, and descends to the heir; but the rule seems to be otherwise in England. *Tillinghast v. Champlin*, 67 D. 510; *Buchan v. Sumner*, 47 D. 305; *Yeatman v. Woods*, 27 D. 452; *Summey v. Patton*, 86 D. 451; *Foster's Appeal*, 15 R. 553.

A partner's lien upon partnership lands may be enforced by his personal representatives after his death, where inequality between the partners, or indebtedness from one to the other, arose from transactions occurring in the lifetime of such partner; as it is immaterial whether the amount of such inequality or indebtedness was ascertained at the death of the partner in whose favor this inequality existed. *Williams v. Love*, 73 D. 191.

The personal representative, heirs, or devisees of one holding the legal title and equitable lien on partnership land for satisfaction of indebtedness to him, may enforce such equitable lien, if the party holding it dies before its enforcement. *Id.*

Nothing but the interest of which a partner died seized passes by sale of partnership real estate under the order of the orphans' court for the payment of his debts, although the legal title was in him alone. *McCormick's Appeal*, 98 D. 191.

5. *Liability for firm debts.* — Real estate purchased by a firm as partnership property is liable to the payment of the partnership debts. *Divine v. Michem*, 41 D. 241.

Real estate belonging to a firm is considered as personal property in equity, to the extent that it is liable to pay the debts of the firm and then to distribution between the partners, in the same manner as if it had been personal instead of real estate. *Andrews v. Brown*, 56 D. 252.

Land purchased and held for partnership purposes is partnership property, although not necessary for the purposes of the firm, and judgments against the firm for partnership debts are payable out of its proceeds, in preference to judgments against the partners

* Real estate purchased with funds of a firm, when firm property, see note, 27 R. 270, 271.

† Partnership in real estate, effect of, and from what evidence established, see note, 64 R. 792-800.

For Index to Notes in American Decisions and American Reports, see Volume L.

for individual debts. *Erwin's Appeal*, 80 D. 542; *Page v. Thomas*, 54 R. 788.

6. — *for individual debts.* — A judgment lien of a separate creditor of a partner on his share of partnership realty is subordinate to the prior equitable lien of a copartner who has paid all the debts of the firm. *Buchan v. Sumner*, 47 D. 306.

Where land had been conveyed to a partnership by a deed expressing on its face that it is to be holden as partnership stock, a judgment subsequently entered against an individual member is not a lien upon it or any interest in it, so as to preclude the firm from disposing of the property and making a title to the purchaser clear of such encumbrance. *Meily v. Wood*, 10 R. 719.

Real estate was purchased by G. S. and J. G. in their individual names. Subsequently they formed a partnership with J. S., under the name of G. S. & Co. The cash payment on account of purchase-money of the real estate, and the first installment, were paid before J. S. became a partner. He acquiesced in the subsequent appropriation of the firm funds to the payment of the balance, and to expenditures made in improvements, knowing that it stood in the individual names of G. S. and J. G. It was agreed by parol that J. S. was to have one third of the real estate as soon as there was a final settlement. *Held*, that there was no resulting trust for the partnership, and the real estate having been sold under execution, the fund arising from the sale should go to the individual creditors of G. S. and J. G., instead of the creditors of the firm. *Lefevre's Appeal*, 8 R. 229.

30. Conveyances by or between partners. — 1. *By the firm, or in invitum.* — Partners must grant or demise their real estate as other tenants in common are required to do. *Dillon v. Brown*, 71 D. 700.

A grant or demise of real estate owned by partners must be made by each and all of them. *Id.*

Each partner must exonerate the other from a moiety of a joint debt. No act falling short of a complete exoneration of one partner and his property, from so much of the liability as he is entitled to be exonerated from, will operate as a discharge of the other from his obligation in that regard. *Downs v. Jackson*, 86 D. 289.

A sale *en masse* of lands belonging to partners in severalty for the discharge of a joint partnership debt does not discharge any part of the property sold nor the parties from their respective duties, namely, to each pay a moiety of the debt. *Id.*

Where there is a sale *en masse* of lands belonging to partners in severalty, to discharge a joint partnership debt, neither can obtain a discharge of his property without paying the whole amount of the purchase-money with interest, and each of them has

the same right after the sale, within the time allowed to redeem the lands for that purpose as he had before that time, to pay the debt to discharge himself from personal liability. *Id.*

Where lands owned by partners in severalty are sold *en masse* under execution, to discharge a partnership debt, and one of the partners redeems the lands, he is entitled in equity to recover from the other one moiety of the money paid by him with interest thereon from the time of its payment. *Id.*

Partners may convey firm property to secure a debt due from an individual member of the firm, as firm creditors and individual creditors stand upon an equality as regards the partnership effects. *Purman v. Fisher*, 94 D. 210.

2. *By one partner.* — The principles and rules of law applicable to partnerships, and which govern and regulate the disposition of the partnership property, do not apply to real estate. One partner can convey no more than his own interest in houses or other real estate, even where they are held for purposes of the partnership. *Coles v. Coles*, 8 D. 231.

A conveyance by a tenant in common, and partner, of his moiety of the common land upon which he is carrying on the farming business in partnership with his co-tenant, dissolves the partnership and renders his grantee tenant in common with the other partner in the partnership property. *Mumford v. McKay*, 24 D. 34.

The grantee takes his grantor's undivided share of the surplus of the partnership property after the partnership debts and the claims of the copartner are satisfied. *Id.*

The grantee may maintain trover against his co-tenant, in such a case, where the latter sells the whole of the joint property, unless the defendant can show that there were outstanding partnership debts, and the burden of doing so rests upon him. *Id.*

A partner selling his right in real estate bought with partnership funds is liable to an account to his copartners for the price paid. *Baca v. Ramos*, 29 D. 463.

A sale by a partner to a copartner of his interest in the partnership bars him of his right to demand partition of the real estate, purchased with the partnership funds. *Id.*

Real estate held by a partnership cannot be alienated by one of the partners, without a breach of trust, unless made to one who had no notice, actual or constructive, of such trust. *Dyer v. Clark*, 39 D. 697.

A *bona fide* purchaser of a partner's legal title in partnership realty, conveyed to the partners as tenants in common, having no notice of the equitable rights of the copartners or partnership creditors in the land as partnership property, will be protected in equity as well as at law. *Tillinghast v. Champlin*, 67 D. 510; *Buchan v. Sumner*, 47 D. 306.

For Index to Notes in American Decisions and American Reports, see Volume I.

A lease by one partner of partnership realty, to be binding on the other partners, must be made in the prosecution of the partnership business, and where the making of the lease is in the exercise of an authority necessarily implied from the nature and object of the partnership. *Mussey v. Holt*, 55 D. 234.

A partner has no power to convey real estate of the firm, either by deed or assignment, nor to make contracts, written or verbal, concerning it, specifically enforceable against his copartners. *Ruffner v. McConnell*, 63 D. 362.

One partner or tenant in common cannot grant or demise more than his undivided interest in the common estate, unless he is authorized by his co-tenants or copartners to grant or demise their interests also. *Dillon v. Brown*, 71 D. 700.

A sealed lease executed by one partner only, in the name of the firm, does not pass the estate of other partners without evidence of previous authority or subsequent ratification by them, although the lease was for a term which required no seal. *Id.*

21. Suits by partners against third persons. — In an action by partners, if all the partners do not join, it is a ground of nonsuit at the trial. *Dob v. Halsey*, 8 D. 293.

In the case of a sale by one of several joint owners, the purchaser not knowing that others were interested, the action for the purchase-money may be in the name of all the joint owners, or of the one who made the sale. *Hilliker v. Loop*, 26 D. 286.

A plea in abatement, setting forth a partnership between the plaintiff and one other, and judgment thereon, does not estop the defendant from insisting that two others were partners with the plaintiff. *Id.*

Non-joinder of proper parties may be pleaded in abatement, or made the ground for a nonsuit. *Id.*

A dormant partner need not be joined by the ostensible partner in an action upon a contract entered into by him in his own name. *Goble v. Gale*, 41 D. 219.

Damages for a joint injury only can be recovered by a mercantile firm suing for injury done to their joint business, and in such a suit the private feelings of the partners are not a proper subject of inquiry. *Donnell v. Jones*, 48 D. 59.

Loss of mercantile character and credit of a firm may be proved by reputation, and compensated in an action on the case. *Id.*

Under general averments in a declaration, it is proper to show as sources of injury the general loss of credit and mercantile character of the firm, but not the loss of any particular customer. *Id.*

Partners suing must all be entitled to recover, to maintain an action at law. *Cochran v. Cunningham*, 50 D. 186.

An act barring one partner bars all from bringing an action in the partnership name. *Id.*

Recovery by a partner suing alone for an injury to partnership property, and making the copartner who refuses to join as plaintiff a defendant, must be entire for the whole injury. *Nightingale v. Scannell*, 65 D. 525.

A firm composed of three persons can maintain trespass against an officer who has attached their goods on a writ against two of them only, and who has, under the statute, sold the entire property in the goods attached. And they may recover the full value of the goods sold, though it leave the judgment to satisfy which the property was sold in no part satisfied. *Moore v. Pennell*, 83 D. 500.

An action is not maintainable in favor of a copartnership upon a written contract entered into by one of the partners, deceased, in his individual name only. *Mead v. Tomlinson*, 2 D. 62.

Where the same person is partner in two firms, and a note is made by one firm to the other, an action cannot be maintained thereon by the latter firm against the partner in the other, who does not belong to both firms. *Banks v. Mitchell*, 29 D. 106.

A firm cannot demand payment, in the same action, of two promissory notes given by the debtor, and both dated at the same place, on the same day, and both payable to such firm at the same time, when it is shown that the firm was composed of different persons at the time when the indebtedness was created, which forms the consideration of the notes. *Dyas v. Dinkgrave*, 77 D. 196.

An old and new firm are considered in law as distinct and separate persons, with distinct and separate rights and obligations, and cannot, as creditors, join in the same action their separate and distinct demands against a debtor. *Id.*

3. Interpretation of Partnership Articles.

22. In general. — Written articles of copartnership are not necessary to constitute a partnership in all its incidents. *Buffum v. Buffum*, 77 D. 249.

A parol agreement for a partnership for the purpose of dealing in lands is not within the statute of frauds, and is valid. *Holmes v. McCray*, 19 R. 735.*

Shares of partners are presumed by law to be equal, where nothing appears to the contrary; and the terms of a contract of partnership will be deduced by law from the facts agreed in the pleadings of the parties, where there is no evidence *aliunde*. *Pirrie v. Penn*, 28 D. 70.

23. Validity and effect of partnership agreements. — Those dealing with

* Oral agreement to form partnership for purchase of real estate, whether within statute of frauds, see note, 60 R. 379, 380.

For Index to Notes in American Decisions and American Reports, see Volume I.

parties connected in business are bound by their agreements with each other, if at the time they know the nature of those agreements, or have knowledge of such facts or circumstances as would lead a man of common prudence to make inquiry in relation to them. *Bromley v. Elliot*, 75 D. 182.

A secret agreement of parties relative to their connection in business is binding between themselves, but will not control their responsibility to others ignorant of such agreement. *Ib.*

An agreement contained in articles of partnership, if made *bona fide* and for a valuable consideration, is valid and effectual to transfer the title to partnership property, where it is agreed that upon the death of one of the partners the title to the property shall vest in the survivor, who shall thereupon become indebted, as therein stipulated, to the representatives of the deceased. *Gaut v. Reed*, 76 D. 94.

24. Interpretation of particular agreements. — Where by agreement contained in articles of partnership, made *bona fide* and for a valuable consideration, the title to the property upon the death of one partner vests in the survivor, and he becomes indebted as therein stipulated to the representatives of the deceased, he has a right to dispose of the property, by a *bona fide* sale and transfer, to any person, and as well to the representatives of the deceased as to a stranger. *Gaut v. Reed*, 76 D. 94.

Articles of copartnership between A, B, C, and D, for the transaction of a commission business, provided that A and B should contribute the whole capital in unequal proportions; that A should contribute "such time as he may be able to give"; that B, C, and D should each contribute all their time to the business; that each partner should receive one fourth of the net profits; and that A and B should receive interest on the capital contributed by them. The partnership was afterward dissolved by mutual consent, the business of the firm closed by B, and it resulted in a loss. *Held*, on a bill in equity by B against the other partners, that the capital constituted a debt of the partnership to which all the partners were bound to contribute equally, and that one of them being insolvent, the loss was to be borne equally by the other three. *Whitcomb v. Converse*, 20 R. 311.

4. The Firm Name.

25. Adoption of and right to use firm name. — A partnership drawing a bill in one firm name upon itself in another, payable to its own order, and indorsing it in the former name and accepting it in the latter, is liable thereon, without notice of non-payment, where it does business in both names. *Bank of Rochester v. Montooth*, 43 D. 681.

An action is not maintainable against a partnership on a note signed "A B, Ag't," on the principle that "A B, Ag't," was the firm name under which the partners had chosen to transact business, where the only evidence to establish that fact is, that the firm, while conducting the business of furniture dealers, owns a manufactory in another town, at which the business is conducted by A B under the name of "A B, Ag't"; that in the course of the conduct of such business, A B signed the note sued on, giving it in payment for goods delivered to workmen upon his order; that in a previous instance of a similar claim on a like note, the firm had paid it; and that the partners on that and other occasions said that they would settle or be responsible for all claims for anything that went into their business at the manufactory. *Williams v. Robbins*, 77 D. 396.

A partnership style, as A B & Co., is not a good name of purchase in a conveyance of realty sufficient to pass the legal title to all the members of the firm. *Winter v. Stock*, 89 D. 57.

An obligation under seal, executed by all the members of a firm in and for its business, and for its benefit, binds the firm, although the firm name is not mentioned, and although it appears upon its face to be simply the obligation of the partners contracted in their individual names. *Berkshire Woolen Co. v. Juillard*, 31 R. 488.

On the dissolution of the firm of M. & S., S. bought M.'s interest in certain of the firm property, and assumed the rent of the old stand, where he continued the business, while M. opened an office for the same business in another part of the city, as it was understood he was to do. M. removed his name from the old firm sign, but S. replaced it, placing over it "S., successor to," in small and almost imperceptible letters. *Held*, that S. should be restrained from such use of M.'s name. *Morgan v. Schuyler*, 35 R. 543.

C. W. D. & Co., a copartnership which had acquired an extensive trade and reputation as dealers in seeds, made an assignment for the benefit of creditors, and the assignee sold the stock to the plaintiff company, which continued the business at the old stand, renting the building from the owner. Among the stock so purchased was a large number of wrappers, sacks, etc., marked with the name of C. W. D. & Co. One of the firm of C. W. D. & Co. was also a member of the plaintiff company. Afterward, C. W. D. organized a corporation under the name of C. W. D. & Co., and engaged in the same business in the same city. The plaintiff claimed, but never exercised, the right to use the name of C. W. D. & Co. *Held*, that the plaintiff was not entitled to an injunction restraining the defendant from using that name, and receiving mail matter

For Index to Notes in American Decisions and American Reports, see Volume I. thus directed. *Iowa Seed Co. v. Dorr*, 59 R. 445.

26. Using fictitious firm name.—A statute prohibiting the use of names in firms of persons not interested, and requiring that "& Co." shall represent an actual partner, does not apply to a case where those words represented the wife of the person whose full name appears. *Zimmerman v. Erhard*, 38 R. 396.

Where one who has carried on business alone, under a firm name, sells the business to his son, who continues the business under the same name, the former is liable for goods purchased by the latter from an actual dealer with the former, who has no knowledge or notice of the transfer. *Ellierson v. Leeds*, 49 R. 458.

The plaintiff alone was doing business in the name of "Wood Brothers," in violation of a statute which prohibits the use of fictitious names in firms. A carriage was purchased by plaintiff in said firm name, and was shipped by him at Buffalo on defendant's railroad, marked "Wood Brothers," for delivery "to the party entitled to the same," at New York, and was injured in transit. *Held*, that the statute being highly penal, its operation would not be extended by implication, and that the plaintiff could maintain an action for the injury. *Wood v. Erie R'y Co.*, 23 R. 125.

A bond was executed to "John Gay and Charles Gay, Jr., doing business as Gay Brothers & Co." They were, as the obligors knew, the only partners. *Held*, not within the statute prohibiting the transaction of business in the name of a partner not interested, and requiring the designation "& Co." to represent an actual partner, under penalty as a misdemeanor for non-observance. *Gay v. Seibold*, 49 R. 533.

A firm in Philadelphia having a branch house in New York orally leased part of its premises situated in New York. The firm was doing business under the name of Kohn, Adler, & Co., although there was no Adler in the firm. *Held*, that the leasing was not "transacting business," within the meaning of the New York penal statute forbidding the transaction of business in the name of a partner not interested in the firm. *Sparrow v. Kohn*, 58 R. 726.

27. Right to sue or be sued in firm name.—A copartnership cannot maintain an action under the title of "Proprietors of Mexican Mill" as plaintiffs, for such title does not name a natural or artificial person authorized to sue. As there is no plaintiff, there is no action, and the proceeding may be dismissed at any time before or after appeal. *Proprietors etc. v. Yellow Jacket S. M. Co.*, 97 D. 510.

A judgment by confession against McIndoe and Shuter, partners, etc., if irregular, is not void, where the parties constituting such

firm have executed a warrant of attorney containing the full names of the judgment debtors, and authorizing such confession of judgment, and where they have in their answer to the action released all errors that might intervene in entering up judgment, or in issuing execution in the cause. *McIndoe v. Hazelton*, 88 D. 701.

A defect in such judgment by confession, by reason of not giving the full names of the parties constituting such firm, must be disregarded under Wisconsin Revised Statutes, 1858, chapter 125, sections 37, 40; or if not, it was certainly cured by the statute of amendments before the code (R. S. 1849, c. 10, sec. 70, subd. 10), making such a judgment good where the full names of the judgment debtors had been once rightly alleged in any of the pleadings or proceedings, as in this case. *Id.*

An omission in such judgment of the full names of the parties constituting such firm may be amended under section 8, chapter 100, of the Revised Statutes, 1849, by a warrant of attorney which the parties constituting such firm have executed over their full names, authorizing confession of judgment, and which has become a part of the record. *Id.*

Whether judgment recovered against a partnership in their firm name alone becomes a lien on the firm property has never been decided in Iowa. But the judgment plaintiff may, by *scire facias*, make the individual property of the members of the firm liable to the judgment. *Markham v. Buckingham*, 89 D. 590.

A partnership may be sued in the individual names of its members, as well as in the partnership name. *Id.*

II. RIGHTS OF CREDITORS.

1. In General.

28. Law of place.—The liability of partners on a contract entered into with a third person is governed by the *lex loci contractus*. *Baldwin v. Gray*, 16 D. 169.

29. Creditor's lien.—A lien on partnership property for the payment of partnership liabilities arises at its acquisition, both between the partners and in favor of their creditors. *Sumner v. Hampson*, 32 D. 722.

The lien of partnership creditors for payment of their debts is not upon the partnership property, but is derived from one of the partners who has a lien upon the partnership property for the payment of the partnership debts; and such lien by a partner, being derivative, ceases when he has divested himself of his interest. If the means by which he has divested himself of this interest is fraudulent, the creditors may be relieved in a court of chancery. *Wilson v. Soper*, 56 D. 573.

A judgment against a firm is a lien on realty of partners, whether owned in com-

For Index to Notes in American Decisions and American Reports, see Volume I.

mon or in severalty, and such lien, once attached, is not divested by any subsequent judgment of a separate creditor, or otherwise. *Cummings's Appeal*, 64 D. 695.

Partnership creditors have no lien, while partners are administering their own funds, on the joint property for the payment of their claims, nor have creditors of individual partners any lien upon their separate property, or any priority of payment out of it. *Tillinghast v. Champion*, 67 D. 510.

The lien acquired by partnership creditors in joint assets cannot be defeated by any subsequent disposition of the property by the several partners. *Coover's Appeal*, 70 D. 149.

Partnership creditors have no equity, strictly speaking, against partnership effects, nor have they a lien on the partnership effects for their debts. All they can do is to prosecute their claims to judgments against the partners, and procure executions to be issued thereupon, to be levied upon the partnership effects, upon the separate effects of each partner, or upon both. *White v. Parish*, 73 D. 204.

Partners may make a *bona fide* sale of their property at any time before their creditors acquire a lien; but a sale directly or indirectly to one of the partners, with a stipulation that he will pay the firm debts, is not such a *bona fide* sale so as to divest the property of its character as firm property, primarily liable for firm debts. *Conroy v. Woods*, 73 D. 605.

Where a partner buys the interest of copartners in the firm, agreeing to pay the firm debts, the property of the firm remains bound for such debts just as before the sale. *Id.*

30. Release by creditors.—Where a partnership is indebted, and the partners severally covenant to pay, each his proportion of the debts, and the creditor thereupon releases the partners from their joint liability, the original contract or debt is merged. *Le Page v. McCrea*, 19 D. 469.

An agreement by a creditor of a firm to release one partner from liability, or covenant not to sue him for twenty years, on his giving security for the payment of a portion of the debt, does not operate to release or discharge the other partners. *Roberts v. Strang*, 82 D. 729.

A promise by a creditor of the firm to release one partner and look to the other two for payment of his claim, where the released partner is not shown to have acted upon the faith of the promise, or to have released any security, is without consideration, and does not release the latter from liability. *Fogg v. Hambell*, 89 D. 561.

31. Attachments and executions.—A creditor of one of the partners of a firm

* Levy on property of firm for partner's private debts, see note, 29 D. 663, 664.

may attach such partner's interest in a specific portion of a stock of goods belonging to the firm, and is not required, in order to render the attachment regular, to take the partner's interest in the entire stock of goods. *Fogg v. Lawry*, 28 R. 19.

To attach the partner's interest in the firm goods, they must be taken into possession. *Reed v. Shepardon*, 19 D. 697.

An officer taking firm goods into possession under an attachment against an individual partner is not liable as a trespasser, though the firm be insolvent. *Id.*

For the private debt of a partner, partnership property cannot be seized under attachment or execution. *Morrison v. Blodgett*, 29 D. 653.

An attachment of a partner's property for a firm debt will lie, and is not defeated by a subsequent assignment by such partner in trust for his creditors, under the Massachusetts statute of 1836, though it is otherwise under the statute of 1838. *Allen v. Wells*, 33 D. 757.

A debtor of a partnership cannot be garnished in an action brought to recover the separate debt of one of its members. *Winston v. Boring*, 34 D. 768; *People's Bank v. Shryock*, 30 R. 476.

Where the creditors of a partnership have levied their execution on lands belonging to one of the partners, and their title has become absolute by lapse of the time prescribed by statute, a creditor of the individual partner cannot defeat their title by levying his attachment or execution on the same lands. *Bowler v. Smith*, 2 R. 189.

32. Set-off.—A partner cannot set off a debt due the firm, in an action against him for an individual debt, as a general rule. *Craig v. Henderson*, 44 D. 193.

33. Subrogation.—A separate judgment creditor of a partner is not entitled to be substituted to the rights of a judgment creditor of the partnership who has obtained satisfaction out of such partner's estate, to enable such separate creditor to proceed against the other partner, where there is nothing to show the latter partner indebted to his copartner whose property was taken to pay the firm debt. *Sterling v. Brightbill*, 30 D. 304.

2. Power of One Partner to Bind Another, or the Firm.

34. In general.—By virtue of the partnership relation, each partner is constituted the general agent of his copartners, and has power authorizing him to act as once as principal and their agent. So long as the relation exists, he has the power to bind the partnership in all matters within the scope of partnership dealings or falling within the ordinary business and transactions of the firm. *Western Stage Co. v. Walker*, 65 D. 789; *Crosthwait v. Ross*, 34 D.

For Index to Notes in American Decisions and American Reports, see Volume 1.

613; *Warder v. Needgate*, 52 D. 567; *Savings Fund Soc. v. Savings Bank*, 78 D. 390. And in all transactions which from their nature appear to the world to be legitimately connected with the business of the partnership in which they are openly engaged, although in reality they exceed the terms of the partnership, one partner may bind the firm. *Heirn v. McCaughan*, 66 D. 588; *Barker v. Mann*, 96 D. 373.

Partners have equal authority over the partnership affairs, and one cannot, by any private instructions, limit the power of the other to bind him in a partnership transaction. *Miller v. Hughes*, 10 D. 719.

A partner's authority, even in a partnership not purely commercial, is regulated by the usages of trade. *Hart v. Withers*, 21 D. 382.

The presumption regarding one who deals with a partner in a matter not within the scope of the partnership is, that such person dealt with the partner on the latter's private and individual account, notwithstanding the partnership name was used. *Crosthwait v. Ross*, 34 D. 613.

A debt due from one partner is not a valid set-off against a debt due to the firm. *Warder v. Needgate*, 52 D. 567.

An agreement with an individual partner that a debt due from him should be an offset against one due to the firm cannot bind the other partner unless he assents. *Id.*

The fact that money which was obtained on the personal credit of one member of a firm was used by the firm and for its exclusive benefit will not of itself make the firm liable to the creditor for such debt, but would be a good consideration to support a subsequent promise by the firm to pay the debt. *Siegel v. Chidsey*, 70 D. 124.

Demand, to charge a partnership, need be made on but one of the partners. *Hunter v. Hempstead*, 13 D. 468.

Notice to one of the partners of a firm, of a prior unrecorded deed, is notice to all the partners, and will render void a subsequent conveyance of the same land to the firm. *Barney v. Currier*, 6 D. 739.

Notice of demand and protest upon one member of a firm dissolved is sufficient to bind all the other members, if due notice of the dissolution has not been given. *Nott v. Downing*, 26 D. 491.

Notice to one partner that sheep purchased by him for the firm are diseased is notice to his copartners, and they are liable for damages occasioned by a sale of them without disclosing the defect, after the withdrawal of such partner from the firm, though they have no actual knowledge of such defect. *Jeffrey v. Bigelow*, 28 D. 476.

Service of a citation upon one partner during the existence of the partnership is a service upon all. *Gaiennis v. Akin*, 36 D. 804.

One partner has no implied power to enter appearance in a suit for his copartner, but only for the partnership. *Phelps v. Brewer*, 57 D. 56; *Haslet v. Street*, 13 D. 724.*

35. By contracts, generally.—Where a partnership is limited to a particular trade or business, one partner cannot bind his copartner by any contract not relating to such trade or business, and third persons will be presumed to have knowledge of the limited nature of the partnership from the circumstances connected with the business of the firm. *Livingston v. Roosevelt*, 4 D. 273. S. F., *Western Stage Co. v. Walker*, 65 D. 789.

The implied authority of one partner to bind his copartner by contract may be revoked by the refusal of the latter to be thus bound, communicated to the person in whose favor the contract is to be made. And it makes no difference that the partner revoking is a secret partner, and that the partnership was unknown to the opposite party. *Leavitt v. Peck*, 8 D. 157.

One partner is not bound by a contract entered into by his copartner, after giving actual notice to the party proposing to make it that he will not be bound thereby, although the fruits of the contract have been enjoyed by the partnership, of which he is a member. *Monroe v. Conner*, 32 D. 148.

If a commercial partnership be formed, and by the articles of copartnership only such real estate as is necessary for convenience in carrying on trade is to be purchased, a purchase by one partner of 20,638 arpents does not bind the firm. *Brook v. Hamilton*, 13 D. 328.

Where a contract which is required by law to be in writing is made with one of two partners, in his individual capacity, the other partner cannot be sued for the consideration. *Harris v. Miller*, 33 D. 138.

An agreement by one partner to deliver property to the sheriff on request, or pay a debt of his copartner for which it had been seized under execution, is valid; and it is no defense to an action thereon by the sheriff, that the property was partnership property and had been applied to the use of the firm. *Burrall v. Acker*, 35 D. 582.

A contract of a partner for his own benefit cannot bind the firm, unless the other members have assented to it. *Warder v. Needgate*, 52 D. 567.

Goods furnished a partner individually are not payment of the debt due the partnership, though the partner receiving them agrees that they shall be. Such an agreement does not bind the firm. *Id.*

A member of a mining partnership is in legal contemplation a principal of the firm, and general agent for all the copartners in the transaction of the copartnership business, without having had general, special, or lim-

* Partner's power to authorize appearance by attorney for firm, see note, 13 D. 726, 727.

For Index to Notes in American Decisions and American Reports, see Volume I.

ited powers conferred upon him, and the firm is liable to a person whom he employs to labor for it. *Burgan v. Lyell*, 55 D. 53.

Persons are liable as partners for services rendered for the partnership, and it is wholly immaterial what the arrangement as to the several duties of each may have been between the persons themselves, and which one employed or engaged the services of the plaintiff. *Coons v. Renick*, 60 D. 230.

A partner who, without authority, agrees to indemnify a surety on an injunction bond, given in a suit prosecuted for the benefit of his firm, does not thereby bind the firm unless his copartners subsequently ratify his act. *White v. Davidson*, 63 D. 699.

A contract made by a copartner in the name of the firm *prima facie* binds the firm, unless it is outside the business of the firm. *Stockwell v. Dillingham*, 79 D. 621.

Where a partner contracts a debt, representing to the creditor that it is for the benefit of the firm, the firm is liable, whether such representation is true or false, if the transaction is within the scope of the partnership business. *Id.*

A partner alone is liable upon all contracts made by himself upon his own exclusive credit; and the partnership, although the contract is for their proper use and benefit, or is applied thereto, will in no manner be liable therefor. *North Penn. Coal Co.'s Appeal*, 84 D. 487.

The liability of one partner for the contracts of another, when not estopped from denying the liability, is founded on the relation they sustain of being each principal and agent in the joint business. That relation is therefore the true test of a partnership, and the liability rests on the ground that it was incurred on the express or implied authority of the party sought to be charged. *Harvey v. Childs*, 22 R. 387.

One partner, without the consent, express or implied, of his copartners, cannot apply a claim of the firm to the payment of his individual debt, even to retain the debtor's custom for the firm. *Cotthausen v. Judd*, 28 R. 539.

Several plaintiffs were commission merchants dealing in cattle. One of the plaintiffs, without the knowledge of his other partners, agreed with the defendant, in the name of the firm, to advance money, with which the defendant was to purchase cattle to be sold by the plaintiffs on commission, the profits to be divided between the plaintiffs and defendant. Transactions under this agreement resulted in loss. No settlement or accounting having been had, — *held*, that the plaintiff could not maintain an action upon an implied contract to pay commissions. *Frye v. Sanders*, 30 R. 421.

36. By purchases of goods. — Where one partner purchases goods on his single credit for the use of the partnership, if the

seller does not know at the time of the existence of the partnership, he may, when he discovers it, hold the firm liable. *Griffith v. Buffum*, 54 D. 64.

If credit be given exclusively to one partner, and it appears that it was not intended that the other should be held or looked to for payment, the latter cannot be made liable. *Smith v. Durrett*, 2 D. 714; *Huntington v. Lyman*, 12 D. 716.

It is not necessary to secure a person giving credit to a partnership that he should know or believe that each individual of the firm would approve the transaction; but it is necessary that he should not know that the debt attempted to be secured was not the debt of the partnership, or the property sold was not to inure to their benefit, in the absence of all proof of the assent or approbation of the party to be charged. *Huntington v. Lyman*, 12 D. 716.

Goods purchased by one partner, in his own name and upon his own credit, although used in the business, are not liable to be seized for a private debt of the other partner, contracted in his own name, and entirely disconnected with the business. *Allen v. Dunn*, 33 D. 614.

A partner cannot maintain an action in the firm name to recover certain firm moneys of a person to whom they were paid by another partner for the value of certain goods received by the latter, with a knowledge of the fact that they were stolen, though such payment was made in order to prevent a prosecution of the latter for felony, and without the knowledge or consent of his copartner. *Johnson v. Byerly*, 75 D. 764.

A partner ratifies the act of his copartner, not within the scope and usage of the partnership, in purchasing property on the firm credit, by obtaining possession and selling it as firm property. *Porter v. Curry*, 99 D. 520.

37. By sales of goods.* — One partner has power to sell all the goods of the partnership at a single sale, though the object of the partnership was to sell by retail. *Arnold v. Brown*, 35 D. 296.

A sale made by one partner is not invalid because the purchaser, as part payment, pays one of such partner's private debts. *Id.*

A *bona fide* sale of all the partnership effects made by one partner to another, at the dissolution of the partnership, is valid, and the property so sold becomes the separate estate of the purchaser, although the firm and both partners are at the time insolvent. *Howe v. Lawrence*, 57 D. 68.

One partner may sell the entire stock of the firm to pay its debts in good faith, and may do it on Sunday, it not being in the usual business of sales, and being a work of necessity. *Schneider v. Sansom*, 50 R. 521.

*Power of partner to make sale of all property of firm, see notes, 30 D. 290, 291; 30 R. 532-537.

For Index to Notes in American Decisions and American Reports, see Volume I.

Where a ship at sea belonging to a partnership was sold by one of the partners at home, and subsequently sold and possession delivered by the other partner abroad, under whose control she then was, and who had no knowledge of the prior sale, — *held*, that the second sale passed the title as against the former. *Lamb v. Durant*, 7 D. 31.

Where one partner sold all the goods of the firm, and against the will of his copartner broke into the store with the purchaser to whom he delivered the goods, — *held*, that either partner had a right to sell all the goods, and that, unless some of them had been destroyed, trespass would not lie against a partner at the suit of a copartner. *Montjoy v. Holden*, 12 D. 331.

A, one of several partners, having a dispute with his copartners as to the firm accounts, stored cotton belonging to the firm, without their assent, with a warehouseman, taking a receipt in his own name, and informing his partners that he had done so to force a settlement; B, one of the latter, induced certain reputable cotton buyers to send an order to the warehouseman to turn out the cotton for shipment, and the warehouseman, supposing the order to be given in good faith, delivered the cotton, in accordance with a custom of warehousemen, without requiring production of A's receipt, and the cotton buyers delivered it to B, who sold it on his own account. In an action by A against the warehouseman for damages, — *held*, that he could not recover. *Croswell v. Lehman*, 25 R. 684.

33. — or other disposal of partnership assets. — 1. *In general*. — A partner possesses authority, independently of articles or express stipulations regulating his power in behalf of the firm, to dispose of the partnership property and effects for any and all purposes within the scope and objects of the partnership and in the course of its trade and business. *Wright v. Boynton*, 72 D. 319; *Woodward v. Coving*, 66 D. 211.

A partner may transfer the whole stock in trade of the partnership *bona fide* in payment of debts of the firm, especially where his copartner has absconded, and the fact that the assignment is under seal is immaterial. *Deckard v. Case*, 30 D. 287.

Employment of the partner who made the transfer, and the resumption of business at the shop formerly occupied by the firm, if not a part of the consideration of the transfer, and not *mala fide*, will not render such transfer fraudulent as against other creditors of the firm. *Ib.*

A dedication of partnership property by a managing partner to street purposes, to render the remaining portion more valuable, inures to the benefit or detriment of all the partners in proportion to their shares. *Lafsan v. Naglee*, 70 D. 678.

2. In payment of individual debt.* —

Where a creditor of one partner knowingly receives partnership property in payment of the debt, he thereby becomes a debtor to the partnership for the price, and cannot set off the partner's debt against such claim. *Dob v. Halsey*, 8 D. 293.

A transfer of partnership property in satisfaction of a private debt of one of the firm, after the failure of the partnership, is fraudulent and void as to the partnership creditors. *Yale v. Yale*, 33 D. 393.

Where a partnership has so intrusted one partner with the partnership goods that he is enabled to deal with them as apparently his own, and to induce the public to believe them to be his, a sale by him of such goods, in payment of his private debt, to one who has no knowledge or notice that they are partnership goods, is valid as against the partnership and its creditors. *Locke v. Lewis*, 26 R. 631.

A confession of judgment by partners to a creditor, on promise to pay the individual debt of a member of the firm for money borrowed by him and used by and for the exclusive benefit of the firm, is not the application of partnership effects to the private debt of a member of the firm, but the honest assumption by the partners of a debt created for their joint benefit, and which in equity and conscience they are equally bound to pay. *Siegel v. Chidsey*, 70 D. 124.

Assumption by a firm of debt of a member for money borrowed for exclusive use of the firm is not a fraudulent transaction as to the partners, because they all assent to it, and not as to the firm creditors, if they have no lien on the partnership effects, because their equities must be worked out through the partners themselves. *Ib.*

As against a general creditor of a solvent partnership, one of the firm, with the consent of his copartners, may in good faith make an absolute transfer of the entire partnership assets in payment of his individual debt. *Schmidlapp v. Currie*, 30 R. 530.

Where one partner pays his individual debt, to the knowledge of his creditors, out of the funds of his insolvent firm, without the assent of his copartners, the money may be attached by a creditor of the firm. *Johnson v. Hersey*, 35 R. 303.

One partner, individually indebted to a person owing the firm, may not apply the debt due the firm to the payment of his own debt, without consent or ratification by his copartners, and the debtor to the firm is still liable therefor. *Thomas v. Stetson*, 49 R. 143.

A member of an insolvent firm may, with the consent of his partner, use the assets of

* Misappropriation of property of firm by payment of individual debt of partner, see note, 2 D. 297-299.

For Index to Notes in American Decisions and American Reports, see Volume I.

such firm to pay premiums on a policy of insurance on his life for the benefit of his wife, to whom he is in good faith indebted, and partnership creditors cannot set aside the transaction unless they show fraud. *Hansover Nat. Bank v. Klein*, 60 R. 47.

A member of a mercantile partnership delivered goods of the partnership to his physician, by agreement, on account of his individual debt due and to become due to him. The physician knew that the goods belonged to the partnership. The other partner knew nothing of the agreement at the time, but subsequently learning it, he offered the physician to allow his account as a credit if he would pay the balance of the firm account in cash, but this offer was not accepted. In an action by him against the physician, — *held*, 1. That the agreement was not binding on the plaintiff; 2. That the unaccepted offer was not a ratification of it. *Hurt v. Clarke*, 28 R. 751.

39. By mortgage of firm property. — One partner has a right to encumber the entire interest in personal property of the partnership for the security of the debts. *Donald v. Hewitt*, 73 D. 431.

One partner may mortgage or pledge all the goods of the firm. The mortgage is not the less effective because unnecessarily made under seal. *Tapley v. Butterfield*, 35 D. 374.

Where one of three partners executes, in the firm name, with the consent of his copartners, a mortgage on land owned by one of the other partners, for the purpose of securing a partnership debt, such mortgage will be valid as against a party who, with actual notice thereof, takes a subsequent mortgage of the same property from the partner in whose name the title stands. *Wilson v. Hunter*, 80 D. 795.

40. By receiving or transferring negotiable paper, generally. — In all contracts concerning negotiable paper, the act of one partner binds all, even though he sign his individual name, if it appear on the face of the paper to be on partnership account, and to be intended to have a joint operation. *Crozier v. Kirker*, 51 D. 724.

A note assigned by one member of a partnership does not pass such an interest in it that the assignee can set it off in a suit on a bill single executed by himself to the assignor, who assigned it after maturity to the plaintiff. *McIntire v. McLaurin*, 36 D. 300.

The transfer by a partner of notes due the partnership in payment of an individual debt, at a time when the insolvency of the partnership was not known, does not indicate fraud. *Huntton v. Dow*, 70 D. 404.

Attorneys at law who are partners in the practice of their profession have no authority to bind the firm by becoming parties to negotiable instruments, unless such authority is given by the terms of partnership, or expressly given or recognized by both, or

may be implied from the general habits of the partners in their business transactions. *Friend v. Duryee*, 35 R. 89.

The members of a firm engaged in the insurance, real estate, and collecting business have no implied power to bind each other by commercial paper in the name of the firm. Such power can only arise from consent, ratification, custom, or necessity. *Deardorf v. Thacher*, 47 R. 95.

41. By making a bill or note. — 1. In general. — Every partner has implied authority to bind his copartner by the making of notes and the drawing and accepting of bills for commercial purposes consistent with the object of the partnership; and to rebut this presumption of authority there must be proof of fraud, or a knowledge of the want of authority, or notice to the party seeking to charge the firm that the other partners would not be responsible for the acts of their copartners. *Crozier v. Kirker*, 51 D. 724.

Drawing, accepting, or indorsing bills or notes by one partner in the name of the firm or in their behalf renders all the firm liable to a bona fide holder, although the other partners were ignorant of the transaction. *Flemming v. Prescott*, 45 D. 766.

One partner has no authority in the name of the firm to guarantee the debts of others, nor to make or indorse notes or bills for the accommodation of others, unless such authority has been specially conferred, or may be inferred from the common course of business of the firm, or the previous course of dealing between the parties. *Sweetser v. French*, 48 D. 666.

Authority of a partner to make a guaranty, or to make or indorse notes or bills for the accommodation of others, need not be shown by direct positive proof, but may be inferred from the common course of the business of the firm, or the previous course of dealing between the parties. Ratification by the other partners may also be presumed from their acts or omissions after their knowledge of the act done in the name of the firm. *Ib.*

Actual knowledge that negotiable paper was given without consent of certain partners is a good defense to the non-consenting partners. *Haldeman v. Bank of Middletown*, 70 D. 142.

In an action against a firm on negotiable paper drawn and discounted by a partner in name of firm, it is not error to reject evidence showing that the partner having the paper discounted appropriated the proceeds to his own use. *Ib.*

In an action against a partnership, evidence having no tendency to disprove existence of partnership, as that the partners held the real estate used in their partnership transactions as tenants in common, or that the counsel of one of the partners advised him not to enter into the partnership, or that the partner having the paper discounted

For Index to Notes in American Decisions and American Reports, see Volume 1.

did not pay over to the other partner his proportion of the profits of the concern, is not admissible for that purpose. *Id.*

Whether a partner has revoked the implied authority of his copartner is a question of fact. Therefore, it was held in an action on a promissory note against two persons, as partners, that the fact that one of them was a dormant partner merely, and had refused to give a joint note with the other, did not necessarily constitute a revocation of the partner's implied authority, but was evidence only of such revocation. *Leavitt v. Peck*, 8 D. 157.

2. *Bills, and orders for money.* — A bill drawn by a partner contrary to the partnership agreement is binding on the firm, as against third persons taking it without notice of the agreement, if drawn in the firm name for a partnership demand. *Bank of Rochester v. Montecuth*, 43 D. 681.

A partner has no right, without consent of his copartner, to give an order in the firm name, to his own separate creditor, on a debtor of the partnership; and the fact that his copartner knew of such order before it was executed, and did not give notice of his dissent thereto, to such creditor, will not prevent the firm from recovering from him the amount of the order. *McKinney v. Bright*, 55 D. 512.

3. *Promissory note — Firm liable.* — A mercantile partnership is liable on a promissory note signed by one of its members, in the firm name, without the knowledge or consent of his copartners, although the note was given for the debt of a third person unconnected with the partnership business. *Hawes v. Dunston*, 19 D. 663.

A promissory note given by a person who is engaged with three others in manufacturing paper, for material which was used in making paper, is binding upon all of such persons, although it appears that the only authority the person had to sign such persons' names to said note was an agreement entered into by all of said parties, providing what each person should do in the management of said business, and the authority given to him who signed the note was "to collect the stock and market the paper." *Doak v. Swan*, 22 D. 233.

A note executed in the firm name by one member thereof is *prima facie* obligatory upon the firm, and it is incumbent upon a party denying the firm's liability to prove that it was not executed for the benefit of the firm or in its business. *Hamilton v. Summers*, 54 D. 609.

The fact that the payee believed that the borrowed money for which the note was given was to be applied to an individual purpose will not prevent the note from binding the firm, if the money borrowed was actually used for a partnership purpose. *Id.*

To bind a partner by a note drawn by a

copartner in his own name, it must appear that such name was the style of the firm. *Macklin v. Crutcher*, 99 D. 680.

In an action against a firm upon its promissory note made by a partner, brought by a transferee from payee, — held, 1. That the presumption was that the note was for the benefit of the firm; 2. But defendants might show that it was made in fraud of the firm, to the knowledge of payee; and 3. That thereupon the presumption would be that the transferee was not a *bona fide* holder for value. *Carrier v. Cameron*, 18 R. 192.

4. — *firm not liable.* — A partner has no power to bind his copartners, without their assent, by signing the firm name as sureties on the note of a third person, and the burden is on the creditor to prove the assent. *Foot v. Sabin*, 10 D. 208.

A promissory note signed by a person in whose name a copartnership is carried on does not, although in the hands of an innocent holder, *prima facie* bind his copartners; and the burden of proving that the note was given for the use of the copartnership is upon the holder. *Manufacturers' Bank v. Winslip*, 16 D. 369.

A note given by one partner in his individual name cannot be enforced against the partnership, though made in consideration of property of which the firm had the benefit. *Holmes v. Burton*, 31 D. 621.

A debt is not paid by a note given by one of the partners, in the firm name, without authority. And the creditor may resort to his original cause of action, even after he has brought suit on the note, particularly if he was ignorant of the invalidity of the note at the time when he brought his action on it. *Lee v. Fontaine*, 44 D. 505.

A partner is not liable upon the individual note of a copartner given upon the purchase of goods for the use of the firm; though he may be liable upon the implied contract, unless the note was accepted in discharge of the partnership liability. *Macklin v. Crutcher*, 99 D. 680.

5. *Two firms with common partner.* — One who is a member of several firms may draw and indorse the same paper as the representative of each; and this is no ground for suspicion that his indorsement of the name of one firm is in bad faith to the other as maker of the note. *Miller v. Consolidation Bank*, 88 D. 475.

Where a partner in two firms made and indorsed, in the name of one of them, a note payable to its own order, and then indorsed the name of the other firm, there is nothing on the face of the paper to indicate that the note was not drawn by the first firm in their usual course of business in a partnership transaction with the second firm; and the bank discounting it is not put upon notice as to the good faith of the common partner in executing it by the mere fact that the note

For Index to Notes in American Decisions and American Reports, see Volume I.

and indorsements are all in his handwriting. *Ib.*

A note made under the following circumstances was held to be the property of the firm, and not chargeable to the individual member who signed it; viz.: G. B. McFarland, the testator of defendant in error, and Brown, the plaintiff in error, were partners in a store under the firm name of McFarland & Co., and they were partners with one Caldwell in a smelting furnace, under the name of Phoenix Furnace. The latter firm owed the former firm one thousand two hundred dollars, which was represented by an individual note of McFarland, drawn in favor of Brown. Brown claimed a right to charge the whole of this note against McFarland's estate, but the claim was disallowed. *Brown v. McFarland*, 80 D. 598.

A., who was a member of the firm of M. & Co., and also of W. & Co., made his individual note to the order of W. & Co.; it was indorsed by W. & Co., and A. then indorsed it with the firm name of M. & Co., and it was put for negotiation for W. & Co., into the hands of a note-broker, who sold it to plaintiff. W. & Co. were in the vinegar business, and M. & Co. in a business not requiring the use of vinegar. Held, that these circumstances were not sufficient to put plaintiff on inquiry as to the character of the paper, and the fact that the indorsement of M. & Co. was in fraud of the firm did not relieve such firm from liability. *Moorehead v. Gilmore*, 18 R. 485.

6. *Non-trading partnerships.*—One partner can bind his copartners by note in the name of the firm in those partnerships only that are engaged in a trade or concern in which the issuing or transfer of bills is necessary or usual, unless express authority for the purpose is given. *Lanier v. McCabe*, 48 D. 173.

One partner in a non-trading partnership cannot bind his copartner by a bill or note drawn, accepted, or indorsed by him, in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his copartner, or unless the giving of such instrument is necessary to the carrying on of the firm business, or is usual in similar partnerships; and the burden is upon the holder of the note to prove such authority, necessity, or usage. *Smith v. Sloan*, 19 R. 757.

One member of a firm of attorneys cannot, without special authority, bind his copartner by a promissory note executed in the firm name, even though it be given for a firm debt, unless it affirmatively appear that it was necessary to the carrying on of the firm business, or was usual in similar partnerships. *Ib.*

One member of a partnership formed for conducting a theater has no implied power to bind his partner by a note in the firm

name, in the absence of necessity, usage, or ratification; and the burden of proof is on the holder. *Pease v. Cole*, 55 R. 53.

42. By accepting a bill.—An acceptance by one member of a firm of a bill of exchange which represents a private debt of his own binds the firm, if the holder of the bill was ignorant of the nature of its consideration. *Potter v. Dillon*, 37 D. 185.

If one partner draws a bill of exchange on the firm in payment of his own individual debt, and accepts it in the name of the partners, without the consent or knowledge of his copartner, the other partner is not liable, and an action cannot be sustained against him upon such acceptance. *Brown v. Duncanson*, 1 D. 409.

A firm is bound by an acceptance in an agent's name, which it has adopted as a firm name by an agreement of the partners to do business under the name of such agent, where it does not appear that the agent was doing business also on his own account; but if that fact appears, it must be shown that he accepted the bill on account of the partnership, in order to bind it. *Bank of Rochester v. Monteath*, 43 D. 681.

A partnership is bound by the accommodation acceptance or indorsement of one partner in the name of the firm. *Flemming v. Prescott*, 45 D. 766.

Acceptance of a bill of exchange, drawn on a partnership, by one member of a firm, in his own name, does not bind the firm. One partner has general power to bind the firm, but only by use of the firm name. *Heenan v. Nash*, 83 D. 790.

An individual member of firm, who accepts bill of exchange, drawn upon the firm, in his own name, does not become individually liable, nor does he bind the firm. *Ib.*

43. By indorsing a bill or note.—Where partners are sued as indorsers, the indorsement being made by one of the firm, his copartner is not liable unless shown to be a party to the contract. *Wilson v. Williams*, 28 D. 518.

Notice that the indorsement was not on account of a partnership transaction will defeat the holder's right of recovery against the firm. *Ib.*

That the plaintiffs parted with their goods in the usual course of trade, and on the credit of the indorsement, will not help them. *Ib.*

In such case, the question involved is one of contract, not of fraud, and the holder of the paper is not entitled to have the question of fraud submitted to the jury. *Ib.*

To bind a partner by the unauthorized acts of a copartner, on the ground of assent, there must be more than slight and inconclusive evidence of such assent. *Ib.*

A partner's indorsement of the firm name for his private purposes, without the consent or knowledge of his copartners, will, after

For Index to Notes in American Decisions and American Reports, see Volume I.

the note has passed to a *bona fide* holder, bind the firm; but not where the holder's ignorance that it was so indorsed without authority arises from his gross negligence. *New York Fire Ins. Co. v. Bennett*, 13 D. 109.

Where a partner indorses the firm name as surety for a third person, without the consent or knowledge of his copartners, the firm is not bound, and it lies with the indorsee to prove the partner's authority for so using the partnership name, and the mere fact that the indorsee had no knowledge, express or implied, of the partner's want of authority, will not be sufficient to charge the firm. *New York Fire Ins. Co. v. Bennett*, 13 D. 109; *Andrews v. Planters' Bank*, 45 D. 300.

Authority of a partner to bind his copartner by signing the partnership name to a note, as sureties of a third person, may be presumed from circumstances. *Andrews v. Planters' Bank*, 45 D. 300.

The presumption of authority in such a case, arising from the fact that such partner had been in the habit of using the firm name in such a mode, is rebutted by proof that such other partner was not the acting partner, and that when such a use of the firm name came to his knowledge, he denied that any such authority was reposed in his copartner. *Id.*

An accommodation indorsement of a bill by one member of a firm is not sufficient to charge the other member of the firm, in the absence of proof of an express or implied authority, independent of the authority conferred by the partnership. *Chenoweth v. Chamberlin*, 43 D. 145. And in such case the burden of proving the authority or consent of the copartner rests on the creditor or holder of the note. *Hendrie v. Berkowitz*, 99 D. 251; *Sweetser v. French*, 48 D. 666.

Where a third person finds a note, indorsed by a member of a firm in the firm name, in the hands of the maker, this is notice to him that the firm indorsement was for the accommodation of the maker. *Hendrie v. Berkowitz*, 99 D. 251.

44. By giving bill or note of firm for individual debt. — A note given in the name of a firm by one partner for his own private debts, and known to be so given by the person taking it, does not bind the other partners, unless they were previously consulted, and consented to the transaction. *Lanier v. McCabe*, 48 D. 173; *Livingston v. Roosevelt*, 4 D. 273; *Taylor v. Hillyer*, 26 D. 430.

Where one of two partners gives the firm note for his private debt, without the consent of his copartner, the latter is not bound thereby, even though the debt be for goods which have been subsequently applied to

the use of the firm. *Poindexter v. Waddy*, 8 D. 749.

A subsequent verbal promise by one partner, to pay a note given by another for the latter's individual debt, is void under the statute of frauds. *Taylor v. Hillyer*, 26 D. 430.

Evidence of knowledge of a former abuse of the partnership signature, for private purposes, by a partner, on the part of a plaintiff suing on a note made in the firm name by such partner, and contested by the other partners as being made for the private use of such partner, with the knowledge of the plaintiff, is admissible as tending to show *scienter*. *Eastman v. Cooper*, 26 D. 600.

A partner's use of the firm name for a purpose entirely distinct from the partnership business is *prima facie* evidence that the act was unauthorized and a fraud upon the partnership, and such evidence must be rebutted by one seeking to hold the other partners bound by the contract, by showing their assent thereto. *Eastman v. Cooper*, 26 D. 600. *S. P., Mechanics' etc. Ins. Co. v. Richardson*, 39 R. 290.

All the partners are liable on a note indorsed in the firm name, though transferred by one partner for his individual benefit, if it is sued upon by an indorsee who shows that he acquired it before maturity and for value. *Bank of St. Albans v. Gilliland*, 35 D. 566. *S. P., Bedlon v. Charchill*, 40 R. 345.

A note of a firm given for a private debt of one partner is good against the firm in the hands of a *bona fide* holder; the right of the individual partner's creditor depending, however, on the consent of all the partners. *Haldeman v. Bank of Middletown*, 70 D. 142.

A partnership for the practice of medicine does not authorize one of the partners to bind the firm by a note given in the name of the partnership for money borrowed for the private and individual use of the partner by whom the note was given. *Crosthwaite v. Ross*, 34 D. 613.

A company formed to operate a steam saw-mill is not a partnership having the right to issue bills. And a note signed by one stockholder in such company, and by another indorsed over to the latter's creditor, in payment of his own individual debt, is, in effect, the note of those two stockholders only. *Lanier v. McCabe*, 48 D. 173.

A member of a publishing partnership executed his note for his individual debt, and indorsed it in the firm name to a *bona fide* holder. *Held*, that the firm were not *prima facie* liable upon it. *Pooley v. Whitmore*, 27 R. 733.

One member of a firm of livery-stable keepers cannot bind the firm by a note in the firm name for his private debt, in the absence of express authority, necessity, or custom. *Levi v. Latham*, 48 R. 361.

A partner made his promissory note and

* Partner's power to bind firm as surety on commercial paper, see note, 13 D. 115-118.

For Index to Notes in American Decisions and American Reports, see Volume I.

indorsed it in the firm name without his copartner's knowledge or consent, in payment of an individual debt to defendant, who took the note with knowledge of the facts, and in order to bind the firm, indorsed it before maturity to a bona fide holder for value. The note was paid out of the firm assets. *Held*, that defendant was guilty of a fraud for which he was liable in damages, but that the fraud was not upon the firm, but upon the individual partners, who did not consent to the indorsement of the note, and that the cause of action against the defendant did not pass to plaintiffs by a general assignment of the assets of the firm, or by a conveyance to plaintiffs of the firm interest of a partner injured by the fraud. *Calkins v. Smith*, 8 R. 575.

One partner, without the knowledge or consent of his copartners, and not in the partnership business, executed a promissory note in his individual name, and for his own benefit, adding the firm name under his own. There being a conflict of evidence whether the payee was informed, at the time of its negotiation, that it was an individual transaction, — *held*, that the jury might consider the circumstance that the note purported to be the partner's individual obligation, with the firm name underneath his own, in determining that disputed question of fact. *Sherwood v. Snow*, 26 R. 155.

45. By sealed instruments. — 1. Generally. — A partner has no power to bind his copartner by an instrument under seal, without special authority. *Trimble v. Coons*, 12 D. 411.

The law of partnership is part of the law merchant, which has respect exclusively to the business of commerce; and as sealed instruments do not ordinarily enter into such business, the authority of a partner does not extend to their execution. *Hart v. Withers*, 21 D. 382.

The mere partnership relation will not authorize one partner to execute an instrument under seal, whereby a new and original obligation is created, which will be binding on the firm. *McDonald v. Eggleston*, 60 D. 203.

A sealed instrument signed by a partner with the firm name, even though given in a partnership transaction and for the partnership benefit, does not bind his copartners. *Hart v. Withers*, 21 D. 382.

While as a general proposition one partner cannot bind another by deed, yet in the regular course of business, as in the execution of a charter-party, he may do so. *Stratton v. Newell*, 4 D. 705.

Where a partner undertakes to bind his copartners by an instrument in writing, without express authority, he will be personally liable on such contract. *Skinner v. Dayton*, 10 D. 286.

A sealed contract executed by one partner

in the name of the firm, without previous authority or subsequent ratification by his copartner, does not bind the latter. *Van Deusen v. Blum*, 29 D. 582.

Such partners are liable on a *quantum meruit* and *quantum valebat* for labor and materials furnished to the firm before its dissolution, in attempted execution of such invalid contract, it being for a purpose within the scope of the partnership, though the work is not completed until after the dissolution. *Id.*

Partners executing under seal, in the name of the firm, an instrument which does not require to be sealed, does not render it void. It may be treated as a valid writing by parol. *Tapley v. Butterfield*, 35 D. 374.

A partner has no authority to bind his firm by an instrument under seal, even where the seal is not essential to the validity of the instrument. *Schmertz v. Shreeve*, 1 R. 439.

But where the contract is independent of the instrument, and has been executed on behalf of the firm, the making, for the purposes of evidence, of an instrument, under seal, by a partner, will not vitiate such contract. *Id.*

2. Bonds. — Money borrowed by a partner upon his individual credit, and for which he gives his separate bond, is not chargeable to the partnership, though it comes to its use. *Willis v. Hill*, 31 D. 412. Otherwise, however, if there be a dormant partner. *North Penn. Coal Co.'s Appeal*, 84 D. 487.

A bond given by one member of a firm for a partnership debt is binding only on the party executing the bond, and not on the partnership. *McNaughton v. Partridge*, 38 D. 731.

One partner cannot bind copartner by a forthcoming bond to which he has signed the latter's name without authority, and a statutory judgment on such bond is invalid as to the partner not signing. *Doe v. Typper*, 43 D. 483.

Where there is no antecedent debt, and the bond of one partner is taken, at the time money is loaned to a partnership, as the consideration for loaning the money, it can hardly be treated as a collateral security. It must be considered as all one transaction, and the bond is the only security contemplated in the absence of strong and positive evidence to show an agreement to the contrary by all the parties. *North Penn. Coal Co.'s Appeal*, 84 D. 487.

Where a partner buys real estate in his own name and gives his individual bonds and mortgage in part payment therefor, the firm is not liable to the seller for the unpaid purchase-money, though it appears by the firm books that the land was bought on firm account, and a declaration of trust was afterwards executed by the purchaser, but not recorded, declaring that the money paid was

For Index to Notes in American Decisions and American Reports, see Volume I.

partnership funds, and that the land was held by him in trust as partnership property *Id.*

In a bond given for the purpose of obtaining a dissolution of an attachment of partnership property, both partners were named as principals, but the bond was executed by only one of them, in the name of the firm. *Held*, that it could not be enforced against a surety without proof of the assent of the other partner to its execution. *Russell v. Annable*, 12 R. 665.

3. *Deeds*. — One partner cannot execute a deed in the firm name so as to bind his copartner. *Gerard v. Basse*, 1 D. 226; *Robinson v. Crowder*, 17 D. 762; *Doe v. Tupper*, 43 D. 483.

An assignment by one partner, by deed, of all the interest of the firm in a bond, passes the firm's right. *Morse v. Bellows*, 28 D. 372.

Deeds professing to transfer property of an absent partner, or to incur liabilities, are regarded as absolutely void as against the partner who did not join, but valid as to those who sign. *Doe v. Tupper*, 43 D. 483.

A partner may bind his copartner by deed, if the deed conveys only such property as could be conveyed without the deed. *Price v. Alexander*, 52 D. 526.

The execution of a deed purporting to be executed by a partnership, but acknowledged by one of the firm alone, is not proved unless a previous authorization or subsequent ratification by his copartners is shown. *Shirley v. Fearn*, 69 D. 375.

Partner's power to bind copartners by deed discussed, *arguendo*. *Worrall v. Munn*, 55 D. 330.

4. *Various other instruments*. — If one partner execute a deed of release under his hand and seal, in the firm name, of a debt due the firm, it extinguishes the debt, and the release is binding on the firm. *Pierce v. Hooker*, 3 D. 467.

A mortgage given to three partners to secure payment of a debt due the firm may be transferred by an assignment of such debt, executed by one of the partners in the name of the firm. And the fact that a seal is appended to the name of the firm does not invalidate the assignment. *Dubois's Appeal*, 80 D. 478.

One partner may bind the partnership by a sealed note executed in the firm name, for a loan of money for the partnership business, so far at least as to warrant a recovery under the common counts, by bringing in the instrument to be canceled. *Walek v. Lennon*, 38 R. 75.

A partnership formed to continue until a certain date leased premises for a term to expire at the same date, and made valuable improvements thereon. During the term one partner, without the knowledge of the others, took a renewal of the lease in his

own name for a term to begin at the expiration of the partnership term. *Held*, that the new lease inured to the benefit of the firm, and that the partner was in equity a trustee of the lease for the partnership. *Mitchell v. Reed*, 19 R. 252.

5. *Previous authority, or subsequent ratification*. — One partner or member of an association cannot execute a deed or writing under seal so as to bind his copartners without express authority therefor; but such authority may be given by parol. However, if by their subsequent acts the copartners ratify a contract made without such authority, they will be compelled to contribute ratably to any damages that may have been recovered at law on such contract against the partner executing it. *Skinner v. Dayton*, 10 D. 286.

A partner present and assenting to the execution of a sealed instrument by his copartner in the firm name is bound thereby. *Fitchthorn v. Boyer*, 30 D. 300; *Hart v. Withers*, 21 D. 382. Such presence and assent may be proved by any evidence satisfactory to the jury, such as the admissions of the party. *Fitchthorn v. Boyer*, 30 D. 300. S. P., *McDonald v. Eggleston*, 60 D. 303.

Circumstances, if tending to show previous authority or subsequent ratification by copartners of a partner's act in executing an instrument under seal in the name of the firm, should be submitted to the jury. *McDonald v. Eggleston*, 60 D. 303.

One may adopt a seal affixed by another, without his authority, or even against his will, and by delivery make the instrument his deed. *Hart v. Withers*, 21 D. 382.

One partner may, by virtue of parol authority from his copartners, bind them by an instrument under seal, although as a general rule an authority to bind another by an instrument under seal must itself be created by a like instrument. *Wilson v. Hunter*, 80 D. 795. Contra, see *Hart v. Withers*, 21 D. 382; *Turbeville v. Ryan*, 34 D. 622.

A partner may bind his copartner by contract under seal, in the name and for the use of the firm, in the course of the partnership business, if the copartner assents to the contract before its execution, or afterwards ratifies and adopts it; and such assent or adoption may be by parol. *Bond v. Aitkin*, 40 D. 550. S. P., *Cady v. Shepherd*, 22 D. 379; *Price v. Alexander*, 52 D. 526; *Drumright v. Philpot*, 60 D. 738; *McDonald v. Eggleston*, 60 D. 303.

46. *By confession of judgment*. — A confession of judgment by one partner binds him, but not his copartner. *Bitzer v. Shunk*, 37 D. 469; *North v. Mudge*, 81 D. 441.

Fraud upon the partnership by one of two partners will be relieved against in a court of equity. So where a partner gave notes in the name of the firm, and afterwards confessed judgment thereon, equity will relieve the copartner from such judgment, it appear-

For Index to Notes in American Decisions and American Reports, see Volume I.

ing that he had no knowledge of the proceedings until the judgment had been obtained. *Morgan v. Scott*, 12 D. 35.

A partner has no authority to confess judgment for his copartner, either before or after dissolution; and where judgment is so confessed after dissolution by one partner, it will be set aside as against the copartner, and an execution against him will be quashed. *Morgan v. Richardson*, 57 D. 235.

47. By admissions or declarations.* — The answer and admission of one partner upon process of garnishment, where both have been regularly served with process, will bind the other. *Anderson v. Wanner* 37 D. 170.

An admission of one partner that he has no right of action is competent evidence to show the fact admitted by him. *Cochran v. Crenshaw*, 50 D. 186.

Acknowledgment or part payment of a debt by one partner amounts to a promise binding on the firm. *Burgan v. Lyell*, 55 D. 53.

A partner's declarations are evidence against the copartner in an action against the latter upon a partnership liability. *Fickett v. Swift*, 66 D. 214.

Where the authority of an agent or partner depends upon some fact outside the terms of his power, and which, from its nature, rests peculiarly within his knowledge, his principal or firm is bound by his representation, though false, as to the existence of such fact. *Griswold v. Haven*, 82 D. 360.

Where one of a firm of warehousemen falsely represented to a person who advanced money on the faith of such representation that he had on storage with the firm a certain quantity of grain, the innocent partners were held bound by such representation and by the firm receipts given by the former for such money, and responsible therefor. *Id.*

Where a partner falsely represented that he had grain on storage with his firm of warehousemen, and sold the same, giving the firm receipt for the price, the purchaser suing for conversion of the grain was entitled to recover, though evidence was improperly received which showed that the grain never had existence. *Id.*

A payment on a joint and several promissory note, by one of the makers, who were partners when they signed the note, will take it out of the statute of limitations as to the others, if the note is a partnership debt and the payment is made out of partnership funds, although the partners had discontinued the partnership style and were conducting the business as a corporation at the time of such payment; and parol evidence is admissible to show these facts. *Mix v. Shattuck*, 23 R. 511.

Acts and declarations of a partner actually engaged in a transaction in his own name do not bind the partnership so as to affix a liability upon it. *Lockwood v. Beckwith*, 72 D. 69.

48. By entries in books of account. — Entries made in books of a partnership, to which plaintiff had no access, are not binding upon him. *Folt v. Wilson*, 83 D. 599.

49. By receiving payment. — Payment to a partner is payment to the firm, unless expressly forbidden by the other partners. *Gregg v. James*, 12 D. 151.

Receipt of money by an agent is *prima facie* evidence of its receipt by the principal; and its receipt by a partner is *prima facie* evidence that it was received for the benefit and use of the firm. *Simons v. Vulcan Oil & M. Co.*, 100 D. 623.

50. By compromising firm claim. — Where one of two partners releases a debt due the partnership, though he has no authority to release more than his own moiety of the debt, the debt is, however, discharged. *Salmon v. Davis*, 5 D. 410.

51. By assignment for benefit of creditors.* — An assignment under seal, of the effects of the firm, by one or more of the partners for the payment of the firm debts, binds the rest. *Robinson v. Crowder*, 17 D. 762.

Whether one of the partners, during the existence of the partnership, may, against the consent of his copartners, assign the partnership effects in the name of the firm for the payment of a firm debt, whereby a preference is created, *quære*. *Egberts v. Wood*, 24 D. 236.

Either of the partners before the dissolution of the firm, or all of them afterwards, may appropriate the partnership funds to the payment of one creditor in preference to another. *Id.*

A deed of assignment executed by one partner only cannot be avoided on that ground, when the property has been delivered to the assignee. *Hennessy v. Western Bank*, 40 D. 560.

One partner has no implied authority to make a general assignment of the partnership property for the benefit of the partnership creditors, and such assignment is void, unless the other partners are absent or incapable of expressing assent or dissent. *Loeb v. Pierpoint*, 43 R. 122. But their subsequent ratification will make it effectual except as to persons who have acquired rights immediately. *Coleman v. Darling*, 57 R. 253.

Where one partner absconds, leaving the partnership insolvent, the other may make a general assignment of the partnership property, including lands, for the benefit of creditors. *Sullivan v. Smith*, 48 R. 354.

* Assignment for benefit of creditors, whether one partner may make, see note, 45 R. 356-361. See also ASSIGNMENTS, etc., §.

* See also EVIDENCE, 144.

For Index to Notes in American Decisions and American Reports, see Volume I.

An assignment by partners which stipulates for a release is invalid, unless it transfers the separate estate of each of the partners, and this although it may not affirmatively appear that the partner who failed to execute the deed of assignment had any separate property. *Hennessey v. Western Bank*, 40 D. 560; *Wilson's Accounts*, 45 D. 701.

An express ratification of the assignment by the partner who did not sign the deed at the time of its execution by the other members of the firm can, if made after the expiration of the time given for the execution of releases, have no operation whatever as against creditors who did not choose to accept the terms proposed in the assignment. *Wilson's Accounts*, 45 D. 701.

52. By submission to arbitration. — Though one partner cannot bind his copartner, by a writing under seal, to submit to an award, yet if after the award is made such partner accepts the amount awarded and indorses a receipt in full on the award, it bars the copartnership claim, being in the nature of a release, or an accord and satisfaction. *Buchanan v. Curry*, 10 D. 200.

53. By wrongful acts, frauds, etc. — 1. *Negligence*. — Where physicians are in partnership, all are liable in damages for the professional negligence of one of the firm. *Hyrne v. Erwin*, 55 R. 15; *Whittaker v. Collins*, 57 R. 55.

2. *Fraud*. — For the fraud or deceit of one partner within the scope of his general partnership authority, the partnership is liable in damages. *Locke v. Stearns*, 35 D. 382.

Acts of one partner in effecting a fraudulent purchase of lands at sheriff's sale is binding on all the partners. *Blight v. Tobin*, 18 D. 219.

A partner cannot maintain trespass against a purchaser from copartner of all the partnership goods, though the sale was made in fraud of his rights; the remedy in such a case is in equity. *Wells v. Mitchell*, 35 D. 757.

Members of a partnership firm are answerable for a false warranty made by one of such members, in a sale of partnership property, within the scope of his authority; and they are equally liable for a fraud under the same circumstances, especially where they share in the profits. *Morehouse v. Northrop*, 89 D. 211.

A partner who receives and participates in use or sale of goods obtained by fraud of copartner will be held to have adopted the fraudulent act, and will be placed in the same situation in reference to the rights of the vendors of the goods as if he had directed his copartner to procure them, or had originally concurred with him in the transaction. *Jacobs v. Shorey*, 97 D. 586.

A partner on a note signed by the firm by means of a forged indorsement, of which his

copartner was ignorant, obtained money from a bank, which was placed to the credit of the firm. Before the maturity of the note it was discovered that the indorsement was forged. *Held*, that the amount could be recovered immediately, in an action which would well lie against both partners. *Manufacturers' Bank v. Gore*, 8 D. 83.

N. and S. jointly owned a chattel, and agreed that N. should take possession and sell it for their joint benefit. N. did so, and sold it by means of false and fraudulent representations, dividing the profits equally with S. *Held*, in an action against both for the fraud, by the vendee, that both were liable, although the representations were made in the absence of S., there being no proof that he, on learning that they had been made, had repudiated the contract, or had ever offered to restore any part of the consideration. And the liability of the defendants would have been the same had they been regarded as partners. *Morehouse v. Northrop*, 89 D. 211.

Defendants entered into a written agreement to purchase, lease, and take refusals of lands on their joint account, and to sell, lease, or work the lands so obtained, all losses, expenses, gains, and profits to be divided equally among the parties to the agreement. There was evidence that this agreement had previously been in existence by parol. R., one of the defendants, represented to plaintiffs that the lands were oil-producing, whereas the indications of oil had been produced by petroleum poured on the lands through the connivance of J., another of the defendants. R. was cognizant of the fraud, but it did not appear that D., another defendant, knew of it. Plaintiffs purchased the lands, and after discovering the fraud, brought an action against defendants. *Held*, that the agreement entered into by defendants was a partnership, and was valid even when existing by parol; also that D. was liable with J. and R. for their fraudulent acts and representations in the transaction of the partnership enterprise. *Chester v. Dickerson*, 13 R. 550.

3. *Conversion*. — Conversion committed by one partner, of property which has been delivered to him for purposes connected with the business of the partnership, is deemed to be the act of the firm, unless repudiated by the other partners. *Nisbet v. Patton*, 26 D. 122.

The refusal by one partner to deliver goods upon demand, which have been received by the firm, is evidence of a conversion by all the partners. *Holbrook v. Wight*, 35 D. 607.

4. *Other torts*. — Partners are liable for a tort committed by one of their number, or by his servant or agent, in the prosecution of the partnership business. *Champion v. Bostwick*, 31 D. 376.

Partners are individually liable for tortious

For Index to Notes in American Decisions and American Reports, see Volume I.

acts of the firm, its agents and servants, and a partner may be sued therefor individually. *Stockton v. Frey*, 45 D. 138.

One partner is not chargeable with the tort of his copartner, done without his knowledge, when the wrongful act was wholly unconnected with the partnership business, but where it is connected with the business of the firm, and incident to it as the business is carried on, the tort of one partner is considered the joint and several tort of all, and the partner doing the act is considered as the agent of the other partners. *Heirn v. McCaugham*, 66 D. 588.

One partner is not liable for a malicious prosecution by his copartner, where he did not know of or consent to it, and it did not benefit the firm. *Rosenkrans v. Barker*, 56 R. 169.

2. What Acts of One Partner will Release the Firm.

54. In general. — A discharge of one partner by proceedings in insolvency does not release the others. *Russell v. Rogers*, 13 D. 326.

Payment by a partner, under a compromise, of a specific sum in satisfaction of a partnership debt, discharges it, and it cannot be kept alive by an agreement between the creditor and the paying partner to enable the latter to collect it from his copartner. *Le Page v. McOrea*, 19 D. 469.

A partner may pay a debt of his firm out of his individual property, even at the expense of his individual creditors. *Gallagher's Appeal*, 60 R. 350.

55. Individual note for firm debt.* — The acceptance of the note of one partner for a firm debt, and balancing the firm accounts therewith, does not release the firm. *Patashall v. Aphorp*, 1 D. 3.

Where a partner gave his individual note, taking up a promissory note issued by the firm the firm liability is thereby discharged. *Arnold v. Camp*, 7 D. 328; *Crooker v. Crooker*, 63 D. 509.

The individual note of one partner given to a firm creditor, and payable at the maturity of the firm debt, is merely a promise by one partner to pay the firm debt, is not a collateral security for the debt, and the creditor is not barred for suing the firm because of his laches in not collecting the note before the maker's insolvency. *Tyner v. Stoops*, 71 D. 341.

Admission by a firm creditor that by taking individual notes of one partner he had discharged the firm is not evidence of an agreement to discharge the firm, when made after the maker's insolvency, and indicating his own conclusion as to the effect of his taking the note. *Id.*

Taking the individual note of one member of a firm for the price of goods sold the firm

* See note on the effect of giving the note of a partner for a firm debt, 1 D. 4-6.

does not exempt the other member from liability therefor, unless there was an agreement and understanding to that effect. *Folk v. Wilson*, 83 D. 599.

Where the partners are all known, and the existence of the partnership brought home to those dealing with them, the latter may take the individual credit of any member of the firm if they so choose. Parties have a right to make their own contracts, to assume extraordinary liabilities, or to take inferior securities where they might have insisted on greater ones. *Richardson v. Farmer*, 88 D. 129.

A partner is exonerated, if an individual note of a copartner is accepted as a merger and discharge of the partnership liability. *Mackin v. Crutcher*, 99 D. 680.

A creditor of a dissolved partnership accepted the note of one of the partners for a portion of his demand, in discharge of the maker from liability for the partnership debt. *Held*, an effectual release. *Luddington v. Bell*, 33 R. 601.

56. Personal bond for firm debt. — A bond given by one partner for a simple contract debt due to a creditor of the firm, and accepted by him, is, in law, a release of the other partner, and an extinction of the simple contract debt at law and in equity. *Williams v. Hodgson*, 3 D. 563.

Such a bond, although not binding on the party who does not join in its execution, is, however, obligatory on the one executing it. *Id.*

The bond of one partner, taken at the time money is loaned to the partnership, and as the consideration for such loan, is an extinguishment of the debt, and not a collateral security. *Bond v. Aitkin*, 40 D. 550.

III. SUITS BETWEEN PARTNERS.

57. In general.* — An assignment of all partnership demands to one of the firm, including a claim against such assignor, does not entitle the firm to sue such assignor. *Burley v. Harris*, 29 D. 650.

A partner in a single adventure or transaction to be performed for a stipulated price has an action of *assumpsit* for his share against the other partner, who has received the whole sum due after the work was finished, and it is not necessary to resort to account render. *Hamilton v. Hamilton*, 55 D. 585.

An indorsement of a note payable to a firm, or order, by one partner in his individual name, does not authorize the other partner to sue thereon in his own name. *Estabrook v. Smith*, 66 D. 443.

58. Suit at law, generally. — No action at law lies by one partner against another where there has been no settlement of the partnership accounts, and no promise by the defendant to pay the balance struck. *Mur-*

* Actions between partners, what maintainable, see note, 12 D. 649-651.

For Index to Notes in American Decisions and American Reports, see Volume I.

ray v. Bogert, 7 D. 486; *Course v. Prince*, 12 D. 649; *Dana v. Gill*, 20 D. 255; *Burley v. Harris*, 29 D. 650; *Graham v. Holt*, 40 D. 408; *Bonnaffe v. Fenner*, 45 D. 278.

One partner has no right to sue his copartner at law, to pay his portion of a contribution. *Kennedy v. McFaddon*, 5 D. 434; *Lawrence v. Clark*, 35 D. 133.

A partnership cannot sue one of its members at law. *Burley v. Harris*, 29 D. 650.

An action at law cannot be sustained by a partnership against one of its members for advances made to the latter by the firm. *Thompson v. Steamboat J. D. Morton*, 59 D. 653.

One partner cannot maintain an action at law against the other to recover a sum of money advanced by him to be invested, under an agreement before witnesses that the profits arising from the investment, if any, should be shared equally by the partners, and in the absence of proof that the money advanced was a loan, or that the partnership was limited to any part of the adventure, or that it was limited to any particular time, or that it was dissolved. The remedy is by bill in equity for an account on dissolution, and decree for any balance found due. *Neubrau v. Snider*, 88 D. 667.

A partner may sue at law a copartner for the excess contributed over and above his proportion of the joint stock. *Bumpass v. Webb*, 18 D. 34.

An exception to the rule that a partner cannot sue his copartner for a sum of money due on account of the partnership exists where the sum of money sought to be recovered is separated from the partnership account. *Bonnaffe v. Fenner*, 45 D. 278.

The making of a promissory note by several partners in favor of another partner is an acknowledgment of the separation of the sum from the partnership account, and such partner may recover at law against his copartners upon it. *Id.*

One partner can maintain an action at law against another partner for a breach of the partnership agreements, and need not join other partners as defendants if they have sold out before the cause of action arose. *Vance v. Blair*, 51 D. 467.

A partner may sue his copartner at law for damages caused by his willfully dissolving the partnership before the expiration of the term fixed by the articles for its continuance. *Bagley v. Smith*, 61 D. 756.

Damages recoverable by one partner for his copartner's wrongful dissolution of the partnership include anticipated profits for the residue of the term fixed by the articles. *Id.*

A partner cannot maintain an action of account render against his two copartners jointly, without showing joint liability to account. *Portsmouth v. Donaldson*, 72 D. 782.

Two partners cannot maintain a joint action of account against a third to recover their share of the net profits received by him, in the absence of an independent promise or of an adjustment of the partnership matters. *Farrar v. Pearson*, 8 R. 439.

Assumpsit will not lie by one partner against a copartner, as a general rule, it seems, in respect to any matter connected with the partnership transactions, or which involves the consideration of their partnership dealings. *Bruce v. Hastings*, 96 D. 592.

That there are outstanding debts does not necessarily defeat an action of *assumpsit* by one partner against another, as the plaintiff may show that these debts are incapable of collection. *Williams v. Henshaw*, 23 D. 614.

But where a new trial is granted for the purpose of enabling the plaintiff to prove that the outstanding debts are not collectible, he cannot assume that all the debts had been paid, and on this theory recover the balance stated. *Id.*

On articles of partnership, the partner's remedy for violation of covenants therein contained is in covenant. *Dana v. Gill*, 20 D. 255.

An action at law lies for breach of an agreement to form a partnership. An action at law lies for breach of a covenant in a partnership agreement, where the damages belong exclusively to the partner claiming, and can be assessed without an accounting of the business. *Hill v. Palmer*, 43 R. 703; *Duncan v. Lyon*, 8 D. 513.

59. Action at law for balance due. — *Assumpsit* between partners will lie, generally, where, after a balance struck, a partner has promised to pay. *Dana v. Gill*, 20 D. 255.

No express promise to pay such balance is essential. These principles were applied between part owners of a vessel which had been engaged in a whaling voyage. *Fanning v. Chadwick*, 15 D. 233.

In Massachusetts this principle extends to all cases in which the rendition of the judgment will be an entire termination of the partnership transactions. Rule is not inapplicable because of debts due the firm, if it be shown that the debts are not collectible, or that the plaintiff has assigned them to the defendant; but the assignment must be before action brought. *Williams v. Henshaw*, 22 D. 366.

After dissolution of the partnership, where there has been no settlement, and no agreement with or notice to his partner, a copartner cannot, by assuming all the outstanding debts, maintain *assumpsit* for any balance which may be due. *Williams v. Henshaw*, 23 D. 614.

When a settlement has been had and a balance struck, an action at law will lie for recovery of such balance, but as to matters of partnership account subsequently accruing

For Index to Notes in American Decisions and American Reports, see Volume I.

ing, a settlement can only be compelled by suit in chancery. *De Jarnette v. McQueen*, 68 D. 164.

A partner has a lien on partnership realty for a balance found due him from his copartner upon a settlement at a dissolution of the firm, and such lien takes precedence of an assignment for creditors made by his copartner. *Roberts v. McCarty*, 68 D. 604.

The mere fact that a partnership once existed does not, it seems, render void a judgment obtained in the county court of Illinois by the administrator of one partner against the administrator of the other. If the defendant chose to submit to the jurisdiction, the power of the court to pronounce a judgment for the balance it might find due cannot be denied on the ground that that court has no jurisdiction in matters of partnership. *Gild v. Bailey*, 92 D. 190.

60. Right to relief in equity. — One partner may sue the other for his share of the profits, during the continuance of the partnership, if the articles thereof provide for a division of profits before its determination. *Rondeau v. Pedesclaux*, 23 D. 463.

Where an agreement had been made for a partnership between plaintiff and defendant, by which defendant was to contribute an amount of money and plaintiff only his services, — *held*, that an action would not lie to compel the performance of the agreement. *Buck v. Smith*, 18 R. 84.

61. Suits to compel accounting, generally. — Equity will not entertain a bill for an account, even between partners, when the transaction is plain and simple, not involving a statement of complicated partnership accounts, and having no feature taking it out of the jurisdiction of a court of law. *Lesley v. Eosson*, 77 D. 679.

A bill for an account between partners will not lie for the breach of a particular stipulation of the articles of partnership, for which an adequate remedy at law by recovery of damages exists. *Kinloch v. Hamlin*, 27 D. 441.

When an illegal partnership enterprise has been completed, one partner cannot refuse to account to the other for the profits on the ground of the illegality of the partnership objects. *Pfeuffer v. Malby*, 38 R. 631.

One partner may be compelled to account to his copartners for profits derived from clandestine dealing with third parties in fraud or to the disadvantage of the copartners. *Kilbourn v. Latta*, 60 R. 373.

A former partner is not a necessary party in a suit between the partners for an accounting, when he has sold out all interest in the firm. *Hoswell v. Harvey*, 39 D. 376.

A bill in equity by one partner against one of his copartners for an account, alleging that the other partners are not within the jurisdiction of the court, that they have received their full share of the partnership

effects, that the defendant has received more than his share and the complainant less, is not demurrable for a non-joinder of the other partners. *Towle v. Pierce*, 46 D. 679.

A bill for an account between partners may be maintained, in a proper case, without a prayer for dissolution. *Pirle v. Penn*, 28 D. 70.

A partner cannot have a partial account, but accounts between partners must embrace all partnership transactions. *Baird v. Baird*, 31 D. 399.

A bill in equity need not state with as much certainty and particularity the facts of the case, where it alleges that the complainant and defendant are copartners; that the defendant has all the partnership books in his possession and under his control, and refuses to permit the complainant to examine them, and prays for an account, as would be necessary if the complainant had access to the books. *Towle v. Pierce*, 46 D. 679.

Evidence of profits realized during the continuance of a partnership may be received, as aiding to estimate profits which would have been realized thereafter had the firm been continued. *Bagley v. Smith*, 61 D. 756.

An agreement for dissolution of a partnership between A, B, and C provided that A should continue the business, paying B and C for their respective interests, for the arbitration of disputes, and for an account of stock. This account was taken, and certain goods, supposed to belong to a third party, were excluded. Arbitrators were selected, and decided all matters of difference, but the question about those goods was not submitted to them. A settled with B and C on the basis of that account. In a subsequent dispute between the partners and the third party, the referee to whom it was submitted decided that a large portion of those goods belonged to the late firm. *Held*, that the account was not conclusive; that B and C might show that those goods were the property of the firm; that the award of the arbitrators was no bar; that A could not prove his readiness and willingness to refer this claim to the arbitrators; and that the award, and the personal testimony of the referee that the ownership of those goods was in dispute before, and decided by him, were admissible. *Evans v. Clapp*, 25 R. 52.

62. Injunction. — Specific execution of a partnership contract will be decreed by a court of equity, which will sometimes enjoin a partner from persisting in conduct jeopardizing the rights or derogating from the authority of his copartner. *Pirle v. Penn*, 28 D. 70.

An order granting an injunction restraining defendant from collecting debts, making sales, etc., is proper in a suit for a dissolution and an accounting by one partner against his copartner, upon motion made, without

For Index to Notes in American Decisions and American Reports, see Volume I.

notice, if the circumstances shown are such that the giving of notice might in all probability "accelerate the injury." *Allen v. Hawley*, 63 D. 198.

63. Receiver. — A receiver will be appointed by chancery to settle up the affairs of a partnership whenever it is made to appear, by a bill filed by one partner, that there is a breach of duty or a violation of the agreement of partnership on the part of the others. *Allen v. Hawley*, 63 D. 198.

Chancery has no power to appoint a receiver to carry on the business of a copartnership. Such power would not be intended by an order "to take charge of the steamer Quincy, to prevent injuries, . . . to repair said boat so as to put her in condition for sale, or such disposition of her as may be ordered by the parties, or as the court may order. The expense of repair, and the like, to be repaid by proper use of said boat." *Id.*

A court of equity, in a suit between partners, will not appoint a receiver, or provide for interim management of the partnership, when there is no prayer for a dissolution. *Pirtle v. Penn*, 28 D. 70.

The disposition of a fund in the hands of a receiver, in a suit to dissolve a partnership and distribute its assets, cannot be affected by any action of the parties to the suit so as to deprive the court of power to control it. *Adams v. Haskell*, 65 D. 491.

A partnership receiver, appointed in a suit by a representative of a deceased partner against the surviving partner to compel a settlement of the affairs of the partnership, and the application of its property to its debts, is an officer of the court, invested with the whole equitable title to the firm assets without an assignment; represents, in any suit affecting the partnership property, the interests therein of all parties to the suit in which he was appointed, if not of persons who are not parties; is clothed with all the rights and equities of the deceased partner for the purposes of his trust; and may sue, without leave, in this country, to obtain possession of the partnership property for the purpose of applying it to the partnership debts, and need not, on a bill filed for that purpose, join the representative of the deceased partner as a party. *Tillinghast v. Champlin*, 67 D. 510.

64. What are proper charges and credits. — Where one partner holds exclusive possession of the partnership property, and refuses to let in the other partner, he will be accountable in a court of equity to such partner or his grantee for one half the rents and profits of the property so withheld. *Adams v. Kable*, 44 D. 772.

Where one partner occupies, with his family, premises belonging to the firm, he is justly chargeable, at the dissolution of the partnership, with the reasonable rent thereof,

although there was no special agreement to that effect. *Holden v. Peace*, 45 D. 514.

Advances to the firm and advances from it to one of its members do not constitute debts, strictly speaking, but are only items in the account between the partners in the winding up of the concern. *Wilson v. Soper*, 56 D. 573.

In taking a partnership account upon dissolution, the capital stock should not be taken into account until a balance is struck, and then, if there is any fund on hand, each should be allowed to withdraw his capital, or a ratable part of it. *Phelan v. Hutchinson*, 93 D. 602.

In taking such account debts due from one of the partners to the firm should not be deducted out of the assets of the firm. They should be deducted out of the portion coming to him after a balance has been struck. *Id.*

Upon the settlement of a partnership, where two partners are equal in interest, one half of any balance of loss or profit is the extent of the liability of one to the other, after having first applied the partnership assets to the exoneration of the partnership liabilities; and as to individual transactions, the whole balance is the amount of the indebtedness of one to the other. *Chambers v. Crook*, 94 D. 637.

A partner who neglects and refuses, without reasonable cause, to perform personal services which he has stipulated to render the partnership, is liable to account to the firm for the value of the services in the settlement of the partnership accounts. *Marsh's Appeal*, 8 R. 206.

Where several persons entered into articles of agreement, forming a partnership, and one of the partners, by verbal agreement, assumed to render certain services which he neglected to perform, — held, that he was chargeable with the value of his services on the settlement of the firm accounts. *Id.*

A statement of partnership accounts, prepared by clerks to aid in a settlement between the partners, is *prima facie* evidence, binding as to items mutually assented to at the time, but not as to disputed items. *Rehill v. McTague*, 60 R. 341.

65. When interest will be allowed. — In the settlement of partnership accounts between partners, there is no general rule as to interest, but the allowance or refusal thereof depends upon the circumstances of each case. *Gyger's Appeal*, 1 R. 382.

A partner who has advanced money to the firm is entitled to interest thereon from the time of the advancement. *Hodges v. Parker*, 44 D. 331.

A partner receiving monthly rents is

* Partner, when may be charged with interest in partnership account, see note, 45 D. 518-520. See also INTEREST, 2.

For Index to Notes in American Decisions and American Reports, see Volume I.

chargeable with interest from date of receipt until paid over to the partnership. *Lafan v. Naglee*, 70 D. 678.

Where, in settling up the accounts of a dissolved partnership, interest is charged upon notes and accounts upon a wrong principle, the calculation will not be disturbed if no substantial injury is done. *Phelan v. Hutchinson*, 93 D. 602.

66. When it will not be. — One partner cannot be charged interest on a balance due by him each year, unless there has been a special agreement to that effect. *Holden v. Pease*, 45 D. 514.

In the absence of a special agreement, interest cannot be charged on a partnership account, except upon a balance due at the time of the dissolution of the firm, and until a settlement of the accounts be made. *Id.*

A partner advancing funds will not be allowed compound interest. *Lafan v. Naglee*, 70 D. 678.

67. Right to compensation for special services. — One partner cannot maintain an action against his copartner for personal services rendered for the copartnership. *Causten v. Burke*, 18 D. 297.

A partner is not entitled to compensation for services in conducting the partnership business, beyond his share of the profits, unless there is a stipulation to that effect. *Anderson v. Taylor*, 38 D. 689; *Reynold v. Dodd*, 26 D. 401.

A partner may recover compensation for his services in the firm business if there was an implied agreement therefor. *Emerson v. Durand*, 54 R. 593.

68. — or capital. — An express promise from one partner to another in respect to contributing to the common stock or making advances thereto may be enforced in an action at law, but an implied promise cannot. *Townsend v. Gooley*, 32 D. 514.

Assumpsit may be maintained by one partner of a ship against another, to recover the excess contributed by him in building the ship, over and above his share, although there has been no liquidation of their accounts, nor balance ascertained, nor any express promise to pay such excess. *Marshall v. Winslow*, 25 D. 264.

IV. DISSOLUTION.

1. How a Partnership may be Dissolved.

69. In general. — Although one partner exaggerated the value of property which he put into the firm as capital, this is no ground of dissolution. So of discourtesy to customers, not causing any serious injury. Where unfriendly relations are alleged, they must be so serious as to prevent the success of the business, and the complainant must

himself be without fault. *Gerard v. Gateau*, 25 R. 438.

70. By act of the parties. — To dissolve a partnership at will, in equity, two things are necessary: 1. The renunciation of the partnership must be in good faith; and 2. It must be made at a reasonable time. *Howell v. Harvey*, 39 D. 376.

A partner cannot dissolve a firm during the absence and without the knowledge of the other partner, when the latter was absent with the consent of the dissolving partner. *Id.*

Dissolution of a partnership is not produced by the voluntary absence or absconding of one of the partners. *Arnold v. Brown*, 35 D. 296.

An order of sale of partnership property upon a dissolution of the partnership will be made by a court of chancery where there is no provision for its disposition in the partnership agreement. *Allen v. Hawley*, 63 D. 198.

A transaction whereby managing members of an embarrassed firm unite in forming a manufacturing corporation under the general law, and then transfer to it the property of the partnership, is fraudulent as to existing creditors, and the property so transferred may be taken in execution as that of the former firm; the creditors of the new corporation have no priority of claim to the property in its possession. *Booth v. Bunce*, 88 D. 372.

It is in the power of one partner at any time to withdraw, and thus cause a technical dissolution of the firm, subject to liability to his copartners if the act was wrongful. *Stemmer's Appeal*, 98 D. 255.

71. By death. — Death, as a general rule, dissolves a partnership. *Powell v. North*, 56 D. 513.

The effect of dissolution of partnership by death of one of the members is to vest the legal title to the choses in action and the debts in the surviving partners as joint tenants under the law merchant. *Egberts v. Wood*, 24 D. 236.

Death of a partner does not terminate the employment of an agent of the firm, hired by express contract, for a definite period, so as to defeat his claim for compensation for the full period. *Ferreira v. Sayres*, 40 D. 496.

72. By bankruptcy or insolvency. — The bankruptcy of one partner dissolves the copartnership, and the assignee of the bankrupt and the insolvent partner become tenants in common or joint owners of the partnership property, and must unite in suits respecting the same. *Halsey v. Norton*, 7 R. 745.

Insolvency of one or of both partners does not operate as a dissolution of the firm, though perhaps this result would follow from such bankruptcy or legal insolvency as

* See monographic note on the causes for and effect of dissolution, 98 D. 260-271.

For Index to Notes in American Decisions and American Reports, see Volume I.

results in an assignment of all the insolvent's effects. *Arnold v. Brown*, 35 D. 296.

Insolvency does not of itself work dissolution of partnership, nor divest partners of their authority over firm property. *Siegel v. Chidecy*, 70 D. 124.

73. By assignment of interest. — If a partner, in contemplation of insolvency, dissolves the partnership by a general assignment of his interest and property in the firm, makes an assignment of his individual property, and authorizes the assignee to dispose of the same, and pay the proceeds over to his individual creditors, the funds in the assignee's hands must be distributed *pro rata* among his own creditors and those of the firm from which he has retired. *Miller v. Metill*, 67 D. 305.

Where a partner, in contemplation of insolvency, has dissolved the partnership by assignment to a trustee, and the partnership property is by agreement divided between the retiring partner and his associates so as to leave the property as it was before the partnership, on consideration that the remaining copartners will pay the partnership debts; and the copartners form a firm of their own, but in contemplation of their own insolvency assign all their own individual and partnership property to a trustee, with directions to pay the partnership debts, — the funds in the hands of the trustee of the latter firm must be distributed *pro rata* among the creditors of both the former and the latter firms; and if any balance of the funds of the latter firm remains after paying the debts of both firms, the same may be adjusted to reimburse the retiring partner, in view of the agreement that the latter firm would pay the debts of the former. *Id.*

74. By war. — A commercial copartnership between a resident of the North and a citizen of the South was dissolved by the war of the rebellion. *Woods v. Wilder*, 3 R. 684; *Hubbard v. Mattheus*, 13 R. 562.

75. By decree of the court. — Equity has jurisdiction to decree dissolution of a partnership during the term for which it was originally entered into, and to declare it void *ab initio*, where there was fraud, imposition, misrepresentation, or oppression in the original agreement. *Fogg v. Johnston*, 62 D. 771.

Equity may decree dissolution of a partnership for causes arising subsequent to its formation, such as misconduct, fraud, or violation of duty of one partner, his incapacity or inability to contribute his skill, labor, or diligence, or to perform his obligations or duties, or for the existence of a state of facts rendering it impracticable to accomplish the purposes of the partnership. *Fogg v. Johnston*, 62 D. 771; *Hoswell v. Harvey*, 39 D. 376.

Equity will dissolve a partnership at the complaint of one who was induced to enter

into a partnership with another through his misrepresentations as to his skill as a machinist and engineer, and because of the misconduct and violation of duty of the latter. *Fogg v. Johnston*, 62 D. 771.

Equity, upon dissolving a partnership, may fix the date of the dissolution at the time of the abandonment by the aggrieved party, and notice thereof given by him. *Id.*

If equity makes a final decree dissolving a partnership, and applying its effects to the payment of its debts, without judicially ascertaining the joint liabilities which the receiver is directed to pay, this may still be done, with proper notice to the defendants. *Hubbard v. Curtis*, 74 D. 283.

A bill to enjoin sale of partnership property under execution against individual partner, and for a dissolution and settlement of the partnership to ascertain the interest of the debtor partner in the firm, may be filed either by such debtor partner, by the other partners, by the joint creditors, by the separate creditors, or by the purchaser of the partnership property, if that has been sold. *Id.*

A wide discretion is vested in courts of equity on the subject of dissolution of partnership, and on what terms. A dissolution will not be decreed on slight grounds. *Slemmer's Appeal*, 98 D. 255.

Equity will decree dissolution of a partnership when it can no longer be carried on with comfort and advantage to all concerned. But where a valuable business has grown up by the labors and contributions of all, the courts should not appoint a receiver, but should be careful to preserve the partnership, and put all the partners on a fair and equal footing in competing for it. *Id.*

76. Necessity of notice of dissolution. — Partners are by law liable to be jointly charged for all credits given at the request of either partner, relating to the copartnership business, until public notice is given of a dissolution; and on a joint contract, if only one be sued, it is matter of abatement, but no advantage can be taken of it under the general issue. *Bradley v. Camp*, 1 D. 13.

Credit must be regarded as given to a partnership where goods were delivered before any publication of its dissolution and the retiring partner remained in the store as clerk, but with the old sign up. *Amidown v. Osgood*, 58 D. 171.

77. What is sufficient notice. — Evidence of the mere notoriety of the dissolution of a partnership is not admissible to affect a party with notice of that fact, it not appearing that such party had any actual knowledge thereof, or that notice of the dissolution had been published in any newspaper. *Pitcher v. Barrows*, 28 D. 306.

* Notice of dissolution, what sufficient, and when necessary, see note, 26 D. 290-293

For Index to Notes in American Decisions and American Reports, see Volume I.

Actual notice of dissolution is required in order to exonerate a retiring partner as to those who have dealt upon the credit of the firm after its dissolution, but before notice thereof had been published. *Amidown v. Osgood*, 58 D. 171.

Notice of dissolution must be actual as to those who have had previous dealings with the firm, and notice by publication is required as to others, in order to exonerate a retiring partner. *Id.*

Notice of dissolution was published in a newspaper, and a copy thereof, with a red line drawn about the notice, was mailed to an actual dealer residing in another place. *Held*, not alone sufficient to charge such dealer with notice. *Haynes v. Carter*, 27 R. 747.

A partnership indorsed the note of third persons to the plaintiff for value. At maturity the note was renewed by the check of third persons indorsed by the partnership and others. Pending the running of the note the partnership had been dissolved, and notice thereof had been published in the newspapers, but there was no proof that the plaintiff took or read them, and there was no proof of actual notice to him of the dissolution. *Held*, that he could recover against the partnership on the check. *Ross v. Coffeld*, 36 R. 389.

78. Who entitled to actual notice. — Public notice of the dissolution of the partnership, published in the newspapers, is sufficient as to strangers; but customers of the firm are entitled to special notice, or at least entitled to have knowledge of the notice brought home to them. *Nott v. Douming*, 25 D. 491; *Graves v. Merry*, 16 D. 471; *Prennis v. Sinclair*, 26 D. 238; *Watkinson v. Bank of Pa.*, 34 D. 521; *Johnson v. Totten*, 58 D. 412.

After a dissolution, a person having had previous dealings with a copartnership, but who had no notice of the dissolution, public or otherwise, may hold the partners liable on an acceptance in the name of the firm given by one of them. *Ketcham v. Clark*, 5 D. 197.

Continuous dealings between a partnership and a distant correspondent for some time entitles the latter to actual notice of the dissolution of the former, to avoid a liability of all the members of the firm for subsequent dealings carried on by one of the partners in the name of the firm, although without the knowledge or consent of the late partners. *Scheiffelin v. Stevens*, 84 D. 355.

A retiring dormant partner is bound to give notice of dissolution only to those who knew of his connection with the firm. *Nussbaumer v. Berker*, 29 R. 53.

Agents, clerks, and salesmen of one with whom a firm has had dealings are not entitled to actual notice of its dissolution. *Richardson v. Snider*, 37 R. 168.

79. Advertisement of notice. — Notice of dissolution published in the newspapers is sufficient as to all persons who have had no previous dealings with the firm. *Graves v. Merry*, 16 D. 471; *Lansing v. Gaine*, 3 D. 422.

A customer taking a newspaper in which a notice of the dissolution is printed is not affected with knowledge of such notice. *Watkinson v. Bank of Pa.*, 34 D. 521.

The court cannot determine who is a customer, and cannot reject proof of notice published in a newspaper because the party sought to be affected is a customer; the determination of that question is within the province of the jury. *Id.*

Publication of notice of dissolution in a newspaper is sufficient notice of such dissolution, to one taking a promissory note upon the faith of the firm's subsequent indorsement. *Galliot v. Planters' etc. Bank*, 36 D. 256.

Publication of dissolution in a local newspaper is not actual notice of such dissolution to a distant correspondent of the firm, nor is it evidence from which actual notice could be inferred. *Scheiffelin v. Stevens*, 84 D. 355.

80. Notice by mail. — Mailing notice of dissolution of partnership, properly directed, is not alone sufficient to relieve a retiring partner from liability to one who has had actual dealings with the partnership; it raises a presumption of notice, which may be repelled by proof that the notice was not in fact received. *Austin v. Holland*, 25 R. 246.

2. Consequences of Dissolution.

a. In General.

81. As between the partners. — Partners are bound in *solido*. All debts of the firm must be paid before either partner is entitled to a division of the assets, or to payment of any claim held by him against the partnership. *Ward v. Brandt*, 13 D. 352.

A division of profits realized after dissolution will not be decreed unless the business is continued with the joint stock and on the joint capital. *Reybold v. Dodd*, 26 D. 401.

A new partnership undertaking to pay the debts of the old firm, which comprised some of the same members, will not be permitted to deny a receipt given for the goods of such new firm, attached for a debt of the first partnership, nor to allege that such debt was but an individual debt. *Morrison v. Blodgett*, 29 D. 653.

Where a partnership is furnished with a signed blank, to be filled by the partners as a note, to be used in their business, and the blank is not used during the continuance of the firm, but after the dissolution one of the partners fills it up, all the partners will be liable to repay the signer the amount that

For Index to Notes in American Decisions and American Reports, see Volume L.

he may have been obliged to pay thereby. *Roberts v. Adams*, 33 D. 291.

A partner dissolving the partnership with an unfair design, and for his own private advantage, is liable to his copartners for the damages suffered thereby. *Howell v. Harvey*, 39 D. 376.

Where one partner, during the absence of the other, buys large quantities of goods, and then dissolves the partnership to the other's prejudice, he will be liable to the latter for his share in the proceeds. *Id.*

A covenant of indemnity against "all claims" against a dissolved firm, executed by the liquidating partner's assignee for benefit of creditors, to the other partner, on the latter's assigning all his interest in the partnership effects to such assignee, does not cover a debt of the firm not appearing on the partnership books, or otherwise known to the assignee, but known to the partner taking such indemnity, who kept the books and neglected to enter such claim. *Case v. Cushman*, 39 D. 47.

In equity, by the very law of partnership, the partnership effects are pledged to each separate partner, until he is released from all partnership obligations; but this lien is solely under the control of the partners, and if the partnership is dissolved, this lien is gone; while the partnership continues, this equitable lien existing for the benefit and security of the separate partners may be reached in a court of equity by the creditors, as the only mode of fully carrying into effect the stipulations of the parties at the time of forming the association. *Bardwell v. Perry*, 47 D. 687.

The effect of dissolution is, that from the moment the partnership terminates, the partners become distinct persons with respect to each other, and that consequently one partner can have no power to subject by his acts or declarations his former associates to new obligations, burdens, or responsibilities. *Ellicott v. Nichols*, 48 D. 546.

The power of adjusting the unsettled affairs of the partnership survives the dissolution, as a necessary power; yet with this qualification, and subject to this exception, those who were formerly partners stand to each other after the dissolution as if the association had never been formed. *Id.*

After dissolution *inter vivos*, the joint interest of partners continues in the partnership property, and the mutual agency continues, with some restrictions, until the affairs of the partnership are administered. *Kinsler v. McCants*, 53 D. 711.

Dissolution of a mining copartnership by one of the partners silently withdrawing or assigning his interest to another will not relieve such partner from liability for work done before or debts contracted after thus silently withdrawing or resigning. *Burgan v. Lyell*, 55 D. 53.

A partner's engagement to pay partnership debts is but a personal contract, and creates no lien where it is entered into by him on a sale to him of his partner's interest; and such partner need not appropriate the partnership assets to the payment of partnership liabilities. *Baker's Appeal*, 59 D. 752.

Each partner has the same rights after dissolution, in the fulfillment of outstanding engagements and in the settlement of business of the firm generally, as he had before. The different partners' rights are not changed, and unless the partnership articles stipulate to the contrary, a majority of the partners, if they act fairly and in good faith, may conduct the partnership business, notwithstanding the dissent of a minority. *Western Stage Co. v. Walker*, 65 D. 789.

Where, after dissolution, parties formerly composing the firm give a note in their individual capacity for a partnership liability, this does not change their character of joint and several makers, nor convert the liability into an individual debt as between the partners; and upon payment of the note by one, the others are not liable to him for contribution. *De Jarnette v. McQueen*, 68 D. 164.

On dissolution, either partner may continue to use the trade-marks, unless he has specifically transferred or expressly divested himself of such right. *Hazard v. Caswell*, 45 R. 198.

On dissolution of a partnership between lawyers, each is entitled to share in the fees collected from the unfinished business. *Oement v. McElrath*, 58 R. 17.

82. As towards third persons. — A firm note executed during the existence of the partnership, but not delivered until after the dissolution of the firm, does not bind the partnership. *Woodford v. Dornin*, 21 D. 573.

To hold a partnership upon an indorsement made after dissolution, of which public notice has been given, the indorsee must show that they came within the exception of customers of the firm who are entitled to particular notice. *Nott v. Downing*, 26 D. 491.

A judgment against a partner who was not personally served with process in an action brought after dissolution is void. *Galemie v. Akin*, 36 D. 604.

A dissolved firm continues in existence for many purposes. *Fereira v. Sayres*, 40 D. 496.

Creditors of a partnership may pursue remedies at law and secure preferences or liens upon partnership assets after suit brought by one partner for a dissolution and before a decree of dissolution. *Adams v. Woods*, 68 D. 313.

83. Power of one partner to bind the others after dissolution. — 1. *In general.* — A partner's acts after dissolution of the partnership will bind the other partners un-

* See notes on the power of one partner after dissolution of the firm, 51 D. 550-552; 5 D. 574-576.

For Index to Notes in American Decisions and American Reports, see Volume I.

less notice of the dissolution be given. *Price v. Tacey*, 14 D. 81.

One partner, after dissolution, cannot, without express authority, create or revive a debt against his late partners. *Wilson v. Torbert*, 21 D. 632.

Payment by one partner of debts of the partnership, with money held by him as agent of another, makes all the members of the partnership liable to the latter for the amount so paid, although such payment was made after the partnership had been dissolved. *Brown v. Higginbotham*, 27 D. 618.

Service of a citation after dissolution does not bind the partners who are not served personally, nor will the fact that the partner served had been given a general power to settle the partnership accounts render the service upon him valid as to the others. *Gaensie v. Akin*, 36 D. 604.

A partner cannot bind the firm after dissolution by his individual act in the partnership name, without express authority for that purpose. *Gallott v. Planters' etc. Bank*, 26 D. 256.

One partner, after dissolution, may waive notice of demand and non-payment of a note indorsed by the firm and discounted for it. *Seldner v. Mount Jackson Nat. Bank*, 59 R. 190.

2. *By contracts, generally.*—Dissolution works absolute revocation of all implied authority in either of the partners to bind the other to new engagements, contracts, or promises, made to or with persons having notice of the dissolution, although springing out of or founded upon the indebtedness of the firm. *Palmer v. Dodge*, 62 D. 271; *Hurst v. Hill*, 63 D. 705.

After dissolution, one of the partners cannot impose new obligations upon the firm, or vary the character or form of those already existing. *White v. Tudor*, 76 D. 126.

Money borrowed by a partner will be presumed to have been borrowed for the partnership, which will be liable therefor if it has been applied to its use. The principle applies as well after a partnership has been dissolved as before. *Estate of Davis*, 34 D. 574.

Where partners contract with a third person to perform a piece of work, and the latter, after the dissolution of the firm, enters into an agreement with one of the partners that he shall be exonerated from liability for the part of the work already done, but without any promise by the other partner to assume the liability, the contract made with the first partner is void for want of consideration; but if the second partner had made a new promise, it would have been a valid release for a consideration, one debt being substituted for the other. *Colliver v. Moulton*, 98 D. 370.

Where partners agree with a third person to perform a piece of work, they remain

joint contractors as to such third party after the dissolution of the partnership. Either of them may countermand the work before completion, but they remain joint contractors as to the part done, and liable in damages to the third party for his loss on the remainder of the contract. *Id.*

Delivery of goods, after dissolution, at a place designated by one of the firm, different from the place specified in the contract, is binding, and will render the other partner liable in an action for the purchase price. *Cady v. Shepherd*, 22 D. 379.

After partnership dissolved, one partner may yet assign all of the interest of the firm in a bond. *Morse v. Bellows*, 28 D. 372.

After dissolution, one of the partners cannot bind the others, without their consent, by settling accounts with or allowing credits to customers of the firm. *Rootes v. Wellford*, 6 D. 510.

On the dissolution of a firm by death of a member, neither survivor can, without the co-survivor's consent, assign the whole interest in the partnership effects to trustees for the benefit of preferred creditors. *Hgbarts v. Wood*, 24 D. 236.

3. *By making a bill or note.*—Where a partner, after dissolution, issues notes in the name of the firm, the other partner is not liable thereon; for the power to bind the firm ceases with the partnership. *Lansing v. Gaine*, 3 D. 422; *Woodworth v. Downer*, 37 D. 611; *Haddock v. Crocheron*, 5 R. 244; *Smith v. Sheldon*, 24 R. 529.

Giving a forged note in payment, by a partner to a creditor of the firm, after its dissolution, does not extinguish the original liability of the partnership. *Pope v. Nance*, 18 D. 60.

Where a partnership note is given and renewed after the dissolution of the partnership, by the remaining partner, in the old firm name, it will not bind the retiring partner, neither does its acceptance discharge the pre-existing debt; not being valid as to the retiring partner, the consideration fails, and the old debt remains. *Parker v. Cousins*, 44 D. 388. S. P., *Hurst v. Hill*, 63 D. 705. The renewal of the note being in the firm name is strong inference that the promisee did not intend to release the other partner, and hold alone liable the partner who executed it. *Parker v. Cousins*, 44 D. 388.

A surety on a promissory note given by one of the members of a dissolved partnership, in the name of the firm, and to renew a debt of such partnership, must look to such member alone for indemnity, as he cannot hold the other for it. *Palmer v. Dodge*, 62 D. 271.

A note made after dissolution by one of the partners, in the firm name, to payees, who have had previous dealings with the partnership and have no actual notice of the

For Index to Notes in American Decisions and American Reports, see Volume I.

dissolution, is binding on all the partners. *Graves v. Merry*, 16 D. 471.

Indorsees having actual notice of the dissolution may recover on such note against all the partners if it was valid in the hands of the payee, for want of such notice. *Ib.*

A partner's authority after dissolution to sign the firm name to notes for partnership debts may be implied from circumstances. *Ib.*

An express admission by the other partners that the firm is bound, or a failure on their part to object to such a note as being made without authority, when it is brought to their notice, will warrant a presumption that it was executed with their knowledge and consent. *Ib.*

After the dissolution of a partnership, A, one of the partners, without authority, gave a new note in the name of the firm, in renewal of an old six-per-cent partnership note, and without intent to defraud, made it to bear ten per cent interest, and included it in an individual liability of B, another partner. D, another partner, subsequently promised to pay the new note, supposing it to be a simple renewal of the old note. In an action on the new note, — *held*, that as the considerations were several, D was liable for the amount of the old note, with interest at six per cent. *Wilson v. Forder*, 5 R. 627.

4. *By accepting or indorsing negotiable paper.* — A partner after dissolution cannot bind the firm or his copartners, without special authority, by accepting a bill drawn on the firm. *Commercial Bank v. Perry*, 43 D. 168.

Where a bill is accepted without authority by a partner after dissolution of the firm upon which it is drawn, and is by the acceptance made payable at a certain bank, a demand there is not a demand upon the drawee, so as to charge the drawer. *Ib.*

One partner cannot, after dissolution, indorse a note in the name of the firm, even to pay a prior debt of the firm. *White v. Tudor*, 76 D. 126; *Nott v. Downing*, 26 D. 491; *Humphries v. Chastain*, 48 D. 247.

5. *By admissions and declarations.* — An admission by a partner after dissolution is not evidence against his former copartners. *Brady v. Hill*, 13 D. 503; *Baker v. Starkpoole*, 18 D. 508; *Hamilton v. Summers*, 54 D. 509.

Admissions of a partner after dissolution, not relating to the previous business of the firm, are not evidence against the partners. *Taylor v. Hillyer*, 26 D. 430.

A partner's admissions after dissolution, in regard to a partnership demand, are competent though not conclusive evidence. *Oady v. Shepherd*, 22 D. 379.

An admission by one partner, after dissolution, that a particular debt of the firm was not paid, though a receipt had been given therefor, is evidence against his copartner, particularly where such admission is made by the active partner, who has been consti-

tuted agent to settle up the firm business. *Bridge v. Gray*, 25 D. 358.

After dissolution, the admission of a debt by one partner is not sufficient of itself to charge the other partners, and no act can be done by one which is binding on the rest, except under special circumstances. *Chardon v. Olphant*, 6 D. 572.

The acknowledgment by one partner of a partnership debt, after the dissolution of the partnership, does not deprive the other partner of the benefit of the statute of limitations. *Lewy v. Cadet*, 17 D. 650; *Ellcott v. Nichols*, 48 D. 546; *Van Keuren v. Parmelee*, 51 D. 322.

After dissolution, a partner cannot bind the firm by an acknowledgment of a debt, whether the statute of limitations has operated to bar it or not. *Moss v. Donelson*, 36 D. 309.

The implied agency of a partner to bind his copartner by a new promise ceases at dissolution. *Van Keuren v. Parmelee*, 51 D. 322.

Declarations of a partner after dissolution cannot charge the partnership with a debt; though if the existence of the debt and the original liability be proved otherwise, such declarations would be sufficient to remove the bar of the statute of limitations. *Willis v. Hill*, 31 D. 412; *Greenleaf v. Quincy*, 28 D. 145. But such acknowledgment is entitled to little weight if not honestly made, but rather with a design to charge the copartner. *Austin v. Boastwick*, 25 D. 42.

An acknowledgment by one partner, after a dissolution of the partnership, will prevent the operation of the statute of limitations upon a firm debt. *McIntire v. Oliver*, 11 D. 760; *Austin v. Boastwick*, 25 D. 42.

Admissions of one of the makers of a firm note after dissolution of the partnership, but before the statute of limitations has run, will remove the bar of the statute as to all the makers. *Beardsley v. Hall*, 4 R. 74.

An acknowledgment by one partner operates against all, to take a debt out of the statute of limitations, whether made before or after the dissolution of the copartnership, or before or after the statute has run upon the demand. *Wheelock v. Doolittle*, 46 D. 163.

Declarations of a partner after dissolution bind himself only. *Barringer v. Sneed*, 20 D. 74.

Admissions and declarations of a partner after dissolution are admissible in evidence against himself; so under the Pennsylvania statute, where one firm sues another and he is a member of both. *Tassey v. Church*, 39 D. 65.

A promise by one partner after dissolution of the partnership, and before a suit is barred by the statute of limitations, to pay a partnership debt, does not prevent the running of the statute as to the other partners,

For Index to Notes in American Decisions and American Reports, see Volume I.

although the creditor was ignorant of the dissolution. *Tate v. Clements*, 26 R. 709.

Payment of interest on a note drawn by a firm, by one of the members, after the dissolution of the firm, but within six years after the maturity of such note, will renew it as against the statute of limitations; nor will the fact that one of the firm is a married woman alter the effect of such renewal. *Merritt v. Day*, 20 R. 302.

Where, after dissolution of a partnership, one of the late partners, without the knowledge or authority of the other, made payments upon a debt against which the statute of limitations had run, — held, that such payments did not revive the debt as against his late copartner. *Mayberry v. Willoughby*, 25 R. 491.

84. Validity of special agreements upon dissolution. — A promise made to the retiring partner by his former copartner and others, forming with the latter a new partnership, that such new firm will pay the debts of the old one, is founded on a sufficient consideration, and is not within the statute of frauds. *Les v. Fontaine*, 44 D. 605.

Upon a voluntary dissolution, the partners may agree that the partnership property may be the property of one of the members, and if such agreement be *bona fide*, it will be given full effect. *Wilson v. Soper*, 56 D. 573; *Allen v. Center Valley Co.*, 54 D. 333; *White v. Parish*, 73 D. 204.

A *bona fide* transfer by a going partnership, of firm property, to a corporation, taking in payment stock of the corporation to be held by the partners individually, not made in contemplation of insolvency or to defeat creditors, cannot be impeached by partnership creditors on a bill filed against the corporation and attaching creditors of the individual partners, nor have the joint creditors any priority over separate creditors with respect to the stock received by the partners in payment, although the assets at the time of the transfer were barely equal to the joint debts. *Allen v. Center Valley Co.*, 54 D. 333.

Where partners dissolve the firm, and orally agree that one of them shall take the joint property and pay the joint debts, and the one who takes the property for this purpose fails to pay the debts, another partner may voluntarily pay them, and maintain an action against the former to recover the amounts so paid by him. *Hunt v. Rogers*, 83 D. 704.

85. Their interpretation. — An agreement to "quit even," although it might have the effect of mutual acquittance as to all liabilities subsisting between partners at the time of its adoption, does not destroy the relation of partners, nor their liability as to all subsequently accruing items of partnership account. *De Jarnette v. McQueen*, 68 D. 164.

An agreement between partners, upon dissolution, that one of them shall take the joint property, and pay the joint debts, is not within the statute of frauds. It is not, within the statute, a collateral agreement to pay the debt of another. *Hunt v. Rogers*, 83 D. 704.

An agreement by one to wind up the business and pay the other his share of the fees collected is valid, and is not within the statute of frauds, although it was not expected that the business could be wound up in a year. *Oement v. McElrath*, 58 R. 17.

b. Rights and Liabilities of Surviving and Liquidating Partners.

86. Powers and duties of surviving partner. — 1. *In general.** — After the dissolution of a partnership, a surviving partner cannot make any contract which will bind the effects of the firm against creditors, or those entitled to a share of the funds. Hence a debtor of an insolvent firm cannot, in an action against him by the assignee, set off the amount of a protested bill of exchange, indorsed for accommodation by one of the partners in the firm name, after the dissolution, which has been discounted by the defendant. *White v. Union Ins. Co.*, 9 D. 728.

Upon a dissolution by death of one partner, the survivors may give a preference with the consent of the personal representative of the decedent. *Egberts v. Wood*, 24 D. 236.

When a partnership is dissolved by death of one or more of the partners, the legal title to all the personal property and choses in action belonging to the firm becomes vested in the survivor exclusively, for the purpose of paying the debts and then dividing the net balance amongst those entitled, giving to the representatives of the deceased partner the same interest he would have taken had he been in life and the firm had been dissolved, not by death, but by mutual consent. *Andrews v. Brown*, 56 D. 252; *Kinsler v. McCants*, 53 D. 711.

The *jus accrescendi* among partners means that the survivor holds the partnership funds for the settlement of the partnership concerns, and the balance for equitable distribution among the personal representatives of the decedent and the survivor. *Egberts v. Wood*, 24 D. 236. S. P., *Moffatt v. Thomson*, 57 D. 737.

Partnership funds coming into the hands of a surviving partner who has been appointed administrator of the deceased partner come to him as survivor, and not as administrator. *Pearson v. Keedy*, 43 D. 160.

The heir of a deceased partner holds the legal title to real property belonging to the firm, subservient to or in trust for the sur-

* See monographic note on the powers and duties of a surviving partner, 65 D. 296-303.

For Index to Notes in American Decisions and American Reports, see Volume I.

viving partner, who is charged with the payment of the debts. *Andrews v. Brown*, 56 D. 252.

A surviving partner has a right in equity to dispose of real property belonging to the firm for the payment of the debts, where the firm is insolvent, and the deed will convey the equity of the heir of a deceased partner, who may be compelled to make a conveyance. *Id.*

A surviving partner cannot set off a private debt due him by the deceased copartner against his share of assets collected since the dissolution of the copartnership; the effect of such set-off would be to give a preference among creditors of equal degree, which is in opposition to the South Carolina act of 1789. *Moffatt v. Thomson*, 57 D. 737.

Surviving partner is entitled to assets of firm for purpose of paying its debts. As such survivor, he may maintain actions at law for the purpose of collecting debts due the firm, to the exclusion of the administrator of the deceased partner. *Shields v. Fuller*, 65 D. 293.

A surviving partner, appointed receiver of the partnership affairs at his own instance, is not entitled to compensation as such receiver. *Barry v. Jones*, 27 R. 742.

2. *Power to transfer property.*—An assignment by a surviving partner of the partnership effects transfers to the assignee that partner's interest, and makes the assignee a tenant in common with the other surviving partner. *Egberts v. Wood*, 24 D. 238.

A surviving partner may dispose of partnership realty for the payment of partnership debts, and of any balance due him as a partner, if the legal title is vested in him, and if not, equity will assist him by compelling a conveyance of the legal title to himself or to a purchaser from him. *Tillinghast v. Champkin*, 67 D. 510.

A purchaser of partnership realty from a surviving partner, though he knows it to be partnership property, and that there are partnership debts to be paid out of it, if he honestly buys it and pays for it, without knowledge or notice of any facts indicating an intent by the surviving partner to misapply the funds, will be protected, although such surviving partner does in fact appropriate the money to his own use, leaving the debts unpaid; but where he purchases either the whole of such realty or the surviving partner's undivided legal interest therein, knowing it to be partnership property, and that the firm is nearly or quite insolvent, and receives the conveyance, and pays the purchase-money secretly and at night, under circumstances indicating knowledge of the fraudulent designs of the surviving partner, who immediately absconds, leaving the firm debts unpaid, such purchaser takes the property subject to the trusts under which it was held by his vendor. *Id.*

The sole survivor of a firm may effectually transfer a promissory note, payable to the late firm, by indorsement. *Johnson v. Bernheimer*, 25 R. 427.

A surviving partner of an insolvent firm may not mortgage partnership property to secure one creditor in preference to others. *Anderson v. Norton*, 54 R. 400.

3. *Power to assign for benefit of creditors.*—Upon the dissolution of a partnership by the death of one of the partners, the surviving partner can make a valid assignment of the partnership effects, for the benefit of the creditors of the firm. *White v. Union Ins. Co.*, 9 D. 726.

A surviving partner who has bought the interest of a deceased partner may make an assignment of the merchandise for the benefit of his creditors, and the claimants under this assignment have a right to its proceeds, and also to all the debts which were created after the purchase made by the surviving partner. *Wilson v. Soper*, 56 D. 573.

The surviving partner has a right to apply the assets of the firm to the payment of partnership debts. He may prefer one creditor to another, and if he makes an assignment for the benefit of part of the creditors, they may under it entirely satisfy their debts. This does not increase the liability of the estate of the deceased partner, as it makes no difference to it whether the assets are distributed ratably or applied to the payment of some debts to the exclusion of others. *Id.*

The surviving partner of an insolvent firm may make a general assignment for creditors without preferences. *Salisbury v. Ellison*, 49 R. 347.

87. *Powers and duties of partner authorized to liquidate.*—A dissolved partnership remains in force for closing the business, and for that purpose, the partner winding up the concern has the same power to bind the firm as he had before. *Houser v. Irvine*, 38 D. 768.

No power to bind his copartner to new engagements, contracts, or promises can be inferred from an authority given by one partner to the other to settle, liquidate, and close up the affairs of the partnership. *Palmer v. Dodge*, 62 D. 271.

The liquidating partner has no power to extend time for payment of obligations of firm, to increase their amounts, or to obligate the firm to persons to whom it was not bound at the dissolution of the partnership. *Id.*

Where a partner upon dissolution of the firm takes all notes and accounts into possession, and assumes control in regard to making collections and settling up the business, he is to be treated as a collecting agent, and should be charged with all notes and accounts which he has collected, or might with reasonable diligence have collected; but he is not to be charged with those not proved

For Index to Notes in American Decisions and American Reports, see Volume I.

to be solvent, and which it is not shown could have been collected with reasonable diligence. *Phelan v. Hutchinson*, 93 D. 602.

Where a partnership which is afterwards dissolved by the death of one of its members has indorsed a note or bill, notice of dishonor must be given to the surviving member, in order to bind the firm, especially when he is its liquidator or representative. Notice to the executor of the deceased partner, who does not represent and has no power to administer the partnership affairs, is not sufficient. *Slocumb v. De Lisardi*, 99 D. 740.

The admissions of a partner, made while engaged in the adjustment of unsettled partnership business, after the dissolution of the firm, may be given in evidence to charge the other partners in relation to such business. *Feigley v. Whitaker*, 10 R. 778.

A partner intrusted with the settlement of a dissolved partnership may bind the partnership by borrowing money to meet its accruing liabilities, and by actually applying the money borrowed in discharge of such liabilities. *Estate of Davis*, 34 D. 574.

Payment by a liquidating partner, within six years, on a note given by him after the dissolution, in the firm name, for a firm debt, is evidence of a new promise by all the partners, and takes the case out of the statute of limitations as to all. *Houser v. Irvine*, 38 D. 768.

A settling partner of a dissolved firm may set off a debt due the firm in an action against him, where his copartners have assigned the effects to him with full power to collect and pay debts, etc. *Craig v. Henderson*, 44 D. 193.

General authority to one partner, upon dissolution, to settle the business of the firm, does not authorize him to give a note in the name of the firm for a firm debt, or to renew one given before the dissolution. *White v. Tudor*, 76 D. 126. S. P., *Perrin v. Keene*, 26 D. 759; *Smith v. Shelden*, 24 R. 529; *Haddock v. Crocheron*, 5 R. 244.

Where a settling partner, after dissolution, gives a draft in payment of a partnership debt, he cannot waive protest so as to bind his former dormant copartner. *Mauney v. Coit*, 30 R. 80.

A surviving partner is not entitled to compensation for winding up the partnership business. *Beatty v. Wray*, 57 D. 677; *Brown v. McFarland*, 80 D. 598. But see *Phelan v. Hutchinson*, 93 D. 602.

88. Suits by surviving partner.—In *assumpsit* by a surviving partner, upon a promise alleged to have been made to both partners, upon the plea of the statute of limitations, it is competent for the plaintiff to give evidence of an acknowledgment to himself alone, after the decease of his partner, of a debt due to the partnership. *Barney v. Smith*, 7 D. 679.

All property and responsibilities of a partnership, by the death of a partner, devolve on the surviving partner, and in a suit in relation thereto, the personal representative of the deceased partner need not be made a party. *Jones v. Hardesty*, 32 D. 180.

Death of a partner must be proved in an action by the surviving partner to recover a debt due the firm, although it need not be alleged. *Ludden v. Colby*, 40 D. 173.

A surviving partner of two different firms may join in one action counts for sums due him as the surviving partner of each of said firms, and a count for money due him in his individual capacity. *Adams v. Hackett*, 59 D. 376.

The surviving partner cannot recover unless the firm could have sustained an action in the lifetime of the deceased partner. *Thompson v. Steamboat J. D. Morton*, 59 D. 658.

The surviving partner cannot maintain a proceeding *in rem* against a vessel of which the deceased partner was the owner, for materials and labor furnished by the firm, for these are advances by a copartnership to a member of the firm, and a plea setting forth these facts will be good in bar of the action. *Id.*

Although one partner cannot maintain an action at law against his copartner, a surviving partner may well maintain such an action against the administrator of his deceased partner who has wrongfully obtained possession of property belonging to the partnership, as such survivor has the exclusive right to the use of it. *Shields v. Fuller*, 65 D. 293.

Where the administrator of estate of deceased partner is sued by the survivor to recover money improperly collected by said administrator upon partnership accounts, if he attempts to show that the partnership was dissolved before the death of his intestate, he must show that the accounts were so divided as to vest the title to them in each partner individually. *Id.*

Where a partner had died, and the surviving partners had continued to trade under the firm name, and then an account between a debtor and the firm was stated, from which it appeared that a balance was due by the debtor for goods sold in the lifetime of the deceased partner, — *held*, that the surviving partners could recover this balance without alleging the death of the other partner and the survivorship, as the stating of the account was in the nature of a new promise to the survivor. *Holmes v. De Camp*, 3 D. 293.

A surviving partner who has been appointed one of the administrators of the deceased partner cannot maintain a bill for an accounting against his co-administrator, especially when the bill charges fraud against the deceased. His only remedy is to have the letters of administration revoked. *Smith v. Bryson*, 93 D. 610.

For Index to Notes in American Decisions and American Reports, see Volume I.

89. Liabilities of surviving partner. — The effects of a deceased partner cannot be pursued at law or in equity while the surviving partner is solvent. *Alsop v. Mather*, 81 D. 703.

Admissions of a surviving partner, direct or indirect, are evidence against him in a suit against him, although the judgment would not affect the question of contribution between him and the representatives of the deceased partner. *Hamilton v. Summers*, 54 D. 509.

A proceeding in a district court cannot be supported as a creditor's bill which seeks to subject partnership property to a demand by proceeding against a surviving partner, and where the decree in such proceeding makes the court take upon itself the administration and settlement of the partnership concerns out of the hands of the surviving partner and the representatives of the deceased, and places the partnership effects in the hands of the officers of the court, to be applied in payment of the claims of creditors, when established by suit. *Gaut v. Reed*, 76 D. 94.

If one partner dies pending an action against the firm, the action may be continued against the surviving members of the firm. *Childs v. Hyde*, 77 D. 113.

A surviving member of a partnership owning real property is trustee for the purposes of winding up the affairs of the firm, and must account and pay over to the administrator of the deceased partner the value and profits of the use and occupation thereof. *Smith v. Walker*, 99 D. 415.

Such surviving partner must account and pay over to the administrator of deceased partner all the profits of the realty and personality of the firm which rightfully belong to the estate, although he has purchased the interest of the heirs, or the community interest of the surviving wife of the deceased partner; it is for the probate court to distribute the estate to the parties entitled. *Id.*

90. Liabilities of liquidating partner. — A partner who is appointed by a firm to settle up the business of the firm after dissolution, and who continues the business of the firm upon his own account, is not liable to account to the firm for the value of the "good-will" thereof. *Gyger's Appeal*, 1 R. 282.

Where a partnership is dissolved, and one partner purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, he thereby becomes in equity the principal debtor as to such debts, and the other his surety, and a creditor having notice of such agreement is bound by such relationship. *Colgrove v. Tallman*, 23 R. 90; *Smith v. Sheldon*, 24 R. 529.

Where a creditor with such notice is requested by the surety to collect his claim of

the partner who has assumed the debts, and he neglects or refuses to do so, the surety is discharged, provided the principal was at the time solvent. *Colgrove v. Tallman*, 23 R. 90.

91. Rights and duties of retiring partner. — 1. *General rules.* — A retiring partner remains liable for all the existing debts of the firm, to the same extent as if he had not retired. An agreement between him and the remaining partners, or with the new firm that succeeds, that they will assume and pay all such debts, while valid as between the partners, has no effect upon the creditors of the old firm unless they become parties thereto. *Rasson v. Taylor*, 27 R. 464; *Winston v. Taylor*, 75 D. 112.

A retiring partner has no lien on the partnership property when he sells his interest in the firm assets to his copartners, and takes their covenant to indemnify and save him harmless from the liabilities of the firm. He cannot maintain any proceeding in equity to subject such assets to the satisfaction of such debt, especially after they have gone into the hands of a subvendee. *Smith v. Edwards*, 46 D. 71; *Miller v. Estill*, 67 D. 305.

On dissolution of partnership, an assignment by retiring partner, *bona fide*, of all his interest in the stock and effects to the remaining partner vests the same in the latter as his individual property, and it will be distributable accordingly, notwithstanding his subsequent insolvency; and this rule applies as well to limited as to general partnerships. *Upon v. Arnold*, 63 D. 302.

Where one partner takes partnership property on consideration that he will pay the debts of the partnership, the retiring partner's lien upon the partnership effects is gone; though if the agreement be to take the partnership property and pay the partnership debts therewith, a court of equity would, perhaps, enforce a proper application of the assets of the firm in behalf of the retiring partner. *Miller v. Estill*, 67 D. 305.

A debtor colluding with the outgoing partner cannot obtain from him a discharge of his debt. *Burley v. Harris*, 29 D. 650.

Where a firm receives stock to be pastured for an indefinite time, if one of the firm retires he may absolve himself from further liability upon the contract by requiring the owner to remove his stock. If owner permitted stock to remain after a reasonable time, it would operate as a release to the retiring partner. Such defense, however, ought to be clearly made out. *Winston v. Taylor*, 75 D. 112.

A partner retiring from the firm must give notice of retirement, or he will be liable to creditors of the continuing firm on contracts made by them after his retirement. *Williams v. Bowers*, 76 D. 489.

A partner who gives no notice of his retirement is liable to an attorney employed by the firm before his retirement to defend a

For index to Notes in American Decisions and American Reports, see Volume L.

suit against the firm for fees for services rendered in such suit after his retirement. *Ib.*

An agreement to discharge a retiring partner will not be inferred from the mere acceptance of the note of the continuing partners for the joint debt. *Nightingale v. Chafes*, 23 R. 531.

Where a partnership is dissolved, one partner taking all the property and assuming all the debts, all the partners are still liable on an acceptance previously given for goods, although the vendor may have promised to release the retiring partners and look to the other alone, there being no new consideration for such promise. *Eagle Mfg. Co. v. Jennings*, 44 R. 668.

In an action against a retired partner for a debt contracted by the remaining members, in the same firm name, on the ground of the want of notice or knowledge of the dissolution, the account as entered on the ledger of the new firm is not evidence against the defendant. *Pringle v. Leverick*, 49 R. 522.

2. *Illustrations.* — T. and H. were, in 1861, partners in business in Washington; D. C. In May of that year H. went to Richmond, Virginia, where he remained during the war. At the time, the debts of the firm, a considerable portion of which was due to T., very largely exceeded the assets. T. compromised with the other creditors, took the goods and assets of the firm, and continued the business in his own name. *Held*, 1. That the partners being domiciled in hostile states, the war dissolved the partnership; and 2. That the retention of the partnership property by T., it being shown that there would be nothing due to H. after the payment of debts which were compromised by T., did not give H. a right to a share in the profits made by T. after the dissolution. *Taylor v. Hutchinson*, 18 R. 689.

It is not a uniform rule that when upon the dissolution of a firm by the withdrawal of a partner, the stock of the firm is carried over into the new business, and not sold at auction, the outgoing partner is entitled to an account and a share in the profits. *Ib.*

After the dissolution of a partnership, a creditor of the firm, with knowledge that one of the partners had taken the firm assets and assumed the firm debts, took from him the firm note for the debt, payable one day from date, with interest. *Held*, 1. That the outgoing partners were not liable on the note as partners; and 2. That, as sureties, they were discharged by the new contract, it having been entered into without their knowledge or consent. *Smith v. Sheldon*, 24 R. 529.

One partner retired from the firm, selling his interest to the remaining partner, he agreeing to pay the firm debts, and having sufficient property to do so. That property having been wasted, a firm creditor, being unable to enforce his claim, filed a bill to

reach property which the outgoing partner had withdrawn from the firm when he retired. *Held*, that he had no equitable lien thereon. *Hollis v. Staley*, 27 R. 759.

R. held the promissory note of the firm of T. G. & Co. After it was given, some members of the firm retired, leaving assets sufficient to pay all debts, and taking the obligation of the succeeding new firm to pay all debts and save the retiring partners harmless. *Held*, that unless R., by some valid contract, express or implied, had made himself a party to this new arrangement, or had so acted as to be estopped, his rights on the note against all the members of the old firm remained unchanged; that while, as between the partners themselves, the relation of principal and surety existed, yet as to the payee of the note, all were principals and joint debtors, although notice of such obligation was brought home to him. *Rawson v. Taylor*, 27 R. 464.

Where the payee of such note has received from the new firm a chattel mortgage of the partnership property sufficient, if applied, to satisfy the debt, he may, with the assent of the retiring partners, release the mortgage, and return the property or its avails to the new firm, without impairing his rights against all the joint obligors on the note, even though he had notice of the subsequent contract between the partners. *Ib.*

92. *Carrying on business after dissolution.* — Until the affairs of a partnership are settled, and outstanding engagements made good, it continues, in legal contemplation, so far, at least, as respects winding them up. *Brown v. Higginbotham*, 27 D. 618; *Kinsler v. McCanta*, 53 D. 711.

Where a testator, by his will, directs that a partnership, of which he was a member, should be continued after his death, and the profits at the end of a specified time distributed among his devisees, the creditors of the partnership have no lien on the general assets of the estate of the deceased in the hands of his devisees. *Pitkin v. Pitkin*, 18 D. 111.

The remedy of such creditors is by claim against the executor, to be pursued like other general claims against the testator's estate, and not in chancery. *Ib.*

Equity has power to authorize continuance of a partnership, after death of a partner, in behalf of the infant children of the deceased partner. *Powell v. North*, 56 D. 513.

A partnership has a limited existence after dissolution, for the purpose of fulfilling engagements made during its existence; consequently the late members of a firm, by selling butter consigned to the firm of which

* Liability of representative of deceased partner for carrying on business, see note, 36 D. 600-602.

Power of equity to appoint person to continue partnership for benefit of infant heirs, see note, 36 D. 517, 51a.

For Index to Notes in American Decisions and American Reports, see Volume I.

they were recently members, after its dissolution, by one having no notice of such fact, become liable to the consignor as partners. *Johnson v. Totten*, 58 D. 412.

A partnership has a limited existence after dissolution, for purpose of making good all outstanding engagements, of taking and settling all accounts, and collecting all the property, means, and assets of the partnership existing at the time of its dissolution, for the benefit of all interested. *Western Stage Co. v. Walker*, 65 D. 789.

The personal representative of a deceased partner may carry on business for and bind his estate where the articles of copartnership contained a covenant to that effect. A covenant for the continuation of a partnership for a reasonable period after the death of one of the partners is binding on his estate, if assented to and carried out by his personal representatives. *Laughlin v. Lorens*, 86 D. 592.

Where on the death of a partner the business of the firm is closed by the creation of a new firm, composed of the surviving partner and the representatives of the deceased partner, the creditors of the new firm become clothed with those equities of that firm against the estate of the decedent, which arose out of the payment by the new firm of the debts of the old firm. *Id.*

c. Application of Assets to Debts.

93. Marshaling assets.—A partnership creditor having a lien on the separate property of one of its members must, if the firm is insolvent, exhaust his separate lien, before he comes in with other creditors for a share of the partnership effects. *White v. Dougherty*, 17 D. 803.

Joint creditors who have been partially paid out of the joint estate cannot share equitable assets with joint creditors who have received nothing, until the latter have been paid sufficient to put them on an equality with the former. *Wilder v. Keeler*, 23 D. 781.

Copartnership effects upon the firm's insolvency are in equity considered a trust fund for the payment of the partnership debts. *Egberts v. Wood*, 24 D. 236.

Partnership property must be first applied to firm debts, and to equalize the claims of the partners in relation to the fund; and the separate interest of each partner is only his share after the debts are paid and his partners' claims are satisfied. *Buchan v. Sumner*, 47 D. 305.

After the dissolution of a firm by the death or bankruptcy of one or more of its members, partnership property will, in equity, first be applied to the payment of the firm debts, and the separate property of each member will be first applied to paying his individual debts. *Kirby v. Schoonmaker*, 49 D. 160.

Separate estate of partners must be first

distributed to separate creditors, under the Massachusetts statute, although there may be no solvent partner and no joint estate to which the joint creditors can resort. *Hove v. Lawrence*, 57 D. 68.

An individual creditor of a partner may, in equity, compel a partnership creditor to resort first to the partnership assets for payment, since the claim of the individual creditor applies only to the private property of his debtor, including whatever balance may remain to him out of the firm assets after its affairs are wound up, while the partnership creditor is entitled to payment not only out of the firm property, but also out of the private property of the individual partner. *Gadsden v. Carson*, 70 D. 207.

The lien of a judgment rendered after the death of a partner, for a partnership debt, upon the individual real estate of the surviving partner, if it has legal priority, will not be disturbed in favor of a junior judgment against the survivor for a debt of his own, even though the junior judgment cannot be otherwise satisfied, and the senior judgment might be enforced against the estate of the deceased partner. *Meech v. Allen*, 72 D. 465.

94. Rights of the partners.—Partnership property is primarily liable to pay partnership debts; and the surplus, if any, belongs to the partners. *Miller v. Etill*, 67 D. 305.

Each partner is liable *in solido* for firm debts, and has an equity to have all the firm assets applied, in the first instance, to their payment. It is through this equity that the firm creditors have a priority over separate creditors to be paid out of the partnership funds. *Manhattan I. Co. v. Webster*, 98 D. 332. *S. P., Pearson v. Keedy*, 43 D. 160; *Allen v. Center Valley Co.*, 54 D. 333; *Miller v. Etill*, 67 D. 305; *Happgood v. Cornwall*, 98 D. 516.

A partner's lien is limited to advances for partnership purposes, and does not exist for a private debt due by a copartner. *Moffatt v. Thomson*, 57 D. 737.

The right to confine a partner, or those claiming under him, to an interest in the surplus, after payment of the partnership debts, is an equity resting, not in the creditors of the firm, but in the remaining partners alone, who may insist upon it or waive it at their pleasure, leaving the creditors to the personal responsibility of the partners who contracted the debts. The creditors have no lien on the partnership property, and must work out their preference through the medium of the partners whose interests remain undisposed of. *Baker's Appeal*, 59 D. 752.

A transfer of interest by a portion of the partners to others does not discharge the original partners, nor impose upon the subsequent firm any new liabilities to the creditors of the first. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

Partners who have attached the property of a copartner for a partnership debt, for which all are jointly liable, may be enjoined from enforcing their attachment against an attachment subsequently levied upon the property by an individual creditor. *Price v. Cutts*, 74 D. 52.

A partner may apply or compel application of partnership property to firm debts while any partnership property remains; and it would seem, if he is backward, firm creditors may compel him to allow them to use his name for this purpose. *Backus v. Murphy*, 80 D. 531.

The equity of partnership creditors to have partnership property applied to firm debts is extinguished by a sale of the property on execution against an individual partner, the effect of which is to exhaust the firm assets and dissolve the partnership. *Id.*

Where one copartner has paid more than his share of partnership debts, he has a claim upon the partnership property which, in equity, is superior to the claims of the separate creditors of his copartners. *Crooker v. Crooker*, 83 D. 509.

One copartner who has paid more than his share of partnership debts can sustain a bill enjoining separate creditors of his copartner from satisfying their judgments against such indebted copartner out of the partnership property. *Id.*

An assignment by one partner of his interest in partnership property in trust to pay all his individual and partnership debts is inferior to the implied lien of the copartner on the partnership property, which inures to the benefit of the partnership creditors. *Bank of Kentucky v. Herndon*, 89 D. 630.

All the members of a firm may agree to an appropriation of firm property in payment of an individual debt of one partner, and his creditor takes the property discharged of any claim or equity of the partnership creditors, since the members of the firm have expressly parted with their lien, and the firm creditors have none except through the partners. *Hapgood v. Cornwell*, 95 D. 516.

A partner purchasing the entire interest of copartners may use firm property in payment of his individual debt, and his creditor will take it discharged of any claim or equity of the firm creditors. Nor will it invalidate the transaction that the purchase is made with the express intention of turning over the goods to the creditor of the purchasing partner. *Id.*

The assets of a partnership were sold, on dissolution, at public auction, to a person who subsequently conveyed them to one of the partners, in pursuance of a secret arrangement made before the sale. The other partner was also present, and bid. *Held*,

that the purchasing partner must account to the other therefor, as if no sale had taken place. *Jones v. Dexter*, 39 R. 459.

95. Rights of the creditors, generally.—A partner's interest in partnership property is his share after the firm debts are paid, and an individual creditor of such partner can only acquire a lien on such interest. If the partnership is insolvent, there is no interest upon which he can acquire a lien. *White v. Dougherty*, 17 D. 802.

Partnership creditors are entitled to prove their whole debts, notwithstanding any securities they may have from third persons who stand in the situation of mere sureties for the partnership. *Wilder v. Keeler*, 23 D. 781.

The sureties in such a case have an equity that the creditor should prove his demand against the estate of the principal debtors, and against the separate estate of each, as far as it can be done for their indemnity. *Id.*

Partnership creditors have no specific lien upon firm assets for the payment of their claims, either legal or equitable. *Allen v. Center Valley Co.*, 54 D. 333.

Creditors of a partnership have a *quasi* lien upon its property, upon the death or bankruptcy of one or all the partners, which may be made effective by proper proceedings in chancery. *Ketchum v. Durkee*, 45 D. 412.

A creditor of a firm, upon the death of one partner, cannot go into chancery, as a matter of course, to coerce satisfaction of a legal demand out of the effects of the firm in the hands of the survivor, but only upon the insolvency of the latter, and the consequent inefficiency of the legal remedy. *Pearson v. Keedy*, 43 D. 160.

Whether, as the insolvency of the surviving partner is the sole ground of the creditor's right to go into chancery, a bill can be entertained that does not show the inefficiency of the legal remedy by a judgment and return of "no property" against the survivor, *quere*. *Id.*

Insolvency of the surviving partner and the insufficiency of the legal remedy being the only ground upon which a creditor of a partnership can go into equity, it is necessary that this fact should be clearly and explicitly stated in the bill. *Id.*

Where a bill does not show a case for equity jurisdiction, it does not operate as a *lis pendens*, though process be served, so as to affect the choses in action sought to be subjected, or to overreach, on that ground alone, the settlement thereof made between the survivor and the debtors of the firm. *Id.*

Partnership obligations are treated as joint and several in equity. In the event of the death of one partner, the firm creditors

* Joint and separate creditors, respective rights of, see note, 49 D. 163, 164.

For index to Notes in American Decisions and American Reports, see Volume I.

may proceed at law against the survivors, and in equity against the estate of the decedent. *Ladd v. Grinwold*, 46 D. 443; *Camp v. Grant*, 54 D. 321.

The claim of creditors of a firm to partnership realty is superior to a wife's right of dower and to the legal title of the heirs at law of a deceased partner. *Andrews v. Brown*, 56 D. 252.

Creditors of a partnership have no lien on partnership property, and can invoke the rule that the partnership property shall be primarily liable only through right of partners to have joint property applied to pay joint debts. *Miller v. Estill*, 67 D. 305; *Coover's Appeal*, 70 D. 149; *Backus v. Murphy*, 80 D. 531.

When the right of partners themselves to apply partnership property in extinguishment of partnership debts is gone, the right of partnership creditors thus to apply it is also divested. *Miller v. Estill*, 67 D. 305.

A creditor may attack a proceeding for dissolution of partnership at any time before final distribution of the assets, on the ground that it was instituted to hinder, delay, or defraud creditors. *Adams v. Woods*, 68 D. 313.

Individual creditors of a partner have not such exclusive right to payment out of his individual property as to render fraudulent an assignment of it for the benefit of the firm creditors. *Gadsden v. Carson*, 70 D. 207.

Where the surviving partner of a firm becomes insolvent, and his individual creditors levy attachments on the partnership property, the partnership creditors may come into equity to enforce their right to priority of payment out of the partnership assets. *Farley v. Moog*, 58 R. 585.

A partner in an insolvent firm sold his interest to his copartner, who assumed the firm debts. The latter deeded all the firm property to secure a debt of his own accruing previous to the dissolution. Held, that a creditor of the firm was entitled to payment out of such property before the individual creditor, and as to the firm creditor such deed was void. *Phelps v. McNeely*, 27 R. 378.

Respective rights of the partnership creditors and the creditors of its individual members considered. *Allen v. Wells*, 33 D. 757.

96. Firm creditors, when confined to partnership assets. — The partnership contract imposes precisely the same obligation upon each separate partner that a sole and separate contract does; there is no express or implied contract resulting from the law of partnership that the separate estate shall go to pay separate debts exclusively, but as the partnership creditors, in equity, have a prior lien upon the partnership funds, chancery will compel them to exhaust that remedy before resorting to the separate es-

tate; beyond this, both sets of creditors stand precisely equal, both at law and in equity. *Bardwell v. Perry*, 47 D. 687.

Partnership creditors cannot resort to the separate estate of their debtor until the separate creditors have been satisfied. *Morgan v. His Creditors*, 20 D. 262; *Wilder v. Keeler*, 23 D. 781.

Judgment obtained by one firm against another firm, constituted in part of the same members, cannot be enforced by levy upon the separate property of an individual member of the defendant firm. *Tassey v. Church*, 40 D. 575.

97. — when they may share in individual assets. — Joint creditors may, at law, pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, which are at law considered both joint and several. *McCulloh v. Dashiell*, 18 D. 271.

Partnership creditors, in equity, can only look to the surplus of their debtor's separate estate after the payment of his separate debts. *McCulloh v. Dashiell*, 18 D. 271; *Bailey v. Kennedy*, 29 D. 351.

Courts of equity do not, as against separate creditors, treat a joint debt as joint and several; yet where the claims of joint creditors do not come into conflict with the separate creditors, but only with the interests of the representatives of a deceased partner, equity will, as against such representatives, decree to joint creditors a satisfaction of their claims by considering them joint and several. *McCulloh v. Dashiell*, 18 D. 271.

Where a partner is liable not only as such, but also as indorser for the firm, his separate estate is considered legal assets for the payment of the demand; but the partnership estate, being primarily liable, must first be resorted to for payment. *Wilder v. Keeler*, 23 D. 781.

A judgment creditor of a firm may levy upon the separate property of any member thereof, though he is insolvent and unable to pay his individual debts. *Kirby v. Schoonmaker*, 49 D. 160.

A partnership creditor, after exhausting partnership funds, is entitled equally with individual creditors to payment of an unsatisfied balance of his debt out of the private property of a partner. *Gadsden v. Carson*, 70 D. 207.

Notes payable to a partnership transferred by a partner in payment of an individual debt cannot be reached by firm creditors on trustee process against the transferee; but if there was fraud in the transaction, a bill in equity is the proper remedy. *Huntton v. Dow*, 70 D. 404.

The rule that individual creditors must first be paid out of separate property of each member of firm before partnership creditors

* Separate property of partner, when liable for partnership debts, see note, 18 D. 280-283.

For Index to Notes in American Decisions and American Reports, see Volume I.

can resort to it has no application in a proceeding by a firm creditor to cancel an invalid assignment of such property made for the benefit of creditors of the same class. *Loring v. Pairo*, 77 D. 108.

Where it is shown that two persons are engaged in commercial business as partners, and debts have been contracted by the firm, they will be liable for the payment thereof *in solido*. *Gumbel v. Abrams*, 96 D. 426.

98. Individual creditors, when confined to separate assets. — Creditors of the several partners cannot claim a dividend out of the joint estate until all the partnership creditors are paid, and then they are permitted to come in upon the surplus. *Wilder v. Keeler*, 23 D. 781. S. P., *McCulloch v. Dashiell*, 18 D. 271; *Bowden v. Schatzell*, 23 D. 170; *Winston v. Ewing*, 34 D. 768; *Dyer v. Clark*, 39 D. 697; *Cummings's Appeal*, 64 D. 695. If the partnership is insolvent, the firm creditors have a right to have all the property applied to the payment of their debts. *Willis v. Freeman*, 82 D. 619.

Advancements made by one partner to the firm, and all other firm debts, must be first discharged out of the firm property, whether real or personal, before recourse can be had to the same by the individual creditors of a partner. *Divine v. Mitchum*, 41 D. 241.

The sheriff can sell and deliver no part of partnership goods, under an execution at the suit of a judgment creditor of one partner, but only the contingent interest of the debtor partner in the stock and profits after settlement of partnership accounts and payment of partnership creditors. *Deal v. Bogue*, 67 D. 702.

Equity will restrain a sale of partnership property under execution against an individual partner, until the settlement of the partnership affairs to ascertain whether the debtor partner has a real and valuable interest over and above the liabilities of the firm. But if such sale is not restrained, the purchaser thereof takes subject to the settlement of the partnership, and if there is no surplus belonging to the debtor, he takes nothing, and the property is taken from him by the joint creditors. *Hubbard v. Curtis*, 74 D. 283.

The object of staying a sale of partnership property under execution against individual partner, until an account is taken between such partner and the partnership is to ascertain and protect the rights of the joint creditors, not to preserve the interests of the other partners. Nor is such account taken solely to ascertain whether there is a surplus interest in the debtor partner; but it being found that the joint effects are not sufficient, or only sufficient, to meet the demands of the joint creditors, the object is to protect these and direct the funds to their payment. *Id.*

Insolvency of a partnership need not be

positively averred in a bill for injunction to restrain the sale of partnership property under an execution against an individual partner; it is sufficient if, with the facts stated and the averments of the bill, an alleged insolvency is apparent. *Id.*

The fact that complainant asks a perpetual injunction to stay such sale, and not merely a stay to ascertain the debtor's interest in the partnership, is no objection to his bill. For the court having cognizance of the case to take an account of the partnership affairs, finding it insolvent in fact, must necessarily make the injunction perpetual in the end, since, in such case, there is no interest remaining in the debtor to sell. *Id.*

Judgment taken against a survivor, not as surviving partner, but as upon his sole, individual contract and liability, does not give plaintiff any right against the partnership effects; especially when the pleadings show that they were not sufficient to satisfy the partnership debts. *Gaut v. Reed*, 76 D. 94.

Where a partner buys real estate upon his own individual security, but asserts that it is partnership property, and his firm fails, and the land is sold by their assignee, the partnership creditors alone are entitled to share in the proceeds, and not the vendors, who can claim only against the purchasing partner. *North Penn. Coal Co.'s Appeal*, 84 D. 487.

The doctrine that the separate debt of one partner shall not be paid out of the partnership property till all the partnership debts are paid applies only where the principles of equity are brought to interfere in the distribution of the partnership property among the creditors. *Midnight v. Smith*, 88 D. 233.

99. — when they may share in firm assets. — Partnership property may be attached for a partner's individual debt, after a dissolution of the firm, and the appointment of a receiver, in a suit between the partners, to collect and dispose of the assets. *Schatzell v. Bolton*, 13 D. 748.

A separate creditor of an individual surviving partner may attach, by way of execution, a debt due the partnership, of which that individual was a member, before a settlement of the partnership and ascertainment of the debtor partner's interests. *Berry v. Harris*, 85 D. 639.

Separate creditors of a partner, where there is no insolvency, may levy upon the partnership estate of their debtor; but in case of bankruptcy, the partnership estate is first applied to partnership debts. *Morgan v. His Creditors*, 20 D. 262.

Partnership property is as much liable to judgments for individual as for partnership debts of the only ostensible partner. *How v. Kane*, 54 D. 152.

Whether, after taking judgment against one of the partners, a party can maintain an action on a note as the joint contract of the

For Index to Notes in American Decisions and American Reports, see Volume I.

firm, is a question upon which there is some diversity of opinion. The great weight of authority seems to be against a second recovery. *Gaut v. Reed*, 78 D. 94.

Equity will not aid a party to subject partnership property to the payment of a judgment upon a note against the maker only and individually. *Id.*

The interest of a partner in tangible property of a firm is liable to seizure upon execution in favor of his separate creditor. *Nixon v. Nash*, 80 D. 390.

A levy and sale on execution of partnership property for an individual debt of one partner must be of an undivided interest in the chattel corresponding to the debtor's share in the firm; but the purchaser at the sale acquires only the beneficial interest of the debtor partner therein. *Nixon v. Nash*, 80 D. 390; *Sutcliffe v. Dokrman*, 51 D. 450.

Equity will restrain the sale of the entire partnership property in satisfaction of the individual debt of one partner. *Sutcliffe v. Dokrman*, 51 D. 450.

A separate creditor of a partner who has levied execution on tangible property of the partnership may file a petition in equity against the other partners, before a sale upon execution, for an account of the partnership, and the ascertainment of his debtor's interest in the property seized. *Nixon v. Nash*, 80 D. 390.

Upon levy of execution by creditor of an individual partner upon tangible property of firm, it is the right of the creditor and of the other copartners, should either desire, to invoke the equity powers of the court to adjust the partnership business, and to stay proceedings under the execution till the beneficial interest of the debtor partner in the goods seized has been ascertained; but if they do not so elect, the officer must sell the apparent interest of the debtor in the chattels levied on, and upon such sale redeliver the same to the other partners and the purchaser, who will then be owners in common, subject to a lien in favor of the other partners and the joint creditors, upon the interest of the debtor partner in the hands of the purchaser, for any balance due upon final adjustment of the partnership account. *Id.*

A creditor of a member of a firm which afterwards becomes insolvent, who has attached his debtor's interest in some partnership property, prior to such insolvency, cannot have his lien divested by it. This is so, although judgment was not rendered until after the insolvency. *Willis v. Freeman*, 82 D. 619.

An individual creditor is guilty of no fraud in requesting his debtor to procure the consent of his copartners, either by purchase or otherwise, to a surrender of partnership property in payment of the individual debt. *Hagood v. Cornwell*, 95 D. 516.

An individual creditor who takes firm

property in payment of his debt and for an additional valuable consideration paid, after his debtor has purchased the interest of his copartners, and without notice of an agreement by the purchasing partner with his copartners to pay firm debts, is a purchaser for a valuable consideration without notice, and cannot be required to surrender the goods to the firm creditors or to account for their proceeds. *Id.*

100. When all creditors may share *pari passu*. — At law both separate and joint creditors may attach either separate or joint property and sell it upon execution in satisfaction of their judgments, without regard to the equities of the debtors. *Bardwell v. Perry*, 47 D. 687.

Partnership and separate creditors of a deceased partner take *pari passu*, where the surviving partners are insolvent and there is no joint fund to which the partnership creditors can resort. *Emanuel v. Bird*, 54 D. 200.

Where joint creditors were to look to the separate property of the debtors respectively for payment, and where the surviving debtor was insolvent, and the fund to be distributed was equitable assets, it would be a matter of course to permit the creditors to come in upon the fund with the separate creditors of the decedent on an equality, at least as to one half the debt; otherwise as to legal assets. *Wilder v. Keeler*, 23 D. 781.

101. Priority. — 1. *In general*. — Partnership creditors are entitled to priority of payment out of the partnership effects, and the separate creditors of the individual partners may claim a priority of payment out of their separate assets. *Egberts v. Wood*, 24 D. 236; *Morgan v. His Creditors*, 20 D. 262; *Ladd v. Griswold*, 46 D. 443.

Joint creditors of an insolvent partnership are entitled to a preference over separate creditors of the individual partners in payment out of the property of the firm; and the separate creditors of an individual partner have a like preference over the partnership creditors in payment out of such partner's estate, in case of his death or bankruptcy. *Payne v. Matthews*, 29 D. 738.

A partner having paid more than his share of debts of the firm has a paramount claim in equity upon the partnership property as against separate creditors of his copartners. *Buchan v. Sumner*, 47 D. 305.

Partnership creditors have an equitable lien in case a firm is dissolved by death of a partner, or in case of the bankruptcy or insolvency of one or all the partners, upon the joint property of the firm, and separate creditors have a similar lien and priority as to the separate property of the partners. *Tillinghast v. Champlin*, 67 D. 510.

Equity has jurisdiction of a conflict between individual and firm creditors. *Georg v. Woods*, 73 D. 605.

For Index to Notes in American Decisions and American Reports, see Volume L

Creditors of a firm are entitled to be first satisfied from partnership funds, and the separate creditors from the individual funds; but this rule is applied only where there is a deficiency in one of the funds. Absolute insolvency is not, however, required; for if a firm is barely solvent, and no more, having just sufficient to pay its creditors, the creditors of individual partners cannot come in. And so it will be of the separate fund. *Hubbard v. Curtis*, 74 D. 233.

2. *Of firm creditors over individual creditors.*—Creditors of a partnership have in equity a lien upon the partnership property, and they are entitled to have their claims satisfied out of the partnership effects, in preference to the creditors of an individual member of the firm. *White v. Dougherty*, 17 D. 802. S. P., *Doner v. Stauffer*, 21 D. 370; *Grosvenor v. Austin*, 25 D. 743.

Partnership creditors, in order to avail themselves of their rights of priority, in case of conflicting attachments with individual creditors, require nothing more than a valid execution properly levied. *Jarvis v. Brooks*, 59 D. 359.

Subsequent attachment by creditors of a partnership who have attached property of firm takes precedence of a prior attachment by creditors of the individual members of the firm who have attached the same property. *Jarvis v. Brooks*, 59 D. 359; *Conroy v. Woods*, 73 D. 606; *Bullock v. Hubbard*, 83 D. 130. Contra, see *Reed v. Sheperdson*, 19 D. 697.

An attachment of a partner's separate property for a firm debt has precedence at law over a subsequent attachment of such property for his individual debt. *Allen v. Wells*, 33 D. 757.

Where executions are issued against individual partners for separate debts, and also against firm for partnership debts, and by agreement of the execution creditors the firm property is all sold at the same time, the firm creditors are entitled to preference, and are entitled to all the proceeds, where necessary to satisfy their claims, and the rule is the same though the individual executions were prior in date. *Crocker's Appeal*, 70 D. 149.

Creditors holding partnership notes of firm, after dissolution thereof, have priority of claim upon partnership property, over creditors holding the individual notes of each partner for his share of indebtedness. *Crocker v. Crocker*, 83 D. 509.

Where the payee of a note made by a copartnership during its existence, and for a copartnership debt, exchanges it, after a dissolution of the firm, for the several note of each partner for his share of the original note, he has simply a precedence over partnership creditors as to the separate property of each member, which a court of equity will enforce; and no priority of claim upon the partnership property. *Id.*

Joint creditors have no preference, unless the partners are individually involved, except in the single case of a joint commission. *Doner v. Stauffer*, 21 D. 370.

Creditors of a solvent partnership, in the event of one partner selling all its assets to the other, have no prior right to satisfaction out of such assets over the creditors of the partner to whom such sale was made. *Ketchum v. Durkee*, 45 D. 412. S. P., *Ladd v. Griswold*, 45 D. 443.

Partners have no lien upon partnership funds for the payment of the partnership liabilities before individual debts, where the scope of the partnership is so extensive and covers so much of the property of the individual partners, and the relations of the partners towards each other, with respect to the firm property, are such that the parties, by their very articles of compact, must have contemplated a community of goods and of all other interests, rather than a partnership. *Rice v. Barnard*, 50 D. 54.

Joint creditors have no priority over separate creditors in such a case. *Id.*

Partnership creditors have priority of right in partnership property, but this does not import that the partnership creditors may step in and take precedence of an individual creditor at any and all times and under all circumstances; for to enable the court to apply the rule, the case must be such that the court may marshal the debts and effects, and thus ascertain the amount of the assets and liabilities, and whether the entire assets, or what part of them, is necessary to pay joint creditors. *Scudder v. Delashmut*, 71 D. 428.

A joint creditor cannot come in by his attachment alone and oust the separate creditor from his prior attachment or other lien; for the joint creditor has no lien which he can enforce in this manner. *Id.*

Where B. & L. are partners, and B. & L. as a partnership are also a member of two other firms, B., L., S., & D., and B., L., & S., the creditors of B. & L. are entitled to a preference in the payment of their debts over the creditors of B., L., S., & D., and B., L., & S., out of money which is the proceeds of the property of B. & L., and this in the order of the priority of their several attachment liens. *Bullock v. Hubbard*, 83 D. 130.

3. *Of separate creditors over firm creditors.*—Separate creditors of a decedent are not entitled to preference over creditors of a firm of which he was a member. *Grosvenor v. Austin*, 25 D. 743.

Separate creditors of a partner have no priority respecting his separate estate in right of payment over creditors of the partnership, it seems. *Camp v. Grant*, 54 D. 321.

An individual creditor of a partner obtains no priority over firm property by the fact that he obtains judgment, issues execution, and levies thereon, as against firm creditors

For Index to Notes in American Decisions and American Reports, see Volume 1.

who have not yet obtained judgment. *Conroy v. Woods*, 73 D. 605.

102. Rights of creditors against estate of deceased partner.*—Securities held by partnership creditors should be first applied toward the discharge of their respective claims, before they can resort to equitable assets of a deceased partner. *Wilder v. Keeler*, 23 D. 781.

The separate estate of a deceased partner is liable at law only to the claims of separate creditors; in equity, creditors of the partnership, by alleging the insolvency of the surviving partners, may resort to a deceased partner's estate. *Id.*

A creditor of the partnership is always entitled to whatever he can obtain out of the fund in the hands of the surviving partner, without relinquishing his security against the separate estate of the deceased partner. *Id.*

A creditor before judgment may sustain a bill against a deceased partner's administrator to compel the distribution of the estate. *Grosvener v. Austin*, 25 D. 743.

Where a firm is dissolved, leaving one of the partners largely indebted to the concern, and the latter afterwards dies insolvent, his solvent surviving partner, having been compelled to pay debts of the firm out of his own property, is entitled to share in the deceased partner's estate for the balance due him, equally with other creditors having unliquidated demands or accounts, etc., constituting debts of the fourth class under the statutes. *Payne v. Matthews*, 29 D. 738.

Such demand may be liquidated by the surrogate in settling the estate, or by a decree of the court of chancery after a reference. *Id.*

In equity, a partnership debt is considered joint and several, and upon the death of any member of the firm the creditor may proceed directly against the estate of the deceased partner. This rule has been adopted by our statute; and in consequence, in Arkansas, a partnership creditor is entitled to an allowance in the probate court of a partnership debt which he has presented to the representative of a deceased partner. *McLain v. Carson*, 37 D. 777.

At common law, a partnership debt is the joint debt of the partners, and the death of any member of the firm extinguishes the debt as to him; and the remedy of the creditor is confined to one against the survivors. *Id.*

Partnership debts may be presented against the estate of a deceased partner, under the Connecticut statute, and allowed equally with separate debts, whether the surviving partner is solvent and within the jurisdiction of the court or not. *Camp v. Grant*, 54 D. 321.

* Death of partner, proceedings to enforce partnership liability against his representatives, see note, 77 D. 114-117.

Heirs of a deceased partner have such interest in the firm's real estate as to give them the privilege, when sued for a divestiture of title by a derivative purchaser from the surviving partner, of showing that the alleged equity is founded in a wrongful conversion of the partnership effects, which a court of equity would not sanction; and it is no answer to their right to defend, that the firm is insolvent, and the whole of the assets is required to pay its debts. *Lang v. Waring*, 60 D. 533.

Heirs of a deceased partner will not be compelled, in equity, to convey real estate of firm to a purchaser from the surviving partner in all cases of disposition by him, however unfair, inequitable, or unauthorized; and if the disposition be for a grossly inadequate consideration, and made under such circumstances as were well calculated to cause it to be sold for an almost nominal sum, the court ought not to lend its aid to perfect the purchase, especially when its aid is invoked by one whose conduct has contributed, in all probability, to bring about the sacrifice. *Id.*

Where, under an agreement contained in articles of partnership, the title to the partnership property, upon the death of one partner, vests in the survivor, who transfers it, *bona fide*, to the representatives of the deceased, if the partnership was insolvent, the assignment, though honestly intended to discharge a debt due to such representatives growing out of the partnership business, might not affect the rights of creditors to have the property subjected to the satisfaction of their demands; but if it becomes necessary to proceed against the estate of the deceased partner, payment can only be enforced through the probate court. *Gass v. Reed*, 76 D. 94.

In equity, every partnership debt is joint and several. Therefore the creditor may, at the same time, sue the survivor, as such, and proceed against the estate of the deceased partner. *Id.*

In case of the death of one partner, a creditor of the firm may resort to his estate without first exhausting his remedy against the surviving partners. *Doggett v. Dill*, 48 R. 565.

103. Position of representative of deceased partner.—Representatives of a deceased partner cannot be sued at law for the partnership debts; the suit must be brought against the survivors, into whose hands the partnership effects pass by survivorship, for the payment of these debts. *Wilder v. Keeler*, 23 D. 781.

The representative of a deceased partner cannot be sued while there is a surviving partner. *Burgwin v. Hostler*, 1 D. 582.

A deceased partner's representative may insist that the partnership effects shall be applied to the debts of the firm. *Egberts v.*

For Index to Notes in American Decisions and American Reports, see Volume I.

Wood, 24 D. 236; *Wilson v. Soper*, 56 D. 573.

A deceased partner's representative has no interest in the question as to what debts shall be paid first, where the partnership funds are insufficient to pay the whole. *Egberts v. Wood*, 24 D. 236.

Upon the decease of a partner, and the consequent dissolution of the partnership, the surviving partner must account with the representatives of the deceased for his share of the partnership funds, whether the same consist of real or personal assets. *Dyer v. Clark*, 30 D. 697.

The representative of a deceased partner has no legal interest or title in the choses in action which may have been in the possession of the deceased partner at the time of his death, and is liable to an action by the surviving partner for the recovery of them. *Kinsler v. McCants*, 53 D. 711.

Payment of a judgment against the surviving partners by the executor of the deceased partner operates as a satisfaction of the judgment, and the executor cannot, by taking an assignment of the judgment, keep it alive to coerce payment from the surviving partners. *Hogan v. Reynolds*, 56 D. 236.

Personal representatives of a deceased partner become tenants in common with the survivor, of all the partnership property or effects in possession, while the choses in action vest in the survivor, who has the right to control the partnership effects for the purpose of paying the debts and settling up the business. *Wilson v. Soper*, 56 D. 573.

The administrator of a deceased partner, being tenant in common with the survivor, has power to dispose of an undivided moiety of the stock of goods on hand, and thus vest the surviving partner with the title to the whole stock. *Id.*

A contract made by representatives of a deceased partner, without authority, and touching matters over which the surviving partner had entire control, will be considered as wholly inoperative to affect the rights and estate of the firm when it is declared inoperative as to the surviving partner. *Lockwood v. Mitchell*, 70 D. 78.

Where one partner sells his interest in partnership to his copartner, upon consideration that the latter pay all the partnership debts, and upon other considerations, such property becomes the separate property of the copartner. Upon his death, it goes to his administrator, and the seller cannot claim it as surviving partner, to be used in paying partnership debts which he was forced to pay. His remedy is against his deceased partner's estate under the agreement. *White v. Parish*, 73 D. 204.

The executor of a deceased partner cannot employ the surviving partner to wind up the affairs of the firm at a fixed compensation, unless he is expressly authorized to do so by

his testator's will. *Brown v. McFarland*, 80 D. 598.

104. Liability to creditors, of representative of deceased partner.* — Creditors of a firm had no remedy against representatives of a deceased partner, at the common law, on the dissolution of the firm by the death of one of its members, but were compelled to look to the survivors alone for the payment of their debts. *Emanuel v. Bird*, 54 D. 200.

In equity, partnership debts are considered joint and several, and the joint creditors have the right to proceed against the estate of the deceased partner if the survivors are insolvent. *Id.*

In an action upon a firm liability, the administrator of a deceased partner cannot be joined as a defendant with the surviving partners. *Childs v. Hyde*, 77 D. 113.

An action will lie against the representatives of a deceased partner for the recovery of a partnership debt after the recovery of a judgment therefor against the survivor, and the return of an execution thereon unsatisfied, notwithstanding it may be shown that the survivor had property out of which the execution might have been satisfied, which was not discovered by the sheriff. *Pope v. Cole*, 14 R. 198.

Where articles of partnership simply provide that on the death of one partner, his capital shall be left in the business until the close of the partnership term, the executor of the deceased partner is not personally liable for the partnership debts when he does not personally engage in the business. *Wald v. Davenport*, 57 R. 552.

V. LIMITED PARTNERSHIP.

105. Rights and powers of special partner. — Authority of one special partner to bind another ceases when the particular purpose of the partnership is concluded. *Benley v. White*, 38 D. 186.

Where a limited partnership is formed for the purpose of purchasing a drove of horses for a distant market, and after making sundry purchases, on joint account, one partner is placed in charge of the horses, and begins driving them to the market for which they were destined, he has no authority thereafter, while on his journey to the market, to make additional purchases, and bind the other partner thereby. *Id.*

The special partner is not deprived of his interest in a limited partnership by a levy thereon under an attachment, nor is he thereby deprived of the right to an account, or prevented from collecting any surplus over such claims as the sheriff has upon it. *Harris v. Murray*, 86 D. 268.

106. His liabilities, generally. — When a partnership is formed for a special

* Liability of executor of deceased partner for debts of the firm, see note, 57 R. 536, 537.

For Index to Notes in American Decisions and American Reports, see Volume I.

purpose, and is limited, and a partner gives the firm notes for his individual obligation, the other partner is not liable, if the notes are issued without his knowledge or consent, and the person receiving them is aware that they are not issued for a firm debt. *Lanning v. Gaine*, 3 D. 422.

The interest of a special partner in a limited partnership cannot be levied upon and sold under an execution issued in an attachment suit brought against the members of the partnership. *Harris v. Murray*, 86 D. 268.

A partner in *commendam* does not become responsible for liabilities created by the active partner after the expiration of such partnership, from the fact that he fails to have a settlement of its affairs; nor is such partner liable as a general partner if he allows his money to remain in the firm after its expiration, believing himself to be a partner in *commendam*, and liable only for the amount invested, unless he has done or permitted some act which could have induced creditors to believe him to be a general partner. *Slocumb v. De Licardi*, 99 D. 740.

The defendant, S., resided in Cuba, and was a special partner of a firm organized and doing business there. The provisions of the Spanish law relative to limited partnerships had been so far complied with as to limit his liability to the amount of capital which he had contributed. The firm became indebted to the plaintiffs, citizens of this state. S. had no personal connection with the transactions. In an action upon such indebtedness, — *held*, that the contract of partnership was to be interpreted and regulated by the laws of Spain; that the liability of S. and the authority of the acting partner to bind him were to be determined by those laws; and that he was entitled to set up his limited liability as a defense. *King v. Sarria*, 25 R. 128.

107. When liable as general partner. — Under the statute for the formation of limited partnerships, which requires the capital of the special partner to be paid in actual cash on the formation, and provides that if there is any false statement in the certificate and affidavits of formation, the special partner shall be liable as a general partner, a partnership was formed, by a certificate and affidavits dated and filed December 23, 1870, to commence January 1, 1871; the affidavits and certificates stated that the special partner's capital had been actually and in good faith paid in cash; in fact, the special partner gave his checks for the amount, dated December 31, 1870, which were paid January 2, 1871. *Held*, that the statements were false within the meaning of the statute, and the special partner was liable as a general partner for the debts of the firm. *Durant v. Abendroth*, 25 R. 158.

On the formation of a limited partnership the special partner gave his certified check

for ten thousand dollars, the amount of his capital, which was deposited to the credit of the new firm. Afterward, on the same day, the firm gave him their checks on the same bank for some seven thousand six hundred dollars, the amount appearing to his credit on the books of a former firm composed of the same members. *Held*, that this was not an actual cash contribution as required by the statute, and the special partner was liable as a general partner. *Lineweaver v. Slagle*, 54 R. 775.

PARTNERSHIP LANDS.

Generally, see PARTNERSHIP, 19, 20.

When subject to dower, see DOWER, 6.

PARTY-WALLS.

[Includes the title to and relative rights and liabilities of adjoining land-owners, as affected by the existence of a wall between their lots, built for their common use, at their common expense.]

1. What is a party-wall.* — A description in a notice of sale of premises as the "Collins Hotel" does not import, *ex vi termini*, that the walls are party-walls, or of a different character. *Hendricks v. Stark*, 93 D. 549.

The plaintiff bought a lot of the defendant, agreeing to erect a building on it, and it was also agreed that when the defendant should build on his own adjacent lot, he should construct a stairway to the second story to serve for both buildings, and to stand one half on the land of each party. The plaintiff built his wall twenty inches from the line, and the defendant not only used it for the stairway, but for the independent support of his own building. *Held*, that the wall became a party-wall, and defendant was liable for one half the cost. *Melony v. Dixon*, 54 R. 1.

2. Right to build or increase dimensions. — Either owner of a party-wall may increase the thickness, length, or height of his own part of it, if he can do so without injury to the other part. *Andrus v. Haseltine*, 46 R. 635. But the party making the addition does it at his peril. And if injury results he is liable for all damages. He must insure the safety of the operation. *Brooks v. Curtis*, 10 R. 545. And where the original agreement was for a dead wall, there can be no windows or other openings in the part so raised. *Dauenhauer v. Desine*, 32 R. 627.

The owner of two adjoining lots conveyed one to B. and the other to S., each deed containing an agreement that the division wall between the houses then standing should, notwithstanding a deviation from the true dividing line, remain undisturbed "so long as the said houses shall endure." *Held*, that the true construction of the deeds was, that

* See monographic note on the law of party-walls, 92 D. 289-306.

For Index to Notes in American Decisions and American Reports, see Volume L.

whenever the grantee, or person claiming under him, should find it necessary, either by reason of the decaying or dilapidated condition of his house, or its unsuitness for the locality, to remove it and to erect in its stead a more substantial structure, suitable to the place, and required for the business wants and purposes of the locality, he had the right to remove the old division wall and erect a new building on his lot, extending to the true dividing line. *Glenn v. Davis*, 6 R. 389.

3. Rights of adjoining owners in use of wall. — Where parties construct a wall for the support of their houses, on the line of their respective lots, and continue to occupy the same for more than twenty-one years, under an agreement containing no express stipulation as to the continuance or termination of such joint use of the wall, one of the parties may, if he desires to remove the building upon his lot, in order to erect another thereon, notify the other of his intention to remove that portion of the wall standing upon his land, and upon the other party's refusing to suffer or permit such removal, he may proceed to take the wall down, using due and proper care to prevent injury to that part of the wall standing upon the lot of the other party, without being liable in an action therefor. *Hieatt v. Morris*, 78 D. 280.

Where two owners of realty build adjoining houses at the same time, in such a manner that an alley is left between them, one of the walls of which rests on the property of each owner respectively, the two walls coming together at the top in an arch, above and upon which, on the division line between their property, is erected a party-wall, into which the houses on each side are built, the manner of construction implies an agreement or contract between the owners that each shall have a right of support or easement in the land of the other, so far as necessary to maintain the alley for mutual use, and the party-wall for common support of the two houses, and that the uninterrupted enjoyment of such right for a period of more than fifty years raises a presumption of mutual grants for such enjoyment for the time the two houses shall be capable of sale and beneficial occupation, operating to preclude any authority or right of either of the parties to interfere with the alleys or walls without the consent of the other, unless he can do so without injury to the latter's possession. *Dowling v. Hennings*, 83 D. 545.

The upper owner of a tenement has a right to have his portion thereof supported by the division walls between him and the lower owner. And for the removal of such support by the lower owner, the upper owner may maintain an action, without showing special damage. *McConnel v. Kibbe*, 85 D. 265.

Owners of adjoining premises are not tenants in common of a party-wall, but each owns in severalty the part thereof on his side of the line, with an easement of support from the other part. *Bloch v. Isham*, 92 D. 287.

The right of an adjoining owner to use a party-wall does not constitute such an encumbrance upon the premises or defect in the title thereof as will relieve the vendee from his contract for the purchase thereof. *Hendricks v. Stark*, 93 D. 549.

Where a wall of a house stands wholly upon the land of another, and is essential to the support of the house, the latter cannot remove or impair it, both owners having bought from the common owner, and with knowledge of the situation of the wall. *Henry v. Koch*, 44 R. 484.

4. Contribution between them. — Where there was an old party-wall between two owners, and one, being desirous to build a new house on his lot, pulled down the old house, and with it the party-wall, which was ruinous, and rebuilt it with his new house, the owner of the adjoining house and lot is bound to contribute ratably to the expense of the new wall; but he is not bound to contribute to building the new wall higher than the old; nor if materials more costly or of a different nature are used, is he bound to pay any part of the extra expense. *Campbell v. Mesier*, 8 D. 570.

A party building on his own land and thereby using the wall of another is not liable to the owner for one half the cost of the wall. *Abrahams v. Krausler*, 66 D. 698.

In Philadelphia, by statute, one who builds a wall partly on his own ground, and partly on the ground of an adjoining owner, must bear the entire expense, but he has a contingent claim against such adjoining owner that the latter shall pay for his share of the wall before using it. *Roberts v. Bye*, 72 D. 710.

Where it is agreed between the builder and his contractor that the latter is to look to the adjoining owner of a party-wall for half his compensation, as the wall is part of the building, the legal title to which is in the builder, he becomes trustee for the contractor. If he sells his building to a purchaser with notice, the latter becomes substituted as trustee. To recover his compensation in such case, the contractor must bring his action against the adjoining owner, when the claim accrues by the latter's using the wall, in the name of his trustee. But if the builder sells to a bona fide purchaser without notice, the latter takes the property divested of the trust, and then the contractor's remedy is an action for money had and received, against the builder. *Ib.*

In an action to recover the value of one half of a party-wall erected by the plaintiff, partly on his estate and partly on that of the defendant, the jury may, in the absence of

For Index to Notes, in American Decisions and American Reports, see Volume I.

an express agreement as to payment on the defendant's part, infer a promise to pay, if the plaintiff undertook and completed the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection. *Day v. Caton*, 20 R. 347.

One owner of a party-wall who adds to it for his own use may maintain an action of contribution against the other owner, who has used such additions, for one half the value of the additions when made. *Sanders v. Martin*, 31 R. 598.

In case a party-wall is destroyed by fire, there is no implied obligation to contribute toward rebuilding it. *Antomarchi v. Russell*, 35 R. 40.

Plaintiff and defendant owning adjoining lots entered into a parol agreement to jointly build a party-wall, and in pursuance thereof built a portion of the wall, when defendant refused to proceed further. Whereupon the plaintiff, who had prepared materials and planned a building in reliance upon the performance of the agreement, proceeded to complete the wall after due notice to the defendant. *Held*, 1. That the parol contract having been partly executed, the parties were estopped from denying the existence of the easement thereby created; and 2. That plaintiff was not limited to an action for specific performance, but could recover of defendant one half the cost of the wall. *Rindge v. Baker*, 15 R. 475.

5. Conveyances, and rights of purchasers.—Conveyances of adjoining buildings having a party-wall, to different grantees, the center line of the wall being made the boundary between them, give to each grantee a right to have his building supported by means of his neighbor's half of the wall. When either building becomes, by age and decay, so dilapidated that rebuilding becomes necessary, its owner may, for that purpose, and on reasonable notice to the adjoining tenant, and using proper care and skill, take down and rebuild the party-wall, without incurring liability to the other tenant. *Partridge v. Gilbert*, 69 D. 632.

A covenant to pay the owner of an adjoining lot one half the cost of a party-wall erected by him when the covenantor should use the wall is a personal covenant, and does not pass to the grantee of the covenantee. *Bloch v. Isham*, 92 D. 287; *Cole v. Hughes*, 13 R. 811. Contra, *Sharp v. Cheatham*, 57 R. 433; *Richardson v. Tobey*, 23 R. 283.

The sale and conveyance of land by the owner amounts to a revocation of an oral agreement between him and an adjoining owner, whereby the latter was to build on the line between the lands a party-wall, and the former was to pay one half the cost

thereof, provided the adjoining owner has notice of the sale, and has not at the time commenced the erection of the wall. *Rice v. Roberts*, 1 R. 195.

Where A and B agreed upon a party-wall, to be built at the expense of A, and for one half of which B was to reimburse him before using the wall, and that the agreements should be taken as covenants running with the land, — *held*, that the covenant for reimbursement did not run with the lot of A. *Gibson v. Holden*, 56 R. 146.

6. Controversies relative to party-walls. — If a party's wall is used by another to the owner's injury, his remedy is an action for damages resulting from such injury. *Abraham v. Krautler*, 66 D. 698.

Action on the case is the proper remedy by one tenant in common of a party-wall against his co-tenant, where an injury to the wall, and the house of the plaintiff, of which it forms a part, has been occasioned by the negligent and unskillful manner in which his co-tenant has made an excavation on his own lot. *Moody v. McClelland*, 84 D. 770.

7. Termination of the easement. — Where houses having a party-wall are accidentally destroyed by fire, leaving the wall standing, the easement in the wall ceases, and either owner may dispose as he pleases of the part on his ground. *Hofman v. Kuhn*, 34 R. 491.

PASS-BOOKS.

Of depositors in savings banks, see BANKS AND BANKING, 82, 83.

PASSENGERS.

Carriage of, by vessel, see SHIPPING, 21, 22.

Carriers of, see CARRIERS, III; RAILROAD COMPANIES, 64-69.

Connecting lines as carriers of, see RAILROAD COMPANIES, 112.

Contributory negligence of, see RAILROAD COMPANIES, 82-85.

Expulsion of, from street-car, see RAILROAD COMPANIES, 119.

Liability of carrier for injuries to, see RAILROAD COMPANIES, 74-89.

On street-cars, injuries to, see RAILROAD COMPANIES, 120.

Retention of custody of baggage by, see RAILROAD COMPANIES, 64.

Rights of foot-passengers, see HIGHWAYS, 32.

Who are, see CARRIERS, 69-72; RAILROAD COMPANIES, 75.

PAST CONSIDERATIONS.

Insufficiency of, see CONTRACTS, 34.

PATENT AMBIGUITIES.

In writing, not explainable by parol, see EVIDENCE, 93.

For Index to Notes in American Decisions and American Reports, see VOLUME I.

PATENTS (FOR INVENTIONS).

[Includes decisions in controversies in state courts growing out of or in some way involving patents, and the rights of patentees, licensees, etc.]

For inventions, parol evidence to explain, see EVIDENCE, 120.

For lands, as means of evidence, see EVIDENCE, 209.

For public lands, see PUBLIC LANDS, 27-34. Liability of corporation for infringement, see CORPORATIONS, 133.

1. Powers of the states respecting patent rights. — State statutes regulating or limiting the sale of patent rights are void. *Helm v. First Nat. Bank*, 13 R. 395; *Grover & B. S. M. Co. v. Butler*, 21 R. 200; *Hollida v. Hunt*, 22 R. 63; *Crittenden v. White*, 23 R. 676. But a provision regulating the sale of articles is not void, because such articles are patented. *Patterson v. Com.*, 21 R. 220. Contra, *Grover & B. S. M. Co. v. Butler*, 21 R. 200; *Wood Moving Machine Co. v. Caldwell*, 23 R. 641.

The use of a patented article devoted to public use is subject to control by state legislation when the public welfare demands it. *State v. Telephone Co.*, 38 R. 583.

A state statute providing that any person taking a written obligation, the consideration whereof is a patent right, shall, before such obligation is signed by the maker, insert in the body thereof "given for a patent right," is unconstitutional, as interfering with the exclusive power of Congress to regulate patents. *Helm v. First Nat. Bank*, 13 R. 395; *Crittenden v. White*, 23 R. 676; *Hollida v. Hunt*, 22 R. 63; *Cranston v. Smith*, 26 R. 514. Contra, see *New v. Walker*, 58 R. 40.

A state statute requiring vendors of patent rights to file with the county clerk an authenticated copy of the letters, with an affidavit that they are genuine and have not been revoked or annulled, and that the vendors have authority to sell, is valid. *Breechbill v. Randall*, 52 R. 695; *New v. Walker*, 58 R. 40.

A state statute required foreign corporations, as a condition precedent to the transaction of their business in any county of the state, to deposit in the office of the county clerk a power of attorney, authorizing their agents to transact business for them, and the service of process on said corporations by service on such agents. Held, not to apply to corporations engaged in the manufacture and sale of articles covered by letters patent. *Grover & B. S. M. Co. v. Butler*, 21 R. 200.

A state statute provided for the inspection of illuminating oils, and forbade the sale of any that would not stand a prescribed test. Held, that the prohibition was constitutional as applied to oils patented under the laws of the United States, as well as in other cases. *Patterson v. Com.*, 21 R. 220.

2. What may be the subject of a patent. — An invention, to be the subject of a patent, must be useful for some beneficial purpose. *Dickinson v. Hall*, 25 D. 390.

A valid patent may be obtained upon a new combination of existing principles or machines. *Holliday v. Rheem*, 57 D. 628.

3. What constitutes invention. — An instruction that if there is anything new in an invention a patent obtained upon it is valid, is erroneous. *Holliday v. Rheem*, 57 D. 628.

In a joint invention each party should invent or discover something essential to the whole result. *Slemmer's Appeal*, 98 D. 248.

4. The requisite utility. — A "useful invention," within the meaning of the patent act, is one that may be applied to some practical and statutory use named in the patent; but it is not necessary that it should be of such general utility as to supersede all other inventions used to accomplish the same purpose. *Rouse v. Blanchard*, 86 D. 783.

The question as to whether an invention is useful must be left to the jury, under proper instructions, in an action upon a note, the consideration of which is the right to make and sell a patented invention. *Id.*

In an action upon a note given for a patent right, the defense to which is failure of consideration, it is error for the court to refuse to instruct the jury, at defendant's request, that if the article patented is "impracticable to be used for the purpose for which it was patented, then the defense of failure of consideration is established." *Id.*

In such an action it is error to instruct the jury, at plaintiff's request, "that if the invention patented is useful in some measure and for some purpose the patent is not void." It is too broad, and calculated to mislead the jury. So where the jury are told "that if the invention can be applied to any beneficial purpose, it may be deemed a useful invention," the charge is objectionable. *Id.*

The expression "useful for some beneficial purpose," found in the patent decisions, is to be taken in a general sense as applicable to all patents, and not as implying in a particular case, where the thing invented is worthless for the purpose intended, but of possible useful application to some other, that the patent may nevertheless be valid. *Id.*

5. Rights of patentees, generally. — An inventor loses his right to a patent, if he suffers the invention to go into public use before he makes application for a patent; and this, although the articles used were manufactured by himself or his agents. *Earl v. Page*, 26 D. 711.

One joint owner of a patent right cannot maintain a bill in equity against another joint owner, to compel an accounting for a portion of the profits of sales of the patented

For Index to Notes in American Decisions and American Reports, see Volume L.

article, in the absence of any special agreement. *Voe v. Singer*, 81 D. 696.

An inventor may grant the use of his invention, within the limits prescribed by the law, before the patent is issued, provided he does not thereby forfeit his right, or abandon his discovery to the public. *Stemmer's Appeal*, 98 D. 248.

The right of a patentee is not invalidated by reason of mere suggestions or assistance received from others. To effect this, the suggestions must furnish all the information to enable the alleged inventor to construct the improvement, or use the new process completely and perfectly. *Id.*

A patent right is a reward granted by the public for the skill and ingenuity of the inventor. No one but the inventor can have this exclusive right, and he may assign it after the patent has been issued. *Id.*

The right of an inventor in his patent may be reached and sold upon proceedings supplementary to execution. *Pacific Bank v. Robinson*, 40 R. 120.

An inventor or discoverer of a secret process of manufacture, whether patentable or not, has property therein which equity will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use, or to disclose it to third persons, and as against third persons having notice of such relations, although he may not have an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it. *Peabody v. Norfolk*, 96 D. 664.

A salary agreed to be paid an employee is sufficient consideration for his promise not to disclose the employer's inventions and discoveries as well as for his promise to serve as engineer, where the employee agreed to serve the employer as engineer in his factory, and particularly in the construction and running of the machinery, and not to give any person information, directly or indirectly, in regard to any portion of the machinery, and by all means in his power to prevent others from obtaining any information in regard to it such as would enable them to use it, and the employer agreed to pay the employee an annual salary "in full compensation for the above-described services." *Id.*

An employee's agreement never to disclose his employer's inventions and discoveries confidentially imparted to him will be enforced in equity, although, perhaps, the employee's agreement to serve as engineer may not be specifically enforced. *Id.*

A secret of trade or manufacture does not lose its character as such by being confidentially disclosed to agents or servants, without whose assistance it could not be made of any value. *Id.*

An inventor or discoverer of a secret process of manufacture is none the less entitled

to protection against those who, in or with knowledge of, violation of, contract and breach of confidence, undertake to disclose it or to reap the benefit of it, from the fact that the process is liable to be inspected by the assessor of internal revenue or other public officer, or from the danger of divulging the secret in the course of a judicial investigation. *Id.*

Executors of an inventor or discoverer of a secret process of manufacture succeed to his rights, and may maintain a bill in equity to prevent its disclosure in violation of contract and breach of confidence. *Id.*

At the suit of the owner of a patent for vulcanized rubber, A, a dentist, was enjoined from using the preparation. Believing that A disregarded the injunction, the owner employed B to ascertain. B procured C to apply to A for a set of teeth upon a plate of vulcanized rubber. A made the teeth upon such plate, delivered them to C, and received pay therefor. B and C reported the facts to the owner, and on their affidavits, proceedings for contempt were commenced against A. *Held*, that B and C were not liable for a conspiracy to induce A to violate the injunction; that the owner of the patent had a right to resort to this method of learning the facts; and that the communications of B and C to the owner of the patent were privileged. *Knowles v. Peck*, 19 R. 542.

6. Proceedings to obtain a patent.*

— An inventor, to entitle himself to a patent, must give, in his specification, a true description of his invention, and state clearly and accurately what he claims as his invention. *Davis v. Bell*, 31 D. 202.

Ambiguity in any material part of such description will render the patent void. *Id.*

The specification must state what is new and what is old, in such a manner as to show clearly what is claimed as a new invention, and if it seeks to cover more than is new, the patent will be void. *Id.*

7. Surrender and abandonment.†

An invention may be surrendered or dedicated to public use, and when once abandoned it can never be resumed. *McCay v. Burr*, 47 D. 441.

8. Assignments.— A conveyance of an exclusive right to fabricate and use a patented invention within a certain district carries with it the right to vend the same, without express words. *Belius v. Hays*, 9 D. 385.

The assignment of a particular interest in a patent right, or a conveyance of a right to use an invention in a limited territory, is not required to be recorded in the patent-office. *Stevens v. Head*, 31 D. 617.

* Specifications for, what must contain, see note, 81 D. 204-206.

† Abandonment of invention, when occurs, see note, 47 D. 443-451.

For Index to Notes in American Decisions and American Reports, see Volume I.

The vendee of a right to use a patented invention, who has not been disturbed in the exercise of such right, must show that the vendor had no right to convey, if he seeks to recover against him on the ground that there was no right conveyed. *Id.*

A purchaser of a patented article, knowing that the vendor had no right either to manufacture or sell the same, cannot recover from the vendor the money paid. *Bell v. Bowney*, 56 D. 601.

The assignment of a right to construct and use a worthless patented invention constitutes no consideration for a promissory note. *Rove v. Blanchard*, 86 D. 783.

Where the plaintiff alleges that he and the defendant were the joint inventors of certain machines, and as such entered into certain covenants, pleas that neither party was the inventor, or that separate patents to them previous to the agreement were void, or a subsequent joint patent was void, were held bad. *Stearns v. Barrett*, 11 D. 223.

Where the defendant pleads that each party, supposing himself the inventor, procured a patent and entered into the agreement expecting to enjoy the exclusive right within his district, and that the patents were void, a replication traversing that they entered into the agreement under that supposition and expectation was held sufficient. *Id.*

A stipulation in the agreement that the defendant might use the machines in the plaintiff's district upon certain conditions, need not be stated in the declaration, as it is matter of defense. *Id.*

Letters patent of the United States, owned by an insolvent debtor, pass to his assignee in insolvency. *Barton v. White*, 59 R. 84.

9. Licenses.—A license to use an invention, which is limited to individuals, is not an abandonment of the invention. *McCay v. Burr*, 47 D. 441.

The use of an invention by special permission of the patentee is not a use of it by the public. *Id.*

A license to an employer to use an invention is implied, where his employee, while receiving wages, experiments at his employer's expense, constructs the article invented, and permits his employer to use it without compensation paid or demanded, and then obtains a patent therefor. *Slemmer's Appeal*, 98 D. 248.

A manufacturing company was preparing to put upon the market a new machine. Its superintendent, knowing this intention, voluntarily disclosed to the company a device of his own, and by direction of the company, with its materials and at its expense, voluntarily applied his device to the machines. Held, that this did not imply an agreement for the absolute assignment to the company of a patent for the device, but implied a perpetual license to the company to apply the

device at those works, and sell the machines anywhere. *Fuller & J. Mfg. Co. v. Bartlett*, 60 R. 838.

10. Interpretation and validity of letters patent.—A patent may be valid, although some parts of the machine described were not the original invention of the patentee. *Holliday v. Rheem*, 57 D. 628.

If anything be included in a patent which is not new, or if the patent covers any material or substantial part of a machine which the patentee did not invent or discover, the patent is void. *Id.*

One who obtains a patent upon two appliances upon a water-wheel, when said patent is attacked must show that each of said appliances is new, or his patent is void. *Id.*

A joint patent taken out on the sole invention of one is void, as is likewise a sole patent taken out on an invention of more than one. *Slemmer's Appeal*, 98 D. 248.

In an action brought in a state court to recover the price agreed to be paid for a patent right, the defendant may, for the purpose of showing want or failure of consideration, prove that the patent is void for want of novelty. *Rice v. Garnhart*, 17 R. 448.

11. Jurisdiction of suits involving patents, generally.—The federal courts have exclusive jurisdiction where the question of the validity of a patent is directly involved, and the state courts have no cognizance thereof either at law or in equity. But when patent rights come in question collaterally, their validity may become a subject of inquiry in the state courts. *Slemmer's Appeal*, 98 D. 248; *Nash v. Lull*, 3 R. 435.

State courts are competent, either at law or in equity, to enforce a contract or a trust, the subject of which is a patent, where the validity of the patent is not directly in question, and may pass upon that when it arises *ex necessitate*, as by way of defense to an action on a contract. *Slemmer's Appeal*, 98 D. 248.

A state court has jurisdiction of an equitable action on a bond conditional upon the validity of a patent. *Middlebrook v. Broadbents*, 7 R. 457. Also, to compel performance of an agreement to assign a patent. *Binnay v. Annan*, 9 R. 10; *Fuller & J. Mfg. Co. v. Bartlett*, 60 R. 838. But a court of equity cannot decree the assignment of a patent on the ground that plaintiff, and not the patentee, is the true original inventor, in whole or in part. *Slemmer's Appeal*, 98 D. 248. Also, of an action to rescind a contract for the sale of a patent right, brought on the ground of the false and fraudulent representations of the vendor as to its value. *Page v. Dickerson*, 9 R. 532.

In a suit by the owner of a patent against a licensee for breach of contract to pay royalties, a state court may not restrain the defendant from the use of the patent during the

For Index to Notes in American Decisions and American Reports, see Volume I.

suit. *Hat Sweat Mfg. Co. v. Reinohl*, 55 R. 793.

Plaintiffs alleged that they were the owners of a valuable right secured by letters patent, and were carrying on a profitable trade in making and selling the article patented; that defendant had printed and issued a circular, claiming therein to be the real patentee of said right and the only one authorized to make and sell articles of the kind made by plaintiffs, and cautioning all persons against purchasing plaintiffs' articles, — thereby injuring plaintiffs. Defendant's answer set up its letters patent, and alleged that plaintiffs' trade was an infringement thereof. The trial court found the issuing of the circular, that it was injurious to plaintiffs, but that it was issued in good faith. *Held*, that an injunction to restrain the publication of the circular and for damages caused by it was not within the jurisdiction of a state court. *Hovey v. Rubber Tip Pencil Co.*, 15 R. 470.

12. — of suits for infringement. — A state court has no jurisdiction of an action by the owner of a patent to recover compensation for its use from one who has used it without his consent. *De Witt v. Elmira Nobles Mfg. Co.*, 23 R. 73.

13. Actions for damages. — Unless the inventor has patented his medicines, he has no cause of action against another who prepares the same kind of medicines, and calls them by the same generic name, if he does not offer and sell them as the preparation of the inventor. *Thomson v. Winchester*, 31 D. 135.

But if another puts up an inferior article, and sells it as the plaintiff's preparation, it is a fraud upon him, for which he may recover without proving special damage. *Id.*

14. Matters of defense. — A party entering into an agreement for the purchase of a patent right is not bound to go on with the contract if the patent turns out to be invalid, but this is an equitable defense which must be specially and distinctly pleaded, and in such a case, the court should instruct the jury with reference to the validity of conflicting patents, whether the patentees are before the court or not. *Bellas v. Hays*, 9 D. 385.

In an action brought in a state court to recover the price agreed to be paid for a patent right, the defendant may, for the purpose of showing want or failure of consideration, prove that the patent is void for want of novelty. *Rice v. Garnhart*, 17 R. 448.

Plaintiff, being joint owner with defendant of certain letters patent which both supposed to be valid, conveyed to the defendant the exclusive right to manufacture the patented articles, and defendant agreed to pay plaintiff a certain royalty therefor. *Held*, in an action for the royalty, that the invalidity of the patent was no defense for the

time the defendant had actually enjoyed the patent under the license unmolested. *Mareton v. Sweet*, 23 R. 43. *S. P.*, *Jones v. Burnham*, 24 R. 10.

PAUPERS.

See POOR AND POOR LAWS.

PAWNBROKERS.

Rights and liabilities of, see FLEDGE, etc., 15.

PAYEE.

See BILLS AND NOTES, 7, 55.

PAYMENT.

[Includes the discharge of pecuniary obligations by payment in money or its equivalent. Other modes of satisfaction are treated under their appropriate titles, and payment of particular obligations will be found under their respective titles.]

Authority of attorney to receive, see ATTORNEY AND CLIENT, 17.

By representative, effect of subsequent insolvency of estate, see EXECUTORS, etc., 185.

Demand of, see DEBTOR AND CREDITOR, 4.

Effect of delivery without, see SALES, 53.

Filing in time and place of, see BILLS AND NOTES, 20, 21.

For goods bought, generally, see SALES, II.

For stock, what may be taken in, see CORPORATIONS, 68.

Guaranty of, see GUARANTY, 19.

How proved, see EVIDENCE, 256.

Of alimony, enforcement of, see MARRIAGE AND DIVORCE, 93.

Of bill or note, see BILLS AND NOTES, 251-253.

Of bill or note, proof of, see BILLS AND NOTES, 291.

Of debts in insolvency, order of, see INSOLVENCY, 18, 19.

Of decedent's debts, sale of land for, see EXECUTORS, etc., 104-122.

Of executions, see EXECUTION, 171, 172.

Of funeral expenses, see EXECUTORS, etc., 82.

Of legacies, see EXECUTORS, etc., 96; LEGACIES, III.

Of loss, by insurer, see INSURANCE, 33, 34.

Of premiums on insurance policies, see INSURANCE, 203-208.

Of premiums on life policy, see INSURANCE, 72-74.

Of price of land, action for relief against, see VENDOR AND PURCHASER, 71.

Of price, rights and duties of purchaser as to, see VENDOR AND PURCHASER, 23.

Of witness's fees, condition precedent to attendance, see WITNESSES, 8.

Power of partner to bind firm by receiving, see PARTNERSHIP, 49.

Satisfaction of judgment by, see JUDGMENT, 110.

For Index to Notes in American Decisions and American Reports, see Volume L.

Taking a bill or note in, see also ACCORD AND SATISFACTION, 5.
 To bankrupt, pending proceedings, see BANKRUPTCY, 20.
 To redeem from execution sale, see EXECUTION, 151.
 To take contract out of statute of frauds, see SALES, 21; VENDOR AND PURCHASER, 9, 10.
 What necessary to redeem mortgaged premises, see MORTGAGES, 125.
 What sufficient to raise resulting trust, see TRUSTS, 16.
 When discharges mortgage lien, see MORTGAGES, VIII.
 When necessary before bringing ejectment, see EJECTMENT, 22.

I. GENERAL PRINCIPLES.

II. PAYMENTS OTHER THAN IN MONEY.

1. GENERAL PRINCIPLES.

1. Obligation to make payment. — The law requires a man to devote the whole of his property, with some trivial exceptions, to the payment of his debts. *Trimble v. Turner*, 53 D. 90.

All property, real and personal, of a debtor, is liable, both during his lifetime and afterwards, for the payment of his debts, which liability is to be made effectual by special provisions of the law for that purpose. *Ticknor v. Harris*, 40 D. 186.

2. What amounts to a payment. — Money credited on account by him who receives it will be considered intended as a payment, unless it is shown to have been delivered as a loan; but it is otherwise as it respects personal property, though delivered at a fixed valuation. *Norton v. Larco*, 89 D. 70.

The assignment and receipt of goods to be applied to a particular debt constitute one entire contract. *Raymond v. Roberts*, 16 D. 602.

Parol evidence affecting such contract is admissible to prove that there were other goods, not mentioned therein, sold at the same time, to be applied upon the same debt, but not to contradict the contract by showing that part of the goods embraced in the assignment were not included in the receipt fixing the price agreed on. *Id.*

The holders of certain gold-warrants accepted payment thereof in treasury notes under protest, and surrendered the warrants. *Held*, that the payees could not afterward recover the difference between the value of the notes and gold coin. *Gilman v. County of Douglas*, 3 R. 237.

3. What does not. — An executory agreement to apply the value of certain services and materials to the part payment of a debt, when the amount to be applied is uncertain and unliquidated, is not a payment so as to be admissible under the general issue in *assumpsit*. *Manville v. Gay*, 60 D. 379.

Where husband and wife deed away wife's land, receive therefor a promissory note, and the wife agrees, with the husband's assent, that the makers of the note shall furnish her family with goods and apply them upon the note, articles delivered to the family, under this agreement, constitute a payment upon the note; but not so as to goods delivered under the husband's order, to persons not members of the family. *Barber v. Slade*, 73 D. 299.

The burden of proof under an agreement that makers of a note shall furnish goods for family use, and to be applied in payment thereof, is on the makers, when sued, to show what goods were delivered for such use. *Id.*

A usurious extension of the time of payment of a valid debt does not impair the creditor's right to recover therefor. The surrender and cancellation of a security will not operate as a bar to a recovery, unless the intent of the transaction was to release or discharge the indebtedness. *Winsted Bank v. Webb*, 100 D. 435.

Defendant proposed to pay his note to plaintiff, but at plaintiff's request the note was renewed, upon the understanding that it should be deposited in bank for collection. Subsequently defendant deposited in his own name the amount of the note in the bank, which was burned, with the contents, before the note had matured or been deposited. *Held*, that defendant was liable for the amount of the note. *Moss v. Price*, 8 R. 609.

The holder of a second mortgage took up a note which was secured by a first mortgage on the same premises. *Held*, that he did not thereby pay the note or release the maker and indorser from their obligation to pay. *Mattison v. Marks*, 18 R. 197.

4. Who may receive payment, generally. — It is payment in law when the hand which is to pay is the hand also to receive. *Linscigler v. Gourley*, 94 D. 51.

A payment by a debtor to an administrator duly appointed is valid, and a bar to an action to compel a second payment, although the supposed intestate is alive at the time, and letters of administration are subsequently revoked for this reason. *Roderigas v. East River Saving Inst.*, 20 R. 555.

Payment by a debtor to the nominal creditor, not the real creditor, and known to be such, is not a performance of one of the conditions of a bond by payment of the debt, nor would the payment of the entire debt to a part owner have that effect, when there was knowledge of an equitable interest in another to a portion of it. *Hobson v. Watson*, 56 D. 632.

Payment of interest on a state bond to one not the true owner does not discharge the state if the latter has not authorized the payment. *People v. Smith*, 92 D. 109.

If a state custodian of money pays inter-

For Index to Notes in American Decisions and American Reports, see Volume I.

out on a state bond to one simulating the true owner, it will be no bar to a recovery by the latter, because it is no payment. *Ib.*

A state disbursing officer must assure himself of the identity of the payee in a state bond; if through negligence in this respect payment of interest has been made to the wrong person, the state remains liable to pay the interest to the party entitled to it. *People v. Smith*, 92 D. 109. S. P., *Dutcher v. Beckwith*, 92 D. 232.

5. — of bill or note. — Plaintiff, under an assignment duly executed, held a mortgage to secure notes made by defendant, payable to the order of the assignor at the E. bank. On the day the notes were due, defendant had on deposit in the E. bank money sufficient to pay them, and which, he had told the bank officers when depositing it, was to meet the notes. At maturity plaintiff presented the notes, which were not indorsed by the assignor, at the E. bank, but the bank officers refused to pay them, on the ground that they were not indorsed, and likewise refused when the notes, assignment, and mortgage were subsequently presented. *Held*, that the bank officers could not insist upon the indorsement of the notes as a condition of payment, and that plaintiff was entitled to maintain an action for the foreclosure of the mortgage. *Pease v. Warren*, 18 R. 58.

6. Time and place of payment. — 1. Time. — Money payable in a reasonable time cannot be divided at the election of the payor so as to make it payable at different times, reasonable time being indivisible. *O'Donnell v. Leeman*, 69 D. 54.

An agreement to pay in specific articles at a time fixed compels the debtor to become the first actor, and to tender the articles to save himself from default. *Deel v. Berry*, 73 D. 236.

If a debt is to be paid in services, and the time of performance is specified, the promisor must be the first actor. *Ib.*

Where a note is to be paid by a certain day in services or money, the maker has until the maturity of the note to make his election, but if not then made, he becomes liable as for a demand in money. *Ib.*

It is a general rule of the common law, followed in chancery, that sums of money, payable periodically at fixed times, are not apportionable during the intervening periods. *Dexter v. Phillips*, 23 R. 261.

In the absence of express statute or agreement, no apportionment can be made between the days of payment in rents of real estate, or in the interest on bonds of the United States, with or without coupons, and whether the principal is payable at a time fixed or at the option of the government, the option not having been exercised; or in the interest on bonds or certificates of a state, county, city, town, or railroad cor-

poration, not issued separately for the payment of specific debts, but usually bought and held by way of investment; or in the interest on a note of the receiver of a railroad, or on the certificate of a voluntary association, as a social club, if such note or certificate creates no personal or corporate liability, but is to be satisfied, at a future day, only out of a fund held upon a special trust, the terms of which are not shown to take it out of the general rule. *Ib.*

But interest upon promissory notes of individuals or of incorporated companies, such as are usually given for money lent, whether secured or not by mortgage or pledge, is apportionable between the days upon which it is stipulated to be paid. *Ib.*

2. Place. — Where a man is to pay money or deliver property at a valuation, he is not bound to carry the property to the creditor, but the latter should receive it at the debtor's house. *Dandridge v. Harris*, 1 D. 465; *Grant v. Groshon*, 3 D. 725.

If no place for the payment of money is specified, the party who is to make the payment must seek the other party, if within the state. *Hops v. Tuttle*, 46 D. 309.

Where ponderous articles are to be delivered by promisor at time specified, but place unknown, he must request the promisee to designate a convenient place of delivery. *Deel v. Berry*, 73 D. 236.

Though a debtor be bound to seek and pay his creditor, yet if an employer has an established place where he pays those employed, and where he has reason to expect they will call for their hire, mere neglect to pay elsewhere, without evidence of a demand and refusal, will not justify those employed in abandoning the contract of service. *Dockham v. Smith*, 18 R. 495.

Where the payee of a money obligation specifying no place of payment is out of the state when the payment is to be made, the debtor is not obliged to follow him, but readiness within the state will be as effectual as actual payment to save a forfeiture. *Hale v. Patton*, 19 R. 168.

A mortgage was conditioned to be due and payable, should any installment of interest remain unpaid for thirty days. Eight days after an installment of interest became due, the mortgagee, who was a single man residing in the house of his mother, left the state, and remained absent during the residue of the thirty days. *Held*, that the mortgagor was not required to tender the interest at the house of the mother in the absence of notice that she was authorized to receive it, and that there was no forfeiture. *Ib.*

A corporation legally issued its bonds, payable to the plaintiff or her assigns, on a certain day, at a specified bank, and before their maturity deposited sufficient funds, and directed the bank to pay them on pre-

For Index to Notes in American Decisions and American Reports, see Volume I.

sentment. The bank was then solvent, but subsequently became insolvent, with sufficient of the funds on hand to pay the bonds. The plaintiff did not present them to the bank until after its failure, and had no knowledge of the arrangement between the obligors and the bank. *Held*, that the obligors were liable upon the bonds in spite of the failure of the bank. *Adams v. Hackenack Imp. Comm.*, 43 R. 406.

7. Manner of making payment. — Agreements to pay in specific articles are presumed to be made in favor of the debtor, and he may in all cases put in money in lieu of the articles. *Roberts v. Beatty*, 21 D. 410.

Decisions on contracts to pay in specific articles, in the several states, reviewed and discussed. *Id.*

8. Payment to creditor of creditor. — A balance due on land is paid by purchaser's note to vendor's creditor for a debt of equal amount, with the vendor as surety, given under an oral agreement made after sale and bond to convey on payment, and after a sale by the purchaser, of which the vendor has notice, the agreement being that the note shall be given in payment, that the vendor shall hold the title as security, and that if he is compelled to pay the note, the original debt shall be still due, and the vendor can make no claim for such balance against the deceased purchaser's estate, though after paying the note he may claim as surety. *Davis v. Smith*, 48 D. 279.

A person voluntarily paying the debt of another must see that all conditions of section 240 of the California practice act are fulfilled. There must be a judgment and an execution against property, and the person making the payment must be indebted at the instant to him against whom the execution runs, and therefore he is bound to know of an assignment of his indebtedness. *Brown v. Ayres*, 91 D. 656.

9. Part payment and its effect, generally.* — Payment of part of a claim, though tendered in satisfaction, is no defense to an action for the balance, where the claim is liquidated; otherwise where it is unliquidated. *Donohue v. Woodbury*, 52 D. 771. *S. P.*, *Shaw v. Clark*, 27 D. 578; *Obernado v. Union Bank*, 1 R. 31.

A parol agreement to accept part of a debt in satisfaction of the whole is not binding although such part payment is made, unless such agreement is made on a new consideration. There is a new consideration sufficient to support the agreement, if the part payment is made before the debt is due or in any manner more advantageous to the creditor than the payment to which he was entitled by the terms of his original contract. *Spence v. Russell*, 46 D. 345.

* Payment of a sum less than that due, whether may release entire contract, see note, 54 D. 123-124.

Any partial payment made by a co-trespasser in satisfaction of the damages sustained by reason of the joint trespass inures to the benefit of the other, and in an action against the latter, must be considered by the jury in determining the amount of their verdict. *Snow v. Chandler*, 34 D. 140.

Acceptance, without verbal assent, of a sum expressly tendered in full payment of an unliquidated demand is an assent *de facto*, and binding, though through inattention the terms of the tender were not heard, if by ordinary care they might have been heard. *Donohue v. Woodbury*, 52 D. 777.

A debtor who has paid money on account of a debt cannot, on a subsequent recovery by the creditor of a judgment against him for the whole amount of the debt, maintain an action against the creditor to recover back the money so paid. *Fuller v. Shattuck*, 74 D. 622.

A partial payment on a contract cannot be recovered by a party who has made default in the fulfillment of the contract. *Asbrook v. Hite*, 75 D. 468.

An agreement by a creditor to accept, in satisfaction and discharge of a liquidated debt, a sum less than the full amount due, provided that no other creditor shall receive more than a like per cent on his claim, is void. *Parkins v. Lockwood*, 1 R. 103.

10. The presumption of payment, generally. — The presumption of payment arising from lapse of time, in cases to which the statute of limitations does not apply, may create the belief of payment, but is of itself insufficient to justify a verdict solely on that ground. *Smithpeter v. Leon*, 53 D. 732.

11. When inferred from circumstances. — The presumption of payment does not arise from the failure of the claimant to include the debt in the schedule filed by him on a cession of his goods when he was ignorant of his rights at the time the schedule was made. *Tremoulet v. Cenas*, 17 D. 195.

12. When lapse of time will raise the presumption.* — Payment is presumed after twenty years have elapsed since the rent sued for became due. *Bailey v. Jackson*, 8 D. 309.

A presumption of payment of a mortgage may arise from lapse of time, without payment of interest or demand, but the length of time has not been settled. *Wanmaker v. Van Buskirk*, 23 D. 748.

Twenty years would seem to be sufficient for that purpose in analogy to the law relating to bonds. *Wanmaker v. Van Buskirk*, 23 D. 748; *Howland v. Shurtleff*, 35 D. 384.

Lapse of time may be set up to show that

* Presumption of payment from lapse of time less than period of limitation, see note, 58 D. 590, 591.

For Index to Notes in American Decisions and American Reports, see Volume I.

no debt existed, as well as to raise a presumption of payment. *Wanmaker v. Van Buskirk*, 23 D. 748.

Non-claim for twenty years is strong evidence of the non-existence of a debt, where the parties have every opportunity of knowing and asserting the claim, and there are no explanatory circumstances. *Ib.*

A stronger case is required to establish the non-existence of a debt from lapse of time, than to raise the presumption of its payment. *Ib.*

Where sixteen years have been allowed to pass since the execution of a bond due on demand, the jury may presume its payment. *Atkinson v. Dance*, 30 D. 422.

The presumption of payment after lapse of twenty years of is one fact, and not of law, though equally as important as if it were; but it shifts the burden of proof, and though the court cannot make such a presumption, yet a new trial will usually be granted if the jury disregards it. *Stover v. Duren*, 51 D. 634.

The presumption of payment raised from definite time no more permits a jury to give to a shorter time a force beyond its natural efficacy in producing belief that the bar under the statute of limitations permits a near approach to the statutory period to avail; and a verdict found in contravention of the principle herein stated will be set aside. *Smithpeter v. Isom*, 53 D. 732.

Lapse of time affords strong corroboration of testimony that there was a settlement and adjustment of a claim between partners. *Hamilton v. Hamilton*, 55 D. 585.

Whether or not a note has been paid is a question for the jury, and lapse of time so long as fourteen years is a circumstance which should be left to them in determining this question. Its production by the payee after this lapse of time does not rebut any presumptions arising from this circumstance. *Walker v. Emerson*, 73 D. 207.

13. When it will not. — Courts are never at liberty to presume payment from mere lapse of time, in any period less than that which is fixed by the statute of limitations. *Grafton Bank v. Doe*, 47 D. 697; *Adair v. Adair*, 71 D. 779.

The inference is that a note barred by statute is unpaid when the creditor comes into equity to enforce a mortgage given to secure the same, and it appears that there is no fact other than the lapse of time to warrant a presumption of payment, and that the debtor had no property other than the land mortgaged. *Belknap v. Gleason*, 27 D. 721.

14. How the presumption may be rebutted. — The presumption of payment arising from lapse of time is not an absolute bar, but may be rebutted by circumstances explaining the delay, as by showing that the plaintiff was ignorant of the defendant's residence; that the plaintiff, being an alien, had

been prevented from suing by the existence of war, etc. *Bailey v. Jackson*, 8 D. 309.

The presumption may be repelled by a variety of circumstances, as where it appears that the parties are near relations, and that the mortgagor was not in a situation to pay either principal or interest. *Wanmaker v. Van Buskirk*, 23 D. 748.

Insolvency or near relationship has been held sufficient to repel the presumption. *Ib.*

Relationship between the parties will repel the presumption arising from lapse of time that there is no debt, where to exact payment might have occasioned distress. *Ib.*

An indorsement of a credit on a bond made by the obligee within the period that raises a presumption of payment may be considered as a circumstance tending to rebut such presumption, because when made, the indorsement was against his interest. *Dabney v. Dabney*, 40 D. 761.

The lapse of twenty years raises a presumption of payment of a sealed note, which although not conclusive can only be rebutted by such facts as would revive an unsealed and barred note. The existence of a stay law, the pendency of the civil war, and the lunacy of the plaintiff would not be sufficient. *Boyce v. Lake*, 43 R. 618.

15. What evidence is sufficient to prove payment. — The debtor's possession of his bond is evidence of its satisfaction by himself. *Craig v. Craig*, 24 D. 390.

Possession of a bond by one of several obligors is not evidence that he has paid the whole. *Ib.*

16. What is insufficient. — Payment of money to a third person must be proved by the examination of witnesses. The receipts of such persons, made after the cause of action against the defendant accrued, are inadmissible. *Davis v. Shreve*, 14 D. 66.

The fact that the debtor has had means of paying his debt is not evidence tending to show that he has paid it. *Atwood v. Scott*, 96 D. 728.

The fact that the debtor has not had means with which to pay his debt is admissible evidence tending to show that he has not paid it. *Ib.*

On trial of an action for money lent, evidence that defendant had money in his possession at a certain time is inadmissible to corroborate his testimony that at a time soon afterwards he repaid the plaintiff. *Ib.*

17. Under what plea payment may be given in evidence. — Evidence of payment of a debt is not admissible unless payment is specially pleaded. *Landry v. Bismont*, 36 D. 606.

Payment, complete or partial, must be pleaded, being "new matter constituting a defense," under the New York code of procedure, section 149, and it cannot be shown (either in bar or mitigation of recovery) un-

For Index to Notes in American Decisions and American Reports, see Volume I.

der a general denial. *McKyring v. Bull*, 69 D. 696.

18. Effect of payment, generally. — Payment of a debt by one who is not a party to the contract, although made without the assent of the debtor, extinguishes the debt. *Harrison v. Hicks*, 27 D. 635.

8. advanced money to a railway company to enable it to pay its past due coupons, under an agreement that he should hold the coupons thus paid as security. The property of the railway was afterward sold under the mortgage given to secure the bonds and coupons, and the proceeds being less than the indebtedness, S., as holder of such coupons, claimed a *pro rata* share with the holders of other bonds and coupons. *Held*, that as the bondholders were ignorant of the arrangement between S. and the company, the coupons when paid became, as to them, extinguished, and that S. was not entitled to share. *Union Trust Co. v. Monticello etc. R. R. Co.*, 20 R. 541.

19. Effect of voluntary payments. — Money voluntarily paid, with full knowledge of all the facts, although no obligation to make such payment existed, cannot be recovered back. *B. & S. R. R. Co. v. Faunce*, 46 D. 656. *S. P., Stevens v. Head*, 31 D. 617; *Clafin v. McDonough*, 84 D. 54; *Elston v. City of Chicago*, 89 D. 361; *Lester v. Mayor etc. of Baltimore*, 96 D. 642; *Kenneth v. South Car. A. R. Co.*, 98 D. 382; *Gibson v. Bingham*, 5 R. 289.

The rule does not apply where the parties are not upon equal terms in the transaction. *City of Marshall v. Snediker* 78 D. 634.

A payment is not voluntary when made in consequence of a mistaken view of facts. *B. & S. R. R. Co. v. Faunce*, 4 D. 656.

Money voluntarily paid by mistake cannot be recovered back, where the parties cannot be placed *in statu quo*. In such case the loss must fall upon the person who occasioned it. *Boas v. Upacgrove*, 47 D. 425.

Money voluntarily paid for the use of another does not impose a liability on such one to repay unless the payment was made at his request. *Kenan v. Holloway*, 50 D. 162.

Money paid on a note given for a much larger sum, and not indorsed thereon, cannot be recovered back, where the promisor was sued on the note, and filed a specification of defense stating the payment of such sum, but subsequently withdrew his appearance, suffered a default, and the plaintiff took judgment for the whole amount of the note without deducting the payment. *Jordan v. Phelps*, 50 D. 747.

A voluntary payment of an unjust demand attempted to be enforced by legal proceedings cannot be recovered back, though made under protest, unless there is fraud on the part of the payee, and he knows the claim to be unjust. *Benson v. Monroe*, 64 D. 716.

A voluntary payment of a judgment by

the debtor is binding upon him if made with full knowledge of the facts affecting its validity, but otherwise if made in ignorance of these facts. *Knox County Bank v. Doty*, 75 D. 479.

Payment of a judgment is not voluntary when it is made to release property held under execution or to prevent property from being seized. *Id.*

Money voluntarily paid upon a claim of right with full knowledge of all the facts cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability. The illegality of the demand paid constitutes of itself no ground for relief, but there must be, in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment. *Brumagin v. Tillinghast*, 79 D. 176; *Elston v. City of Chicago*, 89 D. 361.

The rule that "money voluntarily paid upon claim of right cannot be recovered back" has exceptions. *Brumagin v. Tillinghast*, 79 D. 176.

A voluntary payment of an illegal demand, with knowledge of its illegality, and without an immediate and urgent necessity, unless to redeem or preserve person or goods, is not the subject of action for money had and received. *Clafin v. McDonough*, 84 D. 54.

Assumpsit for money had and received will not lie against a railroad company to recover charges for transportation in excess of those which by law the carrier is permitted to exact when such charges are paid voluntarily without objection or protest, or notice of discontent, and after the service has been fully performed and the property is out of the possession of and beyond the control of the carrier. *Kenneth v. South Car. R. R. Co.*, 98 D. 382.

A lease provided that the lessee should keep the premises repaired, except in case of fire, and in case the premises should be rendered unfit for tenancy by fire, there should be a just and proportionate abatement of the rent. The premises were rendered unfit for tenancy by fire, but the lessor demanding the rent, the lessee paid it under protest. *Held*, that he could not recover it back. *Regan v. Baldwin*, 30 R. 689.

Where the defendant in a suit, with full knowledge of the facts, voluntarily pays part of the demand, and judgment is rendered against him for the balance, which is conclusively reversed on appeal, he cannot recover the part so paid. *Beard v. Beard*, 52 R. 219.

Excessive charges for freight paid to a railroad company for a long course of years voluntarily and without objection may not be recovered. *Killmer v. New York Central etc. R. R. Co.*, 53 R. 194.

Where one purchased the right to use a patent, which was afterward pronounced

For Index to Notes in American Decisions and American Reports, see Volume I.

void, — *held*, that in the absence of fraud, he could not recover back the purchase price. *Schwabenbach v. Odorless Excav. App. Co.*, 57 R. 301.

A recovery back of money paid has been denied in the following instances: Money voluntarily paid to the city authorities, as a license, in pursuance of an ordinance which is adjudged to be void. *Robinson v. Charleston*, 45 D. 739. S. P., *Brumagim v. Tillinghast*, 79 D. 176; *Town of Ligonier v. Ackerman*, 15 R. 323; *Noyes v. State*, 32 R. 710.

Money voluntarily paid in satisfaction of a judgment, which the payer believed to be a lien upon his land. *Boas v. Updegrove*, 47 D. 425.

A payment voluntarily made, with knowledge of the facts, by a vendee, for property illegally sold to him. *Boutelle v. Melendy*, 49 D. 152.

Money voluntarily paid for losses in stock-jobbing transactions, in violation of statute. *Wyman v. Fiske*, 80 D. 66.

30. Effect of compulsory payments.

— 1. *What payment is compulsory.* — No distinction exists between a compulsory and a voluntary payment, with respect to the rights which the one or the other confers upon a partner. *Lawrence v. Clark*, 35 D. 133.

Money exacted by a sheriff, *colore officii*, in excess of his lawful fees, as a condition precedent to the return of a runaway slave, may be recovered back. *Alston v. Durant*, 49 D. 596.

The law raises an obligation to refund money paid upon compulsion, and the form of action is *assumpsit* for money had and received. *McMillan v. Richards*, 70 D. 655.

To constitute such compulsion or coercion as will render a payment involuntary, there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no means of immediate relief but by advancing the money. *Brumagim v. Tillinghast*, 79 D. 176. S. P., *Kenneth v. South Car. R. R. Co.*, 98 D. 382.

A payment of money is compulsory when made through necessity to obtain possession of goods illegally withheld, where the detention is fraught with great immediate hardship or irreparable injury, and the money paid may be recovered back in an action of *assumpsit*. *Cobb v. Charter*, 87 D. 178.

Where a person detains another's chest of tools and implements of trade, necessary for upholding life, until they are redeemed by the payment of money to which he had no shadow of right, the money so paid may be recovered back without making any demand therefor. *Id.*

* See monographic note on what constitutes a compulsory payment, 45 D. 155-171. See also note, 51 R. 820-833.

Where a person having possession of another's chest of tools refuses to deliver them to the owner on demand, except upon his paying, without any obligation, the debt of another person, and the owner thereupon leaves money with a third person to be paid when the chest should be sent to the owner, which money is accordingly paid by such third person after the goods are so sent, there is a sufficient demand for the chest to maintain an action for the recovery back of the money so paid. *Id.*

Money paid under mistake of fact, under circumstances of fraud or extortion, or as a necessary means to obtain the possession of goods wrongfully withheld, may be recovered in an action therefor. *Lester v. Mayor etc. of Baltimore*, 96 D. 542.

Payment of a water license fee under threat of cutting the water off is not voluntary, and any excessive charge may be recovered without tender. *Weatlake v. St. Louis*, 48 R. 4.

2. *What is not.* — Payment is not regarded as compulsory unless made to relieve the person or property from an actual and existing duress imposed upon him by the party to whom the money is paid. *Elston v. City of Chicago*, 89 D. 361; *Mayor of Baltimore v. Lefferman*, 45 D. 145.

Where judgment is rendered against land for an assessment, and the owner of the land pays it without the issuance of any precept or execution, such payment is a voluntary payment, and not one made under compulsion. *Elston v. City of Chicago*, 89 D. 361.

To justify recovering back money paid, where all the facts were known to the party paying, such payment must not have been simply an unwilling payment, but a compulsory one, and the compulsion must have been illegal, unjust, or oppressive. *Dickerman v. Lord*, 89 D. 579.

The fact that a party is sued by attachment, upon a claim which is not due, in a state where the plaintiff resides, but which is foreign to the residence of the defendant, will not, in the absence of any element of fraud or other means of oppression, where he pays such claim under protest, make such payment compulsory in such a sense that it can be recovered back. *Id.*

Payment under a menace of suit or distress-warrant is not compulsory, and cannot be recovered back. Hence where, under an unconstitutional statute, a city passes an ordinance providing that lot-owners shall improve their lots in a particular way upon notice from the proper authority, or the city will make the improvements and issue warrants to collect the expense from the owners, as paving taxes are collected, and the plaintiff, upon receiving notice to improve his lot or that the city will do so, and charge the expense to him as provided by the ordinance,

For Index to Notes in American Decisions and American Reports, see Volume L.

accordingly makes the improvement, and uses the city for the amount expended, as an involuntary payment, he cannot recover. *Mayor of Baltimore v. Lefferman*, 45 D. 145.

Money paid rather than resort to litigation, and under the supposition that the claim, which subsequently turned out to be unauthorized by law, was enforceable against him or his property, cannot be recovered as money paid under compulsion. *Lester v. Mayor etc. of Baltimore*, 96 D. 542.

A payment made under the belief that it is demanded contrary to law, and under the apprehension of legal proceedings, is not compulsory. To entitle a person to recover back money so paid, it must have been exacted under a threat of prosecution, and paid under protest. *Town of Ligonier v. Ackerman*, 15 R. 323.

3. *Payment under protest.* — The object of protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It has no application to voluntary payments. *McMillan v. Richards*, 70 D. 656; *Brumagin v. Tillinghast*, 79 D. 176.

Protest does not prevent a payment being a discharge of the demand upon which it is made, so far as such demand is legal. *McMillan v. Richards*, 70 D. 655.

Payment under protest of an illegal tax, on demand by the sheriff, to prevent levy and sale, is not voluntary, although there was no present threat of levy. *Farcher v. Marathon County*, 33 R. 745.

If one, to procure the transportation of goods by railroad, pays illegal rates under protest, he may recover them, even although by arrangement the payments were made monthly. *Peters v. Railroad Co.*, 51 R. 814.

21. *When money paid may be recovered back.* — Where a party is compelled by operation of law to pay a debt, which in equity and good faith another party should have kept him from paying, the party so paying may recover from such other party the amount paid. *Ticonic Bank v. Smiley*, 46 D. 593.

Money unlawfully exacted, under a claim of right, by one who has possession of the property of another and makes the payment of his demand a condition of its return, may be recovered. *Alston v. Durant*, 49 D. 596.

Money paid for another's use creates a liability on that party if it is beneficial to him, or if he takes advantage of it. He becomes the agent by virtue of the adoption of the act. *Kenan v. Holloway*, 50 D. 162.

Where one person is compelled to pay money which another is bound by law to pay, a promise by the latter is raised by law to reimburse the person paying. *Winchester v. Beards*, 51 D. 702.

Where person is subjected by legal pro-

* Recovery of money paid under an illegal contract, see note, 12 D. 325-327.

cess to pay money which another is bound by law to pay, it cannot be required that the former shall have exhausted every possible means of litigation in resisting the payment, before he shall be entitled to his action for money paid. *Id.*

II. PAYMENTS OTHER THAN IN MONEY.

22. *In general.* — Payment does not import delivery of money; it may be made in property or other securities. *Ryan v. Dunlap*, 63 D. 334.

Money is a generic term, and covers everything which by consent is made to represent property, and passes as such currently from hand to hand. *Crutchfield v. Robins*, 42 D. 417.

A deed of land from a debtor to his creditor will operate as a payment to the extent of the land, though there is no agreed price for the land. *Buffum v. Green*, 20 D. 562.

An agreement without consideration to pay a different compensation, and one of a character not more certain than that originally stipulated, in discharge of a liability upon a completed contract, is not binding, nor does it discharge the original contract. *Randolph v. Perry*, 27 D. 659.

Payment can be made in money only, under the Tennessee act of 1807, authorizing payment of money on a judgment rendered to be made to the clerk of the court. A receipt given by the clerk, the consideration of which is anything but money, as debts due by himself, choses in action, or property, is not a satisfaction of the judgment, and no hindrance to its collection. *Crutchfield v. Robins*, 42 D. 417.

If the payee of a note, after it falls due, surrenders it to the maker on receiving from him a certificate of deposit, payable in current funds for a part of the amount due, and the remainder in cash, and upon presentation of the certificate at the bank five or six days afterwards, the bank refuses payment on account of having failed in the mean time, the payee may recover the amount against the maker of the note, unless it appears that he expressly agreed to take the certificate in payment of his debt. *Lindsey v. McClelland*, 86 D. 786.

23. *Forged paper.* — Payment by a forged note does not extinguish the debt. *Eagle Bank v. Smith*, 13 D. 37.

Where the note of a third person, received by the creditor in payment of his claim, proves to be forged, he cannot maintain an action on the original consideration, unless, as soon as the forgery is discovered, he offers to return the note, or unless he has exhausted his remedies upon it with due diligence. *Pope v. Nance*, 12 D. 51.

One who receives a counterfeit note from an innocent person and keeps it six months after knowing its true character, without giving any notice thereof, is guilty of gross

For Index to Notes in American Decisions and American Reports, see Volume I.

negligence and must sustain the loss. *Raymond v. Baar*, 15 D. 603.

The vendor sold and delivered cattle, and received payment in bank notes, which he afterwards paid away to a third party, who discovered one of the notes to be forged. Neither the vendor nor vendee knew that the note was bad. In an action brought by the vendor against the vendee, on the original contract, for cattle sold and delivered, —held, that a forged note or bill which proves worthless is no payment, and that the party may treat it as a nullity, and resort to the original contract. *Markle v. Hatfield*, 3 D. 446.

24. Spurious coin. — Gold coin issued by a private individual is not money, and the same rules of law must be applied thereto which apply to other chattels. *Chapman v. Cole*, 71 D. 739.

One receiving counterfeit money is bound to use due diligence in ascertaining its character, and in notifying the giver, provided the latter was ignorant of its character, and paid it in good faith. *Atwood v. Cornwall*, 15 R. 219.

25. Bank notes, generally. — Current, convertible bank notes are money; and a payment made in them, whether to the principal or his agent, is a good payment. *Oratchfield v. Robins*, 42 D. 417. And the loss falls upon the receiver where the bank suspends immediately after payment. *Ware v. Street*, 75 D. 755.

Payment in bank notes circulating and received as money, there being no fraud, cannot be avoided by demand, refusal, and notice of tender to the payor, bank notes not standing on the same ground with negotiable paper. *Id.*

Payment into court in notes of a bank is good payment as between it and its debtor, no matter when they were procured by him. *Northampton Bank v. Balliet*, 42 D. 297.

There is no implied warranty of the value of current money of the country passing from hand to hand in the course of trade. *Edmunds v. Digges*, 42 D. 561.

A person passing bank notes guarantees only that they are genuine, and not counterfeit. *Id.*

A representation that notes can be exchanged for legal tenders at par does not constitute an express warranty. *Id.*

The maker of a note due a bank has the right to pay it in bills issued by the bank. *Blount v. Windley*, 12 R. 616.

26. Uncurrent or depreciated bank notes. — Acceptance in payment of a debt of the notes of an insolvent bank, the fact of the insolvency being at the time unknown to either party, operates as a discharge of the debt. *Lowrey v. Murrell*, 27 D. 651; *Bayard v. Shunk*, 37 D. 441. Contra, see

Ontario Bank v. Lightbody, 27 D. 179; *Wainwright v. Webster*, 34 D. 707; *Westfall v. Braley*, 75 D. 809. And no action can be afterwards brought on the debt, unless, perhaps, where the payee presents the bills to the bank, and upon refusal to pay them, gives due notice to the person from whom he received them. *Scruggs v. Gass*, 29 D. 114.

Notes of an insolvent bank received on general deposit by another bank, after the first had suspended, both it and the depositor being at the time in ignorance of the fact of suspension, will render it liable to the depositor for the face value of the notes received. *Corbit v. Bank of Smyrna*, 30 D. 635.

Payment in worthless or badly depreciated bank bills is not a valid payment. And a person receiving such bills, without fault or negligence on his part, in payment of a pre-existing debt, may treat the payment as void, and resort to his original cause of action. *Glman v. Peck*, 34 D. 702.

An action on book-account may be maintained in such a case. *Id.*

The receipt of depreciated currency by some business men, in payment of demands, does not prove that all creditors in the locality have agreed to receive the same. *Marine Bank v. Chandler*, 81 D. 249.

A general agreement to receive depreciated paper in business transactions may be abandoned by common consent of the parties, and after abandonment, one abandoning party cannot hold the other to it. *Id.*

27. Confederate notes. — Where payments have been made upon a promissory note in confederate money, and a credit therefor indorsed upon the note by the holder, who was of lawful age, and not the victim of fraud, the sums so indorsed will be allowed as payments on the note. *Freeman v. Bass*, 89 D. 255. S. P., *Ritchie v. Sweet*, 5 R. 245.

Where payments were made during the late war on a promissory note in Georgia, this is not *prima facie* evidence that the payments were made in confederate money. *Freeman v. Bass*, 89 D. 255.

Payment of a debt in confederate notes received by the creditor under duress is void, whether or not the debtor knew of the duress. *Emerson v. Lee*, 89 D. 648.

To recover upon a debt, the amount of which has been received in confederate notes under duress, the plaintiff must allege and prove that he retained and tendered back the identical notes received by him. *Id.*

In 1864 the county of Greenbrier was under the domination of the so-called Confederate States government. Treasury notes of said government were tendered in payment of a bond to a creditor who was loyal to the Union, and had not demanded the debt, and he refused to accept them. He was then told that he was "obliged to take them un-

* Payment in bills of insolvent bank, see note, 7 D. 183-192.

For Index to Notes in American Decisions and American Reports, see Volume I.

A check deposited as money operates as payment of the bill for which it was given from the moment the deposit is made. *Ib.*

The holder of a check may as well employ his banker, as agent to collect it, as any other person; and if the holder deposits the check with his banker for collection, such deposit is the same, in legal effect, as handing the check to a messenger for the same purpose. *Ib.*

It is a question for the jury whether a certified check taken in payment of a note or draft is an absolute or only a conditional discharge of the debt. *Andrews v. German Nat. Bank*, 24 R. 300.

30. When it will not be so deemed. — A note is not an extinguishment or payment of a precedent debt, unless there is an express agreement to accept it as payment, and to take the risk of the solvency of the maker. *Tobey v. Barber*, 4 D. 326; *Reed v. Van Ostrand*, 19 D. 529; *Estate of Davis*, 34 D. 574; *Weymouth v. Sanborn*, 80 D. 144. And the burden of proof is on the debtor to show that it was so given and received. Nor does it make any difference that the makers of the note so given are fewer in number than the original debtors. *Nightingale v. Chassee*, 23 R. 531. Unless the creditor parts with the note, or is guilty of laches in not presenting it for payment in due time. It simply postpones payment of the old debt until a default is made in the payment of the note. *Mitchell v. Hockett*, 85 D. 151. And a receipt, stating the note to be "in full," for goods sold, is not evidence of such an agreement. *Muldon v. Whitlock*, 13 D. 533; *McMurray v. Taylor*, 77 D. 611. Upon non-payment the creditors may sue on the original contract. *Patapasco Ins. Co. v. Smith*, 14 D. 268; *Costello v. Cave*, 27 D. 404; *Steamboat Charlotte v. Hammond*, 43 D. 536; *Larrabee v. Talbot*, 46 D. 637; *Blunt v. Walker*, 78 D. 709; if the note remains in the creditor's hands unpaid, and can be produced to be canceled. *Gleason v. Smith*, 20 D. 452; *McMurray v. Taylor*, 77 D. 611.

Taking a note for goods sold and delivered does not extinguish the original cause of action. *Wyman v. Rae*, 37 D. 70; or prevent the vendor from retaining the goods until payment, in case of the buyer's insolvency while the note is yet unnegotiated. *Arnold v. Delano*, 50 D. 754.

A new note given without any new consideration to the same person, and for the same sum as an old one, is not deemed a satisfaction thereof, unless so received and accepted, and whether it was so received and accepted or not is a question of fact for the jury. *Hart v. Boller*, 16 D. 536. S. P., *Moses v. Trice*, 8 R. 609.

Where an indorser gives his own note to the holder of a promissory note as security for the debt, the original note is not extinguished unless the last note was received in

satisfaction of the first. *Clopper v. Union Bank*, 16 D. 294.

Giving a negotiable note is not a payment of money between the maker and payee so as to support an action for money had and received, on failure of the consideration. *Reed v. Van Ostrand*, 19 D. 529.

An agreement at the making of a note, that it shall be set off against a note due the maker from the payee (which is not present), so far as the smaller will pay the larger, is executory, and does not, *pro tanto*, extinguish either note. *Cary v. Bancroft*, 25 D. 393.

Notes of an insolvent bank, or of an insolvent individual, received as consideration of a contemporaneous contract, will operate as payment or satisfaction; but if received on a precedent debt, they will not be a discharge, in the absence of a special agreement. *Corbit v. Bank of Smyrna*, 30 D. 635.

Where the separate note of one joint debtor is taken, the *onus* is on the other debtors to show that it was taken with the intention of extinguishing the joint debt. *Estate of Davis*, 34 D. 574; *Tyner v. Scoops*, 71 D. 341.

A debt is not extinguished by a note given by some of the debtors, with other parties as sureties, for a larger amount, unless it appears to have been so intended and accepted, the presumption being, it seems, that it was intended as collateral security only. *Jones v. Johnson*, 38 D. 760.

Promissory notes accepted by a landlord in lieu of rent due on a written lease do not extinguish the original debt, but operate to suspend his right of distress during the time allowed for the payment of the notes. *Judge ada. Fiske*, 42 D. 380.

The plaintiff sold and delivered certain goods to the defendant for a stipulated price, a part of which was paid in cash, and agreed to accept in payment of the balance a note of a third party, and ran the risk of its being paid, relying upon the representations of the defendant that the note was good, and would be paid at maturity. The note was not paid at maturity, and proved worthless, the drawers having failed several days before it became due. On the day of its maturity the plaintiff notified the defendant of its non-payment, and the failure of the makers, and demanded of him payment of the balance due on the goods sold. *Held*, that if the agreement to accept the note as payment was induced by the fraudulent representations of the defendant, such fraud rendered the receipt given by the plaintiff invalid, and he had the right to affirm the sale and sue in *assumpsit* for the price of the goods. *Hoopes v. Strasburger*, 11 R. 533.

A bill of exchange given for a pre-existing debt is not payment, unless it is so expressly agreed by the parties. *Murray v. Gouverneur*, 1 D. 177.

A draft of agent on principal, given as the

For Index to Notes in American Decisions and American Reports, see Volume I.

price of a purchase made by the agent in the name of the principal, is not an extinguishment of the debt, unless the draft was accepted or paid by the principal. *Taylor v. Conner*, 97 D. 419.

A negotiable town order transferred by a debtor to his creditor, for the purpose of paying his debt, and received for that purpose, — both parties acting in good faith, — will not operate as a payment, if, at the time, it was worthless for the reason that the drawers and acceptor had no authority to make or accept it. *Hussey v. Sibley*, 22 R. 557.

A bank check is not payment of a pre-existing debt until cashed, without an agreement to receive it as such, any more than a promissory note is a payment of such a debt. *Barnet v. Smith*, 64 D. 290.

The bare reception of a check from drawee for amount of a bill will not, ordinarily, be considered as a payment, but only as a means of payment; and this is so, whether the bill is surrendered to the drawee at the time of receiving the check, or is retained by the holder until payment is consummated. *Strong v. King*, 85 D. 336.

The deposit of a check for collection does not operate as payment of a bill for which the check was given. *Ib.*

A tax-payer gave his check for his taxes to the collector. It was not presented for several days, and meantime the bank failed. The bank was insolvent when the check was drawn, and it was not shown that the check would have been paid if promptly presented. *Held*, that the check was not payment. *Koomes v. District of Columbia*, 54 R. 278.

31. Taking the bill or note of a third person in payment. — The taking of the negotiable note of a third person for an existing debt is *prima facie* payment, and the burden of proving an agreement to the contrary is on the creditor. *Smith v. Bettger*, 34 R. 256.

If a vendor of goods at the time of sale received from the purchaser the note of a third person (such note not being forged, and there being no fraud on the part of the purchaser), such note will be deemed to have been accepted by the vendor in payment and satisfaction, unless the contrary be expressly proved. *Whitbeck v. Van Ness*, 6 D. 583; *Gibson v. Toley*, 7 R. 397.

Where the note of some who are liable for goods sold is taken, and a receipt given "in full," if the others, relying upon such receipt, are prejudiced in their dealings with the makers, they will be discharged. *Muldon v. Whitlock*, 13 D. 533.

Giving one's note, in discharge of a third person's debt to the payee, is equivalent to a payment of money to the use of such third person. *Reed v. Van Ostrand*, 19 D. 529.

The original debt is discharged if the debtor effects a compromise, and gives the

note to a third person in payment of the sum fixed by the compromise. *Stafford v. Bacon*, 37 D. 366.

The liquidation of a debt or account by a note, though by a note of a third person, unless expressly received in payment, does not discharge the debt or open account. *Barelli v. Brown*, 10 D. 683; *Palapoco Ins. Co. v. Smith*, 14 D. 268; *Berry v. Griffin*, 69 D. 123; *Taylor v. Conner*, 97 D. 419. Where such a note was taken as payment, and a receipt in full given by the vendor, — *held*, a question of fact for the jury, whether there was such a special agreement or not. *Johnson v. Weed*, 6 D. 279.

Rendering bills to some of those for whose benefit and at whose credit goods were furnished, and taking the note of those to whom the bills were rendered, will not discharge the others. *Muldon v. Whitlock*, 13 D. 533.

Acceptance of the note of a third person, for an antecedent debt, does not operate as payment, unless the creditor is guilty of laches in presentment. *Glenn v. Smith*, 20 D. 452.

A book-account is not merged in a note given by a stranger as surety with some of the original debtors as principals, and for a larger sum than was then due; for merger occurs only where the debt is one and the parties are identical. *Jones v. Johnson*, 38 D. 760.

An action for goods sold and delivered is not barred by an agent, who was authorized to receive the vendee's note for the price, receiving a note of a less amount, signed by the vendee as agent of a third person, under the vendee's representations that it was the latter's note for the price, and delivering the same to the vendor, who did not consent to accept it as payment; nor does it affect the rights of the vendor that he retained the note until the commencement of the action without taking measures to enforce its collection, or giving notice of its non-payment, or offering to return it. *Hatch v. Barnum*, 56 D. 59.

Where a debtor delivers to his creditor the note of a third person drawn to the creditor's order, without indorsing it, the presumption is that the note is not absolute payment, but only collateral security, and the debtor continues liable without notice of dishonor, unless the neglect to give such notice has occasioned him loss. *Hunter v. Moul*, 42 R. 610.

A check of a third person, given and accepted in payment of a demand, and by both parties supposed to be good, but proving worthless, is not payment. *Fleig v. Sleeh*, 54 R. 800.

Where A, having an account against a corporation, settled with B, their agent, and took B's note for the amount which was afterwards credited to B, upon the adjustment of his accounts with the corporation, — *held*,

For Index to Notes in American Decisions and American Reports, see Volume I.

that A's demand against the corporation was extinguished. *Wright v. Crockery Ware Co.*, 8 D. 68.

Where a debtor remitted to his creditor, in payment, a draft of one third person upon another, and at the maturity thereof the creditor surrendered the draft to the drawee in exchange for the latter's check, and the drawee failed before the check could be collected in the ordinary course of business, and no notice of dishonor or protest of the draft was ever given to the drawer, — *held*, that the debt was paid. *Whitney v. Eason*, 96 D. 762.

The defendants who were indebted to the plaintiffs tendered the note of third parties, which was accepted in payment of the indebtedness. At the time of such acceptance the makers of the note were insolvent, but both plaintiff and defendant were ignorant of the fact. *Held*, no payment, and that plaintiff was entitled to recover the amount of indebtedness for which the note had been given. *Roberts v. Fisher*, 3 R. 680.

Plaintiff sold a number of hogs to defendant, to be paid for on delivery. On the delivery, defendant's agent, who made the purchase, said he would have to go to the bank to get the money to pay for the hogs, and asked plaintiff which he preferred, the currency or a draft. Plaintiff replied that he preferred a draft, and permitted defendant's agent to ship the hogs, with the understanding that the draft should be procured as soon as possible. The draft of a third person was procured and accepted by plaintiff, on the same day, without defendant's indorsement. The draft was dishonored; and subsequently, plaintiff tendered it to defendants and demanded the money, which was refused, whereupon plaintiff brought action for the contract price. *Held*, that the draft must be deemed to have been received in payment, and that the action could not be maintained. *Gibson v. Tobey*, 7 R. 397.

32. Taking non-negotiable securities in payment. — A payment is equivalent to and will be treated as payment in cash, when made in property or securities, if such payment is received as a full satisfaction of the demand. *Ralston v. Wood*, 58 D. 604.

The execution of a mortgage by an indorser to the holder, to secure the payment of a promissory note made for the indorser's accommodation, does not extinguish the note. *Clopper v. Union Bank*, 16 D. 294.

33. Right of creditor to sue on original cause of action. — An action will not lie upon an account which has been adjusted by the parties, and where a note has been given for the balance. *Apthorp v. Shepard*, 1 D. 6; if there was no fraud or deception in giving the note. *Hutchins v. Olcott*, 24 D. 634; unless plaintiff proves the loss of the note, or produces and cancels it at the trial.

Holmes v. De Camp, 3 D. 293; *Glenn v. Smith*, 20 D. 452.

Where a note has been given, its production is generally required in an action on the original cause, for the security of the defendant, and not from any rule of evidence which would prevent the introduction of evidence of indebtedness without the production of the note. *Wyman v. Rae*, 37 D. 70.

Where the party is not bound to produce a promissory note, evidence offered with a view to account for its non-production is unnecessary and inadmissible. *Id.*

Evidence of indebtedness without the production of the note is admissible in such a case. *Id.*

Where a note or bill has been taken in satisfaction of a precedent debt, the creditor cannot proceed in an action for such debt without showing that he has used due diligence to obtain acceptance or payment. *Cochran v. Wheeler*, 26 D. 732.

A plaintiff counting on a note is not precluded from surrendering it so as not to amount to payment, and from recovering on a count for goods sold constituting the consideration, if he cannot recover on the note. *Melledge v. Boston Iron Co.*, 51 D. 59.

The holder of a note taken in payment of a precedent debt, at the maturity of the note, may, at his election, proceed either on the note or on the original cause of action. *Mudd v. Harper*, 54 D. 644.

A debtor does not satisfy his debt by giving his own notes, payable at a future day. If the new notes are not paid, whether valid or usurious, the creditor may proceed upon and recover for the original indebtedness, as if such notes had not been given, surrendering them on the trial. *Winsted Bank v. Webb*, 100 D. 435.

PAYMENT INTO COURT.

See TENDER, 11.

PEDIGREE.

Declarations of deceased persons as to, see EVIDENCE, 149.

Reputation, rumor, etc., to prove, see EVIDENCE, 65.

PENAL STATUTES.

Rule of strict construction of, see STATUTES, 58, 59.

PENALTIES.

For breach of city ordinances, see MUNICIPAL CORPORATIONS, 22.

For breach of license laws, see LICENSES, 9.

For taking illegal fee as pension agent, see PENSIONS, 3.

For usury, see USURY, 27.

For violation of excise laws, see INTOXICATING LIQUORS, 8.

For violation of injunctions, see INJUNCTION, 60.

For Index to Notes in American Decisions and American Reports, see Volume L.

For violation of internal revenue laws, see REVENUE, 9.

Jurisdiction of equity in cases of, see EQUITY, 16.

No discovery in cases of, see DISCOVERY, 4.

When amount recoverable is a penalty, see DAMAGES, 13, 14.

1. Enforcement, generally. — The right of an individual to a penalty incurred under a statute is a civil cause within the meaning of the constitution, and cannot be taken away by a repeal of the statute. *Dow v. Norris*, 17 D. 400.

An action to recover a penalty imposed by statute will not lie outside of the state which enacted the law. *First Nat. Bank v. Price*, 3 R. 204.

2. Amount recoverable. — A statute provides a penalty against any railroad company for failure during any trip to announce the stopping-places. *Held*, that only one penalty can be recovered up to the time of suit. *Parks v. Nashville etc. Ry Co.*, 49 R. 655.

3. Enforcement by action *qui tam*. — Actions strictly popular, and not compensatory, are not criminal prosecutions, but civil suits. *Spicer v. Rees*, 28 D. 648.

Actions to recover damages by way of a penalty are not criminal prosecutions, but strictly civil in their nature. *Id.*

When a penal statute provides that a penalty may be recovered by indictment or civil action, one moiety to go to the state, and the other to the prosecutor, it must appear of record who the prosecutor is, in order to entitle him to his share of the penalty; otherwise the whole penalty goes to the state. *State v. Smith*, 6 R. 480.

PENDENTE LITE.

Alimony pending divorce proceedings, see MARRIAGE AND DIVORCE, 86.

See *LIT PENDENS*.

PENSIONS.

1. Exemption of pension money from claims of creditors. — Pension money is not exempt from claims of creditors after it actually comes into the hands of the pensioner. *Friend v. Garcelon*, 52 R. 730.

Pension money invested by the pensioner in a homestead is not exempt from the claims of prior creditors. *Robton v. Walker*, 56 R. 878.

Under the statute exempting pension money "in course of transmission," the money is not exempt where the pensioner sells the pension draft to a bank, and is credited in his general account with the proceeds, and portions of the same are from time to time checked out by him. *Cruss v. White*, 41 R. 408.

Where a pensioner receives pension drafts

from the government, and transfers them or their proceeds to another, upon his agreement to convey land to the pensioner's wife, and the land is so conveyed, — *held*, that it is not subject to the lien of judgments against the pensioner existing at the time the drafts were received by him. *Hissom v. Johnson*, 55 R. 327.

2. Compensation of pension agents. — An attorney having received the statutory fee for procuring a pension cannot maintain an action against a third person, by whom he was originally employed, upon his agreement to pay him the reasonable value of his services. *Wolcott v. Frisell*, 45 R. 272.

3. Recovery back of illegal fees. — Where an agent takes from a pensioner a fee in excess of the statutory allowance for obtaining his pension money, the pensioner may recover the excess from him, although both parties acted innocently, and the agent has paid the amount to his principal. *Smart v. White*, 40 R. 356.

PER CAPITA — PER STIRPES.

Taking *per capita* or *per stirpes*, see DEVISE, 14.

When legatees so take, see LEGACIES, 13.

PEREMPTORY CHALLENGES.

In civil cases, see TRIAL, 28.

In criminal cases, see TRIAL, 141.

PEREMPTORY WRITS.

Of injunction, when granted, see INJUNCTION, IV.

Of mandate, when granted, see MANDAMUS, 25.

PERFORMANCE.

Averments in respect to, see CONTRACTS, 162; COVENANTS, 44.

Damages in lieu of, see SPECIFIC PERFORMANCE, 45, 46.

Effect of, to satisfy statute of frauds, see CONTRACTS, 58; SPECIFIC PERFORMANCE, 23; VENDOR AND PURCHASER, 23.

Extension of time for, see CONTRACTS, 137.

In ignorance of offer of reward, see REWARDS, 5.

Of condition of bond, see BONDS, 19.

Of conditions in contract for sale of land, see VENDOR AND PURCHASER, 33.

Of conditions in deeds, see DEEDS, 87-89.

Of conditions in insurance policy, see INSURANCE, 20-22.

Of contracts, generally, see CONTRACTS, VI.

Of contract with owner, to give rise to lien, see MECHANIC'S LIEN, 8.

Of covenants, see COVENANTS, 12-18.

Plea of, see PLEADING, 37.

Possibility of, within a year, effect of, to take contract out of statute of frauds, see CONTRACTS, 42.

Tender of, see TENDER, 15.

For Index to Notes in American Decisions and American Reports, see Volume I.

PERILS OF THE SEA.

Meaning of, in bill of lading, see **BILLS OF LADING**, 8.

What covered by marine policy, see **INSURANCE**, 120-131.

When excuse carrier, see **CARRIERS**, 29.

PERJURY.

[Includes the criminal offense of willfully swearing falsely in a material matter, after being sworn to tell the truth, by an oath judicially administered.]

Words charging, when actionable, see **SLANDER**, 7.

1. **Jurisdiction.**—Perjury committed by swearing falsely before the register of the United States land-office, in a proceeding touching the public land, is an offense against the laws of the United States solely, and is not punishable in the state courts. *People v. Kelly*, 99 D. 360.

A state court has no jurisdiction of the offense of perjury committed before a United States commissioner during the investigation of a charge of violating the laws of the United States. *Ross v. State*, 21 R. 278.

2. **What false swearing is perjury.***—Perjury is limited exclusively to oaths administered in some judicial proceeding, at the common law. *State v. Dayton*, 53 D. 270.

Perjury is not obviated by a subsequent admission of the party upon cross or further examination, of the truth of the matter previously falsely denied. *Martin v. Miller*, 28 D. 342.

The meaning of the word "deposition," as used in twenty-third section of act for punishing crimes, is limited to the written testimony of a witness given in the course of a judicial proceeding either at law or in equity, and it is not used as synonymous with "affidavit" or "oath." *State v. Dayton*, 53 D. 270.

The taking of a false affidavit is perjury within the provisions of the act relative to oaths and affirmations. *Ib.*

Where an affidavit falsely charges that a felony has been committed by some person, and was made for the purpose of obtaining a search-warrant for the discovery of the property alleged to have been stolen, the affiant is guilty of perjury, though no particular individual is charged with the offense. *Carter v. State*, 34 D. 116.

A witness is guilty of perjury who testifies falsely to a material fact, although he was not competent as a witness in the case, or to prove the particular fact concerning which he testified. So held, in an action for divorce on the ground of adultery, where the husband, his wife having borne a child, tes-

tified falsely that he had had no sexual intercourse with her during their marriage. *Chamberlain v. People*, 80 D. 255.

Swearing to a false affidavit relative to an application to be thereafter made in a state court for naturalization under the laws of the United States is perjury, and indictable in the courts of the state. *State v. Whittemore*, 9 R. 196.

Where a witness voluntarily testifies to matters concerning which he might refuse to answer on the ground that his answer might tend to criminate him, he may be punished for perjury if his testimony is willfully false. *Mackin v. People*, 56 R. 167.

3. **What is not.**—Where the prisoner handed to an officer, authorized to take and certify affidavits, an affidavit previously signed by him, and reciting that he had been duly sworn, and the officer affixed his own signature to the jurat without any words or formalities, — held, that perjury could not be predicated of the transaction. *O'Reilly v. People*, 40 R. 525.

4. **The power to administer the oath.***—The authority of an officer taking an oath need not be averred with time and place, in an indictment of the affiant for perjury, if every material act done to constitute the offense is averred with time and place. *State v. Dayton*, 53 D. 270.

Perjury cannot be predicated of an affidavit sworn before a notary public professing to act in the city of New York, but who was a non-resident of the state at that time and at the time of his appointment. *Lambert v. People*, 32 R. 293.

5. **The materiality of the evidence given.†**—Perjury is false swearing, willfully and knowingly, in the course of a judicial proceeding, as to some matter relevant to the issue; it does not exist where there is false swearing to matter immaterial. *Martin v. Miller*, 28 D. 342.

Perjury may be committed by swearing falsely to a collateral issue before a court. It is not essential that the fact sworn to should be material to the main issue in the case. *State v. Shupe*, 85 D. 435. And although the particular fact as to which the witness is alleged to have sworn falsely need not be material *per se*, it must have a direct and immediate connection with some material fact, so as to give weight to the testimony. *State v. Hattavony*, 10 D. 580.

Where a witness swore to a particular fact which was material, and that he was present when it occurred, and afterwards, when asked where he lived at the time, testified that he lived near the parties, which was proved to be false, — held, that this was

* The oath, and who may administer it, see note, 85 D. 489, 490.

† Materiality of perjured testimony, see note, 85 D. 492-494.

* Perjury defined, see note, 85 D. 483.

For Index to Notes in American Decisions and American Reports, see Volume I.

too remote from the issue to constitute perjury. *Ib.*

An affidavit is material so as to sustain an indictment for perjury under it when taken under an act providing that a certain bank that had suspended shall not resume operations until the affidavit as to its capital had been filed. *State v. Dayton*, 53 D. 270.

A false affidavit may sustain an indictment for perjury, though unavailing from other causes, if the oath was material when it was taken. *Ib.*

An affidavit differing from the phraseology of a statute prescribing it will, if false, sustain an indictment for perjury where it is identical in meaning with the statute, and was filed to comply with the law. *Ib.*

An affiant is guilty of perjury if he willfully states in an affidavit for continuance matters which are false, and material to the establishment of one of the essential parts of such affidavit, although the matters stated as to the other parts are wholly immaterial. *State v. Shupe*, 85 D. 485.

It is necessary that the indictment should aver that the facts respecting which the testimony was given were material; or such materiality must clearly appear from the other facts set forth in the indictment. *Com. v. Knight*, 7 D. 72; *People v. Collier*, 48 D. 699; or it may appear from the matters shown upon the record. *State v. Dayton*, 53 D. 270.

6. What indictments are sufficient.* — In an indictment for perjury, the style of the court before which the perjury is alleged to have been committed must be correctly set out. *State v. Street*, 3 D. 682. But it is not necessary that it should appear whether the witness was subpoenaed or whether he attended voluntarily, or that the false testimony was given in answer to a specific interrogatory. *Com. v. Knight*, 7 D. 72.

It is sufficient to allege, in such an indictment, that the perjury was committed in the trial of an issue duly joined, without an express allegation that the cause of action was within the jurisdiction of the court. *Com. v. Knight*, 7 D. 72. But see *Com. v. Pickering*, 56 D. 158.

An indictment charging generally that the false oath was material to the trial of the issue upon which it was taken, without showing particularly how it was material, is sufficient. *State v. Mumford*, 17 D. 573.

The indictment must not only allege the materiality of the evidence given by the accused, but must also show that the court had jurisdiction of the case in which the alleged perjury was committed. *Com. v. Pickering*, 56 D. 158.

An indictment for perjury which avers that the defendant did "then and there, in due form of law, take his corporal oath," without stating that he was sworn on the

Gospels, or by uplifted hand, is sufficiently certain. *Republica v. Newell*, 2 D. 381.

An indictment for perjury at common law which states that the defendant "did, voluntarily, and of his own free will and accord, propose to purge himself upon oath of the said contempt," negating, by express averments, the truth of the oath, and concluding that the defendant "did knowingly, falsely, wickedly, maliciously, and corruptly commit willful and corrupt perjury," etc., is good. *Ib.*

7. What are insufficient. — A general averment of the falsity of the testimony is insufficient; each fact falsely sworn to must be distinctly negated. *State v. Mumford*, 17 D. 573.

The indictment must show particularly to what falsehood the defendant has sworn; it is too indefinite to say that the defendant made oath to a false schedule in bankruptcy, where that schedule relates to a great variety of facts. *United States v. Morgan*, 41 D. 234.

The materiality of a false allegation is not sufficiently averred in an indictment for perjury, by an averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to," immediately preceding the statement of the matters alleged to have been falsely sworn to. *People v. Collier*, 48 D. 699.

The innuendo in an indictment for perjury is bad, when there is nothing previously stated to which it can refer. *Ib.*

The rules regulating the mode in which indictments for perjury are to be framed are not changed by Michigan Revised Statutes of 1838, page 630, although this statute embraces cases which were not before embraced by the law. *Ib.*

8. Admissibility and sufficiency of the evidence to convict.* — The evidence of one witness is not sufficient to convict of perjury, as the case is then in equilibrium, oath weighing against oath. *Nesbit v. Stuck*, 58 D. 706.

Upon the trial of an indictment S. testified to certain facts. Afterward he stated that he had sworn falsely, and, upon re-examination, testified to directly contradictory facts. Upon an indictment for perjury, — *held*, that his own statements were not sufficient to convict him of perjury. *Schwartz v. Com.*, 21 R. 365.

Under the statute which permits a conviction of perjury on the testimony "of one credible witness corroborated strongly by other evidence as to the falsity," the other evidence may be circumstantial merely, but it must relate to a material matter, and taken together it must produce a deep conviction upon the minds of the court and jury. *Hernandez v. State*, 51 R. 295.

* Sufficiency of the indictment, see note, 55 D. 494-495.

* Evidence to convict, see note, 55 D. 499, 500.

For Index to Notes in American Decisions and American Reports, see Volume I.

9. Civil action for injuries caused by perjured testimony. — No civil action lies for injury caused by perjury, except in cases in which it is expressly given by statute. *Parker v. Huntington*, 68 D. 455; *Phelps v. Stearns*, 64 D. 61.

An action will not lie against a witness for giving false testimony in another case. *Dunlap v. Glidden*, 52 D. 625; *Cunningham v. Brown*, 46 D. 140; *Guaman v. Hearsey*, 26 R. 104.

No action lies for procuring or giving false testimony, so long as the judgment procured thereby remains. *Stevens v. Rowe*, 47 R. 231.

A creditor has no action for perjury against his debtor who, being committed to jail on execution, committed perjury at the examination on his application to be admitted to take the poor-debtor's oath, by which he obtained his discharge. *Phelps v. Stearns*, 64 D. 61.

10. Subornation of perjury.* — No action will lie against a person for suborning a witness to swear falsely in a cause in another state, in consequence of which a judgment was given against the defendant in the latter state, contrary to the truth and justice of the case. *Smith v. Lewis*, 3 D. 489.

An action lies for suborning witnesses to falsely defame plaintiff's character in a suit to which neither the plaintiff nor defendant was a party. *Rice v. Coolidge*, 23 R. 279.

PERPETUATING.

Injunctions, see INJUNCTION, 50.

Testimony, see DEPOSITIONS, 1.

PERPETUITIES.

Devises, when void for, see DEVISE, 8.

Legacies, when void for, see LEGACIES, 22.

Testamentary provisions void as, see WILLS, 61.

PERSON.

Actions for trespass upon, see TRESPASS, 33-44.

Executions against the, see EXECUTION, II.

Identity of name indicates identity of, see NAME, 2.

Larceny from the, see LARCENY, 7.

PERSONAL LIABILITY.

Of agents, see AGENCY, 62-65.

Of agent making bill or note, see BILLS AND NOTES, 51.

Of directors of corporation, see CORPORATIONS, 154, 155.

Of president, see CORPORATIONS, 161.

Of factors, to third parties, see FACTORS, 18.

Of infant wards, see GUARDIAN AND WARD, 49.

Of public agents, see AGENCY, 107.

* Offense of subornation, see Note, 35 D. 602.

Of representatives, on their contracts, see EXECUTORS, etc., 62.

Of representatives, to creditors, see EXECUTORS, etc., 97.

PERSONAL PROPERTY.

[Includes the general nature and ownership of property other than realty or chattels real; the rights of the owner while in possession or when deprived of it; the rights and liabilities of finders of lost chattels, etc.]

Actions for trespass to, see TRESPASS, 23-37.

Admissions and declarations as to title to or possession of, see EVIDENCE, 154, 155.

Distinguished from real, see also REAL PROPERTY, 1.

Enjoining alienation of, see INJUNCTION, 19.

Is primary fund for payment of debts, see EXECUTORS, etc., 104.

Levy of attachment on, see ATTACHMENT, 58-60.

Management of, by representatives, see EXECUTORS, etc., 59, 76.

Of ward, sales of, by guardian, see GUARDIAN AND WARD, 18.

Of wife, rights of husband respecting, see HUSBAND AND WIFE, 9.

Power of corporation to acquire, see CORPORATIONS, 94.

Resulting trusts in, see TRUSTS, 15.

Sale of, when avoided by possession remaining in seller, see FRAUDULENT CONVEYANCES, 11, 13.

Sales of, by representatives, see EXECUTORS, etc., 69, 70.

Sales of, on Sunday, see SUNDAY, 5.

Sales of, when within statute of frauds, see CONTRACTS, 53.

Tenancy in common of, see CO-TENANCY, 1-6.

What constitutes trespass to, see TRESPASS, 10, 11.

What is taxable, see TAXES, 12.

What reached by *f. fa.*, see EXECUTION, 26.

When limitation begins to run against actions for, see LIMITATIONS OF ACTIONS, 35.

When reached by attachment, see ATTACHMENT, 21-33.

1. How distinguished from realty.

— "Movable property" attends the person, and is therefore called "personal" as distinguished from fixed or real property. *McLean v. Hardin*, 69 D. 740.

Grain growing upon land does not pass by a description of personal property in a will. *Kinsman v. Kinsman*, 1 D. 37.

A house built on another's land with his consent is the personal property of the one who builds it, and may be taken on execution against him. *Jewett v. Partridge*, 28 D. 173.

Slabs, sawdust, shavings, and other refuse used to fill up low or marshy ground are realty, but slabs and pieces of lumber suitable for firewood, piled up on land, and intended to be used and removed as firewood,

For Index to Notes in American Decisions and American Reports, see Volume I.

are personality. *Jenkins v. McCurdy*, 33 R. 841.

2. What chattels are property, so as to be proper subjects of replevin or trover.—An action of trover will lie for wild geese which have been tamed and strayed away, but without regaining their natural liberty. *Amory v. Flynn*, 6 D. 316.

Turpentine in boxes cut into trees is personal property. *Branch v. Morrison*, 69 D. 770.

One who plants oysters in tidal waters on land of the state may maintain trespass against another who carries them away. *Metzger v. Post*, 43 R. 341.

3. The title and ownership. — 1. *In general*.—Ownership of personal property, when proved, is presumed to continue until some alienation is shown; and ownership is not lost by permitting another to be in possession. *Magee v. Scott*, 55 D. 49.

A contracted with B to build a vessel, the former to furnish the timber requisite to complete the frame, and the latter to advance the money, and also to furnish the materials for the joiners' work; and the vessel, while standing on land hired by A, and in an unfinished state, was seized on an execution issued against A, and sold to C, who afterwards completed the vessel and sold her to D. In an action of trover brought by B against D, — *held*, that the property in the vessel was in D, and that B could not have any property in the vessel until she was completed and delivered to him. *Merritt v. Johnson*, 5 D. 289.

2. *Ownership presumed from possession*.—Possession alone is presumptive evidence of the ownership of a chattel, and if not opposed is sufficient; and the evidence is still stronger if the possession is accompanied by the exercise of complete acts of ownership for a length of time. *Moon v. Hawks*, 16 D. 725; *Magee v. Scott*, 55 D. 49; *Avery v. Clemons*, 46 D. 323. But the *prima facie* case may be rebutted by circumstances attending the possession, or by positive proof. *Bergen v. Riggs*, 85 D. 304; especially to repel the charges of fraud, and to protect the true owner's rights. *Staples v. Bradbury*, 23 D. 494. And if another person desires to make out a title, he has the burden of proof to show how he came by it, and to explain why it is not in his own custody. *Dick v. Cooper*, 64 D. 652.

The presumption of ownership arising from the possession of a horse is overcome by the unexplained existence of the government brand upon the horse. *Bergen v. Riggs*, 85 D. 304.

3. — *from adverse possession*. — Four years' adverse possession of personal property gives a good title thereto, even though

* Owner not answerable for damages caused by his property when in charge of another, see note, 27 K 702-704.

the origin of such possession may have been fraudulent. *Gregg v. Bigham*, 26 D. 181.

Prima facie presumption of title and ownership is raised by proof of uninterrupted adverse possession of personal property for twenty years, and such presumption can only be overturned by proof that such possession was not inconsistent with plaintiff's right, or explaining or excusing such long acquiescence on some ground other than proof of original defect of title in the possessor. *McArthur v. Carrie*, 70 D. 529.

Acts of ownership by the possessor of chattels, inconsistent with another's ownership, must be brought to the knowledge of the true owner to divest him of title. *McMahon v. Sloan*, 51 D. 601.

4. *Authority of one in mere possession to sell*. — Mere possession of another's property is not such evidence of ownership or authority to sell that third persons have a right, as against the true owner, to rely thereon. *Spraight v. Hawley*, 100 D. 452.

Possession of personal property is only *prima facie* evidence of ownership, and never prevails against the true owner, except with reference to negotiable instruments and whatever comes under the general denomination of currency. With this exception, the effect of possession as evidence of ownership is subordinate to the principles that no one can be divested of his property without his consent, and that no one can transfer a better title than he has himself. *Wright v. Solomon*, 79 D. 196; *Spraight v. Hawley*, 100 D. 452.

A son's possession and apparent ownership of cattle by the father's consent will not prevent the father's representatives from showing, as against a purchaser from the son, that there was no authority to sell. *Staples v. Bradbury*, 23 D. 494.

The consent of the owner to the disposition of his property may be inferred from acts as well as given in direct terms. It may be inferred when the owner gives such evidence of the authority of disposal as usually accompanies such authority, according to the custom of trade and the general understanding of business men. *Wright v. Solomon*, 79 D. 196.

Selling a part of a number of chattels received at the same time and under the same circumstances is proper evidence to go to the jury upon the question of ownership of the residue. *Moon v. Hawks*, 16 D. 725.

5. *Joint possession*. — Where two persons are in joint possession of property, the title being in one, the law will refer the possession to him who has the title. *Bragg v. Massie*, 79 D. 82.

A joint owner is bound to that care which prudent men ordinarily have of their property. *Guillot v. Dossat*, 6 D. 702.

4. *Effect of the law of place*. — 1. *In general*. — The validity of every transfer,

For Index to Notes in American Decisions and American Reports, see Volume I.

alienation, or disposition of personal property depends upon the law of the owner's domicile. *Petersen v. Chemical Bank*, 88 D. 298; *Minor v. Cardwell*, 90 D. 390.

The character of property, as real or personal, is to be determined by the laws of the state into which it is removed. *Minor v. Cardwell*, 90 D. 390.

An involuntary transfer of movable property abroad, by process at home, does not divest the title in prejudice of creditors domiciled at the place of actual *situs*. *Speed v. May*, 55 D. 540.

A voluntary transfer of movable property by act of owner divests title in it wherever it may be. *Ib.*

2. *The situs of personalty.*—Personal property has no *situs* other than that of the person having its possession, ownership, custody, or control. *Molynex v. Seymour*, 76 D. 662; *Speed v. May*, 55 D. 540. But this principle has no proper application where an attempt is made to take it from him against his consent, but applies only where the claim of the owner ceases by his death intestate, or by his voluntary transfer. *Owen v. Miller*, 75 D. 502.

The law of the actual *situs* of personalty protects claims of creditors domiciled there only against transfer by operation of law. *Speed v. May*, 55 D. 540.

The *situs* of bank stock secured on real property is the same as that of the property upon which it forms a charge. *Packwood's Succession*, 43 D. 230.

5. *Conveyances, and other transfers of title.**—The title of goods is transferred to a defendant upon recovery in trespass or trover by the plaintiff of the value of the specific chattels of which the possession has been acquired by tort. *Admson v. Miller*, 59 D. 663.

The payment by a carrier for goods lost *in transitu* transfers property in them to the carrier. *Hagerstown Bank v. Adams Exp. Co.*, 84 D. 499.

Growing trees are severed in law from the land, and become personal property without an actual severance, so that they may thereafter be sold like any other personal property, where the owner of the lands, by a valid deed, sells the trees to a third person, or, it seems, where he sells the land, reserving the trees. *Kingsley v. Holbrook*, 86 D. 173.

A sale of standing trees in contemplation of their immediate separation from the soil, by either the vendor or vendee, is a constructive severance of them, and they pass as chattels; and the contract is not within the statute of frauds, though no definite time is fixed for their removal. The phrase "in contemplation of immediate separation

from the soil," is used to distinguish a sale of standing trees, or growing crops, which passes no interest in the land except a license to enter upon it for the purpose of removing them, from a contract conferring an exclusive right to the land, for a time, for the purpose of making a profit out of the growth upon it. *Byassee v. Reese*, 83 D. 481.

The selection and marking of trees sold as chattels by the purchaser, with the knowledge and consent of the vendor, is a constructive delivery, and the title vests in the purchaser as against the vendor. *Ib.*

A *bona fide* purchaser for a valuable consideration paid, who acquires title to land before he has notice of a sale of the standing trees, is entitled to them, and the purchaser of the trees must look to his vendor for damages. *Ib.*

Defendants purchased of J., and paid for, a quantity of linseed. At the time of the purchase, J. did not have the linseed; but three days afterward he procured a quantity of plaintiffs by fraudulent representations, and delivered it to defendants with the bill of lading. *Held*, that the plaintiffs could recover the linseed of the defendants. *Bernard v. Campbell*, 14 R. 289.

A sale of ice, already formed in a pond, is a valid sale of personal property. *Higgins v. Kusterer*, 32 R. 160.

Whether courts, independently of positive legislation or local established regulations in regard to the transfer of personal property, can discriminate in favor of their own citizens and maintain their consistency in holding that personal property has no locality, *quære*. *Walters v. Whitlock*, 76 D. 607.

6. *Rights of owner wrongfully dispossessed.**—The owner of property tortiously taken or converted, if it can be identified and a delivery had, is entitled to recover it, notwithstanding any change of form or addition to its value which may have been made by the labor of the wrong-doer. *Weymouth v. Chicago etc. Ry Co.*, 84 D. 763.

Accordingly, a trespasser who cuts down trees and converts the lumber into shingles acquires no title. *Betts v. Lee*, 4 D. 368; *Strubbee v. Trustees Cincinnati Ry*, 39 R. 251. Where, however, the property has been so changed in its character as to have lost its identity, it ceases to have the same legal existence, and the owner cannot pursue it against third persons. *Cross v. Marston*, 44 D. 353.

Where a person, without the consent or knowledge of the owner, entered on land and cut timber which he made into coal, he cannot maintain trover for the coal which remained in possession of the owner of the timber. *Curtis v. Groat*, 5 D. 204.

*Transfers of personalty, by what laws governed, see note, 12 D. 578-579.

After-acquired title, when embraced within mortgage of, see note, 76 D. 721-723.

*Equity jurisdiction for recovery of, see note, 51 D. 589, 590.

Acts which owner may commit in taking or retaking, see note, 82 D. 573-579.

For Index to Notes in American Decisions and American Reports, see Volume I.

One wrongfully dispossessed of his goods may retake them wherever he can find them, provided it be not done in a riotous or forcible manner. *Bobb v. Bosworth*, 12 D. 273.

A forcible attempt to retake goods may be repelled by force, and if the one making such forcible attempt wound the other, an action for the battery will lie in favor of the latter, although the first may have had the better claim to the property. *Ib.*

The owner of a chattel wrongfully taken from his possession and placed upon the land of another may lawfully enter and retake it, and is not liable even for nominal damages for so doing. *Chambers v. Bedell*, 37 D. 508.

The owner has the right of recaption of his personal property, and may, without any prior request, take it from one who improperly detains it; but unless it was seized or attempted to be seized forcibly, the owner cannot justify more than gently laying his hands on the wrong-doer for its recovery. *Scribner v. Beach*, 47 D. 265.

Where a trespasser carries away a bar or pole of another person, and uses it in constructing a staging for his own use, the owner may recapture it at any time without giving notice to the trespasser of its removal from the staging. And if such trespasser sustains damage by reason of the falling of the staging, owing to the removal of the pole without notice to him, the owner is not liable therefor. His loss in such case is *damnum absque injuria*. *White v. Twitchell*, 60 D. 294.

Where the owner of a colt exchanges it for a mare on condition that the exchange shall be permanent, provided the title to the mare shall, upon inquiry, prove good, otherwise the owner of the colt to have the right to reclaim it wherever found, and it proves, upon inquiry, that the mare was stolen by the party offering to exchange her, the owner of the colt may reclaim it from one who purchased it from the thief, without notice of the terms upon which the latter held it, and such purchaser cannot maintain trover for the recovery of the colt from its original owner. *Stevens v. Ellis*, 77 D. 240.

The mere naked possession of personal property in a vendor will not prevail against the true owner, who may follow his property and reclaim it wherever found. *Fawcett v. Osborn*, 83 D. 278.

7. Abandonment and relinquishment.—Property found to be derelict, in a strict maritime sense, does not imply that the owner is divested of all right in such property. *Wyman v. Hurlburt*, 40 D. 461.

Abandonment of property divests the owner of his title therein, and the finder who reduces the same to possession after such abandonment is not guilty of conversion. *Ib.*

The law will imply an abandonment of a

wreck without the positive testimony of an owner of the boat and cargo in affirmation of the fact, where such wreck is covered by an island formed upon it, on which trees have grown to the height of thirty or forty feet, and the owners, after recovering a portion of the cargo, have abandoned the remainder. *Eads v. Brazelton*, 79 D. 88.

The finder of wreck as such is entitled to the property as owner, or to its possession as salvor, and will be protected from the interference of third persons. *Ib.*

Property is abandoned when it is thrown away or is voluntarily forsaken by the owner. It then becomes the property of the first occupant, subject to the superior claim of the owner, except that in salvage cases, by the admiralty law, the finder may retain possession until paid his compensation, or until the property is submitted to legal jurisdiction for the ascertainment of compensation. *Ib.*

Occupation or possession of property lost, abandoned, or without an owner, as a wreck, must depend upon an actual taking of the property with the intent to reduce it to possession. This possession need not be an absolute or perpetual appropriation of the property to the use of the finder, nor need the act of taking possession be manual; still, marking trees that extend across the wreck, or affixing temporary buoys to it, are not such acts of possession as the law will notice and protect as indicating a desire or intention to appropriate the property. *Ib.*

8. Rights of finders.—The finder of a lottery ticket purporting to be payable to the holder cannot sustain an action thereon. *McLaughlin v. Waite*, 21 D. 232.

The finder of a chose in action cannot maintain any action against the maker to recover the amount due thereon. *Ib.*

Payment to the finder of a chose in action purporting to be payable to the bearer or holder will not protect the obligor against an action by the true owner, if he knew that the person whom he paid was not such owner. *Ib.*

The finder of lost property acquires a right, upon return of the property to its owner, to any reward that may have been offered by the owner for a return. *Deslandes v. Wilson*, 25 D. 187.

If no reward is offered for finding of lost property, the finder thereof is entitled to no reward or remuneration. *Watts v. Ward*, 62 D. 299.

The finder of lost property cannot be allowed to judge as to how much his demand for trouble and expense in finding the property shall be, and then how much he ought

* Who is finder of, and his duty, see notes, 21 R. 187-189; 30 R. 180-182.

Trover by finder of, see note, 18 D. 55-59.

Larceny by finder of, see note, 17 R. 140, 141; LARCENY, 11; REWARDS.

For Index to Notes in American Decisions and American Reports, see Volume I.

to use the property to satisfy such demand. *Ib.*

The reward must be ratably apportioned, in case part only of the lost property is found and returned. *Deslonde v. Wilson*, 25 D. 187.

The finder of stray horses which die while being used by him in the ordinary course of his business is liable to the owner thereof for their value. *Watts v. Ward*, 62 D. 299.

The finder of lost property is entitled to it as against all the world except the real owner, and ordinarily the place where it is found is of no consequence. *Durfee v. Jones*, 23 R. 528.

A bought an old safe, and afterward offered it to B, who refused to purchase it. It was then left with B for sale, B having permission to use it. B found between the outer casing and the lining a roll of bank bills belonging to some person unknown, whereupon A first demanded the money, and then demanded the safe and its contents as they were when B received them. The safe was returned, but the money retained by B. In *assumpsit* brought by A against B for the money found,—*held*, that as against A, B was entitled to retain the money. *Ib.*

A servant in a hotel found a roll of bank notes in the public parlor, and informed her master, who suggested that it belonged to a transient guest, and received the money from her to give to him. It proved not to belong to the guest, and the servant demanded it from the master, who refused to return it. *Held*, that she could recover it from him. *Hamaker v. Blanchard*, 35 R. 664.

The plaintiff, while engaged as an employee in the defendant's paper-mill, in assorting a bale of old papers which the defendant had bought for manufacture, found a number of bank notes, in a clean unmarked envelope, in a bale, and delivered them to the defendant for the purpose of ascertaining if they were good, and upon his promise to return them. The defendant refusing to return them upon demand,—*held*, that the plaintiff was entitled to recover their value from him. *Bowen v. Sullivan*, 30 R. 172.

The proprietor of a shop is entitled to the possession of a pocket-book which has been accidentally left by another upon a table there, and has remained uncalled for, as against a stranger who first sees it there. Property so left is not to be treated as other lost property, so as to entitle the finder to take and hold possession. *McAvoy v. McDina*, 87 D. 733.

The owner of a tannery sold it, and accidentally omitted to remove a few hides from the vats. Many years afterward a laborer found them. *Held*, that he got no title to them, they not being lost, abandoned, derelict, nor treasure-trove, and that they belonged to the original owner or his representatives. *Livermore v. White*, 43 R. 600.

The plaintiff, having found a bank note,

deposited it for gratuitous safe-keeping with the defendant, from whose safe it was stolen by burglary. *Held*, 1. That in the absence of any claim by the rightful owner communicated to the defendant, the plaintiff had such an interest in it as would entitle him to recover it from the defendant; but 2. That the defendant was not liable unless he had been grossly negligent in his care of the note. *Tancil v. Seaton*, 26 R. 380.

9. Confusion or accession.*—Confusion of goods has taken place when there has been such an intermixture of goods owned by different persons that the property of each can no longer be distinguished. *Hesseltine v. Stockwell*, 50 D. 627.

The doctrine of confusion of goods is: If the goods can be distinguished and separated each may claim his own; if the goods are of the same nature and value, as corn, tea, etc., then each may claim his aliquot part; but if the mixture is not distinguishable, nor an aliquot division possible, then the party who occasions, or through whose neglect or fault occurs, the wrongful mixture, must bear the whole loss. *Robinson v. Holt*, 75 D. 233; *Hesseltine v. Stockwell*, 50 D. 627; *Sims v. Glazener*, 48 D. 120; *Inglebright v. Hammond*, 53 D. 430.

Where a person mingled his hay with that of a judgment debtor, and did not and could not identify his own,—*held*, that the mass became the property of the judgment debtor as between the party mixing the hay and an officer levying upon the same under a writ of execution against the debtor. *Robinson v. Holt*, 75 D. 233.

The injured party is entitled to replevy a whole body of mixed lumber where one willfully and indiscriminately intermixes his own lumber with that of another person so that they cannot be distinguished, and where the two lots so mixed are of different qualities or values. *Jenkins v. Steanka*, 88 D. 675.

The doctrine of confusion of goods is applicable to mill-logs and other lumber. *Hesseltine v. Stockwell*, 50 D. 627.

"Accession" and specification explained and defined. *Lampton v. Preston*, 19 D. 104.

The owner of property movable or immovable has a right by accession to that which is added or united to it. *Peirce v. Goddard*, 33 D. 764.

The owner of the principal materials acquires by right of accession the right of property in the whole where the materials of two persons are united by labor into a joint product. *Pulcifer v. Page*, 54 D. 582.

A willful trespasser can acquire no right by accession to the property of another, and the owner may reclaim it notwithstanding

* See monographic note on title by accession and confusion, 54 D. 583-597.

Alteration in form of property, what affects owner's right to recover, see note, 4 D. 369-371.

Wrong-doer changing form of property, whether acquires title, see note, 53 D. 315, 316.

For Index to Notes in American Decisions and American Reports, see Volume I.

any alteration of form, unless it be changed into a different species and incapable of restoration to its original state. *Peirce v. Goddard*, 33 D. 764.

The title to chattels is not changed by bestowal of labor or skill upon them, by a willful wrong-doer, in manufacturing them or changing them into a commodity of another kind. No matter how great the transformation may be, the true owner may follow and reclaim his materials as far as he can prove their identity. *Silbury v. McCoon*, 53 D. 307; *Dunn v. Oneal*, 60 D. 140. But the right to the same may be so acquired, provided the possession of the same is innocently obtained and the species of the property be changed. *Lampton v. Preston*, 19 D. 104.

Willful trespassers taking corn and making it into whisky acquire no title, and can maintain no action against an officer seizing and selling the whisky in their distillery, on an execution against the owner of the corn. *Silbury v. McCoon*, 53 D. 307. Contra, *Silbury v. McCoon*, 41 D. 753.

The owner of the principal materials of an article manufactured by another who also supplied some slight deficiencies in the materials is the owner of the manufactured article, but the manufacturer has a lien thereon for his services and materials. *Dunn v. Oneal*, 60 D. 140.

One of two tenants in common of certain timber-land conveyed his undivided half of the land by warranty deed to certain parties to whom he was indebted, such parties agreeing orally to reconvey upon the discharge of the indebtedness. Subsequent to the sale of his interest in the land, and under authority previously given by his co-tenant, the vendor sold a quantity of the timber growing upon the land to a third party, who cut and manufactured the same into hoops. An action of replevin was brought by the owners of the land to recover the hoops. It was shown upon the trial that the value of the timber was twenty-five dollars, and that the value of the hoops was seven hundred dollars. *Held*, that evidence showing that the defendant purchased the timber and manufactured it, in good faith, was admissible; and that upon such showing he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was by an action of trespass. *Weberbee v. Green*, 7 R. 653.

Where one by mistake, in good faith, has expended labor upon the property of another, not destroying its identity, nor converting it into something substantially different, nor essentially enhancing its value, he cannot recover compensation therefor from the owner, although the owner has availed himself of the benefit. *Isle Royal M. Co. v. Hertin*, 26 R. 520.

Where one by mistake and in good faith

cut cord-wood on the land of another, and hauled it to a landing and piled it, and the owner seized and sold it, — *held*, that the owner was not liable for the value of such labor. *Id.*

10. **Derelict property.*** — The owner of property which, without his fault or negligence, is carried by high water down a stream and deposited upon the lands of another, will not be liable for any damage occasioned by it, unless he reclaim it, in which event he must make good the damages done. *Sheldon v. Sherman*, 1 R. 569; *Livsey v. Philadelphia*, 3 R. 578.

PERSONAL REPRESENTATIVES.

Competency of, as witnesses, see WITNESSES, 56.

Generally, see EXECUTORS, etc.

Set-off in actions by or against, see SET-OFF, 23, 24.

When limitation begins to run for or against, see LIMITATIONS OF ACTIONS, 26.

PERSONALTY.

Sales of, by infants, validity of see INFANTS, 26.

See PERSONAL PROPERTY.

PETITION.

For divorce, see MARRIAGE AND DIVORCE, 67.

For partition, see PARTITION, 15.

For sale of infant's lands, see INFANTS, 10.

For specific performance, see SPECIFIC PERFORMANCE, 35.

In action for malicious prosecution, see MALICIOUS PROSECUTION, 9.

In actions under codes, see PLEADING, 94.

In foreclosure suit, see MORTGAGES, 82.

To sell decedent's land for payment of debts, see EXECUTORS, etc., 109.

PETTY LARCENY.

See LARCENY, 12.

PEWS.

Property in, and rights of owners, see RELIGIOUS SOCIETIES, 9.

PHYSICIANS AND SURGEONS.

[Includes the right to practice medicine or surgery, and the statutory regulations thereof; the right of physicians or surgeons to compensation, and how enforced; the skill required of them; their liability for want of skill, or for negligence or malpractice; privileged communications between physician and patient; and the law relating to medical societies.]

Competency of, as experts, see WITNESSES, 134.

Competency of, as witnesses, see WITNESSES, 71.

* Owners of property set adrift by floods, wrecks, and other causes, rights and liabilities of, see note. 56 D. 548-512.

For Index to Notes in American Decisions and American Reports, see Volume L.

1. The right to practice medicine or surgery. — An agreement by a physician transferring his practice and good-will to another physician for a price, and guaranteeing that "no other physician, for the space of four years, will establish himself in this place as a competitor, unless the increased population of the place should warrant it, or unless the purchaser should commit some act which shall forfeit to him the confidence of the community," and that if any such competitor do so establish himself, the former will repay the sum paid, is not an agreement which is void as being in restraint of trade, nor too uncertain and insensible to support an action. *Gilman v. Dwight*, 74 D. 634.

Plaintiff, a physician, being about to remove from the town where he lived, agreed with defendant, also a physician, in consideration of five hundred dollars, to recommend him to his patients, and to use his influence to induce them to employ him. *Held*, that the agreement was lawful, and not against public policy. *Hoyt v. Holly*, 12 R. 390.

2. Statutory regulations of the right. — The legislature may regulate the practice of medicine and surgery, and prescribe the qualifications of applicants for license. *Eastman v. State*, 58 R. 400.

A statute requiring physicians and midwives to report births and deaths to the clerks of courts is not unconstitutional nor unreasonable. *Robinson v. Hamilton*, 46 R. 63.

The state may authorize the state medical board to refuse a certificate, as a necessary condition to the right to practice medicine, for "unprofessional or dishonorable conduct," but the applicant has a right first to be heard, and is not entitled to *mandamus* to review the determination. *State v. State Med. Exam. Board*, 50 R. 575.

Under a statute regulating the practice of medicine and surgery, an application for leave to practice who has a diploma must furnish the state board of health satisfactory proof that it was granted by some legally chartered institution in good standing. *Held*, that the granting of leave by the board is discretionary, and will not be enforced by *mandamus*. *State v. Gregory*, 53 R. 565.

3. Right to compensation, and how enforced. — A physician or surgeon, without special contract for the purpose, never stipulates for the successful conclusion of his services, nor is he ever a warrantor or insurer. *Leighton v. Sargent*, 59 D. 388.

In an action by a physician for his services rendered to a patient, evidence that while rendering such services he attended patients afflicted with small-pox, and communicated that disease to the defendant, notwithstanding his promise made to the defendant when first employed by him that he would not

while attending him wait upon small-pox patients, is admissible for the purpose of reducing the recovery for the services in the performance of which the violation of this promise and the consequent damage occurred. *Piper v. Menifce*, 54 D. 547.

The superintendent of a hotel at a watering-place does not render himself liable for the services of a physician by sending to a friend in the neighboring town the following telegram, which is by him shown to said physician: "There are many cases of yellow fever at the Well; send out a physician this afternoon without fail." *Williams v. Brickell*, 75 D. 88.

The facts authorizing a recovery for malpractice constitute a defense to an action for professional services. *Patten v. Wiggin*, 81 D. 593.

A consulting surgeon who, at the request of the attending surgeon, and with the consent of the patient, renders services to the patient, may recover from the patient, although the attending surgeon had agreed with the patient to pay therefor, but without the knowledge of the consulting surgeon. *Garrey v. Stadler*, 58 R. 877.

A physician may recover for his services, although he was mistaken in his treatment, provided he was not negligent or unskillful. *Ely v. Wilbur*, 60 R. 668.

4. The skill required, and how proved.* — The law requires of physicians and surgeons, in the treatment of their patients, to use ordinary skill and diligence only, the average of that possessed by the profession as a body, and not of the thoroughly educated only; having regard to the improvements and advanced state of the profession at the time of the treatment. *Smother v. Hanks*, 11 R. 141; *Leighton v. Sargent*, 59 D. 388; *Patten v. Wiggin*, 81 D. 593; *Wilnot v. Howard*, 94 D. 338; *Barnes v. Meuns*, 25 R. 328.

A physician must use reasonable and ordinary care and diligence in treatment of a case. *Patten v. Wiggin*, 81 D. 593.

A physician must use his best skill and judgment in deciding upon the nature of the disease, and the best mode of treatment, and the management, generally, of the patient. *Id.*

A physician is not a warrantor of a cure, and is not responsible for want of success in his treatment, unless it is proved to result from want of ordinary care, or ordinary skill and judgment. *Id.*

The law does not require that a physician or surgeon should have the highest skill, or largest experience, or most thorough education, equal to the most eminent of the profession. *Id.*

A country physician and surgeon is not bound to the exercise of that high degree of

* Skill and knowledge exacted of, see note, 56 R. 3:2-394.

For Index to Notes in American Decisions and American Reports, see Volume I.

art and skill possessed by eminent surgeons living in large cities, and making a specialty of the practice of surgery, but only to that reasonable degree of learning, art, and skill ordinarily possessed by others learned in his profession, having regard to the advanced state of the science. *Small v. Howard*, 35 R. 363.

A physician or surgeon should be charged with the consequences of errors only where such errors could not have arisen except from want of reasonable skill or diligence. *Leighton v. Sargent*, 59 D. 388.

A physician is not responsible for an honest mistake of nature of disease, or as to the best mode of treatment, when there was reasonable ground for doubt or uncertainty, provided he is properly qualified as a physician, and exercises the proper care. *Patten v. Wiggin*, 81 D. 593; *Leighton v. Sargent*, 59 D. 388.

A physician under whose care a man places his wife, some distance from his own residence, is presumed to have authority to do all such acts and adopt such course of treatment and operations as are in his opinion necessary, without previously notifying the husband of an intended operation; nor need he prove to the satisfaction of the jury that the operation was necessary, or that it would be dangerous to the wife to wait until her husband was notified. *McClallen v. Adams*, 31 D. 140.

Evidence that a person accused of negligence and unskillfulness in the treatment of a broken ankle was educated at a medical school of high repute, was a regularly educated and skillful physician and surgeon, is proper and should be admitted. *Leighton v. Sargent*, 59 D. 388.

The reputation of the institution where the physician's studies were pursued can have no legitimate bearing upon question of skill possessed by one physician as compared with others. *Leighton v. Sargent*, 64 D. 323.

The treatment of a physician of one particular school is to be tested by the general doctrines of his school, and not by those of other schools. *Patten v. Wiggin*, 81 D. 593.

The number of cases treated, the course of treatment, or the amount of practice possessed by a physician, is not competent evidence to show his skill. *Leighton v. Sargent*, 64 D. 323.

In an action against a surgeon for malpractice, evidence of his reputation, in the community and among his profession, as to skill, is inadmissible. *Holsman v. Hoy*, 59 R. 390.

Evidence introduced to prove skill possessed by a surgeon two years subsequent to the act complained of is incompetent to prove skill at the time that the act was done. *Leighton v. Sargent*, 64 D. 323.

Where but one course of treatment would be suggested by physicians of ordinary knowl-

edge or skill, the adoption of any other course may be evidence of a want of ordinary knowledge, skill, or care. *Patten v. Wiggin*, 81 D. 593.

Evidence that a skilled surgeon assisted a physician who had sole control of a case could not tend to prove the degree of skill possessed by said physician, especially when there was a disagreement as to mode of treatment to be pursued. *Leighton v. Sargent*, 64 D. 323.

The measure of skill which a physician is bound to exercise is not affected by his refusal of the proffer of assistance from other physicians. *Potter v. Warner*, 36 R. 668.

5. Liability for want of skill.*—The civil responsibility of physicians and surgeons in the treatment of their patients is not governed by the same rule of law that applies to mechanics and artisans in the execution of their work. *Almond v. Nugent*, 11 R. 147.

A physician is liable for damages arising as well from want of skill as from the want of application of skill. *Long v. Morrison*, 77 D. 72.

A physician attending patients afflicted with infectious diseases is bound to take all such precautions as experience has found to be necessary, to prevent the communication of those diseases to his other patients. *Piper v. Menifee*, 64 D. 547.

A surgeon is not liable for a want of the highest degree of skill, but only for the want of ordinary skill, care, or judgment. *Howard v. Grover*, 48 D. 478.

A surgeon is answerable to his patient for error of judgment so gross as to be inconsistent with the use of that degree of skill that it is the duty of every surgeon to bring to the treatment of a case. *West v. Martin*, 80 D. 107.

A surgeon is liable for the mismanagement of a broken arm, whereby it became defective, although the negligence or improper care of those having charge of the sufferer aggravated the injury and caused the damage to be greater than it otherwise would have been. *Wilmot v. Howard*, 94 D. 338.

Where the original treatment of a broken arm by a surgeon was such that the arm must have inevitably been injured, the mismanagement of those having the patient in charge, whereby the injury was aggravated, goes only to the measure of damages, and not to the right of action against the surgeon. *Id.*

Where a person had sustained an oblique fracture of the larger bone of the leg, and the surgeon in attendance neglected promptly to use the customary appliances, for extension and counter-extension, whereby the limb was materially shortened, it not appearing that the patient was unable to undergo such treatment, — *held*, that the surgeon was liable in damages. *Barnes v. Means*, 25 R. 328.

* Liability of physicians and surgeons for negligence, see note, 48 D. 481-487.

For Index to Notes in American Decisions and American Reports, see Volume I.

6. — or for malpractice.* — 1. *Generally.* — Where a physician was charged in an action for damages for wounding and injuring a patient in child-birth, — *held*, that particular acts of the defendant might be given in evidence to sustain the general allegations, and that it was competent for the plaintiff to show by what means such injuries and wounds were received. *Grannis v. Branden*, 5 D. 143.

Evidence of the declarations of the defendant that the patient was infected with the venereal disease, and that this was the cause of protracted labor, when it appeared that she had no such disease, was held admissible, for the purpose merely of showing the defendant's ignorance as to the real state of her case. *Id.*

It was held to be competent to show that the defendant had not been regularly bred to his profession, to rebut evidence introduced by him of his general professional character. *Id.*

A physician is liable for injuries resulting from his carelessness, or from a want of ordinary diligence, care, and skill. Principle applied to careless vaccinating. *London v. Humphrey*, 23 D. 333.

When an action is brought against a surgeon for an injury arising from unskillful treatment, the burden of proof is on the plaintiff to show want of knowledge and skill on the part of defendant. *Leighton v. Sergeant*, 64 D. 323.

Negligent or improper conduct of a patient will not defeat his right of recovery against his physician for malpractice, unless it substantially contributes to the injury for which the patient seeks to recover. *West v. Martin*, 80 D. 107.

A complaint charged that the defendants undertook as surgeons to set and heal plaintiff's arm which was broken, but that they so negligently conducted themselves in attempting so to do that the arm was rendered worthless. *Held*, that the cause of action was *ex contractu*, and not *ex delicto*, and therefore only barred by the statute limiting actions on contracts. *Staley v. Jameson*, 15 R. 235.

2. *Malpractice resulting in death.* — An action for damages can be sustained by the husband against a surgeon for an unskillful operation upon his wife, notwithstanding she dies in consequence thereof. *Cross v. Guthery*, 1 D. 61.

The right of action for malpractice resulting in the death of a wife, if it grows out of the breach of the contract for skillful service on the part of the physician, is a chose in action, and survives the death of the wife. *Long v. Morrison*, 77 D. 72.

At common law, the right of action against a physician for malpractice founded on the

tort, died with the death of the person injured. *Id.*

The following instruction is correct: "The action is predicated upon the injury to the deceased; and the amount of damages should be compensatory for the injury, short of the loss of life, which the law cannot estimate. The jury may well consider the pain and suffering of the deceased, but not the suffering of her parents, nor the suffering nor loss of the husband." *Id.*

For malpractice resulting in death of wife, the husband has a right of action for the loss of service, etc., sustained by him between the times of the commission of the injury and the death of the wife. *Id.*

The husband and personal representative of wife must join in action for malpractice resulting in death of wife, under a statute providing "when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission," but the husband would have no right to settle the suit, nor control the proceeds of it, independent of the administrator, since the statute declares the use to be made of the proceeds of the judgment recovered. *Id.*

The non-joinder of a husband with the personal representative of the wife, in an action for malpractice resulting in the death of the wife, is no ground for reversal under the code, if it was not specially raised as an objection below. *Id.*

A physician prescribing for a patient honestly and to the best of his ability is not criminally answerable for his death from the medicines so prescribed. *State v. Schulz*, 39 R. 187.

A physician is criminally liable for his gross ignorance causing the death of his patient, but not for mere mistake of judgment. *State v. Hardister*, 42 R. 5.

7. *Privilege of communications between physician and patient.** — The narration by a patient to his physician, of the cause of his injuries, received some months previously, is not admissible as evidence, on the part of the patient, of the cause of such injury. *Chapin v. Martborough*, 69 D. 281. The physician cannot give in evidence the mere statement of the party injured, in lieu of his own professional opinion. *Illinois Cent. R. R. Co. v. Sutton*, 92 D. 81.

An attending physician is incompetent to testify as to information of the condition of the insured, acquired in his attendance and necessary to enable him to prescribe. *Diller v. Home Life Ins. Co.*, 25 R. 182.

* Contributory negligence of patient which will bar recovery for malpractice, see note, 86 R. 670, 671.

* Knowledge obtained in course of professional employment, whether may be disclosed, see notes, 33 R. 435-439; 82 R. 4, 5; 56 R. 527-529.

For Index to Notes in American Decisions and American Reports, see Volume I.

Under a statute prohibiting the disclosure by a physician of information acquired in professional attendance and necessary to enable him to prescribe, in an action for damages for a personal injury by defendant's violence, a physician is not precluded from divulging the plaintiff's admission to him that the injury existed before the defendant's act, unless it affirmatively appeared that the disclosure was necessary to enable him to prescribe. *Campas v. North*, 33 R. 433.

A physician called on to make a professional examination of a patient may not be allowed to testify as to his opinion of his health based on "general sight," before the examination, or any conversation with him. *Grattan v. Metropolitan Life Ins. Co.*, 44 R. 372.

In an action on a life insurance policy, the prohibition of testimony by physicians as to attendance on the insured before the application may be waived by the beneficiary, but the waiver as to one does not prevent his asserting the privilege as to others. *Penn. Mut. Life Ins. Co. v. Wiler*, 50 R. 769.

On a prosecution for abortion, a physician who, after the commission of the crime, was selected by the public prosecutor to attend and examine the woman, and did attend and examine her with her consent, was allowed to testify as a witness for the prosecution to his opinion, founded on his observation of the woman and her narration of the circumstances, that an abortion had been committed. The woman was alive at the time of the trial. *Held*, 1. That the disclosure was prohibited by the statute; 2. That it was incompetent, because a narration of past events and not part of the *res gesta*. *People v. Murphy*, 54 R. 661.

S. Medical societies.—An incorporated medical society, under the power to make the by-laws contained in its charter, may adopt a by-law providing for the expulsion of a member who shall be guilty of ungentlemanly conduct during a session of the society, or shall conduct himself out of the society in such a manner as would render him ineligible to membership; but the society has not an uncontrollable discretion in its construction and enforcement. *State v. Georgia M. Soc.*, 85 D. 408.

An incorporated medical society cannot justify the expulsion of a member for doing that which the law not only authorizes but encourages. *Id.*

A medical society, incorporated under a charter empowering it to expel its members, summoned the plaintiffs, who were members, to appear before a board of trial, composed of members, to answer charges preferred by a committee, that the plaintiffs had violated the by-laws of the society by conduct unworthy honorable physicians and members of the society, in practicing according to a

certain exclusive theory or dogma, and belonging to an association whose purpose was at variance with the principles of the society and tended to disorganize it. The plaintiffs filed a bill in equity against the society, the board of trial, and the committee preferring charges, alleging that it was the defendant's intention to expel the plaintiffs only for practicing homœopathy; that the body to try them was wrongly constituted; and that the proceedings were irregular and void. *Held*, on demurrer, that the court had no jurisdiction to interfere by injunction. *Gregg v. Mass. Medical Soc.*, 15 R. 24.

A board of censors of a medical society may not refuse a license to an applicant on the sole ground that he is not worthy of public confidence. *Gage v. New Hamp. etc. Med. Soc.*, 56 R. 492.

PIERS.

Right to erect, see RIPARIAN RIGHTS, & CONSULT WHEARVER.

PILOTS.

Rights of, and duty to employ them, see SHIPPING, 26.

PLACE.

Allegation of, in indictment, see HOMICIDE, 19.

Of assessment of taxes, see TAXES, 33.

Of birth or death, how provable, see EVIDENCE, 68.

Of corporate meeting, see CORPORATIONS, 113.

Of death, stating, in indictment for murder, see HOMICIDE, 22.

Of delivery of goods sold, see SALES, 34.

Of executing commission to take deposition, see DEPOSITIONS, 13.

Of payment, see PAYMENT, 6.

Of performance of contract, see CONTRACTS, 122.

Of presentment of negotiable paper, see BILLS AND NOTES, 172-176.

Of probate of will, see WILLS, 42.

Of registration of deed, see DEEDS, 49.

Of service of process, see PROCESS, 15, 26.

Of trial, in civil cases, see TRIAL, II.

Of trial, in criminal cases, see TRIAL, 125, 126.

To move for new trial, see NEW TRIAL, 47.

PLANS.

Use of, in evidence, see EVIDENCE, 241.

PLATFORMS.

Duty of railroad company as to safety of, see RAILROAD COMPANIES, 70.

Injuries to passenger riding on, see RAILROAD COMPANIES, 84.

PLEA.

Form and requisites of, in actions at law, see PLEADING, 21-42.

For Index to Notes in American Decisions and American Reports, see VOLUME I.

- In actions against personal representatives, see EXECUTORS, etc., 172.
- In actions for fraud or deceit, see FRAUD, 20.
- In actions on contracts, see CONTRACTS, 165.
- In actions on insurance policies, see INSURANCE, 189.
- In actions on judgments, see JUDGMENT, 138.
- In detinue, see DETINUE, 7.
- In ejectment, see EJECTMENT, 28.
- In equity, see PLEADING, 68-82.
- In suits by corporations, see CORPORATIONS, 195.
- In suits for divorce, see MARRIAGE AND DIVORCE, 68.
- In suits for partition, see PARTITION, 18.
- In suits for wrongful attachment, see ATTACHMENT, 141.
- Of *non est factum*, see BONDS, 36.
- Of payment, how interposed, and effect of, see PAYMENT, 17.
- Of set-off, see SET-OFF, 30.
- Of statute of limitations, see LIMITATIONS OF ACTIONS, 15-17.
- Of statute of limitations, replication to, see PLEADING, 52.
- Of title, discontinuance on, see JUSTICE OF THE PEACE, 10.
- To indictment, see INDICTMENT, 43-48.
- To writ of right, see RIGHT (WRIT OF), 2.
- When answer in equity overrules, see PLEADING, 79.
- See also LIBEL, 11; MALICIOUS PROSECUTION, 10; SLANDER, 22-25; SPECIFIC PERFORMANCE, 36; REPLEVIN, 22; TRESPASS, 20; TROVER, 18.

PLEADING.

[Includes rules of pleading in civil actions, at law or in equity, both under the former and present practice, except such as are peculiar to some particular cause of action, remedy, or defense, which is the subject of a separate title in the work.]

- Admissions in pleadings, see EVIDENCE, 156.
- Admissibility of evidence under pleadings, see TRIAL, 43.
- Allegation of former jeopardy, see JUDGMENT, 91.
- Allegations in, when raise estoppel, see ESTOPPEL, 12.
- Allegations respecting good faith and want of notice, see VENDOR AND PURCHASER, 40.
- Appearance, when waives defects in, see ACTIONS, 15.
- As evidence, see EVIDENCE, 193.
- Averment of acknowledgment or new promise, see LIMITATIONS OF ACTIONS, 89.
- Continuance, for amendment of, see TRIAL, 14.
- Election between, joinder, and severance of causes of action, see ACTIONS, 10-12.
- How an estoppel should be pleaded, see ESTOPPEL, 8, 9.
- Impeachment of judgment for irregularities in, see JUDGMENT, 96.
- In actions against carriers, see CARRIERS, 112, 113.
- In actions against corporations, see CORPORATIONS, 206.
- In actions against sureties, see SURETSHIP, 15.
- In actions by or against sheriffs, see SHERIFFS, 31.
- In actions for breach of warranty of goods sold, see SALES, 102.
- In actions for causing death, see NEGLIGENCE, 40.
- In actions for conspiracy, see CONSPIRACY, 3.
- In actions for false imprisonment, see FALSE IMPRISONMENT, 5.
- In actions for obstructing highways, see HIGHWAYS, 41.
- In actions for price of goods sold, see SALES, 90.
- In actions for price of land sold, see VENDOR AND PURCHASER, 58.
- In actions for rent, see LANDLORD AND TENANT, 46.
- In actions for services rendered, see SERVICES, 5.
- In actions founded on negligence, see NEGLIGENCE, 20.
- In actions on bills and notes, see BILLS AND NOTES, 264-275.
- In actions on bonds, see BONDS, 32.
- In actions on guaranties, see GUARANTY, 34.
- In actions on non-negotiable instruments, see BILLS AND NOTES, 309.
- In actions on the case, see CASE, 4.
- In justices' courts, see JUSTICE OF THE PEACE, 20.
- In proceedings by *sci. fa.*, see SCIRE FACIAS, 6.
- In proceedings by writ of entry, see ENTRY, 3.
- In *quo warranto*, see QUO WARRANTO, 10.
- In suits against infants, sufficiency of, see INFANTS, 55.
- In suits by or against husband and wife, see HUSBAND AND WIFE, 109.
- In suits for breach of promise to marry, see MARRIAGE AND DIVORCE, 35.
- In suits for diverting water, see WATERCOURSES, 13.
- In suits for dower, see DOWER, 50.
- In suits for rescission, see VENDOR AND PURCHASER, 79.
- In suits for wrongful attachment, see ATTACHMENT, 139-141.

For Index to Notes in American Decisions and American Reports, see Volume I.

- In suits in equity on ground of fraud, see FRAUD, 29.
- In suits involving accounts, see ACCOUNTS, 11.
- In suits on bail bonds, see BAIL, 24, 25.
- In suits on injunction bonds, see INJUNCTION, 65.
- In suits on official bonds, see OFFICERS, 49.
- In suits on sheriff's bonds, see SHERIFFS, 37.
- In suits to contest wills, see WILLS, 95.
- In trespass, see TRESPASS, 32, 40.
- In trespass to try title, see TRESPASS, 46.
- Judgment must conform to issue raised by, see JUDGMENT, 21.
- Licence, how pleaded, see LICENCE, 3.
- New promise must be pleaded, see BANKRUPTCY, 48.
- New trial for irregularities in, see NEW TRIAL, 1.
- Presumptions as to pleadings, on appeal, see APPEAL, 22.
- Rules for pleading notice, see NOTICE, 10.
- Rules of, as to tender, see TENDER, 20.
- Setting up a release, see RELEASE, 9.
- Setting up a discharge in insolvency, see INSOLVENCY, 24.
- Setting up fraud as a defense, see FRAUD, 34.
- Setting up the statute of limitations, see LIMITATIONS OF ACTIONS, 15-18.
- Setting up usury as a defense, see USURY, 16.

I. AT COMMON LAW.

1. *General Principles.*
2. *The Declaration; State of Demand.*
3. *The Plea.*
4. *Demurrer.*
5. *Replication, and Subsequent Pleadings.*
6. *Proffer and Oyer.*

II. IN EQUITY.

1. *General Principles.*
2. *Bill; Cross-bill.*
3. *Plea; Answer.*
4. *Demurrer; Disclaimer.*
5. *Replication.*

III. UNDER CODES OF PROCEDURE AND PRACTICE ACTS.

1. *General Principles.*
2. *Complaint; Petition.*
 - a. *Formal Parts.*
 - b. *Statement of Cause of Action.*
 - c. *Prayer for Relief or Damages.*
3. *Defendant's Pleadings.*
 - a. *Answer.*
 - b. *Demurrer.*
4. *Reply.*

IV. VERIFICATION OF PLEADINGS.

V. THE ISSUE; ITS SCOPE, AND HOW JOINED.

VI. EVIDENCE UNDER PLEADINGS; VARIANCE.

1. *In Actions at Law.*
2. *In Suit in Equity.*
3. *In Actions under Codes of Procedure.*

VII. EFFECT OF PLEADINGS AS EVIDENCE.

VIII. SERVICE; FILING; WITHDRAWAL.

IX. AMENDED AND SUPPLEMENTAL PLEADINGS.

X. REMEDIES FOR ERRORS AND DEFECTS; WAIVER.

I. AT COMMON LAW.

1. *General Principles.*

1. *Interpretation of pleadings, generally.* — Pleadings are to be taken most strongly against the pleader, and it is to be supposed that the best aspect of the case has been presented. *President etc. of Natchez v. Minor*, 48 D. 727; *Burrows v. Yount*, 39 D. 439; *Ex parte Martin*, 58 D. 321; *Chipman v. Bmeric*, 63 D. 80. Consequently in an action against a sheriff for not levying on property pointed out by the plaintiff, if the defendant pleads in defense that the plaintiff, subsequent to the levy of the first, sued out an *alias* execution which was levied on other property, but the plea fails to show what disposition was made of the property, the court will infer that the property was sold or the levy set aside. *Lawson v. State*, 50 D. 238.

The rule that a pleading is taken most strongly against the party making it is drawn from the legal supposition that every suitor will state his case as strongly as the facts warrant. *Green v. Covilland*, 70 D. 725.

No great strictness should be required as to the manner of stating facts in the records of courts of limited and special jurisdiction. *Haynes v. Meeks*, 70 D. 703.

2. *Form of allegations.* — Rules of pleading in equity are not so strict in matters of form as at law; courts of equity look to substance, not form. *Birely v. Staley*, 25 D. 303.

The dollar-mark, prefixed to Arabic numerals, is not part of the English language, within the meaning of the Vermont statute requiring pleadings to be drawn in the English language. *Clark v. Stoughton*, 44 D. 361.

Short pleadings, when applicable, are to be encouraged. *Harlan v. Bernie*, 76 D. 428.

3. *The requisite certainty.* — Presumptions of law need not be averred or proved. *Ferguson v. State*, 61 D. 120.

A party need not plead a fact which when established has no effect whatever except to admit secondary evidence to sustain his right of action or ground of defense. Thus in an action on a promissory note it is not necessary to allege the fact that the note sued on is in the defendant's possession, if

For Index to Notes in American Decisions and American Reports, see Volume I.

such be the case, for the right of action would be complete and perfect in the plaintiff, notwithstanding the fact that defendant had got possession of the note. In such a case, if defendant refused or failed on notice to produce the note sued on, the plaintiff would have a right to give secondary evidence of its contents. *McClusky v. Gerhauser*, 90 D. 512.

In pleading a levy on execution, it is sufficient to allege generally that the levy was made, without stating the specific acts of the sheriff constituting a levy in law. *Bank v. Rogers*, 97 D. 239.

A person cannot complain of error who does not show by his pleading that he has some cause of action or ground of defense. *Sherman v. Clark*, 97 D. 516.

A declaration which merely describes as "goods, chattels, wares, and merchandise," the cargo of a vessel, for the failure to tow out which safely the action is brought, does not contain a description sufficiently certain and definite. *Pennsylvania etc. Co. v. Dandridge*, 29 D. 543.

4. Pleadings must contain facts fully and plainly stated. — Facts should be pleaded, not the evidence to sustain them. *Church v. Gilman*, 30 D. 82.

Pleadings in chancery should consist of averments of fact, and not of inference or argument. *Chambers v. Chalmers*, 23 D. 572.

5. Exhibits. — While written evidence may be filed as exhibits, and referred to as part of the pleading, good pleading requires that the substance of such evidence shall be set forth by proper averments in the pleading. *Harvey v. Kelly*, 93 D. 267.

An allegation in a bill contradicted by the exhibit referred to is unavailing. *Henderson v. Pickett*, 16 D. 130.

In equity, a defendant may deny on oath the execution of any document annexed as an exhibit to the bill, and thus put the complainant on proof. *Oliver v. Persons*, 76 D. 657.

Exhibits in chancery which are lost or mislaid after the decree may be supplied at a subsequent term; and a defect in the record occasioned by a loss of process may also be supplied in the same way. *Genry v. Hutchcraft*, 18 D. 172.

A statement in a letter annexed as an exhibit to a bill, and prayed to be taken as part of it, will, unless qualified in some manner, become the statement of the bill. *Minter v. Branch Bank*, 58 D. 315.

The instrument set out in a pleading, though called by a wrong name, is to have effect according to the intention of the parties. Thus if a release, so called by the pleader, operates in any way, whether as a deed of bargain and sale, a covenant to stand seised, or as an instrument in any manner effectual to pass title, the pleader is to have the benefit of it. *Thornton v. Mulguinne*, 79 D. 548.

A plaintiff is not required to attach to his petition evidence in the case, but simply the instrument or account on which he brings his suit. *Latterett v. Cook*, 63 D. 428.

In an action on a judgment of another state, if plaintiff files with his petition a transcript consisting of a declaration in *assumpsit* and the judgment thereon, he is not precluded from offering in evidence on the trial a further or amended transcript containing, in addition to the declaration and judgment contained in the first transcript, a copy of the original writ or summons, and the service thereof. *Id.*

A record which shows a cause of action and a judgment rendered thereon is, in an action on a judgment of a sister state, sufficient to annex to plaintiff's petition, under the provisions of section 1750 of the Iowa code, which requires that when a pleading is founded on a written instrument a copy thereof must be annexed to such pleading. *Id.*

6. Pleadings must not contradict terms of written instruments. — A party relying on an account for the purpose of claiming a credit must accept it as a whole, though he may contradict or disprove it; if he does not, it is evidence to go to the jury. *Turner v. Child*, 17 D. 555.

A plea by the drawer of a bill payable at a day certain, setting up a parol agreement, at or before the making of the bill, not to sue, in any event, before the stipulated time of payment — the time specified in the bill — is bad, as being an agreement varying the legal effect of the written contract as to the time of payment. *Rockmore v. Davenport*, 65 D. 132.

7. How statutes should be pleaded. — A public statute need not be recited or referred to in pleading, for the information of the court, but will be judicially noticed. *Reed v. Northfield*, 23 D. 662.

In remedial actions under a statute, no offense need be set out, and an action against a town for damages from a defect in the highway is of that nature. *Id.*

Where a law is unconstitutional, that fact will be considered without its having been pleaded. *People v. Comm'rs of Highways*, 13 R. 581.

A different rule prevails as to indictments, informations, and actions for penalties under a statute, and an averment that the act was done against the statute is necessary in such cases, because it is of the substance of the offense. *Reed v. Northfield*, 23 D. 662.

A party who would bring himself within an exception must plead it; but if the exception forms no part of his cause of action, but merely an excuse for his adversary, the latter must plead it. *Bloodgood v. Mohawet etc. R. R. Co.*, 31 D. 313.

Where usury is pleaded in bar of an

For Index to Notes in American Decisions and American Reports, see Volume I.

action on a note executed in another state, the laws regulating the rate of interest in that state must be averred and proved as matters of fact. *Jones v. Bank*, 46 D. 540.

A party claiming a right under a law of foreign jurisdiction, and not under the common law, must prove the law upon which his claim or right depends, as a fact; and applying this principle to the rules of pleading, he would be required to set out the law or statute upon which he based his claim, in order that the court might see if it supported the right asserted. *Gunn v. Howell*, 62 D. 785.

8. The commencement of a narr. is the mere recital of the writ, and not a necessary part of a declaration, under article 75 of the Maryland code, which declares that it shall not be necessary to state any formal commencement or conclusion to any declaration or other plea. *Wilms v. White*, 90 D. 113.

The demand of interest in the commencement of the declaration is unnecessary, but it forms no valid objection to the declaration. *Dudley v. Lindsey*, 50 D. 522.

9. *Videlicet*. — Actions on contracts and for personal injuries, wherever arising, may be brought in the courts of Virginia, without alleging in the declaration where the cause of action arose; yet in cases where it may be necessary, in order to avoid a variance, by fiction, the plaintiff is permitted to aver under a *videlicet* that the place is within the jurisdiction of the court in which the action is brought. *Shaver v. White*, 8 D. 730.

When the plaintiff does not use this fiction, the defendant is not, in general, permitted to aver that the cause of action arose in another country, except to justify the act by the laws of that country, or to show that the action has been brought in an improper form; but such plea goes to the justification of the defendant, not to the jurisdiction of the court. *Ib.*

It is a principle that if a party be justified as to a transaction in the country where it took place, he is justified everywhere. *Ib.*

10. *Surplusage*. — *Surplusage* consists in alleging other facts than those necessary to charge, and may be entirely disregarded. *Com. v. Jeffries*, 83 D. 712. But the objectionable part cannot be stricken out where enough will not remain to make a cause of action. *Crocker v. Mann*, 26 D. 684.

A superfluous allegation in a declaration may be rejected as surplusage, as where in an action against a stockholder in a corporation, for a corporate debt, the plaintiff avers that he has judgment and execution against the corporation, and also that the corporation has been dissolved, when either fact would entitle him to recover. *Freeland v. McCullough*, 43 D. 685.

The words "survivor of," etc., assumed by plaintiff in his pleading, may be treated as a

descriptio personæ, or rejected as surplusage. *Kinsler v. McCants*, 53 D. 711.

11. *Repleader*. — *New assignment*. — A repleader will be awarded, and costs to abide the final event of the suit, where the substance of the defense as set forth in the plea is good, but the plea is bad in form. *Parkhurst v. Sumner*, 56 D. 94.

Where a defect is radical, going to the very foundation of the action, where the error in the decree is apparent by reference to the bill and the decree, the aggrieved party may assign error, although no demurrer has been interposed. *Gregory v. Ford*, 73 D. 639.

2. Declaration; State of Demand.

12. *Naming and describing the parties*. — Where some dignitary, officer, or person in a special character only can bring the action, the plaintiff must aver that he holds such position. *Brewster v. Vail*, 38 D. 547.

A declaration setting forth that plaintiffs hold as assignees, and the several assignments through which they acquired that right, is sufficient; they need not style themselves assignees. *Bennington Iron Co. v. Rutherford*, 35 D. 528.

One to whom a bond is made payable, by a name, differing from his own, may declare on it in his own name, averring that it was made to him by the wrong name; such an averment is a material, traversable one upon which issue may be taken, but the plea of *non est factum* does not put it in issue. *Nicholay v. Kay*, 42 D. 680.

13. *Stating the cause of action*. — 1. *Generally*. — Where a party claims to have acted under a special authority, and his action is founded on such authority, it should be set out with reasonable precision and certainty. *Stoyel v. Westcott*, 2 D. 109.

The jury have nothing to do with the statement as to whether it is appropriate to the cause of action, or contains any cause of action, or lays a valid consideration; but these points may be mooted on a motion to arrest the judgment. *Sidwell v. Evans*, 21 D. 387.

An allegation of precise time is not essential, in general, in actions on penal statutes. Proving the act to have been done on any day after the day first alleged, and before the commencement of the action, is sufficient. *Gebhart v. Adams*, 76 D. 702.

A declaration on a penal statute may be framed in the words of the statute; and therefore, in debt to recover a statutory penalty for cutting timber, the declaration, if in the words of the statute, need not aver that the timber was cut willfully, knowingly, or in criminal negligence. *Ib.*

Declaration against common carrier of passengers for refusal to carry must aver that plaintiff offered, or was ready and willing, to pay his fare. *Doy v. Owen*, 72 D. 62.

For Index to Notes in American Decisions and American Reports, see Volume I.

Our statement set should be liberally construed to advance its object, which is to guard against the common-law mischief of variance between the *allegata* and the *probata*. *Id.*

Immaterial averments unnecessarily inserted in the statement need not be proved. *Id.*

A plaintiff proving only a part of his declaration may recover, if the part proved presents a cause of action. *Blanchard v. Baker*, 23 D. 504.

The declaration in an action to recover toll for carrying passengers by mail stages need not allege a demand therefor. *State v. Neil*, 28 D. 623.

The derivation of an equitable plaintiff's title from the legal plaintiff need not be set out in the declaration, where a recovery on the naked legal title would be a conclusive bar to a subsequent action by any one, but it will be sufficient to mark the suit to the use of the equitable plaintiff; as in the case of an action brought in the name of an assignor to the use of his assignee. *Armstrong v. Lancaster*, 30 D. 293.

The rejection of evidence of an assignment by the legal to the equitable plaintiff in such a case, though such evidence is in itself irrelevant, is a ground for reversal, where it appears that the want of such evidence was regarded on all hands as an insuperable barrier to a recovery. *Id.*

The declaration in an action founded upon a statute giving a new remedy ought to show whence the plaintiff derives his right of action, and all the facts and circumstances requisite to bring the case within the statute. *Thorpe v. Rankin*, 38 D. 531.

A trial may be stopped if the county court, in its discretion, is satisfied that no cause of action is stated in the declaration, and none proved on trial, although declaration is traversed instead of demurred to. *Baxter v. Winoski Turnpike Co.*, 52 D. 84.

As a general rule, the plaintiff need not anticipate matters of defense, and is required only to state facts which constitute, *prima facie*, a cause of action. *Cooper v. Poston*, 85 D. 610.

2. *In an action on a bond.*—The declaration on a bond to deliver chattels need not allege demand at the place stipulated for delivery. *Mitchell v. Merrill*, 18 D. 128.

3. *— on a contract.**—In an action by a son-in-law against his father-in-law, for the breach of a promise made before marriage, in reference to his daughter's fortune, the declaration averred that he promised to do equal justice to all his daughters as it should be convenient for him, without stating what portion he had given to his other daughters, or that he had given them larger proportions, or that it was convenient for him to give the

plaintiff's wife a particular amount. *Held*, the declaration was insufficient after verdict. *Chichester v. Vase*, 1 D. 509.

A declaration which alleges that the defendant, in consideration of a certain sum to be paid to him by the plaintiff, promised to do certain things, for breach of which promise the action is brought, is bad after verdict, because it fails to allege any agreement between the parties, or any consideration for such promise by the defendant. *Pa. etc. Nav. Co. v. Dandridge*, 29 D. 543.

Where payment of an installment is independent, an action may be maintained on it after all the installments are due, without averring a performance or an offer to perform on the part of the plaintiff. *Biddle v. Coryell*, 38 D. 521.

An allegation of an offer of performance must state the date on which such offer was made. *Vance v. Blair*, 51 D. 467.

A declaration on a contract in partial restraint of trade need not expressly aver the reason to support the restraint, if it sufficiently appears from the contract itself, which is set forth in the declaration. *Kellogg v. Larkin*, 56 D. 164.

No averment can give to an agreement a character it had not, and no admission can take from it the character it had, where an agreement is laid before the court for construction. *Id.*

A plaintiff suing on a promise made in consideration of forbearance to file a caveat to a will must allege in his declaration that he was interested in setting the will aside. *Busby v. Conoway*, 63 D. 688.

A declaration in an action based on the forbearance must show either detriment to plaintiff or a benefit to the defendant; and a declaration in an action on a promise made upon the consideration of forbearance to file a caveat to a will, which contains no allegation that the testator left any assets, either real or personal, after payment of his debts, is therefore fatally defective. *Id.*

4. *— on a covenant.*—A count on covenant for the payment of installments, on the last of which the plaintiff is to make a deed to defendant, of certain land, should aver a performance, or an offer to perform, on plaintiff's part. *Biddle v. Coryell*, 38 D. 521.

5. *— on a warranty.*—In an action upon a contract of warranty, the party injured may, at his election, declare in *assumpsit* or in tort. *Morehouse v. Northrop*, 89 D. 211.

6. *In an action for special damages.*—The plaintiff declared that he had prepared rafts with intent to navigate them down a river which was constituted a public highway, and that he did navigate them until he came to a dam erected by the defendant, by which he was prevented from passing down the river with his rafts. It was held that this was a

* Contract sued on need not be alleged to be in writing, see note, 16 D. 149, 150.

For Index to Notes in American Decisions and American Reports, see Volume L.

sufficient averment of special damage to support an action. *Hughes v. Heiser*, 2 D. 459.

7. *In an action upon an easement.*—In declaring upon an easement, the plaintiff may either allege a certain deed from one party to another, or generally that a deed supposed to have been lost had been made, without naming the parties or date. Where twenty years' user is relied upon to prove said last-mentioned deed, such declaration is sufficient. Either form is good upon demurrer. *French v. Martin*, 57 D. 294.

8. *In an action for fraud or deceit.*—A general charge of fraudulent combination is not sufficient. *Lewis v. Lewis*, 43 D. 540.

In an action on the case for deceit in the sale of a newspaper establishment, it was alleged that the defendants affirmed the number of subscribers to be nine hundred, and the profits to be three thousand dollars per annum, whereas in fact the number of subscribers was only six hundred, and the profits nothing. The declaration then concluded: "And so the said S. B. saith that he, by reason of the said affirmation of the said R. M. and S. M., was falsely and fraudulently deceived, to wit, the day and year aforesaid, at the city and county aforesaid. Wherefore, he saith he is made worse, and hath damage to the value of," etc. This was held to be a sufficient allegation that the defendants made the affirmations falsely and fraudulently, especially after verdict. *Bayard v. Makolan*, 3 D. 450.

9. — *for money due.*—A statement of demand is proper under the act of March 21, 1806, only where a sum certain, or to be made certain by calculation, is due; hence it is not appropriate to the case of a due-bill for "two bureaux." *Roberts v. Beatty*, 21 D. 410.

An allegation is too general to allow of proof in its support, if it is to the effect "that plaintiff is indebted to defendant in the sum of," etc. *Pargond v. Guice*, 25 D. 202.

Recovery cannot be had of a sum payable on a contingency, without showing that the contingency has arisen. *Worden v. Dodge*, 47 D. 247.

10. — *for negligence.*—An allegation of the loss of property through the negligence and carelessness of the defendants is equivalent to an averment of destruction. *Herrin v. Eaton*, 29 D. 499.

11. *In penal actions.*—The declaration in a penal action should allege that the facts charged are against the form of the statute upon which the action is based. *Palmer v. York Bank*, 36 D. 710.

One who would hold a bank liable for penal damages, given by the statute for a neglect to make payment in specie, on demand or within the time limited, must distinctly claim such damages in his declaration. *Id.*

12. *In an action on a tort.*—A charge of slander accompanied by a tortious act may be joined therewith in one count. *Miles v. Oldfield*, 2 D. 412.

In a declaration on a tort, an averment that an injury to plaintiff's hogs by defendant's servants was done with defendant's dogs, though it may be unnecessary, cannot be disregarded, since it is descriptive of the tort complained of, and it will not allow a recovery for an injury done with other dogs than those of defendant. *Smith v. Causey*, 65 D. 372.

An allegation that one maliciously and wantonly did something he had a right to do states no cause of action. Motive for doing a lawful act is immaterial. *McCune v. Norwich City Gas Co.*, 79 D. 278.

A declaration that defendant did wrongfully threaten plaintiff with great injury, — *held*, too general. *Grimes v. Gates*, 19 R. 129.

A declaration that defendant did threaten to have "plaintiff arrested and imprisoned in the state prison," — *held*, sufficient on demurrer. *Id.*

14. *Assigning breaches.*—A declaration that a defendant agreed to do a certain thing at a specified time and place is sufficient without alleging demand and refusal; as in order to excuse himself defendant must show in his plea either that he did the thing agreed to be done, or that he was ready to do it. *Patterson v. Jones*, 56 D. 296.

The breach of an official bond is sufficiently assigned by negating the words of the covenant therein. *Governor v. White*, 24 D. 763.

The breach of a contract may be assigned affirmatively or negatively by using words of contract, provided the affirmation or negation in that form necessarily amounts to a breach; or it may be in words containing the sense and substance of the contract, but they must be co-extensive with it in their import and effect. *Atlantic Mut. F. Ins. Co. v. Young*, 76 D. 200.

If a breach assigned is more enlarged or more limited than the contract alleged, it is bad on demurrer. Thus when the promise contained in the deposit note given by the insured to a mutual fire insurance company is set out in the declaration as a promise to pay such assessments, and at such times, as may be ordered by the directors, agreeably to the act of incorporation and by-laws of the company, while the breach assigned is enlarged to the non-payment of an assessment ordered by the directors, without averring whether it was made in conformity to the act and by-laws or not, and further enlarged as to time, so that it may include an assessment ordered to be paid on some day subsequent to the commencement of the suit as well as prior, and without alleging the time when it was ordered to be paid, — the declaration is bad on demurrer. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

15. What may be declared for under the common counts. — A special demand is not generally necessary, where the recovery may be had under the general counts; for a declaration need be special only where the claim sounds in damages, and is for the non-performance of a special contract. *Mattocks v. Lyman*, 46 D. 138.

16. When special counts are necessary. — In cases of tort, the special damages sued for must be the legal and necessary consequence of the alleged wrongful act, and must be particularly stated. *Bulter v. Kent*, 10 D. 219; *Mattocks v. Lyman*, 46 D. 138.

To impeach a sale for fraud, the fraud must be specially pleaded. *Davis v. Hooper*, 24 D. 751.

17. When several counts are proper. — Alternate pleading in the same count, as charging a loss or destruction, is bad; each should constitute a separate count. *Stone v. Graves*, 40 D. 131.

Matter proper for two counts may be embraced in one, where special demurrers have been abolished. *Donnell v. Jones*, 48 D. 59.

Subsequent counts intelligibly referring to the time correctly averred in the first count sufficiently show the causes of action alleged therein to have accrued before suit brought. *Goodman v. Gay*, 53 D. 589.

A plaintiff's claiming more than he proved, or more than he legally could demand, or his presenting his claim on different grounds in different counts in his declaration, forms no objection to his right to recover in an action to recover damages of the defendant for erecting a shop upon a road so near the plaintiff's store as to deprive him of the use of the road and store. *Cole v. Sprout*, 56 D. 696.

18. Effect of defects in one or more of several counts. — Each count should contain a distinct and complete cause of action, and objection to one count is not obviated by an averment in another count. *Tinsman v. Belvidere Delaware R. R. Co.*, 64 D. 415. Contra, *Freeland v. McCullough*, 43 D. 685.

Where the first count of a declaration for the recovery back of money illegally extorted is sufficient, and a second count, inartificially drawn, and containing superfluous averments, but fully stating the circumstances out of which the law implies a promise by the defendant to pay the plaintiff's demand, is added, the defect in form is not sufficient to invalidate the declaration. *Cobb v. Charter*, 87 D. 178.

19. What counts may be joined. — Though tort and contract cannot be joined in the same declaration, yet where the gist of the action is tort, the declaration will not be held bad because it alleges that the transaction out of which the tort arose has been one of contract. *Stoyel v. Westcott*, 2 D. 109.

Counts in debt or *assumpsit* on a *quantum meruit* or *quantum valebat* may be joined in the same declaration with counts on a specialty. *Van Deusen v. Blum*, 29 D. 582.

A debt on a specialty may be joined with a debt on a simple contract. *Medlin v. Platte Co.*, 40 D. 135.

A count for fraud may properly be joined with a count for false warranty, in an action upon contract of warranty. *Morehouse v. Northrop*, 89 D. 211.

20. Effect of variance between declaration and writ. — A fatal departure exists when the name of the party in the declaration is not the same as in the writ of attachment by which the suit was commenced. *Goodman v. Walker*, 68 D. 124.

3. The Plea.

21. General rules. — A plea bad in part is bad for the whole, where the plea is entire. *Rison v. Farr*, 87 D. 52.

Matter more in the knowledge of one party than in that of the other must be pleaded by the former. *Owens v. Geiger*, 22 D. 435.

Matter in aggravation need not be noticed in a plea. *Rasor v. Qualla*, 30 D. 658.

A defendant, by pleading to an action, admits the filing of the declaration therein. *Arthur v. Broadnax*, 37 D. 707.

A pleading in chief to a declaration waives any demurrer that may have been previously interposed. *Neale v. Newland*, 38 D. 42.

Defenses not raised in the pleadings are considered waived, especially such as are connected with the facts of the case. *Stewart v. Preston*, 44 D. 621.

It is not necessary to plead the presumption which the law raises from a given state of facts. Thus if a levy is pleaded, the presumption being that the sheriff accomplished his duty by selling the property, it is not necessary to aver the sale. *Kershaw v. Merchants' Bank*, 40 D. 70.

It is not necessary for a defendant in his pleading to state more than a *prima facie* case. *Id.*

Fraud and misrepresentation must be set out specifically. *Clapp v. County of Cedar*, 68 D. 678; *Sterling v. Mercantile M. I. Co.*, 72 D. 773.

A plea that the "plaintiff did not notify defendant" fails to negative notice to the defendant. *Moore v. Appleton*, 73 D. 448.

A plea must answer all it professes to answer. If it purports to answer the whole declaration, and answers but a part, it is bad on demurrer. *Goodrich v. Reynolds*, 63 D. 240.

Where in *assumpsit* with a special count on a promissory note, and the common counts, pleas are interposed to the whole declaration, but answer only the special count, they are objectionable on demurrer, and the

For Index to Notes in American Decisions and American Reports, see Volume I.

fact that plaintiff admitted, after the pleas were filed, that the note was the sole cause of action, does not cure the defect. *Id.*

In pleading citizenship, an averment that defendant is a citizen of the state is sufficient. *State v. Harris*, 36 D. 460.

22. Time to plead.—A defendant need not answer before moving for a continuance, under a statute which provides that where he is in actual military service of the United States or the state, an action against him "shall stand continued during the actual continuance of said defendant in the military service." *McCormick v. Rusch*, 83 D. 401.

23. Plea in abatement, generally.—Greatest accuracy and precision are required in framing pleas in abatement, as they delay the trial of the merits of the action. *Southard v. Hill*, 69 D. 85.

A plea in abatement is waived by a plea in bar. *Gains v. Park*, 38 D. 185.

A plea in abatement comes too late after exceptions to petition, and should be rejected. *Cook v. Southwick*, 60 D. 181.

Non-tenure cannot be pleaded in bar, and only in abatement within the time required by the rules of court. *Newbegin v. Langley*, 63 D. 612.

A plea in abatement of a writ may be both of writ and declaration; and it must be so where it is intended to plead in abatement only to a part of the writ, and the cause of abatement arises only on some of the counts in the declaration. *Southard v. Hill*, 69 D. 85.

The question whether defendant is a corporation or not should be presented by plea in abatement, and not by motion to quash the return of summons, it being raised upon matter *dehors* the record. *American Exp. Co. v. Haggard*, 87 D. 257.

A plea in abatement must give a better writ to the plaintiff by so correcting his mistake that he may avoid it in a new writ. *Miller v. Ford*, 55 D. 687. So held where the "American Express Company" is sued as a corporation, and a plea in abatement is filed in the names of several persons "and others," admitting that they, "together with others," were doing business under the name of the "American Express Company," but denying that the company was a corporation. The plea should have set forth who were the "others," so that the plaintiff might know against whom to bring his suit, if the plea should prove to be true. *American Exp. Co. v. Haggard*, 87 D. 257.

The facts presented by a plea in abatement cannot be considered by the jury or looked to for any purpose in the court below; and if in such a case the jury rendered a verdict for too great an amount, the mode of relief is by an application to the court for a new trial. *Crawford v. Slade*, 44 D. 463.

Errors relating to the form of the process, and not to the cause of action, and which

are in the nature of dilatory pleas, are not favored in law. *Wilms v. White*, 90 D. 113.

24. — for defect of parties.—A plea in abatement is the proper mode to take advantage of non-joinder of a partner, but is too late after the general issue pleaded in trespass, by one of two partners against a sheriff for a seizure and sale of goods under an execution against the other partner alone, the declaration alleging that the goods were the goods of the plaintiff. *Deal v. Bogue*, 57 D. 702.

An allegation that a party not joined is of full age, in a plea in abatement for the non-joinder, is unnecessary. *Roberts v. McLean*, 42 D. 529.

An allegation that a party not joined resides in state, and "did at the time of praying out" the writ, in a plea in abatement, is sufficient without saying "did reside," etc. *Id.*

A plea in abatement for the non-joinder of tenants in common of a dam, without an averment that the dam was real estate, will be overruled on demurrer. *Southard v. Hill*, 69 D. 85.

A judgment for the defendant on a plea in abatement, for not making proper parties defendants, is, that the writ be quashed. *Miller v. Ford*, 55 D. 687.

25. — for want of jurisdiction.—The objection to the form of process by which a party to an action is brought into court should be by plea in abatement, and not by demurrer to the declaration. *Nashville Bank v. Henderson*, 26 D. 257.

A plea in abatement that one of several defendants is a resident of the state where the suit has been commenced by warrant in a justice's court is bad, because, though personal to only one of the defendants, it goes to the whole suit. *Shannon v. Comstock*, 34 D. 262.

A plea in abatement to the jurisdiction, on the ground that the justice before whom the case is tried is a postmaster, is not good. *McGregor v. Balch*, 39 D. 231.

26. Plea of another action pending.—To constitute sufficient a plea that a debt has been garnished, where *assumpsit* was brought on a promissory note, the plea must set out the proceedings in the attachment suit at large, and show that all the requisites of the custom have been complied with. *Crawford v. Slade*, 44 D. 463.

The prayer of a plea in abatement of a pending attachment of the debt on which the action is brought should not be that the "writ be quashed," but that the defendant be not required to give any further answer, as this plea does not abate or destroy the writ, but leaves the matter in uncertainty whether the plaintiff will ever be able to maintain the action. *Id.*

An improper conclusion of a plea in abatement of a pending attachment of the debt is

For Index to Notes in American Decisions and American Reports, see Volume I.

fatal on demurrer; the greatest precision is necessary in these pleas; indeed, it is the conclusion of the plea which is looked to to ascertain its true character. *Id.*

27. Pleas in bar, generally. — A plea in an action upon a bond, conditioned to convey a lot in fee-simple "as soon as a title can be obtained from the United States, agreeably to the regular routine of the sales and land titles of the United States," that the defendant has not yet been able to obtain a title from the United States, agreeably to the regular routine of sales and land titles of the United States, is insufficient. A sufficient excuse for not having obtained the title should be set forth, and it should appear that diligence has been used in attempting to obtain it. *Nixon v. Bumpass*, 26 D. 249.

The general plea of fraud, covin, and misrepresentation is good in an action of *assumpsit* for goods sold and delivered, even when assailed by special demurrer. *Elliott v. Coggeshall*, 29 D. 365.

A defendant justifying under a writ should set it out substantially in his plea, showing at whose instance the writ issued, the time when, etc. A plea that "defendant, as constable, by virtue of sundry executions, levied on," etc., is insufficient. *Petres v. Hill*, 33 D. 306.

A plea which fails to answer the averment that defendant had no title, in an action upon a covenant of seisin, is insufficient and defective. *Logan v. Moulder*, 33 D. 338.

A plea in an action on a note given for the purchase price of land, a conveyance of which is to be made by the vendor on payment of the note, is bad, if it merely avers that the payee had not made or tendered the deed before commencing the action. The plea in such a case should allege that the payee had not, on the day the note became due, or within a reasonable time afterwards, offered to deliver to the holder a good title, upon being paid, at the time of the delivery of the deed, the amount due on the note. *Burrows v. Yount*, 39 D. 439.

Matter which comes more properly from the plaintiff need not be stated in the plea. *Union Bank v. Powell*, 52 D. 367.

A *similiter* to a plea of not guilty, or to any negative plea, can be added by defendant, if he chooses to add it, and it is not error to proceed to trial without it. *Gillespie v. Smith*, 81 D. 328.

A plea justifying an arrest on suspicion of felony, without a warrant, should set forth the grounds of the suspicion, so that the court may judge of them, and determine whether they afford probable cause or not. *Wade v. Chaffee*, 5 R. 572.

28. The general issue.* — A plea of general issue admits that the declaration states

* Defenses that are admissible without being specially pleaded, see note, 69 D. 705-707.

a good cause of action, and when, in such a case, the plaintiff proves what he has undertaken to prove, he is entitled to a verdict, though the court should afterwards arrest the judgment for the defectiveness of the declaration. *Brewer v. Strong*, 44 D. 514.

Matter in mitigation of damages need not be specially pleaded. *Joy v. Hull*, 24 D. 625.

The general issue is sufficient, in an action by an indorsee against an indorser, to put in issue the allegation that execution had been returned no property found before the suit was commenced. A plea in abatement is not required in such case. *Woodward v. Harbin*, 37 D. 753.

Recoupment of damages may be allowed under plea of the general issue. *Babcock v. Trice*, 68 D. 560.

Under the Mississippi pleading act of 1850, the general issue and an offer to pay by tender cannot be pleaded together, nor will proof of a tender be allowed under the general issue. *McIntyre v. Kline*, 64 D. 163.

A defendant may plead a general issue to one count of the declaration, although he demurs to other counts. *Patterson v. Wilkinson*, 92 D. 568.

A demurrer being sustained to a declaration containing but one count, and a new count being added as an amendment, to which a plea of not guilty was entered, it was held that the plea applied to the new count only. *Sanders v. Vance*, 18 D. 167.

A plaintiff declaring as assignee of an insolvent, for a debt existing before the assignment, must prove the character in which he sues under the general issue. *Best v. Strong*, 20 D. 607; *Winchester v. Union Bank*, 19 D. 253.

A plea of general issue is a waiver of all objections to the person of plaintiff, and admits his capacity to sue in the action. A defendant cannot, under that plea, avail himself of any objection to the corporate character of a plaintiff suing as a corporation, but must take such objection by a plea in abatement. *Brown v. Illius*, 71 D. 49; *McIntire v. Preston*, 48 D. 321.

29. Non assumpsit. — A plea of non *assumpsit*, verified by an affidavit to the effect that the written contract sued on is not the defendant's act and deed, is sufficient to gain issue on the execution of such contract. *Hunt v. Test*, 42 D. 659.

Pleading non *assumpsit* in an action founded on a simple contract puts the plaintiff upon proving his whole case, and entitles the defendant, without prior special notice, to give evidence of anything which shows, *ex æquo et bono*, that the plaintiff ought not to recover. *Falconer v. Smith*, 55 D. 611.

A breach of a warranty may be set up under general issue in *assumpsit*, when it is parcel of the plaintiff's ground of action, and touches its consideration. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume L.

30. *Nil debet*. — A plea of *nil debet* to debt on a bond, where the bond is the gist of the action, and the recovery is of a sum in *numero*, is bad; otherwise where the bond is merely the inducement to the action. *Davis v. Burton*, 36 D. 511.

A plea of *nil debet* to debt on a sheriff's bond is bad. *Ib.*

A plea of *nil debet* is insufficient in an action of debt on a common-law bond. *Hanna v. McKenzie*, 43 D. 122.

31. *Non est factum*. — Where an award was made against copartners upon a sealed instrument executed in the firm name by one partner, without authority, and they agreed to let the award stand as security, on being "let into a defense on the merits without being in any degree prejudiced by the award," — *held*, that they might, under such agreement, plead *non est factum*, that being a defense "on the merits." *Hart v. Wilkerson*, 21 D. 382.

An objection that such plea is precluded by the agreement is waived by taking issue thereon. *Ib.*

A judgment cannot be rendered against the partner who signed the instrument in such a case in an action against all the parties. *Ib.*

The plea of *non est factum* only puts in issue the execution of the deed, and its continuance as a deed at the time of the plea, and under such plea, the plaintiff has only to prove the sealing and the delivery. *Nicholson v. Kay*, 42 D. 680.

32. *Nul tiel record*. — An issue joined upon the plea of *nul tiel record* must be first decided by the court, before any other issue can be submitted to the jury. *Gray v. Pingry*, 44 D. 345.

Upon a plea of *nul tiel record*, in an action on a judgment, the justness of the judgment cannot be inquired into. *Gay v. Lloyd*, 46 D. 499.

Nul tiel record is insufficiently pleaded, where the allegation is, in substance, that if there be a record of any such supposed judgment, the defendants were not made parties to the suit in which it was rendered, because it does not conclude with a verification by the record. A demurrer to such a plea ought to be sustained. *Cannon v. Cooper*, 80 D. 101.

33. *Special pleas, generally*. — If a defense is founded upon a total or partial failure of consideration, or upon fraudulent acts or representations affecting the consideration, the special facts must be pleaded. *Huston v. Williams*, 25 D. 84.

A plea charging the illegality of a consideration must aver the facts constituting the illegality; a general plea alleging illegality will not be allowed. *Dickson v. Burk*, 44 D. 521.

A specialty may be impeached by a general plea alleging no consideration. *Ib.*

A plea of mistake in the consideration of

a note is not sufficient in law, unless it states specifically the facts constituting the alleged mistake. *Gaines v. Park*, 38 D. 185.

A plea which avers, generally, that a note sued upon was given in the settlement of a balance of accounts, and that the balance charged against defendant was the result of mistake, as a true settlement would have shown nothing to be due, is not good. *Ib.*

A plea that a sealed note was obtained by fraud, covin, and misrepresentation is good on demurrer; and fraud may be specially pleaded in bar, without averring the acts constituting the fraud, even where evidence thereof might be given under the general issue. *Saunders v. Stotte*, 27 D. 263.

A special plea which amounts to a denial of an allegation which, in the first instance, the plaintiff would be bound to prove, under the general issue, to sustain his action, is bad as amounting to the general issue; but where, in an action of debt upon a written obligation, the defendant pleaded specially that he had executed the writing sued on, but averred that he did so on behalf of a corporation of which he was president, under the seal of the corporation, in conformity to its by-laws and for a corporate debt, it was held that such plea was allowable, and that it did not amount to the general issue. *Pitman v. Kintner*, 33 D. 469.

Each one of several defendants is entitled to present his defense in the form of a special plea, and cannot be compelled to adopt the plea of the other defendants. *Roberts v. Williams*, 34 D. 549.

A special pleader is not allowed to leave his pleading open to different constructions, and then take his choice between them. *Van Etten v. Hurst*, 41 D. 748.

A defendant cannot be required to plead, specially, facts which amount to no more than a denial of the plaintiff's averments, or facts which it will only become material for the defendant to prove for the purpose of rebutting evidence introduced by the plaintiff, or that which is but evidence of a material, issuable fact. *Griffin v. Chubb*, 58 D. 85.

A defendant may deny his liability under the general issue, but he must plead justification specially. *McGuire v. Grant*, 67 D. 49.

Title by prescription must be specially pleaded. *Hicatt v. Morris*, 78 D. 280.

A demurrer to a special plea amounting to a general issue should be sustained. *City of Quincy v. Warfield*, 79 D. 330.

34. *Notice of special defense with general issue*. — The right reserved to give special matter in evidence cannot embrace matters which could not be pleaded in bar. *Scott v. Coleman*, 15 D. 71.

An officer joining in a plea of the general issue, with notice of justification, with his co-defendant, does not lose his justification. *Jennings v. Carter*, 20 D. 635.

For Index to Notes in American Decisions and American Reports, see Volume I.

A defendant has not the right to plead specially, and also give notice of special matter, relied on as a defense under the general issue. When he so pleads, he may be called on to elect how he will proceed. *Benjamin v. McConnell*, 46 D. 474.

A defendant cannot supply a deficiency in his notice of special matter by embodying with it the additional matter in a special plea. *McCay v. Burr*, 47 D. 441.

In *assumpsit* by an administrator, a defendant may show, without notice of special matter being given, that by deceased's ledger his account was settled. *Beals v. See*, 49 D. 573.

A notice appended to a general issue is good only for the particular purpose for which the statute allows it to be filed; it is not binding as an admission upon the party filing it, and has no other effect upon the opposite party than to allow the matters of which it gives notice to be given in evidence. *Adams v. Filer*, 73 D. 410.

35. The statute of frauds. — The statute of frauds must be specially pleaded, and cannot be relied on by demurrer, unless the objection appears on the face of the complainant's bill, and if the defense is not raised by plea or demurrer, it is waived. *Switzer v. Skiles*, 44 D. 723; *Osborne v. Endicott*, 65 D. 498.

The defense of the statute of frauds may be shown under a general issue, or pleaded specially, at the option of the defendant. *Hotchkiss v. Ladd*, 86 D. 679.

The refusal of one defendant to plead the statute of frauds cannot affect the rights of his co-defendants who rely upon and claim the protection of the statute. *Petty v. Petty*, 39 D. 501.

A plea that a note sued upon was given in consideration of a sale of an interest in land, not evidenced by an instrument in writing, is not a sufficient plea in bar directly setting up the statute of frauds. For a failure of consideration is the only issue raised by such a plea. *Edelin v. Clarkson*, 38 D. 177.

36. Pleading matter in confession and avoidance. — A plea that the cashier was robbed, in an action on his bond, should set out the place and circumstances of the robbery. *Huntsville Bank v. Hill*, 18 D. 39.

37. Plea of performance. — A plea of performance of a specific act, such as an agreement to give a deed, must state specially the facts constituting the performance. *Tinney v. Ashley*, 26 D. 620.

A plea that if plaintiff has been damaged he has been so only through his own wrong, etc., is applicable only in an action on a bond of indemnity. *Harmony v. Bingham*, 62 D. 142.

38. — of tender. — A plea of tender of specific articles must state that they were kept ready until the uttermost convenient

time of the day of payment. *Aldrich v. Albee*, 10 D. 45.

A tender of personal property at the time and place of delivery may be pleaded in bar to an action on a bond for such delivery, without averring readiness afterwards to deliver it, or to bring it into court. *Mitchell v. Merrill*, 18 D. 123.

39. — of former recovery. — A plea of former recovery is good in bar, if it contains sufficient matter to show that the causes of action in the two suits were the same, and that the merits were determined in the first case. *Culler v. Cox*, 18 D. 152.

A plea of former recovery to an action on the case founded on a tort cannot be objected to merely because the first action was covenant, the causes of action being the same. *Id.*

If a plea of a former recovery aver the causes of action to be the same, and the record do not show them to be different, the averment, on demurrer to the plea, must be taken as true. *Id.*

If in a former action of covenant for the same cause, now made the subject of an action for a tort, accord and satisfaction be pleaded, and issue be joined on a replication, and the defendant recover judgment, it is a good plea in bar to the present action. *Id.*

A plea by two of three partners, sued on sundry notes that in a former action by the plaintiff against the same defendants on another note, the said two partners pleaded that they did not promise with the third partner, and that it was proved that the said note was given by the said third partner as a substitute for those now in suit, which were not then due; that said notes were given in evidence by the plaintiff, and that the defendants showed that they were given by the said third partner for his own debt, and in fraud of them, with the plaintiff's knowledge, and these facts being in issue, that the jury found that the defendants did not promise with the said third partner, upon which verdict judgment was rendered in their favor, which had not been reversed or annulled, — is not good as a plea in bar, because the former judgment was not for the same cause of action. *Eastman v. Cooper*, 26 D. 600.

40. Retraxit. — In a *retraxit*, the plaintiff voluntarily abandons his cause, and admits that he has no cause of action; it is this admission upon the record which constitutes a bar to another suit, and operates as an estoppel to the party. *Coffman v. Brown*, 45 D. 299.

A plea, held not to be a *retraxit* or a bar to plaintiff's action, viz., "that suit for the same cause of action, between the same parties, had been previously brought, in which the plaintiff, in his own proper person, came into court and confessed that he would not further prosecute his said suit against

For Index to Notes in American Decisions and American Reports, see Volume I.

the defendant, but from the same altogether withdrew himself, whereupon it was considered by the court that the plaintiff should take nothing, and that the defendant go without day." *Ib.*

41. *Plea puis darrein continuance*. — A plea *puis darrein continuance* should show the date of the last continuance, and that the matter sought to be pleaded arose since that time. Averring that the matter arose since issue joined is insufficient. *Vicary v. Moore*, 27 D. 323; *Brown v. Brown*, 48 D. 52. But a deed which, by relation, takes effect prior to issue joined, need not be so pleaded. *Jackson v. Ramsay*, 15 D. 242.

A matter of defense which arose after the commencement of the action is admissible under the general issue, for the purpose of mitigating the damages, and not as a bar to the whole action. To have such effect, it must be pleaded *puis darrein continuance*. *Costar v. Davies*, 46 D. 311.

Evidence of the payment of a promissory note *pendente lite* cannot be given in evidence under the general issue. Such defense must be set up by a plea of *puis darrein continuance*. *Boyd v. Weeks*, 43 D. 749.

A defendant, by pleading *puis darrein continuance*, waives all other pleas, and admits the cause of action as set out in the plaintiff's declaration. *Adams v. Filer*, 73 D. 410; *Kimball v. Huntington*, 25 D. 590.

A plea *puis darrein continuance* is not bad under the Alabama code as professing to be in bar of the entire action, when in fact it goes only to the further maintenance of the action, if the plea is "in short by consent," and does not in terms propose to bar the entire suit, but simply sets out the facts. *Broughton v. Bradley*, 73 D. 474.

In an action of trespass and ejectment, pleas of not guilty, and of soil and freehold, look to the state of things at or before the commencement of the action, and if matter of discharge accrues to the defendant pending the action, it must be pleaded to the further maintenance of the action, if it has arisen after suit, but before plea or continuance, and *puis darrein continuance*, if after plea or issue joined. A defendant in such action cannot, therefore, protect his possession by setting up an outstanding mortgage of the plaintiff's ancestor, purchased in by the defendant pending the action, nor by setting up such a mortgage discharged of record before the commencement of the action, but assigned to him pending the action, although he proves that the mortgage was purchased by him before the commencement of the action, and discharged by the mistake of the mortgagee instead of being assigned. *Fitzpatrick v. Fitzpatrick*, 75 D. 681.

The court may, in its discretion, receive or reject a plea *puis darrein continuance* after one continuance. *Cummings v. Smith*, 79 D. 623.

Plea *puis darrein continuance* must have the same certainty as to time and place as other pleas. If such a plea does not allege the day on which the matter pleaded happened, it is bad. *Ib.*

42. Joint or double pleas. — A joint plea may be considered as several, as well as joint, in order to the attainment of justice. *Bevin v. Linguard*, 2 D. 684.

A defendant having a justification, and joining in a plea with a co-defendant who cannot justify, loses his defense; but the plaintiff must show a cause of action against him on the general issue before he is called on to justify. *Bissell v. Gold*, 19 D. 480; *Ferrill v. Bradford*, 50 D. 298.

Where several defendants have inconsistent claims, or will occupy adverse positions towards each other, on the event of plaintiff's recovery, they must frame their pleadings, as to each other, in contemplation of such event, or the court will not interpose to adjust their respective rights. *Teas v. McDonald*, 65 D. 65.

A plea is double when it presents two distinct grounds of defense, as breach of warranty and partial failure of consideration. *Cunningham v. Smith*, 60 D. 333.

4. Demurrer.

43. When a demurrer will lie, generally. — A party should take advantage of defective pleadings by demurrer. *Martin v. Webb*, 39 D. 363.

If a plea answers only a part of the declaration, the plaintiff should demur, and is entitled to judgment on demurrer. *Hickok v. Coates*, 20 D. 632.

A pleading is demurrable, by reason of superfluous, impertinent, and scandalous allegations therein. "*The Count Joannes*" v. *Burt*, 83 D. 625.

A plea which merely sets out the consideration of a contract sued on, without showing in what respect it was insufficient to support the contract, is no answer to the declaration, and a demurrer thereto is properly sustained. *Mead v. Hughes*, 50 D. 123.

A declaration which discontinues the suit against such defendants in the original writ as have not been served with process is not demurrable, if the case it states could be sustained by proof of such a case as under the statute would authorize the discontinuance. *Gillaspie v. Wesson*, 31 D. 715.

Pleading a deed with a profer of the original, and upon oyer being demanded, filing a copy, is not an objection of which advantage can be taken by demurrer. *Auditor v. Woodruff*, 33 D. 368.

A demurrer prior to the passage of the revised statutes enabled the party to avail himself of any defect in his adversary's pleading which would have been fatal to it on a general demurrer at common law, without specially alleging the grounds. *Ib.*

For Index to Notes in American Decisions and American Reports, see Volume I.

44. General demurrer. — A general demurrer can only be sustained where the pleading does not state any cause of action, and it will not reach duplicity, or an improper joinder of causes of action. *Smith v. Jordan*, 97 D. 232.

Formal defects cannot be reached by a general demurrer, but only substantial ones. *Coffin v. Knott*, 52 D. 537; *Wilms v. White*, 90 D. 113.

Only those grounds of demurrer that go to plaintiff's right of action will be considered upon an appeal from a judgment overruling a general demurrer. *George v. Thomas*, 67 D. 612.

An objection of want of particularity in a statement of a cause of action is not raised by general demurrer. *Id.*

Where defendant's default is waived on condition that he will plead to the merits, he cannot file a general demurrer. *Doty v. Strong*, 40 D. 773.

An objection that the writ is in the detinet only, where the plaintiff sues on a contract in his own right, cannot be raised on general demurrer since the statute of 4 and 5 Anne, chapter 16. *Sauser v. Walker*, 25 D. 272.

An advantage may be taken by general demurrer of a material variance between an instrument pleaded with profert as a deed or writing obligatory, and a copy thereof filed as oyer, when the latter shows simply a mere contract signed with the names of defendants, but having no seal affixed. *Auditor v. Woodruff*, 33 D. 368.

A general demurrer in an action of trespass of *et armis* must, if sustained, inure to the advantage of all the defendants, when the act complained of could not, either in point of fact or of law, be joint. *Foots v. Cincinnati*, 34 D. 420.

In a declaration against a defendant for corrupt misconduct as a commissioner under the insolvent act in discharging the plaintiff's debtor, whereby the debt was lost, an averment that after judgment the debtor could not be found to satisfy the plaintiff is sufficient on general demurrer, without alleging that a *ca. sa.* was issued and returned *non est inventus*. *Cunningham v. Bucklin*, 18 D. 432.

If any one count in a declaration is good, a demurrer to the whole declaration must be overruled, though the other counts are bad in substance. *United States v. White*, 37 D. 374; *Lane v. Levillian*, 37 D. 769; *Freeland v. McCullough*, 43 D. 685; *Smith v. Salomon*, 91 D. 711.

45. Special demurrer. — A variance in a declaration must be taken advantage of by special demurrer. *Phillips v. Runnels*, 43 D. 109; and so in the case of a defective conclusion of a replication. *Hooker v. Smith*, 47 D. 679; or a plea presenting two distinct defenses. *Judy v. Kelley*, 50 D. 455; *Cunningham v. Smith*, 60 D. 333; or an objection

that a plea only amounts to the general issue. *Hotchkiss v. Ladd*, 86 D. 679.

A plea in bar which denies the original cause of action is bad on special demurrer. *Hatch v. Hyde*, 39 D. 203.

46. What matters are admitted by demurring. — By demurring, a defendant admits the facts set out in the declaration, and raises the question of law as to their sufficiency to maintain the action. *Stout v. Keyes*, 43 D. 465; *Sleeth v. Murphy*, 41 D. 232; *Wallace v. Holly*, 58 D. 518.

A demurrer admits only facts well pleaded; whether injury is remote and consequential is a conclusion of law upon the facts stated in the declaration. *Tinsman v. Belvidere etc. R. R. Co.*, 69 D. 565; *Kellogg v. Larkin*, 56 D. 164; *Chicago etc. R. R. Co. v. Sweet*, 92 D. 206.

The averments in a plea, not inconsistent with those of the declaration, are admitted by a demurrer. *Hanna v. McKensie*, 43 D. 122.

The existence or the time of taking effect of a public statute cannot be put in issue, or admitted or denied by the pleadings, but must be determined by the judges themselves. Accordingly, an allegation in answer to *quo warranto*, that a statute under which the defendant claims to hold office was published and went into effect prior to the day of his alleged election, is not admitted by a demurrer to such answer. *Attorney-General v. Foote*, 78 D. 689.

47. How demurrers are determined, generally. — Where one of two pleas to the whole cause of action is adjudged good on demurrer, the other need not be considered. *Outler v. Cox*, 18 D. 152.

On a general demurrer to a declaration containing three counts, if either of the counts is good, the demurrer must be overruled, with costs, as it cannot be sustained in part and overruled in part. *Biddle v. Coryell*, 38 D. 521; *Tinsman v. Belvidere Delaware R. R. Co.*, 64 D. 415; *Thompson v. Newlin*, 42 D. 169.

The failure of defendants to make special causes of demurrer good will not deprive them of the benefit of other causes assigned for demurrer going to the entire *gravamen* of the complaint, so as to defeat it on matter of substance. *De Louis v. Meek*, 50 D. 491.

48. Rendering judgment against party who committed first fault in pleading. — A general demurrer brings the whole record before the court, and judgment thereon will be rendered against the party whose pleadings contain the first vice or imperfection. *Baughner v. Nelson*, 52 D. 694; *McDonald v. Wilkie*, 54 D. 423; *Dunlap v. Glidden*, 52 D. 625; *Union Bank v. Powell*, 52 D. 367; *Donnell v. Jones*, 48 D. 59; *United States v. White*, 37 D. 374; *Dibrell v. Miller*, 29 D. 126; *Hickok v. Coates*, 20 D. 632.

A demurrer to a plea, where the defendant

For Index to Notes in American Decisions and American Reports, see Volume I.

has craved oyer of the deed declared on, brings the whole record before the court, and such demurrer should be overruled if the declaration is defective. *Birney v. Hann*, 13 D. 167.

A demurrer to a plea in abatement does not open previous pleadings. The objection raised by the plea goes to the abatement of the writ, and not to the sufficiency of the declaration. *Crawford v. Blade*, 44 D. 463.

5. Replication, and Subsequent Pleadings.

49. When a replication is necessary or proper. — Where payment is pleaded in an action on a bond, and issue joined thereon, the short entry of set-off added thereto is only a notice, and not strictly a plea, and therefore requires no replication. *Henderson v. Lewis*, 11 D. 733.

The objection of multifariousness cannot be sustained where the complainants have similar interests, and seek the same redress for a common injury. *Robinson v. Smith*, 24 D. 212.

An objection to the averments in a plea should be taken by demurrer; the defects are waived by a replication, and cannot afterwards be examined on a demurrer to the replication. *Wallace v. Collins*, 39 D. 359.

50. Form and sufficiency of replication, generally. — Whatever is well set forth in a plea, and not controverted in the replication, is admitted to be true. *Phillips v. Harris*, 19 D. 166.

A replication is bad if it neither traverses the plea nor states matters in avoidance. *Bank of Chillicothe v. Swayne*, 32 D. 707.

If the declaration on a bond sets out the condition and assigns the breaches, they need not be reassigned in the replication. *Conover v. Com.*, 12 D. 451.

The replication to a plea of *non est factum*, that the note sued on was the act and deed of the maker, is insufficient. *Hall v. Bank of Com.*, 30 D. 685.

Where the defendant pleads a judgment against plaintiff in another suit for the same cause of action, a replication by plaintiff which does not admit the judgment and deny that the cause of action was the same, but denies "that the merits of the present suit were tried and determined in the former suit," is defective in both form and substance. *Agness v. McElroy*, 48 D. 772.

To a plea of the statute of frauds alleging that the promises mentioned were special promises to pay the debt of a person named, a replication denying that the promises were for the debt of such person is a good answer, without the words, or any other person. The traverse is as broad as the issue offered. *Hutchins v. Ladd*, 86 D. 679.

In proceedings against a corporation for usurping banking privileges, a replication which avers that defendant issues paper in the similitude of bank notes, and that they

were issued with the intent that they should be put in circulation as money, is objectionable for duplicity. *People v. River Raisin etc. R. R. Co.*, 86 D. 64.

51. Departure in replication. — There is no departure in the pleading where the plaintiffs suing on an appeal bond describe themselves in the writ, which is in the detinet only, as "executors of," etc., and in the declaration which recites the writ, as "the said plaintiffs," and again describe themselves in the replication as "executors of," etc., and in their demurrer to the defendant's rejoinder, as "the said plaintiffs." *Sasser v. Walker*, 25 D. 272.

The addition of the word "executors" is mere surplusage, and not an irregularity in the writ, etc., where the plaintiffs are suing on an appeal bond given to them as executors, upon which they can maintain an action only in their individual capacity, the demand being the same. *Id.*

52. Replication to plea of statute of limitations. — Where the petition on its face shows that plaintiffs' cause of action is barred by statute of limitations, a replication setting up a subsequent promise to remove the bar is bad, because it is a different cause of action from that stated in the petition. *Coles v. Kelsey*, 47 D. 661; *Murston v. Seabury*, 4 D. 409.

53. Rejoinder. — To a replication in an action for the breach of the covenant of seisin, denying the defendant's plea that the deed under which he claims was executed before the enrolling and delivery of plaintiff's deed, a rejoinder is insufficient that it was executed before the commencement of the suit, with a *videlicet* setting out a date prior to the execution of the plaintiff's deed. *Church v. Gilman*, 30 D. 82.

A plaintiff relying on defendant's appearance by attorney in an action on a judgment of a sister state must reply that fact to the defendant's plea to the jurisdiction, and the defendant may rejoin that the attorney had no authority. *Welch v. Sykes*, 44 D. 689.

A defendant justified an arrest under an execution. Plaintiff replied payment before arrest, and traversed that the judgment was in full force. *Held*, that the traverse was to an immaterial matter, and the rejoinder of non-payment was good. *Breck v. Blanchard*, 51 D. 222.

6. Profert and Oyer.

54. Profert. — Where the plaintiff was bound to give a warranty deed to the defendant as a condition precedent, it is sufficient to allege, in the declaration, that he made out and tendered a warranty deed in every way legally authenticated, with a profert, without setting out the deed at length. *Nichols v. Blakenlee*, 2 D. 95.

Profert of a simple contract is not necessary. *Bank of United States v. Sil*, 13 D. 44.

For Index to Notes in American Decisions and American Reports, see Volume I.

The production of the bond is an indispensable part of the plaintiff's case in an action for contribution among obligors, where the joint indebtedness has been disputed. *Craig v. Craig*, 24 D. 390.

The identical instrument sued upon, if profert had been made of it, had formerly to be introduced in evidence; but this rule has been modified by our modern practice. *Jones v. Robinson*, 54 D. 212.

It was necessary to make a profert of a writing declared upon at common law, to set out its date and the parties to it. Its loss or destruction necessarily destroyed any claim under it, but at present an excuse for its non-production may be made. *French v. Martin*, 57 D. 294.

55. Oyer. — A plea to the action without oyer is equivalent to a waiver of every objection to the form of the oyer granted, or its sufficiency. *Auditor v. Woodruff*, 33 D. 368.

Where an agreement declared on is not an agreement given on oyer according to its true intent or meaning, a demurrer to the declaration should be sustained. *Anderson v. Orlicher*, 37 D. 72.

Oyer not having been called for, and the defense of payment and the general issue having been interposed, plaintiff need not introduce in evidence the instrument upon which he founds his suit. *Jones v. Robinson*, 54 D. 212.

Oyer is never granted of instruments not under seal. *Commercial I. Co. v. Mahlman*, 95 D. 543.

II. IN EQUITY.

1. General Principles.

56. Grounds for relief must be fully stated. — The plaintiff's claim to relief in equity must appear from the pleadings. The style and character of pleading in equity are of a more liberal cast than those of other courts. *Tierman v. Poor*, 19 D. 225.

A bill, though confessed, yet, if its allegations are destitute of precision, no decree can be correctly rendered thereon. *Marshall v. Tenant*, 19 D. 126.

A bill in equity to impeach a judgment or decree for fraud must set forth specifically and particularly the facts constituting the fraud. *Pendleton v. Galloway*, 34 D. 434.

The rule that certainty to common intent must exist in pleadings applies as well in equity as at law, the reason of the rule in both instances being to inform the adverse party with sufficient precision of the charge made against him, and to enable the court to pronounce the proper judgment. *Farr v. Farr*, 69 D. 406.

2. Bill; Cross-bill.

57. General rules relative to the bill. — A party to a suit is not bound to dis-

close to his adversary facts which tend to defeat or weaken his own right of recovery; and he commits no fraud by remaining silent. *Taylor v. Bradshaw*, 17 D. 132.

Where the complainant's want of equity appears on the face of the bill, no relief will be granted, though the defendant answers instead of demurring. *Collins v. Jones*, 29 D. 216.

Practicing attorneys are presumed to be present in court, and it is not necessary to allege that fact in a bill of privilege filed against one. *Bennington Iron Co. v. Rutherford*, 35 D. 523.

A bill asking discovery and also relief, upon a sufficient statement of facts, is an original bill, and if chancery has jurisdiction, an order dissolving an injunction and allowing the answer to be read does not dismiss the bill. *Cowan v. Colbert*, 46 D. 427.

The complainant can recover only on the case made by his bill; and he is entitled to no relief on equities brought into the case only by subsequent pleadings or by evidence. *Converse v. Blumrich*, 90 D. 230.

Where the plaintiff alleges an important equity, he is at liberty to add a small item which would not be within the jurisdiction of equity if alone, but which is connected with and tends to elucidate the main subject. *Hart v. Roper*, 51 D. 425.

58. Naming the parties. — One of the complainants may amend the bill by striking out his name as complainant and inserting it as defendant, under the Georgia statutes. *Pool v. Morris*, 74 D. 63.

The bill ought to be dismissed without prejudice, and not absolutely, where it has merits, and its sole defect is the want of proper parties. *Kirkpatrick v. Buford*, 76 D. 363.

59. Stating the cause of action, generally. — A complainant must state in his bill every fact showing him to be entitled to the relief prayed for. *Brown v. Wylie*, 98 D. 781.

The purchaser of a legal title for a valuable consideration, without notice of an outstanding equity, will not be affected by it; but it is otherwise as to a purchaser of an equitable title. Accordingly, a bill seeking to divest the legal title in the grantee and third persons claiming under him, upon the ground that the warrant on which the grant is founded was the property of the complainants, is good as against the grantee, but cannot be sustained against the other defendants claiming under such grantee, without alleging that no valuable consideration was paid by them, or that they knew of the complainant's equity either at or before the consideration was paid or the conveyance made. *Perkins v. Hays*, 5 D. 680.

A bill in equity is insufficient which seeks to restrain the directors of an incorporated company from issuing certificates of deposit

For Index to Notes in American Decisions and American Reports, see Volume I.

which show upon their face that they were intended to circulate as money, unless there is an allegation in the bill that they were intended, when issued, to circulate as money. It is not a conclusion of law, from the face of the certificates, that the purpose of their issue would be that they might circulate as money, but is an inference of one fact from another, which may be overcome by countervailing evidence. *Bliss v. Anderson*, 70 D. 511.

An allegation in a bill that the petitioner "is informed and verily believes, and thereupon avers," is a direct and positive averment. *Wells v. Bridgeport Hydraulic Co.*, 79 D. 250.

Whether a bill is demurrable for want of equity where filed by a *feme covert* as *cestui que trust* against her trustee and a stranger, alleging that the trustee has loaned trust funds to the stranger, who has not paid, and that the trustee is insolvent, but alleging neither refusal of the trustee to sue, nor stranger to pay, nor showing when the insolvency of the trustee commenced, and alleging no waste or misconduct, and praying for the removal of the trustee, appointment of another, and a decree that the stranger pay to the new trustee, *quere*. *Mason v. Mason*, 83 D. 172.

60. Multifariousness, as to parties. — In chancery, several complainants cannot unite in one bill to demand several distinct and unconnected matters of one defendant; nor can one complainant demand several distinct and unconnected matters of one defendant. *Richardson v. McKinson*, 12 D. 308.

A bill filed against several persons, concerning distinct things or acts, is demurrable. Unconnected parties may unite in a suit, if there is one connected interest among them all, centering in the point in issue in the case. *Fellows v. Fellows*, 15 D. 412.

A bill is multifarious when against several persons for rent, and some of them have no interest in the rents for which others are answerable. *Childs v. Clark*, 49 D. 164; or which joins as parties defendant a partner, the firm of which he is a member, the several trustees to whom they have separately assigned property in trust for the benefit of creditors, and the creditors respectively affected by the deeds of trust. *Johnson v. Brown*, 37 D. 556.

A bill is not multifarious in which all the complainants are creditors of the same party, and seeking to subject the same fund to their claims. *Comstock v. Rayford*, 40 D. 102; or where the plaintiffs claim by a single, general, and entire right, although in opposition to the distinct and separate rights of several defendants. *Pann v. Hargett*, 32 D. 689; or where it seeks to enjoin a sale under executions of two several plaintiffs at law, but the same property is levied

upon, and the complainant asserts one title to it all. *Bridges v. Phillips*, 60 D. 495.

A bill to subject property to the payment of a judgment, and presenting one entire case, as against the judgment debtor, is not multifarious, because one or more of the defendants, to whom parts of the property have been fraudulently conveyed, had nothing to do with other fraudulent transactions. *Way v. Bragaw*, 84 D. 147.

61. — as to causes of action. — No general principle in regard to multifariousness can be extracted from the cases; on the one hand, multiplicity of actions is to be avoided, and on the other hand, the blending in one suit of distinct and incongruous claims and liabilities. *Johnson v. Brown*, 37 D. 556; *Marshall v. Means*, 56 D. 444.

The objection of multifariousness is discouraged by the courts, where it would defeat instead of promote the ends of justice. *Marshall v. Means*, 56 D. 444.

A bill is not multifarious which sets up one sufficient ground for equitable relief with another claim containing no equity on its face entitling the complainant either to discovery or to relief. *Varick v. Smith*, 28 D. 417; or because it both seeks to remove fraudulent conveyances and encumbrances, and also to bring within the reach of the judgment equitable interests, which are not the subjects of execution at law. *Way v. Bragaw*, 84 D. 147; or which unites two good causes arising out of the same transaction, all the defendants being interested in the same claim of right, and relief of the same general character being asked in relation to each. *Varick v. Smith*, 28 D. 417; or because it seeks an account both of the rents and profits of real estate and also of personal estate. *Rubey v. Barnett*, 49 D. 112; or when all allegations relate to one and same transaction between the same parties, to one and the same subject-matter, and to the same injury, though it prays for different modes of relief against that injury. *Wells v. Bridgeport Hydraulic Co.*, 79 D. 250.

A bill is multifarious and demurrable which unites separate, distinct, and unconnected claims against several defendants. *Stuart v. Coalter*, 15 D. 731; or which seeks to enforce several separate demands against a corporation as such, against the stockholders as such, against them in their private capacity, and against them as trustees of the capital stock, and also as trustees in a deed of assignment for the benefit of creditors, and which seeks to set aside the assignment, and subject the property conveyed by it to the payment of the complainant's claims. *Ohio L. & T. Co. v. Merchants' etc. Co.*, 53 D. 742; or which demands several distinct matters of distinct natures of several defendants, or several entirely unconnected matters of one defendant, as where the assignee of a bond for the conveyance of land files a bill against

For Index to Notes in American Decisions and American Reports, see Volume I.

his assignor and the original vendor to remodel and enforce the agreements between the defendants and between the complainant and his assignor, and claims also of the original vendor compensation for holding over, and for removing fences and manure, etc. *Marshall v. Means*, 56 D. 444.

Neither of the defendants to a bill can demur for multifariousness, or for misjoinder of causes of action, in some of which he has no interest, when the case presented by the bill is so entire that it cannot be prosecuted in several suits, and yet each of the defendants is a necessary party to some part of the case stated. *Way v. Bragone*, 84 D. 147.

62. Prayer for relief, generally. — The prayer for relief incompatible with the allegations and purpose of a bill may be rejected as surplusage. *Murdock's Case*, 20 D. 381.

The prayer should be disjunctive where the case made may entitle the complainant to one or another kind of relief, but not to both, or where the complainant is in doubt whether the facts stated entitle him to the special relief prayed for, or to some other form of relief. *Colton v. Ross*, 22 D. 648.

An alternative prayer for relief is proper in such a case, but the relief must be consistent with the case made by the bill. *Id.*

A proper case for a bill with a double aspect is, where the complainant is in doubt whether he is entitled to one kind of relief or another, upon the facts as stated in the bill; in such case he may frame his prayer in the alternative. *Lloyd v. Brewster*, 27 D. 88; *Colton v. Ross*, 22 D. 648; *Brown v. Wyllie*, 98 D. 781.

In a bill filed by heirs to set aside a will, in which such will is positively alleged to be invalid, a prayer for special relief, if the will should be found valid, is inconsistent with the case made by the will. *Colton v. Ross*, 22 D. 648.

So if the nature of the complainant's relief depends upon the existence or non-existence of a particular fact not within his knowledge, he may allege his ignorance, call for a discovery, and frame his prayer in the alternative. *Lloyd v. Brewster*, 27 D. 88.

63. — for general relief. — A party will not be denied relief by a court of equity merely because he is mistaken in the specific relief prayed for; but if his bill contains a prayer for general relief, the court will give the relief required by the facts of the case. *Behee v. Bank*, 3 D. 353; *Stemmer's Appeal*, 98 D. 248. So held under a disjunctive prayer for general relief. *Colton v. Ross*, 22 D. 648.

Under a general prayer for relief, none entirely distinct from and independent of nor inconsistent with the relief specially prayed for can be granted complainant. *Brown v. Wyllie*, 98 D. 781; *Pensacola etc. R. R. Co. v. Spratt*, 91 D. 747.

Under a prayer for general relief, only the relief consistent with the case made in the bill can be granted. *Pensacola etc. R. R. Co. v. Spratt*, 91 D. 747.

Where the complainant who had sold land, and taken a trust deed back to secure payment of part of the purchase price, brought an action in which he prayed that the lien of this trust deed be enforced, and also prayed for general relief, the court cannot, under either of these prayers, set aside his original deed of conveyance. *Brown v. Wyllie*, 98 D. 781.

64. — for special relief. — A complainant praying for a particular relief and other additional relief can have no relief inconsistent with that specifically prayed for, though consistent with the case stated. *Colton v. Ross*, 22 D. 648. But he may be relieved under his general prayer in any way not inconsistent with his special prayer. *Brown v. Wyllie*, 98 D. 781.

The insertion of a prayer for the removal of administrators in a bill filed in aid of proceedings at law to remove the administrators for the purpose of having a receiver take charge of the assets pending the legal proceedings, being inconsistent with the case made by the bill, cannot change the ancillary nature of the suit. *Lewis v. Campen*, 90 D. 245.

65. Cross-bill.* — A defendant who is entitled to affirmative relief can obtain it only by cross-bill, and it is not essential that all the facts which would entitle him to the relief sought should appear in the original bill. *Hurd v. Case*, 83 D. 249. But he may, in his answer, rely on any matter which shows the complainant not entitled to the relief claimed in his bill. *Tarleton v. Vietes*, 41 D. 193.

A bill in equity will be treated by the court as original or as a cross-bill, according to its substance and the relief prayed; not according to the title which may have been given to it by the solicitor. *Pollock v. National Bank*, 57 D. 520.

The bill is original, and not a cross-bill, which is filed by the defendant in a suit to hold him as the debtor and fraudulent grantee of a judgment debtor, and alleges that the complainant (the defendant in the earlier suit) has become the owner of the debt for which the judgment was rendered, and of a collateral mortgage given to secure it, and prays to have his title to these securities established; and also joins as parties the said judgment debtor (who was mortgagor in the collateral mortgage), and the holder of a prior mortgage, and prays leave to redeem from the prior mortgage, and the foreclosure of the other. *Andrews v. Kibbe*, 83 D. 766.

The object of a cross-bill for relief is to

* Cross-bills, nature and extent of, see note, 88 D. 351-354.

For Index to Notes in American Decisions and American Reports, see Volume I.

enable a defendant to avail himself of some defense which can only be made complete by granting him some affirmative relief against complainant, or against some co-defendant. To be such, it must be strictly confined to matters involved in the original cause; for if it introduces distinct matters it is an original bill, and the suits are separate and distinct. *Andrews v. Kibbee*, 83 D. 766; *May v. Armstrong*, 20 D. 137; *Dill v. Shahan*, 60 D. 540; *Hurd v. Case*, 83 D. 249.

A cross-bill will be dismissed where the original bill is without equity, or where the cross-bill contains matter wholly repugnant to the answer of the defendant who files it. *Dill v. Shahan*, 60 D. 540.

A cross-bill by a junior mortgagee who was a party defendant to the foreclosure suit, seeking relief against a sale made by the prior mortgagee, *pendente lite*, under the power of sale in his mortgage, and for leave to redeem from that mortgage, was held to be confined to the subject-matter of the original bill, and its scope and object within the purpose of a cross-bill. *Hurd v. Case*, 83 D. 249.

New parties, who were not parties to the original bill, may be brought in by cross-bill; and where a junior mortgagee, made party defendant to a suit for foreclosure of a prior mortgage, seeks relief upon cross-bill against a sale made by the prior mortgagee, *pendente lite*, under a power of sale in his mortgage, the purchaser at such sale is an indispensable party to the cross-bill. *Ib.*

Where the plaintiff in a cross-bill does not object to the report of a commissioner for a failure to make a charge specially set up against a party, the objection will be considered as abandoned. *Pena v. Spencer*, 91 D. 375.

Where a plaintiff files a cross-bill to test the validity of a trust deed set up by defendant, and both parties claim satisfaction out of the same fund, if the deed is sustained, yet plaintiff is entitled to an account of the fund; and if upon such inquiry it is found that a portion of it belongs to plaintiff, then the amount thereof should be deducted from the amount provided for in the deed of trust, and in the absence of fraud, the deed should be held valid for the residue after such deduction. *Ib.*

66. Bill of revivor. — A bill of revivor is not always necessary where the execution of a former decree is sought; that relief will be allowed upon a bill, not one of revivor, where the bill, besides the former decree, introduces much other new matter. *Johnson v. Johnson*, 29 D. 72.

An original bill of revivor must show a case for complainant, otherwise new matter introduced supplementary is a new cause in court. *Eastman v. Batchelder*, 72 D. 295.

67. Interrogatories. — A defendant cannot be required to answer as to the for-

gery of a deed which the bill seeks to have canceled as forged. *Leigh v. Everheart*, 16 D. 160.

Where a statute requires that before interrogatories are allowed to issue, it must appear to the court, by the oath of the party filing the same, or otherwise, that the testimony will be material, and that the questions are pertinent; this will sufficiently appear to the court without affidavit of the party if the object of the testimony sought by the defendant in ejectment appears from the record to be to prove that the lessor of the plaintiff never existed, or was dead before suit brought. *Tison v. Yawn*, 60 D. 708.

The plaintiff, in an action to set aside a sheriff's sale for fraud, has a right to propound interrogatories to either or all of the defendants, touching any matters pertinent to the issues. *Teas v. McDonald*, 65 D. 65.

The court may refuse to permit a party to make new answers to interrogatories propounded to him, where the first answers were stricken out as not sufficiently categorical. *Ib.*

A plaintiff failing to answer interrogatories filed by defendant pursuant to an order of the court made at the time of filing, under the Indiana practice, cannot complain that no further steps were taken to enforce his answer until the trial, and the refusal of a motion at the trial to rule him to answer is error. *Hubler v. Pullen*, 68 D. 620.

An answer of a defendant to interrogatories propounded by plaintiff has the effect of a deposition. *Short v. Tinsley*, 71 D. 482.

3. Plea; Answer.

68. Right to elect between plea, answer, or demurrer. — Where a general demurrer to a bill would hold, the court will not grant relief, even though the defendant answer. *Stuart v. Coalter*, 15 D. 731.

69. When a plea is necessary or proper. — Where a debt is payable on a particular day, the plaintiff need not allege, in his declaration, a demand and refusal at the residence of the defendant. If the defendant were really ready and willing to pay, he should specially plead it. *Grant v. Groshon*, 3 D. 725.

An objection that a party is not entitled to equitable relief, on the case made by his bill, may be made by the defendant at the hearing, after answer and issue joined thereon, and if sustained, the bill will be dismissed. *Chambers v. Chalmers*, 23 D. 572.

This rule does not apply to some statutory defenses, such as that of limitations, which must be pleaded, both at law and in equity, and cannot otherwise be taken advantage of at the hearing, although the claim may be apparently barred. *Ib.*

The defense of usury must be pleaded or relied on in the answer to a bill for specific performance, where the contract upon which

For Index to Notes in American Decisions and American Reports, see Volume I.

the plaintiff's claim is founded may or may not be usurious, according to the facts really existing in the case. *Ib.*

Where a case stated in a bill is clearly usurious, and such as no inference or intentment can help, it may fall within the general rule authorizing the objection to be taken at the hearing, though not relied on in the answer. *Ib.*

An objection of usury in a mortgage to secure a divisible contract, containing distinct and independent stipulations, cannot be made at the hearing of a bill to enforce the mortgage, if not directly pleaded, where there is nothing in the bill to debar the plaintiff from showing that the mortgage debt arose from stipulations in the contract which were clearly not usurious. *Ib.*

Matters *dehors* a bill showing a want of interest in the complainant cannot be set up by way of demurrer, but must be raised by plea. *Southern Life Ins. & T. Co. v. Lanier*, 58 D. 448.

70. Form and sufficiency of the plea, generally. — Where the defendant alleged, in his plea, that on the statement of an account, he delivered certain negotiable notes to C. on account and in behalf of the plaintiffs, but did not aver that C. was the agent of the plaintiffs, nor that the notes were accepted in full satisfaction and discharge of the debt, the plea was held bad. *Bird v. Caritat*, 3 D. 433.

An allegation that prior to the suing out of the writ, the defendant settled and discharged the debt of the plaintiffs, is sufficient as to the time; for the suing out of the writ is considered as the commencement of the suit. *Ib.*

A suit in equity pending, to be pleadable in bar of another suit in equity, must not only be for same cause, but the remedy must be co-extensive and equally beneficial to the complainant. *Way v. Bragaw*, 84 D. 147.

The plea of another suit pending for the same cause in bar of a suit in equity can only be of a suit pending in the same or in some other court of equity. *Ib.*

71. Time to plead. — Dilatory and declinatory pleas should be made at the proper time, or the same will be deemed waived; but a plea that shows a total want of legal right in a suitor may be objected to and advantage taken of the same at any stage of the proceedings. *Brown v. Saul*, 16 D. 175.

72. When the proper defense is by answer. — Any defense which would afford matter for a plea to a bill in equity may be availed of in an answer. *Carmichael v. Hunter*, 35 D. 401.

If a defendant choose to avail himself of the statute of frauds, it is not necessary that he should, by answer, confess or deny the parol agreement alleged in the bill, the law

having declared it void. *Glens v. Calder*, 2 D. 686.

A cross-bill is unnecessary to set up a defense of set-off to a bill under the New York revised statutes; but the defense should be made by answer, unless a discovery is necessary to make such defense available, or unless for some other reason it cannot be taken advantage of by plea or answer. *Jennings v. Webster*, 35 D. 722.

73. Formal requisites of answer, generally. — Though in the caption of the answer the defendant is described as executrix only, yet she will be considered before the court in the character of devisee as well, where the answer is responsive to all the allegations of the bill charging her in that capacity. *Kinney v. Harvey*, 21 D. 597.

74. Rule that defendant must answer fully. — A defense not set up in the answer is of no avail. *Field v. Mayor*, 57 D. 436; though the defense appears in proof. *Cummings v. Coleman*, 62 D. 402. And if defendant purposely holds back something, he cannot complain if he should find himself regarded with suspicion, and refused that to which he may be entitled, and under other circumstances might have obtained. *Keighler v. Savage Mfg. Co.*, 71 D. 600.

Where the defense "bona fide purchaser without notice" is relied upon, notice must be denied fully and positively, though it be not charged in the bill; and if the facts be charged from which such notice may be inferred, such facts must be denied also. *Johnson v. Toutin*, 52 D. 212.

A party must make a full disclosure of all his proceedings during two years that he ought to have been engaged under his contract to procure gold, where he agrees, in consideration of certain advances by the plaintiffs, to dig for gold in California for two years, and to return the amount he procures, and the bill charges that he in some way obtained and sent home large sums of money, which were either procured by digging or by the use of the funds furnished by the plaintiffs for that purpose. *Hoyt v. Smith*, 60 D. 632.

Whenever intention is necessary or material, it is issuable, like any other fact. *French v. Martin*, 57 D. 294.

75. Rule that answer must be responsive to bill. — Allegations in the answer of stockholders of a dissolved corporation to a bill filed by creditors to the effect that the stockholders are also creditors are not evidence if not responsive to the bill, and must be proved if material. *Briggs v. Penniman*, 18 D. 454.

Statements in an answer not responsive to the bill must be proved. *Ives v. Hazard*, 67 D. 500.

An averment in an answer to a bill for specific performance, that the contract was conditional on its being approved by the de-

For Index to Notes in American Decisions and American Reports, see Volume I.

defendant's wife, no such condition being expressed in the memorandum sued on, is not responsive to the bill, and must be proved by evidence independent of the answer. *Id.*

Where, in a bill, it is alleged, among other things, that the defendants, being owners of the legal title to a vessel, accepted, in writing, an order drawn upon them by the owner of an equitable interest therein, directing them to pay to the plaintiff all balances due the drawer, and to hold the drawer's interest in the vessel subject to the plaintiff's order, and the answer admits the acceptance as alleged, but avers that the defendants informed the plaintiff that there was no balance due from them to the drawer, but on the contrary, a large balance due from him to them, for which they held the vessel, such averment is inadmissible, because not responsive to the bill, and because it seeks to contradict the writing by parol. *Clark v. Flint*, 33 D. 733.

An answer to a charge of fraud in obtaining the surrender of an instrument of defeasance, setting forth that such surrender was made by the mortgagor's agent under an agreement between the parties that the mortgagee was to keep the land and pay the mortgagor a certain sum in full of his interest and right of redemption, which sum was paid accordingly on the mortgagor's order to his agent, is sufficient. *Youle v. Richards*, 23 D. 722.

An answer stating such facts is directly responsive to the charge of fraud in the bill. *Id.*

A defendant denying a charge in the bill has a right to state the whole transaction. *Id.*

Where the complaint alleges a judgment, issuance of an execution and a sale thereunder of land, and the answer denies the validity of the judgment, and that the plaintiff acquired any title by the pretended sale, the execution and sale are not sufficiently denied to require the execution to be put in evidence. *Lee v. Figg*, 99 D. 271.

A bill in equity to enforce a trust brought against an administrator alleged that the respondent as administrator withdrew a bank deposit, being the trust funds in question. The answer alleged the respondent's appointment as administrator in Massachusetts, and that as such he withdrew the deposit and held the same as part of his decedent's estate. Held, in the absence of denial by the administrator, that he held the deposit as administrator in Rhode Island, that the court would presume he held it as administrator in Rhode Island, and would order him to account directly with the complainant, the trust having been proven. *Ray v. Simmons*, 23 R. 447.

76. Proper contents of answer, generally. — An answer setting up the defense of "bona fide purchaser" is defective, if it

fails to aver a want of notice down to the delivery of the deed. *Byers v. Fowler*, 54 D. 271.

An answer is sufficient which avers the payment by a bona fide purchaser for value of the purchase-money in full, and denies that he had any notice, either in fact or in law, of a trust deed, or of any interest in or claim to the property conveyed, in conflict with the absolute ownership of the grantor. *Wyse v. Dandridge*, 72 D. 149.

77. Form and sufficiency of denials. — A defendant may, on the hearing, avail himself of the statute of frauds, though not set up in his answer, where he has denied the making of the agreement charged in the bill. If defendant presents the issue of agreement or no agreement, the complainant must prove a valid agreement. It is where defendant admits a verbal agreement that he must, in his pleadings, insist upon the statute of frauds. *Wynn v. Garland*, 68 D. 190.

78. Effect of failure to deny allegations in bill. — Allegations positively sworn to in a bill, and not substantially denied in the answer upon the defendant's own knowledge, must be taken as true. *Grimstone v. Carter*, 24 D. 230; *Hanty v. Blackford*, 25 D. 114.

A failure to deny a material allegation in the bill, where the answer is responsive to every other part of the bill, raises an inference that it cannot be successfully denied. *Dulaney v. Hoffman*, 28 D. 207.

A material allegation in a bill, though not denied, must be proved. *Joice v. Taylor*, 25 D. 325.

When the bill charges the fact to be within the knowledge of the defendant, or which may fairly be presumed to be so, if the answer is silent as to the fact, it will be taken as admitted; otherwise, where the fact is not within the knowledge of the defendant. *Moore v. Lockett*, 4 D. 683; *Lyon v. Bolling*, 48 D. 122; *Cowan v. Price*, 4 D. 627.

When a bar to the relief prayed appears on the face of the bill, it is unnecessary for the defendant to plead it or suggest it in his answer; but he may take advantage of it on the hearing. *Cowan v. Price*, 4 D. 627.

79. Effect of answer to overrule plea. — Where a party pleads and answers to the same matter, the answer overrules the plea; so a demurrer is waived by a plea or answer to the same matter. *Chase's Case*, 17 D. 277.

80. Exceptions to answer, generally. — Taking a bill as confessed as to those points not responded to is a waiver of exceptions to the answer. *Griffith v. Depue*, 13 D. 141.

Exceptions which go to the merits and foundation of an action may be entertained after an answer to the merits, it seems. *Fowler v. Stoneum*, 62 D. 490.

Where an answer is defective and irregular, this point need not be raised before issue

For Index to Notes in American Decisions and American Reports, see Volume I.

joined, but may be raised at the hearing on the bill, answer, replication, and testimony filed. The rule may be different as to pleas, but with answers, some facts may be sufficiently stated and material, so as to render it necessary to take issue upon them, while others may be immaterial or defectively averred, and require no denial. It is true, plaintiff may except to such parts of the answer, but it is not essential that he should do so unless he desires a further discovery. *Everts v. Agnes*, 65 D. 314.

Though taking issue upon a plea may be an acknowledgment that it is good, it is not so with the answer. A plea may be set down for hearing on objection to its sufficiency as a defense, but exceptions are not taken to an answer unless the complainant requires a more full discovery by probing still further the conscience of defendant. *Id.*

Where a complainant is entitled to the full knowledge of the amount of collaterals in the hands of the defendants, and a detailed statement of their condition, and the answer fails to give such statement, an objection to its sufficiency must be sustained. *Keighler v. Savage Mfg. Co.*, 71 D. 600.

81. — for impertinence. — The general rule is, that if the answer goes out of the bill to state anything not material to the defendant's case, it will be deemed impertinent, and may be expunged. *Price v. Tyson*, 22 D. 279.

Nothing is irrelevant that may have an influence upon the suit attending to the nature of it. *Id.*

Where pertinent matters are mixed with impertinent, so that they cannot be separated, the whole shall be expunged. *Id.*

82. — for scandal. — A co-defendant or a stranger may have scandalous matter, which is also impertinent, stricken out of an answer, at the cost of the party filing it. *Price v. Tyson*, 22 D. 279.

Pertinent matter, though scandalous in itself, is not to be so considered. *Id.*

Answers to impertinent questions, though reflecting and impertinent, are not scandalous. *Id.*

4. Demurrer; Disclaimer.

83. When a demurrer will lie, generally. — The equity of a bill in chancery can be questioned only by demurrer, or on the hearing. *Brill v. Stiles*, 85 D. 364.

A defendant in chancery cannot demur to and answer the same allegations in a bill at one time. And after answer it is too late to demur, unless the answer is first withdrawn. *Id.*

Multifariousness cannot be assigned for error, under the Tennessee act of 1852, chapter 365, section 7, unless the objection is first made by demurrer to the bill, taken at the proper time. *Moreau v. Saffarans*, 67 D. 532.

That a discovery may occasion the forfeiture of a corporate charter is not sufficient to support a general demurrer to the whole bill against the directors, even if it would have authorized a demurrer to the discovery of particular facts. *Robinson v. Smith*, 24 D. 212.

The statute of frauds may be taken advantage of by a demurrer, although the bill alleges that the contract was prevented from being put in writing by the fraud of the defendant, if, admitting the fraud as charged, the complainant is entitled to no relief. *Box v. Stanford*, 51 D. 142.

When an allegation in a bill claimed that a check was paid, and then detailed the manner and circumstances of its payment, and the latter do not show facts constituting a valid payment, a demurrer to the bill should be sustained. *Redmond v. Dickerson*, 59 D. 418.

A bill in equity to enjoin the erection of a livery-stable, with a prayer for general relief, and alleging that the stable, by its proximity, will render the complainant's house untenable, break up his business, and diminish the rents of his stores, is not demurrable for want of equity. *Aldrich v. Howard*, 80 D. 636.

An averment that the statements in a bill which is not verified are made upon information and belief, though unnecessary and inappropriate, constitutes no ground for demurrer. *Marsh v. Marsh*, 84 D. 164.

84. Demurrer for defect of parties. — On the sustaining of a demurrer for multifariousness, the complainant may dismiss as to those whose joinder made the bill bad, and proceed as to the rest. But if he appeals without so doing, the appellate court, on sustaining the lower court, can only dismiss the bill without prejudice. *Jackson v. Brown*, 37 D. 556.

An objection by demurrer, that a bill in equity is multifarious, as including several parties as defendants who have no interest in the suit, is not good in a suit by creditors against estate of deceased person to set aside fraudulent conveyances, where the bill alleges that the parties were connected with the fraudulent transactions. *Snodgrass v. Andrews*, 64 D. 169.

An objection of multifariousness may be raised at the hearing, but is usually done by demurrer; and when made at the hearing, its allowance is in the discretion of the court, and it is never allowed where the real point in controversy can be determined as well as if there were as many suits as there are plaintiffs. *Hamilton v. Whitridge*, 69 D. 184.

A bill to enforce the payment of a judgment is not demurrable because it is not prosecuted for the benefit of all the creditors of the judgment debtor jointly with the complainant, it not appearing that there is any other creditor of equal degree with the complainant. *Way v. Bragan*, 84 D. 147.

For Index to Notes in American Decisions and American Reports, see Volume I.

85. Formal requisites of demurrer. — A demurrer *ore tenus* was allowed upon the payment by the defendants of the costs of the demurrer; but the complainants were permitted to amend. *Robinson v. Smith*, 24 D. 212.

86. Effect of demurrer as an admission. — A general demurrer admits all well-pleaded allegations of a bill. *Smith v. Allen*, 21 D. 33; *Taylor v. Bradshaw*, 17 D. 132; *Peabody v. Norfolk*, 96 D. 664. And if overruled, and the defendant declines to answer over, he cannot impeach the decree against him by denying the truth of the bill. *Miller v. Davidson*, 44 D. 715.

The question to be decided on a demurrer to a bill in equity is simply whether the facts alleged in the bill would, if true, entitle the party complaining to relief. *Lockwood v. Mitchell*, 53 D. 438.

87. Hearing and determination of demurrer. — On a demurrer to a part of a bill, leaving another part unnoticed by a plea, answer, or demurrer, it is clearly irregular to set the cause down for argument on bill and demurrer. *Cowan v. Wheeler*, 43 D. 283.

Every reasonable presumption is to be made in favor of a bill in equity, rather than against it. It is only when it clearly appears, from the face of the bill, that the equity of complainant is barred that the bill will be dismissed on demurrer for that cause. *Lincoln v. Purcell*, 73 D. 196.

Under a general demurrer for a want of equity, no objection for want of form can be raised. *Marsh v. Marsh*, 84 D. 164.

A demurrer to a bill may be overruled with leave to amend it by stating the grounds thereof within a specified time, unless within that time the complainant shall amend his bill in the particulars objected to. *Id.*

A decree should not be entered directly on overruling a demurrer to a bill, but the defendant should be directed to answer, and if he fails to do so the bill may be taken *pro confesso* and a decree entered thereon; but entering the decree immediately on overruling the demurrer is a mere irregularity which will not be noticed on appeal if not assigned for error. *Miller v. Davidson*, 44 D. 715.

Poetical or highly colored statements in a sworn bill in equity, regarding the noxious effects of coal-dust from a coal-yard adjacent to the complainant's premises, will not, on demurrer, be deemed a mere poetic fiction. *Barrow v. Richard*, 35 D. 713.

88. Disclaimer. — A disclaimer contained in an answer, to be effective, must be absolute and unqualified. Less than this, plaintiff is not bound to accept. *De Uprey v. De Uprey*, 87 D. 81.

5. Replication.

89. When a replication is necessary. — An answer is to be taken as true, as it was

not put in issue by a replication, where it was agreed that the cause should be submitted on bill and answer. *Ware v. Richardson*, 56 D. 762; *Trout v. Emmons*, 81 D. 326; *McQueen v. Chouteau*, 64 D. 178.

Where the facts charged in the bill were admitted to be true, and no replication was introduced, but the parties agreed to submit the cause on the pleadings, the question to be decided is, whether the proceedings of the defendant, be they a plea or an answer, are sufficient in law to bar the plaintiff's claim. *Tiernan v. Poor*, 19 D. 225.

90. Sufficiency and effect. — The replication to an answer defective in substance does not make it better. In such a case the defendant can claim no more than he has set up in his answer, any more than the plaintiff can be allowed to depart from the case made by his bill. *Everis v. Agnes*, 65 D. 314.

Under the old chancery practice, a replication to a plea admitted its sufficiency, and though the plea was bad, the bill had to be dismissed, as a matter of course, on proof of the facts stated in the plea. *Ely v. Wilcox*, 91 D. 436.

III. UNDER CODES OF PROCEDURE AND PRACTICE ACTS.

1. General Principles.

91. The changes introduced by codes. — In Mississippi, formal distinctions between actions are abolished, and their character must be determined by the nature of the grievance rather than the form of the declaration. Hence when the facts are distinctly stated, the action will be regarded as either in tort or contract; having regard, first, to the character of the remedy; and second, to the most complete and ample redress which, upon the facts stated, the law can afford. *New Orleans etc. R. R. Co. v. Hurst*, 74 D. 785; *Lubert v. Chauviteau*, 58 D. 415.

The Wisconsin code has changed the forms of actions, but not their causes. *Oleson v. Merrill*, 91 D. 428.

There are no forms of action in Texas; and if, upon the facts stated, the plaintiff is entitled to recover, he must have judgment. *Estes v. Browning*, 60 D. 238.

Under the California system of pleading, there is but one form of action, and the statute makes no distinction in matters of form between actions of contract and those of tort, relief being administered without reference to the technical and artificial rules of the common law. *Jones v. Steamship Cortes*, 79 D. 142.

In California, all matters may be litigated in the same action which arise from and constitute part of the same transaction. *Id.*

The rules of pleading and practice of courts of law and equity, as known in the remedial jurisprudence of common-law coun-

For index to Notes in American Decisions and American Reports, see Volume I.

tries, are not of any obligatory force in Texas, as matter of absolute principle, further than they have been introduced or recognized by statutory enactment. *Sequin v. Maverick*, 76 D. 117.

At common law, an allegation of time was, in general, a mere form; and mere form in pleading having been abolished by the code, such allegation may, in general, be wholly omitted; and in those cases only where a statement of time in common-law pleading was material and traversable need the time now be stated. *Backus v. Clark*, 83 D. 437.

92. Facts, not evidence, must be alleged. — Under the code system of pleading, facts only must be stated. This means the facts as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts. *Green v. Palmer*, 76 D. 492; *Thompson v. Munger*, 65 D. 176; *Gray v. Osborne*, 76 D. 99.

Those facts only must be stated which constitute the cause of action, the defense, or the reply, under the code system of pleading. *Green v. Palmer*, 76 D. 492.

In pleading under the code, an averment of the facts constituting the cause of action or defense should be simple and concise, and without repetition or prolixity. *Balkell v. Nosler*, 63 D. 466; *Green v. Palmer*, 76 D. 492.

An allegation of duty, without stating the facts which raise the duty, is insufficient, and if the facts stated do not raise the duty alleged, the allegation of duty is immaterial. *Hewison v. New Haven*, 91 D. 718.

93. General rules for interpretation of pleadings. — The presumption as to a traverse of facts stated in an answer, and the finding of the court or jury upon those facts, as provided in section 127 of the Ohio code of procedure, applies only to such facts stated in the answer as are inconsistent with the averments of the petition. *Erwin v. Shaffer*, 72 D. 613.

The plaintiff should be permitted to state his whole case in his own way, in a petition asking for equitable relief, where a full disclosure of the facts is necessary to enable the court to arrive at a definite conclusion. *Lane v. Ewing*, 77 D. 632.

Where pleadings were under the old chancery practice, in an action in equity brought before the code went into effect, they were given the same construction, force, and effect that they would have had under that practice, although the cause was not tried until after the code took effect. *Ely v. Wilcox*, 91 D. 436.

2. Complaint; Petition.

a. Formal Parts.

94. Describing the parties. — The character in which a party sues must be determined from the body of the pleading, and

not from the description of himself given therein. A right of action as an individual, properly averred, and accruing to plaintiff in a fiduciary character, authorizes him to sue in his individual capacity; and superadded words, as "administrator," etc., are mere *descriptio personæ*. *Tate v. Shackelford*, 60 D. 488.

A description of plaintiffs as lately partners is surplusage, and if untrue, is no ground for nonsuit. *New Brunswick etc. Trans. Co. v. Tiers*, 64 D. 394.

b. Statement of Cause of Action.

95. Actions on contract, generally. — An allegation that an agreement is in writing is unnecessary under the statute of frauds, it seems, in a petition in a suit on an agreement concerning lands. *James v. Fulcrud*, 65 D. 743.

A general allegation of performance, by a plaintiff, of the conditions of a contract is sufficient, under the California statute. *Cal. Steam Nav. Co. v. Wright*, 65 D. 511.

The petition under the Ohio code is good on error, after verdict or a finding by the court of all the issues in favor of the plaintiff, where it states facts which, if proved on the trial, would constitute a good *prima facie* case for the plaintiff. *Erwin v. Shaffer*, 72 D. 613.

In an action on a *quantum meruit*, the plaintiff need not set up in his complaint the excuse for not fully performing his contract, this being a matter of reply to a defense interposing the contract. *Wolfe v. Howes*, 75 D. 388.

Whenever "actual request" is necessary to be stated, a general averment, "though often requested," is not sufficient. Such request, if essential to the breach, is so also as to the right of action; and it must therefore be specially alleged whenever such request is, either by the terms or nature of the contract, the condition of the liability. *Whitton v. Whitton*, 75 D. 163.

The complaint in an action by an assignee, for value of a county warrant for the payment of money, is sufficient, if it sets forth that the assignor represented that it was valid, and would be paid on presentation, but that in fact it was illegal and valueless. *Keller v. Hicks*, 83 D. 78.

The complaint in an action by persons assessed for the construction of a road to enjoin the payment of moneys to contractors for building the road charged that the contracts had been given to two persons, one of whom was a director of the road company, and that the other contractor had an illegal and corrupt understanding with the directors that he was to share the profits with them. *Held*, that there were sufficient facts alleged to constitute a cause of action, and a demurrer would not lie. *Port v. Russell*, 10 R. 5.

For Index to Notes in American Decisions and American Reports, see Volume I.

96. Averment of indebtedness.*—A petition does not disclose a good cause of action, when it merely contains an allegation that defendant is indebted to petitioner, as is evidenced by a certain promissory note; but contains no allegation that the note described in it was either made, executed, or delivered, by defendant. Nor is the defect cured by a subsequent allegation that defendant executed and delivered his deed of mortgage, the substance of which purports to be set out in the petition, but in which there is no allegation that the mortgage discloses the fact that the note sued on was executed by defendant. *Gray v. Osborne*, 76 D. 99.

A complaint in an action to recover for professional services is sufficient, which avers, in substance, that defendant was at a certain time indebted to the plaintiff in a certain sum for such services, rendered at the special instance and request of the former, without setting out in terms the value of the services, or that the defendant promised to pay. *Willies v. Stidger*, 83 D. 64.

A promise to pay is a mere conclusion of law, and need not be alleged under the code system of pleading, which requires only facts to be stated. *Ib.*

A complaint which briefly, yet clearly, sets forth the grievances of which the plaintiff complains, is sufficient under the Alabama code. *Clark v. Goddard*, 84 D. 777.

97. Actions of tort, generally.—A complaint in tort should be framed for the particular cause of action which the party has a right to sue for; but if it includes two or more causes of action, it will be presumed, after verdict, that the proof was limited on the trial to the legitimate ground of damages. This is the common-law rule. *Rogers v. Smith*, 79 D. 483.

The allegation of special damages as matter of aggravation is a substantive allegation of fact, and not an inference of law, resulting from facts antecedently stated. *McConnell v. Kibbe*, 85 D. 266.

98. Joinder of causes of action.—Many causes of action, under the code practice, may be joined in one petition; but each must be set out separately from the others, with its appropriate prayer for relief. *Mooney v. Kennett*, 61 D. 576.

If several causes of action are joined in one petition, there should be a separate assessment of damages, or verdict, in each cause; but a general finding for defendant on such petition may be sustained. *Ib.*

A cause of action by a principal against his agent for fraudulently selling land cannot be united, it seems, under section 167 of the New York code of procedure, with a cause of action against the purchaser, as a

trustee, for a reconveyance or an accounting. *Gardner v. Ogden*, 78 D. 192.

In California, a cause of action in tort may be united with a cause of action on contract, if both arise out of the same transaction. *Jones v. Steamship Cortes*, 79 D. 142.

Where a complaint in tort contains two or more distinct causes of action in one count, it is duplicity under code. The remedy is by motion to strike out, and not by demurrer. *Rogers v. Smith*, 79 D. 483.

A claim to enforce an express or implied trust may be joined in a complaint with a claim to enforce a vendor's lien existing without any written contract. *Burt v. Wilson*, 87 D. 142.

Demands accruing to the plaintiff in his own right may be joined with demands accruing to him as survivor. *Smith v. Salomon*, 91 D. 711.

99. Several counts for same cause of action.—One cause of action cannot be stated in different counts, under the code system of pleading, as might have been done at common law; and if so set forth, the court may, on motion, require the plaintiff to elect upon which count he will proceed. *Sturges v. Burton*, 72 D. 582.

100. Rule requiring separate statement of distinct causes of action.*—Where various causes of action are united in one petition, they should be separately and distinctly stated. *Baltzell v. Nosler*, 63 D. 466.

Where a complaint contains allegations of several breaches of same contract, in the same count, a motion to compel the pleader to elect upon which of the claims stated he will proceed, and to abandon the others, should be overruled. Such motion should be granted only when the complaint contains several causes of action improperly blended. *Fisk v. Tank*, 78 D. 737.

Each paragraph of a complaint must contain in itself sufficient averments to constitute a good cause of action. *Day v. Vallette*, 87 D. 353.

c. Prayer for Relief.

101. General rules.—The prayer for relief need not be looked to for grounds of action. *Pridgin v. Strickland*, 58 D. 124.

While a prayer cannot aid in making out a case otherwise defectively stated in the complaint, it may serve to show what kind of a case the plaintiff supposes he has made, and the kind of relief to which he conceives himself to be entitled, and indicate the object which he seeks to accomplish. *Arrington v. Liscom*, 94 D. 722.

102. Prayer for general relief.—A prayer for general relief is sufficient to enable the court to afford appropriate relief,

*Common counts, allowance of, under code system, see note, 57 D. 544-550.

*Stating cause of action in different counts, see note, 72 D. 588-590.

For Index to Notes in American Decisions and American Reports, see Volume L.

in an action for money had and received. *Merryfield v. Willson*, 65 D. 117.

3. Defendant's Pleadings.

a. Answer.

103. When an answer is proper.—The sufficiency of a complaint is admitted by answering to merits, under code of Indiana of 1852. *Riser v. Snoddy*, 65 D. 740.

A petition, pending a suit, asking for the appointment of a receiver, and setting forth new facts which are material, if not denied by a written answer on oath, will be taken as true. *Chase's Case*, 17 D. 277.

The existence of a partnership must be denied, if it is alleged in the complaint, within the time limited by statute, by an affidavit, or the truth of the allegation is deemed admitted. *Fist v. Tank*, 78 D. 737.

104. Formal parts of the answer.—Under the Iowa statute, a defendant in an action at law may set up an equitable defense against one holding the legal title. *Shawhan v. Long*, 96 D. 164.

105. What matters must be alleged.—When the defendant in his answer neither denies the legal right of the plaintiff to recover, nor the truth of the allegations in his petition, they are taken to be confessed, and the plaintiff, in such case, need not adduce proof in support of his claim or demand. *Clapp v. Phelps*, 92 D. 645; *Lord v. Ocean Bank*, 59 D. 728.

An answer of a carrier must show the necessity of jettison, and that such necessity was caused by a peril within the exceptions in the bill of lading, where such jettison is relied on as a justification for non-delivery of goods, and it must state the facts constituting the necessity and peril, and not mere conclusions of law, as that the accident was caused by dangers of the river, or was unforeseen and unavoidable, or the like. *Bentley v. Bustard*, 63 D. 561.

The defendant, having denied each averment in a declaration, may object to maintenance of action without having filed a demurrer under the practice act, which requires his answer to contain a statement that he demurs, if he wishes to raise an issue of law: See Acts of Mass. 1852, c. 313, secs. 17, 21. *Hervey v. Moseley*, 66 D. 515.

In pleading fraud, accident, or mistake, the facts and circumstances must be alleged. *Fahie v. Pressey*, 80 D. 401.

When the right to land acquired by adverse possession under the statute of limitations is presented in a complaint, any matter which would take the case out of the statute must be pleaded as a defense in the answer. *Arrington v. Liscom*, 94 D. 722.

106. What matters may be pleaded as a defense.—A tort may be made available as an equitable defense, total or partial, when it springs from the same transaction, and by impeaching the consideration of the

contract sued on, meets and repels the plaintiff's allegations in whole or in part. *Price v. Lewis*, 55 D. 536.

107. Sufficiency of the denials, generally.—Under section 46 of the California code there are but two classes of defense allowed. The first consists of a simple denial, the second of the allegation of new affirmative matter; and as the code has abolished all distinctions in the forms of action, and requires only a statement of the facts constituting the cause of action or defense, the two classes of defense must be the same in all cases. *Piercy v. Sabia*, 70 D. 692.

The object of an answer is to apprise plaintiff what defense is intended to be set up in bar of his claim. This is all the law requires. *Munn v. Taulman*, 81 D. 503.

The phrase "he says that he denies," in an answer, is equivalent to the phrase "he denies," under the Kansas code. *Ib.*

An answer that defendant "does not admit" a material averment of the petition does not put plaintiff upon proof of its truth. *Bomberger v. Turner*, 82 D. 438.

A plea which professed in its commencement to answer the whole cause of action, and afterwards answered only a part, was bad under the old system of pleading as well as under the code. *Filassimons v. City Fire Ins. Co.*, 86 D. 761.

A partial defense to an action should be set up and relied on as such, and not as a complete and entire defense. *Ib.*

An answer which professes and assumes to answer an entire cause of action is bad on demurrer, where the facts alleged constitute only a partial defense to the action. *Ib.*

108. Denials must be certain and direct.—The complainant has a right to have notice upon record, in a precise and unambiguous manner, of the conclusions of fact intended to be drawn from allegations in the answer. *Vogle v. Ripper*, 85 D. 298.

Averments in a complaint not denied must be taken to be true. *Buckout v. Swift*, 87 D. 90.

A denial that an assignment was in writing, or for valuable consideration, does not amount to a denial of the fact of an assignment alleged in the complaint, but if it denies anything, merely amounts to a denial that the assignment was written or for a valuable consideration. *Randolph v. Harris*, 87 D. 139.

A denial, in an answer, of "each and every material allegation of the complaint" is insufficient. Whether a denial be general or specific, there should be no room left for mistake as to what is denied and what is admitted. *Montour v. Purdy*, 88 D. 88.

A denial of each and every allegation in a complaint, except what the court may construe to be admitted in the foregoing part of the answer, is both indefinite and uncertain. *Starbuck v. Dunklee*, 89 D. 68.

For Index to Notes in American Decisions and American Reports, see Volume I.

109. General denials. — An answer by way of denial raises the issue only on the facts alleged in the complaint. *Finley v. Quirk*, 86 D. 93.

A general denial must be definite and positive; it must deny what is not admitted. *Starbuck v. Dunklee*, 88 D. 68.

A general denial, under the code practice, merely puts in issue such of the averments of the complaint as the plaintiff is bound to prove. *Adams Exp. Co. v. Darnell*, 99 D. 892.

A general denial in an action on a note requires the production of the note, although it does not put the plaintiff upon proof of its execution; but the plea of the general denial in such an action precludes the plaintiff from taking judgment by default, or for want of an answer. *Able v. Chandler*, 62 D. 518.

110. Specific denials. — An answer should be so certain and specific in its averments that, if admitted, the court may be able to give judgment upon it. *Thompson v. Munger*, 65 D. 176.

111. What may be denied on information and belief. — A denial of facts presumptively based on information need be only according to defendant's information and belief, but it must be according to both information and belief. *Humphreys v. McCall*, 70 D. 621.

A defendant must answer according to his belief, and is precluded from controverting the alleged fact which he believes, though his belief may be founded upon mere hearsay, general report, or other information. *Id.*

112. What may not be so denied. — A denial "for want of information to enable them to admit," etc., is not sufficient where both complaint and answer are verified. *Humphreys v. McCall*, 70 D. 621.

A denial of facts presumptively within defendant's knowledge must be in the positive form, and not on information and belief. *Id.*

In an action for a breach of a contract for transporting cord-wood, if defendant admits that he received and transported a large quantity of such wood, a denial that he has no knowledge or information whether the quantity of wood was as stated in the complaint or otherwise is bad, unless some special reason is given why he did not know. *Starbuck v. Dunklee*, 88 D. 68.

113. Negatives pregnant. — A mere denial that the property was of the value alleged in a complaint, where the question of value is material, is insufficient, and amounts to the pleading of a negative pregnant. The pleading should allege that the property is of no value, or should state the value as defendant claims it. *Lynd v. Pickett*, 82 D. 79.

114. Pleading new matter, generally. — The California code has adopted the

rule that a defendant must either deny the facts as alleged or confess and avoid them, and if new matter in defense exists, it must be stated in the answer. *Piercy v. Sabie*, 70 D. 692.

New matter in a defense is that which, under the rules of evidence, the defendant must affirmatively establish. Thus if the onus of proof is thrown upon the defendant, the matter to be proved by him is new matter. A defense that concedes that plaintiff once had a good cause of action, but insists that it no longer exists, involves new matter. *Id.*

Facts which occur subsequent to the date of the original transaction constitute new matter; and as the code has made no distinction between different classes of new matter, therefore all such matter of defense must be stated in the answer. *Id.*

New matter constituting either an entire or partial defense must be pleaded, in order to be admissible in evidence. *Morrell v. Irving Fire Ins. Co.*, 88 D. 396.

A defendant claiming affirmative relief must plead as fully as if he were a plaintiff. *Rose v. Treadway*, 97 D. 546.

Common counts may be pleaded in a counterclaim under the code. *Meagher v. Morgan*, 87 D. 476.

115. Former recovery. — Former recovery operates as a bar by way of estoppel only when specially pleaded. *Gray v. Gillilan*, 60 D. 761.

An answer setting up a former adjudication must be accompanied by a complete record of all the pleadings and proceedings in the case upon which it is founded, and if it fails to do this, the defect may be reached by demurrer. *Wilkinson v. Foreman*, 85 D. 475.

116. Statute of limitations. — An amendment setting up the plea of the statute of limitations, in an answer, will not be allowed, unless it would further the ends of justice. *Cooke v. Spears*, 56 D. 348.

117. Matter in avoidance. — Defenses in avoidance of an action must be alleged in an answer, under the Massachusetts practice act, Statutes of 1852, chapter 312, in order to avail the defendant, although first disclosed by the plaintiff's evidence. *Muhry v. Mohawk Valley Ins. Co.*, 66 D. 380.

118. — or in mitigation of damages. — Mitigating circumstances serve only to reduce damages, and do not constitute a defense to the action, and when set up in an answer, the pleader should state that they are in mitigation of damages, otherwise the court would be warranted in striking them out as not amounting to an answer. *Atteberry v. Powell*, 77 D. 579.

119. What defenses may be joined. — Under the Iowa practice, a party defendant may set up as many defenses, both legal and equitable, as he may have. *Roberts v. Corbin*, 96 D. 146.

* See important note on when denials may be made on information and belief, 70 D. 625-634.

For Index to Notes in American Decisions and American Reports, see Volume I.

120. Inconsistent defenses. — Inconsistent defenses cannot be set up in an answer where the statute requires pleadings to be verified. *Atteberry v. Powell*, 77 D. 579.

Two or more defenses are inconsistent only when proof of one necessarily disproves the other. The facts should be so set out that both defenses may be true. *Nelson v. Brodhack*, 100 D. 328.

A special defense is not necessarily inconsistent with a denial; it is only inconsistent when there is an absolute incompatibility of facts. *Id.*

b. Demurrer.

121. When it lies, generally. — A demurrer is properly sustained on the ground that an allegation is too general, when the allegation is that "no requisite of chapter 15 of the code was observed." *Clapp v. County of Cedar*, 68 D. 678.

An answer setting up a matter of law is bad on demurrer, at common law, and under the Indiana code. *Kern v. Hazlerigg*, 71 D. 360.

122. When it will not lie. — A demurrer to a petition is waived by filing of an answer by the defendant. *Smith v. Silence*, 66 D. 137.

That several grounds of defense are inconsistent is not a defect that can be taken advantage of by a demurrer. The usual and proper course is to compel the party to elect on which of the inconsistent grounds he will rely. *Munn v. Taulman*, 81 D. 508.

An averment of a complaint in an action against a railroad company for damages resulting from the negligence of its agents and servants, that the defendant ran its train with carelessness and gross negligence, is good on demurrer. *Ohio etc. R. R. Co. v. Davis*, 85 D. 477.

The complaint in an action by a passenger against a railroad company alleging that the plaintiff was carried to his destination in a box-car which had no steps for the safe descent of passengers, and which was stopped before it reached the platform at the station, and that the plaintiff was required by the conductor to leap from the car to the ground, whereby he received injuries, is not demurrable on the ground that the injury appears to have resulted from rash conduct of the plaintiff. *Evansville etc. R. R. Co. v. Duncan*, 92 D. 322.

An objection that a pleading is argumentative will not be considered on a demurrer. *Bell v. Eaton*, 92 D. 329.

The prayer of a complaint is not demurrable. *Althof v. Conheim*, 99 D. 363.

123. Demurrer for want of jurisdiction. — A demurrer is properly sustained when a complaint shows an action is based upon the judgment of a court of another state, and that jurisdiction over defendant was acquired by the publication of the summons. *Winston v. Taylor*, 75 D. 112.

124. — for misjoinder of causes of action. — A misjoinder of causes of action appearing on the face of a complaint cannot be taken advantage of on the trial after failure to demur. *Blossom v. Barrett*, 97 D. 747.

A complaint is not demurrable on the ground of a misjoinder of causes of action, which contains one count charging defendants with an implied liability, on a sale of a county warrant, to repay the purchase-money, a second count charging them as indorsers of negotiable paper, and a third count for money had and received. *Keller v. Hicks*, 83 D. 78. Or where the complaint asks damages for the immediate injury to a mining claim caused by the breaking of a dam, and for the consequent preventing the plaintiffs from working the claim. *Fraler v. Sears Union Water Co.*, 73 D. 562.

125. — for failure of complaint to state facts sufficient to constitute a cause of action. — The adverse party may demur under the code system, if every fact essential to the claim or defense be not stated. *Green v. Palmer*, 76 D. 492.

A complaint stating facts entitling plaintiff to any relief, either in law or in equity, is not demurrable for want of facts. *Grain v. Aldrich*, 99 D. 423.

Uncertainty is not a ground of demurrer, under the Indiana code of procedure, but of a motion to compel the party to make his pleading more certain, unless the pleading be so uncertain as not to state intelligibly a substantially good cause of action or defense. *Snowden v. Wilas*, 81 D. 370.

The statute of frauds must be pleaded only when it does not appear, from the complaint, that the contract was parol; when it does so appear, and nothing is alleged to take the case out of the statute, the complaint is demurrable. *Wentworth v. Wentworth*, 72 D. 97.

126. Form of demurrer. — A demurrer is to be taken distributively, and is equivalent to a separate demurrer filed to each paragraph, and may therefore be overruled as to part, and sustained as to part, of the paragraphs, where an answer consists of several paragraphs, and a single demurrer is filed thereto, in which it is said that "the plaintiff demurs to each paragraph of the answer," etc. *Parter v. Thomas*, 81 D. 385.

127. General demurrer. — A plea in abatement may be objected to on general demurrer, because defective in not being verified by affidavit, when of facts not apparent of record, or for not being seasonably filed, or for not being entitled of the term when the writ and declaration were entered. *Whidden v. Seelye*, 63 D. 661.

If any of several grounds of defense set up in the answer is good, it is error to sustain a general demurrer thereto, on the ground

For Index to Notes in American Decisions and American Reports, see Volume I.

that it does not set forth any defense to the action. *Munn v. Taulman*, 81 D. 508.

128. Interposing statute of limitations by demurrer. — An objection that the equity of the plaintiffs is barred by long adverse possession may be taken by demurrer. *Williams v. Harrell*, 55 D. 442.

A count in a complaint in the old form of *assumpsit* for money had and received is demurrable, if the promise is laid of a day more than two years prior to the commencement of the action, thus showing the demand to be barred by the statute of limitations. *Keller v. Hicks*, 83 D. 78.

129. Hearing and determination of demurrers. — The record of a former suit on which action is brought will not be examined on demurrer, where it is not made a part of the petition, but is simply filed with it. *Hall v. Harrison*, 64 D. 225.

Where a defect in the pleading is remedied by an additional pleading before the demurrer thereto is determined, such demurrer should be overruled. *Bell v. Byerson*, 77 D. 142.

4. Reply.

130. When a reply is necessary. — Under the Iowa system of pleading, no replication is required to an answer of defendant which admits the execution of a policy of fire insurance sued upon, and the loss as alleged in the petition, but sets up certain acts of plaintiff in violation of the terms of the policy whereby it became forfeited. The cause is at issue upon such answer, the law presuming a full denial thereof, and all matter properly in avoidance, as the replication of plaintiff. The answer may be controverted at the trial by evidence in denial of the facts averred, or by new matter in avoidance, as if fully pleaded under the old system. *Viele v. Germania Ins. Co.*, 96 D. 83.

Where an answer contains no counterclaim nor set-off, no replication is necessary under the Missouri practice act of 1855. *Powers v. Kueckhoff*, 97 D. 281.

131. What replies are sufficient. — Matter in avoidance, denied by a general replication, must be proved. *Cecil v. Cecil*, 81 D. 626.

A general replication waives the benefit of the statute of frauds as a defense against an agreement set up in the answer. *Tarleton v. Vietes*, 41 D. 193.

A plea of the statute of limitations alleged that the causes of action did not, nor did either of them, accrue within six years, etc. A replication thereto alleging that the said causes of action, or some of them, did accrue within six years, etc., was held to be defective in not saying which accrued within six years. *Holchies v. Ladd*, 86 D. 679.

IV. VERIFICATION OF PLEADINGS.

132. Form and sufficiency, generally. — An affidavit made in another state, veri-

fying an answer in a suit brought in this state, is not within the act of Congress regulating the authentication of judicial proceedings in other states. *Gibson v. Tillon*, 17 D. 306.

Such an affidavit, if made before a magistrate duly authorized to administer an oath by the laws of the state where it was taken, is admissible here, and is considered as having been taken under the authority of the court in which the suit is pending. *Id.*

A jurat to an answer in the form of a certificate by the officer, that the defendant swore that the "facts," instead of the "matters," stated in the answer "were true," instead of "are true," is sufficient. *Whelpley v. Van Epps*, 37 D. 400.

133. Necessity of verification. — The execution of a note is admitted as to one of two defendants, where the denial of the execution is sworn to by the other only. *Pursley v. Morrison*, 63 D. 424.

134. Remedies for defective verification. — An objection to an answer for want of verification is waived by receiving and retaining that pleading without objection. *Folsom v. Carli*, 80 D. 429.

A neglect to return a defectively verified pleading, or pleading not verified when it should be, is to be deemed a waiver of the defect or omission. *Hayward v. Grant*, 97 D. 228.

V. THE ISSUE; ITS SCOPE; AND HOW JOINED.

135. Necessity of joinder of issue. — A trial without an issue is error. *Hubler v. Pullen*, 68 D. 620.

Questions not presented by a bill and demurrer will not be considered. *Chilton v. Wilford*, 60 D. 399.

Facts shown by the evidence, but not put in issue by pleadings, cannot be considered on the hearing. *Warner v. Whittaker*, 72 D. 66; *Winston v. Taylor*, 75 D. 112.

To put the proof of the execution of a contract upon the opposing party, it must be put in issue by the pleadings, under the provisions of the Texas statute. *Fulshear v. Randon*, 70 D. 281.

A plaintiff may properly dismiss as to a party defendant after an answer, notwithstanding another defendant set up a defense in his answer which was unfavorable to his co-defendant. *Stone v. Durnell*, 78 D. 582.

136. What is a sufficient joinder. — Where a replication denies matters contained in the plea, it is error to dismiss the bill without hearing the issue of fact thus raised. *Yost v. Devault*, 66 D. 92.

An answer containing a demand in reconvention need not be served on the plaintiff, as he is bound to take notice of the issues of law, without an answer. *Hunter v. Spurlock*, 22 D. 165.

Payment pleaded but not replied to is not in issue. *Hubler v. Pullen*, 68 D. 620.

For Index to Notes in American Decisions and American Reports, see Volume I.

In a proceeding against a railroad corporation for usurping banking privileges by issuing paper in the similitude of bank notes, a plea that defendants have issued certain paper which they describe, and which paper as described may or may not be within the meaning of the law preventing banking by unauthorized persons, is defective, as the issue tendered thereby is immaterial. *People v. River Raisin etc. R. R. Co.*, 86 D. 64.

137. Scope of the issue. — A recovery must be on the case made by the pleadings; therefore insurers treating a policy as one of reinsurance of the risks assumed by them cannot, on failing to prove the contract as alleged, recover the ratable contribution due on the policy, were it one of double insurance. *Alliance Marine Ass. Co. v. La. State Ins. Co.*, 28 D. 117.

A judgment cannot be rendered in favor of a party upon the issue of law formed upon a separate plea, without disposing of the issue of fact joined upon plea of payment. *Devers v. Ross*, 60 D. 331.

An answer to a bill to foreclose a mortgage denying that alterations in the mortgage notes were made by the consent of the parties, as alleged in the bill, but not averring that they were fraudulently made, does not put in issue the intention with which they were made, and the court will not consider the evidence in regard to it. *Vogle v. Ripper*, 85 D. 298.

Evidence must correspond to the allegations and be confined to the issues, and if in the examination of witnesses facts come out which would furnish ground of relief or defense, such facts must be disregarded, unless they are warranted by allegations in the pleadings. *Finley v. Quirk*, 86 D. 93.

An allegation in a complaint in an action on a promissory note, payable to the payees as individuals, that they were partners at the time of bringing the suit, is immaterial, and a denial of such allegation in the answer does not raise a material issue. *Hayward v. Grant*, 97 D. 228.

No provision of the Kentucky code abrogates the principle that a plaintiff can recover only upon proof of the cause of action alleged in his pleading. *Gossom v. Badgett*, 99 D. 658.

138. Effect of express admissions. — An answer may be held to aid the complaint which distinctly sets out most of the facts necessary to entitle the plaintiff to the relief sought, but omits some material facts, where the facts so omitted are clearly stated and admitted in the answer. *Hawthorne v. Smith*, 93 D. 397.

A fact will be deemed established without proof which is affirmatively alleged both in the petition and answer, although the answer contains also a general denial, and the plaintiff filed a reply in general denial of the alle-

gations of the answer. *Cur v. Watson*, 98 D. 763.

Under the Iowa system of pleading, a party may admit in writing any allegation of facts pleaded by his adversary which otherwise would be deemed controverted by mere force of law. This admission, of course, dispenses with proof of all facts thus admitted; but it does not preclude the party making it from proving other independent facts in avoidance of those admitted. *Viele v. Germania Ins. Co.*, 96 D. 83.

Where the defendant files a written admission of facts pleaded by the plaintiff, his answer sets up the facts relied upon as matter in avoidance; but when plaintiff files a written admission of facts pleaded by defendant, the replication being dispensed with, there is no pleading prescribed by the Iowa statute in which such matter may be embodied. *Id.*

Where the plaintiff files a written admission of matters alleged in defendant's answer, in a case where no replication is allowable, such writing may, and should by good practice, contain an averment or notice that the plaintiff relies upon and expects to show on the trial matter in avoidance of the allegations thus admitted. But the plaintiff may admit the facts pleaded by defendant, without stating the matters in avoidance to be given in evidence. *Id.*

After plea and issue joined, in an action to recover damages for the sale and conversion of hypothecated stock, it was agreed between the parties that all errors in pleading on both sides should be released, and that the plaintiff should be considered as having amended his declaration by adding such counts in tort as the state of the facts appearing at the trial would justify; and it was held that the plaintiff in his amendments was confined to his counts in tort, and that the suit had to be dealt with as an action *ex delicto*, and as if the supposed amended counts in that form were added. It would not be strictly correct to hold that all errors in pleading were released, and that the questions at issue were presented by the facts disclosed in the bill of exceptions, and the instructions of the court thereupon. *Maryland F. Ins. Co. v. Dalrymple*, 89 D. 779.

VI. EVIDENCE UNDER PLEADINGS; VARIANCE.

1. In Actions at Law.

139. What evidence may be admitted under the pleadings, generally. — Where a party neglects to plead a former recovery as an estoppel when he has an opportunity to do so, and puts the facts directly in issue, the jury may find according to the truth of the case. *Wood v. Jackson*, 22 D. 603.

The rule does not apply where a special pleading is not required, as in *assumpsit*,

For Index to Notes in American Decisions and American Reports, see Volume I.

where such an estoppel may be given in evidence under the general issue, nor where the plaintiff's title is by estoppel, nor where there is no opportunity to plead the estoppel. *Id.*

A general averment in a declaration, of presentment of a bond for payment will let in proof that the bond was presented at the last known residence of the payor. *Taylor v. Branch*, 23 D. 293.

Matter not pleaded may be given in evidence when its materiality has been caused by conduct of the plaintiff at the trial. *West v. McConnell*, 25 D. 191.

A defendant must elect between two contradictory defenses, and evidence should be permitted only in support of the one on which he determines to rely. *Cox v. Cox*, 67 D. 432.

In an action for refusing to furnish the necessary kiln and hop-house for preparing hops for market, under a contract to prepare a suitable and convenient kiln and dry-house, to be prepared and ready for use when the same should be required, evidence that the contractee directed the contractor not to build them, but to use the contractor's kiln and dry-house for the purpose, that the contractor did so, and paid for the use of the same, and that the contractee made no objections, but fully assented to the arrangement, is admissible under a plea by the contractor that he did prepare a suitable kiln and dry-house, ready for use when required; also that he did prepare the same according to the true intent and meaning of said contract, and to the full satisfaction of plaintiff. *Thompson v. Kilborne*, 67 D. 742.

140. What should be excluded. — If the declaration omits to notice a note subjoined to the agreement and limiting its continuance to a day certain, the agreement cannot be introduced in evidence under such declaration, unless it appears that such note was subjoined without plaintiff's knowledge or consent, and that it was not a part of the agreement. *Newell v. Mayberry*, 23 D. 261.

Evidence of a negligent performance is not admissible to support an issue of total neglect and refusal to perform. *Pennsylvania &c. Co. v. Dandridge*, 29 D. 543.

141. What evidence is admissible under the general issue. — A former recovery may be given in evidence, without being specially pleaded, — 1. When the party who seeks the benefit of it had no opportunity to specially plead it; 2. By defendant in those cases in which other matters in discharge of the action can be proved under the general issue. *Young v. Rummell*, 38 D. 594.

A former recovery, release, or satisfaction need not be pleaded in an action on the case, but may be given in evidence under the general issue. *Gilchrist v. Bale*, 34 D. 469; *Cook v. Vinmont*, 17 D. 157; *Young v.*

Rummell, 38 D. 594; *Whitney v. Clarendon*, 46 D. 150; *Reynolds v. Stansbury*, 55 D. 459; and is as conclusive as if specially pleaded. *Young v. Rummell*, 38 D. 594; *Offutt v. John*, 40 D. 125; *Gray v. Gillilan*, 60 D. 761.

Under the general issue in *assumpsit*, defendant may show that there are other persons jointly interested with the plaintiff in the cause of action sued on, and it is not necessary to plead such matter in abatement. *Marshall v. Jones*, 25 D. 260.

Evidence tending to establish a payment may be given under the general issue. *Cress v. Bleakley*, 61 D. 58; *Hanna v. Mills*, 34 D. 216.

Evidence of an award in favor of defendant is admissible in an action of *assumpsit*, under the general issue. *Winne v. Elderkin*, 52 D. 159.

Evidence that neither the plaintiff on the record nor the real plaintiff has any beneficial interest in the suit may be given under the general issue. *Berry v. Gillis*, 43 D. 584.

A constable sued for an act done by virtue of his office may, under the general issue, give evidence of any matter which is a defense to the suit. *Parker v. Walrod*, 30 D. 124.

In an action on the case, any evidence may be given under the general issue which destroys the right of action. *Whitney v. Clarendon*, 46 D. 150. Accordingly, where the action was for diverting the water in plaintiff's mill, the defendant may give evidence, on the general issue, that the dam was higher than legally allowed, whereby defendant's improvements were overflowed, and that the defendant dug the canal on his own land to let off the surplus water. *Langford v. Oneley*, 4 D. 699.

142. What is not. — Evidence that an invention was useless, and of no value, cannot be given under the general issue pleaded to an action on a promissory note given for a certain patent right of the payee. *Williams v. Hicks*, 19 D. 693.

A matter of justification or excuse in an action of trespass for breaking and entering plaintiff's house cannot be given in evidence under the plea of not guilty. Such matter must be specially pleaded. *Carson v. Wilson*, 19 D. 368.

A defendant cannot avail himself of an objection to the declaration in an action of trespass to try title, after he has pleaded "not guilty." *Ware v. Bradford*, 36 D. 427.

A partial failure of consideration cannot be given in evidence under the general issue. *Manville v. Gay*, 60 D. 379.

Payment cannot be shown under a general issue in an action of covenant for rent, except with a brief statement. But payment may be shown in such action under a special plea of payment. *Russell v. Fabyan*, 61 D. 629.

A defendant in a real action between ten-

For Index to Notes in American Decisions and American Reports, see Volume 1.

ants in common cannot give in evidence under general issue that he "had never ousted the plaintiff of his portion of the demanded premises, nor in any way hindered his taking possession, but had only been in possession of the same as tenant in common with the defendant." *Billings v. Gibbs*, 92 D. 587.

143. Admissibility under plea of non assumpsit. — In an action to recover compensation for services as housekeeper, and for goods sold and delivered, evidence that the plaintiff embezzled or wasted the goods of her employer is admissible under the plea of *non assumpsit*, though not by way of set-off. *Heck v. Shener*, 8 D. 700.

144. Burden of proof. — The mere admission of a debt is not sufficient to charge the defendant with the whole demand of the plaintiff; he must, nevertheless, prove the amount due. *Quarles v. Littlepage*, 3 D. 637.

The plea of covenants performed admits the due and proper execution of the bond on which suit is brought, and if the covenant be to make title to land, it implies the defendant had made title; and he must prove it, or show by law that, agreeably to the plaintiff's own showing, he was not bound to make it. *Cock v. Taylor*, 5 D. 650.

Where a person seals a deed or executes a covenant in behalf of others, it is incumbent upon him to set forth in his plea and prove the authority under which he acted, in order to release him from his personal liability. *White v. Skinner*, 7 D. 381.

The averment of a demand, though immaterial, must be proved. *Conn v. Gano*, 13 D. 639.

On a declaration setting forth a joint undertaking to construct a mill, and the negligent and unskillful conduct of the defendant, whereby plaintiff was greatly damaged, the plaintiff must prove the joint contract, to enable him to recover. *Wright v. Geer*, 27 D. 538.

Where an express contract is necessary to create a liability, it must be stated, and must be proved as laid. *Id.*

A failure to prove a strictly joint liability is fatal upon a motion for a nonsuit, in an action in which the declaration charges a joint contract by the master and owner of a vessel, and alleges a loss through negligence. *Patton v. Magrath*, 33 D. 98.

In actions growing out of torts, it is sufficient to prove a part only of the allegation stated in the declaration, provided what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved. The only exception to this rule is, when the allegation contains matter of description. *Walsh v. Homer*, 45 D. 342.

It is not necessary to prove an averment in a declaration, where the whole of it may be stricken out without destroying the

plaintiff's right of action. *Maxwell v. Maxwell*, 50 D. 657.

A party has the right to have the jury pass upon all allegations contained in the declaration, and he is entitled to their verdict if he sustains by his proof any of the allegations showing a cause of action. *Kearney v. Farrell*, 73 D. 677.

145. What variances are material. — On the trial of an issue upon the *assumpsit* of the testator, evidence is not admissible showing a promise or engagement on behalf of the executor. *Quarles v. Littlepage*, 3 D. 637.

Whatever is alleged as inducement, and is not impertinent and foreign to the cause, must be proved as alleged, and when a contract is alleged and described, a variance is equally fatal, whether the action be upon the contract itself or upon some collateral matter. *Walsh v. Gilmor*, 6 D. 502.

Where it was in issue whether the plaintiff had a patent right dated November 17, 1810, for "a steam-still and water-boiler," evidence of a patent dated January 16, 1811, for "a water-boiler and steam-still" was held inadmissible. *Bellas v. Hays*, 9 D. 385.

In an action on a contract, the one set forth on the record and the one proved must agree in substance and effect. And in the case of mutual executory promises, a trivial variation in setting out the contract is fatal. *Curley v. Dean*, 10 D. 140.

A declaration on a covenant to convey on performance of certain conditions by the plaintiff, alleging performance of the conditions, will not be supported by proof of a waiver of such performance. *Baldwin v. Munn*, 20 D. 627.

A party, in an action on special contract, who fails to prove his contract as laid, but proves a different special contract, cannot recover on either contract; nor can he recover on the common counts, when there is a special contract in existence. *Fowler v. Austin*, 26 D. 701.

An allegation of a total neglect and refusal to perform an engagement is not sustained by proof of a negligent and imperfect performance. *Pennsylvania etc. Co. v. Danbridge*, 29 D. 543.

A declaration which alleges a contract to tow out a vessel and cargo safely is not sustained by proof of a contract to tow out free from a particular description of danger. *Id.*

On a plea of *nil siet record*, a variance between the decree relied on and that offered in evidence, as to the name of one of the parties in whose favor the decree was entered, is fatal, and cannot be helped by an averment that the name was inserted by mistake. *Dibrell v. Miller*, 29 D. 126.

Where, in an action on a jail bond, it appears that the sum named in the bond is

For Index to Notes in American Decisions and American Reports, see Volume I.

different from the amount for which judgment was rendered and execution issued, this constitutes a variance, and the court must either exclude the execution from evidence or hold that it does not support the issue. *Avery v. Lewis*, 33 D. 203.

A difference of a half-cent between the note declared on and the one offered in evidence is a fatal variance. *Spangler v. Pugh*, 74 D. 77.

Names, sums, magnitudes, dates, durations, and terms are matters of essential description, and must, in general, be precisely proved. *Id.*

In declaring on a contract, it need not be recited *in hoc verba*; but if it be so recited, the recital must be strictly accurate. If the instrument be declared on according to its legal effect, that effect must be truly stated; and if there be a failure in either mode, an exception may be taken for the variance, and the instrument cannot be given in evidence. *Id.*

Where a plaintiff declares upon a parol promise, and the proof shows that his action is based upon a sealed instrument, the variance is fatal. He cannot set up one cause of action in his petition, and on the trial prove another and different one. *Dougherty v. Matthews*, 88 D. 128.

Variance is fatal, whether an action is in case *ex contractu* or *ex delicto*, where the declaration alleges a special contract for unusual dispatch in transporting merchandise, and the evidence does not tend to prove that there was any agreement for unusual dispatch. *Mann v. Birchard*, 94 D. 398.

Where several sue for an injury to property alleged to belong to them jointly, they can recover only for damage to such property as they prove belonged to them in a joint capacity. *St. Louis etc. R. R. Co. v. Linder*, 89 D. 319.

146. What are immaterial. — A variance between the date of the bond declared on and that recited in the award is not fatal, if in other respects they agree; thus if the bond declared on have the month blank, and the award recites the month, it will not be fatal. *Ross v. Overton*, 2 D. 552.

In declaring upon such a writing, to allege that defendant undertook that "the oil was of a good and superior quality, to wit, prime quality winter oil," is not a material variance. *Hastings v. Lovering*, 13 D. 420.

An allegation that an action was commenced on the 24th is supported by proof of a writ dated the 25th for the day is not material. *Steele v. Bates*, 16 D. 720.

Where a declaration sets out a warrant which charges that property had been stolen from a person's premises, and the warrant produced in evidence charges that it was stolen from his possession, the variance is not material. *Miller v. Brown*, 23 D. 693.

A variance in mere matter of form between

the record of acquittal offered and that pleaded is not sufficient to warrant its exclusion as evidence, especially when the prosecution out of which the acquittal arose was for a misdemeanor only. *Adams v. Lisher*, 25 D. 102.

A variance between an instrument offered in evidence from that set forth in the pleadings, where this latter is not of the foundation of the action, is immaterial, unless it be of such character as to cause a strong probability that the two instruments are not identical. *Leidy v. Rawson*, 29 D. 354.

Averments of matters of substance in a declaration need only be proved substantially, but matters of description must be proved exactly. And where *assumpsit* is brought to recover money alleged to be due from the defendant to the plaintiff, and by mistake omitted in a settlement between them, the averments of the time of such settlement, and of the particular sum due, and not embraced therein, are averments of matters of substance, not of description. *Sage v. Hawley*, 41 D. 128.

There is no variance between a declaration and proof, where the former alleges a promise of defendant, consequent upon his acceptance of a bill to pay it according to its tenor, and the proof is that the acceptor said the bill was all right, and he would come to Burke in a few days, and pay the bill. *Fisher v. Beckwith*, 46 D. 174.

Variance in an action of debt on a judgment is immaterial where the declaration alleges it to have been obtained in a suit brought before that time in the circuit court, when, from the description in the declaration of the record, it appears that it was originally brought in the district court and transferred by an act of Congress to the circuit court. *Dudley v. Lindsey*, 50 D. 522.

The omission in a count on a note to set out a memorandum thereon, which constitutes a defeasance or qualifies the stipulations of the note, is a variance, and the note will not support the count; but if the declaration contains the common money counts, and the memorandum is merely that the note is given as collateral security for another note, the variance is immaterial. *Tebbetts v. Pickering*, 51 D. 48.

Variance between an allegation and the proof in an action on an assessment does not exist where the proof shows that an assessment alleged to have been made by three directors was signed by but two directors. *North R. M. Co. v. Shrewsbury Church*, 53 D. 258.

Where the plaintiff declared that defendant had assumed to pay certain rent, and the evidence showed that he had promised to assure it, there is no variance, as it is sufficient to allege a promise according to its legal effect. *Dougherty v. Matthews*, 88 D. 128.

For Index to Notes in American Decisions and American Reports, see Volume I.

Immaterial allegations are not required to be proved as laid, unless they are of such a character as to be important in ascertaining the identity of the thing which is the cause of action. *Holt v. Inhabitants of Penobscot*, 96 D. 429.

147. Effect of variance.—The entry of a motion to quash a writ or dismiss a suit is not such an appearance as waives a variance between the writ and the declaration. *Schoonhoven v. Gott*, 71 D. 247.

A variance between a declaration and the proof, where defendants are charged with obstructing and turning a watercourse on plaintiff's land, and the proof is that defendants allowed their ditch to become so filled up as to throw an accumulation of water on plaintiff's land, is not so great but, by amendment, plaintiff's declaration might be made to cover all the facts. *Waterman v. Connecticut etc. R. R. Co.*, 73 D. 326.

2. In Suits in Equity.

148. What evidence is admissible under the pleadings, generally.—Evidence to support an allegation not made or relied on in a bill or answer in equity is inadmissible. *Price v. Tyson*, 22 D. 279.

A decree between co-defendants may be made on pleadings and evidence between plaintiffs and defendants. *Motte v. Schult*, 26 D. 194.

149. — in support of the bill.—Evidence is inadmissible to prove a fact not alleged in the bill. *Bonwell v. Goodwin*, 81 D. 169.

150. — in support of the answer.—Averments in an answer must be supported by proof, where the matter set up is new, or where it is not responsive to the allegations in the bill. *Leach v. Fobes*, 71 D. 732; *Gasbill v. Sinc*, 78 D. 106.

An answer to the merits does not deprive the defendant of any legal objection insisted on in the answer. *Teagus v. Dendy*, 16 D. 643.

Defendants' answers in equity are to be taken as true if the complainants do not give them an opportunity to substantiate them by proof. *Covenhoven v. Shuler*, 21 D. 73.

151. Burden of proof.—Equitable relief will not be granted, unless the allegations of the bill, which are denied, are proved. *Ayres v. Campbell*, 74 D. 346.

If the answer to a bill in chancery, by way of affirmative allegations, sets up new matter, not responsive to the bill, the burden is upon the defendant to prove the allegations as charged. *Cooper v. Tyler*, 95 D. 442.

152. Variance, and its effect.—Complainants, having asked for relief as the heirs of A, cannot recover as the heirs of B, although the proof adduced shows them to be such, as they can only recover on the va-

lidity of their title stated in their bill *Maulding v. Scott*, 56 D. 298.

Allegata and *probata* must agree, and averments material to the case omitted from the pleading cannot be supplied by evidence. This is a cardinal rule in equity as well as in all other pleading, and is peculiarly necessary upon a bill for specific performance. *Green v. Covillaud*, 70 D. 725.

3. In Actions under Codes of Procedure.

153. What evidence may be admitted under the pleadings, generally.—The proof must correspond with the allegations. *Caldwell v. Neil*, 99 D. 738.

Under a complaint substantially alleging that the plaintiff was deprived of the use of his meadow by reason of the defendant causing water to overflow it, thereby rendering it spongy and impassable, it is competent for plaintiff to show that his muck-bed in the meadow, valuable for manure, was made inaccessible by the flowage, and that he was injured in consequence thereof; for if the single question is, whether the railroad company so constructed its road as to injure the owner's meadow-land by flowage, the latter may show in what manner, and every manner, in which the flowing impaired the profits of the land. *Johnson v. Atlantic etc. R. R. Co.*, 69 D. 560.

Under a plea of total failure of consideration, defendant may show partial failure, in Texas. This is not the rule in England, and in some of the states of the Union, but it is so here by virtue of the statute. *Brandley v. Thomas*, 73 D. 264.

The California practice act governs all cases, legal and equitable, by the same rules, at least in regard to evidence necessary to sustain the pleadings. *Goodwin v. Hammond*, 73 D. 574.

154. What should be excluded.—The causes of an action set forth in a complaint can be recovered upon, only; and concurrent and intimate causes of action cannot as a matter of course be given in evidence, nor made the basis of a verdict, under the act which declares that "there shall be but one form of civil action." *Benedict v. Bray*, 56 D. 332.

Under a complaint for damages sustained by being thrown from a wagon by reason of its being brought into contact with a defect in a highway, the plaintiff is not entitled to prove damages arising from his voluntarily leaping from such wagon to avoid injuries rendered imminent by such defect. *Lead v. Tyngsborough*, 59 D. 159.

A plaintiff cannot make out a cause of action by proof, where he fails to make it out in his complaint. *Heath v. Frackleton*, 91 D. 405.

Evidence of a fact essential to the support of an action is inadmissible, unless it be

For Index to Notes in American Decisions and American Reports, see Volume L.

averred in the complaint. *Maynard v. Fireman's Fund Ins. Co.*, 91 D. 672.

155. What is admissible under the general issue. — Though the rule of court may make a general denial a sufficient denial of the averments of the petition, it cannot extend further than as a denial of the petition, and cannot open the door to special defenses and matter in avoidance. *Walters v. Washington Ins. Co.*, 63 D. 451.

Under an answer containing a general denial of indebtedness, and plea of payment, a judgment of garnishment against the defendant cannot be given in evidence. Such matter is special matter in avoidance, and not negating the original indebtedness, and must therefore be specially pleaded. *Walters v. Washington Ins. Co.*, 63 D. 451; *Hubler v. Pullen*, 68 D. 620.

In trover, trespass, and replevin, defendant need not deny amount of value or allegation of damages. They must be proved, though defendant puts in no answer. This was the practice before the code, and is so now. *Jenkins v. Steamba*, 88 D. 675.

Evidence is admissible under a general denial, in an action for an injury to the person, that the injury resulted from the plaintiff's negligence. *Indianapolis etc. R. R. Co. v. Rutherford*, 92 D. 338.

Proof of fraud is not admissible under a general denial. *Pino v. Merchants' Mut. Ins. Co.*, 92 D. 529.

156. Burden of proof.* — Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged, under the code system; and he must allege nothing affirmatively which he is not required to prove. Negative allegations are, however, frequently necessary, but they are not to be proved. *Green v. Palmer*, 76 D. 492.

An allegation of new matter not constituting a counterclaim or set-off must be considered as denied, and must be proved by the party making the allegation. *Fahnestock v. Bailey*, 77 D. 161.

An allegation in a complaint that a defendant "has or claims an interest," etc., does not relieve him from proving that it is a redeemable interest, and the evidence must be the same as in other cases of disputed title. *Smith v. Smith*, 88 D. 707.

157. What variances are material. — A variance between names in a summons and a declaration is material, when the summons is against "Schoonhoven" and the declaration is against "Schoonover"; the names are not the same in sound. *Schoonhoven v. Gott*, 71 D. 247.

A failure of proof exists under the code system as well as at common law, when the plaintiff, in an action against one defendant, declares upon a joint undertaking of the de-

fendant and another, and proves only a separate agreement of the defendant; for there is a want of identity between the contract declared on and the contract proved, which would prevent the judgment from being a bar to another action on the contract proved. *Gossom v. Badgett*, 99 D. 658.

A party cannot declare upon one cause of action and recover upon another; but the variance between allegations and proof, to be fatal, must be such as to mislead the adverse party, to his prejudice, in maintaining his action or defense upon its merits. *Murphy v. Wilson*, 100 D. 290.

158. What are immaterial. — The provisions of New York code of procedure concerning variance between pleadings and proofs are applicable to all actions; and a variance between allegations of usury in an answer and the proof should be deemed immaterial, when the proof does not differ from the allegations in their entire scope and meaning, and the plaintiff does not prove that he was actually misled thereby to his prejudice. *Catlin v. Gunter*, 62 D. 113.

A variance between an allegation and the proof is to be disregarded, under the New York code, unless it appears to have misled a party to his prejudice. *Dubois v. Beaver*, 82 D. 328.

Omitting from a pleading a portion of a contract which is declared upon is not a material variance between the allegations and proof, unless it shall actually mislead the adverse party, to his prejudice, in maintaining his action or defense upon its merits. At common law, variances of this kind were fatal, but the rule has been changed in Wisconsin by statute, and the court may order the pleading amended so as to conform to the facts, upon such terms as may be just, or it may disregard it altogether. *Fisk v. Tank*, 78 D. 737.

Averring greater damages than proved is no variance. *Mallory v. Leach*, 82 D. 625.

VII. EFFECT OF PLEADINGS AS EVIDENCE.

159. Bill or complaint as evidence.

— Allegations in an unverified bill are not evidence against the complainant. *Rankin v. Macneil*, 12 D. 431.

A bill against two defendants, taken *pro confesso* against one for want of his appearance, will not estop the other from denying or disproving the allegations in the bill. *Petty v. Hannum*, 36 D. 303.

Jurisdictional facts stated in a bill must be deemed to be true in a suit on a decree, when the decree is collaterally attacked. *Harrison v. Harrison*, 56 D. 227.

A bill in equity, sworn to by a complainant, may be used as evidence of the facts stated in it, concerning his title to certain lands, in another case in chancery affecting the same lands. *Stump v. Henry*, 61 D. 300.

* Burden of proof on plea of statute of limitations, see note, 81 D. 725-727.

For Index to Notes in American Decisions and American Reports, see Volume I.

160. When defendant's answer is evidence. — An answer responsive to a bill, and within the discovery sought, is legal evidence. *Woodcock v. Bennet*, 13 D. 568.

161. When answer is not evidence. — An answer, after a replication, is not evidence for the defendant, unless it is made so by discoveries called for in the bill. *Gillis v. Martin*, 25 D. 729.

An answer of one defendant is not evidence against his co-defendant in chancery. *Jones v. Hurdey*, 32 D. 180.

An answer to a bill in equity that is unsupported by proof, and not responsive to the bill, but setting up matters in avoidance, must be considered as untrue and out of the case. *O'Brien v. Elliot*, 32 D. 137.

An answer responsive to a bill in equity, and denying charges therein, is not evidence for the defendant, though the bill be sustained by one witness only. *Goodwin v. Hammond*, 73 D. 574.

162. Answer not evidence in respect to new matter not responsive to bill.

— Allegations in an answer responsive to the bill are evidence for the defendant, but averments of new matter in avoidance are not. *Ringgold v. Ringgold*, 18 D. 250; *Buck v. Swasey*, 56 D. 681; *Com. v. Cullen*, 53 D. 450.

Where an answer admitting or denying facts in a bill sets up other facts in defense or avoidance, they must be proved by independent testimony. *Miles v. Miles*, 64 D. 362.

163. Effect of answer as evidence. — The answer of a respondent to a bill in equity praying for a disclosure is conclusive upon the petitioner as to the truth of its statements. *Pollard v. Lyman*, 2 D. 63.

An answer must be taken for true, in the absence of evidence, where it denies the statement in the bill, and avers otherwise. *Paul v. Carver*, 64 D. 649.

Where a bill in chancery calls for an answer under oath, the latter must be taken to be true in so far as it is responsive to the bill, and not contradicted by evidence. *Cassell v. Ross*, 55 D. 270; *Garretson v. Vanloon*, 54 D. 492; *Price v. McDonald*, 54 D. 657. So held, of an answer to a bill charging fraud, denying such fraud. *Murray v. Blatchford*, 19 D. 537; *Allen v. Cole*, 59 D. 416.

An answer, where a cause is heard upon a bill and answer, must be taken as conclusive proof of the facts which it sets up by way of defense; but intentions and motives are not facts touching which the answer is conclusive. *Belford v. Crane*, 84 D. 155.

Allegations in an answer respecting questions of fact are to be sustained by proper evidence, and are entitled to no more consideration than those of the orator, except as far as directly called for by the latter. *Samborn v. Kittredge*, 50 D. 58.

A sworn answer of a defendant to a bill in equity is evidence in his favor equal in

weight to the testimony of a single witness, and is not to be discredited, nor any presumption raised against it, by reason of its being the answer of an interested party; and the answer is sufficient in itself, if direct and positive and responsive to the bill, to establish the denials and the affirmations of facts which it contains, if not outweighed by opposing proof. *Pickering v. Day*, 95 D. 291.

164. How the denials in the answer may be overcome. — Evidence sufficient to falsify an answer in chancery, determined under the peculiar circumstances of the case. *Pringle v. Samuel*, 13 D. 214.

If a defendant files a verified answer in equity, evidence may be received to impair the force of the answer as evidence, by showing that he is unworthy of belief. *Miller v. Tollison*, 14 D. 712.

Mere opinions founded on data that do not justify the conclusion reached cannot outweigh the positive statement in the answer of a defendant who had positive knowledge of the facts alleged. *Simpson v. Feltz*, 16 D. 602.

A parol contract alleged in a bill, which is denied by an answer thereto, may be established by parol evidence; the answer may be contradicted by evidence *alibis*. *Printz v. Mitchell*, 63 D. 258.

An answer to a bill ought not to be overthrown by evidence less positive than the allegations and denials of the answer, nor should it be outweighed by proof of circumstances which may be reconciled with the truth of the statements therein contained. *Pickering v. Day*, 95 D. 291.

A witness relied on to overcome an answer to a bill in equity must not only be competent, but his testimony must be credible; and the circumstances depended upon as corroborative must be such as to materially support the witness and strengthen his testimony, so that when both are considered together, they may be sufficient to satisfy the conscience of the court that the allegations and charges of the bill are true. *Id.*

The answer of a defendant to a bill filed against him in equity, if responsive to matters contained in the bill, will be conclusive evidence in his favor until overcome by testimony of two opposing witnesses, or one such witness and corroborating circumstances. *Miles v. Miles*, 84 D. 362; *Meth. P. Church v. Baltimore*, 48 D. 540; *Zeigler v. Scott*, 54 D. 395; *Feigley v. Feigley*, 61 D. 375; *Trout v. Emmons*, 81 D. 326. But the circumstances must be such that, standing alone, a reasonable conclusion as to the truth of the fact might be deduced from them. *Maddox v. Sullivan*, 44 D. 234.

To overcome an answer of a defendant to a bill in equity, it is not indispensable in all cases to have the testimony of a witness with corroborative circumstances; because circumstances alone may sometimes be found in the

For Index to Notes in American Decisions and American Reports, see Volume I.

answer itself, or in documentary evidence referred to in the answer sufficient to more than countervail the denials of the answer. The rule properly applies to the case of an answer opposed only by the testimony of a single witness. *Pickering v. Day*, 95 D. 291.

The answer of an executrix alleging facts not within her personal knowledge is not within the rule that an answer asserting a fact responsive to the bill can only be disproved by two witnesses, or by one witness with strong corroborating circumstances. But as such answer does not admit the allegations of the bill, it puts the complainant on proof, and leaves him to sustain them as he can, unembarrassed by any supposed responsive features of the answer. *Dugan v. Gittinge*, 43 D. 306.

VIII. SERVICE; FILING; WITHDRAWAL.

165. Time to plead. — A peremptory exception cannot be received after answer. *Coles v. Kelsey*, 47 D. 661.

A plea of limitations is not a plea to the merits, and must be filed by the rule day, and is never allowed to be amended. *Kunkel v. Spooner*, 66 D. 332.

Pleas and motions in abatement must be filed within two days after entry of action, under the rules of court in Maine, and the entry of a special appearance for defendant does not dispense with the requirements of such rules in regard thereto. *Mitchell v. Union Life Ins. Co.*, 71 D. 529.

One of several defendants cannot object that a bill was prematurely filed, and that the defendants were not then in default, when the bill was filed pursuant to an agreement between him and the complainants that he should unite with them in obtaining the relief prayed. *Cobb v. Duke*, 72 D. 157.

A defendant, by obtaining time and failing to file his amended answer, is not entitled to longer time without some showing why such answer was not ready. *Butcher v. Bank of Brownsville*, 83 D. 446.

166. Proof of service. — Where the sheriff's return states that he served the defendant with a certified copy of the complaint, this is sufficient to support a judgment by default. It cannot be argued that this does not show that the copy was certified by the clerk; he being the only person who could legally make the certificate, it must be presumed, in favor of the officer who has the general power of making service, that he discharged his duty in the legal mode. *Curtis v. Herrick*, 73 D. 632.

167. Sufficiency of filing. — The practice of filing pleas at different times, and after the answer has been filed, without first obtaining the leave of the court, is an irregularity not to be sanctioned, and calculated to perplex and leave it uncertain whether such pleas were received and went to the jury or not. *Coles v. Kelsey*, 47 D. 661.

A plaintiff, by conforming and not excepting to a bad rule of court requiring demurrers and answers to be filed at the same time, can take no advantage of it, save that it repels the inference that, by filing his answer, the defendant waives his demurrer. *Butcher v. Bank*, 83 D. 446.

168. Withdrawal of pleadings. — Where a demurrer to a petition is overruled, but not withdrawn, a withdrawal will be implied where the parties go before the jury on an issue made up under the direction of the court; the demurrer will not remain a confession of the facts in the petition. *Dickey v. Malechi*, 34 D. 130.

A refusal of defendant's motion for leave to withdraw a plea of the statute of limitations, where such motion is not made until the jury has been partly sworn, and if granted would give the defendant the privilege of opening the case, is not an improper exercise of the discretion of the court. *Sanders v. Johnson*, 36 D. 564.

After a verdict has been found for defendant on several pleas, he may withdraw one of them, if the verdict can be sustained on any one of the pleas. *Godfrey v. Alton*, 52 D. 476.

IX. AMENDED AND SUPPLEMENTAL PLEADINGS.

169. Amended pleadings in actions at law.* — 1. *When allowable.* — A declaration may be amended by inserting proper counts, provided the original cause of action remains the same. *McVicker v. Beedy*, 50 D. 666; *Haverhill Ins. Co. v. Prescott*, 80 D. 123.

An amendment changing a cause of action from *assumpsit* to *trover* may be allowed, in the discretion of the court, although such amendment may prevent the defendant from availing himself of a matter of set-off. *Lee v. Lee*, 64 D. 247.

Where a declaration contained a count for work and labor done and materials found, and the specifications of the plaintiff claimed the price of a carriage sold and delivered, an amendment thereto by filing a count upon an agreement by the defendant to take, and pay for a carriage to be built to his order, is for the same substantive cause of action and is properly allowed. *Mizer v. Howarth*, 32 D. 256.

A declaration may be amended on a motion in arrest of judgment, upon affidavits to show the true time of the commencement of the action, where rent is claimed which accrued after the beginning of the term of which the declaration is entitled. *Zule v. Zule*, 35 D. 600.

An amendment will be allowed in a suit upon an invalid promissory note, given in settlement of an account, by incorporating a

* Amendments varying or altering cause of action, how far allowed, see note, 34 D. 156-162.

For Index to Notes in American Decisions and American Reports, see Volume I.

count upon the original indebtedness. *Perrin v. Keene*, 36 D. 759.

An amendment of a declaration in *indebitatus assumpsit* at the trial by increasing the amount in the several counts and in the claim for damages, but not changing the cause of action, may be allowed. *Tassey v. Church*, 39 D. 65.

A plaintiff must declare upon the cause of action stated in his original writ; but if the facts set forth in the writ show the action to be improperly entitled therein, as if it be styled an action of trespass, whereas it should be an action on the case, he may amend in his declaration by inserting the proper name. *Coggswell v. Baldwin*, 40 D. 686.

An amendment should be allowed where the contract declared on, the cause of action alleged, and the redress sought are the same in the proposed amendment as in the original declaration. *Stewart v. Kelly*, 55 D. 487.

Where a plaintiff declares on an executed contract of sale, alleging performance by delivery of the property sold, and claiming damages for the defendant's refusal to pay for it, and the evidence shows that he had the property at the time and place appointed for delivery, but that the defendant refused to accept the same, or pay for it, he should be allowed to amend his declaration at the trial, so that its allegations may conform to the evidence. *Id.*

It is not error for the court to allow amendment to the declaration, in cases of libel and slander, striking out the original words, and inserting other words varying in terms, though amounting very much to the same in import, after the jury had been charged that the words proved would not sustain the declaration. Such amendment would not present a new cause of action. *Hawks v. Patton*, 63 D. 266.

A plaintiff will be allowed to amend his declaration by striking out items of illegal traffic, where he has brought an action for the value of a stock of goods sold, each article at an agreed price, but where the sale of some of the articles was prohibited by statute. *Boyd v. Eaton*, 69 D. 83.

2. *When not allowable.*—An amendment cannot be granted which changes the form of action, or introduces a new count for a new cause of action not contained in the original declaration. *Carpenter v. Gookin*, 21 D. 586; *Ball v. Claffin*, 16 D. 407; *Lloyd v. Brewster*, 27 D. 88; *Stevenson v. Mudgett*, 34 D. 153; *Pridgin v. Strickland*, 58 D. 124; *Emerson v. Wilson*, 34 D. 695. But the same contract or wrong may be alleged in a different manner, so as to conform to the facts and the proof; and such alteration may be allowed after the jury is sworn. *Cassell v. Cooke*, 11 D. 610; *Stewart v. Kelly*, 55 D. 487.

Where such an amendment was allowed by a justice of the peace, the county court,

on an appeal thereto, must dismiss the action, and cannot restore the declaration and cause of action to what it was before the amendment. *Emerson v. Wilson*, 34 D. 695.

An amendment will not be allowed which gives to the plaintiff a new substantive cause of action, and which may take from the defendant the right of pleading the statute of limitations; so the plaintiff will not have leave to change his action for slander into one for malicious prosecution. *Shock v. McChesney*, 2 D. 415.

3. *Time to amend.*—A motion to amend a declaration after nonsuit has been directed is in season, where the nonsuit is taken off and a new trial ordered. *Medbury v. Watson*, 39 D. 726.

A plaintiff may amend his declaration so as to cure a mistake in the name of the defendant, even after a plea in abatement. *Carterright v. Chabert*, 49 D. 742.

After a demurrer to a declaration has been sustained, if plaintiff amends, he thereby waives the right to review the correctness of said ruling on appeal. *Stallings v. Newman*, 62 D. 723.

Plaintiff will not be allowed to amend his declaration after the defendant has been defaulted, and the cause has been argued upon the existing counts. *Palmer v. York Bank*, 36 D. 710.

No amendment of pleadings is allowed after the rendition of judgment. *Landry v. Baugnon*, 36 D. 606.

A plea in abatement is not amendable after demurrer filed thereto. *Brown v. Nourse*, 92 D. 583.

170. — in suits in equity. — 1. *What amendments allowable.*—Amendments are allowed in equity with great liberality. *Codington v. Mott*, 82 D. 258.

Where a bill is defective in omitting facts existing at the time, they should be inserted by amendment. *Candler v. Pettit*, 19 D. 399.

The complainant in equity relying on the statute of frauds to defeat a defense set up in the answer could formerly do so by a special replication, but that form of pleading is now disused, and he must now take advantage of the statute by amending his bill, so as to anticipate and avoid the defense. *Tarleton v. Vietes*, 41 D. 193.

A general and comprehensive statement of title may be sufficient where the complainant has no knowledge that such title would be controverted by the defendant; but when the title is impeached by the answer, it is more in accordance with ordinary practice to bring forward by amendment a distinct statement of the title, instead of simply traversing the defendant's answer. *Sanborn v. Kittredge*, 50 D. 58.

A mere clerical mistake of a single figure in a bill in equity the court will permit to

For Index to Notes in American Decisions and American Reports, see Volume I.

be corrected *instantly* upon suggestion unless the opposite party has been misled by it. *Howell v. Ashmore*, 57 D. 371.

Error in overruling a demurrer or admitting evidence is cured by amendment removing the ground of demurrer or of objection to the evidence; as where a bill is filed by one in his own name as assignee of a cause of suit, when it should have been filed in the name of the alleged assignor, and a demurrer interposed on that ground is overruled, and an objection to proof of the alleged assignment is also overruled, and the bill is afterwards amended by making the assignor, or his representative, a complainant. *Huff v. McDonald*, 68 D. 487.

An amendment to a bill does not make a new case, and is properly allowed in a case where the bill is filed by a husband, as sole legatee of his wife, to recover her distributive share in her father's estate, and the amended bill exhibited a marriage contract which secured to him a life estate in his wife's personalty, and to her a separate estate in the remainder; for both titles set out give him the entire interest in the subject-matter. *Blackwell v. Blackwell*, 70 D. 556.

An error in the names of parties to a petition in a probate proceeding may be corrected by an amendment. And where a petition is irregularly presented by the attorneys of the legatees in their own name instead of the name of the legatees, this error may be corrected by substituting the names of the legatees for those of the attorneys. *Lucich v. Medin*, 93 D. 376.

Where the original bill was to compel a guardian to account, and to settle his affairs, an amended bill, which, in addition, to such relief, prayed for a reformation of the guardian's bond, so as to make it payable to the probate judge just elected, where it had by mistake been made payable to the judge whose term had just expired, is not a departure nor demurrable. *Hall v. Hall*, 94 D. 703.

2. *Time to amend.* — Material amendments in equity, as a general rule, should be applied for and made before the cause is at issue. So held where an amendment sought to make a new case, inconsistent with that made by original bill; and in the case of an application to amend a bill for the specific performance of a contract, by charging the contract to be fraudulent, and praying that it be declared void. *Codington v. Mott*, 82 D. 258.

Amendments are not generally allowable, if the parties are at issue upon the points of the original bill, and witnesses have been examined. *Dow v. Jewell*, 45 D. 371.

After a submission of his case on final hearing, a party has no right to the privilege of being allowed to amend. *Hopkins v. Hopkins*, 53 D. 663.

Formal amendments, as the introduction of necessary parties, and amendments in the prayer of the bill to meet the exigency of the case, will be made up to and after the final hearing. *Codington v. Mott*, 82 D. 258.

An application to amend a bill should be promptly made after the discovery of the facts upon which it is based. *Id.*

171. In actions under codes.* — 1. *Generally.* — The true criterion for determining whether an amendment to a complaint is allowable, is to inquire whether the proposed amendment is another cause of controversy, or is upon the same contract or injury. *Maxwell v. Harrison*, 52 D. 385.

The words "as trustee" may be stricken out of a complaint wherever they are added to the name of the defendant, so as to let the suit stand against him individually. *Id.*

The object of the California statute in reference to amendments to pleadings is the furtherance of justice, and to that extent applications for amendments ought to be treated favorably. *Cooke v. Spears*, 56 D. 348.

A plaintiff may so amend his petition as to change the character or right in which he sues, upon the payment of costs, where the change does not deprive the defendant of any defense, or prejudice any right that may have accrued to him at the time of the amendment. *Whitehead v. Heron*, 65 D. 145.

Filing an amended answer that meets objections set out in a demurrer to the original answer is an admission that the demurrer was well taken, and it is not error to proceed to trial upon issues of fact without a decision upon the demurrer. *Shirley v. Fearne*, 69 D. 375.

Where a cause of action instituted at law is one of exclusively equitable jurisdiction, it is the duty of the plaintiff, under the Kentucky code, to amend his pleadings, and move the court to transfer the action to the proper docket. *Cobb v. Stewart*, 83 D. 465.

An amendment to pleadings should be allowed at any stage of the proceedings, when it will not delay the suit nor affect the rights of the adverse party, and a motion to strike from the files ought not to be sustained without first giving an opportunity to amend. *Butcher v. Bank of Brownsville*, 83 D. 446.

The court may amend pleadings by inserting the correct name of a defendant, either before or after judgment. *Parry v. Woodson*, 84 D. 51.

A plaintiff may amend his pleadings by striking out the wrong name and inserting the correct name of defendant. *Parry v. Woodson*, 84 D. 51.

* Amendments allowed under code practice, see note, 84 D. 160-162.

For Index to Notes in American Decisions and American Reports, see Volume I.

A complaint may be amended by striking out the name of one of the complainants. *Murray v. Hay*, 43 D. 773.

A complaint cannot be amended in the supreme court so as to make it correspond with the verdict; but the district court, in a proper case, may, before judgment, direct the complaint to be so amended. *Hooper v. Wells, Fargo & Co.*, 85 D. 211.

Where the plaintiff has two actions pending for the same debt, one in New York and one in New Jersey, and pending the latter suit a judgment in his favor is rendered in the New York suit, he will not be allowed to amend his pleadings from *assumpsit* on the claim to debt on the judgment. *Barnes v. Gibbs*, 86 D. 210.

Where an action is brought before the statute begins to run, a substituted plaintiff cannot amend his complaint and incorporate a new cause of action so as to bar or embarrass the defense of the statute, which might be pleaded against the new cause of action. *Bullion M. Co. v. Cræcus Gold etc. M. Co.*, 90 D. 526.

The provisions of the Wisconsin code respecting amendments of complaint in case of variance do not apply where the complaint states no cause of action. *K— v. H—*, 91 D. 397.

There is no error in allowing plaintiffs to amend a petition so as to increase the amount claimed as damages. *McDonald v. Chicago etc. R. R. Co.*, 96 D. 114.

A defect or omission in a complaint that no person, natural or artificial, is named as plaintiff is beyond the reach of amendment. All proceedings under such complaint are null and void. *Proprietors etc. v. Yellow Jacket S. M. Co.*, 97 D. 510.

The Pennsylvania act of 1806, relating to amendments, extends only to the declaration or plea; and amendments beyond the plea are to be tested by a legal discretion, as at common law. *Diehl v. Adams Co. M. I. Co.*, 98 D. 302.

A proposed amendment to a replication, which would introduce entirely new matter inconsistent with the replication already filed, is not an amendment of form, and its refusal is not error. *Id.*

2. *Discretion of the court.* — The court has discretion, under Alabama code, to allow amendment of complaint after the jury have been instructed; and the judgment will not be reversed on that ground. *Prater v. Miller*, 60 D. 521.

Allowing amendments to pleadings is passed to discretion of court by the California statute declaring that courts may, "in furtherance of justice," permit amendments to be made; but if that discretion is shown by the record to have been abused, in that it has been illegally exercised, it would be the duty of the appellate court to correct it. *Cooke v. Spears*, 56 D. 348.

Under the Indiana statute, the court may, at any time in its discretion and on such terms as may be deemed proper, direct any material allegation to be inserted, struck out, or modified, to conform the pleadings to the facts proved, when the amendment does not substantially change the claim of defense (See 2 R. S., p. 48, sec. 99). *Miles v. Vanhorn*, 79 D. 477.

If facts are developed upon the trial that will enable the defendant to impeach the transaction upon which suit is based, or if he is taken by surprise by these facts, or if other facts have come to his knowledge since making up the issues, or if any other good excuse can be given for not having made them up, so as to admit desired testimony, he should be permitted to amend. But this is a matter of discretion with the court, and will be presumed to have been soundly exercised until the contrary is shown. *Allen v. Ranson*, 100 D. 232.

In making amendments, leave of the court is asked for the purpose only of notifying the adverse party, and preventing surprise. *Teas v. McDonald*, 65 D. 65.

172. *Supplemental bill in equity.* — Proceedings founded on an original bill, so entirely defective that no valid decree can be made, cannot be sustained by a supplemental bill based on subsequent facts. *Candler v. Pettit*, 19 D. 399.

Where a complainant had no ground for proceeding originally, but subsequently becomes entitled to relief, he should file a new bill. *Id.*

A supplemental bill is proper when the original bill is sufficient to entitle the complainant to one kind of relief, and facts afterwards occur giving him a right to other or more extensive relief. *Id.*

A supplemental bill for an injunction may be filed, founded on facts subsequently arising, where the original bill was for a *re exeat* and an injunction, and the injunction was disallowed because the party was not then entitled to it. *Id.*

Where a bill is filed by a mortgagor against the mortgagee, before the mortgage is due, for an injunction to stay waste, the complainant may, after it has become due, file his supplemental bill to have the equity of redemption foreclosed, and the mortgaged premises sold. *Allen v. Taylor*, 29 D. 721.

Leave of the court should be obtained to file a supplemental bill; but where no objection is taken on this ground, it will be considered as waived by the voluntary appearance of the defendant. *Id.*

Complainant's assignee can in no case proceed in the name of the original party, but must make himself a party by supplemental bill. *Mills v. Hoag*, 31 D. 271.

A petition is the proper mode of affecting a fund in equity, where no other parties are to be brought in to litigate the question

For Index to Notes in American Decisions and American Reports, see Volume I.

than such as are or should have been parties to the original bill, though it is otherwise where additional parties are required. *Hays v. Miles*, 31 D. 70.

A bill stating the previous proceedings of the court, not with a view to their alteration or amendment, but as a portion of the facts out of which the complainant's equity arises, is an original bill, though it is alleged to be a supplemental bill. *Brooks v. Brooke*, 38 D. 310.

New averments to a bill in equity are properly alleged in a supplemental bill, and in it any party may be brought before the court who has been omitted to be introduced at the stage of the cause in which an amendment for that purpose may be made. *Dow v. Jewell*, 45 D. 371.

The orators should file a supplemental bill stating the grounds upon which they desired to contest the release, in order to have the matters properly in issue before the court, on the coming in of the answer setting up a release of the defendant's liability, where the orators desire to restrict its operation. *Fletcher v. Jackson*, 56 D. 98.

173. Supplemental complaint under code. — In an action to set aside a conveyance of land from husband to wife as fraudulent, evidence on the plaintiff's part that a mortgage had been executed by the husband and wife on said land after the commencement of the suit, and that the money raised by such mortgage was invested in other real estate in the wife's name, was held to be inadmissible without a supplemental complaint, setting up the facts and asking appropriate relief against such other real estate. *Pite v. Miles*, 99 D. 148.

174. Supplemental answer in equity. — A supplemental answer explaining equivocal expressions in the original answer may be allowed, permitting the first answer to stand. *Murdock's Case*, 20 D. 381.

The court will not permit a supplemental answer to be filed, where the defendant permits the cause to be put at issue upon his answer, asks and obtains a continuance to procure the attendance of a witness, and allows many special and regular terms to intervene, with the privilege of applying to the judge at chambers for any interlocutory order, before asking leave to file such supplemental answer. The time of the application would alone justify the court in refusing the leave asked. *Stout v. Shea*, 42 D. 579.

A supplemental answer will be permitted according to chancery practice, in small and immaterial matters, where a mistake has crept into the engrossment, where new matter has been discovered since filing the original answer, in cases of surprise, and in mistakes of names. *Id.*

Supplemental answers will not be permitted according to chancery practice, where the defendant mistook the law, has unintentionally

perjured himself, and an indictment is suspended over him, and has not failed to set forth his defense in his answer from an inability to state it with precision. *Id.*

The court will not permit a supplemental answer to be filed where it is not in aid or explanation of the answer, but assumes entirely new and distinct grounds of defense, as one resting upon a penal statute of the United States, even though in the petition for leave to file it the defendant has sworn that he intended to swear to the original answer in the sense in which he wished to be permitted to swear to his supplement. *Id.*

Granting of leave to file a supplemental answer, by the court of equity, is matter of discretion, and its action upon an application for such leave cannot therefore be assigned as error, or reviewed on appeal. *Frisby v. Parkhurst*, 96 D. 503.

X. REMEDIES FOR ERRORS AND DEFECTS; WAIVER.

175. General rules. — A defective declaration should be taken advantage of by demurrer, or in arrest of judgment. *Beals v. Olmstead*, 58 D. 150.

An improper blending of several causes of action may be cured by motion to compel an election. *Mooney v. Kennett*, 61 D. 576.

The insufficiency of a declaration cannot be taken advantage of by way of objection to evidence offered in support of the averments in the declaration. *Morehouse v. Northrop*, 39 D. 211.

176. Striking out pleadings, generally. — A plea which sets up in bar of the action an agreement between the parties, without stating what the terms of that agreement were, is defective, and may be properly stricken out on motion. *Mead v. Hughes*, 50 D. 123.

Pleas inapplicable or insufficient may be stricken out, or demurrers to them sustained, without error. *Swafford v. Whipple*, 54 D. 498.

An error in striking out a good plea is cured if the defendant is afterwards allowed to avail himself fully of all the matters of defense on which he saw fit to rely. *Sanders v. Young*, 73 D. 175.

When an amended answer is stricken from the files, the original answer stands as if no amended answer had been filed. *Hill v. Jamieson*, 79 D. 414.

177. Sham pleadings. — A sham answer may be stricken out, although verified. *Hayward v. Grant*, 97 D. 223; or one which does not aver any new matter, but consists merely of denials of knowledge or information sufficient to form a belief as to the several matters alleged in the complaint, if such denials are proved to be false; and this rule

* Striking out answer as sham, see note, 72 D 521-526.

For Index to Notes in American Decisions and American Reports. see Volume I.

applies, though the answer was duly verified. *People v. McCumber*, 72 D. 515.

A defendant may protect himself against unnecessary costs by putting in issue only the allegations in the complaint, or by conceding them to be true, and setting up new matter, thus narrowing the proofs upon the trial; but the plaintiff is protected against sham answers, which may be stricken out on motion. Such answer consists of one good in form, but false in fact, not pleaded in good faith, and which sets up new matter in defense which is false. *Piercy v. Sabin*, 70 D. 692.

178. Frivolous pleadings. — A motion to strike out one defense as "sham" may be united with an application for judgment on another defense as "frivolous." *People v. McCumber*, 72 D. 515.

179. Judgment on the pleadings. — Dilatory pleas being found against the defendant, the judgment must be in chief and peremptory, and he can not go into his defense as upon the general issue. *Boston Glass Manuf. v. Langdon*, 35 D. 292.

A plaintiff is not entitled to judgment on the pleadings, where the defendant denies the right of the plaintiff, and sets up title in himself. *Union Water Co. v. Crary*, 85 D. 145; or if the answer, qualified by an offer of proof upon the trial, sets up a defense. *Lamberton v. Windom*, 90 D. 301.

180. Striking out particular allegations or defenses, generally. — An adverse party may move to strike out unessential parts of pleading under code system, if anything is stated which is not essential to the claim or defense; or in other words, anything that is not an issuable fact. *Green v. Palmer*, 76 D. 492.

An unessential or immaterial allegation is one that can be stricken from a pleading without leaving it insufficient, and need not be proved or disproved. Whether or not an allegation is material may be determined by the question, "Can it be made the subject of a material issue?" In other words, "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material. *Id.*

An averment in a complaint in a foreclosure suit, that the mortgage was executed by defendant (thus alleging in effect that it is a legal mortgage), may be struck out as surplusage if the complaint also sets out a copy of the instrument, which from its face does not appear to be a legal as distinguished from an equitable mortgage. *Love v. Water and Mining Co.*, 91 D. 602.

181. — as irrelevant. — Irrelevant matter in a pleading might be stricken out on the motion of the party prejudiced thereby, prior to the act of 1856 amending the Ohio code of civil procedure. *State v. Harper*, 67 D. 363.

In an action for the seizure and conversion of a bag of gold coin, the complaint, after the usual and only necessary averments, proceeded to detail the manner in which the seizure was made, with the incidents occurring on the street, and everything done by the defendants, the plaintiff, and the "crowd," relating to or constituting the evidence of the wrongful conversion: *Held*, all this narration should have been stricken out as irrelevant and redundant matter. *Green v. Palmer*, 76 D. 492.

In an action for breach of contract, admitted by defendant to be in full force, and to contain an agreed price for certain specified services to be rendered by him, an allegation in his answer as to the value of services rendered is immaterial, and should be stricken out. *Starbuck v. Dunklee*, 88 D. 68.

A plaintiff who regards the denials contained in an answer as insufficient may take advantage of the fact, by a motion to strike them out on the ground that they are sham and irrelevant. *Tynan v. Walker*, 95 D. 152.

Denials contained in an answer may be stricken out, on motion, as sham and irrelevant, when they do not explicitly traverse the material allegations of the complaint. *Id.*

182. — as scandalous. — In equity pleading, words, however disparaging or abusive, are not scandalous unless they are also "impertinent," or in other words, irrelevant, and put in for the mere purpose of scandal. *Henry v. Henry*, 98 D. 87.

183. — as impertinent. — Scandalous and impertinent charges in an answer to a bill will be expunged. Thus, where a bill was filed for the purpose of setting off a judgment recovered by a third person against the defendant, and assigned to the complainant, against a judgment recovered by the defendant against the complainant for slander, and the answer, after denying that the assignment was in good faith, and alleging it to be colorable and without consideration, charged that the assignor of the judgment was the real author of the slander against the defendant, and that the complainant uttered it at his instigation, under a promise of indemnity, in pursuance of which such assignment was made, the latter charge was expunged as scandalous and impertinent, with costs against the defendant. *Sommers v. Torrey*, 28 D. 411.

Counsel signing a pleading containing scandalous and impertinent matter, is liable, it seems, for the cost of expunging it. *Id.*

A defendant is not allowed to put the same matter twice in issue by allegations in different parts of his answer. *Id.*

An allegation that a sale was unjust, iniquitous, and fraudulent, is impertinent, if not accompanied with a statement of the

For Index to Notes in American Decisions and American Reports, see Volume I.

facts, showing wherein the fraud and iniquity consisted. *Baird v. Baird*, 31 D. 399.

184. — as repugnant. — Where a complaint sets out in terms a contract sued on, and also contains an allegation which places a false construction upon the contract, such repugnant allegation may be rejected as surplusage. *Love v. Water & M. Co.*, 91 D. 602.

185. Making allegations more definite and certain. — Common counts for goods sold and delivered, work and labor done, money had and received, etc., are sufficient under the code, as they were under the practice before the code; and if the opposing party objects to this form of pleading, he may, under the code, move to have it made more specific. *Meagher v. Morgan*, 87 D. 476.

186. Waiver of defects by failing to demur. — The legality of a contract set out in a declaration is not open to revision, if defendant has failed to demur. *Reid v. Edwards*, 31 D. 720.

The failure to demur to a bill in equity which states a cause of action in the alternative, one allegation of which is insufficient, and answering the same, is a waiver of such objection to the bill, and can not be taken advantage of on appeal. *Andrews v. McCoy*, 42 D. 669.

An objection to a declaration in tort because laid with a continuando comes too late after issue joined, and trial, and judgment rendered. If the objection is good at all, it should have been made by demurrer. *Great Western R. R. Co. v. Helm*, 81 D. 226.

A defect, if any, in declaring on a sealed instrument by averring simply that the defendant "covenanted" with the plaintiff, without saying "under seal," or using any technical word or phrase which in legal acceptance imports a seal, is one of form merely, and is waived by failing to demur, and pleading over; and it is not error to allow the contract to go to the jury. *Cooke v. England*, 92 D. 618.

187. Effect of pleading to cure prior errors. — 1. *What is cured.* — If the declaration, in an action on a bond for the purchase price bid at a sheriff's sale, omit to allege the sale, it will be bad on demurrer. But such defect will be cured by notice of special matter in defense, wherein is set out the fact of sale. *Friedly v. Sheets*, 11 D. 691.

A bill in chancery should be so certain in setting forth the case as to enable the chancellor to pronounce his decree at once; but if relief is sought on a lost paper, and the complainant mistakes his case the defect may be aided by the answer. *Rankin v. Maxwell*, 12 D. 431.

The objection of multifariousness to a bill in equity which sets up two distinct causes of complaint is obviated by defendants'

answer that they have entirely removed and abated one of them since the filing of the bill. The allegation in the bill may then be deemed stricken out. *Whitney v. Union R'y Co.*, 71 D. 718.

Averments in an answer may cure a petition, defective in material allegations. *Erwin v. Shaffer*, 72 D. 613.

2. *What is not cured.* — An improper misjoinder of two causes of action is not cured by a plea and judgment, where the defendant pleaded the general issue, and then suffered judgment by default. *Whipple v. Fuller*, 29 D. 330.

A misjoinder of causes of action must be corrected by defendant before filing answer, or all objections to this defect are waived. *Chiles v. Drake*, 74 D. 406.

A defect in an answer as to matters of substance is not cured by filing a general replication to the answer. *Byers v. Fowler*, 54 D. 271.

A complaint containing no cause of action cannot be aided by reply. *Bernheimer v. Marshall*, 72 D. 79.

Where the court has no authority to take cognizance of the subject-matter of the suit, the proceedings may be dismissed at any stage of the case when that fact is made to appear; but to take advantage of a personal exemption, the objection should be interposed before pleading to the merits. *Thompson v. Steamboat J. D. Morton*, 59 D. 658.

An objection that equity has no jurisdiction, because there is an adequate remedy at law, comes too late after answer filed, unless it is in a case where equity could not entertain jurisdiction under any circumstances. *Mages v. Magee*, 99 D. 571.

188. Waiver by failure to object. — When a defendant takes issue upon an imperfect pleading and thus makes it necessary for a plaintiff to go through trial, he waives all exceptions of which he might avail himself; but material omissions he cannot waive, for in such case there is no foundation on which the court can render judgment. *Anderson v. Read*, 5 D. 661.

The introduction of proof by the plaintiff at a trial, in support of material averments in his complaint, which were so defectively denied that, upon motion, such denials might have been stricken out as sham and irrelevant, is a waiver of all objections to the sufficiency of said denials; and an instruction to the jury, asked by the plaintiff, to the effect that the facts so averred were admitted to be true for all the purposes of the trial, may properly be refused. *Tynae v. Walker*, 95 D. 152.

A plaintiff waives his objection to the defendants being allowed to appear and plead without giving special bail by joining issue without making the objection, and the appearance bail are discharged. *Culpeper Mfg. Soc. v. Digges*, 18 D. 708.

For Index to Notes in American Decisions and American Reports, see Volume I.

An apparent variance between an instrument introduced in evidence from the one set out in a pleading, is obviated by the failure of plaintiff to object to its introduction, such failure being deemed a confession that the instrument in evidence is relevant to the issue. *Leidig v. Rawson*, 29 D. 354.

An objection to the rejection of pleas is waived by going to trial on those remaining, and taking no exceptions to the ruling of the court below. *Swafford v. Whipple*, 54 D. 498.

In a proceeding for a divorce, where the plaintiff seeks also to have a deed from the defendant to his sister set aside, and for that purpose makes the sister a party, if the sister answers without objection, she must be considered as having submitted her rights under that deed for adjudication in such proceeding. *Feigley v. Feigley*, 61 D. 375.

If a plaintiff declares in assumpsit on a deed, the defendant must take advantage of the irregularity by his pleadings, or at the trial when the instrument is introduced in evidence, otherwise this ground of defense must be treated as waived. *Harris v. Morse*, 77 D. 269.

Any objections to common counts under the code on account of indefiniteness or uncertainty are waived by proceeding to trial. *Meagher v. Morgan*, 87 D. 476.

An irregularity in not answering a special plea is waived if the parties go to trial without objection on the part of the defendant. *Parmelee v. Fischer*, 74 D. 138.

Where a defense must be specially pleaded, the omission to plead it is not cured by the introduction, without objection, of evidence in support of it, and the finding of the facts in relation to it by the court. *McComb v. Reed*, 87 D. 115.

189. — by delay in objecting. — The want of legal precision in stating the defense of usury in an answer can not be objected to after issue joined on such answer. *Chambers v. Chalmers*, 23 D. 572.

Objections that answers are irresponsible to interrogatories come too late at trial. *Nelson v. Iverson*, 60 D. 442.

An objection to the mode of bringing a case before a competent court must be made before a general appearance and plea in bar. *Schenley v. Com.* 78 D. 359.

190. Disregarding harmless errors. — The omission of the word "not" in an averment of non-payment is cured by statute of jeofails; and even if it were not, the declaration would be held good, where it is apparent from the language used that the omission was a mere clerical error. *Baldwin v. Banks*, 71 D. 249.

The plaintiff need not state his cause of action with syllogistic accuracy. If bad grammar does not vitiate a declaration, other faults of style ought not to have that

effect, unless they produce such a degree of obscurity as to give rise to the belief that the tribunal before whom the cause is heard might be misled as to the true issue. *Holt v. Inhab. of Penobscot*, 96 D. 429.

191. Errors cured by verdict. — 1. What is cured. — The general principle of aiding defects in a pleading by intendment after verdict is, that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required proof on the trial of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict. *Roper v. Clay*, 59 D. 314.

If a declaration contain a substantive cause of action, though informally set forth, it will be aided after verdict. *Miles v. Oldfield*, 2 D. 412.

A defect in a petition which should be assailed by demurrer is cured by verdict. *Crossen v. White*, 87 D. 420.

Where there is a defective statement in a pleading which would have been fatal upon demurrer, and where an issue has been joined which necessarily required the proof of such defectively stated fact, and where the verdict could not have been rendered without such proof of such fact, the imperfection or omission is cured by verdict. *Richardson v. Farmer*, 88 D. 129.

After a verdict, the allegations of fraud and deceit in the declaration are equivalent to the charge of an actual scienter. *Osgood v. Lewis*, 18 D. 317.

The omission to allege value makes a pleading demurrable, but will be cured after verdict. *Lune v. Maine Mut. F. Ins. Co.*, 28 D. 150.

The want of alleging a special demand in a declaration, is a defect that is cured after verdict. *Biss v. Arnold*, 30 D. 467.

A variance between a writ and a declaration would be cured by verdict under the old forms of pleading. *Wilms v. White*, 90 D. 113.

Where an act, which the plaintiff was bound to perform within a reasonable time, is alleged to have been done within a reasonable time, to wit, on or about such a day, it is sufficient after verdict. *Nichols v. Blakeslee*, 2 D. 95.

A declaration in an action against a corporation for a tort stating that the act complained of was unjustly and wrongfully done, without alleging that it was not within the scope of the powers of the corporation, is good after verdict. *Chestnut Hill T. Co. v. Rutter*, 8 D. 675.

2. What is not cured. — Where an agree-

For Index to Notes in American Decisions and American Reports, see Volume I.

ment was to convey the party's interest in a certain suit, and (in case the defendant in that suit was not legally bound by his undertaking) then to convey the right of such party to certain land, a declaration charging a refusal to convey the interest in the suit, or the right to the land, without setting forth a failure to recover in the suit, and a subsequent refusal to convey the land is substantially defective, and is not cured by a general verdict assessing entire damages. *Austin v. Whitlock*, 4 D. 550.

A verdict in favor of a pleader establishes the truth of all his material allegations of fact and nothing more, and when a fact material to the plaintiff's right of recovery is omitted altogether from his declaration, or is not so connected with other facts which are stated that the latter cannot be proved without proving the former, the verdict of the jury ascertains nothing in regard to such omitted fact, and cannot aid the declaration. *McCune v. Norwich City Gas Co.*, 79 D. 273.

An allegation of duty or liability in a declaration is of no avail, unless the facts necessary to raise it are stated. It is but the statement of a legal inference never traversable and of no avail in pleading. Such defect is not cured by verdict. *Id.*

PLEDGE: COLLATERAL SECURITY.

[Includes the rights and obligations arising out of the bailment of personal property as security for the payment of a debt, or the performance of some other obligation on the part of the bailor.]

Attachment of thing pledged, see ATTACHMENT, 31.

Distinguished from mortgage, see CHATTEL MORTGAGES, 19.

Of bonds held as collateral, see BONDS, 26.

Of collaterals, see BROKERS, 16.

Of corporate stock, see CORPORATIONS, 34.

Of goods, by factors, see FACTORS, 10.

Power of representatives to make, see EXECUTORS AND ADMINISTRATORS, 66.

Subject of, when reached by execution, see EXECUTION, 29.

I. PLEDGE OR PAWN.

II. COLLATERAL SECURITY.

I. PLEDGE OR PAWN.

1. Power to pledge franchises and rights of a corporation implies, as incident thereto the power to pledge everything that may be necessary to the enjoyment of the franchise and upon which its real value depends. *Phillips v. Winslow*, 68 D. 729.

Where one holding certificates of stock in his own name as "trustee" pledges them for his own debt, the term "trustee" is a sufficient notice to the pledgee of the trust and he takes them at his peril. *Shaw v. Spencer*, 1 R. 115.

The owner of stock certificates, fraudulently pledged by one holding them as trustee, is not estopped from claiming them of the pledgee by standing by, after having notified the pledgee of his claim and demanding the stock, and without protest witnessing the pledgee pay an assessment theretofore made on the stock. *Id.*

2. What constitutes a pledge.* — A pledge is a bailment of personal property, as security for the performance of some obligation. *Stearns v. Marsh*, 47 D. 248.

Shares of corporate stock may be pledged, and although their owner transfers them absolutely in form, yet if the intention of the parties is that the transferee shall hold them only as security for money lent, and that the owner may redeem them at any time (even after the loan falls due) before the lender has exercised his power of sale, the transaction is a pledge, not a mortgage. *Wilson v. Little*, 51 D. 307.

Coupon bonds payable to the bearer may be pledged by the party issuing them, because they are securities usually sold in the stock market, and understood by the parties to be designed for that use, and not because party's ordinary bond or mortgage, deposited as a collateral, could be so regarded, *semble*. *Morris Canal and Banking Co. v. Fisher*, 64 D. 423.

3. Distinction between pledge and mortgage.† — Although a pledge is not technically a mortgage, the subject of it not having been assigned or transferred by an instrument known to the law as such, with a condition of defeasance, yet, where it is given as a security for a debt, it partakes of the nature of a mortgage; and is subject to some of its incidents, including the right of redemption, and no good reason exists why equity should withhold its aid from the pledgor seeking a return of the pledge in a case where the law cannot restore it. *Bryson v. Rayner*, 90 D. 69.

4. Consideration, delivery, etc.‡ — A liability for another on a contract still in force, is a sufficient consideration for a mortgage or pledge; and the ratio of the consideration to the value of the thing pledged is of no importance. *Jewett v. Warren*, 7 D. 74.

Delivery of possession must accompany a pledge of a personal chattel to render it valid. *Fletcher v. Howard*, 16 D. 686; and cannot be dispensed with by merely setting aside the article pledged, or by the pledgor's consenting to act as bailee thereof for the pledgee. *First Nat. Bank v. Nelson*, 95 D. 400.

If the pawnee immediately redelivers the

* Definition and nature of a pledge, see note, 49 D. 730.

† Distinguished from mortgage, see notes, 49 D. 731; 51 D. 313, 314.

‡ Delivery essential to constitute, see note, 49 D. 731-733.

For Index to Notes in American Decisions and American Reports, see Volume I.

thing pledged to the pawnor the special property therein created by the bailment is determined. *Fletcher v. Howard*, 16 D. 686.

Pledge of a steamboat need not be recorded, and the lien of the pledgee, who remains in possession, even without registering or recording it, is superior to that of a subsequent bona fide execution creditor. *Thoms v. Southard*, 28 D. 467.

5. Relative rights of the parties. — The relation of pledgor and pledgee is a legal relation; its rights and duties are defined by law; and the remedies for a violation of such duties are ordinarily in a court of law. *Maryland F. Ins. Co. v. Dabrymple*, 89 D. 779.

A general owner having possession of a pledge may lawfully dispose of it or maintain trespass for it. *Fletcher v. Howard*, 16 D. 686.

6. Rights and duties of pledgee, generally.* — A specific pledge or appropriation of goods, with intent that they shall be a security for payment, vests the property in them, as soon as deposited with a bailee, in the person to whom they are to be delivered. *Desha v. Pope*, 41 D. 76.

The duty of the pledgee is to safely keep property pledged, without using it, and without causing detriment thereto. *Stearns v. Marsh*, 47 D. 248.

A pledge of personal property passes to the pledgee merely the possession, with a right of retainer until the debt is paid, or other engagement is fulfilled, for which the article pledged is given as security. *Luckette v. Townsend*, 49 D. 723.

The amount due from a factor is in nature of a fund provided for pledgee's benefit by the pledgor, and which the pledgee is not at liberty to wholly disregard, and claim the entire balance of his debt as if no means of satisfaction had ever been at his command, where he has the superior right to pursue the fund by virtue of an understanding that the goods received by him should be disposed of through a factor, and the debtor credited with the amount of sales. *Bigelow v. Walker*, 58 D. 156.

The pledge of personal property is a "mortgage" thereof within the attachment act, the word being therein used in a general sense meaning security; and by receiving such pledge as security for a debt, the creditor gives up his right to enforce his debt by attachment. *Payne v. Bensley*, 68 D. 318.

7. The care and diligence required. — If a pawn is lost the pledgee can not recover on the debt for which it stood as security, without showing that the loss was in no wise attributable to any want of necessary care and diligence upon his part. *Orocker v. Monroe*, 36 D. 660.

* Duties and liabilities of pledgees, see note, 49 D. 785-738.

Remedies of the pledgee, see note, 79 D. 499-506.

The bailee of a pawn is bound for ordinary care and answerable for ordinary neglect. If a theft of the pawn is occasioned by his negligence, he is responsible; if without any negligence, he is discharged from liability. *Petty v. Overall*, 94 D. 634.

The care required of a pledgee is that of a prudent administrator; he is not subjected to the requisition of the most exact diligence. *Commercial Bank v. Martin*, 45 D. 87.

A detriment happening to pledged property may be set off against the debt. *Stearns v. Marsh*, 47 D. 248.

8. Lien of pledgee. — The lien on personal property left in pledge or subject to an equitable lien, may be enforced in equity, if the property has been taken by the debtor from the pledgee. At law the lien incident to a pledge depends upon possession. *Coleman v. Shelton*, 16 D. 639.

The pawnee by giving up possession of the pawn, though for a special purpose, loses his lien, and cannot recover the pawn from an innocent purchaser of the pawnor. *Bodenhammer v. Newsom*, 69 D. 775.

The pledgee of goods loses his lien thereon by surrendering possession of them to a third person and taking from him a written guaranty of the debt. But such third person acquires a new lien on such goods, not only for the security of his own debt, but as an indemnity against the liability which he incurs to the pledgee, provided the pledgor, who is indebted to him, consents to the transaction, when it is made, or ratifies it afterward. And when the pledgor was absent when the transaction took place, but, on being informed of it the next day, expressed his gratification with the arrangement, this is a sufficient ratification thereof. *Treadwell v. Davis*, 94 D. 770.

9. His right to sell, assign, or transfer thing pledged. — Where the pledge is for an indefinite period, the pawnor should be called on to redeem before the pawnee can dispose of the property, and if he is absent, or cannot be found, judicial proceedings should be had to bar his right of redemption. *Garlick v. James*, 7 D. 294.

Sale of a pledge at the maturity of a debt is not required, under an instrument executed by pledgee to pledgor, simply dispensing with notice to the latter to redeem before sale. *Robinson v. Hurley*, 79 D. 497.

A sale of a pledge by the pledgee before the maturity of a debt secured thereby, if unauthorized by the agreement, renders the pledgee liable for a breach of trust, though he afterwards purchases other articles of the same kind and value to replace those sold. *Dykens v. Allen*, 42 D. 87.

An express authority in a contract to sell a pledge for non-payment of the debt at maturity excludes any implied authority to sell at any other time. 1*b*.

For Index to Notes in American Decisions and American Reports, see Volume I.

A pledgee holding a pledge as collateral security may, after the debt falls due, elect one of three remedies: 1. Proceed personally against pledgor for his debt, without sale of pledge; 2. File a bill in chancery for a judicial sale under a regular decree of foreclosure; 3. Sell the pledge without judicial process upon reasonable notice to debtor to redeem. *Robinson v. Hurley*, 79 D. 497.

A pledgee can not sell the pawn without demanding payment of the debt and giving notice to the pledgor of the time and place of sale. *Wilson v. Little*, 51 D. 307.

A pledgee, upon the failure of the pledgor to redeem, may either sell the articles pledged, under a judicial decree, or at auction, upon giving reasonable notice to the pledgor to redeem, and apprising him of the time and place of sale. *Luckett v. Townsend*, 49 D. 723; *Stearns v. Marsh*, 47 D. 248.

A pledge is not forfeited by non-payment of the debt at the time stipulated; but the pledgee may then proceed to sell the property to pay his debt, interest, and expenses. The residue, if any, must be paid the pledgor. *Stearns v. Marsh*, 47 D. 248.

A pledgee has in no case an authority to sell, without judicial process, unless he first gives the pledgor personal notice to redeem, and of the intended sale. *Id.*

A pledgee is bound to notify the pledgor of the intent to sell a pledge, after default in payment, and of the time and place of sale, in the absence of a contract to sell *ex mero motu*. *Davis v. Funk*, 80 D. 519.

If a pledgee sell the property without giving notice to the pledgor, the latter may recover the value of the property from the former without tendering payment of the debt. *Stearns v. Marsh*, 47 D. 248; *Luckett v. Townsend*, 49 D. 723; *Wilson v. Little*, 51 D. 307.

Consent that the pledge may sell without giving notice does not relieve him from the necessity of demanding payment of the debt before he sells. *Wilson v. Little*, 51 D. 307.

A stipulation in a contract of pledge, to the effect that upon the pledgor's failure to make prompt payment, the title should become absolute in the pledgee, is void. *Luckett v. Townsend*, 49 D. 723.

The measure of damages in an action for wrongfully selling a pledge, discussed in a case where there had been negotiations between pledgor and pledgee of stocks for a payment of the debt and a return of similar stocks to those which the pledgee had received and sold, pending which, such stocks had risen in value; and—*held*, that the pledgor was entitled, under such circumstances, to recover the highest value down to the time when the negotiations were broken off. *Wilson v. Little*, 51 D. 307.

Where a debtor leaves property with his creditor as security for a loan, with direc-

tions to sell it, deduct his debt, and pay the balance to the debtor, and the creditor, instead of doing so, exchanges it for other property, the property got by the exchange does not necessarily belong to the creditor, nor is it necessarily liable to attachment for the payment of his debts. The right of property is determined by the debtor's ratification or repudiation of the contract of exchange. *Strong v. Adams*, 73 D. 305.

If the subject of a pledge is divisible, and the pledgee sells more than is necessary to satisfy the debt, he is liable in damages to the pledgor; the pledgor's acceptance of the surplus of such sale will not defeat his right to recover such damages; and the measure of damages is the difference between the price for which the excess was sold and the price necessarily paid by the pledgor to replace it. *Fitzgerald v. Blocker*, 29 R. 3.

10. Duty to return subject of pledge. — The pledgee must redeliver the identical article pledged, where it is distinctive in its character, and capable of being recognized among other things of a like nature, or where a mark is set upon it with a view to its discrimination, but not, where, from its very nature, it is incapable of identification if once mingled with other things of the same kind. *Gilpin v. Howell*, 45 D. 720; and for a failure to do so renders himself liable in trover, for the full value of the property pledged, without any deduction for his debt. *Ball v. Stanley*, 26 D. 263; and equity may be invoked for this purpose where the law fails. *Bryson v. Rayner*, 90 D. 69.

The pledgee of certificates of stock is not required to keep and return the identical shares pledged. *Gilpin v. Howell*, 45 D. 720.

The pledgee is bound to restore the pledge in the condition in which he received it, on payment of the debt. *Stearns v. Marsh*, 47 D. 248.

11. Liabilities of pledgee, generally. — The profits of the labor of a slave pledged for the payment of a debt must be accounted for by the pawnee, in the absence of an agreement to the contrary; and if such profits have discharged the debt, the pawnor is entitled to the possession of the slave. *Geron v. Geron*, 50 D. 143.

A borrowed of B two hundred dollars, and to secure payment pledged a negro slave, whose services were worth sixty dollars a year. A paid B the money borrowed, and received back the slave. A then demanded of B satisfaction for the services of the slave, and upon refusal, brought his action, declaring upon a *quantum meruit*, and also for money had and received. He was held entitled to recover; and the measure of damages is the excess of the value of the slave's services above the interest of the sum borrowed. *Houston v. Holliday*, 5 D. 522.

For Index to Notes in American Decisions and American Reports, see Volume I.

In an action brought by a pledgee to recover the amount of his debt, the pledgor may, under the plea of *non assumpsit*, show that the plaintiffs ought not to recover, because they have converted the pledged property by an unlawful sale thereof. *Stearns v. Marsh*, 47 D. 248.

12. When liable for conversion. — Where an article pledged is a specific chattel there is an ample remedy at law by replevin if the pledgee retains the possession, or by trover or *assumpsit* in case he has parted with it. *Bryson v. Rayner*, 90 D. 69.

The pledgee may recoup the amount of his debt when sued for the conversion of the pledged property, or for any tort with respect thereto. *Stearns v. Marsh*, 47 D. 248.

The measure of damages for the conversion of a pledge by pledgee is the value of the pledge at time of conversion. *Robinson v. Hurley*, 79 D. 497.

13. Pledgor's right of action as against third persons. — A purchaser from a pledgee of an article given in pledge acquires no greater title than his vendor had at the time of conveyance. *Luckette v. Townsend*, 49 D. 723.

A debtor may repudiate his creditor's exchange of pledged property by bringing an action, within a reasonable time, to recover the original property pledged by him to secure his debt. *Strong v. Adams*, 73 D. 305.

A debtor may ratify his creditor's exchange of pledged property by bringing an action, within a reasonable time, to recover the property got by the exchange, and against one who has attached it as the creditor's property, unless there is evidence inconsistent with that of ratification. *Ib.*

14. Pledgee's right of action against third persons. — Where an action by a pledgee for the conversion of goods is against a stranger, the plaintiff is entitled to recover the full value of the goods. But if the goods be converted by the owner or by any one acting in privity with him, the pledgee can recover only the value of his special interest in the goods pledged. *Treadwell v. Davis*, 94 D. 770.

Where a sheriff violates the law in seizing goods pledged, under an attachment against the pledgor, in an action against him by the pledgee, he will be liable to the latter for the entire value of the goods. *Ib.*

A pledgee may maintain an action in his own name upon a promissory note payable to order, transferred, after its maturity without indorsement by the payee, as collateral security for the payment of a debt due on a certain day, where the pledgor has made default in the payment of the debt which it was pledged to secure. And no demand by the pledgee is necessary, in such case, to enable him to sue. *White v. Phelps*, 100 D. 190.

For the purpose of borrowing money from B, to form a limited partnership, A executed an instrument pledging to B all his interest in the limited partnership of A and C, A to remain in possession, but to make an assignment of his interest on demand. The proposed partnership was formed, but under another name, including additional parties. B lent the money to A, who contributed it to the capital of the partnership. No assignment was ever made nor demanded. A died insolvent, but upon the subsequent winding up of the partnership a balance of profits remained, and A's share thereof was paid to his executor. Upon distribution of said fund — held, that B was entitled to receive the amount of the pledge to the exclusion of a general creditor of A. *Collins' Appeal*, 52 R. 479.

15. Pawnbrokers. — A statute making it a misdemeanor for any pawnbroker to exact interest at the rate of more than two per cent a month is not within the constitutional prohibition of special laws regulating the rate of interest. *Ex parte Lichtenstein*, 56 R. 713.

One who lends money of his own or of others, and takes security by mortgage on real or personal property, or by stocks, bonds or notes, is not a pawnbroker. *Chicago v. Hulbert*, 59 R. 400.

II. COLLATERAL SECURITY.

16. Rights of the parties, generally. — A promissory note of a third person, deposited by a debtor with his creditor as collateral security for a debt, is a pledge in which the pawnee has merely a special property, the general ownership remaining in the pawnor. *Garlick v. James*, 7 D. 264.

The taking of collateral security for the payment of a debt affords no implication that the creditor is to look to it only or primarily for the payment of the debt. The debtor's obligation to respond in his person and property is the same as if no security had been given. *Rogers v. Ward*, 85 D. 710.

If a debtor, at or immediately after an execution or an assignment of a mortgage on his property to a creditor, transfers to him a policy of insurance against fire on the mortgaged premises, though nothing be expressed at the time, or it is transferred as collateral security generally, it is a conclusion of law that the policy is to be held by the creditor as collateral security for the mortgage, and it requires an express agreement to authorize the assignee to apply the insurance money, in case of loss, to any other debt or liability; and so the jury should be instructed. *Buckley v. Garrett*, 100 D. 564.

* Right of pawnee to sell or dispose of goods pawned, see note, 93 D. 42.

For Index to Notes in American Decisions and American Reports, see Volume I.

17. — of the debtor. — Money collected by a creditor on a note received as collateral security, which the creditor has power to convert into money, operates *pro tanto* as payment of the secured debt. *Hunt v. Newera*, 26 D. 616.

The surplus of money so collected is money had and received to the use of the beneficial owner of the note, which the law implies a promise to pay over on demand. *Ib.*

A special demand is unnecessary before bringing an action on such implied promise. *Ib.*

Interest is collectible only from the service of the writ, in such a case, in the absence of a special demand. *Ib.*

Where stock is held as collateral security for the payment of a promissory note which is indorsed by a third person, and the holder, without the consent of the original owner of the stock, releases the indorser for the purpose of making him a witness in a suit in equity by such owner for the recovery of the stock, the stock will be thereby released, and cannot be held for the purpose of enforcing payment of the note. *Denny v. Lyon*, 80 D. 463.

18. — of the holder.* — The holder of collateral security cannot appropriate it in satisfaction of the debt at his own option, unless in pursuance of a contract to that effect. *Diller v. Brubaker*, 91 D. 177.

One with whom an insurance policy is deposited as security has a lien thereon at law. *Wells v. Archer*, 13 D. 682.

The application of a surplus arising from a sale of securities may be made *pro rata* to all liabilities mentioned in a letter by the debtor to the pledgee, directing him to hold the stock as a general collateral security for all the pledgor's liability to the pledgee at present existing or which may hereafter be incurred by him. *Eichelberger v. Murdock*, 69 D. 140.

The pledgee of a promissory note may maintain an action against a pledgor for the conversion of the note, where the latter has obtained the note, though without fraud, under an agreement that he is to return it or another note, which agreement he refuses to comply with. *Way v. Davidson*, 74 D. 604.

The assignment of shares of railroad stock is collateral security for a pre-existing debt, not contracted on the faith of the security, confers upon the assignee no better title than his assignor had, and he takes subject to equities. *City of Cleveland v. Bank of Ohio*, 88 D. 445.

The person holding collateral securities is not bound to resort to them before suing upon his principal claim, but when that claim is satisfied, he may be compelled to

release or reassign the collaterals. *Walker v. Finnegan*, 90 D. 243.

If after allowing a set-off of a note secured by collaterals the defendant is still found in debt to plaintiff, the latter has other remedies to recover the collaterals if the defendant should see fit to withhold them; but if the set-off brings the plaintiff in debt, the defendant may properly hold them for the balance. *Ib.*

19. Liabilities of holder. — A creditor to whom claims are transferred as collateral security, is bound to use ordinary diligence in collecting them, and is liable for loss resulting from his failure to do so; but if the transfer merely authorizes such creditor to receive the proceeds of the claims when collected, and apply them to the payment of his debt, he is not bound to prosecute their collection. *Miller v. Gettysburg Bank*, 34 D. 449.

Where one receives a note as collateral security for an existing debt, the general rule is, that the party receiving such note must use ordinary care and diligence in collecting it; and if any loss should happen to the other party, by reason of a want of such care and diligence, the law will compel him to make good the loss. *Roberts v. Thompson*, 82 D. 465.

Where a creditor holds a collateral security for the protection of his debt, and the collateral is lost by the insolvency of the debtor in the collateral instrument, through the negligence of the creditor, the latter is liable for the loss to his own debtor. *Hanna v. Holton*, 21 R. 20.

Plaintiff assigned to defendant, as collateral for money lent, a judgment, the lien of which expired September, 1873. The defendant neglected to revive his lien, and the judgment debtor sold his land in 1866, and the judgment was lost. *Held*, 1. That the defendant was liable to plaintiff for the judgment, and 2. That (the judgment debtor being solvent when his land was sold) the statute of limitations began to run from the time of the sale, and not from the expiration of the lien. *Ib.*

A declaration alleged that the plaintiff delivered stock to the defendant as collateral security for the payment of his note, the defendant undertaking to redeliver it on payment; that at the maturity of the note the plaintiff was ready and willing to pay it, and demanded the stock, but was informed by the defendant that it was lost; that some fifteen months afterward the stock was found and the note was paid; that owing to the delay the plaintiff lost a sale of the stock which he had contracted to make to his damage. *Held*, no cause of action. *Cummock v. Newburyport Savings Inst.* 56 R. 679.

20. Right to sell collaterals. — The holder of collateral security cannot sell it

*Holder of negotiable paper as collateral security, and diligence which he must exercise for its collection, see note, 34 D. 451, 452.

For Index to Notes in American Decisions and American Reports, see Volume I.

without first giving notice to the pledgor of his intention to do so, in order that the pledgor may have an opportunity to redeem. *Diller v. Brubaker*, 91 D. 177.

The sale of hypothecated stock to satisfy a loan need not necessarily be made at public auction. A sale by the pledgee at the board of brokers, publicly and fairly made, would be legal and valid, and if made to a third person, and not to himself, would vest a good title in the purchaser, and terminate the bailment, where default has been made and notice dispensed with by the contract of the parties. *Maryland F. Ins. Co. v. Dalrymple*, 89 D. 779.

In the absence of any express agreement to the contrary, it is necessary for the pledgee before exercising a power of sale to give notice to the pledgor of the time and place of sale; but this rule has no application to a case where such notice is dispensed with by the contract of the parties. *Id.*

In absence of a special authority, it is the duty of pledgee of hypothecated stock to dispose of it at public sale, after a reasonable notice to the public of the time and place of sale, or at the public stock board; but special authority will enable the pledgee to sell at private sale and without notice. *Bryson v. Rayner*, 90 D. 69.

The sale of collateral security must be public, and the notice of the sale given to the pledgor must specify both time and place. *Diller v. Brubaker*, 91 D. 177.

Notice given on November 13th is sufficient authority for the pledgee to sell hypothecated stock on November 20th, where by the terms of the contract between the parties the loan was payable on one day's notice, and if not paid according to the agreement the defendant was authorized, without further notice, to sell the stock pledged for the purpose of satisfying the same. *Maryland F. Ins. Co. v. Dalrymple*, 89 D. 779.

By the words of a written agreement authorizing a pledgee of hypothecated stock, upon default, to sell without further notice, it is to be understood that when the power to sell arose all notice of the time and place of sale was waived and dispensed with by the pledgor, leaving upon the pledgee the obligation to sell publicly and fairly for the best price he could obtain. *Id.*

If a pledgor of hypothecated stock gives the pledgee a written authority to sell such pledge in case it is not redeemed at a day specified, or to give the same "to any broker to sell on that day," and the pledge is not redeemed on the day specified, a sale made by a broker thereafter at private sale, for the full market price of the stock at that date, is in conformity with the authority, and valid. *Bryson v. Rayner*, 90 D. 69.

A bank holding the bonds of a railroad company as collateral security may sell

them for the payment of the debt secured thereby, if the sale be made to a third person, but the bank itself cannot become the purchaser thereof, either at private or public sale. *Bank of Old Dominion v. Dubuque etc. R. R. Co.*, 74 D. 302.

If a bank holding bonds as collateral security sells them at public sale, and itself becomes the purchaser, no title passes by such sale, but the bank will be considered as still holding them under its original title as collateral security for the payment of the debt due to it from the owner of the bonds. *Id.*

If a pledgee of hypothecated stock sells it at public stock board, upon pledgor's failure to redeem, and himself becomes the purchaser thereof, and continues to hold such stock, he will be regarded as still maintaining the character of bailee, and as holding the pledge to secure the payment of the loan with interest, and will be required to account for all dividends on the stock received by him in the meantime. *Bryson v. Rayner*, 90 D. 69.

A pledgor of hypothecated stock is not entitled to recover in an action *ex delicto* where such stock has been sold by a valid contract breaking up the bailment, and where there has been no violation of the contract of bailment on the part of the pledgee, nor any tortious conversion of the stock. *Maryland F. Ins. Co. v. Dalrymple*, 89 D. 779.

Stock was pledged on August 13, 1860, as collateral security for the repayment of a loan upon one day's notice; the pledgor agreed, in writing, that if said loan was not paid according to agreement, that the pledgee was authorized, without further notice, to sell the stock pledged, for the purpose of satisfying the loan; sufficient notice to pay was given, and the pledgor made default; the pledgee then sold the stock on November 20, 1860, but bought it in himself; nothing further was done, and the pledgor continuing in default, the pledgee, in the spring of 1862, caused the stock to be publicly sold at the board of brokers, and it was transferred to the several purchasers; on the 16th of April, 1861, the pledgee had received a dividend on the stock. *Held*, that the sale of November 20, 1860, being inoperative, and the plaintiff continuing in default, the power to sell conferred by the contract still continued, and was, in fact, executed by the sales made in 1862, which ended the bailment; but that the pledgor would have the right to recover, in an action *ex contractu*, any excess which might have remained in the hands of the pledgee arising from the proceeds of the sale of the stock in 1862, including the dividend received on April 16, 1861, with which the pledgee would be chargeable, after deducting the amount of the loan and interest due at

For Index to Notes in American Decisions and American Reports, see Volume I.

that time, and such excess would simply be money had and received by the pledgee to the use of the pledgor, under and in conformity with the contract. *Ib.*

The custom has grown up in New York of selling hypothecated stock at the Merchants' Exchange, and that usage has been sanctioned by the courts. *Ib.*

Where a pledgee, at the public stock board, sells stock which he has taken and held as collateral security for loans made to the pledgor, the transaction constitutes a valid public sale, where no fraud appears in it. *Bryson v. Rayner*, 90 D. 69.

A pledgee who takes shares of corporate stock as collateral security for a promissory note, with authority to sell in case of the non-payment of the note, is not bound to sell upon default in the payment of the note, and is not liable for a loss occasioned by a depreciation in the value of the stock occurring after the default. *Rozet v. McClellan*, 96 D. 551.

Whether the foreclosure and sale of a negotiable instrument held in pledge can be decreed in satisfaction of the debt for which it is held, under ordinary circumstances, *quære*. *Donohoe v. Gamble*, 99 D. 399.

The foreclosure and sale of a negotiable instrument held as a pledge is authorized, when the maker resides in a remote country or a different state, and it does not appear that he has any property within the jurisdiction subject to seizure and sale. *Ib.*

21. Wrongful disposal of collaterals. — A pledgee's sale of hypothecated stock to himself to satisfy a loan is contrary to the faith of the bailment, is forbidden by the common law, and may be treated by the pledgor, at his election, as a tortious conversion of the property; but if he make no election, there is no such conversion. *Maryland F. Ins. Co. v. Dalrymple*, 89 D. 779.

Where a pledgee's sale of hypothecated stock, made on November 20, 1860, did not operate to vest a title in the pledgee, because he himself was the purchaser, or to work a conversion of the stock, because the pledgor did not elect to so treat it, the bailment continued; and if nothing more had been done subsequently, that is, no valid sale made, and the stock had remained in the pledgee's possession, a tender and demand made on December 16, 1862, would have been valid, and the refusal on the part of the pledgee at that time would have given a good cause of action to the pledgor. *Ib.*

Equity alone can afford relief, by ordering a retransfer of the pledged stock of an incorporated company, where the shares have been transferred upon the books of the corporation, and stand in the name of the pledgee as legal owner. The law falls short of the remedy to which the pledgor is entitled. *Bryson v. Rayner*, 90 D. 69.

Where an agent fraudulently misappro-

priates negotiable collaterals deposited with him on a loan of the principal's money, the borrower offering to pay the loan at maturity, the principal is liable to him for the value of the collaterals at that time. *Reynolds v. Witte*, 38 R. 678.

22. Rights of purchasers in good faith. — A party, by pledging negotiable securities transferable by delivery loses all right to the securities when transferred by the pledgee in good faith to a third party. *Coit v. Humbert*, 63 D. 128.

Warrants drawn by officers of the government upon its disbursing officers, having been pledged, may be held against the original owner by one acquiring them in good faith from the pledgee. *Ib.*

B., an officer of the corporation in this case, and who had signed the compromise agreement, had transferred two of its bonds to a bank as collateral security for a note, and informed P. of their situation; P. furnished B. money, and authorized him to buy the bonds for him (P.), which B. did; *held*, that under all the facts upon this point, it was not a loan of money by P. to B., and a purchase of the bonds of B.; that P. derived his title by purchase from the bank, and not from B.; and that the fact that afterwards there was an agreement between P. and B. that B. with P.'s money should purchase securities for P., and if any profit was made, B. should have a share of it, even if the arrangement included these bonds, would not necessarily change the character of this transaction, although it might, as evidence, have some bearing upon the question of fact as to what the real character of it was. *Miller v. Rutland etc. R. R. Co.*, 94 D. 413.

23. Taking negotiable paper as collateral. — The cases of persons who receive negotiable paper as collateral security, are not governed by the strict rules of the commercial law, applicable to negotiable paper, but fall under the general law of agency, which must determine the rights and liabilities of the parties. However, if the parties make a special agreement, they will be bound by its terms. *Roberts v. Thompson*, 82 D. 465.

A party to whom has been assigned, as collateral security, a promissory note, payable on or before a certain date, under an agreement by which demand and notice of non-payment are waived, is under no obligation to demand or insist upon payment of the note before it becomes due. This is so, although the maker of the note expressed a willingness to pay it, and the holder might have collected it by insisting upon payment. *Ib.*

A pledgee of negotiable paper as collateral security is bound to ordinary diligence to preserve the legal validity and pecuniary value of the pledge, and must take active measures to prevent a loss by insolvency of

For Index to Notes in American Decisions and American Reports, see Volume I.

parties liable upon the collateral note. He is liable to the extent of such loss occasioned through his negligence. *Lamberton v. Windom*, 90 D. 301.

Whether negotiable paper is held in mortgage or pledge, which is indorsed to and held by a creditor as a security for the payment of a debt, without any other express agreement, *quære*. *Donohoe v. Gamble*, 99 D. 399.

A pledgee of negotiable paper has generally a right to collect the whole amount of securities pledged to him, and account to the pledgor for the surplus over his debt. But in case of accommodation paper pledged, the pledgee can recover of the maker only the amount of the debt due him from the pledgor. *Atlas Bank v. Doyle*, 11 R. 219; 98 D. 368.

One to whom a promissory note is pledged as collateral security for a debt, unless specially authorized, cannot sell the same on default, but is bound to collect it at maturity, and apply the proceeds to the debt. *Joliet Iron Co. v. Scott Fire Brick Co.*, 25 R. 341.

The plaintiff assigned to the defendant two promissory notes as collateral security. The defendant got judgment on the notes, and sold the maker's real estate on the judgment in execution, without the knowledge of or notice to the plaintiff, for about one twentieth of its value; the defendant's minor daughter bidding it in at his suggestion, there being no other bidders present. The defendant afterward got judgment against the plaintiff for the balance. In a suit to restrain the collection of that judgment, — *held*, that the defendant must be restrained and account for the loss. *McQueen's Appeal*, 49 R. 592.

24. *Redemption*. — The note of a third person indorsed and delivered as security to a creditor for the payment of a debt due from the payee, no time for redemption being specified, may be collected by the creditor if not redeemed before it becomes due. *Hunt v. Newsa*, 26 D. 616.

The question as to whether the debtor's right of redemption of such note is forfeited if not exercised in his life-time, does not arise, where the note is collected in the life-time of both parties, and there has been no demand or tender of the amount of the debt secured. *Id.*

If a pawnee has two remedies, to sell at law after default and notice, or to foreclose in equity, no reason exists why a pledgor should not be furnished with the equitable remedy to redeem. *Bryson v. Rayner*, 90 D. 69.

One to whom shares of stock had been pledged as collateral security sold them wrongfully, but for the full market price at the time. Upon a bill in equity to redeem the shares, *held*, that the plaintiff was enti-

tled to be placed in the same position as if the sale had not been made; and that the defendant might be charged with the value of the shares at the time of filing the bill. *Fowle v. Ward*, 18 R. 534.

Stock was pledged in 1871, the pledgee advancing money on it from time to time while its value fluctuated from twenty cents on the dollar up to, but never more than the amount advanced. In 1881 the pledgee sold it for less than the amount advanced. In 1884 the pledgor sought to redeem and to hold the pledgee accountable for its value, greatly appreciated after the sale. *Held*, that his bill should be dismissed on account of the staleness of the demand. *Gilmer v. Morris*, 60 R. 85.

POISON.

Sales of, by druggists, see *APOTHECARIES*, 2.

POISONING.

See *CRIMINAL LAW*, 29.

POLICE DEPARTMENT.

See *MUNICIPAL CORPORATIONS*, 86.

POLICE POWER.

Of state, what statutes are within, see *STATUTES*, 28.

POLICIES OF INSURANCE.

Actions on, see *INSURANCE*, 5.

Execution of, see *INSURANCE*, 4.

Of marine insurance, see *INSURANCE*, 90-101.

Parol evidence to explain, see *EVIDENCE*, 121.

Reformation of, see *EQUITY*, 39.

POLLING THE JURY.

See *TRIAL*, 101, 200.

POLLUTION OF RUNNING WATER.

Restraining, see *INJUNCTION*, 24.

PONDS.

Lands bounded on, see *BOUNDARIES*, 16.

POOR AND POOR-LAWS.

[Includes the validity and interpretation of poor-laws, and the relief and maintenance of paupers, either at public expense, or at the charge of kindred liable therefor.]

Effect of bankrupt act on poor-laws, see *BANKRUPTCY*, 7.

I. SUPPORT AT PUBLIC EXPENSE.

II. COMPELLING SUPPORT BY KINDRED.

I. SUPPORT AT PUBLIC EXPENSE.

1. *Constitutionality of poor-laws*. — A state statute authorized two overseers

* Constitutionality of statutes awarding custody of poor children to overseers of poor, see note, 56 R. 456-462.

For Index to Notes in American Decisions and American Reports, see Volume I.

of the poor in any town, by writing under their hand, to commit paupers and vagrants to the workhouse. *Held*, in violation of the fourteenth amendment to the constitution of the United States, as it deprived a person of liberty without due process of law. *Portland v. Bangor*, 20 R. 681.

Where the state constitution declares that the counties shall respectively provide for their paupers, an act to establish and maintain a state asylum for the poor and maimed of the state is not warranted by a constitutional provision for "institutions for the insane, blind, and deaf and dumb, and such other benevolent institutions as the public good may require." *State v. Hallock*, 33 R. 589.

2. Liability of town for support. — A verdict and judgment against a town in an action for the support of a pauper, though rendered after the act of incorporation, are evidence of the reputation of the place as a town, if they were founded on a claim and settlement of a prior date; and they are admissible to rebut the presumption that the town was not incorporated before, though they would have no tendency to prove an incorporation fifteen years prior to the act of incorporation. Their effect would not be modified by the fact that the plaintiff in the action afterwards supported the same pauper; and such fact would have no tendency to rebut the effect of the verdict and judgment as evidence of the reputation of the corporate character of the town. *Bow v. Allentown*, 69 D. 489.

3. Rights of town incident to the liability. — The issuance of a warrant on incompetent testimony is merely erroneous, and does not render the proceeding void, as where the warrant is issued solely on the testimony of the wife of the person whose property is seized thereunder. *Downing v. Ruger*, 34 D. 223.

A town liable for the support of a poor man can not maintain an action against him by whose fraudulent act he was reduced to poverty. Only the party defrauded is entitled to an action, either at law or in chancery. *Milton v. Story*, 34 D. 671.

Townships advancing money to relieve indigent persons may recover the same from the person or municipal authority obligated to support such persons only in case of a neglect of such obligation or a refusal to support such persons. *Ashland Co. v. Richland Co. Infirmary*, 70 D. 49.

4. Powers and duties of officers. — Overseers of the poor are a corporation for certain purposes, and for the execution of their trust may sue and be sued and are liable in debt for the obligations contracted by their predecessors. *Todd v. Birdsall*, 13 D. 522; *Chapline v. Overseers*, 30 D. 504.

Where, pending a motion against their predecessors for moneys officially received

and unaccounted for, the plaintiffs' term of office expires, their motion does not abate, but they may proceed and prosecute it, being themselves accountable to their successors for the money recovered. *Chapline v. Overseers*, 30 D. 504.

The presumption is that a town has two overseers of the poor until the contrary appears, where the statute requires each town to elect two. *Downing v. Ruger*, 34 D. 223.

One or two overseers of the poor may, by consent of the other, act alone, as the agent or deputy of both, in applying for and executing a warrant, under the statute, against the property of one who has absconded, leaving his family chargeable to the town, and the consent of the other overseer will be presumed, if the warrant is regular on its face, and recites an application by both. *Id.*

The presumption that an overseer of the poor acted regularly, and with the consent of his colleague, in proceeding against the property of one who has absconded, leaving his family chargeable to the town, must prevail, and justify his acts until the want of such consent is affirmatively shown by the testimony of the other overseer, he being a competent witness. *Id.*

A return in the name of only one of the overseers of the poor of a seizure of the property of one who has absconded, leaving his family chargeable to the town, is informal only, if jurisdiction has been regularly acquired, and not impeachable in an action against the overseer who made the seizure. *Id.*

5. How a settlement may be acquired. — A year's settlement, under the act of 1797, does not require that the pauper should be constantly with his family, provided their place of abode is his domicile. *Burlington v. Calais*, 18 D. 691.

"Coming and residing within the state," within the meaning of the act, does not require a coming from another state, but a coming from any place to the town, or being and residing there when the act was passed, is sufficient. *Id.*

Service by a pauper under a contract for the space of a year gains a settlement, whether all performed under one contract or whether performed under several distinct contracts. *Heidleberg v. Lynn*, 34 D. 566.

Residence, to gain a settlement under the pauper law, means home or dwelling-place. *Warren v. Thomaston*, 69 D. 69.

But residence, dwelling-place, and home differ from a settlement, under the pauper law, and a person may have a settlement in one town and a residence in another. *Id.*

A residence does not involve continued personal presence necessarily, and temporary absences do not work a change of residence. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

Residence is acquired only by a personal presence without present intent to depart, under the pauper law, and when once acquired, is lost only by departure with intent to abandon it. *Ib.*

Domicile is not synonymous with residence, dwelling-place, or home, in its ordinary legal sense, but it must be regarded as synonymous with those terms when used with respect to the status of a pauper as to habitation. *Ib.*

Residence under the pauper law is abandoned by a departure without a present intent to return, and a subsequent intent to return formed upon a disappointment of business expectations does not cure the abandonment. *Ib.*

A particular house to which a party may resort as matter of right is not necessary to enable him to acquire or maintain a residence, within the meaning of the pauper law. *Ib.*

Under the pauper laws a residence once established may be abandoned or lost without having acquired another; and the continuance of a residence of a pauper, who has left his place of abode, taking all he has, and with no intention as to returning, depends, in no degree, upon the fact of his return. *North Yarmouth v. West Gardiner*, 4 R. 279.

A lunatic's place of settlement is not invalidated or changed by confinement in an asylum or jail by lawful authority. *Ashland Co. v. Richland County Infirmary*, 70 D. 49.

Imprisonment in a state prison for two years for an offense not a felony does not of itself interrupt or terminate the prisoner's residence under the pauper law. *Baltimore v. Town of Chester*, 38 R. 677. Nor does imprisonment for five years do so. *Topsham v. Lewiston*, 43 R. 584.

6. Derivative settlements. — Attaining the age of twenty-one is not ipso facto emancipation, in respect to the question of settlement; so long as the child remains single, enters into no contract inconsistent with the idea of his being a member of, and in a subordinate situation in his father's family, acquires no settlement for himself, and makes his father's house his home, no matter what his age may be, he will follow any newly acquired settlement of his father. *Alexandria v. Bethlehem*, 31 D. 229.

An idiot living with his father may derive a settlement, no matter what his age may be. *Ib.*

The settlement of the parents determines the settlement of an unemancipated child, and where the head of the family changes his settlement, that of his children changes with him. This is the case when, upon death of the father, the mother becomes the head of the family. *Burrell Township v. Pittsburg etc.*, 1 R. 441.

N. W., the widowed mother of A. K. W., removed from the township of Burrell, where she had a settlement, to Pittsburgh. She there leased a house, and resided in it until her death. In the meantime A. K. W. became deranged, and after the death of his mother became a pauper. *Held*, that by the act of the mother changing her settlement, that of A. K. W. was also changed, and that Burrell township was not liable for the support of the pauper. *Ib.*

Although the father and mother stand upon a different footing as to their children, in relation to private parties, in regard to the public their standing is the same. *Ib.*

7. Effect of changes in towns or counties. — The new county made by dividing an old one is not chargeable with any expense incurred by the old county in keeping a pauper whose proper residence is in the new one, until he has been removed to the new one with the request that he be received and taken care of by the commissioners. *Ashland Co. v. Richland Co. Infirmary*, 70 D. 49.

Paupers who become settled remain a charge on the township whose territory affords them a dwelling-place, without regard to the former name or boundaries of the township from which they have become separated. *Ib.*

The new county, when formed, shall receive and become chargeable with all paupers having a residence and legal settlement in the territory of which it is composed. *Ib.*

8. Removal of paupers. — An order for the removal of a pauper, his family and effects, from one town to another, is valid as to the pauper only. *Newbury v. Brunswick*, 19 D. 703.

Directors authorized to remove paupers to a county whose commissioners are obligated to receive them may sue and recover for a breach of duty if such paupers are not received. *Ashland Co. v. Richland Co. Infirmary*, 70 D. 49.

The expenses of returning paupers to the commissioners of a new county carved from the old one, together with the charges for keeping them from that period, is the limit of recovery in case such paupers are not received. *Ib.*

II. COMPELLING SUPPORT BY KINDRED.

9. In general. — The burden of supporting poor relations is not to be imposed when it would be likely to reduce those upon whom it is thrown to poverty and want. *Colebrook v. Stewartstown*, 64 D. 275.

A man's liability to support his poor relations arises only when he can support himself, his family, and the paupers, from his annual income. *Ib.*

The ability of a man to support his poor

* Poor relations, liability for support of, see note, 64 D. 279-281.

For Index to Notes in American Decisions and American Reports, see Volume I.

relations is to be judged of with reference to existing state of things. The jury need not be satisfied of his ability to support his poor relations under all the contingencies which may happen, because the ability of the relative may become less, or the wants of the pauper may become greater. *Id.*

A charge by the court that a "man may have reached that time of life, and be in such circumstances, that it might not be unreasonable to require him, if necessary, to trench upon his capital" to support his poor relations, is erroneous, as all that he is required to spend is the surplus of his annual income. *Id.*

10. Liability of parent or child. — Kindred by consanguinity of sufficient ability to contribute to support of paupers are required by statute to do so, but such statute does not embrace within its provisions the support of an illegitimate child who has become chargeable as a pauper. *Hiram v. Pierce*, 71 D. 555.

A complaint setting forth that a child has been supported by the complainant town as a pauper, since a certain day named therein, sufficiently alleges that the town had incurred expense. *Id.*

A complaint signed and made by an attorney in behalf of a town, to recover the charge for the support of a pauper, is sufficient. *Id.*

11. — of husband or wife. — A husband is not liable for the maintenance of his wife's parents. *Commissioners v. Gansett*, 23 D. 139.

An insane, starving and shelterless wife, absent from her husband, is a "poor person," although her husband is able to support her; and her husband, voluntarily permitting her to be absent and a public charge, is liable to the public authorities for her support. *Goodale v. Lawrence*, 42 R. 259.

POPULAR EXCITEMENT.

Continuance for, see TRIAL, 128.

POSITIVE EVIDENCE.

How distinguished from negative; weight, etc., see EVIDENCE, 10.

POSITIVE TESTIMONY.

Stronger than negative, see WITNESSES, 77.

POSSESSION.

Averment as to, in indictment for larceny, see LARCENY, 21.

By tenants in common of realty, see CO-TENANCY, 9.

Damages in lieu of, see REPLEVIN, 32.

Declarations as to character of, see EVIDENCE, 152-155.

In grantor, when avoids deed of land, or personality, see FRAUDULENT CONVEYANCES, 10-14.

Necessity of, to maintain forcible entry, see FORCIBLE ENTRY, 6.

Necessity of, to sustain lien, see LIENS, 3.

Of assets, by assignor for creditors, see ASSIGNMENTS, etc., 31.

Of bill or note, as evidence of title, see BILLS AND NOTES, 278.

Of burglar's tools, see BURGLARY, 13.

Of counterfeit coin, see COUNTERFEITING, 2.

Of deed, effect of, see DEEDS, 38.

Of land, purchaser's right to, see VENDOR AND PURCHASER, 17.

Of purchaser of land, when satisfies statute of frauds, see VENDOR AND PURCHASER, 11.

Of real property, see REAL PROPERTY, 2, 3.

Of realty, enjoining disturbance of, see INJUNCTION, 21.

Of stolen goods, effect of proof of, see LARCENY, 25.

Proof of, by reputation, etc., see EVIDENCE, 67.

Recovery of, see EJECTMENT; REPLEVIN, 31.

Recovery of, by landlord, see LANDLORD AND TENANT, IV.

Remaining in seller, effect of, see SALES, 14.

Right of mortgagor to retain, see CHATTEL MORTGAGES, 20.

Rights of mortgagee in, see MORTGAGES, 32.

Sales of goods not in, see SALES, 8, 9.

Suit for, by purchaser at execution sale, see EXECUTION, 109.

To support action for trespass on land, see TRESPASS, 14, 15.

To support trespass *de bonis*, see TRESPASS, 30.

Trespass to recover, see TRESPASS, 48.

What necessary to maintain replevin, see REPLEVIN, 10.

What necessary to support trover, see TROVER, 4.

When will support ejectment, see EJECTMENT, 4-8.

Writ of, in ejectment, see EJECTMENT, 48. See also ADVERSE POSSESSION, 4, 5, 9, 11, 14.

POSTHUMOUS CHILDREN.

When take as distributees, see DISTRIBUTION, 5; WILLS, 79.

When take by descent, see DESCENT, 10.

POSTING.

Of notices, see NOTICE, 9.

See also MAILING.

POSTMASTERS.

Rights, duties and liabilities of, see POST-OFFICE, 2, 3.

POST-NUPTIAL SETTLEMENTS.

See MARRIAGE AND DIVORCE, 28.

POST-OFFICE.

[Includes the carrying of the mail; the rights, duties and liabilities of postmasters and other postal officers; and offenses under the postal laws.]

For Index to Notes in American Decisions and American Reports, see Volume I.

What proper for deposit of notice of dishonor, see **BILLS AND NOTES**, 202. See also **MAIL**.

1. Contracts for carrying the mail.*

—Mail contractors are not liable in assumption for money inclosed in a letter, handed to and lost by the mail-carrier employed by them, and through his neglect. *Hutchins v. Brackett*, 53 D. 248.

A mail carrier is not an officer of the government, but is the private agent of the contractor for carrying the mail, and the latter is liable to third persons for any injury sustained through the negligence or default of such agent in the performance of his duties. *Sawyer v. Corso*, 94 D. 445.

A mail carrier not sworn as required by the act of Congress is the private agent of the contractor who employs him, and such contractor is liable for his defaults. *Ib.*

The failure of a mail carrier to take the oath prescribed by the act of Congress does not make the mail contractor who employs him an insurer, but he is liable to third persons for injury caused by the negligence or default of such carrier. *Ib.*

One who contracts to carry the mails for the government is neither a common carrier nor a private carrier, and is not liable to the owner for money stolen from the mails by his subordinates; and his promissory note given therefor is without consideration and creates no liability as between the parties. *Foster v. Metts*, 30 R. 504.

A common carrier, who is also a contractor with the government for carrying the mails, is not liable as a common carrier to the sender of a letter by mail for its loss. *Central R. R. etc. Co. v. Lamproy*, 52 R. 334.

2. Rights of postmasters, generally.—The office of postmaster is an office of profit and trust, under the authority of congress. *McGregor v. Balch*, 39 D. 231.

A person can not hold the offices of postmaster and justice of the peace at the same time, and, although a postmaster is eligible to any executive or judiciary office in the state, he must surrender his office of postmaster, to be able to hold such executive or judiciary office. *Ib.*

A postmaster is a public officer, and in the discharge of his trust is bound to exercise his judgment for the public benefit in locating his office, and any contract for the sale of this exercise of his judgment for his private emolument interferes with the discharge of his official duties and is void. *Spence v. Harvey*, 83 D. 69.

A contract by a postmaster to locate and continue his office at a particular place might be valid, when necessary, in order to secure a fit location, but such necessity would be required to be affirmatively shown to sustain an action on the contract. *Ib.*

*See note on contracts for carrying the mail, 42 D. 209, 210.

In an action of trespass *quare clausum* and for assault, defendant pleaded that the *locus* was part of plaintiff's house, which had been used by him while postmaster as a post-office; that one G. having succeeded him in that office, had license from him to enter and remove the public property of the United States; that defendant, as assistant postmaster and servant to G., and by his direction, attempted to enter for that purpose, but was resisted and assaulted by plaintiff, whereupon, etc. (justifying the trespass) *Held*, that the justification was good, and would have been so without averment of license. *Sterling v. Warden*, 12 R. 80.

3. Their duties and liabilities.*—Where a letter containing money is lost after being delivered to a postmaster, he is liable for want of ordinary care, in an action on the case for his neglect; but he is not liable to an action for money had and received, unless it be shown that he put the money to his own use. *Danforth v. Grant*, 39 D. 224.

A postmaster is liable to an action of trover in a state court (otherwise competent) for detaining matter in the mail under his charge, addressed to plaintiff. *Teall v. Felton*, 49 D. 352.

A postmaster does not act judicially in determining whether a parcel of mail matter is chargeable with letter or newspaper postage. *Ib.*

A postmaster is liable for his servant's negligence, carelessness, and default, as well as his own, and a civil action will lie for a larceny of a letter containing money which was stolen from his office. *Coleman v. Frazier*, 53 D. 727.

An assistant postmaster is merely the servant, or agent of the postmaster, and the doctrine of the common law, that the principal who holds out an agent or servant in any public employment is liable in case for his negligence, will apply. *Coleman v. Frazier*, 53 D. 727; *Keenan v. Southworth*, 14 R. 613.

4. Offenses under the postal laws.—The levy of an execution upon a ferryboat does not obstruct the passage of the mail within the meaning of the act of Congress making it a penal offense to "knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same," where no mails were on the boat at the time of levy, though they were brought on soon afterwards. *Lathrop v. Middleton*, 83 D. 112.

POSTPONEMENT.

Of auction sale, see **AUCTION**, 3.

Of criminal trial, see **TRIAL**, 135.

Of execution sale, see **EXECUTION**, 53.

*Liability of postmasters for loss of mail-matter, see note, 42 D. 208, 209.

For Index to Notes in American Decisions and American Reports, see Volume I.

Of public sale, see JUDICIAL SALE, 4.
See CONTINUANCE.

POUNDAGE.

Right of sheriff to, see SHERIFFS, 11.

POWER.

In will, sales of land under, see EXECUTORS AND ADMINISTRATORS, 47.

To make war, see WAR, 2.

To punish contempt, see CONTEMPT, 1-5.

To revoke a will, see WILLS, 28.

To sell, mortgages with, see MORTGAGES, 33.

POWER OF SALE.

In mortgage, foreclosure under, see MORTGAGES, 112-119.

POWERS.

[Includes the validity, interpretation, and execution of powers conferred by written instruments, upon one person, to dispose of the property of another.]

Of agents, see AGENCY, 2.

Of arbitrators, see ARBITRATION, etc., 15.

Of assignees for creditors, see ASSIGNMENTS, etc., 39-41.

Of auctioneers, see AUCTION, 1.

Of banks, see BANKS AND BANKING, 3.

Of commissioners, see COMMISSIONERS, 1.

Of corporate officers, see CORPORATIONS, 146.

Of corporations, see CORPORATIONS, IV.

Of courts of probate, see WILLS, 44.

Of foreign corporations, see CORPORATIONS, 185-188.

Of public agents, see AGENCY, 102, 103, 105.

Of public officers, see OFFICERS, 19-24.

Of receivers, see CORPORATIONS, 177; RAILROAD COMPANIES, 13.

Of savings banks, see BANKS AND BANKING, 77.

Of attorney, see AGENCY, 24-31.

1. Execution and validity of instruments conferring powers. — A power to sell and convey land not under seal, though insufficient to authorize the execution of a conveyance of the fee, is nevertheless a sufficient authority for the execution of a contract of sale; and an instrument made by the donee reciting the sale is a sufficient "note or memorandum" of such contract, and though inoperative as a conveyance, is good as an agreement to convey. *Dutton v. Warschauer*, 82 D. 765.

Where a trust is void under the rule against perpetuities, a power to lease which is not a mere power distinct from the trust, leaving the act to be done at the will of the party to whom it is given, but is mixed and blended with the trust, and is as imperative in its execution as the trust itself, is also void. *Barnum v. Barnum*, 90 D. 88.

2. Their interpretation. — In considering the extent of a power, the intent of the parties must control. In conformity with this intent a general power may be

limited, or a limited power made general. *Wilson v. Troup*, 14 D. 458.

A power to a feme covert to convey will be strictly construed, and a power to convey by "will or deed of gift," will not include the power to convey by bill of sale. *Marshall v. Stephens*, 47 D. 601.

Every general power or duty given or enjoined implies every particular power necessary to its exercise or performance. *Heard v. Pierce*, 54 D. 757.

Where a discretionary power is not exercised, the whole of the objects who are within it will take in equal shares. So must it be in the disposition of a part where the power is not exercised as to the part. *Cruze v. McKee*, 73 D. 186.

Powers are to be construed in the light of the purpose which the agent or depositary is appointed to accomplish. *Baltimore v. Reynolds*, 83 D. 535.

Every power, the direct object of which is to create a perpetuity, is generally held to be absolutely void; the exceptions to the rule arise out of the distinction between general and limited or special powers. *Barnum v. Barnum*, 90 D. 88.

3. Execution of powers, generally.

—Where a person takes by execution of a power, he takes under the authority of the power, equally as if the power and its execution had been incorporated in one instrument. *Doolittle v. Lewis*, 11 D. 389.

A power delegated to two or more for a private purpose, must be executed by all; but in matters of public concern a majority may act if all are were present. *McCoy v. Curtice*, 24 D. 113.

A power given to executors jointly cannot be exercised by one alone. *Brown v. Hobson*, 13 D. 187.

Where slaves were devised to a husband and wife for life with power to dispose of them as they pleased among their children during their lives or at death, it was held that a continued loan for more than five years to one of the children rendered the slaves liable for such child's debts the same as if the power had been formally executed by gift. *Brwing v. Handley*, 14 D. 140.

The power to mortgage authorizes the execution of a mortgage with a power of sale, particularly where it is the custom of the country to include such powers in mortgages. *Wilson v. Troup*, 14 D. 458.

A person incapable of contracting may be the donee of a power. *Weisbrod v. Chicago etc. R'y Co.*, 86 D. 743.

The execution of a power, being distinct from the power itself, must conform to the requirements of the rule against perpetuities, or run the hazard of being avoided. *Barnum v. Barnum*, 90 D. 88.

Where a power does not in itself transgress the rule against perpetuities, the appointees may, in executing it, go beyond the bound-

For Index to Notes in American Decisions and American Reports, see Volume I.

dary provided by such rule; and equity in such case being guided by the power, will treat the excess as surplusage and void, but only where the excess be definite and ascertained, or can be rendered so. If, however, the limitation is in the instrument itself which creates the trust or power, and no one can declare with certainty how the dispositions of the testator would have been regulated if he had been aware at the time of his inability to extend them to some included in his gifts, the whole will be vitiated by the excess. *Id.*

A power in a will to convey lands in fee is well executed by a warranty deed, upon full consideration, although it does not refer to the will. *South v. South*, 46 R. 591.

4. Execution of power to sell. — 1. *Who may exercise.* — A power to sell, given by a will to several executors, may be exercised by those who qualify. *Taylor v. Galway*, 13 D. 605.

Three executors were given power to sell to satisfy debts, and two only qualified, and the other never intermeddled, but did not formally renounce as executor. A sale by the two executors twenty years after the testator's death, was held valid, the other then living, and not refusing to join. The power is attached to the office, and not to the persons named as executors. *Marr v. Peay*, 5 D. 521.

The court will presume a renunciation after twenty years' lapse of time. A formal renunciation in open court is unnecessary; it only affords easier proof of the fact. *Id.*

A power given in a will to certain persons to sell lands at their discretion, is a personal trust, and though the same persons are named executors, yet, on their decease, the administrator with the will annexed cannot execute the trust. *Brown v. Hobson*, 13 D. 187.

A power to two executors to sell cannot be executed by one; and a power to sell for special purposes can be exercised for those purposes alone. *Floyd v. Johnson*, 13 D. 255.

A power of sale may be given in the alternative; and when such is the case, the deed of sale may be executed either by the donor or donee of the power. *Oranston v. Crane*, 93 D. 106.

A power to sell may be executed by an agent of a donee who is the grantor in a deed of the land signed by the grantee, which, besides giving him a power of sale in case of non-payment of the purchase-money, gives him also a lien therefor on the land, thus giving him a power coupled with an interest; which power is, furthermore, not qualified by any personal trust or confidence, since the deed authorizes the power to be executed, not only by the grantor, but by any assignee of the purchase notes. *Hill v. Walker*, 98 D. 465.

2. *How construed.* — Where a testator devised certain land to his wife for life, and gave her power, in case of need, to sell all his estate, real and personal, for her comfortable support, — held that she took only a life estate with a power of sale depending on a contingency. *Stevens v. Winship*, 11 D. 178.

A power of sale does not authorize the transfer of the property of the principal in payment of a debt. *Durham v. Oddie*, 14 D. 190.

A power under a will to sell such property of a testator as may be useless to his estate does not authorize an executor to sell whatever property he pleases. *McCauley v. Bee*, 16 D. 610.

A power to sell is implied in a deed of trust where the object of the deed is the payment of the trustor's debts, which can not be done without sale of the property. *Williams v. Otey*, 47 D. 632.

A general power to sell lease, etc., given to a stranger in a deed to grantor's children is void, and a sale under such a power is of no effect. *Smith v. Smith*, 59 D. 581.

The difference between a mere power to convey and a conveyance itself is that the latter is regarded in law as a contract, while the former is not. *Weisbrod v. Chicago etc. Co.*, 86 D. 743.

A power to sell personalty does not authorize a barter or exchange. *Cleveland v. Bank of Ohio*, 88 D. 445; *Taylor v. Gallowsay*, 13 D. 605.

Commissioners authorized by a statute to act in behalf of a city derive their power solely from the statute, and those dealing with them or claiming under them, directly or remotely, are bound to take notice of the extent of those powers; and the city is not estopped to deny the existence of a power assumed by them. *Cleveland v. Bank of Ohio*, 88 D. 445.

3. *What is a valid execution.** — A power to sell, either in a will or a deed, to be exercised on the happening of a particular event, can not be lawfully exercised until that event happens. *Brune's Appeal*, 55 D. 499.

Those who claim under a contingent power of sale in a will must show that the power was well executed, and that the contingency happened; and it is for the jury to decide whether it happened or not. *Stevens v. Winship*, 11 D. 178.

A probate of a will, containing a power to sell land, is not necessary to the execution of the power. *Doolittle v. Lewis*, 11 D. 339.

Where town trustees are invested by a special statute with the title to land, and with a general authority to sell and convey, their deed *prima facie* implies a due execution of the power, notwithstanding the act

*Power of sale, whether includes power to mortgage, see note, 38 R. 342.

For Index to Notes in American Decisions and American Reports, see Volume I.

of 1801; but where there is a naked power to convey under special restrictions, one claiming under such power must show a strict execution of it. *Morrison v. McMillan*, 14 D. 115.

A power in a creditor to sell his debtor's land in order to obtain funds wherewith to pay the indebtedness due to himself, must be exercised by a sale of the land to third persons. The creditor will not be justified in taking from his debtor's trustee a deed to himself of the land. *Engles v. Engles*, 38 D. 37.

A power to sell property to pay debts of trustor, given in a deed of trust, is an absolute power as to purchasers, and they are not obliged to show that there were debts existing at the time of the sale in order to acquire a good title. *Williams v. Oley*, 47 D. 632.

A purchaser of property under a sale in pursuance of a power is chargeable with notice of the extent of the power, and is bound to see that it has been pursued. *Sears v. Livermore*, 85 D. 564.

In ascertaining whether a power has been properly exercised or followed, no question of jurisdiction is involved as in cases of judicial sales. *Ib.*

Directions in a power of sale must be strictly pursued, and a deviation in the execution of the power will invalidate the sale. *Sears v. Livermore*, 85 D. 564; *Cranston v. Crane*, 93 D. 106.

Where a deed containing a power of sale provided that notice should be given by posting on the front door of a certain hotel, a posting of such notice near the door but not on it is not a sufficient compliance with the power; and the fact that the proprietor of the hotel refused to permit the posting of such notices on the door of his house would afford no excuse for disregarding the terms of the power. *Sears v. Livermore*, 85 D. 564.

The commissioners empowered by a special statute to act in behalf of a city in subscribing to stock of a railroad company and authorized to sell the stock, "and to do whatsoever else may seem necessary to secure and advance the interests of the city in the premises," have no power to exchange the stock for stock in another company; as the power to sell does not include the power to exchange, and the clause following does not enlarge the specific powers before conferred, the phrase "in the premises" limiting the discretion therein granted to the manner of exercising the powers specifically granted. *Cleveland v. Bank of Ohio*, 88 D. 445.

When a power of sale merely authorizes donee to execute deed in name of donor, or as his attorney, it must be so executed; and the deed of sale will then be the deed of the donor of the power, and not of the donee. *Cranston v. Crane*, 93 D. 106.

A power of sale may be given to be executed by deed of donee; and when such is the case, the deed of sale not only may but must be executed under the hand and seal of the donee of the power. *Ib.*

Where land is conveyed to a wife, and child afterwards to be born, with a power in the husband to superintend, and with wife's concurrence to sell and convey the same as husband, this power to the husband did not contemplate a conveyance by him directly to the wife, but only some conveyance by him and her to a stranger, and then only of the wife's interest, and not of such child as had been born to her, and a deed by the husband directly to his wife would be utterly void. *Powell v. Powell*, 96 D. 372.

When a trustee, having a power to sell lands with the assent in writing of the first *cestui que trust* for life, but no interest whatever in the property, joins with her and her children, subsequent *cestui que trust* for life, in a conveyance of the property on valuable consideration, with covenants of warranty; this is a good execution of the power, although the conveyance does not mention or refer to it. *Gindrat v. Montgomery Gaslight Co.* 60 R. 769.

5. Execution of power of appointment.—1. *How Construed.**—A general power is a power to appoint whomsoever the donee pleases. *Thompson v. Garwood*, 31 D. 502.

A particular power is one by which the donee is restricted to particular objects. *Ib.*

A power general in its terms will not be cut down to a particular power, unless an intent to do so is apparent from the instrument conferring the power. *Ib.*

Wills executed under powers are construed the same as proper wills, and are not affected by the instrument by which the power was conferred, except by the clause by which the power is created. *Ib.*

A power of appointment is deemed general for the purpose of subjecting the estate, after appointment, to the claims of the appointor's creditors, whenever the donee may appoint to whom he pleases, although he can appoint only by deed or will to take effect at his death, and can not appoint to any use in his life-time. *Johnson v. Cushing*, 41 D. 694.

A power of appointment to children does not embrace grandchildren, and the exercise of it in their favor is void. *Cruse v. McKee*, 73 D. 186.

A valid appointment will be maintained, though embraced in the same deed or will with others not valid. *Ib.*

Property not disposed of in conformity with a power under a will must pass as a vested remainder under the will, and be distributed equally to all the objects of the

* Power of appointment, interest of donee in, see note, 41 D. 704-706

For Index to Notes in American Decisions and American Reports, see Volume I.

power, the testator's children in this case, the representatives taking a share of a deceased child, without regard to the property held under the valid appointments of the wife. It is not a case for collation of advancements, as in intestacy. *Ib.*

2. *What is a valid execution generally.*—One clothed with a power of appointment must execute it in good faith for the end and purpose designed. *Cruise v. McKee*, 73 D. 186.

A power of appointment is not executed unless some steps are taken, or some acts done, with this sole and definite intention, which must be such as are properly referable to the power. *Mitchell v. Denson*, 65 D. 403.

Presumption that a power of appointment has been legally exercised, exists in favor of innocent purchasers or meritorious claimants. *Marshall v. Stephens*, 47 D. 601.

Where a party has power to appoint a fee, if there are no words of positive restriction, a less estate may be appointed. *Butler v. Hcutis*, 18 R. 589.

Where a power is created by deed, empowering a husband to appoint to whom the land shall be conveyed, and, in case of his death before his wife, empowering her to do it, there must be an actual appointment in the mode indicated, and not merely an intention in the husband, in order to defeat the wife's right of appointment. Accordingly, where a power requires, among other requisites, that the trustee should convey to such person as the husband should limit or appoint, and the husband executed an instrument of writing, authorizing the trustee to convey to whom he pleases in his discretion, this is not an execution of the power, nor a destruction of that subsequently limited to the wife. *Haslen v. Kean*, 7 D. 718.

An actual exercise of a general power of appointment, by deed or will, converts the appointed estate into assets in equity for the payment of the appointor's creditors, whose claims take preference over those of the appointee, and, upon a bill filed by the creditors, a court of chancery, treating the execution of the power without providing for them, as a fraud upon them, will regard the appointor's executor or the appointee as a trustee for the creditors, and subject the estate in his hands to payment of their claims; but the court will not interfere if the power has not been executed and if no act has been done indicating an intent to execute it. *Johnson v. Cushing*, 41 D. 694.

An appointment will be declared void where one clothed with a discretionary power, in order to secure advantage to the trustee himself, or to a stranger, makes discriminations among a class of the objects of the power. *Quere*: If fraud intervenes in the exercise of a power of appointment,

does it vitiate the entire acts of the trustee, or only such appointments as are fraudulent? *Cruise v. McKee*, 73 D. 186.

A testator's children will take in equal shares property which has been bequeathed to his wife with a discretionary power of appointment, where she fails to exercise the appointment, or makes an invalid one. *Ib.*

3. *Execution by conveyance or will.*—A mortgage is an execution of a power to appoint by any writing, in the nature of a will or other instrument, under hand and seal, executed in the presence of two credible witnesses. *Lancaster v. Dolan*, 18 D. 625.

A power of appointment by a will given to the grantee in a conveyance for life, is not deemed to be executed by a mortgage by the latter to creditors, followed by foreclosure and sale. *Bentham v. Smith*, 34 D. 599.

A power of disposition by a will can not be executed by a conveyance of the premises by deed. *Ib.*

Power of appointment may be executed, though not referred to, by a will disposing of the property, where there is nothing for the will to act on except in execution of the power. *Cathey v. Cathey*, 49 D. 714.

A will by the donee of a power of appointment makes no disposition of the property and is no execution of the power, where such will merely directs the property to be kept together under the management of certain persons "until the heirs may wish a division;" and where the power was to divide the property among the donor's children as the donee should think best, they take equally. *Ib.*

Appointments of a wife in conformity with a power conferred upon her are not void because others, invalid, are included in her will. Those in accordance with the power will be sustained; others will be rejected. *Cruise v. McKee*, 73 D. 186.

A testator devised to his wife as follows: "All my real estate and personal property, to settle all debts, and expenses, and claims, collect all debts, to hold for her life, and to dispose of at her death at her pleasure." The widow conveyed in fee simple some of the land so devised to her, by warranty deed containing no recital of her title, nor evidence of an intention to execute the power. *Held*, (1) that she had, under the will, an estate for life only, with a power to appoint the fee; (2) that the power was not executed by the deed, and that the deed therefore, passed only an estate for her life. *Quere*, whether the power could be executed by deed, or whether it must be by will. *Dunning v. Vanhusen*, 17 R. 709.

By the rules of a benevolent society, a sum was payable, upon the death of a member, to his widow, children, or such persons to whom he might have disposed of the

For Index to Notes in American Decisions and American Reports, see Volume I.

same by will or assignment; and if there should be no widow or children, and no disposition by will or assignment, the fund should go to the permanent fund of the society. A member died unmarried and without issue, and by his will gave the "entire residue" of his "estate," after payment of debts and funeral expenses, to his three sisters. *Held*, (1) that the fund due from the society was not assets recoverable by his administrator or executor, but only the subject of a power; and (2) that the will was not an exercise of the power, and, therefore, the fund went to the society. *Maryland Mut. Ben. Soc. v. Clendinen*, 22 R. 52.

A husband devised to his wife, for her life, two-thirds of his entire estate, subject to certain specific legacies, with power to dispose of the same absolutely by will or deed. After his death, the wife acquired the fee of the undivided third of the lands so devised to her. Subsequently she executed a will, making some specific bequests, and then providing as follows: "All and singular the rest, residue and remainder of my estate, real and personal, of whatever kind and wheresoever situate, I hereby order and direct to be converted into money by my executors." "And for that purpose I do authorize and empower them to bargain, sell, and convey my real estate wheresoever situate, and to make, execute, acknowledge and perfect all deeds and conveyances in law necessary to assure in the purchase or purchasers thereof the full title thereto, the said real estate to be sold as soon as the same can be done without sacrifice, in the discretion of said executors." "And when my said residuary estate shall be converted into money as aforesaid," etc., with directions for its distribution. She also bequeathed a gold watch and some household furniture, which came to her under her husband's will, to different persons. She died seized of several parcels of real estate. *Held*, that the power of disposition conferred by her husband's will was fully exercised, and her will carried all the property in which she derived any interest under that will. *Funk v. Eggleston*, 34 R. 138.

6. Powers coupled with an interest.

— A power coupled with an interest exists when the person to whom the power is given derives a present or future interest in the subject over which the power is to be exercised. The interest must be in the thing itself, and not in the execution of the power merely. *Mansfield v. Mansfield*, 16 D. 76.

The power of a mortgagee to sell is a power coupled with an interest. *Wilson v. Troup*, 14 D. 458; and is not revoked by the death of the mortgagor. *Bergen v. Bennett*, 2 D. 231; *Mansfield v. Mansfield*, 16 D. 76.

A power to sell, coupled with an interest given to several persons, may be executed

by those who accept the power, even though one or more refuse to accept it, or after accepting renounce it. *Williams v. Otey*, 47 D. 632.

A power given to an executor by will to sell lands, when, in his opinion, sale can be made to good advantage, and to distribute the proceeds among the testator's children as they become of age, is a power coupled with an interest, and entitles the executor to the possession of the land. *Dabney v. Manning*, 17 D. 597.

Where a railroad company conveys to trustees to secure payment of bonds issued by it, certain lands divided into tracts, each described, numbered, and valued, reserving to itself the power to sell any portion of the land at its valuation, and the trustees having power to convey in fee, upon the surrender to them by the company of bonds equal in amount to the value of the land sold, the power of the trustees to convey is a power coupled with an interest, and requires only a substantial compliance with its terms. A deed from the trustees passes the legal title, and in an action against their grantee, under the Indiana code, for the recovery of real property, on a complaint averring the legal right of the plaintiff to the possession, the equities of the plaintiff cannot be inquired into. *Rouse v. Beckett*, 95 D. 676.

7. Aiding defective execution in equity. — Courts of equity will aid a defective execution of powers, but not the non-execution of them. *Mitchell v. Denson*, 65 D. 403. Hence a conveyance by only one of three executors or trustees, will be supported in favor of a purchaser for a valuable consideration; and though it be provided by the will, that if one or more of the executors or trustees should die before the trust was executed, others should be appointed by the survivors jointly with them to complete the execution of the trust. *Roberts v. Stanton*, 5 D. 463. But a want of a power to convey can not be supplied in chancery. Hence, if executors convey without power, their conveyance cannot be aided in equity. *Tierman v. Beam*, 15 D. 557.

Equity will not aid the execution of a power of appointment held by one who intended to execute it, but failed to do so because erroneously advised by her attorney that it was unnecessary to exercise it. This was not even a defective execution of the power. *Mitchell v. Denson*, 65 D. 403.

8. Delegation of powers. — A naked power cannot be delegated, but where a devise is to executors in trust to sell and convey, it seems that they may act by attorney. *May v. Frazer*, 14 D. 159.

9. Revocation. — A power to sell and convey is a naked power, and a naked power

*When execution of power may be delegated to agent, see note, 14 D. 170-172.

For Index to Notes in American Decisions and American Reports, see Volume I.

or authority may be revoked at pleasure. A power or authority coupled with an interest is irrevocable. *Mansfield v. Mansfield*, 16 D. 76.

Power coupled with an interest cannot be revoked by person granting it; but it is necessarily revoked by his death, for a valid act cannot be done in the name of a dead man. *Frederick's Appeal*, 91 D. 159.

A naked power given jointly to several persons does not survive, after the death of any of them. *Mallet v. Smith*, 60 D. 107.

Where the defendant, who receives for collection a note in favor of the plaintiff's debtor, the proceeds of which the debtor directed to be paid to his creditors, promised the plaintiff in consideration of his forbearing to sue the debtor, to pay the proceeds to him, — held that the power given to the defendant was revocable, and that he was not liable in an action for money had and received, it appearing that before the note had been collected, the debtor directed the defendant to pay the sum when collected to a particular creditor, which the defendant did. *Peabody v. Harvey*, 10 D. 103.

PRACTICE.

In actions by or against sheriffs, see SHERIFFS, V.

In assumpsit, see ASSUMPSIT, II.

In attachment, see ATTACHMENT, IV.

In courts of equity, see EQUITY, III.

On appeal, see APPEAL, III.

Rules of, in equity, see EQUITY, 43.

PRACTICE ACTS.

Pleading in actions under, see PLEADING, III.

PRAYER.

For instructions, in civil cases, see TRIAL, 89-93.

For instructions, on criminal trial, see TRIAL, 187.

For instructions, reversal for refusal of, see APPEAL, 33, 157.

For relief, in bill in equity, see PLEADING, 62-64.

For relief, in complaint, see PLEADING, 101-102.

PREAMBLE.

Reference to, in construing statutes, see STATUTES, 42.

PREEMPTION.

Of mineral lands, see MINES AND MINING, 3.

Of public lands, see PUBLIC LANDS, 18, 19.

PREFERENCES.

In compositions with creditors, see DEBTOR AND CREDITOR, 16.

In voluntary assignments, see ASSIGNMENTS, etc., 3, 4, 23.

PREFERRED CREDITORS.

Of decedent's estate, rights of, see EXECUTORS, etc., 84.

PREJUDICE.

Challenge to juror for, see TRIAL, 143.

Continuance for, see TRIAL, 128.

Denial of motion without, see MOTIONS, 5.

PRELIMINARY PROOFS.

In marine insurance, see INSURANCE, 172-175.

Of loss by fire, see INSURANCE, 61-63.

Of loss covered by policy, see INSURANCE, 30-32.

To admit secondary evidence, see EVIDENCE, 49-54.

PREMEDITATION.

To constitute murder, see HOMICIDE, 5.

PREMISES.

Description of, in contract to sell, see VENDOR AND PURCHASER, 15.

Description of, in grant, see GRANTS, 9.

Description of, in sheriff's deed, see EXEMPTION, 133.

What may be partitioned, see PARTITION, 10.

PREMIUM NOTES.

On insurance policies, see INSURANCE, 205-208.

PREMIUMS.

On insurance policies, payment of, see INSURANCE, 203-208.

On life policy, payment of, see INSURANCE, 72-74.

PREPONDERANCE.

Of evidence, effect of, see EVIDENCE, 6.

Of evidence as to insanity, see INSANE PERSONS, 34.

PRESCRIPTION.

Acquirement of easements by, see EASEMENTS, 4.

Acquirement of private way by, see PRIVATE WAYS, 3.

Establishment of highways by, see HIGHWAYS, 4.

PRESENCE.

Of accessory, at time and place of crime, see ACCESSORIES, etc., 7.

Of accused, during trial, generally, see TRIAL, 161.

PRESENTMENT.

Of bill or note for payment, see BILLS AND NOTES, 150-179.

Of bill or note, averments as to, see BILLS AND NOTES, 269.

Of bill or note, proof of, see BILLS AND NOTES, 286.

For Index to Notes in American Decisions and American Reports, see Volume I.

Of claims against decedents' estate, see EXECUTORS, etc., 90-93.
Of claims against insolvent estate, see EXECUTORS, etc., 187.

PRESIDENT.

Of banks, see BANKS AND BANKING, 48.
Of corporation, see CORPORATIONS, 157-161.
Powers and duties of corporate, see RAILROAD COMPANIES, 35.

PRESUMPTIONS.

In general, see EVIDENCE, 28-38.
As respects advancements, see ADVANCEMENT, 8.
As to adoption of common law in sister states, see COMMON LAW, 3.
As to boundaries, see BOUNDARIES, 13.
As to dedication, see DEDICATION, 13, 14.
As to delivery of deed, see DEEDS, 35.
As to insanity, see INSANE PERSONS, 10.
As to justices' jurisdiction, see JUSTICE OF THE PEACE, 8.
As to law of foreign jurisdiction, see BILLS AND NOTES, 240.
As to ratification of agent's act, see AGENCY, 91-93.
As to seaworthiness of vessel insured, see INSURANCE, 111.
As to validity of corporate elections, see CORPORATIONS, 141.
From use of corporate seal, see CORPORATIONS, 108.
In actions on checks, see CHECKS, 21.
In favor of agent's act, see AGENCY, 28.
In favor of *bona fide* holder, see BILLS AND NOTES, 233.
In favor of consideration, see DEEDS, 16.
In favor of regularity, see NATURALIZATION, 5.
In favor of regularity on criminal trial, see APPEAL, 151.
In suits on official bonds, see OFFICERS, 51.
Of deed, from long adverse holding, see ADVERSE POSSESSION, 22.
Of fraud, from circumstances, see FRAUD, 9.
Of grant, see GRANTS, 14, 15.
Of grant of easement from long user, see EASEMENTS, 5.
Of grant of private way, see PRIVATE WAYS, 4.
Of malice, see LIBEL, 14, 20; SLANDER, 28, 45.
Of malice and want of probable cause, see MALICIOUS PROSECUTION, 7.
Of malice, on trial for murder, see HOMICIDE, 33.
Of negligence by carrier, see CARRIERS, 15.
Of payment, see PAYMENT, 10-14.
Of payment of judgment, from lapse of time, see JUDGMENT, 112.
Of payment of mortgage, see MORTGAGES, 132.
Of regularity of sale for payment of debts, see EXECUTORS, etc., 117.
On appeal, see APPEAL, 19-27, 110.

On writ of error, see ERROR, 22.
Relative to altered instruments, see ALTERATION OF INSTRUMENTS, 7.
Relative to domicile, see DOMICILE, 10.
Relative to gifts, see GIFTS, 10.
Relative to jurisdiction, see JURISDICTION, 18.
Relative to revocation, see WILLS, 32.
That account is a stated one, see ACCOUNTS, 2.
That attorney has been retained, see ATTORNEY AND CLIENT, 10, 11.
What arise from indorsement in blank, see BILLS AND NOTES, 99.

PRICE.

Return of, on rescinding sale, see SALES, 110.
Seller's action for, see SALES, 88-93. See also CONSIDERATION.

PRIMA FACIE EVIDENCE.

What is, sufficiency, etc., see EVIDENCE, 9.

PRINCIPAL.

Declarations of, to affect surety, see EVIDENCE, 146.
Delay to sue, when discharges guarantor, see GUARANTY, 25.
Exhausting remedy against, see SURETYSHIP, 24.
Giving time to, when discharges surety, see SURETYSHIP, 31.
In murder, see HOMICIDE, 10.
Notice to creditor to proceed against, see SURETYSHIP, 37.
Rights and liabilities of, see AGENCY, IV.
Surrender of, by bail, see BAIL, 3, 22.
Questions between principal and, see FACTORS, 11.
Title to goods, as between factor and, see FACTORS, 6.
Who is, in burglary, see BURGLARY, 2.
Who is, in crime, see ACCESSORIES, etc., 1.
Proving guilt of, on trial of accessory, see ACCESSORIES, etc., 11, 12.
Who is principal debtor in attachment, see ATTACHMENT, 7, 8.

PRINCIPAL AND AGENT.

Law of, generally, see AGENCY.
Damages in actions between, see DAMAGES, 19.
Declarations of, as evidence, see EVIDENCE, 145.
Competency of, as witnesses, see WITNESSES, 58.
Set-off in actions between, see SET-OFF, 19.

PRINCIPAL AND SURETY.

Competency of, as witnesses, see WITNESSES, 59.
Set-off in actions between, see SET-OFF, 20.

See SURETYSHIP.

For Index to Notes in American Decisions and American Reports, see Volume I.

PRIORITY.

- Among claimants of corporate assets, on dissolution, see CORPORATIONS, 183.
- Among claims against decedents' estate, see EXECUTORS, etc., 86.
- Among creditors, see CREDITORS' SUIT, 20; DEBTOR AND CREDITOR, 17.
- Among creditors, on dissolution of firm, see PARTNERSHIP, 101.
- Among deeds, see DEEDS, 52.
- Among executions and other liens, see EXECUTION, 72-75.
- Among legatees, see LEGACIES, 29.
- Among liens, see LIENS, 6; MECHANICS' LIENS, 13.
- Among mortgages, see MORTGAGES, IV.
- Between assignment and other claims, see ASSIGNMENT, 38.
- Between attachments and other process or conveyances, see ATTACHMENT, 112.
- Between chattel mortgages and other claims, see CHATTEL MORTGAGES, 38.
- Between elder and junior grants, and entries, see GRANTS, 16; PUBLIC LANDS, 34.
- Between judgments and other liens, see JUDGMENT, 106, 107.
- Between rival attachments, see ATTACHMENT, 111.
- Of government, in insolvency proceedings, see INSOLVENCY, 19.
- Of the state, see STATES, 7.

PRISONERS.

- Custody of, by sheriff, see SHERIFFS, 7.
- See IMPRISONMENT.

PRIVATE ACTS.

- As evidence, see EVIDENCE, 219.
- Interpretation of, see STATUTES 53.

PRIVATE CORPORATIONS.

- What are, see CORPORATIONS, 4.

PRIVATE EXAMINATION.

- Of wife, when acknowledging conveyance, see ACKNOWLEDGMENT, 12; HUSBAND AND WIFE, 72.

PRIVATE NUISANCE.

- See NUISANCE, 3.

PRIVATE SALES.

- By trustees, see TRUSTS, 31.

PRIVATE WAYS.

[Includes the creation, use, and extinguishment of an easement in one person, of a right of passage over the land of another; not embracing highways, city streets, or ferries.]

1. Nature of the easement, generally. — Where land is granted with a right of way, that right is appurtenant to every part of the land thereafter granted, no matter how small. *Watson v. Bioren*, 7 D. 617.

A right of way as a mere rural servitude

is confined to a convenient passage from the property granted to the public road or highway. *Livingston v. Mayor of N. Y.*, 22 D. 622.

A person can not have a right of way as an easement, in the legal sense of the word, over his own land. *Stuyvesant v. Woodruff*, 47 D. 156.

A right of way is not any interest in land, but merely an easement, which does not conflict with the absolute proprietorship of the owner. *Snyder v. Warford*, 49 D. 94.

The inference establishing a right of way in the public over uninclosed land can not be deduced from the mere travel across it by the public without objection from the owner. *Warren v. Jacksonville*, 58 D. 610.

The owner of a tract of land who has an easement in a mill-race, dam, and a road-way along said race to repair the same, has not got a private right of way for ordinary purposes over said road, but only a right to use it as occasion might require to repair the race and dam. *McTavish v. Carroll*, 61 D. 353.

A right of way is appurtenant to land, and the right to possession and use of land carries with it the right to use the way. *Cheswell v. Chapman*, 75 D. 158.

A way appurtenant to a close is appurtenant to every parcel into which it may be divided. *Whitney v. Lee*, 79 D. 727.

The words "road" and "way" are not synonymous. A road is any piece of land used or appropriated for travel, and is a very different thing from a mere right of way. *Chollar-Potosi M. Co. v. Kennedy*, 93 D. 409.

A right of way is either in gross or appurtenant. The first is attached to and vests the right in the person to whom it is granted. The second is incident to an estate, one terminus of which is the land or tenement of the person claiming it; it inheres in the land, concerns the premises, and pertains to its enjoyment, and passes with it. *Alley v. Carleton*, 94 D. 260.

A way in gross, being attached to a person, cannot be assigned or granted over to another; hence, it must be claimed by grant or from prescription by the claimant in his own person, and does not arise in this manner where it can fairly be construed to be appurtenant to another estate. But a right of way appurtenant may be derived from express grant, from necessity, by implication, from a grant in which it is not expressed, and by prescription. *Id.*

The owner of land who sells half of it, reserving the right of way across it, and in the same deed granting to the vendee a right of way across the unsold half, does not thereby create rights which are annexed or appurtenant to the respective tracts so as to pass with the title. *Wagner v. Hanna*, 96 D. 354.

For Index to Notes in American Decisions and American Reports, see Volume I.

Whether a grant of a right of way be in gross or appurtenant to some other estate must be determined from the grant itself, and not by matter *aliunde*. *Ib.*

A right of way is an easement, only when it appears in the grant to be made for the benefit of a dominant tenement which is described therein. *Ib.*

A right of way is an interest in land within the statute of frauds, and hence transferable only by an instrument in writing, which describes the interest conveyed. If it be appurtenant, the instrument must so describe it, and must include a description of the tract of land to which it is annexed. *Ib.*

2. Creation by act of the landowner.—The grantees of several lots, which originally constituted an entire block, who derive title from the same source by deeds from the original proprietor which conveyed their respective lots with reference to an alley-way laid through the center of the block, are estopped from denying the existence of such alley-way as a public or private way. *Carlin v. Paul*, 47 D. 139.

Ordinary rights of way do not pass by conveyance, unless the grantor uses language showing his intention to create the easement *de novo*; and the use of the word appurtenances does not show such an intention. *Stuyvesant v. Woodruff*, 47 D. 158.

Nothing passes as incident to the grant of a right of way over the land of another except what is necessary for its reasonable and proper enjoyment. *Maxwell v. McAttee*, 48 D. 409.

Verbal promises to establish a pathway through land cannot be enforced: 1. Because there is no specific contract entered into by any person or persons; and 2. Because such promises are not obligatory under the statute of frauds. *Hall v. McLeod*, 74 D. 400.

Upon the division of a deceased person's estate, the committee appointed by the probate court may, where necessity or convenience requires it, give to one share a right of way over land assigned to the other shares. *Cheswell v. Chapman*, 75 D. 158.

A deed granting a right of way by reference to the actual condition of property, and the manner in which it was used by the owner at the time, is valid; and proof may be introduced to show what roads and passes were in use at the time of the conveyance. *Ib.*

A valid right of way in passways after partition is created by a probate court committee who assign to one share the "privilege to pass and repass to and from, in and around, the lands assigned to the other shares," in the usual passways. *Ib.*

A right of way in passways after a partition of a decedent's estate will be limited to such passways as were in existence and in a condition to be used at the time of the

partition, and such as were marked on the ground by a distinguishable track, or otherwise so defined as to be fixed in a certain course. Such a right confers no authority to open passways formerly used, but discontinued and closed at the time of the partition. *Ib.*

Equity will enforce the specific performance of a provision of a will granting a road across the land of a purchaser of one devisee to the land of a purchaser of another devisee, notwithstanding that the will provides that the devisees shall themselves locate the road, or cause others to locate it for them. *Lide v. Hadley*, 76 D. 338.

Under a parol agreement by the owners of adjacent lots, dedicating an alley to the common use of the lots, and in pursuance of which the owners erect their buildings in reference to the alley, the easement becomes appurtenant to each lot, and is not defeated by the statute of frauds, and subsequent purchasers of the lots take the easement as an appurtenance. *Rhea v. Forsyth*, 78 D. 441.

3. Creation by adverse user or prescription.—To establish a right by prescription there must be: 1. Continued and uninterrupted use or enjoyment; 2. Identity of the thing enjoyed; 3. That the right is adverse to the owner of the soil. *Lawton v. Rivers*, 13 D. 741. S. P., as to the third point. *Sims v. Davis*, 34 D. 581; *Rowland v. Wolfe*, 19 D. 651.

Immaterial changes in a road do not destroy its identity; but much depends on the situation of the country. *Lawton v. Rivers*, 13 D. 741.

A person does not have a right of way by prescription by passing over the lands of another in all directions, nor can a grant of such a way be presumed, however long continued. *Jones v. Percival*, 16 D. 415.

Permissive use of a passway through land, although continued for fifty years, confers no right on the persons using it. *Hall v. McLeod*, 74 D. 400.

The mere declaration of one that he uses a way by sufferance is insufficient to divest him of rights acquired by prescription. *Pierce v. Cloud*, 82 D. 496.

A plea, after partition, alleging a right of way by prescription is insufficient, although it refers to the immemorial usage of former proprietors, unless it contains a distinct averment that the passway existed and was in use, or in a condition to be used, at the time of the partition; and not leave it to be inferred that it was closed and discontinued at that time. If defendant allege that it was necessary for him to remove fences or other obstructions in order to use the passway, he must also allege that the obstruction was placed there since the partition. Plea of usage in former times by owners of the whole land is of no im-

For Index to Notes in American Decisions and American Reports, see Volume I.

portance, except as it may furnish evidence that there was a passway at the time of the partition. *Cheswell v. Chapman*, 75 D. 158.

The enjoyment of a way as of right is defined to mean an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by presumption and adverse user, or by deed confirming the right; or though not strictly legal, yet lawful to the extent of excusing a trespass. *Pierce v. Cloud*, 82 D. 496.

Twenty-one years of use and enjoyment of right of way, as of right, confers title, and the owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with the right claimed by the other party. *Ib.*

Five years' uninterrupted enjoyment of a right of way over public land appropriated for a road establishes a prescriptive right to continue to enjoy the same. *Chollar-Potosi M. Co. v. Kennedy*, 93 D. 409.

A party assuming and exercising a right of way openly, notoriously, and continuously, without asking the consent of the owner of the land, and without manifesting in any way that he is exercising the right as a favor or license given him by the owner of the soil, must be considered as holding adversely. *Ib.*

A party relying upon a right of way by prescription need not in pleading aver that he enjoys the right of way by prescription. It is sufficient for him to aver that he has enjoyed the right of way for a period long enough to have established his right. *Ib.*

When a right of way to certain land exists by adverse use and enjoyment only, proof that it was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate, while substantially in the same condition. *Parks v. Bishop*, 21 R. 519.

A right of way over an uninclosed woodland can be acquired by user for twenty-one years. *Reimer v. Stuber*, 59 D. 744.

Adverse use must be uninterrupted for twenty years to give a right of way over uninclosed land, and inclosing the land terminates the use. *Kilburn v. Adams*, 39 D. 754.

A prescriptive right of way over uninclosed lands can not be acquired by mere use thereof. *Sims v. Davis*, 34 D. 581.

The assertion of ownership by the claimant of a right of way, or some implied admission by the owner of the soil that the right exists, is essential to create a right of way by prescription over uninclosed lands. *Ib.*

A right of way over uninclosed land attached to a school-house, designedly left open for convenience or ornament, can not be acquired by an adjacent proprietor, by merely passing over the land in common with those for whose use it is appropriated, for any number of years, although his use is more frequent than theirs, and a marked path is worn thereby, and although he occasionally levels spots gullied by the rain, such use being regarded as permissive and not adverse, unless there is some decisive act, indicating an exclusive use under a claim of right, such as making a wrought way, paved or graveled, or otherwise fitted for use. *Kilburn v. Adams*, 39 D. 754.

A trustee of an incorporated academy can acquire a right of way over its land by adverse use, but more unequivocal acts of adverse and uninterrupted possession are required of him than of a stranger. *Ib.*

4. When a grant will be presumed. — A grant of a right of way may be presumed from an uninterrupted adverse possession for more than twenty years, unexplained. *Hill v. Crosby*, 13 D. 448. The way claimed must be definitely located; no right can be acquired, in common with other neighbors, over uninclosed lands, the routes used being changed with every change of fields and fences at the will of the owner. *Turnbull v. Rivers*, 15 D. 622.

To rebut the presumption of the grant of a way from an alleged uninterrupted use, evidence that the owner of the land had plowed up the way, within the statutory time, at the same time declaring that the claimant had no right of way, is admissible. *Barker v. Clark*, 17 D. 428.

The grant of a right of way will be presumed from an uninterrupted enjoyment thereof for twenty-one years. *Worrall v. Rhoads*, 30 D. 274.

Such a presumption applies to a way over uninclosed land, whether clear or woodland. *Ib.*

The use of a passway, to create a presumption of a grant of a right of way, must be enjoyed under circumstances that indicate that it is claimed as a right, and is not regarded merely as a privilege. *Hall v. McLeod*, 74 D. 400.

The grant of an easement in that portion of a passage-way between adjoining lots of land which lies upon the lot of the other owner will be presumed in the owner of each lot, where the way, which extended from a street along and upon the dividing line between the lots and was the only means of access to the back part of either, was used uninterruptedly for twenty years by the owners of both lots, without limit, restriction, interruption, or objection, or any claim or right, except what might be implied from such use, and no mention of any right of way was made in any of the

For Index to Notes in American Decisions and American Reports, see Volume I.

conveyances of any of the lots for a much longer time. *Barnes v. Haynes*, 74 D. 629.

M. C., owning a tract of land bounded north by W. street, conveyed to D. the west portion, whereon was a well, reserving a right to use the well by the words, "excepting a privilege to the well of water on said lot, which I reserve for the use of my said homestead estate," this homestead estate being the remainder of the tract. M. C. devised to J. in fee simple the land between the house and the lot conveyed to D., together with a tenement in the house, and to S. the rest of the homestead estate. For a long period, but not for the time required to gain an easement by prescription, all the occupants of the homestead estate had crossed the land between the homestead and D.'s lot on their way to the well. In trespass *quare clausum* brought by the grantees of J. against S. *held*, that the way across J.'s lot could not be claimed as a way of strict necessity. *Held*, further, that the way could not be implied from the circumstances of the case as one reasonably necessary. *O'Rourke v. Smith*, 23 R. 440.

Quare, whether the grant of a way existing *de facto* can be implied except in cases of strict necessity. *Ib.*

Seem, that the claimant of such grant must be required to show that without the way he will be subjected to an expense excessive and disproportioned to the value of his estate, or that his estate clearly depends for its appropriate enjoyment on the way, or that some conclusive indication of his grantor's intention exists in the circumstances of his estate. *Ib.*

5. **Transfers and assignments.** — Where the owner of three tracts of land, over one of which he has been accustomed to pass by a way between the other two, conveys these two, with their appurtenances, the way does not pass. *Barker v. Clark*, 17 D. 428.

An ungranted residue of a right of way may be annexed to a particular messuage or close, either by express stipulation or necessary implication, according to the occasion of the grant. *Kirkham v. Sharp*, 29 D. 57.

A grantor of such right of way, by conveying a full privilege of ingress, egress, and regress, puts his right thereto exactly on a footing with that of his grantee as a co-tenant; and therefore he can not afterwards use his ungranted residue in a manner different from that contemplated and obviously intended by the parties at the time the grant was made. *Ib.*

A perpetual right of way is the subject of grant, and not of license, and can be conveyed at law only by deed or prescription. *Foster v. Browning*, 67 D. 505.

A license purporting to give a perpetual right of way is revocable at law, although

money may have been expended upon the faith of it by the licensee in building the way; but it seems that in equity the licensee may have relief upon the grounds of estoppel and part performance of a parol contract. *Ib.*

A right of way to land devised, over other land of the testator, is appurtenant to the land devised, and passes by a conveyance thereof without express mention. *Lide v. Hadley*, 76 D. 338.

J. owning lands, on which was a strip called a street, but which was not laid out or dedicated as a public highway, conveyed the same to S., by a conveyance, in which the said strip was mentioned as a boundary and described as "St. Charles street." Subsequently S. conveyed a portion of such lands to the plaintiff, "with all the privileges and appurtenances thereunto belonging," referring to the so-called street, in the deed. The land so sold did not abut or front upon such street, nor was there a right of way by necessity over the land intermediate. *Held*, that the plaintiff did not acquire any right of way over the so-called street. *Dawson v. St. Paul Fire Ins. Co.*, 2 R. 109.

Where the owner of land has a way over one portion of it for the benefit of another portion of it, such way is a non-continuous *quasi* easement and will not pass on a sale of the dominant portion, by the word "appurtenances" merely, but there must be words sufficient to create a new easement. *Parsons v. Johnson*, 23 R. 149.

The owner of land, over which was a way for his convenience, sold the land adjacent to the way, describing it by precise and definite boundaries, but the way was not mentioned and there were no general words except the word "appurtenances." The way was not necessary to the purchaser. *Held*, that the way was a non-continuous *quasi* easement and did not pass. *Ib.*

6. **Use of private ways.** * — Where the way commonly used is closed by the act of the owner of the land, the way not being limited or defined, the one having the easement may pass to and fro in the manner least prejudicial to the owner. *Farnum v. Platt*, 19 D. 330.

If a private way be unlawfully obstructed by the owner of adjoining land, a person entitled to use the way may pass over the adjoining close, so far as may be necessary to avoid the obstructions, taking care to do no unnecessary damage. *Kent v. Jullkins*, 87 D. 544; *Haley v. Colcord*, 47 R. 176.

The grantee of a right of way takes it subject to all restrictions which the grantor has imposed, and can use it for no other purpose than that provided in the grant. *French v. Martin*, 57 D. 294.

* Private ways, in what manner may be used, see note, 88 D. 279-282.

For Index to Notes in American Decisions and American Reports, see Volume I.

The owner of a right of way over a passage-way may disturb the soil and pave or repair the way for the purpose of keeping it fit for use, provided in so doing he make no material change in the condition of the way nor interfere with the estates of others therein. *Brown v. Stone*, 69 D. 303.

The owner of land burdened with a right of way is bound to furnish reasonable facilities, determined by the circumstances of the case, for its enjoyment by the one entitled to the right. *Bakeman v. Tulbot*, 88 D. 275.

7. When a way of necessity arises.*—A right of way may be created in three ways: 1. By necessity; 2. By grant; 3. By prescription. *Lawton v. Rivers*, 13 D. 741.

A right of way from necessity, strictly speaking, does not exist. A way of necessity, such as the law recognizes, results either from a grant or reservation implied from the existing necessity; and unity of possession at some former time appears to be the foundation of the right. *Tracy v. Atherton*, 82 D. 621.

A right of way by necessity exists in all cases where a person owns land surrounded by other lands which exclude it from a public highway. *Snyder v. Warford*, 49 D. 94.

A way of necessity is impliedly included in a grant of land to which access can be had only by passing over the grantor's land. *Nichols v. Luce*, 35 D. 302; *Brown v. Burkenmeyer*, 33 D. 541; *McTavish v. Carroll*, 61 D. 353; and if a grantor conveys part of his lands, reserving a part to which there is no access except over the part conveyed away, he will be entitled to a way by necessity over the part so conveyed by him. *Collins v. Prentice*, 38 D. 61; but if he can use another way he cannot claim by implication to pass over that of another to get to his own. *Alley v. Carleton*, 94 D. 260.

Where one conveys land to which there is no access, except over his remaining lands or over the lands of a stranger, a right of way exists by necessity over such lands of the grantor. *Kimball v. Cochecho R. R.* 59 D. 387.

Two or more ways of necessity are impliedly included in a grant of lands which are so divided by impassable barriers, that the different parts are inaccessible without such ways. *Nichols v. Luce*, 35 D. 302.

The grantor in a deed of warranty may have a way of necessity over land granted. *Brigham v. Smith*, 64 D. 76.

To establish a way by necessity it is sufficient if the necessity exist; its existence for any particular length of time is not required; but the actual necessity of the right, and not its mere convenience, must be

shown. Hence, where a resident on an island has a way by water to a public road, of no greater length than a passage through a neighbor's field, no sufficient necessity exists to create a way through the field. *Lawton v. Rivers*, 13 D. 741.

The order in which two parcels of land were conveyed makes no difference in determining whether or not a right of way by necessity is appurtenant to either. And neither does the fact that such parcels were conveyed by the executors of a deceased owner, under a decree of the probate court. *Collins v. Prentice*, 38 D. 61.

The common law rule respecting ways by necessity is not changed by the Connecticut statute authorizing the selectmen to lay out private ways. *R.*

Where a right of way by necessity is claimed by a party, he must prove that the necessity exists. *Stuyvesant v. Woodruff*, 47 D. 156.

A right of way is reserved by implication to a wreck commissioner on the grant of land on "the banks," where there is no other way of getting to the shore. *Helfield v. Baum*, 57 D. 563.

A private right of way may exist by necessity. *Id.*

A right of way incident to a right of common for taking sea-weed, etc., passes by implication, by a grant of such right of common, upon one tract of land in favor of another. *Hall v. Lawrence*, 57 D. 715.

A way over other land of grantor in a deed may pass as appurtenant to the land granted, even though there be no "insuperable physical obstacles" to prevent access by another way, if such other way cannot be made without unreasonable labor and expense. And a jury in determining this question may consider the comparative value of the land and the probable cost of such a way. *Pettingill v. Porter*, 85 D. 671.

A right of way from necessity is implied by law solely to secure the party in whom it is vested in the enjoyment of his property, of which he would be otherwise deprived, and if the necessity for its use ceases, the right also ceases. *Alley v. Carleton*, 94 D. 260; *Collins v. Prentice*, 38 D. 61.

Where the real estate of a deceased person is divided among his heirs by proceedings in the Probate Court, a right of way of necessity may be implied from one part to another, and where appurtenant to a part set off for dower, it does not cease with the widow's death, but passes to a grantee or purchaser. *Goodal v. Godfrey*, 38 R. 671.

The owner of two stores, with a pulloo hall over both of them, conveyed the stores at different times to different grantees, and an individual half of the furniture, scenery, etc., of the hall to each. There was but one entrance to the hall, and that was at the south end of the building, and it was

* See notes on ways by necessity, 18 D. 746-747; 85 D. 464, 465; 85 D. 575-581; 100 D. 116-118; 86 R. 415-422.

For Index to Notes in American Decisions and American Reports, see Volume I.

impracticable to construct another without injuring the front of the north store and the hall. *Held*, that the owner of the north store had an implied right to use the stairway. *Galloway v. Bonesteel*, 56 R. 616.

In determining necessity for ways to pass with land, the word "necessary" does not mean absolute physical necessity; and "unreasonable labor and expense" means excessive and disproportionate to the value of the property purchased. *Pettingill v. Porter*, 85 D. 671.

Where a judgment-creditor levied on a part of the debtor's land, leaving the latter no passage from the remaining portion to the highway, the debtor has necessarily a right of way over the land levied upon. *Pernam v. Wood*, 3 D. 43.

When land of a debtor is set off on execution to which no access can be had, except over other lands of the debtor, the creditor may have set off to him a right of passage over such other lands either separately or jointly with the debtor. *Taylor v. Townsend*, 5 D. 107.

8. When it does not. — A way of necessity exists only when there is no other outlet to a public highway. *Goyette v. Bethune*, 7 D. 188.

The necessity from which the grantee derives a right of way is, when the lands purchased are surrounded on all sides by the lands of the grantor. If the land can be reached by water, or by a distant or difficult road, the grantee is not entitled to a way across the lands of the grantor; for it is necessity, and not inconvenience, that gives the right. *Turnbull v. Rivers*, 15 D. 622; *Nichols v. Luce*, 35 D. 302; *Screen v. Gregorie*, 64 D. 747.

A party can have no right of way by necessity over the land of another to connect different parts of a tract of land belonging to himself. *Cooper v. Maupin*, 35 D. 456.

A right of way by necessity does not exist when the party claiming it has a way over his own land. *Stuyvesant v. Woodruff*, 47 D. 156.

A vendee has no right of way through the land of his vendor, unless such right of way is indispensably necessary to the enjoyment of the land conveyed to him. *Hall v. McLeod*, 74 D. 400.

In 1839, the owner of a lot built two houses on it, one fifteen feet front, the other twelve and one-half feet front in the first story, and fifteen feet in the upper stories, leaving an alley of two and one-half feet in width between them, open to the street, thirty feet deep, and communicating at the inner end by gates with the rear yards of both houses, the timbers of the latter house extending across the alley from the upper stories, and resting in the wall of the first house. The alley was used as a common passage-way by the occupants of both houses.

At the inner end of the alley a fence at right angles with the street, extending to the rear of the lot, divided it into equal parts of fifteen feet each. Access could be had to the yard through the house or from a lane in the rear of the premises. The builder and his widow owned both houses until 1865, when the property was sold under decree to W., who in that year sold the second house to C. by a deed including the alley, without reservation of any right in it to the occupants of the other house. In 1868 W. sold the first house to S. by a deed embracing no part of the alley, nor any right in it. *Held*, that the owners of the first house got no right to the use of the alley. *Mitchell v. Seipel*, 36 R. 404.

9. Remedy for interference. * — Case may be maintained against an intruder, by one having a right of way, without proof of special damage. *Williams v. Estling*, 45 D. 710.

10. — or obstruction. — The existence of other obstructions to plaintiff's way is no bar to his recovery, where such other obstructions are not considered in estimating damages. *Rogers v. Stewart*, 26 D. 296.

The measure of damages for obstructing a way is the plaintiff's injury sustained by loss of the use of the entire way; the mere value of the way up to some further obstruction is not the proper rule. *Id.*

A declaration in case for obstructing a way setting out termini, and a general verdict thereunder for the plaintiff, are sufficiently certain. *Pearce v. McClenaghan*, 55 D. 710.

Seisin is not necessary to maintain case for obstructing a way appurtenant to land, but rightful possession is sufficient, and under an allegation of seisin and possession proof of rightful possession will support the action, especially after verdict. *Id.*

An allegation of possession of land and of a right of way over an adjoining tract, without averring that the right of way is by reason of the possession, is sufficient after verdict where a way appurtenant is proved, although the better course is to allege the way to be by reason of the possession. *Id.*

The owner of land subject to an easement has all the rights of an owner, subject only to a reasonable use of the easement. Consequently where such owner builds a fence across a road, to which another person has an easement for occasional use, if the owner offers to and is willing to take down the fence every time the person having the right desires to pass, he occasions such latter person no damage which can be recovered in an action. *McTavish v. Carroll*, 61 D. 353.

An easement to travel along a road running along a mill-race, for purpose of

* Rights and remedies of parties entitled to private ways, see note, 100 D. 114-119.

For Index to Notes in American Decisions and American Reports, see Volume I.

repairing same, is not necessarily obstructed by "plowing and cultivating" the road, the sort of cultivation not being mentioned. There are different modes of cultivation, some of which in particular stages of it would create no such obstruction as could prevent carts and wagons from being used with convenience in repairing the dam and race. *Id.*

A plaintiff is entitled to recover damages for obstructions to his right of way, while such right existed, although he avers himself out of court at the time of suit brought, as to the right of way itself. *Alley v. Carleton*, 94 D. 260.

The grant of a passway over a particular part of grantor's land does not deprive him of the right to erect gates at the *termini* of the way in entering and leaving his land. *Maxwell v. McAtee*, 48 D. 409; provided they do not interfere with a reasonable and proper enjoyment of the way; whether they do or not is a question for the jury. *Baker v. Frick*, 24 R. 506.

Under a grant of a passage-way, "as now laid out," the owner of land over which a way passes cannot maintain a gate thereon, nor can he narrow the way by planting posts therein. *Welch v. Wilcox*, 100 D. 113.

Where city lots are conveyed with the reservation of a passage-way, five feet wide, in the rear, with no outlet at one end, for the purpose of access to the street, the rights of abutters on that way are not infringed by the erection of bay-windows projecting over it from thirteen to eighteen inches, not interfering with foot passage. *Burnham v. Nevins*, 59 R. 61.

11. Extinction of the right by acts of land owner.*—The obstruction of a way by the erection of a gate thereon, which may be opened and shut at pleasure, is not such an obstruction as will operate to extinguish the claimant's right of way, however long it may have been continued. *Barnwell v. Magrath*, 36 D. 254.

An actual obstruction of a private right of way, as by inclosing and cultivating it for ten years, extinguishes the plaintiff's right thereto. *Boven v. Team*, 60 D. 127.

A right of way of necessity is not a permanent right, and the conveyance of an estate to which such a right is appendant carries with it the right, and wholly divests the grantor of all interest in it. *Alley v. Carleton*, 94 D. 260.

12.—by abandonment or non-user.—Omitting to remove an obstruction in a way, placed there by the defendant, is not an abandonment thereof; otherwise, had the plaintiff himself erected the obstruction. *Rogers v. Stewart*, 26 D. 296.

In the case of private ways, non-user for

* Right of land owner to erect buildings over a private way, see note, 56 R. 64, 65.

twenty years affords a conclusive presumption that the right to them never existed, or has been extinguished in favor of some adverse right. *Webber v. Chapman*, 80 D. 111.

13.—by merger.—Unity of ownership extinguishes an easement of way. *Screen v. Gregorie*, 64 D. 747.

A way is extinguished by a union of the title in fee in the dominant and servient estates in the same person. *Pearce v. McClenaghan*, 55 D. 710.

When the title to two adjoining closes becomes united in one person, all subordinate rights and easements are extinguished. And if there is a private way over such premises, actually in use or designated on a plan, and no one else has a legal right to use it, he may discontinue it in whole or in part, and may sell and convey the fee in the land over which such way was laid out or used. *Warren v. Blake*, 89 D. 748.

A right of way appurtenant is not extinguished by merger in a mortgagee taking possession of the dominant and servient estates under separate mortgages for the purpose of foreclosure, but conveying one of the estates before foreclosure. *Rüger v. Parker*, 54 D. 744.

A way is not extinguished by a conveyance of the dominant estate in trust to the owner of the servient estate, for the benefit of a married woman for life, remainder in fee to her children, nor is the way suspended by such a conveyance. *Pearce v. McClenaghan*, 55 D. 710.

The right to use an alley running between two lots of land, and from one street to another, and between other lots of land, such alley having been dedicated to the use of lot-owners by a former owner of the property, constitutes an easement which, if continuous, will not be extinguished by merger of the title of the said two lots in one owner, but will pass to purchasers and holders of other lots upon the alley; and the purchaser of such two lots will have no right to close the alley, though the measurements in his deeds extend to the center of the alley, and embrace the whole of it between his lots; but the consent of all the owners of lots bounding on it will be necessary to authorize it to be closed. *McCarty v. Kitchenman*, 80 D. 538.

PRIVILEGE.

From arrest in civil actions, see ARREST, 9-12. From service of process, see PROCESS, 20.

Of personal representatives, under statute of limitations, see LIMITATIONS OF ACTIONS, 74.

Of re-shipment, see BILLS OF LADING, 10.

Of witness, from arrest and civil process, see WITNESSES, 5, 6.

To refuse to answer, see WITNESSES, 114-119.

For Index to Notes in American Decisions and American Reports, see Volume I.

PRIVILEGED COMMUNICATIONS.

What are, generally, see **LIBEL**, 5, 6 ;
SLANDER, II.
Between attorney and client, see **ATTORNEY AND CLIENT**, IV.
Between physician and patient, see
PHYSICIANS AND SURGEONS, 7.

PRIVILEGES.

Of attorneys, see **ATTORNEY AND CLIENT**, 4.
Of carrier, on railroad trains, see **EXPRESS COMPANIES**, 6.
Of Indians, under treaties, see **INDIANS**, 3.
Of infants, see **INFANTS**, 5.
Of public officers, see **OFFICERS**, III.
What pass by deed, see **DEEDS**, 75.

PRIVITY.

Of contract, see **CONTRACTS**, 8.

PRIZE.

Jurisdiction of admiralty, see **ADMIRALTY**, 7. Consult **WAR**.

PROBABLE CAUSE.

As a defense, see **MALICIOUS PROSECUTION**, 14.
Proof of want of, see **LIBEL**, 16.
When plaintiff must show want of, see **MALICIOUS PROSECUTION**, 6.

PROBATE.

Appeals from courts of, see **APPEAL**, 133-136.
Of wills, see **WILLS**, II.

PROBATE COURTS.

Generally, see **COURTS**, V.
Adoption of common law in, see **COMMON LAW**, 2.
Approval of claims by, see **EXECUTORS**, etc., 94.
Conclusiveness of judgments of, see **JUDGMENT**, 61.

PROCEDENDO.

When awarded on appeal, see **APPEAL**, 117.

PROCEDURE.

In courts of chancery, see **EQUITY**, III.
In creditors' suits, see **CREDITOR'S SUIT**, III.
In ejectment, see **EJECTMENT**, II.
In justice's courts, see **JUSTICE OF THE PEACE**, IV.
In suits for use and occupation, see **LANDLORD AND TENANT**, 49.
On mandamus, see **MANDAMUS**, III.

PROCEEDS.

Of execution sale, distribution of, see **EXECUTION**, 117-120.
Of foreclosure sale, distribution of, see **MORTGAGES**, 106.
Of former levy, liability of, to execution, see **EXECUTION**, 35.

Of loss insured, who entitled to, see **INSURANCE**, 34.
Of public sale, disposal of, see **JUDICIAL SALE**, 15.
Of sale of decedent's land, application of, . see **EXECUTORS AND ADMINISTRATORS**, 54.
Of sale of infants' lands, disposal of, see **INFANTS**, 14.
Of sale of land for payment of debts, disposal of, see **EXECUTORS**, etc., 122.
Of sales of land, when descend to the heir, see **DESCENT**, 4.

PROCESS.

[Includes the general nature, issuing, service and return of process, in actions at common law, suits in equity, and actions under Codes of Procedure, and practice acts.]

Appearance, when waives defects in, see **ACTIONS**, 14.
How far protects officer, see **ARREST**, 17; **OFFICERS**, 35, 36 ; **SHERIFFS**, 17; **TRANSFERS**, 3, 4, 42.
In foreclosure suits, see **MORTGAGES**, 81.
In partition suits, see **PARTITION**, 14.
In suits against husband and wife, see **HUSBAND AND WIFE**, 108.
In suits by or against infants, see **INFANTS**, 41.
Judgment against party not served with, see **JUDGMENT**, 2.
Privilege of witness from service of, see **WITNESSES**, 6.
Service of, by constables, see **CONSTABLES**, 3.
Service of, by sheriffs, see **SHERIFFS**, 4-7.
Service of, on corporation, see **CORPORATIONS**, 203, 204.
Service of, on Sunday, see **SUNDAY**, 8.
Service of, what sufficient to support judgment, see **JUDGMENT**, 14.
When evidence, see **EVIDENCE**, 192.
See also **WARRANT**.

I. IN CIVIL ACTIONS.

1. *General Principles.*
2. *How Framed and Issued.*
3. *Service, and how Proved.*
 - a. In Actions at Law.
 - b. In Suits in Equity.
 - c. In Actions under Codes.

II. IN CRIMINAL PROCEEDINGS.

I. IN CIVIL ACTIONS.

1. General Principles.

1. Necessity of Process.—Notice is necessary to give a court jurisdiction of the person, and unless it is acquired in some mode, the judgments of the court are mere nullities. *Ex parte Cheatham*, 44 D. 525.

A proceeding against a steamboat or other water-craft is one in rem; the liability is upon the craft, and the judgment operates alone upon it. The seizure of the thing is construed notice to the whole world, and ne

For Index to Notes in American Decisions and American Reports, see Volume I.

the powers of the sheriff in serving or executing any process except that he is not to be recognized or obeyed as a sheriff or known officer, but must show his authority, and make known his business if required by the party who is to obey the same. *Burton v. Wilkinson*, 46 D. 145.

A constable, being the plaintiff in an action, may serve the summons himself, and his return can not be impeached in trespass, for an arrest under an execution and judgment founded on such service. *Putnam v. Man*, 20 D. 686.

Process, where a sheriff is a party, plaintiff or defendant, should, at the common law, be issued to the coroner in all cases; and if, in such cases, it be issued to the sheriff, it will be set aside as irregular upon the application of the other party to the court whence it issued. *Collais v. McLeod*, 49 D. 376.

A sheriff acquires a special property in money collected by him under execution, and if such money is at any time subject in his hands to other process, he cannot serve it himself, but it must be executed by the coroner. *Clymer v. Willis*, 58 D. 414.

The law does not authorize a person to execute process in his own favor. *Snyder v. Broese*, 99 D. 551.

11. — and upon whom. — Service upon an attorney after his client's death is invalid. *Ciena v. Beach*, 46 D. 576.

12. Service on one of several defendants.* — In trespass against several defendants, the plaintiff may proceed to trial, as to one or more, without entering a *nolle prosequi* as to the defendants who have not been served with process, and who have not appeared. *Givens v. Bradley*, 6 D. 646.

13. Mode and sufficiency of service. — 1. In general. — It is competent for a state to declare what manner of service or process shall be sufficient to bring its citizens into court; but its regulations cannot operate extraterritorially, and therefore are not binding upon citizens of other states unless they go voluntarily within its limits. *Bimeler v. Dawson*, 39 D. 430.

Courts have the power to determine whether a service of process was sufficient. *Borden v. State*, 54 D. 217.

The mode in which writs and precepts shall be served and executed is regulated by statute, and unless substantially conformable thereto, the doings of the officer are invalid. *Benson v. Smith*, 66 D. 285.

2. Personal service. — Showing to a sheriff an order of supersedeas is a sufficient service thereof upon him. *Hopkinson v. Sears*, 39 D. 236.

The service of a writ of summons is insufficient, where the return states that it was executed by leaving a certified copy for the

*Service of process on one of several partners or joint-debtors, see note, 44 D. 570-574

defendant below, "with his wife, a white member of his family, and over the age of fifteen years," but does not state it to have been left at his usual place of abode, as expressly required by statute when the service is not personal. *Vaughn v. Brown*, 47 D. 730.

A record which shows a service of process, a notice to the defendant, or an appearance for him, not amounting in either case to personal notice or appearance, raises a presumption in favor of the jurisdiction of the court, but such presumption may be met and overcome by proof that the service was not sufficient under the laws of the state where the judgment was taken, or by other countervailing proof. *Bimeler v. Dawson*, 39 D. 430.

3. Constructive service. — Constructive service of process and proceedings *in rem*, are authorized by the laws of most of the states, and judgments founded on such service or proceedings, are valid. *Scott v. Coleman*, 15 D. 71.

Statutes substituting other than a personal service or process, must be strictly complied with, to give the court jurisdiction, and this compliance must appear affirmatively in the proceedings. *Zecharie v. Bosers*, 40 D. 111.

The publication of an order for two months, as required by statute, is sufficient, although such order directed its publication for eight weeks only. *Blight v. Banks*, 17 D. 136.

An affidavit for an order of publication against persons sued as unknown heirs, must be made by the complainant himself, unless it appear why he could not make it. *Id.*

The statute 5 George II., authorizing service by publication against absent parties, is substantially in force in Georgia, but does not apply to citizens of other states who were never residents of the state, or to foreign corporations. *Dearing v. Bank of Charleston*, 48 D. 300.

Where a statute provides for constructive service of writ upon each defendant separately, either by personal service or by leaving a copy at his usual place of abode, the terms and conditions of such service must be complied with. Service cannot be made by leaving one writ for two defendants. *Stewart v. Stringer*, 97 D. 278.

14. Time of service. — A service of civil process upon Thanksgiving day, is prohibited by statute, and is therefore void. *Gladwin v. Lewis*, 16 D. 33.

A sheriff should execute process with the utmost expedition, or as soon after he receives it as the nature of the thing will admit. *Wyer v. Andrews*, 29 D. 497.

Of two writs served on the same day, one of which shows the exact time of day when the service was made, the second only the

For Index to Notes in American Decisions and American Reports, see Volume I.

day, the former will be given precedence to the latter, as no intendment can be made that the latter was served before the hour mentioned in the first return of service. *Fairfield v. Paine*, 41 D. 357.

An amendment to a return of a service that may affect the rights of third persons can only be allowed where something appears of record by which the correction can be made. Thus where one party claims under a writ of execution returned as served at noon of a certain day, an amendment can not be allowed of a writ returned merely as served upon the same day, so as to cause the same to appear as served before the first writ, where nothing appears in the record to indicate the time of service. *Id.*

A computation of the time of serving process before return day, must be made by including the day of service, and excluding the return day. *Dills v. Zeigler*, 48 D. 370.

15. Place of service.*—Process served on a party without the state has no greater effect, it seems, than knowledge brought home to him in any other way. *Ewer v. Coffin*, 48 D. 587.

16. Officer's return, and how compelled.—A party not being an officer, justifying under legal process, need not show it returned. *Plummer v. Dennett*, 20 D. 316.

The omission of the sheriff to sign the return of a writ, renders such return irregular. *Dewar v. Spence*, 30 D. 241.

A misreturn or an irregular return is amendable, but it is otherwise where there is no return, which renders the subsequent proceedings void. *Id.*

An unsigned indorsement on a summons in partition of "*nil habet*, and published as the law directs," when returned into the prothonotary's office, which is referred to in a subsequent part of the record as the sheriff's return, is an insufficient return, and is amendable, and a judgment by default founded thereon is not void. *Id.*

A sheriff's return upon a writ that he served process upon certain named defendants, and could not find the others, imports that a personal service was made upon those found. *Colerick v. Hooper*, 56 D. 505.

The return of a summons, directed to two defendants, does not show legal service, where it is, "I have served this writ on defendant, P. R. and W. R., by leaving a certified copy with his family." It does not show which defendant was served, or that a copy was left with some person of suitable age and discretion. *Rope v. Heaton*, 76 D. 269.

17. Conclusiveness of return.—An official return duly made upon process by a sworn officer is conclusive of the facts therein stated, until vacated or set aside by due course of law, as between the parties and

*Service of process, right of officer to enter for purpose of, see note, 25 D. 171, 172.

privies to the suit and others whose rights are necessarily dependent upon it; but as to all other persons, such return is *prima facie* evidence only of the facts stated in it, and subject to be disproved. *Phillips v. Ellwell*, 84 D. 373; *Stinson v. Snow*, 25 D. 238; and the remedy of the party injured is an action against the sheriff for a false return. *Stewart v. Stringer*, 97 D. 278.

A sheriff's return is conclusive as to the facts therein set forth, upon the parties, as far as the particular action is concerned. Thus, if the return state that property replevied was surrendered to the defendant upon his giving bond, the latter may not show that less property was replevied from him than appeared from the return. *Knowles v. Lord*, 34 D. 525.

An officer can not contradict or invalidate his own return under oath. *Wyer v. Andrews*, 29 D. 497.

An officer's return is only *prima facie* evidence of a fact. *Hutchins v. Johnson*, 30 D. 622.

The return of service of process by a sheriff will not preclude a defendant from showing that he had no notice of the action. *Jones v. Commercial Bank*, 35 D. 419.

The return of service of a writ by an officer is, where a return is required by law, the only proper evidence of what has been done by him thereunder, and no omission therein of any fact may be supplied by other proof. *Fairfield v. Paine*, 41 D. 357.

Privies who are concluded by an official return made upon process by a sworn officer are those whose privy would enable them to maintain an action against the officer for a false return to such process. *Phillips v. Ellwell*, 84 D. 373.

13. Amending return.*—An application for leave to amend a return is addressed to the discretion of the court, and may be denied if the granting of it will work an injustice. *Freeman v. Paul*, 14 D. 237.

A sheriff may, even after judgment, by leave of the court, amend his return on a writ, *nunc pro tunc*, in order to show that the writ was in fact served on the defendant before the judgment was rendered; and such return so made will be sufficient to sustain the judgment, although made after the writ of error is brought. *Heflin v. McMinn*, 20 D. 58.

A return of a summons may be amended according to the facts, to show that a copy left at the defendant's residence was left with a member of his family. *Crocker v. Mann*, 26 D. 684.

19. Relief against irregular service.†—A party decoyed from another state or

* See monographic note on the amendment of the return to a writ, 13 D. 173-181.

† Abuse of process, when renders officer a trespasser *ab initio*, see note, 14 D. 355-359.

For Index to Notes in American Decisions and American Reports, see Volume I.

country, on a promise not to sue him, may, upon being sued in violation of the promise, avoid the process, and may also bring an action for his damages by the breach of such promise. *Steele v. Bates*, 16 D. 720.

If such a party does not avoid the process on the ground of the fraud, but proceeds to trial upon the merits, and judgment go against him, he can not recover the amount of that judgment as damages for the breach of such promise. *Id.*

For any irregularity of an officer in executing valid process, or from any act not authorized by the process the party suing out is not liable, unless the officer acts under his orders or direction. *Barnard v. Stevens*, 16 D. 733.

An action for a false return is the remedy if the return is untrue. *Putnam v. Man*, 20 D. 686.

Process may be quashed on motion if irregularly or fraudulently executed. *Steele v. Boyd*, 29 D. 218.

A suit instituted by process that does not run in the name of the state may be dismissed upon motion of the defendant, though prior to the motion he has appeared in the action for other purposes; and though the statute authorizes like suits to be instituted "either by voluntary appearance and agreement of the parties or by process." *Little v. Little*, 32 D. 317.

Want of authority in a person serving a writ of attachment may be taken advantage of at any time, and is not waived by failing to take advantage of it by plea in abatement. *Kelly v. Paris*, 33 D. 199.

Void process must be set aside or vacated before trespass can be maintained against the party who caused it to issue, for acts done thereunder. *Doy v. Sharp*, 34 D. 509.

A motion to quash a writ for want of a proper teste is addressed to the discretion of court, and if such motion is made for a cause which might have been taken advantage of by plea in abatement, it must be made within the time limited for making such plea, or the party will be deemed to have waived the right to make it. *Parsons v. Swett*, 64 D. 352.

A court has jurisdiction to amend a writ after plea in abatement, or after a motion to quash the writ seasonably made. *Id.*

Strangers, third persons, or volunteers are liable in trespass for interfering, instigating, and causing the enforcement of unlawful process, though it may be regular and valid on its face. Public duty does not require such persons to assume the responsibility of executing legal process. *Emery v. Haygood*, 66 D. 459.

It is the province of the court to see that neither the law, nor its officers, nor its instruments, are made auxiliary to corrupt, unjust, or oppressive ends. Courts fre-

quently remedy such evils upon motion, where the question relates to the control, use, or misuse of the process of the court. *Pomroy v. Parmlee*, 74 D. 328.

A party dispossessed by a writ improperly granted is entitled to restitution. *People v. Johnson*, 97 D. 770.

20. Privilege from service of process. — Privilege in respect to place of service of attachment process does not avoid it, as where it was served on a member of one of the councils of Baltimore in the council-chamber. *Peters v. League*, 71 D. 622.

The service of process on a privileged person is not void; it is treated as an irregularity, which may be waived.

One charged with a criminal offense in another county than that of his residence, and who on the trial is discharged, is privileged from civil suit in that county until the lapse of a reasonable time to enable him to return home. *Palmer v. Rowan*, 59 R. 844.

b. In Suits in Equity.

21. Service upon non-resident defendants. — A decree rendered on an insufficient publication does not bind the parties thereto; and ratification of such decree pending the suit is ineffectual. *Blight v. Banks*, 17 D. 136.

A court can not extend its jurisdiction over citizens of other states, by a rule of practice, as to service of process. *Dearing v. Bank of Charleston*, 48 D. 300.

The rule of equity, in Georgia, for the publication of a notice to absent defendants, is in affirmance of the statute 5 Geo. II., and is valid so far as it affects parties who have departed from the state to avoid service. *Id.*

A decree *pro confesso* is erroneous, when passed on an order of publication, directing publication for three weeks instead of one month, as required by statute. *Central Bank v. Copeland*, 81 D. 597.

Jurisdiction over the person of a non-resident defendant in a chancery suit may be acquired by service of process by publication, and proper return thereon. *McDaniel v. Correll*, 68 D. 587.

Non-resident defendants are not within the jurisdiction of a court where no attempt has been made to serve them with process; and where a part of the defendants have not been thus served, the defect cannot be cured by legislative enactment. *Id.*

A decree against non-residents upon constructive notice by publication affects only property within the jurisdiction of the court. *Harris v. Pullman*, 25 R. 416.

A decree of a court against three persons composing a partnership, doing business in the state of the former, rendered on personal service on two of the partners in that state, does not bind the third, who resided

For Index to Notes in American Decisions and American Reports, see Volume I.

out of that state, did not appear, and was not personally served. *Pickett v. Ferguson*, 55 R. 545.

c. In Actions under Codes.

22. By whom service may be made. — Generally, in case of the inability of a sheriff to execute process, the coroner, by virtue of his office, is authorized to act as his substitute; and where he has acted, the legal presumption is that the facts existed which rendered it proper for him to act in the particular instance. *Kirk v. Murphy*, 67 D. 640.

When a sheriff is a party to an action, the clerk may direct process to a coroner, although there be no proof that the sheriff is a party. The clerk is presumed to know who is sheriff, and may act on his own knowledge in issuing the process in such a case. *Oliphant v. Dallas*, 65 D. 146.

The clerk may direct process to a coroner without an averment in a petition that the sheriff is a party to the action. It is the better practice to insert such averment, but its omission is not fatal, and may, if required, be supplied by amendment. *Ib.*

Personal service of a summons may be made by the sheriff of the county where the defendant is found by his deputy, by a person specially appointed by the sheriff, or by the judge of the court in which the action is brought, or by any white male citizen of the United States over the age of twenty-one years, and competent to be a witness on the trial of the action. *Hahn v. Kelly*, 94 D. 742.

23. Who may be served with process. — A person may appoint an attorney with capacity "to be sued," or to be served with process in his place and stead, and service of process on such attorney will have the same effect as service upon the principal. *Coffey v. Silvan*, 65 D. 169.

Service cannot be made on a non-resident. *Sturgis v. Fay*, 79 D. 440.

24. Sufficiency of service generally. — Service can not render process operative which is so utterly vitiated, with or without appearance, with or without the consent of the defendant, as to be null and void. *Beall v. Blake*, 58 D. 513.

The distinction between the effect of defective service and of no service should be observed. *Pursley v. Hayes*, 92 D. 350.

Service of process in rem should be made openly, and a written notice left with the person in possession; and the officer's acts of custody and control should be exercised in such an open and visible manner, by a custodian or otherwise, that the person having the thing in charge may take the necessary steps to protect the rights of all those interested in it. *Jones v. McGuirk*, 99 D. 556.

25. Time of service. — The day of is-

suing a summons as well as the day of return is to be counted in ascertaining the return day thereof. *Barber v. Chandler*, 55 D. 533.

The court is justified in dismissing an action because of the plaintiff's want of diligence in allowing an action to rest, without service or summons, for two years and eight months after the summons is issued. *Grijsby v. Napa Co.* 95 D. 213.

An action may be dismissed by the court for want of prosecution, notwithstanding an entry of default, where the notice to dismiss is given before summons is served, and the plaintiff then serves the summons, and at the end of ten days takes a default, but judgment is not entered up. The dismissal takes effect by relation back to the time of service of the motion. *Ib.*

26. Place of service. — A joint action was brought in Massachusetts against A, a resident of that state, and B, a resident of Pennsylvania. Process was served on A, and the court ordered that the plaintiff give notice to B by service of a copy of the order. B, in Pennsylvania, indorsed the order, "I accept service of this writ." A judgment by default was obtained against both defendants, and the plaintiff sued B in Pennsylvania, on the judgment. *Held*, that the Massachusetts court obtained no jurisdiction over B, and that the judgment against him was invalid. *Scott v. Noble*, 13 R. 663.

27. Leaving process, or copy. — Process may be served upon a member of a man's family, by leaving a copy thereof with his widowed sister keeping house for him. *Wade v. Jones*, 61 D. 584.

Where a copy of the summons regularly issued against a resident of the state is left by the serving officer at the place where such person then resided, the service is to be regarded as actual notice in law, and not constructive notice. *Sturgis v. Fay*, 79 D. 440.

The "usual or last place of residence" means the residence into which the person, still a resident of the state has moved, in the state, last before the service of process. *Ib.*

An officer's return of the service of process upon a trustee of an absent defendant, by leaving "at his dwelling-house" a true and attested copy of the writ, is a sufficient return under a statute requiring such copy to be left "at the last and usual place of abode" of the trustee. *Bruce v. Cloutman*, 84 D. 111.

28. When service by publication is proper and how made. — Jurisdiction over a non-resident on service by publication results from the fact that he has property within the jurisdiction, and extends only to such property as was within the state when the jurisdiction attached. *Stone v. Myers*, 86 D. 104.

* Summons by publication, — attack on judgment for want of jurisdiction, see note, 94 D. 762-770.

For Index to Notes in American Decisions and American Reports, see Volume I.

Proceeding against a non-resident defendant by an order of publication is simply a statutory mode of conferring upon the court power to pass judgment on property, the subject-matter of suit within its jurisdiction, where the owner is beyond the reach of its process. The courts in such cases act upon the presumption of notice which they will not allow to be rebutted. *Dorsey v. Dorsey*, 96 D. 633.

Jurisdiction of the person of a defendant may be obtained: 1. By personal service of the summons, with a copy of the complaint; 2. By constructive service, or what is commonly designated publication of summons. *Hahn v. Kelly*, 94 D. 742.

The service of a summons by publication thereof is set on foot by an affidavit showing the existence of certain facts, in view of which this mode of service is allowed, followed by an order of the court, the judge thereof, or a county judge, directing publication of the summons to be made in some newspaper most likely to give the defendant notice, for a certain length of time; and if the residence of the defendant be known, also directing a copy of the summons and complaint to be forthwith deposited in the post-office, addressed to him at his place of residence; and is terminated by publication and mailing as ordered, or by personal service out of the state, which is equivalent to publication and mailing. *Ib.*

29. Mailing, and proof thereof.—In the case of service by publication, in addition to the publication, the law requires proof that a copy of the petition and notice be directed to the defendant through the post-office, at his usual place of residence, or that such place of residence is unknown to plaintiff, who, after reasonable diligence, could not ascertain the same; and it is error to enter a judgment by default until such proof has been made. *McGahan v. Carr*, 71 D. 421.

In the case of service by publication, proof that a copy of the petition and notice was mailed to the defendant at his usual place of residence, or that such place of residence is unknown, is a jurisdictional fact, upon which, by the statute, the power of the court to act is made to depend, and should appear of record in the case. Without such proof, no default can be legally entered. *Ib.*

A decree entered upon default in a case in which service was made by publication, which recites that it was made to appear to the court that the defendant had been served with notice of the pendency of said action, is not conclusive of such service. The record must show that in addition to the publication a copy of the petition and notice had been sent by mail to the defendant at his usual place of residence, or that the same was unknown; or the decree itself

must recite and show affirmatively that such copies were mailed. *Ib.*

30. Substituted or constructive service.—The allegation that a debtor had been more than thirty days voluntarily within the Confederate lines may be taken for confessed, if supported by the proper affidavit. *Buckner v. Bush*, 85 D. 634.

31. Proof of service, generally.—Proof of personal service of a summons, if made by an officer, is his affidavit or certificate stating the fact and the time and place of service; if made by a citizen, by his affidavit, setting forth that he is competent to make the service, and that he in fact made it by delivering to the defendant personally a certified copy of the summons and complaint, stating the time and place. *Hahn v. Kelly*, 94 D. 742.

32. Sufficiency of officer's return.—The return of service of a summons failing to state that it was left at the usual place of abode of the defendant, as required by statute, does not render absolutely void a judgment of the circuit court of the United States. *Byers v. Fowler*, 54 D. 271.

A person serving a notice must set out in his return of service all acts done by him, so that the court may judge of the sufficiency of the service. A return that the notice was served, or duly served, is insufficient. *Hodges v. Hodges*, 71 D. 383.

The return of an alias summons is sufficient, when it appears therefrom that the sheriff informed the plaintiff that he had the writ for him, and offered to deliver to him a true copy, but plaintiff refused to hear it read, and walked away. *Story v. Warr*, 72 D. 125.

The term at which an alias summons is returnable is the return term of the suit, and plaintiff may answer or plead at that term, when there is no service of the original process which has issued to the preceding term. *Ib.*

A sheriff's return of service of a summons is sufficient without adding to his signature thereto a designation of his office. *Thompson v. Haskell*, 74 D. 98.

The return of an officer to a summons as served upon an agent of a corporation is not conclusive as to the fact of agency; but the objection should be pleaded in abatement. *Mineral Point R. R. Co. v. Keop*, 74 D. 124.

33. Conclusiveness of return.—Where the record of a judgment shows that a summons was issued in the case under the seal of the court of a sister state, and returned "served" by an officer, who, it appears, was sheriff of the county, the courts of Iowa will not, in an action on such judgment, inquire into the sufficiency of such return, when no evidence to contradict it is offered by the defendant. The question whether that return was sufficient evidence of service under the laws of the state where

For Index to Notes in American Decisions and American Reports, see Volume I.

the judgment was rendered might be raised in the appellate court of that state, but not here, merely upon the record, without further or other proof. *Latterett v. Cook*, 63 D. 423.

A sheriff's return of process, regular on its face, is conclusive upon the parties to the suit. Its truth can only be controverted in an action against the sheriff for a false return. *McDonald v. Leewright*, 77 D. 631.

The sheriff's return on a summons was that he had served it by leaving a copy thereof at the usual place of residence of the defendant. On a motion to set aside the return, — *Ald*, that evidence was admissible to show that the place where the summons was left was not the defendant's residence. *Bond v. Wilson*, 12 R. 466.

In an action to recover real estate, the plaintiff's title was founded on a sheriff's deed executed in pursuance of a sale on execution on a judgment of a justice of the peace rendered by default, on a constable's return of service of the summons by "leaving a certified copy at the defendant's usual place of residence." *Held*, that evidence was admissible to show that the return was false, in that the defendant was not in, and had no residence in Kansas, but was and had long been in, and a resident of, the Indian Territory. *Martin v. Gray*, 27 R. 149.

34. Proof of service by publication. — Proof of the service of a summons by publication is the affidavit of the printer, or his foreman or principal clerk, showing that the publication has been made, stating where and how long, and an affidavit showing a deposit in the post-office, if such deposit was made. *Hahn v. Kelly*, 94 D. 742.

35. Relief against irregular service. — Where a void summons is served upon the defendant, he may take advantage of it, *in rem*, by motion to quash, or wait, and if judgment is rendered by default, reverse it upon writ of error. *Frosch v. Schlampff*, 47 D. 655.

A defect in the service of process, by a failure of the sheriff to serve a copy of the complaint with the summons, is a mere irregularity, and not available on error, after judgment by default. *Dew v. Cunningham*, 66 D. 362.

A defendant's absence in another state at time of service is no reason for setting aside a return of service, though he was not actually notified of the suit until the first day of the term at which the summons was returnable. *Council v. Atwood*, 2 Ind. 289; *Sturgis v. Fay*, 79 D. 440.

Process served on a defendant by the wrong name is as effectually served as if served on him by his right name; and if in such case judgment is taken against him, it is as binding as if rendered against him by

his right name. *Perry v. Woodson*, 84 D. 51.

Where a defendant was fraudulently induced to come within the jurisdiction of the court, the service of civil process upon him will be set aside, although the design, when the representations were made, was to arrest him on a criminal charge, and although the defendant has made a voluntary general appearance. *Townsend v. Smith*, 32 R. 793.

II. IN CRIMINAL PROCEEDINGS.

36. Warrants of arrest. — A warrant issued by a magistrate or officer of limited jurisdiction must show on its face that he had jurisdiction of the subject matter, the person, and the process. *Hall v. Howd*, 27 D. 696.

Whether a warrant running "State of Missouri, County of Cole, ss." would be valid or not, *quare*. *Hickman v. Griffith*, 34 D. 124.

A warrant need not be under the seal of the magistrate issuing it unless it be expressly required by statute. *State v. McNally*, 56 D. 650.

A wafer attached to a warrant, which is the usual seal in such cases, is *prima facie* sufficient without proof that it was the seal of the magistrate, or adopted by him. *Id.*

A warrant purporting to be issued by a justice of the peace, upon a complaint sworn to before him in that capacity furnishes a presumption that he was legally authorized so to act. *Id.*

The corporate seal of a town is not the seal of the mayor as a justice of the peace, and need not be appended to a warrant issued by him in that capacity, nor is his court a court of record. *Santo v. State*, 63 D. 487.

Peace-officers are not prohibited from making a complaint of a violation of penal laws by a statute providing that no sheriff, deputy sheriff, coroner, or constable shall appear as attorney or counsel for any one, nor make any writing or process to commence a suit or proceeding. *Id.*

37. Search-warrants.* A search-warrant under the hand and seal of a justice reciting information on oath that certain described goods had been stolen by specified parties and were concealed in a certain house, and commanding the officer to whom it was directed to enter that house in the daytime, search for the stolen articles, and bring them, with the owner of the house, or the person who had them in custody, before the justice, was held to be a valid warrant, without stating the name of the owner of the goods. *Bell v. Clapp*, 6 D. 339.

Under such a warrant the officer may break open the door of the house, if it is shut, and if, upon demand, it is refused to be opened. *Id.*

* See note on search-warrants, 40 D. 666, 667.

For Index to Notes in American Decisions and American Reports, see Volume I.

A warrant to search for stolen goods, and arrest the person suspected, should only issue on an oath by the applicant, showing his goods to have been stolen, and that he strongly suspects that they are concealed in a specific place, and stolen by a person distinctly pointed out; and the warrant should specifically describe the goods, place and person, and direct the officer to search such place, and arrest such person only. *Grason v. Raymond*, 6 D. 200.

If the preliminary requisites to obtaining a search warrant be omitted, or if the warrant be general, the proceeding is *coram non judice*, and the magistrate who issues the warrant, and the officer who executes it, are liable in trespass to the party injured. *Id.*

A search-warrant, to be valid, must particularly describe the goods to be searched for and the places to be searched. *Sandford v. Nichols*, 7 D. 151.

A search warrant, issued under the provisions of the Kentucky constitution, which provides "that no warrant to search any place or to seize any person or things, shall issue without describing them as nearly as may be," must describe the place to be searched, the person against whom the warrant issues, and the property sought, with such certainty as to be able to identify the same. *Reed v. Rice*, 19 D. 122.

It is not a prerequisite to the issuance of a search-warrant for stolen goods that any steps should be taken to inaugurate a prosecution against the party guilty of the theft; all that is required is an affidavit before a proper officer showing that the goods have been stolen, and that the applicant has sufficient grounds to believe that they are concealed in a place which he desires searched. *Chipman v. Bates*, 40 D. 663.

No return is required upon a search-warrant, if the goods are not found. *Id.*

A plea of justification, in an action of trespass, under a search-warrant, interposed by the party at whose instance the writ issued, need not show that there were sufficient grounds for its issuance. *Id.*

A search-warrant is a sufficient justification, though the stolen goods are not found, even to the party at whose instance the writ issued, for an entry upon the suspected place, where the doors are found open and the entry is peaceable; whether it would be a justification where the doors are found closed and are broken down, not decided. *Id.* Search-warrants should be construed strictly. *Larthe v. Forgay*, 46 D. 554.

Where parties, under the color of a search warrant, commanding the officer to diligently search a certain house for stolen goods, force their way into an adjoining dwelling-house and search it, they will be jointly liable in damages for the injury done to the property and feelings of the occupant. *Id.*

In a statute providing for the issuance of a search-warrant "to any sheriff, city marshal or deputy," the term "deputy" relates to both the marshal and sheriff preceding it, and the warrant may be issued to a deputy sheriff. *State v. McNally*, 58 D. 650.

A steamboat or vessel moored at a wharf is a "place" liable to be searched, within the meaning of a statute that provides that "any store, shop, warehouse, or other building or place in said city or town" may be searched. *Id.*

The authorization of a search-warrant is not "unreasonable," so as to be unconstitutional, when it is authorized for a thing obnoxious to the law, and of a person and place particularly described, and is issued on oath of probable cause. *Santo v. State*, 63 D. 487.

An act authorizing a search-warrant is not unconstitutional, on the ground that it does not require a particular description of the place to be searched or property to be seized, when it requires the place, person, and property to be described "as particularly as may be." *Id.*

PROCLAMATIONS.

As evidence, see EVIDENCE, 221.

Of time and place of election, see ELECTIONS, 4.

PROCUREMENT.

When a defense to suit for divorce, see MARRIAGE AND DIVORCE, 62.

PROFANITY.

See CRIMINAL LAW, 16.

PROFERT AND OYER.

Of letters testamentary or of administration, see EXECUTORS, etc., 155.

Under common law practice, see PLEADING, 54, 55.

PROFITS.

Effect of agreement to share, see PARTNERSHIP, 5, 6.

Interest in, in lieu of salary, see PARTNERSHIP, 7.

Loss of, when recoverable, see DAMAGES, 6, 7.

PROHIBITION (WRIT OF).

1. Jurisdiction, and nature of the remedy.*—The nature of prohibition at common law, and the manner of proceeding therefor, explained. *Ex parte Williams*, 38 D. 46.

Writs of prohibition, *mandamus*, *quo warranto*, *indicavit*, and *waste*, contrasted and explained. *State v. Comm'rs. of Roads*, 12 D. 596.

A prohibition is commonly defined to be a

* When the writ will lie, see note. 12 D. 604-609.

For Index to Notes in American Decisions and American Reports, see Volume I.

writ issuing out of a superior court, directed to the judge and parties of an inferior court, commanding them to cease from the prosecution of a suit, because of want of jurisdiction over the suit or some collateral matter therein; but the writ may be directed to persons whose functions have little or nothing of a judicial nature. *Ib.*

A writ of prohibition is an existing legal remedy, in a proper case, in Kentucky. *Arnold v. Shields*, 30 D. 669.

The office of a writ of prohibition is to prevent the courts from exceeding their jurisdiction in the exercise of their judicial functions. *Ex parte Braudlacht*, 38 D. 593.

2. When the writ will not lie.*—Writ of prohibition does not lie to prevent a court from deciding erroneously, or from enforcing a wrong judgment, in a case in which it has a right to adjudicate, but only to prevent the usurpation of judicial power by a court that has no authority to decide the case which it is assuming to determine, *Arnold v. Shields*, 30 D. 669; or to restrain a governor from issuing a commission to an officer because of irregularity in his election. *Grier v. Taylor*, 17 D. 731; or to restrain action of a court of chancery upon a bill in equity, filed against the special guardian of a *son compos*, by one who, on appeal from the probate court, had been appointed general guardian, and alleging that error had been brought on the order appointing complainant such guardian, and that defendant also prolonged, by appeal, proceedings taken for his removal and threatened further litigation, and was grossly misbehaving as a special guardian; and praying for an injunction, the appointment of a receiver and an accounting, it being held that such bill showed a case of equity jurisdiction to grant the preliminary relief prayed. *People v. Wayne Circuit Court*, 83 D. 754; or where there is no other adequate remedy. *Ex parte Braudlacht*, 38 D. 593.

Error in the exercise of existing jurisdiction is no ground for a writ of prohibition. *Ib.*

A writ of prohibition issues only to restrain the action of courts in excess of jurisdiction, and does not lie to restrain any action which can be reviewed by any of the ordinary methods. *People v. Wayne Circuit Court*, 83 D. 754.

The act of issuing an execution is not judicial, but ministerial. Hence a writ of prohibition will not be issued to prevent it. *Ex parte Braudlacht*, 38 D. 593.

3. Proceedings to obtain the writ.—A plea to the jurisdiction is necessary to the granting of a prohibition only in cases where a court may acquire jurisdiction by consent, waiver of objection, or by default,

and not in cases where the court can not possibly acquire jurisdiction. *Arnold v. Shields*, 30 D. 669.

The preliminary step where a writ of prohibition is sought is the filing, in the superior court, a suggestion, wherein should be set forth all the material facts whereon the party founds his right to such remedy; where such facts are not apparent from the record of the proceedings in the inferior court, an affidavit to their truth should be made. *Ex parte Williams*, 38 D. 46.

Upon the presentation of a suggestion a rule should be entered upon the opposite party requiring him to show cause why a prohibition should not issue. *Ib.*

A rule to show cause why a prohibition should not issue stays all further proceedings in the inferior court from the time that it is served upon that court and the opposite party. *Ib.*

Where a rule for a prohibition is made absolute, the writ should not at once issue, if there is any objection thereto, but the party who seeks it should be required to declare in a *qui tam* action. Such action is based upon the fiction that the prohibition has actually issued, and that the opposite party is proceeding in defiance thereof. The declaration therein should set forth the facts upon which the prohibition issued, so that their sufficiency may be determined by the court on demurrer, or that their truth may be traversed by plea. Upon the determination of such action in favor of plaintiff, the writ of prohibition should issue; if determined for defendant, then the case should be remanded to the original jurisdiction, to be proceeded in. *Ib.*

4.—and for its enforcement.—Issues in prohibition should be submitted to a jury. *State v. Commissioners of Roads*, 12 D. 596.

PROMISE.

By landlord to repair, see LANDLORD AND TENANT, 18.

For benefit of third person, see CONTRACTS, 158.

In relation to marriage, see MARRIAGE AND DIVORCE, I.

To accept bill, see BILLS AND NOTES, 31, 32.

To accept checks, see CHECKS, 5.

To indemnify, when must be in writing, see GUARANTY, 14.

To marry in future, not valid marriage, see MARRIAGE AND DIVORCE, 13.

To pay debt of another, when within statute of frauds, see CONTRACTS, 45-48.

What not within statute of frauds, see GUARANTY, 10-14.

When will be implied, see CONTRACTS, 6.

PROMISE TO MARRY.

Action for breach of, see MARRIAGE AND DIVORCE, 34-42.

*Legislative acts cannot be arrested by the writ, see note, 18 D. 238, 239.

For Index to Notes in American Decisions and American Reports, see Volume I.

PROMISSORY NOTES.

Generally, see **BILLS AND NOTES**.
As evidence, see **EVIDENCE**, 212.
Disability of wife to make, see **HUSBAND AND WIFE**, 32.
Of or partner, when release firm debt, see **PARTNERSHIP**, 55.
Payment by, see **DEBTOR AND CREDITOR**, 8.

PROOF.

Generally, see **EVIDENCE**.
Of acceptance of trust, see **TRUSTS**, 28.
Of acknowledgment, or new promise, see **LIMITATIONS OF ACTIONS**, 59.
Of adultery, see **MARRIAGE AND DIVORCE**, 70.
Of authenticity of documentary evidence, see **EVIDENCE**, 180.
Of authority to appear in justice's court, see **JUSTICE OF THE PEACE**, 17.
Of claims against insolvent estate, see **EXECUTORS**, etc., 187.
Of claims in creditor's suits, see **CREDITOR'S SUIT**, 16.
Of consideration, see **DEEDS**, 17.
Of death of insured, see **INSURANCE**, 78.
Of debts, in insolvency, see **INSOLVENCY**, 16.
Of dedication, generally, see **DEDICATION**, 9-14.
Of dedication of highway, see **HIGHWAYS**, 2.
Of delivery of deeds, see **DEEDS**, 34.
Of dissolution of corporation, see **CORPORATIONS**, 182.
Of domicile, see **DOMICILE**, 9.
Of execution of deeds, see **DEEDS**, 28.
Of fact of advancement, see **ADVANCEMENT**, 9.
Of former jeopardy, see **JUDGMENT**, 91.
Of fraud and undue influence, see **WILLS**, 101.
Of insanity, as a defence, see **INSANE PERSONS**, 33-37.
Of insolvency, see **INSOLVENCY**, 6.
Of jurisdiction, see **JURISDICTION**, 16.
Of license, see **LICENSE**, 3.
Of loss and search for best evidence, see **EVIDENCE**, 49-54.
Of loss by fire, effect of fraud in, see **INSURANCE**, 63.
Of loss under marine policy, see **INSURANCE**, 172-175.
Of loss, waiver of, by insurer, see **INSURANCE**, 81.
Of malice, see **LIBEL**, 13, 14.
Of malice, on trial for murder, see **HOMICIDE**, 32.
Of marriage, see **MARRIAGE AND DIVORCE**, 15-17.
Of official character, see **OFFICERS**, 14.
Of promise to marry, and its acceptance, see **MARRIAGE AND DIVORCE**, 38.
Of registration of deeds, see **DEEDS**, 54.
Of release, see **RELEASE**, 9.
Of requisite skill as physician, see **PHYSICIANS AND SURGEONS**, 4.
Of service of notices, see **NOTICE**, 7.
Of service of pleadings, see **PLEADING**, 166.
Of service of process, see **PROCESS**, 31-34.

Of the *corpus delicti*, see **HOMICIDE**, 29.
Of testamentary incapacity, see **WILLS**, 97.
Of value, on trial for larceny, see **LARCENY**, 23.
Offers of, see **TRIAL**, 42.
On probate of will, see **WILLS**, 48-52.
On which to find indictment, see **INDICTMENT**, 8.
Sufficiency of, in equity trial, see **EQUITY**, 46.

PROPERTY.

Abandonment of, see **REAL PROPERTY**, 20.
Custody of, after levy of execution, see **EXECUTION**, 57-64.
Defence of, see **ASSAULT**, 13.
Defence of, when justifies homicide, see **HOMICIDE**, 52.
Description of, in indictment, see **INDICTMENT**, 27.
Description of, in indictment for larceny, see **LARCENY**, 18.
Description of, in insurance policy, see **INSURANCE**, 7-40.
Destruction of, in cases of necessity, see **EMINENT DOMAIN**, 26.
Division of, on granting divorce, see **MARRIAGE AND DIVORCE**, 96.
Effect of war on rights of, see **WAR**, 11.
Effort to save, when excuses deviation, see **INSURANCE**, 141.
Executions against, see **EXECUTION**, I.
Firm property, see **PARTNERSHIP**, 14-21.
For what ejectment will lie, see **EJECTMENT**, 3.
For what replevin will lie, see **REPLEVIN**, 8, 9.
For what representatives must account, see **EXECUTORS**, etc., 126.
For what, trover will lie, see **TROVER**, 5.
In ice, see **REAL PROPERTY**, 16.
In mills, sales of, see **MILLS**, 6.
In unpublished manuscript, see **COPYRIGHT**, 1.
In slaves, see **SLAVERY**, 1.
In wharves, see **WHARVES**, 1.
In what, homestead may be had, see **HOMESTEAD**, 7.
Liability of military officers for injury to, see **WAR**, 7.
Mortgages of future acquired, see **CHATTEL MORTGAGES**, 2.
Of child, parents' control over, see **PARENT AND CHILD**, 6.
Of guest, liability of innkeeper as to, see **INNS AND INNKEEPERS**, 6-13.
Of infants, power of courts over, see **INFANTS**, 7.
Of religious societies, see **RELIGIOUS SOCIETIES**, 6-8.
Of voluntary association, see **ASSOCIATIONS**, 8.
Of wife, her equity in respect to, see **HUSBAND AND WIFE**, 23-26.
Of wife, liability of husband respecting, see **HUSBAND AND WIFE**, 20.
Power of bank to hold and transfer, see **BANKS AND BANKING**, 9.

For Index to Notes in American Decisions and American Reports, see Volume I.

Power of corporation to sell or transfer, see CORPORATIONS, 97.

Power of counties to hold, see COUNTIES, 12.

Power of foreign corporation to hold, see CORPORATIONS, 187.

Power to take, for local improvements, see MUNICIPAL CORPORATIONS, 39.

Right of, in animals, see ANIMALS, 1, 2.

Title to, when provable by hearsay, see EVIDENCE, 67.

To what, judgment lien attaches, see JUDGMENT, 101.

What chattels are, see PERSONAL PROPERTY, 2.

What deemed incumbered by mortgage, see MORTGAGES, 25.

What is exempt from execution, see EXECUTION, 158.

What is exempt from taxation, see TAXES, 24-29.

What is part of the community, see HUSBAND AND WIFE, 77.

What is taxable, see TAXES, 10-15.

What liable to assessment for local improvement, see MUNICIPAL CORPORATIONS, 43.

What may be burglarized, see BURGLARY, 3.

What may be dedicated to public use, see DEDICATION, 5.

What may be reached in creditors' suits, see CREDITORS' SUITS, 11.

What may be stolen, see LARCENY, 9, 10.

What may be taken for public use, see EMINENT DOMAIN, 8.

What passes by assignment for creditors, see ASSIGNMENTS, etc., 36, 37.

What passes to assignee in bankruptcy, see BANKRUPTCY, 16-18.

What reached by attachment, see ATTACHMENT, 111.

What reached in supplementary proceedings, see EXECUTION, 195.

What subject to dower, see DOWER, 1.

What subject to mechanics' lien, see MECHANICS' LIEN, 2.

What subject to partition, see PARTITION, 10.

What subject to statute of distributions, see DISTRIBUTION, 2.

What will pass by will, see WILLS, 8-10.

PROPOSALS.

Advertisement for, see MUNICIPAL CORPORATIONS, 18.

PROSECUTING WITNESSES.

Impeachment of, see WITNESSES, 87.

PROSECUTION.

Burden of proof, when on, see EVIDENCE, 78, 79.

Counsel to assist, see TRIAL, 164.

Right of, to new trial, see NEW TRIAL, 80.

PROSECUTRIX.

Bad character of, as a defence, see RAPE, 15.

Complaint by, in rape cases, see RAPE, 8.

Corroboration of, see BIGAMY, 7.

Examination of, see RAPE, 11.

PROSPECTIVE DAMAGES.

When recoverable, generally, see DAMAGES, 4.

PROTECTION.

Of *bona fide* purchasers, see BILLS AND NOTES, 115-149; VENDOR AND PURCHASER, 38.

Of infants, by court, see INFANTS, 33.

Of prior liens, see MECHANICS' LIEN, 13.

Of trade-mark, see TRADE-MARKS, 4, 5.

Of trade-names, see TRADE-MARKS, 16.

To officer, when process is, see OFFICERS, 35, 36; TRESPASS, 3, 4.

What accorded to *bona fide* purchaser of chattels, see SALES, 27.

What accorded to purchaser at judicial sale, see JUDICIAL SALE, 8.

PROTEST.

Duties of notary in making, see NOTARIES PUBLIC, 4.

In proofs of loss under marine policy, see INSURANCE, 174.

Of bill or note, see BILLS AND NOTES, 180-184.

Of bill or note, averments as to, see BILLS AND NOTES, 269.

Recovering back duties paid under, see REVENUE, 3.

PROVISIONAL GOVERNMENTS.

In insurgent states, see WAR, 23.

PROVISOS.

In devices, see DEVICES, 28.

In statutes, how construed, see STATUTES, 43.

Negating in indictment, see INDICTMENT, 20.

PROVOCATION.

As a defence in actions for assault, see ASSAULT, 11.

When reduces killing to manslaughter, see HOMICIDE, 50.

PROXIMATE CAUSE.

Of injury, only regarded, see NEGLIGENCE, 2.

Of injury, negligent act must be, see RAILROAD COMPANIES, 81.

Of loss, in marine insurance, see INSURANCE, 121.

PROXY.

Voting by, see CORPORATIONS, 140.

PUBLIC.

Interpretation of charters in favor of, see CORPORATIONS, 14.

For Index to Notes in American Decisions and American Reports, see Volume I.

Nuisances, distinguished from private, see NUISANCES, 3.

Rights of, in use of highway, see HIGHWAYS, 8, 9.

Rights of, in turnpike roads, see TURNPIKE COMPANIES, 2.

Sales by trustees, see TRUSTS, 31-33.

PUBLIC ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS, 24.

PUBLIC AGENTS.

Who are, their powers, and when personally liable, see AGENCY, V.

PUBLIC CORPORATIONS.

Different kinds of, see CORPORATIONS, 3.

PUBLIC DOCUMENTS.

As evidence, see EVIDENCE, 214-222.

PUBLIC ENEMY.

Contracts in aid of, illegal, see CONTRACTS, 114.

See WAR.

PUBLIC LANDS.

[Includes the acquisition, ownership, and disposition of the public lands of the United States and of the several states, and the rights of settlers, pre-emptioners, and others under statutory regulations. Grants of land by government are further treated under GRANTS.]

Interests in, when subject to execution, see EXECUTION, 43.

1. Acquisition of title by general government. — A deed to Thomas Jefferson, president of the United States, and his successors in office, vests the title in him as trustee, and a future conveyance by the United States will raise a presumption of a conveyance from the president to the government. *McOullough v. Wall*, 53 D. 715.

The government and its grants is the true source of title to all lands in this country. *Sullivan v. McLenane*, 65 D. 780.

The cession of territory from one government to another is considered, under the law of nations, independent of treaty stipulations, as passing only public property in and rights of sovereignty over the territory, and does not impair the rights of inhabitants to their property, but they retain all such rights to the same extent as under the former government. *Teschemacher v. Thompson*, 79 D. 151.

When California was ceded to United States, the latter, by the treaty of Guadalupe Hidalgo, in effect stipulated for the protection of the rights of property of the inhabitants of the ceded territory, and thus included such titles to property as were merely equitable, and had never been perfected under the former government. *Id.*

The power of United States to provide for protecting all titles, legal and equitable,

acquired in California from Mexico, prior to the cession of California to the United States, results from the fact that it is sovereign and supreme as to all matters connected with treaties, and the enforcement of obligations incurred thereunder, or cast upon it independent of treaty, by the law of nations, upon the cession of the country. *Id.*

The United States must determine for itself what claims to property existed at the date of the cession of a country, which it thereby became bound to protect, and the lands to which they apply, and the parties entitled to the same. *Id.*

Subsequent claimants from the United States after the cession of California, of lands therein, take in strict subordination to the action of the government, and they are not entitled to any notice of its proceedings. Whatever interests they may possess were acquired with full knowledge of the treaty of Guadalupe Hidalgo, and of the obligations and powers of the new government. *Id.*

2. Acquisition of title by the states.

— The people of the state succeeded to the rights of the crown on the declaration of independence. *Wendell v. Jackson*, 22 D. 635.

The people are owners of all lands within the state not granted to others or lost by adverse possession. The presumption is, therefore, that they own all lands which have never been granted by them, until the contrary appears. *Id.*

Proof that land was vacant within the time required to make title by adverse possession is sufficient *prima facie* to enable the people to recover the same in ejectment. *Id.*

The United States has but a proprietary interest in land within the borders of the state, the sovereignty being in the state, and the rights attaching to such interests do not differ from those of any other land-holder in the state, except as provided by the constitution of the United States, and the terms of the compact between the general and the state governments at the time the state is admitted into the Union. The state therefore cannot interfere with the primary disposal of the soil, nor with any regulations congress may find necessary for securing title to *bona fide* purchasers, nor can it tax the lands of the United States within its borders; and with these exceptions, such lands are subject to the same control by the state government as any other lands over which its jurisdiction extends. *State v. Bachelder*, 80 D. 410.

While lands belong to the United States they may be disposed of by the government to whom it pleases, and the title may be secured to the purchaser in such manner as it sees fit to prescribe; but the moment the sale is completed and the title secured to the purchaser, the land enters into the general mass of the property of the

For Index to Notes in American Decisions and American Reports, see Volume I.

state, relieved from all control of the federal government whatever, save such as is incident to the general relation of the state to the federal Union. *Ib.*

The state of California cannot select and locate five hundred thousand acres of land granted her for purposes of internal improvement by the eighth section of the act of Congress of September 4, 1841, until after the lands to be selected have been surveyed and sectionized by the proper officers of the federal government. *Terry v. Megerle*, 85 D. 84.

No title to any specific land can vest in the state under the eighth section of the act of Congress of September 4, 1841, unless the land has been surveyed by the proper officers of the federal government, and selected and located by the state in parcels conformably to sectional divisions and subdivisions of not less than 320 acres, and has upon it no subsisting valid claim by pre-emption, or otherwise, and the selection has been approved by the federal government. *Ib.*

The state can make no valid selection or location upon public lands of United States in the possession of a *bona fide* pre-emptor under the laws of Congress, nor can it convey any valid title therein to another. *Ib.*

A grant of five hundred thousand acres of land under act of Congress of September 4, 1841, to each new state upon its admission into the Union, imports a present grant, and the title to the lands granted passes upon the admission of the state, although it does not attach to any particular parcel until selected and located by the officers or agents of the state and approved by the United States. *Megerle v. Ashe*, 87 D. 76.

When a particular parcel of land is selected by the state, through her officers or agents as a part of the five hundred thousand acres granted by the United States to each new state upon her admission into the Union, and such selection and location are approved by the United States, the title becomes perfect, and attaches to the tract selected. Such title then vests in the state or her grantee, and prevails over that asserted by the holder of a subsequent United States patent. *Ib.*

A party claiming title to a particular parcel of land through the state, under the act of Congress granting to each state five hundred thousand acres of land upon her admission into the Union, is obliged to show, as against one claiming title under a subsequent United States patent, the performance of all acts required by law to constitute the selection and location of the land. *Ib.*

The United States did not and could not give the state of Michigan any control over private property, under 10 United States Statutes at Large, 35, granting the state a strip of land for canal purposes through the

military reservation at Sault Ste. Marie. *Ryan v. Brown*, 100 D. 154.

A state can only maintain proprietary rights over lands, upon proof of a valid grant, or legal appropriation upon an inquest in form of law. *Ib.*

3. The land-office.* 1. *In general.* — State courts cannot interfere with or control the officers of the general government in the disposal of public lands. *Lewis v. Lewis*, 43 D. 540.

State courts have no jurisdiction in regard to pre-emption of public lands unless the case is affected with fraud or trust. *Ib.*

State land-officers act judicially, and their decisions are as final as those of other courts, in all matters which by law are confided to their examination and decision. *State v. Bachelder*, 80 D. 410.

2. *Registers and Receivers of Land Offices.* — The decisions of the register and receiver of the United States land-office are not conclusive on the rights of individuals. *Bird v. Ward*, 13 D. 506.

The register and receiver have no jurisdiction to grant titles by pre-emption. *Guidry v. Woods*, 36 D. 677.

The register and receiver are special judicial officers, and their decision is final and binding upon pre-emption rights, except in cases of fraud. *Lewis v. Lewis*, 43 D. 540.

The decision of register and receiver of land-office is final and conclusive upon a subject within the jurisdiction of such officers, under the act of Congress of September 4, 1841, if no element of fraud or mistake intervenes. *Lamont v. Stimson*, 62 D. 696.

The decision of the register and receiver of the United States land-office, as to who is entitled to a portion of the public domain, is final and conclusive, and can not be reviewed by the judiciary. *Boatner v. Ventress*, 20 D. 266. *Henry v. Welch*, 23 D. 490.

The certificate of a purchase of public lands issued by the register and receiver does not constitute evidence of title. *Guidry v. Woods*, 36 D. 677.

Such a certificate is evidence that the applicant was then in possession, and that he had cultivated the land in the time and manner required by law. *Ib.*

The omission of the register to mark a sale of land on the township map does not affect the rights of the purchaser, though the land has been afterward sold to another. *Kittredge v. Breaud*, 39 D. 512.

3. *Commissioner of the general land-office.* — The Determinations of the commissioner of the general land-office are not conclusive upon any one, such commissioner not being a judicial officer. *Rogers v. Brent*, 50 D. 422. *Brill v. Stiles*, 85 D. 364.

The Commissioner of the general land-office has authority, under the supervision

* Decision of land-officers, when conclusive, see note, 20 D. 273-276.

For Index to Notes in American Decisions and American Reports, see Volume I.

of the Secretary of the Treasury, to determine the construction of acts of congress relative to the public domain, and if it appear that the register and receiver have issued a certificate of purchase to lands the sale or disposal of which is unauthorized by law, may revoke or annul it. *Guidry v. Woods*, 38 D. 677.

The records of the general land-office and the deposition of the commissioner are admissible to prove the cancellation by the commissioner of the certificate of entry and purchase issued by the register and receiver to land not subject to pre-emption. *Ib.*

Where the commissioner of the general land-office cancels an entry of land without authority of law, such cancellation is a nullity, and the entry is not affected thereby. *Perry v. O'Hanton*, 49 D. 100.

The commissioner of the general land-office is the proper officer to accept relinquishments of title by a grantee to the state, as his is the office or department in which to preserve the evidence of the public lands and land titles of the state; and in the absence of any legal provisions or prohibition, he must be deemed to have authority to accept the relinquishment of title on behalf of the state. *Dikes v. Miller*, 78 D. 571.

4. **Necessity of an entry.**—Under an act providing that the owners of land on watercourses shall be preferred as purchasers of the back land adjoining their own tracts, provided that notice of the claim shall be entered previous to the time designated for the public sale of lands in the township where the claim is situated, and providing further that all claims not so entered shall be liable to public sale, the preferred right of a proprietor entitled to the benefit of its provisions becomes extinct when the lands affected have been offered at public sale by proclamation of the president. *Thompson v. Schlater*, 33 D. 556.

5. — and how construed.—The right acquired by an entry is not a legal but an equitable right, and depends upon an executory contract with the government. *Reed v. Bullock*, 12 D. 345.

The entry is the inception of the title and not the survey made upon it; therefore the expiration of the statutory time after entry will bar the right to recover. *Ib.*

Where an entry calls for land on a certain creek, "about seven miles" from its mouth, the word "about" must be rejected, and the distance taken in a straight line from the mouth, if the stream is of sufficient length. *Sanders v. Morrison*, 15 D. 140.

In such a case, if the stream is a large river, or is not of sufficient length, the meanders may be followed in measuring the distance. *Ib.*

A purchaser of land from the United States, by the act of entry and payment of

the purchase money, acquires an inchoate legal title, which may be alienated or divested in the same manner as any other legal title. *Goodlet v. Smithson*, 30 D. 561.

Prior to the issuance of a patent, the interest of one in lands purchased of the United States, and for which he has received a certificate of final payment, may be levied upon and sold under execution. *Ib.*

Title acquired by a regular entry and purchase to land offered at public sale, under the laws of the United States, irrevocably divests the right of the government in the soil. *Thompson v. Schlater*, 33 D. 556.

An entry on land offered at public sale confers upon the person making it, a prior right and title under a purchase from the government, over another who acquired title to the same land by an entry made afterwards, under an act of Congress giving to proprietors, whose lands bordered on watercourses, a preference in making entry and becoming purchasers of back land adjoining. *Ib.*

An entry of public land gives no title to timber cut and lying upon it at the time such entry is made. *Kecton v. Audsley*, 61 D. 560.

6. **Necessity of a survey.**—A patent is not void for want of a survey, if the boundaries can be identified by any reasonable evidence; and if course and distance alone, from a defined beginning point, will with reasonable certainty locate and identify the land, that will be sufficient. *Stafford v. King*, 94 D. 304.

7. — and how made.—A survey does not mean a map, *ex et terminis*, but will include a description in words or figures of the lands located. *Attorney-general v. Stevens*, 22 D. 526.

Where the lines of survey can be run from well-ascertained and established monuments, they are to control and govern a description delineated on a plat. *Martin v. Carlin*, 88 D. 696.

It is the duty of a surveyor of public land to run around land located and see that such objects are designated as will clearly identify the boundaries of the tract, and to extend a correct description of these objects, natural and artificial, with courses and distances, into the field-notes of the survey; and until the reverse is proved, it will be presumed that the land was thus surveyed, and the boundaries plainly marked and defined. *Stafford v. King*, 94 D. 304.

8. **Effect of surveys.**—The word "withdrawn," found on the margin of a surveyor's entry book, does not prove that the entry was withdrawn. *Mills v. Lee*, 17 D. 118.

There is a sufficient delivery and taking possession of public land when the party entitled to the land purchases it in conformity to a survey returned to and approved by

For Index to Notes in American Decisions and American Reports, see Volume I.

the surveyor-general. *Kittridge v. Bream*, 39 D. 512.

The correctness of boundaries of public lands, as shown by the government plan and survey under which sales have been made, cannot be questioned. *Schurmeier v. St. Paul & R. R. Co.*, 88 D. 59.

An official survey of government lands prevails over a private survey thereof, even though the lines run and corners marked are not located with mathematical precision. *Bellingsley v. Bates*, 68 D. 126.

In re-locating a lost corner marked or line run by the government surveyor, the jury may consider a private survey of the same as well as the known marks and corners, and the field notes and plat, even though such private survey does not correspond in all respects with the government survey. *Id.*

The mode of re-locating a line marked by the government surveyor, a portion of which is lost, is to follow the line as far as it can be traced, and if the corner is also lost, produce the line in the same direction until it intersects the township line, at which point the corner will be presumed to be, unless it is proved to have been at some other point, in which case a straight line is run from the last known point of the line to such location of the corner on the township line. *Id.*

9. Resurveys. — The title to land located and patented under an official survey is not disturbed by a subsequent survey, which disregards and interferes with that according to which the prior location was made and patent procured. *Slack v. Orillion*, 33 D. 551.

10. Rights of settlers, generally. — The confirmation of a title by act of Congress is equivalent to a patent, and can only be defeated by a prior title out of the government. *Boutner v. Walker*, 30 D. 723; but where the boundaries are vague and uncertain, the government may make a valid sale of land not necessarily embraced within the confirmation. *Slack v. Orillion*, 30 D. 724.

A settler's possession under the Donation act and confirmation of his title is superior to the certificate of the commissioners for the adjustment of land titles, followed by an order of survey and actual survey and location approved by the surveyor-general. *Boutner v. Walker*, 30 D. 723.

The confirmation of a claim emanating from the former governments of Louisiana is but a relinquishment of title on the part of the government, and parties must look to the primitive title to ascertain the boundaries. *Slack v. Orillion*, 30 D. 724.

A settler upon land east of the Tennessee is not entitled to relief in equity for the res-

idue of land in his occupancy against one who has obtained an elder legal title therefor, where, having surveyed and appropriated part of the land occupied, he evinces no intention to appropriate such residue. *Aulick v. Colvin*, 43 D. 164.

A purchaser of public lands acquires no title to timber cut thereon prior to his purchase. *Wincher v. Shrewsbury*, 35 D. 108; but he acquires title to the crops on the land at the time of the purchase, and which were planted prior thereto by other persons. *Boyer v. Williams*, 32 D. 324; and this is true whether the crops are severed or unsevered. Consequently, a mere possessor of public land who has planted a crop thereon cannot maintain trespass against a purchaser who enters and removes such crop. *Floyd v. Ricks*, 58 D. 374.

The rights of occupants of public lands are founded on the presumption of a license from the government. *Conger v. Weaver*, 65 D. 528.

A mere possessor of public lands of United States, with hopes of future entry by pre-emption, is not a possessor in good faith. *Gibson v. Hutchins*, 68 D. 772.

An agreement with a settler on public land, that in consideration of money advanced for the purpose of purchasing it and paying costs and incidental expenses, the lender should have a lien upon the land to secure the repayment thereof, is void, and the settler is not entitled to the benefit of the act concerning pre-emptions, under the provision that "he or she has not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title he or she might acquire from the government of the United States shall inure, in whole or in part, to the benefit of any person except himself or herself." *McCue v. Smith*, 86 D. 100.

11. Settlement certificates. — The final certificate of title, under the act of Congress, settling Spanish claims, is sufficient evidence of title, and can not be questioned by a trespasser. *Richardson v. Hobart*, 18 D. 70.

The issuance of a certificate for lands to heirs of the original grantee cannot affect the rights of a party having a beneficial interest therein. The heirs in such case will hold the land in trust for the party entitled. *Wheat v. Owens*, 65 D. 164.

12. Head right certificates. — When the law gives a preference in the purchase of government land to a particular person, and he, in the exercise of his right, pays the money, and receives from the public officer a receipt for it, and a certificate that he is entitled to purchase, the sale is complete, although the evidence of it can not be made out in a prescribed form. *Kittridge v. Bream*, 39 D. 512.

* Rights of settlers upon public lands, see note, 51 D. 604, 606.

Respective rights of miners and others, see note, 65 D. 94, 97.

For Index to Notes in American Decisions and American Reports, see Volume I.

The act of Congress of May 5, 1830, was passed for the relief of those persons only who had paid their money to the receiver and had not presented their receipts to the register for his certificate until it was too late for them to exercise their rights. *Ib.*

A want of notice of a prior sale will not give a second purchaser any claim, when it arose from an omission of the register, and not from want of diligence in the first purchaser. *Ib.*

In Georgia, lands are not subject to survey, and to be granted out on head rights, unless they are vacant. *Moody v. Fleming*, 48 D. 210.

Lands are not vacant which have been in the grantee's possession for more than seven years, under a grant from the state which is void for irregularity. *Ib.*

The grantee of a head-right certificate placing it in the hands of the locator, under a covenant to locate, survey, and obtain a patent, and then to divide the land between the owner and the grantee, does not thereby make a sale of land, although formal words of conveyance are used and a money consideration paid; but the agreement is one for the future acquisition of land, under which the purchaser is to make the selection, and the parties are to participate equally in the benefits to be derived from the selection when made. *Ross v. Armstrong*, 78 D. 574.

A contract whereby the holder of a head-right certificate places it in the hands of a locator, under a covenant to locate, survey, and obtain a patent, and then divide the land between the owner and the grantee, where it is really an adventure on shares, and the patent is to issue in the name of one for the benefit of both, is a resulting trust, in which the grantee becomes the trustee for the benefit of his equitable tenant in common. *Ib.*

Under a joint adventure between the holder of a head-right certificate and the locator, to secure a patent to government land, and to divide the land when acquired, if, after securing the grant and dividing the land, it is discovered that part of the land which the government has thus granted had been previously appropriated by an older title, the partition is one upon a mistake of facts from which equity will relieve. *Ib.*

13. Improvement rights. — Improvements made by innocent purchasers of an equitable claim, without notice of a prior equity, ought to be respected, and the proprietor of a warrant ought not to profit for the adventitious value accruing from the enterprise, labor and industry bestowed by others innocently on the land. *Patrick v. Marshall*, 4 D. 670.

A mere settler upon public lands, with a hope of pre-emption, is, until he makes his entry, a tenant at sufferance; he makes

improvements for his own benefit and at his own risk. *Gibson v. Hutchins*, 68 D. 772.

14. Alienability of settlers' rights. — The sale of improvements upon public lands to one who has a right to pre-emption will constitute a valuable and legal consideration for a promissory note. *Bryan v. Glass*, 54 D. 576; *Ratcliff v. Bridger*, 36 D. 683; *Wilson v. Webster*, 41 D. 230.

No title to or lien or privilege upon the land is transferred by or implied in such sale independent of the rights conferred by the laws of the United States. *Ratcliff v. Bridger*, 36 D. 683.

A grantee of lands could alienate the same under Texas colonization law of 1823, immediately on his acquiring the right of property therein. The period of acquisition commenced with the date of concession; and all requirements of the law concerning cultivation were fulfilled if it were done within two years, either by the original grantee or his vendee. *Portis v. Hill*, 65 D. 99.

The following facts, etc., amount to a contract to convey land which should be enforced specifically in equity. S. and F. were settlers upon different parts of the same quarter-section of land. It all had to be entered in one piece. S. and F. both filed upon the whole tract. S. proposed to F. that he would withdraw his filing and would furnish money to pay for his portion of the land, and allow F. to enter the land, if F. would convey to S. his portion of the land. F. said he could not enter into such an agreement prior to taking the pre-emption oath; that he, however, did not want S.'s land, as the latter was poor; that F. would do what was right about it. S. withdrew his filing, and F. entered the entire tract. S. tendered to F. the value of his portion of the tract and demanded a conveyance. Such a contract does not violate either the letter or spirit of the act of Congress of September, 4, 1841, prohibiting the assignment or transfer of pre-emption rights before entry. *Snow v. Flannery*, 77 D. 120.

15. Issuing land warrants. — The proprietors of a land warrant may pursue it into the hands of assignees and purchasers, for valuable consideration, having notice of their claim before they acquired legal title to the land. *Patrick v. Marshall*, 4 D. 670.

16. Locating the warrant. — Lots of land in each range of a new township, numbered in regular arithmetical series, are presumed to have been located contiguous to each other; the lot numbered eight in such a series is presumed to include all the land lying between those numbered seven and nine, and a party claiming a different location must repel this presumption by positive proof. *Warren v. Pierce*, 19 D. 189.

Location should be governed: 1. By natural objects; 2. By artificial marks; 3.

For Index to Notes in American Decisions and American Reports, see Volume I.

By course and distance. *Stafford v. King*, 94 D. 304.

The true location of land is ascertained by the application of all or of any of the rules of location to the particular case. And when they lead to contrary results or confusion, that rule must be adopted which is most consistent with the intention apparent upon the face of the patent, read in the light of the surrounding circumstances. *Ib.*

17. Assignability of warrant. — The purchaser of a land-warrant in good faith and for value cannot, after he has located the warrant and obtained a patent for the land located, be charged in equity as trustee of the legal title for the true owner of the warrant, although it was obtained by the fraud of a third person, and transferred under a forged assignment. *Dixon v. Caldwell*, 86 D. 437.

18. Pre-emption, generally. — Where a settler erects improvements at the corner of sections, an entry of one of the sections on which the improvements were made is a bar to pre-emptive rights over the other sections. *Carter v. Spencer*, 34 D. 106.

Open and notorious possession of a settler on public land, under the act of May 29, 1830, is notice to all the world of his equitable right of pre-emption. *Bruner v. Manlove*, 36 D. 651.

An actual settlement was not necessary under the act of Congress of July 9, 1832, in order to secure a right to pre-emption, in cases where the claimants waived their claims and relinquished to the United States. The deed of relinquishment was the only evidence required of their pre-emption rights. *Perry v. O'Hanlon*, 49 D. 100.

A married woman has no right of pre-emption when her husband was alive, and had for a valuable consideration sold the improvements erected on the claim, to another, under whom the wife claimed. *Groves v. Fulsome*, 57 D. 347.

In a possessory action for public lands, where the plaintiff claims to recover by reason of prior possession, and the defendant claims as a pre-emptor under the laws of the United States, the latter is entitled to prove the necessary facts to establish his pre-emption right. *Tyler v. Green*, 87 D. 130.

Pre-emption rights and benefits may be acquired by compliance with the requirements of the pre-emption law, and any other conditions or requirements superadded by the commissioners of the general land office cannot affect one's rights under that law. *Baty v. Sale*, 92 D. 128.

The pre-emption act does not require an application for lands to be renewed, where they have been withdrawn from market for a short period after a claim for a pre-emption has once been filed; and such a requirement imposed by the officers of the land-office amounts to nothing. They are powerless to

annex conditions or provisions to the law; that can only be done by the law-making power. *Ib.*

A contract is valid, and not in contravention of the pre-emption laws, nor within the statute of frauds, where it is agreed between two that one shall obtain a pre-emption title to an entire tract of land, and thereafter deed to the other a portion of such tract, in consideration that the latter should refrain from presenting his pre-emption claim to the whole tract, to which he was entitled, and should pay the purchase-money of the smaller portion, which was within his inclosure. *Rose v. Treadway*, 97 D. 546.

When, under an agreement between two, each settler secures the precise land which he has occupied, cultivated, and improved, the object of the pre-emption laws is fully attained, and when under such agreement, the legal title has vested in one by the issuance of a patent, a trust results in favor of the other, which equity will enforce against the patentee. *Ib.*

M. purchased government land, but B. soon entered upon it as a pre-emptor, claiming to have commenced a settlement and improvement on it previous to the purchase by M. The pre-emption claim was contested, but it was held good by the land officers. It having been appealed to the secretary of the interior, — held, that the decision of the land officers was conclusive as to the right of pre-emption. *Robbins v. Bunn*, 5 R. 75.

19. Nature and extent of the right acquired.* — One who by fraud enters land to which another had a valid pre-emption right, may be decreed to hold in trust for the latter or his heirs. *Bird v. Ward*, 13 D. 506.

A right of pre-emption gives no title to the land prior to the exhibition of the necessary proofs and the adjudication of the land by the register and receiver to the person claiming the right. *Henry v. Welch*, 23 D. 490.

A pre-emptor's power of attorney to convey land, held under the pre-emption law of May, 1830, as soon as a patent has issued therefor, is void as an attempted evasion of the inhibition of the act against the transfer of pre-emption rights before patent issued; therefore a conveyance under the power, though after patent issued, passes no title. *McElroy v. Hayter*, 37 D. 645.

A pre-emptor planting a crop which matures after his pre-emption right expires, because of his failure to purchase during the time allowed him by law, may be dispossessed of it by one who, after the expiration of the right, purchases from the government. *Razor v. Qualls*, 30 D. 658.

The validity of a certificate of pre-emption may be impeached in ejectment brought by the pre-emptor against a party in possession.

* See notes on rights of pre-emptors, 23 D. 42, 43; 34 D. 122-124.

For Index to Notes in American Decisions and American Reports, see Volume I.

sion under the authority of the United States, by evidence of fraud and collusion between the pre-emptor and the officers granting the certificate, the latter knowing the land not to be subject to pre-emption. *Jamison v. Beaubien*, 36 D. 534.

A person having acquired an inchoate right of pre-emption to a tract of land under the act of May 29, 1830, by settlement and cultivation, may, upon making proof and paying the purchase money within one year, compel a conveyance by a purchaser thereof by virtue of a Vincennes certificate, under the act of May 11, 1820, who entered and purchased the land after such inchoate right accrued, but before the pre-emption price was paid, and may enjoin such purchaser from recovering the land. *Bruner v. Manlove*, 36 D. 551.

A person in the use and occupation of vacant land has a pre-emptive right to appropriate it, under the act of 1831, which can only be taken away by a three months' notice from another person that he intends to enter and appropriate the same. *Aulick v. Colvin*, 43 D. 164.

Where a patent has been obtained to land west of the Tennessee River in fraud of a settler's pre-emptive rights, equity will grant such settler relief upon his showing that it was his intention, and that he would have entered and appropriated the land, had he not been prevented by the previous illegal entry of the patentee. *Id.*

Pre-emption rights granted to settlers before the issuing of patents are not transferable, and a conveyance in such a case is void and will not even operate as an estoppel. *Stevens v. Hays*, 48 D. 359.

Where a pre-emptor has done everything in his power to comply with the requirements of an act of Congress which fixes a limit to the period within which he may avail himself of the benefit of the act in which the limitation is made, the delay of the officers of the government, by which he is prevented from obtaining his certificate of pre-emption within the time limited, will not defeat his right, but the certificate may be granted to him after the expiration of the time so limited by law. *Perry v. O'Hanlon*, 49 D. 100.

A pre-emptor has one entire year, while land is subject to entry, within which to make his final proof and to complete his purchase, under the act of September 4, 1841, sec. 15, (5 U. S. Statutes at Large, p. 457.) *Baty v. Sale*, 92 D. 128.

Where land is temporarily withdrawn from the market after a party has filed his declaration of an intention to pre-empt it, the officers of the land-office may properly exclude the time that the land is not subject to entry, in computing the year within which he has the right to make his proof and enter the land. *Id.*

A mortgage upon government land given by the pre-emptor, after an entry and certificate received, but before patent issued, is not invalid under the twelfth section of the pre-emption law of 1841, providing that "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void," the words, "the right hereby secured," being construed to mean simply the right of pre-emption. *Robbins v. Bunn*, 5 R. 75.

20. Issuing grants generally. — Only the judicial department of state is clothed with power to investigate antagonistic claims of contending parties, and consequently an order of the executive correcting a grant, after the rights of third parties have intervened, is inoperative and void. *Sykes v. McRory*, 54 D. 402.

The governor may correct a mistake in a grant from the state if the rights of third parties have not intervened, otherwise there must be a judgment or decree in a judicial proceeding between the litigating parties, which will enable the executive to make the correction. *Tison v. Yawn*, 60 D. 708.

A second grant of land after it has already been granted away, is effective for many practical purposes. *Burkhalter v. Edwards*, 60 D. 744.

Islands in navigable streams in Pennsylvania belong to the state, and are excepted from the general laws for the sale and settlement of vacant lands. They are granted under special laws. *Stover v. Jack*, 100 D. 566.

21. Validity of grants. — A confirmation of a Spanish title relates back to the original grant. *Stark v. Mather*, 12 D. 553.

Every presumption is in favor of the validity of a grant. *Winter v. Jones*, 54 D. 379.

A legislative grant passes title to government lands as effectually as a patent. *Megerle v. Ashe*, 87 D. 76.

22. Rules of interpretation. — The sovereignty is not subject to imputations of fraud, is not bound by the doctrine of estoppel, nor do her grants imply warranties. *Elmendorf v. Carmichael*, 14 D. 86.

Grants by the government are construed favorably for the grantor, and pass nothing by implication. *Wilcoxon v. McShea*, 54 D. 409.

A grant of land by the government does not pass the right of overflowing adjoining government lands by maintaining a dam on the land granted, though the dam was on the land at the time of the grant. *Id.*

23. Sufficiency as respects description of land conveyed. — In a description of land purchased from the government under the laws relating to back lands it is not indispensably necessary that the township, range, and section should be stated. *Kittbridge v. Breaud*, 39 D. 512.

A grant of public land having a fixed and

For index to Notes in American Decisions and American Reports, see Volume I.

definite description passes nothing but what is included within the boundaries expressed in the patent, or is naturally or necessarily annexed to the land. *Wilcoxon v. McGhee*, 54 D. 409.

24. Ascertaining boundaries. — A grant of lands, extending along a river, and embracing the space of fifteen miles on each side thereof, must be located so that the sides will be parallel to the river, and so as to include all land which can be found within fifteen miles of the river, measuring from any point, in any direction, not above or below the points of limitation; and the ends must be at right angles with the general course of the river. *Winthrop v. Curtis*, 14 D. 216.

Where public lands bordering on a stream, navigable in fact, are shown by the government survey and plat, under which sales have been made, to be bounded by a river, the margin of such river, and not the meander lines run by the surveyor, must control in determining what amount of land a grantee takes under his grant. In such case the meander lines cannot limit the grant in a patent. *Schurmeier v. St. Paul, etc. R. R. Co.*, 88 D. 59.

A grantee of public lands bordering on a river navigable in fact, but above the flow of the tide, takes the land absolutely to low-water mark, and obtains the fee in the bed of the stream to the middle thereof, subject to the public easement of navigation. *Id.*

In Pennsylvania, the state has not parted with the control of the waters of its navigable streams, nor of the soil beneath. So that grants by the state of lands calling for a navigable stream as a boundary do not extend beyond low-water mark, and the grant is not absolute except to high-water mark; and gives the grantee only a qualified title to the space between high and low water mark. The right of passage over it in high water remains in the public. The state may use it for navigation purposes without compensation, and may protect it from an unauthorized use, even by the owner of the land, to low-water mark. *Stover v. Jack*, 100 D. 566.

25. Courses and distances must yield to landmarks and monuments. — To restore lost lines and corners, no departure should be made from the courses or distances except in cases of necessity, and where it is necessary to depart either from the courses or the distances, the distances ought to yield. *Bryon v. Beckley*, 12 D. 276.

Allowances for the variation of the magnetic needle from the true meridian are to be made in all cases where lost lines and corners are to be renewed. Allowances are also to be made for the unevenness of the ground over which each line passes. *Id.*

A mistake in a distance committed in the

original survey on one line is presumed to have affected the opposite line only. *Id.*

Course and distance are most unreliable calls, because of the liability of the officers of the government to err; and distance is less reliable than course, because of the greater liability of chain-carriers to mistake. *Stafford v. King*, 94 D. 304.

Natural or artificial monuments must generally control the courses and distances in a patent. *Wendell v. Jackson*, 22 D. 635.

Where the beginning point in a patent is identified by satisfactory evidence, the location of the premises must be commenced at that point and the courses and distances pursued, although by doing so a point, mentioned in a patent issued a few days afterwards, as one of the corners, is not reached, and although it may be necessary to exclude some of the courses and distances, and part of the land supposed to be conveyed. *Id.*

Course and distance control a call for a bounded tree described in patent as standing on a point at the mouth of a creek, where both the tree and the spot on which it stood are lost. *Budd v. Brooks*, 43 D. 321.

Natural and artificial objects are not liable to change or mistake like calls for course and distance; and hence the rule that course and distance yield to natural and artificial objects. *Stafford v. King*, 94 D. 304.

Course and distance may control under some circumstances, as where the natural objects appear to have been inserted by mistake, or without regard to precision, as in the case of descriptive calls; but generally they are mere guides to the other calls. *Id.*

26. Revocation of grants. — Where a grant was arbitrarily revoked, and the property re-granted to another, to whom the title was confirmed, he was decreed to hold as trustee for the first grantee. *Stark v. Mather*, 12 D. 553.

27. The patent; its nature and form, generally. — The United States may, by an act of Congress, divest itself at once of all property in a portion of the public lands, and transfer it to an individual. It may also so legislate as to make the issuance of a patent necessary to effectuate that object. *Boatner v. Ventress*, 20 D. 266.

A patent which appears on its face to have been legally executed, is presumed to have been executed by the proper officers. The burden of showing that it was not, is upon the party opposing it. The presumption is not removed in a case where the president's name and the filling up of the patent appear to be in the same handwriting, while the secretary's name appears to be in a different handwriting. *Parkison v. Bracken*, 39 D. 296.

A patent for land without witnesses, but signed and sealed by the Secretary of War

For Index to Notes in American Decisions and American Reports, see Volume 1

is sufficient to convey lands from the United States to a state, if the state recognizes the conveyance as valid. *McCullough v. Wall*, 53 D. 715.

The holder of a receipt from the state for the purchase price of land is indefeasibly entitled to a patent, and said receipt is inchoate evidence of an absolute title. *Winter v. Jones*, 54 D. 379.

A patent of United States to ceded lands formerly belonging to another government is not only the deed of the United States, but is a solemn record of the action and judgment of the government with respect to the validity of the title of the claimant existing at the date of the cession. It declares that the previous grant was genuine; the claim under it valid, and entitled to recognition and confirmation; that the grant was or might have been located by the former government, and that it is correctly located by the new government so as to embrace the premises as they are surveyed and described, and while this declaration remains of record, the government itself cannot question its verity, nor can persons do so who claim through the government by title subsequent. *Teschmacher v. Thompson*, 79 D. 151.

28. How construed. — A construction that gives effect to a patent is to be preferred to one that renders it inoperative and void; and, in determining what land is embraced within the calls of a patent, reference may be had to the surveyor's field notes and the original plat, if the patent itself is uncertain. *Alexander v. Lively*, 17 D. 50.

The true meaning of a binding expression in a patent must be applied, no matter in what part of the instrument such expression may be found. *Budd v. Brooke*, 43 D. 321.

A patent should be so construed as to reconcile all its parts, and to give effect to every word in it, if possible. *Id.*

The United States occupies only the position of a private proprietor, with reference to its real property within the limits of a state, with the exception that such property is exempt from state taxation; and its patent to such property is therefore subject to the same general rules of construction which apply to conveyances of individuals. *Moore v. Smau*, 79 D. 123.

A patent, as a deed of the United States, takes effect only from the date of the presentation of the petition of the patentees for confirmation of their claim. But as a record of the government of the existence and validity of the grant, it establishes the title of the patentees from the date of the grant. *Teschmacher v. Thompson*, 79 D. 151.

If a grant of land ceded to the United States by another government, upon which a patent is issued, was one of quantity only, requiring at the cession the action of the

government to give it location, the duty devolved upon the new government to make the location, and this was essential to perfect the equitable title of the grantees. As the duty of the government attached at the date of the cession, its performance could not be interfered with or defeated by any matters subsequently occurring. *Id.*

United States patent, following a final decree affirming validity of a Mexican grant takes effect by relation at the date of the presentation of the petition for confirmation to the land commission, and is to be regarded, so far as all intermediate conveyances are concerned, as having been executed at that time. *Touchard v. Crow*, 81 D. 108.

Where a Virginia patent issued before the separation of Kentucky from her, the rights of the patentee vested under, and should be determined by, the laws of Virginia. *Berry v. Snyder*, 96 D. 219.

29. Its effect. — A purchaser under a patent from the commonwealth is bound to take notice of a prior title to which a reference is made in the patent. *Burkart v. Bucher*, 4 D. 457.

The final certificate of title, under the act of Congress, settling Spanish claims, is sufficient evidence of title, and can not be questioned by a trespasser. *Richardson v. Hobart*, 18 D. 70.

The recitals in a patent issued by the government are evidence against a person in possession of the land without title. *Boatner v. Ventress*, 20 D. 266.

In sales of land by the United States, the law gives the right, and the patent is considered, not the title itself, but the evidence by which it is shown that the prerequisites to a legal sale have been complied with. *Goodlet v. Smithson*, 30 D. 561.

The patentee of land is invested with seisin of it, if no prior patent has been issued. *Overton v. Davison*, 42 D. 544.

A patent to lands issued to a person after suit therefor against him has become dormant, clothes him with legal title, which will inure to the benefit of those to whom he has previously conveyed, with general covenant of warranty. *Trimble v. Boothby*, 45 D. 526.

United States patent for lands, issued in the name of a deceased person who, while living, conveyed with warranty, vests the legal title in those to whom he so conveyed them. *Id.*

The assignment of a patent certificate by a judgment debtor after execution sale of the land under the judgment, passes no interest except a right of redemption. *Rogers v. Brent*, 50 D. 422.

One whose lands, held under a certificate of purchase, but for which the patent has not been issued, are sold under execution, can not set up the subsequently acquired patent to defeat an action brought for the

For Index to Notes in American Decisions and American Reports, see Volume I.

possession thereof. *Cavender v. Smith*, 56 D. 541.

A purchaser of public lands of United States who has complied with the necessary preliminaries of purchase is, upon payment of the purchase money, vested with title to the land, unless it is established by proof that the claimant who disputes such title was a *bona fide* purchaser without prior notice of purchase by the party in whom the title is vested. *Nelson v. Sims*, 57 D. 144.

Where a prior vendee is in possession of a tract of public lands, and informs a party about to purchase the same that he is the owner, such information will be construed to be proper notice to the intending purchaser of the rights of such possession. *Id.*

One obtaining a patent to land by fraud towards another, or who affects himself with a trust, holds the title thus acquired for the benefit of those who have been injured by his conduct. *Groves v. Fulsome*, 57 D. 247.

An act of Congress confirming an approved survey of commons in villages was equivalent to a patent, and conveyed to the city of St. Louis a perfect title to her commons from the government. A claimant seeking to dispossess her, or those claiming under her, of such title, must produce actual proof of prior cultivation, inhabitation, and possession. *Prima facie* proof of such fact is not sufficient. *Vasquez v. Bwing*, 66 D. 694.

A patent giving a fee-simple title on its face is such title as will afford protection to those claiming under it, either directly or having a title connected with it, with possession for seven years, as required by the statute of limitations of Illinois. *Williams v. Ballance*, 74 D. 187.

The object of the act of Congress of March 3, 1851, is "to ascertain and settle private land claims in California," and it does not restrict the operation of the patents issued by the United States upon confirmation of the claims, to the interests acquired by the claimants from the former government, nor distinguish the patents so issued from other patents issued by the United States; but patents issued under the act are without words of reservation or limitation, except that they shall not affect third persons. *Moore v. Smart*, 79 D. 123.

United States land patents pass to the patentee all interest of the United States, whatever it may have been, in everything connected with the soil; in everything forming a portion of its bed or fixed to its surface; and in fact, in everything which is embraced within the signification of the term "land." *Id.*

United States patent to ceded lands, issued on a grant of former government of quantity only, is evidence that the grantees possessed, at the date of the cession, a vested

interest in the quantity of land mentioned in the grant; a right to so much land to be afterwards laid off by official authority; that the premises described were then subject to appropriation in satisfaction of the quantity granted; and that the United States government, in discharge of its duty, has, through its appropriate departments, made the appropriation, and thereby given precision to the title of the grantees, and attached it to the tract as surveyed. *Teschmacher v. Thompson*, 79 D. 151.

United States patent if no higher evidence of title than a prior legislative grant. *Megerle v. Ashe*, 87 D. 76.

The title derived from the government is no better than the title from an individual owning the fee, and is governed by the same rules. *Rogers v. Brent*, 50 D. 422; *Brill v. Stiles*, 85 D. 364.

The issuance of the patent vests the legal title in the patentee. Until the patent is issued the party is not invested with a complete, perfect title. *Roads v. Symmes*, 13 D. 621; *Carman v. Johnson*, 61 D. 593; *Brill v. Stiles*, 85 D. 364.

The certificate of a purchase from the United States land office, issued prior to a patent, conveys the absolute title, and a patent subsequently acquired relates back to the date of said certificate. *Cavender v. Smith*, 56 D. 541.

A patent for land bounded by navigable water passes the title to the soil and all rights of property incident thereto, subject only to the public rights of fishing and navigation, and no title thereto can, therefore, be acquired by reclamation and improvement under the Maryland act of 1745, by an owner of the adjacent shore under a prior patent. *Casey v. Inloe*, 39 D. 658.

The patentee of a fractional tract of government land, bounded upon a navigable stream, takes to the water's edge. The meander line is not a line of boundary. *Kraut v. Crawford*, 87 D. 414.

30. *Validity.**—A possession by native Indians, existing as an independent nation, is not such an adverse possession as will render void alienations by patentees to whom the lands were granted by the state, and cannot be set up against the validity of the patent, or conveyances under it. *Jackson v. Hudson*, 3 D. 500.

A patent for land granted by a sister state is one of those public acts to which every other state is bound to give full faith and credit under the constitution of the United States; therefore the validity of such patent cannot be collaterally drawn in question by the courts of any other state, on a suggestion that the survey on which it was founded was a forgery. *Lasby v. Fontaine*, 4 D. 510.

* Validity of patent issued to decedent or to heirs of deceased, see note. 83 D. 467-470.

For Index to Notes in American Decisions and American Reports, see Volume I.

A patent, though not recorded, is good in equity against a purchaser with notice. In such case, information of its existence by common report, and from a person declaring he had seen it, with knowledge of possession and use of the land under the patent, is sufficient notice. *Roberts v. Stanton*, 5 D. 463.

If a patent has been issued by fraud, or on false suggestion, unless the fraud or mistake appear on the face of the patent itself, it is not void, but voidable only by a suit for that purpose. *Jackson v. Lawton*, 6 D. 311.

Congress may, by reason of its power to regulate the disposition of the public domain, declare imperfect patents to be of effect from the day that they were issued. *Parkison v. Bracken*, 39 D. 296.

A patent is void which was issued from the government, to land which had previously been appropriated by the government, and reserved from entry. *Hu-tuk-ho-mi v. Watts*, 45 D. 308.

A patent issued for land reserved from sale is void. *Perry v. O'Hanlon*, 49 D. 100.

All land to which claims were presented was reserved from sale by the act of July 9, 1832, until some disposition of such claims could be made; and, therefore, where claims were presented and relinquished to the United States before any decision was made, the reservation still continues, and a patent issued to any other than the claimant who relinquished, is void. *Id.*

A patent issued to the assignee of a certificate before sheriff's deed to an execution purchaser of the land under a judgment against the assignor, where the assignment is made after the execution sale, is void if the assignee has not exercised his right of redemption. *Rogers v. Brent*, 50 D. 422.

A patent issued by virtue of an unconstitutional act is void upon its face. *Winter v. Jones*, 54 D. 379.

A patent for land issued to a person not in existence is void. *Thomas v. Wyatt*, 77 D. 640; *Thomas v. Wyatt*, 69 D. 446.

A patent for land issued to a person under an assumed name is not void, but vests the title in him, and his title will pass by a transfer of the land under his assumed name. *Thomas v. Wyatt*, 77 D. 640.

A land patent issued by the proper officers of United States is presumed to be valid, and is *prima facie* evidence of regularity in all the preliminary steps to entitle the patentee thereto. *Schnee v. Schnee*, 99 D. 183.

31. **Conclusiveness, and how impeached.**—Where a patent had been issued, and afterwards a second, which recited a mistake in the issuing of the first, —*held* that the first was conclusive as to the title until it was set aside by a proper pro-

*Patent for lands, impeachment of, see notes, 25 D. 93, 94; 12 D. 564-568.

ceeding instituted for that purpose. *Jackson v. Lawton*, 6 D. 311.

One who receives a patent from the government when another is entitled thereto, may be declared to hold as trustee for such other. *Stark v. Mather*, 12 D. 553.

An application for a private entry without filing an affidavit that the land was not subject to the right of pre-emption, as required by an instruction of the Secretary of the Treasury under act of April 5, 1832, is not of itself evidence of fraud. *Carter v. Spencer*, 34 D. 106.

A purchaser of land under a patent is bound to take notice of the chain of conveyances which authorizes the commonwealth to grant her remaining title to the patentee. *Gingrich v. Folz*, 57 D. 631.

A patent to land in the territory ceded by another government to United States is not conclusive against those whose title accrued before the duty of the United States to protect the inhabitants and their property in the ceded territory attached. *Techemacher v. Thompson*, 79 D. 151.

A state grant or patent is to be deemed conclusive when drawn in question in a collateral action, so far as to show that the state has passed its title to the lands therein contained, and that all the previous requisites existed that were necessary to authorize and render it a complete and lawful act. Such grant can only be set aside by a direct proceeding on the part of the government for that purpose. It cannot be rescinded, except upon a verdict solemnly rendered, and entered of record. *Overton v. Campbell*, 9 D. 780; *Jackson v. Hart*, 7 D. 280; *Norvell v. Camm*, 8 D. 742.

A patent to lands may be impeached for illegality or fraud, and the question is as well examinable at law as in equity. *Hu-tuk-ho-mi v. Watts*, 45 D. 308; *Carter v. Spencer*, 34 D. 106. When the fraud or other defect arises on circumstances *dehors* the patent, it is voidable only in a suit in equity. *State v. Bachelder*, 80 D. 410.

A patent, issuing in virtue of a decision of land-officers, may be impeached in equity for fraud or collusion in obtaining it, even where such officers act clearly within the sphere of their jurisdiction. But even in equity, it must be made to appear that the party had no remedy at law adequate to his protection. Nor will the court set aside the decision upon the suggestion of fraud alone. *Id.*

An action to set aside a patent to land on the ground of fraud, by a party in actual possession, and brought under the Minnesota statute for determining an adverse claim, estate, or interest in land, is as much a direct proceeding to set aside the patent, as would be a bill in equity filed for that purpose. *Id.*

In an action to set aside a land patent ob-

For Index to Notes in American Decisions and American Reports, see Volume L.

tained through fraud, if it appear that plaintiff had notice and contested, or had an opportunity to contest and did not take advantage of it, the admission of false testimony would not be sufficient ground for relief. *Ib.*

A court of law may disregard a fraudulent patent or deed as void, in an action of ejectment, at the instance of the party defrauded, or those claiming under him; as where a patent is obtained by an assignee of the patent certificate under an assignment made after a sale of the land on execution against the assignor, and the ejectment is brought against the execution purchaser. *Rogers v. Brent*, 50 D. 422.

A fraudulent patent is not the "paramount title" as against a purchaser on execution under the patent certificate, notwithstanding the provisions of Ill. Rev. Stat., c. 40, sec. 5. *Ib.*

A state patent purporting to convey title, which is void upon its face, as where the state had no authority to convey, may be collaterally attacked in an action of ejectment. *Winter v. Jones*, 54 D. 379.

A bona fide pre-emptioner of public land under the laws of the United States may attack collaterally a patent for the same land granted by the state by virtue of a selection of the land made by the state while the pre-emptioner was in possession, in an action of ejectment against him by the state patentee, for the state had no title to the land. *Terry v. Megerle*, 85 D. 84.

Though a patent cannot be impeached in a collateral proceeding by matters or facts outside of the recitals therein, yet when it bears on its face evidence of a want of authority to issue the same, it will be declared void when introduced in evidence in an action of ejectment. *Alexander v. Greenup*, 4 D. 541.

39. Requisite certainty in description, calls, etc.—A mistake in calling for an object, where the same is not found, does not vitiate or destroy the validity of a patent. *Overton v. Davison*, 42 D. 544.

A mistake in one course, evidenced by applying the patent to the ground, cannot be applied or be made by presumption to affect any other course named. *Bryon v. Beckley*, 12 D. 276.

Mistakes in the calls of a patent may be corrected by reference to the plat and certificate of survey as evidence of the true position of the corners, which when ascertained, must control, though varying from the description of the patent. *Steele v. Taylor*, 13 D. 151.

"Seventy acres of land being and lying in south west corner of the south-west quarter of section fourteen," is sufficient as a description. The lands will be located in a square. *Wales v. Ringer*, 15 D. 555.

The calls of a patent may be controlled by a survey. *Newman v. Foster*, 34 D. 98.

In a court of law, a patent is of conclusive effect; and where there are two conflicting patents, the first must prevail. No equitable title can be opposed to the patent where a recovery is sought in ejectment. *Parkison v. Bracken*, 39 D. 296.

Patent is not conclusive evidence of title in Louisiana. *Kittredge v. Breaud*, 39 D. 512.

An equitable right originating before the date of a patent will be examined into. *Ib.*

If land cannot be located to correspond with all the calls in a patent, the direction indicated by the description must be followed in running around the premises, especially where the angles are not marked by natural or artificial monuments. *Wendell v. Jackson*, 22 D. 635.

Where several particulars are given in a patent, all of which are necessary to ascertain the land intended, nothing will pass that does not correspond with all those particulars. *Ib.*

False or mistaken particulars or boundaries, in the description in a patent, may be rejected. *Ib.*

The course of a line is controlled by a conflicting binding call in a patent. *Budd v. Brooks*, 43 D. 321.

A peremptory binding call, in a patent, for a creek, changes the general rule that a line calling for a lost boundary must be run by its course and distance, and in such case, the course and distance must be expended on the creek, and no other line can be interpolated to extend such line beyond the spot where such course and distance leave it. *Ib.*

The words "running up a creek" are not a binding call in a patent, but merely indicate the general direction of the line, which must be run in a straight direction from boundary to boundary. But where such creek is, in another part of the patent, made the boundary, the length of the line must be expended on the meanders of the creek, and the line will terminate at the point where such distance is expended. And if the second boundary named in the patent can not be found on the creek, the line to be supplied is a line drawn from such point on the creek to such second boundary, and not one drawn from the second boundary to the nearest point on the creek. *Ib.*

A variation of the magnetic needle cannot affect a line which must be run according to the calls in a patent, which are to be gratified in the same manner as if no course for the line were expressed in the patent. *Ib.*

It will be presumed that any object of a perishable nature called for in patent, if not found, is destroyed or defaced. *Staford v. King*, 94 D. 304.

Recourse must be had to the calls of a patent in controversies respecting bound-

For Index to Notes in American Decisions and American Reports, see Volume I.

aries of the tract, and if found, there is little room for doubt; but if not found, or found out of their proper places, the rules of law must govern in establishing the boundaries. *Ib.*

The most material and certain calls shall control those which are less material and certain; and a call for a natural object, such as a river, known stream, a spring, or even a marked tree, shall control both course and distance. *Ib.*

Natural and artificial calls are divided into descriptive or directory and special locative calls; and the former, though consisting of rivers, lakes, and creeks, must yield to special locative calls, and for the reason that the latter, consisting of particular objects upon the lines or corners of the land, are intended to indicate the precise boundary. *Ib.*

A descriptive call in a patent for 3,160 varas will be regarded as a mistake, and 750 varas will be taken to be its true length, where the call is the distance of the corner of the tract from a well-known point, and by following the longer distance, and then pursuing the courses and distances none of the natural and artificial calls of the patent are found, whereas if the corner is located at the shorter distance, and the courses and distances then followed, every call of the patent for natural and artificial objects is found. *Ib.*

33. Identifying monuments and landmarks.—Visible and actual landmarks are to be preferred in restoring lost lines and corners; and if they cannot be ascertained, resort must be then had to the courses and distances. *Bryan v. Beckley*, 12 D. 276.

Natural objects are mountains, lakes, rivers, creeks, rocks, and the like; artificial objects are marked lines, trees, stakes, etc.; and a description of these objects should be faithfully transferred into the field notes, and thence into the patent, for the purpose of identifying the land. *Stafford v. King*, 94 D. 304.

34. Priority between junior and senior grants and entries.—A confirmation by an act of Congress of a location of land does not overreach a patent subsequently issued to the same land, so as to annul the title of the patentee, unless the confirmation defines the land according to a particular survey, or within boundaries that are definite and precise. *Slack v. Orillion*, 33 D. 551.

Where an applicant for a patent has knowledge of a prior claim which he conceals from the knowledge of the commissioner of the general land office and the president, the benefit of the patent will inure to the prior claimant. *Kittredge v. Breaud*, 39 D. 512.

United States patent for land relates back to the appropriation of it, and in a court of equity the person who first appropriates the

land has the best title. *McAfee v. Keira*, 43 D. 331.

One who, with full knowledge of the facts, makes an entry upon and obtains a patent for public land upon which a prior entry has been made, which has been cancelled by mistake, will hold the legal title in trust for the prior entryman or his assignee. *Forbes v. Hall*, 85 D. 301.

An entry of public land cancelled by mistake is, if not abandoned, in full force when the mistake is corrected, and a subsequent entry with notice cannot defeat it. *Ib.*

Land-officers cannot, by any act of theirs, divest the equity of a prior entryman without his consent. *Ib.*

One fraudulently making a second entry on public lands has no claim against a prior entryman for purchase-money and taxes paid. *Ib.*

A certificate of entry will prevail in equity over a patent based upon a subsequent entry, unless the prior equity has been legally vacated. *Brill v. Stiles*, 85 D. 364.

In ejectment, where plaintiff offers in evidence a United States patent and rests, defendant is entitled to offer in evidence a prior patent from the state, and in connection therewith to prove that the recitals in the patent are true, showing that the land has been properly selected and located by the state from a part of the grant to the state by act of Congress of September 3, 1841. *Meyerle v. Ashe*, 87 D. 76.

The fact that the same tract was surveyed and patented to another cannot affect the question of boundary under the survey and patent in controversy. *Stafford v. King*, 94 D. 304.

A title subsequently acquired by the commonwealth by escheat, from an elder patentee, will not inure to the benefit of a junior patentee. The commonwealth may convey this title to another, who will have all the rights of the elder patentee. *Emondorf v. Carmichael*, 14 D. 86.

A junior patent based on a senior pre-emption right will prevail against a senior patent to the assignees of Jefferson College, issued in accordance with the provisions of an act of Congress in favor of such college. *McAfee v. Keira*, 45 D. 331.

A junior patent predicated on a reservation to a Choctaw Indian by treaty, will prevail against a senior patent issued under an act of Congress to the assignees of the Jefferson College. *Ib.*

Although there can be no adversary possession against the commonwealth, and therefore a junior patentee can not go behind the elder patent for the purpose of giving color to his possession prior thereto, yet there may be an adversary possession against one who has derived title from the commonwealth, and therefore a junior patentee may go behind his own patent, and also behind

For Index to Notes in American Decisions and American Reports, see Volume I.

the patent of the elder patentee, for the purpose of giving color to his possession from or subsequently to the granting of the elder patent. *Shanks v. Lancaster*, 50 D. 108.

Defendants in ejectment claiming under a junior patent, founded on an inclusive survey, may introduce in evidence the entries for the different tracts embraced in the inclusive survey, the order of court authorizing the survey, and the survey itself, in order to show possession under color of title prior to his patent. *Id.*

Possession under a junior patentee of an island, tolls the right of entry under an elder patentee, when the land was vacant at the time the defendant, claiming under the junior patentee, entered, with an intention of taking possession, and drove his stock upon it for that purpose, and continued to use it in the mode and at such times as was proper, considering its nature and locality, as his own, and such possession was at no time abandoned by him, or those claiming under him, but was continued uninterruptedly for twenty years. *Webb v. Hynes*, 50 D. 515.

Where a junior grant covers and includes an older grant, whether the holder claims all within the outer bounds or excludes the older grant from his claim, is a question of fact, and if he claims all within the outer bounds, possession of part is possession of all of it, where there is no adverse claimant. *McCormac v. Wilkes*, 51 D. 637.

An occupant under a junior grant which covers an older grant will be protected against violation of his claim of right by any one not claiming under such older grant. *Id.*

A patent is a better legal title than a prior entry, as giving the right to possession. *Corman v. Johnson*, 61 D. 593.

Possession taken by an owner of a junior survey of interference with an older and unoccupied survey, by erecting improvements upon and clearing and cultivating his land outside the lines of the interference, and using the balance of it, including the interference, as owners usually do their adjacent timber-lands, by taking fire-wood, fence-rails, or timber for the use of a sawmill for a period of twenty-one years, will be such possession as would give title under the statute of limitations to the part within the lines of such interference. But simply occasional entries upon the interference for lumbering purposes will not constitute such a possession. *Beaupland v. McKee*, 70 D. 115.

A junior patent from the government, or the register's certificate of entry, will prevail in equity over the elder one, if the right on which it is based is prior in point of time to that upon which the elder patent or certificate is founded. *Brill v. Siles*, 85 D. 364.

35. Intrusion on public lands. — Trespassers on lands of the United States

stand in the same position with trespassers on private property, and can not by such trespass acquire any property, either general or special. *Turley v. Tucker*, 35 D. 449.

A stranger can not enter on land granted by government and defend against the grantee on the ground that there is a present or prospective controversy with the government respecting the title, and that the government intends to disregard the location and survey. *Stephenson v. Goff*, 73 D. 171.

A party whose possession was acquired by intrusion upon prior rights of another cannot invoke the protection of the Van Ness ordinance, by which the city of San Francisco relinquished and granted all her claim and title to certain lands, to the parties in the actual possession thereof, by themselves or tenants, during the period named in the ordinance. *Keane v. Cannon*, 82 D. 738.

36. Cutting timber. — A party, not a settler, cutting trees on land of the United States, is a trespasser, and does not thereby acquire such property that he can maintain trover against a third person who hauls away the trees. *Turley v. Tucker*, 35 D. 449.

PUBLIC PLACES.

Power of city to regulate, see MUNICIPAL CORPORATIONS, 32.

See GAMING; INDECENCY.

PUBLIC POLICY.

Bonds contrary to, see BONDS, 17.

Contracts contrary to, see CONTRACTS, 98.

Notes contrary to, see BILLS AND NOTES, 70.

PUBLIC USE.

What is, see EMINENT DOMAIN, 11.

PUBLICATION.

Indecent, see INDECENCY, 2.

Of libel, what sufficient, see LIBEL, 3.

Of libel, when criminal offence, see LIBEL, 27.

Of notices, generally, see NOTICE, 8.

Of notice of sale, under power in mortgage, see MORTGAGES, 116.

Of statutes, see STATUTES, 6.

Of wills, see WILLS, 18-21.

Proof of, see LIBEL, 15.

Service of process by, see PROCESS, 23, 29, 34.

When constitutes contempt, see CONTEMPT, 8.

When may be enjoined, see INJUNCTION, 34.

PUFFERS.

Employment of, at auction sale, see AUCTION, 9.

PUNCTUATION.

Effect given to, see CONTRACTS, 63; STATUTES, 44.

For Index to Notes in American Decisions and American Reports, see Volume I.

PUNISHMENT.

Agreement to obtain mitigation of, see **CONTRACTS**, 105.
 Assessment of, by jury, see **TRIAL**, 208.
 Constitutionality of statutes as to, see **STATUTES**, 31.
 For contempt, see **CONTEMPT**, 23.
 For crime, generally, see **CRIMINAL LAW**, 6.
 For crime, when infant subject to, see **INFANTS**, 36, 37.
 For interference with receivers, see **RECEIVERS**, 15.
 See also **FORGERY**, 15; **RAPE**, 17; **RECEIVING STOLEN GOODS**, 5; **RIOT**, 3; **SABBATH BREAKING**, 7.

PUPILS.

Rights and discipline of, see **SCHOOLS**, 15-17.
 Separation of white and colored, see **SCHOOLS**, 16.

PURCHASE-MONEY.

Action for relief against payment of, see **VENDOR AND PURCHASER**, 71.
 Action to recover back, see **VENDOR AND PURCHASER**, 70.
 At execution sale, liability for, see **EXECUTION**, 110, 111.
 Mortgages for, see **MORTGAGES**, 47.
 Of homestead, enforcement of liability for, see **HOMESTEADS**, 24.
 Vendor's action for, see **VENDOR AND PURCHASER**, 55-59.

PURCHASERS.

At partition sales, see **PARTITION**, 27-29.
 At public sales, rights of, see **JUDICIAL SALE**, 7.
 At sale for payment of debts, rights of, see **EXECUTORS**, etc., 119-121.
 At sale under power in mortgage, rights of, see **MORTGAGES**, 118, 119.
 At tax sales, rights of, see **TAXES**, 52-54.
 At trustees' sales, rights of, see **TRUSTS**, 33.
 Duty of, to demand deed, see **VENDOR AND PURCHASER**, 20.
 From fraudulent grantor, rights of, see **FRAUDULENT CONVEYANCES**, 21.
 From trustee, when take subject to trust, see **TRUSTS**, 42.
 Grounds for rescission by, see **VENDOR AND PURCHASER**, 77, 78.
 How compelled to take title, see **JUDICIAL SALE**, 12.
 In foreclosure, rights and liabilities of, see **MORTGAGES**, 101-103.
 Liability of, for duties paid on goods bought, see **REVENUE**, 2.
 Measure of damages in actions by, see **DAMAGES**, 27-33.
 Of corporate stock, rights of, see **CORPORATIONS**, 40.
 Of coupons, rights of, see **COUPONS**, 3.
 Of goodwill, rights of, see **GOODWILL**, 3.
 Of infants' lands, rights of, see **INFANTMENT**, 15.

Of interest in party-wall, see **PARTY-WALL**, 5.
 Of land, how far deemed owner, see **VENDOR AND PURCHASER**, 16.
 Of land, remedies of, see **VENDOR AND PURCHASER**, 64-73.
 Of land, right of to crops, see **CROPS**, 6.
 Of mortgaged premises, rights and liabilities of, see **MORTGAGES**, 44-46.
 Of negotiable paper, rights of, see **BILLS AND NOTES**, 115-149.
 Of negotiable paper for less than face value, see **USURY**, 11.
 Of property held as collateral, rights of, see **PLEDGE**, etc., 22.
 On sale by sample, rights of, see **SALES**, 85.
 Pending suit, implied notice to, see **LIS PENDENS**, 4.
 Pending suit, rights of, see **LIS PENDENS**, 6.
 Redemption from execution by, see **EXECUTION**, 149.
 Remedies of, for defects in title, see **VENDOR AND PURCHASER**, 27.
 Who may be, at execution sale, see **EXECUTION**, 102-105.
 See also **BONA FIDE PURCHASERS**.

PURCHASES.

By attorney, see **ATTORNEY AND CLIENT**, 31.
 By wife, liability of husband for, see **HUSBAND AND WIFE**, 14.
 Of goods, by one partner, effect of, see **PARTNERSHIP**, 36.
 Of land, by personal representatives, see **EXECUTORS AND ADMINISTRATORS**, 44.
 Of trust property, by trustee, see **TRUSTS**, 35.
 When chargeable to wife's separate estate, see **HUSBAND AND WIFE**, 53.

QUALIFICATIONS.

Of arbitrators, see **ARBITRATION**, etc., 11.
 Of experts, see **WITNESSES**, 132-137.
 Of grand jurors, see **INDICTMENT**, 1.
 Of jurors, see **TRIAL**, 21, 136.
 Of trial judge, see **TRIAL**, 33.

QUALIFYING.

By public officers, see **OFFICERS**, 10.
 By sheriff, see **SHERIFFS**, 1.

QUALITY.

Buyer's action for defect in, see **SALES**, 93.

QUANTITY.

Buyer's action for defect in, see **SALES**, 90.
 How proved, see **EVIDENCE**, 257.
 Of land conveyed, relief for mistake in, see **MISTAKE**, 9.
 Of land conveyed, remedy for deficiency, or excess, in, see **VENDOR AND PURCHASER**, 28, 29, 69.
 When controlled by metes and bounds, see **DEEDS**, 71.

QUANTUM MERUIT.

Recovery on, in action for services, see **ASSUMPT, 12; SERVICES**, 8.

For Index to Notes in American Decisions and American Reports, see Volume I.

QUANTUM VALEBAT.

Recovery on, in action for price, see **ASSUMPT**, 13.

QUARANTINE.

Regulations as to, see **SHIPPING**, 27.
Widow's right of, see **DOWER**, 18.

QUASHING.

Attachment, grounds for, 88.
Certiorari, or return thereto, see **CERTIORARI**, 11.
Executions, see **EXECUTION**, 182, 183.
Indictments, see **INDICTMENT**, 49, 50.

QUESTIONS.

Between principal and factor, see **FACTORS**, 11.
Hypothetical, to experts, see **WITNESSES**, 140.
Of credibility, are for jury, see **WITNESSES**, 75.
Of freedom or slavery, see **SLAVERY**, 9.
To witness, what proper, see **WITNESSES**, 101-103.
What before court on trial of civil case, see **TRIAL**, 34.
What considered on *habeas corpus*, see **HABEAS CORPUS**, 9.
What may be considered on appeal from justice, see **JUSTICE OF THE PEACE**, 35.
What proper on cross-examination, see **WITNESSES**, 106, 107.
What reviewable, see **APPEAL**, 107, 108.

QUESTIONS OF LAW AND FACT.

Adverse possession, when for jury, see **ADVERSE POSSESSION**, 19.
Alteration, when for jury, see **ALTERATION OF INSTRUMENTS**, 2.
Contributory negligence, see **NEGLECT**, 22.
Excuses for want of demand and notice of dishonor, whether for court or jury, see **BILLS AND NOTES**, 225.
In actions against carriers, see **CARRIERS**, 118.
In civil cases, see **TRIAL**, 70-72.
In slander cases, see **SLANDER**, 40.
In suits on insurance policies, see **INSURANCE**, 193, 194.
In suits to set aside conveyances, see **FRAUDULENT CONVEYANCES**, 36.
Limitations of carriers' liability, see **CARRIERS**, 104.
Mixed, of law and fact, see **TRIAL**, 72.
Negligence, see **NEGLECT**, 18, 19.
On criminal trials, see **TRIAL**, 180, 181.
Reasonableness of demand and notice, see **BILLS AND NOTES**, 207.
What is baggage, a question for jury, see **CARRIERS**, 79.
Whether new promise revives debt, when for jury, see **BANKRUPTCY**, 45.
Who are fellow servants, when for jury, see **MASTER AND SERVANT**, 19.

QUIET ENJOYMENT.

Covenants for, and how broken, see **COVENANTS**, 27, 28; **LEASES**, 14.

QUI TAM ACTIONS.

To enforce penalties, see **PENALTIES**, 3.

QUIT CLAIM.

Deeds of, see **DEEDS**, 84.

QUORUM.

At corporate meeting, what is, see **CORPORATIONS**, 114.

QUO WARRANTO.

[Includes the remedies by writ of *quo warranto*, or information in the nature of *quo warranto*, to try the questions of title to office, and usurpation of franchise.]

1. Jurisdiction, and nature of the remedy.—The object of the writ of *quo warranto* was to remove or terminate some usurpation of the rights or prerogatives of the crown. *Com. v. Murray*, 14 D. 614.

It is a writ issuable by the state at will and of right, and is a demand made by it upon an individual, to show by what right he exercises a franchise, which can not lawfully be exercised, except by virtue of some grant or authority emanating from it. *State v. Harris*, 36 D. 460; *State v. Evans*, 36 D. 468.

It originally issued only at the instance of the sovereign against any person who usurped any franchise or liberty against the king, or for misuser or non-user of franchises or privileges granted by him. *State v. Curtis*, 95 D. 263.

The statute of 9 Anne extended an information in nature of a *quo warranto* so that it could issue at the relation of any person against any other person usurping, intruding into, or unlawfully holding any franchise or office in any corporation. *Id.*

It will not lie in a state court to try the right to the office of director in a bank organized under the national currency act. This is one of that class of cases where jurisdiction in the state court is utterly incompatible with the necessary jurisdiction of the national government. *Id.*

The jurisdiction to issue an information in the nature of a *quo warranto* from a state court, to try the right to the office of director in a bank organized under the national currency act, is not conferred by the amended currency act of 1864, section 57, which provides that suits against the national banks may be instituted in either the federal or state courts. *Id.*

The proceeding is civil in character, and a party applying for a change of venue in such proceeding, showing all the requisite facts thereto, is entitled to a change of venue as a matter of right. The Illinois act of 1861, giving the court discretionary power to grant

For Index to Notes in American Decisions and American Reports, see Volume I.

a change of venue in certain criminal proceedings, does not embrace a proceeding by *quo warranto*. *Ensinger v. People*, 95 D. 495.

2. When an information will lie. — A writ of *quo warranto* is the proper proceeding to ascertain whether a forfeiture of the charter of a corporation has been incurred. *State v. Real Estate Bank*, 41 D. 109.

Lapse of time is no bar to filing an information in the nature of a *quo warranto* by the attorney-general. *State v. Pawtucket Turnpike Co.*, 94 D. 123.

Commissioners appointed by the legislature to select a townsite, and lay out and sell lots thereon, who have performed every act required of them, and are *functi officio*, may be proceeded against by information in the nature of a *quo warranto*, where the conviction is sought for the purpose of invalidating their acts, where such acts would affect the general administration of affairs in the community. *Burton v. Patton*, 62 D. 194.

3. When it will not. — A *quo warranto* against a minister cannot be sustained where there is no established church and each religious society manages its own concerns. He does not hold an office connected with the administration of justice, nor does he exercise a right or franchise belonging to the commonwealth. *Com. v. Murray*, 14 D. 614.

4. Who may apply for it. — An information in the nature of a *quo warranto*, may be granted at the relation of any person interested in the election or admission of an officer or member of a corporation; but, for the purpose of dissolving the corporation, or of seizing its franchises, it cannot be prosecuted, except by the authority of the commonwealth, through the legislature, or by the attorney-general. *Com. v. Union Ins. Co.*, 4 D. 50.

The writ can issue only to a competent relator; one having an interest to warrant his interference. *Com. v. Oluley*, 94 D. 75.

The relator in *quo warranto* has no interest when he is the next in vote at an election for sheriff, where the person receiving the highest number of votes and returned was disqualified. He has no more interest than any other inhabitant of the commonwealth. The question of his right to the office is a public one exclusively, and can be raised only by the attorney-general. *Id.*

An enactment that the writ may be issued on suggestion of any person desiring to prosecute the same means any person having an interest to be affected. *Id.*

5. Trying title to office. — *Quo warranto* is a proper remedy to try title to office. *People v. Olds*, 58 D. 398.

Both the title of the party in possession of office, and that of a party claiming a right thereto, will be determined in the action in the nature of a *quo warranto*, and such deter-

mination will dispose as well of the public interest as of the private right. *People ex rel. Smith v. Pease*, 84 D. 242.

An information in the nature of a *quo warranto* lies in all cases where a charter exists, and a question arises concerning the exercise of an office claimed under that charter; but the court has the right to grant or refuse it according to the circumstances. *Com. v. Arrison*, 16 D. 531.

Where the term of office has expired before a *quo warranto* is applied for, or will expire before trial, the application will be denied. *People v. Loomis*, 24 D. 33.

The purview of twelfth section of act of April 13, 1840, covers all questions arising on writs of *quo warranto* between rival claimants of elective offices, and being highly remedial, should be liberally construed. *Com. ex rel. v. Cullen*, 53 D. 450.

In proceedings in nature of *quo warranto* against respondent for having intruded into an office, the information will not be dismissed, even though it appears that the office which respondent is charged to have usurped has expired since the filing of the information, as the statute provides for the imposition of a fine in a proper case, and also for the payment of costs by the respondent and the recovery of damages by the relator. *People ex rel. v. Hartwell*, 86 D. 70.

One wrongfully kept out of an office of profit, by a claimant thereto, is entitled to recover as damages the whole official salary, without deduction for the services of the incumbent. *People v. Miller*, 9 R. 131.

One entitled to an office and ejected may, after being re-instated, recover from the usurper the emoluments received by him, although he was put in possession by a judgment of the supreme court. *Kessel v. Zeiser*, 55 R. 769.

A state constitution provided that any candidate for office who should be guilty of bribery should be disqualified from holding office. *Held*, that an officer might be removed by *quo warranto* for obtaining his election by bribery, without having first been convicted of the offense on an indictment, but *semble*, that the defendant had a right to have the issues of fact raised upon the *quo warranto* tried by a jury. *Com. v. Walter*, 24 R. 154.

Under the constitution and statutes of Virginia no person who has engaged or shall engage in a duel is allowed to hold office. *Held*, that one who has been so engaged may be removed from office by *quo warranto* or an information in the nature of *quo warranto*, without a previous conviction of the offense in criminal proceedings. *Royall v. Thomas*, 26 R. 335.

6. Usurpation, or forfeiture of corporate franchise. — In England *quo warranto* lies in name of the sovereign against those who usurp sovereign franchises, be-

For Index to Notes in American Decisions and American Reports, see Volume I.

cause such usurpation is in derogation of the rights of the crown. *State v. Curtis*, 95 D. 263.

In the United States *quo warranto* lies in name of government against those who usurp sovereign franchises, because such franchises are grantable or granted by the commonwealth. *Id.*

Quo warranto can lie only in name of United States, and in the federal courts, against those who invade a franchise granted by the national government. *Id.*

An information in the nature of a *quo warranto* lies against a corporation for illegally carrying on banking operations. Such information need show no title in the people to a franchise, as it is incumbent on the defendant to show authority for exercising the right. *People v. Utica Ins. Co.*, 8 D. 243.

An information in the nature of *quo warranto* to oust the defendants from acting as a corporation, and to test the fact of their incorporation, should be filed against the individuals; but if the object is to effect a dissolution of a corporation, or to oust such corporation of some franchise which is unlawfully exercised, then the information is correctly filed against the corporation. *People v. Rensselaer etc. R. R. Co.*, 30 D. 33.

Filing false and fraudulent articles of association is a sufficient fact to sustain an information in the nature of *quo warranto* on the part of the state against a corporation. *State ex rel v. Bailey*, 79 D. 405.

Present insolvency is not a sufficient fact to sustain an information in the nature of *quo warranto* on the part of the state against a corporation. *Id.*

The object and effect of the proceeding by *quo warranto* is either to oust the party defendant of the franchise, if he fails to show in himself a complete legal right to its exercise; or if the franchise has been legally granted, but has been forfeited by the defendant or those under whom he claims, then to seize it into the hands of the state. *State v. Evans*, 36 D. 468.

Where a person is legally entitled to the exercise of a franchise, he can not by *quo warranto* be prohibited or restrained from the doing of any particular act or thing, the right of doing which is claimed by virtue of such office or franchise, and constitutes only an integral part of the rights, powers, and privileges incident thereto. Thus a judge legally elected, can not be prohibited by such a proceeding from taking cognizance of and adjudicating any suit or proceeding instituted and pending for adjudication in any court which he is authorized to hold, although such court may not legally possess jurisdiction over the matter. *Id.*

7. The application.—Where leave of court must first be obtained to file an information in nature of *quo warranto*, the court may, in its discretion, refuse its permission

on the ground that the term of office would expire before the question could be tried; but where the statute permits the information to be filed without permission, there is no objection to the prosecution of the proceedings. *People ex rel v. Hartwell*, 86 D. 70.

8. Issuing the writ or information.—A writ of *quo warranto* is not a writ of right. Its issuance rests in the discretion of the court; and this was so under the British statute, 9 Anne, c. 20. The provisions of which statute were incorporated into the revised code of Pennsylvania, though they were not at first adopted in that state. *Commonwealth v. Chuley*, 94 D. 75.

The issuance of the writ does not end the discretion of supreme court, and that court is not obliged to entertain such writ, if in their opinion it was improvidently issued. *Id.*

9. Sufficiency of the information.—A proceeding by *quo warranto* is a criminal prosecution, and must, in Illinois, be carried on "in the name and by the authority of the people of the state," and conclude, "against the peace and dignity of the same." *Donnelly v. People*, 52 D. 459.

The prayer for relief at the close of an information containing several paragraphs must be taken distributively, and applied severally to the paragraphs. *State ex rel v. Bailey*, 79 D. 405.

In an information in the nature of a *quo warranto*, franchises and privileges alleged to be usurped need only to be set forth in general terms. The government has always the right to call upon those who assume corporate powers to require them to show by what warrant they do so, and when the defendants have set forth their claims by plea, the attorney-general may then reply and show the special grounds upon which he relies. *People ex rel v. River Raisin etc. R. Co.*, 86 D. 64.

An information filed against a corporation in its corporate name, admits the existence of the corporation. *People v. Rensselaer etc. R. Co.*, 30 D. 33.

The information is fatally defective which charges certain parties with intrusion into the offices of wardens and vestrymen of St. Paul's Church, "a corporation created by the authority of this state," without showing in what manner the organization became a body corporate, not having been created by special charter. *People v. De Mill*, 93 D. 179.

It is sufficient to aver in general terms the existence of the corporation created by special charter. But where it is not so created, the facts showing its existence must be set forth. *Id.*

The existence of the corporation is a jurisdictional fact which must be set forth, unless judicially known, where an information is filed for usurpation of office. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

The nature and duties of an alleged office in a corporation, not judicially known, must be so described, in an information filed for usurpation of the office, as to show whether it is an office within the meaning of the law relating to the usurpation of franchises. *Id.*

10. Rules of pleading.*—Where the ownership of real estate is by law a prerequisite to the exercise of a franchise, upon *quo warranto*, the party exercising the franchise must in his plea describe the real estate of which he is owner, and how he has derived title thereto, and exhibit the deeds and records by which his ownership is evidenced. *State v. Harris*, 36 D. 460.

Ownership of stock, where a prerequisite to the exercise of a franchise, must be pleaded, so as to show that the stock was originally awarded after a compliance with the requirements of law, and if acquired by the defendant by transfer, the transfer must be set out; and the title deeds and records through which the defendant's title thereto has been acquired, must be exhibited, or some legal excuse for their non-production must be made. *Id.*

In pleading an election to the office of director, by the stockholders of a corporation, defendant must show that the election was held agreeably to law and in conformity with and in pursuance of the ordinances and regulations of the governing board of the corporation, and that at such election he received a majority of the legal votes cast; if his claim is by virtue of an election by the board of directors, to supply a vacancy therein, he must show the existence of a board competent to elect, and that a vacancy existed therein, and how such vacancy arose, and his subsequent election. *Id.*

The defendant in a *quo warranto* need only show a *prima facie* legal right to his enjoyment of the franchise; that if his pleading show an election by electors acting under color of legal right, it is sufficient; and that the electors were not possessed of the proper qualifications must be pleaded in avoidance by the state. *Id.*

Quo warranto is a common-law proceeding, under which a new defensive averment, answering plaintiff's case, is admissible. *Com. ex rel. v. Cullen*, 53 D. 450.

The answer of not guilty or *non usurpavit* is bad in *quo warranto*. The defendant must either justify or disclaim the holding. *Attorney-General v. Foote*, 78 D. 689.

A plea to an information in the nature of a *quo warranto* which puts in issue a material allegation in the information, such as that any votes were cast for the relator at the election, should conclude to the contrary, and not with a verification. *People ex rel. v. Hartwell*, 86 D. 70.

In an action in the nature of *quo warranto*

*Pleading in *quo warranto* proceedings, see note, 86 D. 44-45.

to declare void the election of a county officer on the ground that he offered, before election, to pay a part of his salary into the county treasury if he should be chosen—*held*, that the complaint was bad for not showing that voters influenced by such offer were tax payers of the county, or would otherwise be benefited by the performance of the promise. *State v. Church*, 20 R. 746.

11. Evidence, and burden of proof.* On the trial of a *quo warranto*, in which the issue is on the legality of the election, evidence may be given of conversations and transactions previous to the election, if they were connected with, and might have had an influence on it, though no previous notice thereof has been given. *Com. v. Woelper*, 8 D. 628.

Supreme court of New York, in an action of *quo warranto* to review election of a state officer, is not restricted to correcting mistakes of the canvassing officers, but may go behind their returns, and receive evidence establishing what votes were actually cast and identifying the candidates for whom they were in fact intended. *People v. Cook*, 59 D. 451.

The certificate of a board of canvassers authorized to canvass votes given for any elective office is only *prima facie* evidence of the title of the person receiving it to the office therein mentioned, and in all cases where the proceeding is by *quo warranto*, or by an action in that nature, it is competent to go behind the certificate to ascertain the real facts of the case. *People ex rel. v. Pease*, 84 D. 242.

Evidence is admissible to show that the votes cast for either of two candidates for office were given by persons who were not qualified electors. *Id.*

The poll list kept at an election is admissible in evidence to prove that a person voted at such election, although such list is not signed by the inspectors, has no heading denoting its character, and has never been filed in the town clerk's office. *Id.*

Where the evidence is that a person who was alien born has voted, the legal presumption is that he voted legally, and that he had become naturalized. *Id.*

An information in the nature of a *quo warranto* is essentially a civil proceeding, and the burden of proof is upon the complaining party to show that his adversary is illegally in possession of the office. *State v. Kuyperie*, 100 D. 265.

In *quo warranto*, the burden is upon the defendant of showing such facts as invest him with a complete legal title to the franchise in question. *State v. Harris*, 36 D. 460.

Upon a *quo warranto* to the president of a corporation, requiring him to show his title to that office, he must show the existence of

*Burden of proof in *quo warranto* proceedings, see note, 100 D. 268-274.

For Index to Notes in American Decisions and American Reports, see Volume I.

a corporation, that he is possessed of the qualifications required by law of the incumbent of the office of president thereof, and that he is the president. *Id.*

Where a voter is proved to have been an alien born, and there is *prima facie* evidence that he has not become a citizen by naturalization or otherwise, the burden of showing that he has become a citizen is cast on the party who desires to retain the vote, and in the absence of such proof the vote must be disallowed. *People ex rel v. Pease*, 84 D. 242.

In an action in the nature of a *quo warranto* against the incumbent of an office, brought in the name of the people on the relation of a candidate for an office who, according to the returns, received less votes than the defendant, — *held*, (1) that the returns having been shown to be false, the burden was on the defendant to establish his title to the office by other proof than his certificate of election; (2) that on failure to do this, judgment of ouster should be rendered against defendant; but (3) that the relator was bound to show affirmatively that he was entitled to the office in order to obtain judgment to that effect. *People ex rel v. Thatcher*, 14 R. 312.

12. The judgment, and how enforced. — Where the term expires after information in the nature of *quo warranto*, but before judgment, such judgment will, nevertheless, be rendered, as the prevailing party is entitled to costs. *People v. Loomis*, 24 D. 33.

A judgment of ouster is rendered against individuals for unlawfully assuming to be a corporation, or against a corporation usurping a franchise. Judgment of seizure is given against a corporation for a forfeiture of its corporate privileges. *People v. Rensselaer, etc. R. R. Co.*, 30 D. 33.

13. Review. — In an information in the nature of a *quo warranto* against an officer of a corporation, charging him with having usurped the franchises of the office, a new trial will not be granted for a misdirection, when it appears that the term of the office has expired, and a new annual election of officers has been made. *State v. Tudor*, 5 D. 162.

An action in the nature of *quo warranto*, authorized by the New York code of procedure to be brought for determining the title to a public office, being a civil, not a criminal proceeding, is to be reviewed by appeal, not by writ of error. *People v. Cook*, 59 D. 451.

RAILROAD COMPANIES.

[Includes the incorporation and organization of railway companies; their powers, and the duties and liabilities of their officers; proceedings to condemn land, locate the route, and construct the road; the powers, duties and liabilities of the company as carriers of goods and passen-

gers, including the liability for injuries to person or property caused by negligence; their liability to their servants and employees; the relative rights of connecting lines; and the law relative to horse and street railroads.]

City bonds in aid of, see MUNICIPAL CORPORATIONS, 60.

County bonds in aid of, see COUNTIES, 22.

Power of city to allow tracks in streets, see MUNICIPAL CORPORATIONS, 37.

Power of city to make subscriptions in aid of, see MUNICIPAL CORPORATIONS, 16.

Subscriptions by counties, in aid of, see COUNTIES, 20, 22.

Subscriptions by towns in aid of, see TOWNS, 13.

Taxation of, see TAXES, 9.

I. INCORPORATION, ORGANIZATION, AND POWERS, GENERALLY.

II. ACQUIRING RIGHT OF WAY AND CONSTRUCTING THE ROAD.

1. *Proceedings to condemn lands. Locating the road.*
2. *Constructing the road; and liability for defective construction.*
3. *Fences, crossings, culverts, and cattle-guards.*

III. RIGHTS, POWERS AND DUTIES OF OFFICERS, AGENTS AND SERVANTS.

IV. POWERS, DUTIES AND LIABILITIES IN RESPECT TO THE MANAGEMENT OF THE ROAD.

1. *Under the contract to carry.*
 - a. Carriage of merchandise.
 - b. Carriage of passengers and their baggage.
2. *Liability for injuries caused by negligence.*
 - a. In general.
 - b. Injuries to passengers.
 - c. Injuries to persons crossing the track.
 - d. Injuries to employees.
3. *Relative rights and liabilities of connecting lines.*

V. HORSE AND STREET RAILROADS.

I. INCORPORATION, ORGANIZATION, AND POWERS GENERALLY.

1. Power of the legislature over railroads. — Railroads are not private affairs but public improvements, and it is the right and duty of the state to advance the commerce and promote the welfare of the people by making or causing them to be made at the public expense. *Sharpless v. Philadelphia*, 59 D. 759.

The legislature may, by general laws, impose new burdens on railroad companies, in addition to those imposed by their charters, when such burdens are conducive to the public interest and safety. *Nelson v. Vermont etc. R. R. Co.*, 62 D. 614.

A state legislature has power to prohibit unjust discrimination in railway freights.

For Index to Notes in American Decisions and American Reports, see Volume I.

Chicago and A. R. R. Co. v. People, 16 R. 599.

The right to build roads and levy tolls is an attribute of sovereignty, and, in the hands of a subject, a franchise. Where the legislature confers a franchise to build and operate a railway, it retains the right to control the recipient in its exercise so far as it does not surrender its authority to do so. *Blake v. Winona etc. R. R. Co.*, 18 R. 345.

2. **Constitutionality of statutes affecting railroads.**—Monopolies are not prohibited by the constitution of Pennsylvania, and the legislature may, therefore, grant exclusive privileges to a railroad. *Case of Philadelphia etc. R. R. Co.*, 36 D. 202.

The construction of a railroad through a county is a "county purpose," within the Tennessee constitution, notwithstanding the stock in the railroad subscribed for by the county be distributed among the people in the proportions in which they pay the tax levied for this purpose, for it is not the stock as an investment which is contemplated by the constitution, but the road in which the stock is held. *Louisville etc. R. R. Co. v. Davidson Co.*, 62 D. 424.

The construction of a railroad through a county, although it extends through other counties or states, is a "county purpose," within the purview of the Tennessee constitution empowering the legislature to authorize the several counties of the state to impose taxes for county purposes. *Id.*

A statute required a railroad company, whose charter was subject to amendment by alteration or repeal, to establish a flag station at a certain point on its line, to erect there a station house and to stop its trains, is not in violation of the constitution of the United States. *Com. v. Eastern R. R. Co.*, 4 R. 555.

A statute giving the owner of live stock "double the value" of live stock injured or killed by the cars of a railroad company is void. *Atchison and N. R. R. Co. v. Baly*, 29 R. 356.

A statute rendering railroad companies liable for cattle killed by them, at a valuation to be conclusively fixed by appraisers, is unconstitutional as denying the right to a trial by jury. *Graves v. Northern Pacific R. R. Co.*, 51 R. 81.

A statute, imposing a penalty on railway conductors for failing to cause their trains to stop five minutes at every way station, is constitutional. *Davidson v. State*, 30 R. 166.

By the acts incorporating a railway company, no special authority was given to charge toll for freight and passengers. By a subsequent act, maximum rates of toll were fixed. *Held*, that the state had a right to regulate the matter of tolls, and violated no contract in doing so; that the

act in question was not a usurpation by the legislature of judicial authority, and that the same was constitutional. *Blake v. Winona etc. R. R. Co.*, 18 R. 345.

A statute made railroad companies liable "for all expenses of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision or other accident occurring to such cars, or otherwise." *Held*, unconstitutional so far as it attempts to make railroad companies liable in cases where they have violated no law or been guilty of no negligence. *Ohio and Miss. R'y Co. v. Lackey*, 20 R. 259.

A statute provided that all railroad corporations should be liable for damages from fires caused by the operating of such railroad. *Held*, valid and constitutional as to railroads incorporated before the statute was passed. *Rodemacher v. Milwaukee etc. R. R. Co.*, 20 R. 592.

3. **Their interpretation.**—An act of the legislature authorized "all railroad companies upon equal terms to run their locomotive and cars over the track" of the Union Railway Company of Baltimore. *Held*, that this provision did not confer upon such railroad company the power to construct lateral railroads connecting with other railroads running to Baltimore. 1871. *Baltimore etc. Turnp. Co. v. Union R'y Co.*, 6 R. 397.

A statute makes it the duty of railway locomotive engineers, "on perceiving any obstruction on the track of the road," to use all means to stop the train. *Held*, that this does not apply to an animal running by the side of the track and suddenly springing on the track too late to be avoided. *East Tennessee etc. R. R. Co. v. Bayless*, 54 R. 69.

The Maryland railroad act of 1838, construed. *Baltimore & S. R. R. Co. v. Woodruff*, 59 D. 72.

4. **Construction of charter provisions.**—Railway companies must stand upon a strict construction of their chartered privileges. *Com. v. Pittsburgh etc. R. R. Co.*, 62 D. 372.

A provision in a charter of a railroad company requiring it to restore a highway which it crosses to its former state of usefulness, as near as may be, is not a condition precedent to its right to cross such highway. *Richardson v. Vermont Cent. R. R. Co.*, 60 D. 283.

Building a railroad tract so as to contribute to other purposes is within the charter powers of a railroad company, if the primary object was for railroad purposes. *Jones v. Western Vermont R. R. Co.*, 65 D. 206.

A railroad company acting under a special charter, which leases a line constructed under the general railroad law, with respect to the business transacted by them on said leased road, are governed by the provisions of the general railroad law, and cannot claim the benefit of such exemptions as are con-

For Index to Notes in American Decisions and American Reports, see Volume I.

tained in their original charter. *McMillan v. Michigan S. & N. R. R.*, 93 D. 208.

A charter granted by two states to a company to construct a railroad is not only a contract with the company but a compact between the states. It is to be liberally construed with reference to its objects. Like a treaty, it is the law of the contracting states, not being subject to interpretation by the local usages of either. The same construction must be made in both. *Cleveland & P. R. R. Co. v. Speer*, 94 D. 84.

By the the charter of the P. Railroad Company it was provided, among other things, that the corporation should "be obliged to receive at all proper times and places" persons and articles for transportation, etc. That the legislature should have the right to inquire into and correct abuses of the franchise, but that the charter should not be revoked, annulled, altered, limited or restrained without the consent of the corporation, etc., and that the president and directors should have "authority to exercise all the powers granted the corporation for locating, building, completing and running the road." The railroad commissioners, under the provisions of an act passed subsequent to the charter, ordered the company to build and maintain a station for the receipt of goods and passengers at a specified place on its line. *Held*, (1) that the duties imposed upon the corporation were ministerial to do and perform what public convenience should require, and (2) that it was not in the discretion of its directors to determine ultimately what their duties were; (3) and that the legislature had the constitutional right and authority to confer jurisdiction over the subject, and nothing in the act conferring it conflicted with the charter of the corporation. *State v. Noyes*, 47 Me. 205 distinguished. *Railroad Comm'rs. v. Portland & O. Cent. R. R. Co.* 18 R. 208.

5. Subscriptions to stock and how enforced. — Railway stock subscriptions, conditional on the location of the line or a station, are upheld, on the ground that this agreement, and not the stock itself, is conditional. *Pacific R. R. Co. v. Seely*, 100 D. 369.

A subscription to joint stock is not only an undertaking with the company but with all other subscribers. So where one subscribed to the building of a railroad according to a specified survey, the amount to be paid only when the subscriptions reached an amount specified, he cannot be permitted to show that he induced to subscribe by the promises of the company's agents that the road should be constructed not according to the survey, but past his house, etc., and that his subscription was not to be binding unless the road was so constructed. *Müller v. Hanover Junction etc. R. R. Co.*, 30 R. 349.

The defendant procured subscriptions for

the stock of the plaintiff's railway, and himself previously subscribed thereto, entering his name in the same subscription book belonging to the plaintiff, which he kept about six months thereafter. Subsequently he cut his name out of the book and returned the book to the plaintiff. *Held*, that he was still bound by his contract. *Greer v. Chartier's R'y Co.*, 42 R. 548.

A subscription for building a railroad was made on the conditions that the road should be completed and put into operation to a certain town by a certain date, and that it should locate a station within a specified distance of the court-house in the town. The road was graded to the town by the appointed time, but was not fully completed until several months later, and in the meantime the company used about a mile of another railroad. *Held*, (1) that the contract for completion was substantially complied with; (2) that the distance of the station from the court-house should be measured in a straight line; (3) that the contract for locating the station was lawful. *Missouri Pac. R'y Co. v. Tygard*, 54 R. 97.

6. Powers of the company generally. — A railway company has the right forcibly to eject from its premises a hotel runner, who comes there to solicit patronage for his hotel, in violation of a regulation of the company, of which he has knowledge. *Landrigan v. State*, 25 R. 647.

7. Power to make contracts. — Whether a railroad corporation has power to assign its road and the franchise connected with it, is a matter between the state and corporation, with which third parties have nothing to do. *Arthur v. Com. & R. R. Bank*, 48 D. 719.

If a railroad hold an estate in fee in property it may assign it. *Id.*

Assignment of the road does not carry the franchise with it nor does it of itself work a dissolution of the corporation. *Id.*

A railroad corporation, having affirmative right of possession and management of its road under its mortgage, has a legal right to contract for such articles as would enter into the expense of maintaining and operating the road. *Parkhurst v. Northern Cent. R. R. Co.*, 81 D. 648.

A railroad company may, in exercising its franchises, incur liability for expense on account of injury received by its employees, although the charter may not, in terms, authorize the company to incur such expense. *Toledo R. R. Co. v. Rodriguez*, 95 D. 484.

It is sufficient consideration to support an express agreement to pay for the nursing and medical attendance necessary to the cure of a railroad employee, that he was disabled while in the employ of the company, and in the discharge of his hazardous duties. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

8. — to issue bonds. — Corporations have power by common law to issue bonds, but under the statute of Massachusetts, railroad corporations have no power to issue bonds for the payment of money, except for the purposes and in the mode therein authorized. All bonds issued otherwise are void. *Com. v. Smith*, 87 D. 672.

A mortgage is void which is made to secure railroad bonds issued for purposes not authorized by the statute, and not in the mode therein prescribed. *Id.*

Railroad bonds issued and a mortgage given of its franchise and other property in violation of statute may be attacked as invalid, even in a collateral proceeding, by one who has taken a valid second mortgage on the property, and not made expressly subject to the former mortgage. *Id.*

A railroad corporation may make interest on bonds payable semi-annually, where it is authorized to borrow money "at a rate of interest not exceeding seven per cent per annum," and the bonds shall be "payable at such time and places as shall be agreed on by the respective parties so contracting." *Coe v. C. P. & I. R. R. Co.*, 75 D. 518.

Bonds of a railroad company are not made void by being secured by a mortgage which the company had no power to execute. Nor is the holder's right to recover on such bonds at all affected by a memorandum thereon that they were issued by the company in accordance with its charter, and that the mortgage therein recited had been duly executed. *Phila. & S. R. R. Co. v. Lewis*, 75 D. 574.

A bona fide purchaser of bonds of a railroad company is not bound to see to the application of the money paid for them to the purposes of the corporation, where the bonds are in such form as to pass by delivery. Nor is it any defense to an action on such bonds that the books of the company do not show value received for them, or that the president of the company has not made to it a return of the proceeds. *Id.*

9. — to make leases. — A railroad company has no power to lease its road so as to relieve itself from liability for the non-performance of duties devolving upon it, in the absence of legislative authority, express or implied. *Ohio etc. R. R. Co. v. Dunbar*, 71 D. 291.

The board of directors of a railway corporation have no power to make a lease of their road, under the laws of Virginia, without the sanction of the stockholders. *Stevens v. Davison*, 98 D. 692.

A lease made by the board of directors on the day their terms of office expired, two of the board having been concerned in a fraudulent issue of spurious stock, to two lessees in the employ of the corporation, one of whom had been an agent in the issue of such stock, and securing such lessees a

clear profit, equal to one half of the gross earnings of the road, is a fraud on the rights of the stockholders. *Id.*

10. — to execute mortgages. — A railroad corporation may sell bonds at a discount or exchange them for iron rails, and its mortgages securing them are not rendered invalid thereby, where it is authorized to borrow money and execute its bonds therefor, and secure the same by pledge or mortgage, and it is provided that the directors might sell or negotiate the bonds at such rates as they should deem best to advance the interest of the company; and such sale should be as valid in every respect as if sold at their par value. *Coe v. C. P. & I. R. R. Co.*, 75 D. 518.

The franchise to be a corporation, and that to construct, maintain, and operate a railroad, are devisable as regards alienation by the corporation, however they may be for other purposes; and the fact that corporations only, under the law, can exercise the power of eminent domain, which cannot be the subject of grant or sale, is no objection to the transfer to individuals of the latter franchise, if it otherwise appears to be authorized by the legislature. *Id.*

A railroad corporation is not authorized to pledge or mortgage the franchise of being a corporation, but may pledge or mortgage the franchise to maintain and operate its road, and its property whether real or personal, to be subsequently acquired, under statutes empowering it to borrow money and to execute its bonds therefor, and to "pledge, by mortgage or otherwise, the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof." *Coe v. C. P. & I. R. R. Co.* 75 D. 518. *S. P., Bardtown etc. R. R. Co. v. Metcalfe*, 81 D. 541; *Com. v. Smith*, 87 D. 672.

A railroad corporation's general powers to pledge or mortgage after-acquired property are no greater than those of an individual. *Coe v. C. P. & I. R. R. Co.*, 75 D. 518.

A mortgage on the future net earnings of a railroad company for the purpose of securing prompt payment of interest on its construction bonds is valid. *Jessup v. Bridge*, 79 D. 513.

A mortgage by railroad company to secure money borrowed for the construction of its road is not opposed to the public policy of Kentucky. This is indicated by the general course of legislation upon the subject. *Bardtown etc. R. R. Co. v. Metcalfe*, 81 D. 541.

Where a railroad corporation voluntarily mortgages its property to secure money which it is expressly authorized to borrow, and the bond-holders invest their money upon the faith of the mortgage, this is sufficient to take the case out of the rule that a turnpike road cannot be sold for a general debt of the corporation. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

A resolution of the directors of a railroad corporation authorizing a mortgage of "the road and its property, etc.," is sufficient to authorize a mortgage of the "railroad, with all its rights and privileges," as there was nothing to which the phrase "etc." could have been designed to apply except the franchises, and therefore must have been used to embrace them. *Id.*

A resolution of the directors authorizing a mortgage of the road and its property must design a transfer of the right to operate the road. *Id.*

A street railway corporation has no power to mortgage its franchise, road or property, without legislative authority, and a mortgage without such authority is wholly void. *Richardson v. Sibley*, 87 D. 700.

A mortgage by a railroad company upon its existing road and franchises may be extended to rolling stock thereafter to be acquired and placed on the road, if the intent to acquire such stock and hold it subject to the mortgage be clearly and sufficiently expressed. Such mortgages are exceptions to the general rule that property not in esse cannot be conveyed. *Merrill v. Noyes*, 96 D. 486.

The remedy for enforcing the lien of a mortgage on a railroad and rolling stock to be subsequently acquired, pointed out. *Id.*

A railroad company, authorized by their charter to mortgage "all or any part of their road, property, rights," etc., executed and delivered a mortgage of "all the road, property, rights," etc., "now held or hereafter to be acquired." *Held*, valid as to subsequently acquired property. *Philadelphia etc. R. R. Co. v. Woelper*, 3 R. 596.

11. Construction and effect of mortgages.*—Cars, wheels, fire-wood for engines, and coal for machine-shops of a railroad company are things incident and indispensable to the use and enjoyment of its rights and franchises, and are included in a deed which purports to convey all its present and in future to be acquired property. *Phillips v. Winslow*, 68 D. 729.

A railroad corporation's personal property is not exempted from the operation of liens or claims created by its own acts or resulting from judicial proceedings, from the fact that it has executed a mortgage, under authority, of its franchises and its real and personal property. *Coe v. C. P. & I. R. R. Co.*, 75 D. 518.

A creditor of railroad has no equitable claim superior to mortgages, from the fact that the consideration of his debt was for moneys advanced in payment of interest and taxes, and for right of way. *Id.*

A subsequent mortgage has no priority over a previous mortgage defectively exe-

cuted to which it was expressly made subject. *Id.*

The mode of sale of the property and franchises under a mortgage given by a railroad corporation, and the rights of mortgagees, bond-holders, and creditors thereunder stated. *Id.*

To redeem a mortgage on the property of a railroad company, lying in different states, the entire mortgage must be redeemed, as the mortgage has a lien upon every part of the railroad to secure every part of the debt. *Wood v. Goodwin*, 77 D. 259.

If the mortgage debt matures at successive periods, and the mortgagee goes into possession for default in payment of portion first due, the mortgagor will not be permitted to eject him without paying all that is due, and depositing money, or otherwise providing for the payment of the remainder as it shall become due. *Id.*

Where a mortgage of a railroad and its property authorizes a sale upon failure to pay either the principal or interest to satisfy "the amount claimed and due," but contains no provision that the principal shall become due upon a failure to pay interest, until such principal becomes due the bondholders have no right to insist on payment of it by foreclosure or otherwise. But they have a right to a sale for the interest due; and if the property is divisible, it would be proper to order a sale of only so much as might satisfy the amount due. If it is not susceptible of a division, it must be sold or leased as an entirety. *Bardston etc. R. R. Co. v. Metcalf*, 81 D. 541.

Where such mortgage authorizes a sale upon failure to pay either the interest or principal "to satisfy the amount claimed and due," and the property is worth much more than the debt and interest, it may be leased at public auction for the shortest term that will bring the amount due and accruing interest and principal as the same shall become due. If no lessee is found, then it may be sold absolutely, the company to elect whether or not the property shall be offered in the first instance for a term of years, and if sold, the purchaser to give bonds, with approved security, for the purchase-money, including the accruing interest and principal, and a lien on the property should be reserved as additional security. If leased, the lessee should be required to give a covenant, with approved security, to keep in good repair the road and property, and to return the same to the company at the end of the term in as good condition as it may be when received. An inventory of the property should be filed in the cause and declared in the decree ordering the lease, to be conclusive evidence of the condition and value of the property at the time of the lease. *Id.*

A railroad corporation conveys only the

* Mortgage of property of, what included within, see note, 38 R. 353-355.

For Index to Notes in American Decisions and American Reports, see Volume I.

net income of the road, after payment of all expenses, while it remains in no default in paying the interest, and providing a sinking fund, by a mortgage of its entire road, lands, buildings, rolling-stock, machinery, etc., together with all its tolls, income, rents, issues, and profits, and alienable franchises, to secure its entire debt, providing that if the interest or principal of its bonds should not be paid when due, the trustees under the instrument were to take possession, work the road, and apply the net income to the payment of the bonds, interest and principal; but that until default in the payment of the interest or principal, the mortgagors should continue in the management of the mortgaged property. *Parkhurst v. Northern Cent. R. R. Co.*, 81 D. 648.

The nature and object of mortgages of a railroad do not give them any more enlarged meaning, where the company mortgages separately, at different times, the two divisions of its road, to raise money to complete the road, and neither of the mortgages contains any language purporting to convey materials to be thereafter acquired, any further than they become a part of or appurtenance to the road, or were used in operating it. *Farmers' L. & T. Co. v. Commercial Bank*, 82 D. 689.

A railroad company is not estopped from denying that railroad chairs were conveyed by prior mortgages, where, after having subsequently acquired the chairs, it executed another mortgage of its road and appurtenances, and all "materials," which mortgage was declared to be subject to the lien of the two prior mortgages, "in all respects prior, superior, and senior liens upon the property and premises described therein, respectively, acquired and to be acquired." *Ib.*

Town lots held by a railroad company do not pass by sheriff's sale under mortgage of the road, "with its corporate privileges and appurtenances," unless directly appurtenant to the railroad and indispensably necessary to the enjoyment of its franchises; and the question of appurtenances and necessity is properly referred to the jury as a fact to be determined by them. *Shamokin Valley R. R. Co. v. Livermore*, 86 D. 552.

One holding a valid second mortgage upon a railroad and its franchise, and not made expressly subject to a former first mortgage, has a plain, adequate, and complete remedy at law, and cannot, therefore, maintain a bill in equity to procure the cancellation of said first mortgage, which is void, and thus remove a cloud upon his title. *Com. v. Smith*, 87 D. 672.

Where a railroad company, in pursuance of a power in its charter to borrow money and to execute the required securities therefor, executed a mortgage on its road, etc., and on "all future right thereto and inter-

est therein to be acquired,"—*held*, that such mortgage was a valid lien on all lands over which the road was at the time located, though the title thereto or right of way was not acquired until subsequently; and that it was prior to the lien of the vendor of such right of way for the purchase-money. *Pierce v. Milwaukee etc. R. R. Co.* 1 R. 203.

In an action to foreclose two mortgages on a railroad and its franchises and equipments it appeared that the rolling stock had, subsequent to the giving of the mortgages, been sold on execution and purchased at a sheriff's sale under judgment in favor of J. S., a director of the railroad company. *Held*, that the rolling stock of the railroad was personal property and the mortgage should have been filed as a chattel mortgage under the law requiring mortgages of personal property to be filed when the possession of the property remains with the mortgagor; that such mortgages having been given before the act of 1863 (enacting that mortgages by railroad companies of real and personal property need not be filed as chattel mortgages if recorded properly as real estate mortgages), were void as against judgment creditors; and that J. S. could retain the property purchased by him under the judgment and execution, as against the mortgages seeking to foreclose. That rolling stock is personal property. *Hoyle v. Plattsburgh & M. R. R. Co.*, 13 R. 595. See, also, *Randall v. Ethwell*, 11 R. 747.

A railroad company mortgaged "all its right, title and interest in and to all and singular its property, real and personal, of whatever nature and description, now possessed or to be hereafter acquired; including all its rights, privileges, franchises and easements." *Held*, that the mortgage did not, in law, cover the future earnings of the road. *Emerson v. European etc. Ry Co.* 24 R. 39.

A railroad company mortgaged all its "real and personal estate and franchise now owned or hereafter to be acquired." Subsequently the company bought a hotel, a store-house, some vacant town lots, and a farm of three hundred acres. This property was not used in connection with the railroad but the company carried on a hotel and rented the rest. *Held*, that as against a purchaser under a subsequent judgment the mortgages got no title to this property. *Mississippi Valley Co. v. Chicago etc. R. R. Co.*, 38 R. 348.

12. Dissolution and forfeiture of franchise.—A railroad charter though violated is not void until the state, by proper judicial proceeding, has obtained a judgment of forfeiture. *Arthur v. Com. & R. R. Bank*, 48 D. 719.

A railroad company forfeits its franchise by abandonment of part of road, after its completion between the points named in its

For Index to Notes in American Decisions and American Reports, see Volume I.

charter or articles. *People v. Albany etc. R. Co.*, 82 D. 295.

A railroad company has not the option to discontinue a part of its road, and forfeit its franchise, but the remedy is not by action in equity for specific performance, but by *mandamus* or indictment, or at the election of the people, by action to annul the charter of the corporation. *Ib.*

13. Appointment and powers of receivers.—A receiver will be appointed to take charge of a railway when necessary to secure the rights of the stockholders. *Stevens v. Davison*, 98 D. 692.

A railroad company, whose road with all its appurtenances is in the exclusive possession, use, and control of the receiver, who has power to employ, control, and dismiss all the agents, servants, and employees engaged on the road, is not liable for an injury resulting from the negligence of such agents or servants. *Ohio & Miss. R. R. Co. v. Davis*, 85 D. 477.

Possession of a railroad by a receiver appointed by the court cannot be regarded as the possession of the railroad company. *Ib.*

The receiver or assignee of a railroad company appointed in involuntary bankruptcy proceedings is not the agent of the corporation, so as to render it liable for injuries caused by his negligence while operating the road. *Mets v. Buffalo etc. R. R. Co.*, 17 R. 201.

14. Actions by and against receivers, or trustees.—Where parties acting under appointment as receivers of court are managing and controlling a line of railroad, and holding themselves out as common carriers, the fact that they are such receivers is not a defense to an action at law for a breach of any obligation or duty which is voluntarily assumed by them in matters of business, though conducted and carried on by them while acting as receivers. *Bismuthal v. B. Vinard*, 91 D. 349.

A receiver of a corporation appointed under state laws is liable in his official capacity the same as the corporation would be. *Meara v. Holbrook*, 5 R. 633.

Trustees operating a railroad for the benefit of bondholders are personally liable to owners of freight and to passengers, to the same extent as the company would be if operating the road, and in the same way lessees or mere intruders who operate the road are liable. *Sprague v. Smith*, 70 D. 424.

Where the trustees, under a second mortgage of a railroad, have taken possession of it, and have afterward by a bill in equity obtained a decree of foreclosure with a provision for a sale of the railroad in accordance with the power conferred by the mortgage, and have themselves become the purchasers as they were authorized to do by the decree, and to hold the property in trust for the bondholders, and they continue to

keep possession of the railroad and operate it as such trustees,—*held*, that they are liable as common carriers for the loss of goods received for transportation. *Barter v. Wheeler*, 6 R. 434.

15.—or assignees in bankruptcy.—*It seems* that the purchasers at an assignee's sale of the property and franchises of a bankrupt railroad corporation do not acquire the corporate entity or become stockholders. *Mets v. Buffalo etc. R. R. Co.* 17 R. 201.

A railroad company was thrown into involuntary bankruptcy, and the road was operated by the assignee. The property and franchises of the corporation were sold to holders of bonds on the road. Before the sale was confirmed, and while the assignee was operating the road, plaintiff's intestate was negligently killed. *Held*, that the corporation was not liable. *Ib.*

The assignee in bankruptcy of a railroad corporation, who operates the road under the order of the court, is not personally liable for an injury caused by the negligence of a servant employed by him, in the absence of evidence that he was negligent in the selection of servants or that he held himself out as operating the road otherwise than as receiver. *Cardot v. Barney*, 20 R. 533.

II. ACQUIRING RIGHT OF WAY AND CONSTRUCTING THE ROAD.

1. Proceeding to Condemn Lands. Locating the Road.

16. Power to take lands.*—Railroads are designed for public use, and under the right of eminent domain, may take private property, upon just compensation being made, although such property is in the nature of a franchise, derived from a grant of the legislature, the terms and conditions of which have been fully executed. *Enfield Toll Bridge Co. v. Hartford etc. R. R. Co.*, 42 D. 716.

A right is given to extend the road to and unite with any other road within prescribed limits, by a general power conferred upon a railroad company by its charter, "to extend to and unite its railroad with any other railroad now constructed, or which may hereafter be constructed in this state;" and this power is not limited by other provisions declaring that certain proceedings for the condemnation of lands shall be taken in a particular county. *Belleville etc. R. R. Co. v. Gregory*, 58 D. 589.

Under a charter conferring the power to acquire by condemnation land for the construction of the road, the company has the right to divert a stream of water flowing across the line of their road. This right does not depend upon an express grant to

*Capacity of company to take title to land, see note, 94 D. 881-887.

For Index to Notes in American Decisions and American Reports, see Volume I.

be made and specified in the inquisition itself, but may be acquired by condemnation of the land duly confirmed, and payment or tender of the damages awarded; and proof *dehors* the inquisition is admissible to show that the attention of the jury of inquest was directed to the intended diversion at the time of taking and before they signed the inquisition. If the attention of the jury was thus directed to such diversion, and the same was made within the lines of the land condemned for the construction of the road, the owner of the land through which the road passes has no remedy, either at law or in equity, for any injury that may result therefrom. *Baltimore etc. R. R. Co., v. Magruder*, 6 K. 310.

The legislature of a state, in the exercise of the right of eminent domain, can authorize and empower a railroad corporation to cross another railroad or turnpike road, on making compensation; and the exercise of such a right, whatever damage may result therefrom, cannot be considered as a condemnation of a franchise, nor the impairment of a contract, within the meaning of the United States constitution. *Baltimore etc. Turnpikes Co. v. Union R'y Co.*, 6 K. 397.

A railroad company cannot take, without the owner's consent, land not contiguous or adjoining their road, but four hundred yards distant, for the purpose of a warehouse and road leading thereto, under a clause of its charter that authorizes them to lay out such contiguous lands as they may desire to occupy as sites for warehouses and other buildings; provided, that the adjoining land for the sites of buildings shall not exceed five acres in any one parcel, notwithstanding the space to be occupied by the proposed warehouse and railroad leading to it from the main road will not exceed five acres, since the intention of the act was to authorize only the extension of the width of the roadway for the enumerated purposes. *Bird v. Wilmington etc. R. R. Co.*, 64 D. 739.

A railroad company cannot appropriate ground for an engine and water stations after the lapse of five years, where it is authorized by its charter to appropriate a strip of land of but a certain width, except in deep cuts and fillings, or at points selected for depots, or engine or water stations, and is given five years to complete a locomotive road, but only a horse road was constructed within that time. *Plymouth R. R. Co. v. Cobwell*, 80 D. 526.

A railroad company has no authority to acquire land for purposes of speculation under a grant of power to acquire and hold sufficient real estate for the construction of its road, and for the erection of depots, engine-houses, etc. *Pacific R. R. Co. v. Seely*, 100 D. 369.

Where a railroad corporation takes possession of premises, under the right of em-

inent domain for railroad purposes, the occupation of buildings upon the premises, for the general purposes of trade and mechanical or manufacturing purposes, by lessees of the corporation, is a diversion of the premises from the corporate purposes, and a writ of entry will lie against the corporation by the original owners, in which they are entitled to judgment establishing their title as owners in fee, subject to the valid easement of the corporation, and for damages or mesne profits for the wrongful use of the premises. *Proprietors v. Nashua etc. R. R. Co.*, 6 R. 181.

The taking and condemnation by a railroad company of part of the road-bed of another company is an "interference with the rights and franchises" of such other company. *Alexandria etc. R'y Co. v. Alexandria W. R. R. Co.*, 40 R. 743.

One railroad company has no right, without express statutory authority, to acquire for its own uses land already acquired by another railroad company. *Id.*

Lands belonging to a municipal corporation were reserved and set apart for the public use. *Held*, that the construction of a railroad thereon was a "public use" within the meaning of the reservation. *Cook v. Burlington*, 6 R. 649.

The statute authorized a railroad company to take, by right of eminent domain, any real estate that it may require "for the purpose of its incorporation and for the purpose of running and operating its road." *Held*, that the company could take land for depots, and that the election of the land and location of the buildings were within the discretion of the company. *New York & H. R. R. Co. v. Kip*, 7 R. 335.

17. What title or interest may be acquired.*—A railroad company is to be deemed owner, for the time being, of lands which it has lawfully acquired for a road-bed, in such sense that animals which stray upon the track are trespassers. *Munger v. Tonawanda R. R. Co.*, 53 D. 384.

From the moment that compensation is paid or deposited, as the law directs, where land is appropriated for a railroad, the property is absolutely vested in the owners of such railroad for its use. *Beelman v. Saratoga etc. R. R. Co.*, 22 D. 679.

A railroad company having acquired its road by purchase and grant from the state is the legal owner of the road, and has, by the express terms of its act of incorporation, the entire and exclusive right of its possession and control. *Williams v. Michigan Central R. R. Co.*, 55 D. 59.

A railroad company may remove ornamental or other trees within the limits of the land taken under their charter for a roadway to fit their track for safe and con-

* Right of one railroad to condemn property of another, see note, 24 R. 551, 552.

For Index to Notes in American Decisions and American Reports, see Volume I.

venient use, either when originally constructing the road or afterwards. *Brainard v. Clapp*, 57 D. 74.

The company are judges of the necessity of cutting trees inside their right of way, and may authorize it to be done by any officer or agent, and the burden of proof to justify it does not rest upon them. *Ib.*

A railroad company has a right to exclusive occupancy of land taken for its road, and to exclude all concurrent occupancy by the former owners, at any time or for any purpose. *Jackson v. Busland etc. R. R. Co.*, 60 D. 246.

The right of the company in its road-bed, under an arrangement whereby they have the right to construct and use a track, and hold the same for railroad purposes, amounts only to a permissive license, and gives no right to the soil. Any stone, therefore, excavated in grading the track, and not actually used in the construction of the track, belongs to the owner of the land, and cannot be removed without his permission. *Chapin v. Sullivan R. R.*, 75 D. 237.

The company may use stone and gravel from one portion of their line in the proper construction of any other portion thereof, even though they do not own the land, but only have a permissive license to use it for railroad purposes. *Ib.* But they have no right to sell such material to third parties. *Aldrich v. Drury*, 5 R. 624.

The owner of the land adjoining a railroad, and from whom the land was taken for the construction and use of the road, under the power conferred by the charter, has no right to enter upon the land after it is so taken, and while it is being so used, and cut and take therefrom the herbage and other products of the soil growing thereon. *Troy & B. R. R. Co. v. Potter*, 1 R. 325.

The franchise of a railroad corporation is an incorporeal hereditament, not included within the term "lands or tenements," and a railroad is a public work, entitled and bound to use its franchise; therefore, a proceeding of unlawful detainer does not lie to recover a part of such a public work. *Gibbs v. Drew*, 26 R. 700.

Under a condemnation of lands for railway purposes, the former owner of the soil still retains the fee, and the right to use the land for every purpose not incompatible with the use of it by the railway company for railway purposes; and therefore it is error to instruct a jury that he has no right to cross over or under the railroad. *Kansas Cent. R'y Co. v. Allen*, 31 R. 190.

Under a deed to a railway company of a right of way "for all purposes connected with the construction, use and occupation of the railway," the company has no right to take sand from the land conveyed to build a round-house. *Vermilya v. Chicago etc. R'y Co.*, 56 R. 279.

A railroad company, in the construction of a bridge upon its road, built stone piers and abutments on lands over which it had acquired the right of way. It subsequently abandoned the construction of the railroad at that place. *Held*, 1. That the piers and abutments did not pass to the land-owner; 2. That the fact, that upon such abandonment, the owner of the land had been allowed to take possession of that portion embraced in the right of way, and hold it for a period less than was required to extinguish the easement, did not, of itself, imply a relinquishment, by the railroad company, of its right to enter and remove the piers, etc. *Wagner v. Cleveland etc. R. R. Co.*, 10 R. 770.

18. Compensation to land-owner. —Where a railroad company takes land belonging to a private person without tendering compensation, the owner is not confined to the statutory remedy for the assessment of damages, but can maintain ejectment against the company. *Dankels v. Chicago etc. R. R. Co.*, 14 R. 490.

Under a state constitution not in terms requiring payment as a condition precedent to an entry upon private property sought to be acquired for public uses, a railroad corporation, authorized by the legislature, may enter upon private property necessary to its uses, without such preliminary payment, provided the means of subsequently enforcing such payment have been provided by statute; and the right of way thus acquired cannot be affected by a constitutional provision, subsequently adopted, requiring repayment in such cases. *Cairo etc. R. R. Co. v. Turner*, 25 R. 564.

In such cases the land-owner is restricted to the statutory remedy for compensation, and cannot maintain ejectment. *Ib.*

It is no objection to a claim for damages occasioned by the erection of an embankment by a railroad corporation in altering the grade of a highway that the sectionmen neither authorized nor directed the making of the embankment. *Parker v. Boston & M. R. R.*, 50 D. 709.

Compensation for incidental damage caused to land with buildings thereon by the construction of a railroad near to, but not crossing, the land, may be recovered where the damage is actual and real, and capable of being pointed out, described, and appreciated; a railroad corporation is therefore liable for impairing and cutting off access to such land by the construction of an embankment in front of the same, and for draining a well on the land by an excavation near thereto. *Ib.*

Damages for injuring a private way by the construction of a railroad across the same, may be recovered. *Ib.*

Bridges and lateral embankments constructed by a railroad for the purpose of

For Index to Notes in American Decisions and American Reports, see Volume I.

raising a common road over its track, crossing such road, are as much a part of its structure authorized by its charter, as the railroad itself; and a person damnified thereby may recover damages. *Ib.*

A railroad corporation can not object that bridges and embankments erected by it for the purpose of carrying a highway over its road were made without authority, because preliminary steps had not been had, and thus defeat a claim for damages caused thereby. *Ib.*

A railway company constructed its road through a navigable lake, thereby cutting off the riparian owners from access to the lake, and leaving in front of their land a pool of stagnant water. *Held*, that they were entitled to damages. *Delaplaine v. Chicago etc. R'y Co.*, 24 R. 386.

A railroad company in constructing its road across a navigable lake occupied land which the riparian owner had made by filling in the lake in front of his land. *Held*, that he was not entitled to damages therefor. *Diedrich v. Northwestern Union R'y Co.*, 24 R. 399.

In order to construct a telegraph line along its route for its own use, a railroad company may cut down trees standing on its way, without incurring any additional liability to the original owner of the land for compensation; and if such telegraph line is constructed by the railroad company and another for their joint use, the latter, and the latter alone, is liable to such land owner for the additional damage to the land by the use of the telegraph line. *Western Union Tel. Co. v. Rich*, 27 R. 159.

In a proceeding for the condemnation of a right of way for a railroad across another railroad, no damages may be allowed on account of the statutory requirements to stop trains at such crossings, and the consequent impairment of the hauling capacity of the engines, such requirement being a police regulation subject to legislative repeal, and such damages being too vague and indefinite for computation. *Chicago & A. R. R. Co. v. Joliet etc. R. R. Co.* 44 R. 799.

Owners of lots abutting upon streets only crossed by a railway are not entitled to damages for construction. *Morgan v. Des Moines & St. L. R'y Co.* 52 R. 462.

Where a railroad company has constructed and is operating its road through land of another, without having instituted condemnation proceedings or acquired title, the owner of the land may elect to sue for damages. Where a railroad grade has been constructed and abandoned, and another company takes possession and appropriates it, the owner of the land is entitled to recover the value of the land taken, as enhanced by such grade. Where a railroad company takes possession of land and constructs a track on it with the consent of the

person in possession, under claim and color of title, and the paramount owner afterward sues for damages, the railroad company cannot be compelled to pay for improvements made by itself. *Cohen v. St. Louis etc. R. R. Co.*, 55 R. 242.

19. Occupying city streets. — A railroad company may use a public street or highway when authorized by its charter, expressly or inferentially. *Cleveland & P. R. R. Co. v. Speer*, 94 D. 84.

The phrase "any land" in railroad charters has its common law and technical meaning, comprehending all structures upon it. *Ib.*

Where the charter of a railroad company expressly authorizes it to construct its road across a street, and imposes on it the burden of restoring the street to its former state, or in sufficient manner not to impair its usefulness, the company is not compelled to pay damages to a person who owns a lot lying adjacent to the track, unless it has done some injury to his property in performing the work. *Nicholson v. New York etc. R. R. Co.* 56 D. 390.

The owner of land used as a street may maintain trespass against a railroad company for injury caused to his property by the company's entering upon it and depositing materials thereon. So far as the company is justified in entering, in consequence of there being a highway there, it is not guilty of anything, but if it goes beyond its justification, then it is guilty of a direct trespass. If its justification fails, it is in the same condition as if it had entered upon a separate enclosure not subject to any public easement. *Ib.*

A city council cannot license a railroad company to injure private property by raising the grade of the street in front of it, and such a license will not defeat a recovery for the injury. *Protzman v. Indianapolis etc. R. R. Co.*, 68 D. 650.

A railroad company may extend its track beyond the terminal depot, under the implied powers in its charter, for the accommodation of trains while discharging and loading, etc., where such extension is reasonable and necessary, and may appropriate private property therefor upon making compensation; and an extension of two hundred rods on an important road is not unreasonable. *Ib.*

Raising the grade of a street by a railroad company for the use of the track is not taking property of an abutter thereon so as to entitle him to pursue the statutory remedy for compensation, it seems, but his remedy is by an action for damages. *Ib.*

An agreement by a railroad company to locate a railroad through a city, and to cross a stream north of a certain street, requires the company to cross that stream where a northerly line from said street

For Index to Notes in American Decisions and American Reports, see Volume I.

would intersect it. It is not necessary to cross in the city unless such line strikes the river within the city. *New Albany & S. R. R. Co. v. McCormick*, 71 D. 337.

While an incorporated town or city owning the fee of streets may rightfully authorize a railroad company to occupy its streets with a track, yet the railroad company is, under the organic law of the State, liable to the property-owners along the street for direct and physical damage resulting from the construction and operation of the railroad. *Stone v. Fairbury etc. R. R. Co.*, 18 R. 556.

Where smoke and cinders are thrown from the engines of a railroad company upon plaintiff's property, adjoining a street through which the railroad runs, the company is liable therefor. *Ib.*

An abutting owner who does not own the soil of the street, cannot recover for any injury to his freehold resulting from the presence of a steam railway in the street, but only for damages resulting from such misconduct in its management as amounts to a nuisance, as leaving cars standing an unreasonable time, unnecessary noises and dangerous speed. *Grand Rapids etc. R. Co. v. Heisel*, 31 R. 306.

Where a street railway company unreasonably use a street in a city for storing and switching cars, to the special injury of an abutting land owner, the latter may maintain an action therefor against the company, although the fee of the street is in the city. *Mahady v. Bushnick R. R. Co.*, 43 R. 661.

A railroad company, using a public street for a terminal yard, without having made compensation to the adjoining land-owners, and thereby causing a nuisance to neighboring dwellings, may be restrained by injunction, although such use is authorized by the legislature and is necessary to the business. *Pennsylvania R. Co. v. Angel*, 56 R. 1.

The public authorities may authorize the construction and operation of a railway for passengers in a city street, without compensation to adjacent lot-owners, although the railway is operated by steam-motors, and is used also to transport passengers from its terminus in the city to a point eighteen miles outside the city. *Newell v. Minneapolis etc. R'y Co.*, 59 R. 303.

Such a lot owner, the defendant being in possession of the street, may not raise the objection of *ultra vires*. *Ib.*

By the first section of a city ordinance a street railway company was authorized to build its road over and across certain streets of the city, *provided*, it should be built "on the grade of the city." By the second section the company was authorized to build a bridge across a river running through the city. *Held*, that the clause in the first section relative to grade did not prohibit the company from erecting suitable embankments,

above grade, as approaches to the river; and that the company was not liable to a lot-owner for damages resulting from the erection of the embankment. *Slatten v. Des Moines Valley R. R. Co.*, 4 R. 205.

20. Locating the route generally. — A railroad authorized to be built at one place, if built at other places, is a mere nuisance on every highway it touches in its illegal course. *Com. v. Erie etc. R. R. Co.*, 67 D. 471.

A railroad corporation, as well as its directors, is chargeable with notice of the time, place, and manner of the location of its road. *City of Aurora v. West*, 85 D. 413.

A railroad company may locate its road and stations on such route and at such points as in its judgment will be beneficial to its own and the public interest, in the absence in its charter of any prescribed limit of approach towards buildings and bridges. *Frankford T. Co. v. Philadelphia R. R. Co.*, 93 D. 708.

The exercise of discretion of a railroad company in location and construction of its road cannot be collaterally reviewed at the instance of a private individual, where the company is authorized to locate its road by the most direct and least expensive route, and the location and construction of the road has been completed; because the act of the company was not void. *Cleveland & P. R. R. Co. v. Speer*, 94 D. 84.

The commonwealth only can call a railroad company to account for a voidable act in locating and constructing its road, because other ground should have been taken, after the location and construction of the road has become complete under an authority to locate it by the most direct and least expensive route. *Ib.*

A railroad company cannot construct its road along the shore of tide water, below high-water mark, without a specific grant from the state. *Stevens v. Paterson etc. R. R. Co.*, 3 R. 269.

The location of a railroad by a jury instead of by the company, under an act authorizing the company to locate the road, such location to be approved by the court of quarter sessions upon report of a jury after a view, is no ground of objection to the location, for the provision being for the benefit of the company it may waive it, or the jury may be regarded as its agent. *Case of Philadelphia etc. R. R. Co.*, 36 D. 202.

An exception depending on a literal interpretation of a statute authorizing the location of a railroad is not to be favored. *Ib.*

The objection that the jurors were not sworn according to the general road law, under a special statute authorizing a view and report of the location of a railroad by a jury of six, is unavailing where the statute prescribes no oath. *Ib.*

For Index to Notes in American Decisions and American Reports, see Volume I.

21. Changing the location or route.

— A railroad company having once located their road, under a charter that fixes merely a few points through which the road is to pass from its commencement to its terminus, leaving the location of the road between the points specified to the discretion of the corporation, has no right to change the location either upon the property of an individual or from one part of a street or highway to another. *Little Miami R. R. Co. v. Naylor*, 59 D. 667. But compare *Mississippi & T. R. Co. v. Devaney*, 2 R. 608.

A railroad company is liable for damage caused to a grocery and dwelling by a relocation of their road upon a public street so that the track lay near the premises, thereby depreciating their value. *Little Miami R. R. Co. v. Naylor*, 59 D. 667.

Under a statute authorizing railroad companies to take and hold "so much real estate as may be necessary for the location, construction, and convenient use of their road," they are not authorized, nor can they be compelled, to take and pay for a right of way which has been condemned, but which cannot be used for either of the purposes named in the statute. *Gear v. Dubuque etc. R. R. Co.*, 89 D. 550.

A plan in accordance with which a right of way for a railroad across private land was condemned cannot be changed at the pleasure of the promoter. *Lance's Appeal*, 93 D. 722.

Where the Vermont Central Railroad Company acquired title to land in Vermont by warranty deeds in the usual form, which land they subsequently abandoned for railroad purposes, having changed the location of their road, — *held*, that the land did not revert by reason of such abandonment, but that the railroad company by said deeds acquired a title in fee to the same. *Page v. Heineberg*, 94 D. 378.

22. Proceedings to acquire title, generally.

— Where a land-owner agrees with a railroad company upon the compensation to be made for lands over which the road is laid, and permits the company to take possession of the land and construct their road thereon, it is too late for him to take advantage of the omission of the company to record the survey, as required by its charter. *Troy & B. R. R. Co. v. Potter*, 1 R. 325.

Where a railroad company entered upon land in good faith under the belief that it had title thereto, — *held*, that it was not a naked trespasser though the title was in fact in another; and that it was entitled to all legal protection to its improvements upon the premises given by the statute to the parties in possession under color of title, and that the rails and ties were not the property of the land-owner. *Mississippi & T. R. R. Co. v. Devaney*, 2 R. 608.

23. Assessment of damages for lands taken.

— In the appraisalment of damages for locating a railway on one's premises, every injury is included that the owner would suffer by the construction of the road in a reasonable manner, and its continuance with care and prudence. *Waterman v. Connecticut etc. R. R. Co.*, 73 D. 326.

An assessment of damages for land taken for a railroad does not cover damages occasioned to the owner by the diversion of a natural stream of water, although such diversion is necessary to the proper construction of the road-bed. *Stodghill v. Chicago etc. R. R. Co.* 22 R. 211.

The damages paid to a land-owner by a railroad company, when it acquired, either by grant or condemnation, title of lands, do not cover any injury resulting from negligence or unskillfulness in constructing or operating the road. *Delaware etc. R. R. Co. v. Salmon*, 23 R. 214.

Where one railroad company seeks to acquire a right of way across the tracks of another, although it stipulates to construct and maintain all necessary frogs and crossings, yet the other may show and recover for injury to the value of the road and its capacity to do business. *Chicago etc. Ind. R. Co. v. Englewood Connecting R'y Co.* 56 R. 173.

Where a railroad company, without having acquired a right of way, enters upon land, and constructs its road thereon, and afterward proceeds in condemnation proceedings, the landowner is not entitled to have the value of the railroad placed on his land included in the damages in such proceedings. *Louisville etc. R. R. Co. v. Dickson*, 56 R. 809.

24. Consequential damages.

— A "taking" of property for public use, within the meaning of the constitutional prohibition, refers to a taking of it altogether, and not to a mere consequential injury. *Case of Philadelphia etc. R. R. Co.*, 36 D. 202.

In an action by the owner of land against a railroad company for damages in building their road, the jury may be properly instructed that they cannot compensate the plaintiff for risk of fire to his barn or its contents, nor hold the company responsible for anything that might be burned, nor for the risk of such burning. But if the proximity of the road to the building is such as to make danger from fire imminent, so that no man of common prudence would use it for the purpose of a barn, but would be driven from it and compelled to provide a barn elsewhere, then plaintiff is injured, and they must consider it in estimating the effect of the road upon the owner's property. *Wilmington etc. R. R. Co. v. Stanger*, 100 D. 574.

In estimating damages arising from building a railroad upon private property, a com-

For Index to Notes in American Decisions and American Reports, see Volume I.

parison of its value at the time that the road was projected, and its value at the time of its completion, should be made, and while the jury cannot compensate for risk from fire, still the effect which the proximity of the road to a barn would produce upon the market value of the property is a proper subject for compensation. *Id.* But the depreciation of value arising from the proximity of the road, and the running of trains should be considered only so far as is due to proximity, secured by means, and as a result of such taking. *Walker v. Old Colony etc. R'y Co.*, 4 R. 509.

Injury from proximity of buildings, interruption to their ordinary use of the avenues of passage, inconvenience caused by embankments and cuts, and such matters, are proper subjects for consideration in estimating the depreciation of the value of the property as a whole. *Wilmington etc. R. R. Co. v. Stauffer*, 100 D. 574.

Every agency which works an injury or depreciates its value, recognized by the common law, should be taken into consideration, if they are the direct and immediate consequence of the construction of the road. *Id.*

The effects of noise, smoke, soot and the like, are not distinct elements of damage, but, in estimating the depreciation in value of the entire tract, these causes may be considered, in so far as the annoyance and inconvenience arising therefrom are increased by reason of, and as an incident to the taking of a part of the land. *Walker v. Old Colony etc. R'y Co.*, 4 R. 509.

The turning of surface water upon land, by the embankment of a railroad, is a proper element in estimating the damage to the land-owner by the construction of a railroad. *Id.*

25. Deductions for benefits.—In awarding damages to the owner of lands taken the exposure of his remaining land and buildings to fire from the railroad engines may be taken into consideration, notwithstanding the company is by statute liable for any fire so caused; but the benefits which the owner in common with others derive from the railroad cannot be considered to reduce his damages. *Adden v. White Mountains R. R. Co.*, 20 R. 220.

A railway was located through a farm, leaving land of the owner on each side. The company acquired the exclusive use of the land taken. Provision was made by the company for the owner's crossing the location, and for the drainage and flowage of his cranberry meadow thus cut off, he accepting and using the same with the mutual understanding that he had a right so to do. *Held*, that these facts could not be considered in reduction of the damages, the use of the privileges being merely submissive and subject to the paramount right of the

corporation. *Old Colony v. Miller*, 28 R. 194.

2. Constructing the Road; and Liability for Defective Construction.

26. Duty of the company, generally.—A railroad company must construct its works with proper skill and care, and with due regard to the features of the ground over which its road passes. *Pittsburg etc. R'y Co. v. Gilleland*, 94 D. 97.

Prudence and care may require the company to keep open a ditch to prevent an accumulation of water on the land adjoining the track and owned by other parties, but it is a question of fact, and not of law. *Waterman v. Connecticut etc. R. R. Co.*, 73 D. 326.

A railroad company is not authorized to use a right of way taken under the right of eminent domain for any other independent purpose than that for which it is taken. *Lance's Appeal*, 93 D. 722.

Where work shall begin upon a railroad lies wholly in the discretion of the managers of the company where it has a lawful right to extend its road from a given point in one state to a certain point in another state. *Cleveland & P. R. R. Co. v. Speer*, 94 D. 84.

A railroad company, aided in the construction of its road by taxation of a township at one terminus of its proposed route, may be compelled to construct, maintain and operate its road to that point, and on a foreclosure sale of the road and the company's franchise, the purchaser incurs the same obligation. *State v. Central Iowa R'y Co.*, 60 R. 806.

27. Liability for damage or injury caused by defects.*—1. *In general.*—A railroad corporation has right to construct its road in any suitable and proper manner for its own convenience and the public accommodation, and the right to vary and change that construction within the established limits of its road from time to time forever. *Johnson v. Atlantic etc. R. R. Co.*, 69 D. 560.

A land-owner can maintain no action against the company for any loss or injury which results from building its road in a suitable and proper manner. *Id.*

The corporation is liable for all damages resulting from improper and unsuitable construction of its road over the lands of another. *Id.*

A railroad is bound to keep the road in repair, so that persons and property may at all proper times pass over it in safety, and is liable for injuries for neglect of this duty. *Cumberland Valley R. R. Co. v. Hughes*, 51 D. 513.

A company is liable for injury caused by

* Liability for defects in roadway, see note, 28 R. 749.

For Index to Notes in American Decisions and American Reports, see Volume I.

making excavation on its own land so near to the land of an adjoining owner that the soil of the latter, without any artificial weight imposed upon it, slides into such excavation. *Richardson v. Vermont Central R. R. Co.*, 60 D. 283.

Affecting land injuriously by the construction of a railroad is not a taking of it for public use within the purview of the constitution of Vermont; and a railroad company which constructs its road in a prudent and reasonable manner is not liable to individuals for consequential damages to their premises caused by the building of an embankment upon an adjoining public highway which such railroad crosses. *Ib.*

The company is liable for the manner of constructing an embankment, if the mode of construction is fairly within the charter powers of the company. *Jones v. Western Vermont R. R. Co.*, 65 D. 206.

Consent to suffer land to be overflowed in consequence of building a railroad embankment is not a waiver to the right to damages for defective construction. *Ib.*

Negligence or carelessness of the company in executing work on their road is a tort for which an action at law will lie. The fact that it is not liable for the necessary consequences of the location and proper construction of its road, except so far as it is made liable by its charter, does not justify unskillfulness and unnecessary injury in the mode of performing the work, or in the character of the structures erected. *Pittsburg etc. R'y Co. v. Gilleland*, 94 D. 97.

A railroad company in constructing its road and works is bound to bring to their execution the engineering knowledge and skill ordinarily known and practiced in such works. *Ib.*

The corporation is not exempted from liability for injuries caused to public or private rights by the manner in which it has constructed or maintained its road, by a statute which "ratifies and confirms" the "location" of the railroad, and the "railroad" as "actually laid out and constructed." *Solem v. Eastern R. R. Co.* 96 D. 650.

2. *Liability for negligence of contractors.* — A railroad company is liable for the negligent acts of contractors engaged in constructing its road. *Chicago etc. R. R. Co. v. McCarthy*, 71 D. 285. So held, where a railroad corporation contracted with other parties to build part of its road, and while they were blasting rocks a fragment struck plaintiff, injuring him. *Stone v. C. R. R. Co.* 51 D. 192.

The liability of the company and of their agents for injuries committed by their agents upon the road exists during the time of construction of the road, under the Michigan statute requiring every railroad corporation formed under it to "erect and maintain fences on the sides of their road," and does

not for the first time attach when the road is operated. *Gardner v. Smith*, 74 D. 722.

A contractor for construction of the road is an agent of the company, within the letter and spirit of the above act, who, by assuming control of a section of road, assumes also the liability imposed by law upon the company. *Ib.*

A railway company is not liable for damages resulting from negligence in the management of one of its trains, while being used and governed by contractors in the construction of a portion of its road under a contract with the company. *Cunningham v. International R. R. Co.*, 32 R. 632.

A railroad company employed a contractor to construct, "under the general supervision of the chief engineer of the company," a portion of its road; and the sub-contractors and their employees committed various trespasses and injuries on the lands of plaintiffs. Held, that the company, not having directed the acts complained of, nor having any control over the persons who committed them, and the injuries not being the natural result of the work contracted to be done, plaintiff could not recover of the company; notwithstanding the statutes provided that the company should be liable "for trespasses and injuries to lands and buildings adjoining, or in the vicinity of its roads, committed by a person in its employ or occasioned by its order." The statutory provision does not embrace the acts of contractors. *Eaton v. European, etc. R'y Co.*, 8 R. 430.

A railroad company let by contract the entire work of constructing its road. The contractor sublet a part of the work. Through the negligence of men employed by the sub-contractor in performing the work, stones and rocks were thrown by a blast upon plaintiff's adjoining property, injuring it. Held, that the railroad company was not liable therefor. *McCafferty v. Spuyten Duyvil etc. R. R. Co.*, 19 R. 267.

3. *Interference with watercourses, drains, wells, etc.* — A railroad corporation has a right to construct its road in a suitable and proper manner, whatever may be the injury to the residue of the lands of same owner; but the mere purchase of the fee-simple does not authorize it to flow water upon lands above its road and on a stream, although its rights in this respect are more extensive than it would have as an owner against the party whose lands have been taken for the road. *Johnson v. Atlantic etc. R. R. Co.* 69 D. 560.

In all ordinary cases, a railroad company in building its road has no right to obstruct a natural watercourse, and must construct a culvert or drain, with a proper grade, to carry off the water. *Ib.*

In cases of necessity, the company in building its road in a suitable and proper manner may wholly obstruct a natural wa-

For Index to Notes in American Decisions and American Reports, see Volume I.

tercourse, and submerge lands of the owner other than those taken for the track, without being answerable for any damage resulting from that cause; for it will be regarded as having acquired the right to flow such lands. *Ib.*

A railroad company excavating for purposes of its road-bed within the limits of its right of way, is not liable for the draining of the well of an adjacent owner caused thereby. *New Albany etc. R. R. Co. v. Peterson*, 77 D. 60.

The company is not liable for making erections in running streams, where they are guilty of no want of proper care and skill, unless they directly affect the riparian owners. *Henry v. Vermont Cent. R. R. Co.*, 73 D. 329.

The company is liable for making erections in a running stream, where the riparian owner above is injured by the rise or flowing back of water, occasioned by such erections below him. This is a direct injury, and the company must guard against it. *Ib.*

The company is not liable for making necessary erections in a running stream, although a riparian proprietor's land below has been gradually washed away by a change in the course of the current of the stream; and it makes no difference whether such erections have been made in a careless and unskillful manner or not. The injury is merely consequential, and one of those remote consequences which the law will not make the basis of action. *Ib.*

Where a railway embankment obstructs and turns the surface water on to the land of an adjacent owner, through whose premises the railway goes, the owner may recover damages therefor, although he has received compensation for the taking of the land for the right of way. *Drake v. Chicago etc. R'y Co.*, 50 R. 746.

A railroad company obstructing the ditches and drains of a plantation and causing an overflow by its embankment is liable for the consequent loss of crops. *Payne v. Morgan etc. S. S. Co.* 58 R. 171.

28. Enjoining construction.—Where land has been conveyed in fee to a city in trust for the purposes of a street, abutting owners may enjoin the construction of a steam railway in such street, when it would be materially injurious to their adjoining premises, until the right has been acquired by condemnation proceedings. *Railway Co. v. Lawrence*, 43 R. 419.

A public street in a town ran through the yard of a railroad company. The town authorities granted to a street car company the right to lay and operate their track through that street. Held, that the street car company should not be enjoined from laying and using their track through the street in the yard. *Texas & P. R'y Co. v. Rosedale Street R'y Co.*, 53 R. 739.

29. Switches and side-tracks.—The power to construct a railroad includes authority to make switches and side-tracks, although not expressed, because they are essential to the use of the road. *Cleveland & P. R. R. Co. v. Speer*, 94 D. 84.

The spot where switches should be placed lies in the absolute discretion of the company, and cannot be readjudged by a private citizen, where the right to side-tracks for standing room, or to pass from the main track to the shops or yards of the company, is clearly given. *Ib.*

An action cannot be maintained by a citizen for injury to his property from noise, smoke, and stench of locomotives and trains, arising from the location of railroad switches and side tracks near his house. *Ib.*

30. Interpretation of contracts for railroad construction.—Contracts for construction of railroads and canals made between parties engaged in such undertakings, although they contain provisions more stringent, arbitrary, and penal than those that usually characterize contracts between individuals, will be sustained and enforced, where there is no evidence of any fraud or imposition in their procurement. *Faunce v. Burke*, 55 D. 519.

Where, in a contract between a principal contractor and a subcontractor for the construction of a railroad, it is stipulated that the work shall be subject to the supervision and control of the engineer of the railroad company, and that the estimates made by him as to the quantity, character, and value of the work done shall be conclusive between the parties, the engineer thereby becomes the agent of both parties to make the estimates, and the estimates made by him will be final, in the absence of fraud, or of such gross mistake as amounts to fraud. The term "value" in such contract is to be distinguished from the term "price" as applied to the quantity of any of the different classes of work mentioned therein, and the engineer in making the estimate may deduct from the quantity of work done what will equalize the part taken out as to quality and value with the whole work. *Ib.*

A stipulation of forfeiture of twenty per cent. of the price to be paid for work in a contract for the construction of a section of a railroad, under the adjudication of a competent engineer, is no more than a reasonable provision for securing the progress of the work, and a limited indemnity to the person with whom the contract is made, to enable him to employ others to complete the unfinished work. The sum so stipulated is not a mere penalty, but the measure of reparation for failure to perform the contract. *Ib.*

A railroad company let certain work to a contractor, furnishing him with a construction train with an engineer to run it. Except

For Index to Notes in American Decisions and American Reports, see Volume I.

in respect to speed and side-tracking for other trains, the train was under the control of the contractor. The company was bound to discharge the engineer on the contractor's complaint; otherwise the company controlled him; and it paid his wages, but deducted them from the amount due the contractor. *Held*, that the engineer was the servant of the company. *New Orleans etc. R. R. Co. v. Norwood*, 52 R. 191.

2. Fences, Crossings, Culverts, and Cattle-guards.

31. Fences. 1. *Validity of the statutes.**—A railroad company is subject to reasonable police regulations, and in pursuance thereof, the legislature has power to require it to fence its road, and to erect and maintain cattle-guards at crossings, or to respond in damages to all injuries arising from a failure so to do; and this, though no such power is reserved to the state in the charter. *Gorman v. Pacific R. R.*, 72 D. 220.

A statute regulating fencing of railroads and holding companies liable for injury to animals, caused by want of such fences, is a police regulation for the protection and safety of passengers, rather than for the protection of the owners of animals, and therefore the legislature possesses the power to prescribe such a regulation, either at the formation of the company, or after the charter has been granted and the road built, and though such charter is not amendable. *New Albany etc. R. R. Co. v. Tilton*, 74 D. 195; *Winona etc. R. R. Co. v. Waldron*, 88 D. 100.

A railroad company not required by its charter to make or rebuild fences along its track, was afterward, by a statute, directed to repair fences along its line "destroyed by fire caused by the running of trains or by the employees of the road." *Held*, a valid exercise of the police power of the state. *Pennsylvania R. R. Co. v. Riblet*, 5 R. 360.

2. *And how construed.*—An act of the legislature which provides a forfeiture of one hundred dollars by all railroads neglecting to erect and maintain certain fences along their line of road, being a remedial act passed for the protection of property peculiarly exposed by the introduction of railroads, applies to corporations existing before its passage. *Norris v. Androscooggin R. R. Co.*, 63 D. 621; *Wilder v. Maine Cent. R. R. Co.*, 20 R. 698.

In Indiana railroad companies are required by statute to fence their roads, and the law so providing is construed as a police regulation for the safety of the public; and therefore the fact that a railroad runs alongside of a public highway would seem to require peculiar care on the part of the company in complying with the law. *Indiana etc. R. R. Co. v. Guard*, 87 D. 327.

* Validity of statutes requiring fencing in of railroads, see note, 34 R. 115, 116.

The "suitable" fences which railroad corporations are required to erect and maintain on both sides of their roads, by Mass. Gen. Stat., ch. 63, sec. 43, need not necessarily be such fences as are required to be maintained by adjoining owners of land, under Gen. Stat., ch. 25, sec. 1. *Eames v. Salem & L. R. R. Co.*, 96 D. 676.

Under a statute requiring, under certain penalties, railroads to "erect and maintain fences on the sides of their road," a company is liable for neglecting to fence a road which it does not own, but over which its runs its cars in company with an association of railroad companies who use and maintain the road for their joint benefit. Statutes of this character should be liberally construed. *Tracy v. Troy & B. R. R. Co.*, 98 D. 54.

Where a statute requires a railroad company to fence its track, a lessee of a road is bound to erect and maintain such fences. *Id.*

Under the statute, a railroad company must erect and maintain fences along the sides of its track, and proper cattle-guards, or be liable to any injury which its failure so to do occasions to stock. If it does so comply with the statute, it will be liable only for negligence. *Id.*

3. *The obligation to fence.**—A provision in a charter of a railroad company requiring it to fence its track is for the benefit of the adjoining land-owners only, and merely places the company in the position of a proprietor, who is bound by contract or prescription to build the fences between himself and an adjoining proprietor. *Jackson v. R. & B. R. R. Co.* 60 D. 246.

The statutory obligation of a railroad company to erect and maintain a fence on each side of its track binds them to erect and maintain fences only as against cattle and other stock rightfully running upon the adjoining lands. *Chapin v. Sullivan R. R.* 75 D. 207.

Fences along a railroad track are for the benefit of adjoining land-owners, to prevent their cattle from escaping to the track and there getting killed, and to protect their crops from cattle rightfully on the railroad track. *Id.*

The company is not bound to maintain fences against cattle trespassing either upon lands adjoining their roads or upon their own track. *Id.*

A railroad company is not bound to keep a patrol at night along its road to see that the fence is not broken down. If the company uses all reasonable diligence to keep up a good and sufficient fence, it is not guilty of negligence in that particular. *Illinois Central R. R. Co. v. Dickerson*, 79 D. 394.

It is the duty of a railroad company, both as to adjoining proprietors and as to third

* See note on the obligation to build fences, 7 R. 47.

For Index to Notes in American Decisions and American Reports, see Volume I.

parties, to properly fence its road, erect gates at private crossings, and to keep the same in repair. But when the road is properly fenced, and the company uses the necessary care in keeping it up and in good condition, and it is thrown or left down or open by the act of a third person, without the company's fault, he, and not the company, is liable for injury to stock getting on the track because of such fault or act. *Russell v. Hanley*, 89 D. 535.

The obligation only extends to the owner or rightful occupier of the adjoining fields, and not to mere trespassers there. *Bemis v. Connecticut etc. R. R. Co.*, 1 R. 339.

The obligation to fence attaches from the time when the necessity for protection to owners of land and stock arises, allowing a reasonable time to erect fences. *Silver v. Kansas City, etc. R. R. Co.*, 47 R. 118.

A railroad company is not relieved from the duty of fencing and making cattle-guards at a wagon-crossing by the facts that it is in the company's yard in a city and it would be difficult to do so. *Greeley v. St. Paul etc. R'y Co.*, 53 R. 16.

4. *Liability for neglect to build or repair fences.* — When a railroad company neglects to maintain proper fences and erect cattle-guards along the line of their road, as a matter of law there is that neglect which will render the corporation liable for injuries arising solely from that cause. *Norris v. Androscoggin R. R. Co.*, 63 D. 621.

Where a railroad is required to inclose its road by a good and sufficient fence where it passes through improved lands, and it neglects to do so, and horses and other animals, in consequence of this omission, stray upon the track and are killed or injured by the engine or appendages, the company is liable in damages. This, although the engineer exercised due care. *Id.*

A railroad company bound to keep fences along its road in repair, after a portion of the same has been down for several days, is presumed to have had notice of the fact. *Id.*

The fact that plaintiff, in an action against the company, for injuries to his horse occasioned by their fence being out of repair, originally built the fence for them in an imperfect manner does not excuse them from liability. *Id.*

A railroad company is liable for injuries occasioned by failure to erect and maintain substantial, legal, and sufficient fences on each side of the land taken by them for their railroad, where the same passes through inclosed and improved lands, if this is a duty imposed upon them by their charter. *Whitney v. Atlantic etc. R. R. Co.*, 69 D. 103.

The question of care and diligence on the part of a railroad company does not arise in an action to recover damages for injuries sustained through omission of a railroad com-

pany to fence its road, where the existing statute requires that the company must fence its road and maintain cattle-guards, or be liable for all damage arising from an omission so to do. In such case, if the road be not fenced as required by law, it matters not that the corporation exercised the highest care. *Gorman v. Pacific R. R.*, 72 D. 220.

Under the Indiana statute, a railroad company is liable, irrespective of negligence, for injuries to animals, but not to persons, where the road might be but is not fenced; but where the proper fence is maintained, it is not answerable for animals injured, except as at common law, where there is negligence on its part and the negligence of the owner of the stock does not contribute to its immediate injury. *Thayer v. St. Louis etc. R. R. Co.*, 85 D. 409.

A railroad company failing to fence its track as required by law, or erecting an insufficient fence, or failing to maintain a fence, is liable for all damages resulting from such omission of duty, and this without any reference to the manner in which its engines may have been controlled. *St. Louis etc. R. R. Co. v. Linder*, 89 D. 319.

Where a railroad company is not bound to fence, but the duty rests upon others, the company will not be liable for injuries by its trains to stock straying along the track, unless the injury is imputable to its gross negligence. *Id.*

A railroad company must maintain as well as erect fences required by the statute, and its liability is absolute for damages resulting from its failure to do so. But if the fence was suddenly destroyed by some accident against which it would be impossible for the company to provide, it may be that the company would not be subject to the absolute liability of the statute if immediate steps were taken to rebuild. *Brown v. Milwaukee etc. R'y Co.*, 91 D. 456.

In an action against a railroad company for damages occasioned by its fence being out of repair, evidence that its condition was defective two months before the time in question is admissible to show that its condition was or ought to have been known to the company. *Id.*

A railroad neglecting to fence its road is liable to the owner of adjoining lands for injury to his cattle on the track, although he turned them out to graze, knowing of that neglect. *Cressey v. Northern R. R.*, 47 R. 227.

A railroad, neglecting to maintain a proper fence, is liable to the owner of adjoining lands for his horse, escaping through a defect in a fence and killed by a train, although the owner knew of the defect, and that the horse was breachy, and there was no negligence in running the train. *Congdon v. Central Vt. R. R. Co.*, 48 R. 793.

For Index to Notes in American Decisions and American Reports, see Volume I.

The neglect of a railway company to fence its road may be considered by the jury in an action for an injury to a child straying upon the track. *Keyser v. Chicago etc. R'y Co.*, 56 R. 405.

Where a statute makes it the duty of railroad companies to fence their roads, and to keep their fences in repair, and also declares that such companies shall be liable for all injuries to animals arising from a neglect to perform this duty, — *held*, 1. That where such fences get out of repair, through some accident or event beyond the control of the company, and repairs are made with reasonable diligence, the company will not be liable for injuries to animals straying upon the track, notwithstanding the statute makes the liability absolute; 2. That in such cases, reasonable diligence in making repairs is a high degree of diligence, exceeding that which men in general exercise in their own affairs. *Antisdel v. Chicago etc. R'y Co.* 7 R. 44.

5. *When the road need not be fenced.* — A railroad company is not negligent in not fencing its line where it runs through common, vacant, or unenclosed lands. *Perkins v. Eastern R. R. Co.* 50 D. 589.

A railroad company is not bound to fence its road. *Railroad Co. v. Skinner*, 57 D. 654. Nor, on the other hand, is the owner of cattle compelled to prevent them from running at large. *Chicago & Miss. R. R. Co. v. Patchin*, 61 D. 65. But when the company leaves its road open and unfenced, they take the risk, without any remedy against the owner, of intrusions from animals running at large, as do other proprietors who leave their lands uninclosed; and the owner of the animals, in allowing them to run at large, takes the risk of the loss or injury to them by unavoidable accident. *Kernohacker v. Cleveland etc. R. R. Co.* 62 D. 246.

The grantor of a right of way to a railroad company through his property is not bound to fence the same, nor is the company under legal obligation to do so. *Louisville & Frankfort R. R. Co. v. Milton*, 58 D. 647.

The grantor of a right of way to a railroad company who permits his stock to run upon the road does so at his own risk, unless he retains the right to continue the use of that portion of the property as a pasture. *Id.*

The right of the company to land upon which their road is built is an absolute ownership in fee for railroad purposes. If it be allowable to graze cattle on such land, it is not a matter of right, but at most an immunity, not a privilege. *Chicago & Miss. R. R. Co. v. Patchin*, 61 D. 65.

A railroad company is under no greater obligation to fence its road than is any other proprietor of land, but if the road be not fenced, that fact should be considered in estimating the degree of care to be exer-

cised by the company. *Gorman v. Pacific R. R.*, 72 D. 220.

One whose cattle stray upon a railway, where they are run over by a train, which is damaged by the collision, is liable to the railway company therefor if he was negligent in his care of the cattle, but not otherwise. *Annapolis and E. R. R. Co. v. Baldwin*, 45 R. 711.

A railroad corporation has no right to fence its tracks in cities and towns where it is intersected by streets and alleys. *Blanford v. Minneapolis etc. R'y Co.*, 60 R. 795.

A railroad fireman was killed by collision of the engine with a steer straying on the track. The railway company owned the right of way in fee simple; the owner of the steer owned the land adjoining on both sides; the railway was unfenced, and the owner of the steer was in the habit of turning his cattle loose on his land. There was no statutory duty to fence. *Held*, that there was no cause of action against the owner of the steer. *Sherman v. Anderson*, 41 R. 414.

6. *Agreements to fence.* — An agreement must be performed in a reasonable time, if no time is mentioned, where a railroad company agrees to fence its road through one's land. *Lawton v. Fitchburg R. R. Co.*, 54 D. 753.

Performance after action commenced of an agreement by a railroad company to fence its road through the plaintiff's land in adjustment of damages for the right of way, if such performance was without the plaintiff's consent, does not affect his right to recover damages for not fencing in a reasonable time. *Id.*

The measure of damages against the company for not fencing its road through the plaintiff's land in accordance with its agreement, in settling for the right of way, is such sum as it would fairly cost to make the fences as agreed, notwithstanding the erection of fences after the action was commenced, without the plaintiff's consent. *Id.*

The burden of proving an averment that there was no contract on the part of the plaintiff to fence the track, is not upon the plaintiff, but the defendant must disprove it, in an action against a railroad company for killing an animal on its track, brought under a statute which requires the company to fence its road where it runs through inclosed lands, except where the company has a contract with the proprietor of the lands that he shall fence the road. *Great Western R. R. Co. v. Bacon*, 83 D. 199.

32. *Crossings.* — Railroad companies may constitutionally be required to build and maintain highway crossings, although

* Highway crossings, care which company must use to prevent accidents at, see note, 35 R. 207-211. Duty of railroad company to keep damages at crossings, see notes, 100 D. 412-414; 17 R. 363-368.

For Index to Notes in American Decisions and American Reports, see Volume I.

such liability is imposed by statute enacted subsequent to the chartering of such companies. *Portland etc. R. R. Co. v. Inhab. of Deering*, 57 R. 784; *Illinois Cen. R. R. Co. v. Willenborg*, 57 R. 862.

A railroad company whose road runs along and across a highway over which large droves of cattle are accustomed to travel is bound to take notice of the fact, and govern itself accordingly. When cattle are seen, or might have been seen, scattered for half a mile along such highway, just before a crossing which the train approaches round a curve, such crossing should be approached at a moderated and manageable rate of speed. *Reeves v. Delaware etc. R. R. Co.* 72 D. 713.

A drover of a large herd of cattle, about to cross a railroad track along which a railroad train is momentarily expected to run, must use reasonable care. In determining whether to attempt to cross the track with his herd before the arrival of the train, or to hold them until the train had passed, he should regulate his conduct by whatever a prudent man in general would do, or forbear to do, in similar circumstances. In deciding this question, he has a right to expect that the railroad company will also exercise reasonable care. *Ib.*

Such drover is not required, nor has he any right, to go upon the track and signal the approaching train. *Ib.*

Where cattle have escaped from an owner's enclosure and are crossing a railway at a highway crossing, and the engine-driver sees them but does not stop or slacken speed, but runs upon and kills one of them, this is gross negligence for which the railway company is liable. *Chicago and A. R. R. Co. v. Kellam*, 34 R. 128.

In an action against a railway company for an injury to a horse at a defective highway crossing, evidence of former similar accidents at the same place is inadmissible; and so of evidence that after the accident the company repaired the defect. *Hudson v. Chicago etc. R. R. Co.*, 44 R. 692.

A railroad company is liable, for negligent construction of a highway crossing, to a traveller on the highway injured thereby. *Mann v. Central Vt. R. R. Co.*, 45 R. 628.

It is not necessarily negligent in a railroad company to sound a locomotive whistle at a point where the railroad crosses a highway by a bridge overhead, although the crossing is known to be one of extraordinary danger, and the sounding of a whistle causes a horse to run away. *Cincinnati etc. R'y Co. v. Gaines*, 54 R. 334.

When a railroad company has long, constantly and notoriously permitted the public to cross its track at a place not in a highway, it is bound to use reasonable care towards persons so crossing, and to give notice and warning to them, and what constitutes reasonable care is a question of fact. *Byrne v.*

New York Cent. etc. R. R. Co., 58 R. 512; *Barry v. New York Central etc. R. R. Co.*, 44 R. 377.

No rule of law requires a railroad company to keep a flagman at a street or road crossing to give notice of the approach of trains, and the omission to do so is not negligence, unless the company, by an established and hitherto uniform practice of that kind, have given ground for expectation that such warning would be given. *Ernst v. Hudson R. R. Co.* 100 D. 405; *Welch v. Hannibal etc. R. R. Co.*, 37 R. 440.

Where a railroad company has been accustomed to keep a flagman at a crossing, the fact of his absence or withdrawal does not excuse a traveller from a charge of negligence in omitting the use of his senses. He has no right to interpret the absence as an assurance of safety. *McGrath v. N. Y. Cent. etc. R. R. Co.*, 17 R. 359.

Accordingly—*held*, in an action to recover damages for injuries sustained by a traveller at a crossing, that the receipt of evidence of such custom, and that the flagman was absent at the time of the accident, as a circumstance bearing on the question of plaintiff's negligence, was error. *Ib.*

The omission of a railroad company to maintain a flagman at a highway crossing may be considered on the question of its negligence, in an action for an injury to a traveller, driving on the highway, caused by the sudden escape of steam from a locomotive. *Hart v. Chicago etc. R. R. Co.*, 41 R. 93.

In an action for personal injury sustained by a traveller upon a city street by collision with a railway train at a crossing, evidence of the absence of the flagman customarily stationed there to the plaintiff's knowledge is competent. *Pittsburgh etc. R'y Co. v. Yundt*, 41 R. 580.

In an action against a railroad company for an accident at a crossing, it is error to leave it to the jury to determine whether the omission to have a flagman at the point was negligent. *Houghkirk v. Delaware etc. Co.*, 44 R. 370.

The obstruction of a public crossing over a railroad is a nuisance; and the company is liable for all the consequences that may ensue from leaving a crossing obstructed by a train of cars. *Murray v. S. C. R. R. Co.*, 70 D. 219.

A railway company constructing its road over or across a public highway must, if possible, in so doing cause no inconvenience to the public; but where this cannot be done, the work must be performed with the least possible inconvenience. If a bridge or substituted road be necessary to prevent an obstruction of the highway, the company must build it within a reasonable time, and cannot delay until its road is completed. And this is the rule whether the obstruction of

For Index to Notes in American Decisions and American Reports, see Volume I.

the highway be expressly prohibited in the charter or not. *L. & N. E. R. Co. v. State*, 75 D. 778.

A railroad charter empowered the company to lay its track across any public highway or street, if necessary, on condition that it should put such highway or street "in such condition and state of repair as not to impair nor interfere with its free and proper use." *Held*, that this was a continuing duty, and that although a crossing might have been adequate when constructed, yet if by reason of increase of business of the railroad or travel on the street it became dangerous or seriously obstructed travel on the street, the company was bound to provide some other mode of crossing, as by carrying the street over or under the track. *State v. St. Paul etc. Co.*, 59 R. 313.

33. Culverts. — A railroad company is liable in damages for so unskillfully and negligently constructing a culvert as to be insufficient to vent the ordinary high water of the stream under it. *Pittsburg etc. R'y Co. v. Gilleland*, 94 D. 97.

Where the original proprietors of the railroad company so constructed a culvert that a nuisance was thereby created, the subsequent owners of the road would be responsible for its continuance after notice. *Id.*

The company is not liable for so constructing a culvert that it will not pass extraordinary floods. *Id.*

Three floods happened in quick succession, and damage resulted in each from the insufficiency of a railroad culvert to vent them; and the jury were instructed: "But even if the first flood were an extraordinary one, it will be for you to determine whether the defendants ought or ought not, after the first, or first and second floods, to alter their culvert by enlarging its cavity. Considering the frequency of these floods, was it or was it not negligence in them not to do so, after such repeated instances and positive notices, coupled with the request testified to," etc. *Held*, to be error. The jury should not be left to understand, as possibly they might from such instruction, that they could find a liability for extraordinary floods because of their recurrence in rapid succession. *Id.*

A railroad company, having acquired a right of way, and found it necessary to raise its track above the natural surface of the land, is not bound to provide culverts or other means for the passage through the embankment of surface-water or water overflowing from a river and descending in that direction from or over the lands of the adjoining owner. *Cairo and V. R. R. Co. v. Stevens*, 38 R. 139. Compare *Little Rock etc. R'y Co. v. Chapman*, 43 R. 280; *Louisville and N. R. R. Co. v. Hays*, 47 R. 291.

A railway company, in the construction of its road, is not liable in damages for fill-

ing up an artificial ditch by which surface-water was drained from lands of an adjacent owner into a river. *O'Connor v. Fond Du Lac etc. R. R. Co.*, 38 R. 753.

A railroad is not liable to a landowner for an injury by an overflow of surface water occasioned by the road-bed skillfully constructed. *Abbott v. Kansas City etc. R. R. Co.*, 53 R. 581.

34. Cattle-guards. — The legislature may, under the police power, require existing railroads to erect and maintain cattle-guards at all crossings, and fences on the lines of their roads, under penalty of paying all damage caused by their neglect to comply with such requirements. *Thorpe v. Rutland etc. R. R. Co.*, 62 D. 625; *Trow v. Vermont Central R. R. Co.*, 58 D. 191.

The care and diligence required of a railroad corporation in constructing fences and cattle-guards depend upon the locality of the road and the place through which it passes. *Trow v. Vermont Cent. R. R. Co.*, 58 D. 191.

Neglect to construct fences and cattle-guards renders the corporation liable for injuries arising solely from that cause, when the omission was for a considerable distance in a place so public and common that it must know and reasonably expect that without such precautions injuries to horses and cattle will naturally and frequently arise. *Id.*

A railroad company being bound to transport passengers safely must exclude cattle from their track. Whether to do this by fencing, by mounted police, or by cattle-guards is for them to determine. If they do not exclude this risk, they are responsible in damages to a passenger who is injured because of their failure to do so. *Sullivan v. Phila. etc. R. R. Co.* 72 D. 698.

Railroad companies must construct and maintain cattle-guards at farm-crossings; and are liable for injuries to stock rightfully at such crossings, but occasioned in consequence of the companies' neglect to maintain such guards. *Chapin v. Sullivan R. R.*, 75 D. 237.

It is the duty of a railroad company to keep its cattle-guards open. *Dunnigan v. Chicago etc. R'y Co.*, 86 D. 741. But see *Blais v. Minneapolis etc. R. R. Co.*, 57 R. 36.

A railroad company is guilty of negligence in permitting its cattle-guards to remain filled with snow, so that cattle, which have escaped upon a highway without their owner's negligence, may pass on to the track and be liable to be killed. If any injury is thereby sustained, the company is liable for the damages, and the jury may be so instructed. *Dunnigan v. Chicago etc. R'y Co.*, 86 D. 741.

A statute requiring railroad companies to maintain cattle-guards at road crossings, applies as well to streets which are crossed

For Index to Notes in American Decisions and American Reports, see Volume I.

by railroads in villages as to country highways; and the fact that a crossing is near a depot, and that a guard there would inconvenience the company, does not relieve them from the necessity of erecting it. *Tracy v. Troy & B. R. R. Co.*, 98 D. 54.

III. RIGHTS, POWERS, AND DUTIES OF OFFICERS, AGENTS, AND SERVANTS.

35. The president.—The establishment and posting by the president of the corporation of tariffs of freights and fares, and the receipt and appropriation by the corporation of fares taken on such tariff, without objection, raises the legal presumption that the president acted by authority of the corporation in thus fixing and posting such tariffs. *Hilkard v. Gould*, 66 D. 765.

36. Directors.—The board of directors of a railroad company are its immediate representatives, and occupy the relation of master to the various employees engaged in operating the road and superintending and performing the business of the company in its various departments. *Columbus & I. C. Ry Co. v. Arnold*, 99 D. 615.

Rates of fare need not be fixed by the board of directors, and appear on the record of their proceedings. Agents other than the directors may be empowered to regulate such matters. *Jeffersonville R. R. Co. v. Rogers*, 92 D. 276.

37. Superintendents.—The superintendent of a railroad company, clothed with the power and authority of board of directors, in regard to the management of trains and all arrangements connected therewith, is the immediate representative and corporate executive officer; and his negligent or improper order, which causes an injury, renders the company liable as much as if it had emanated directly from the company's act in its corporate capacity. *Washburn v. N. & C. R. R. Co.*, 75 D. 784.

A railroad division superintendent has no implied authority from the company to employ surgical aid for passengers injured in an accident. *Union Pacific Ry Co. v. Beatty*, 87 R. 160.

The superintendent of a railroad depot has not a right to order a person to leave the depot, and not to come there any more, and to remove him with force if he does come, merely because he has violated some supposed regulation of the company, in the opinion of the superintendent, or has conducted himself offensively to such superintendent. *Hall v. Power*, 46 D. 698.

Evidence of a former violation of other regulations of the corporation, by a person put out of a depot by force for a supposed violation of a certain regulation, is not admissible in an action of assault and battery by the person so put out against the superintendent of such depot. *Id.*

A railroad company itself or its superin-

tendent has no right to fix an obstruction in its track. The track is a public highway, constructed for travel and transportation, and any use of it for other purposes is unlawful. *Railroad v. Norton*, 64 D. 672.

It is within scope of authority of a general superintendent of railroad to bind the company, on his consent implied, for the payment of expenses incurred on account of injuries received by the company's employees. *Toledo R. R. Co. v. Rodriguez*, 95 D. 484.

An employee of a railroad company was injured while in the discharge of his duty, and the station agent, as such, procured a nurse and medical attendants, promising that the company would pay such expenses. He then wrote to the general superintendent stating the facts. *Held*, that it must be presumed that the letter was received, and in the absence of any answer thereto, that the superintendent consented on the part of the company to assume the liabilities of the station agent. *Id.*

38. Station agents.—A railway station agent has implied authority to contract to furnish cars for the shipment of perishable property by a specified day. *Wood v. Chicago & S. P. R. Co.*, 56 R. 861; *Harrison v. Missouri Pacific Railway Co.*, 41 R. 318.

A station agent of a railroad corporation has not authority to bind such corporation as common carriers beyond the line of its own road, by signing receipts furnished in blank by a shipper, and by the terms of which the corporation undertakes to forward and deliver the goods to the order of the consignee at points on a connecting line, where it appears that such agent acted without special authority, and without the knowledge of the corporation, and that the officers of such corporation had furnished such agent with blank forms of receipts, to be given for goods shipped beyond their own line, by which it was provided, that, in case of loss or damage of the goods, the corporation only should be responsible in whose actual custody the goods should be at the time. *Burroughs v. Norwich etc. R. R. Co.*, 1 R. 78.

39. Conductors.*—Where the conductor is the sole representative of the company so far as his train is concerned, it is his duty, as the conductor of such train, to use ordinary and reasonable skill and diligence, not simply in the management of the train, but also in supervising the due inspection of the cars, machinery, and apparatus, as to their sufficiency and safety, while under his charge; and on the discovery of any defect or insufficiency, to notify the company, and to take the proper precautions to guard against danger therefrom. *Mad River etc. R. R. Co. v. Barber*, 67 D. 312.

* Liability of company for acts of conductor and agent, see note, 69 R. 601-604.

For Index to Notes in American Decisions and American Reports, see Volume I.

The company is liable to a passenger for failure to transport him within the agreed time, attributable to a faulty act of the conductor within the scope of his authority, whether such act was willful or merely negligent. *Weed v. Panama R. R. Co.*, 72 D. 474.

A conductor of a train of cars on a railroad belonging to the state has the right to direct all the movements of the train; and the engineers, teamsters, and other means employed, whether the motive power is furnished by the state or not, are regarded as agencies employed by him, and therefore under his control; and for an injury resulting to a third person through the negligence of any of the agencies employed in the moving or management of the cars, the conductor and his employers are liable. *Rauch v. Lloyd*, 72 D. 747.

Where a conductor having control of a railroad train permits it to stand on a public street-crossing, and during his absence from it a teamster attaches horses to it and moves it, a resulting injury is as much the act of the conductor and his employers as if he had been present, and had directed it to be done. The doctrine of remote and proximate cause does not arise, and has no application to such a case. *Id.*

The conductor of a train acts under a general authority, and administers the rules of the company. In the exercise of this authority, he is allowed a discretion, and may apply or relax these rules, within reasonable bounds, according to circumstances. *O'Donnell v. Alleghany V. R. R. Co.*, 98 D. 336.

In an action by a railway conductor against his employer for wages, the employer may set off and recover damages resulting to him from the conductor's negligence in performing the work; and the conductor is not relieved from his duty to exercise reasonable care by the known imperfect equipment of the train in respect to which his negligence occurred. *Mobile and R'y Co. v. Olanton*, 31 R. 15.

Where a railway brakeman is injured in the discharge of his duty at a point distant from the chief offices of the company, and stands in need of immediate surgical attendance, the conductor may bind the company by the employment of a surgeon, if there is no superior agent of the company present. *Terre Haute and I. R. R. Co. v. McMurray*, 49 R. 752.

Where one falsely pretends to the conductor of a railway train that he is an officer of justice, and demands to put upon the train a person whom he pretends to have arrested for crime, and the conductor in good faith receives the prisoner on the train against his protest, the railway company is not liable therefor. *Jackson v. St. Louis etc. R'y Co.*, 56 R. 460.

40. Engineers.*—Negligence of an engineer is negligence of the company, where he might have stopped the train and avoided a collision with a push-car, but did not do so though warned by signals of persons, and though the push-car was in sight for more than a mile; and it is no excuse that he supposed the car to be in the charge of section-men who would remove it from the track upon the approach of the train, for he should have known that the car was not under the control of railroad employees, by the fact that they did not attempt to remove it on the signal being given. *Pittsburg etc. R'y Co. v. Bumstead*, 95 D. 539.

41. Other servants and employees.—A railroad company is liable for the negligence of an agent in loaning a push-car to persons unaccustomed to its use, who left it upon the track, whereby a collision occurred. *Pittsburg etc. R'y Co. v. Bumstead*, 95 D. 539.

A railway road-master, having charge of the repairs of the roadway, has no implied authority to contract for the nursing of a person injured on the line of the road, there being no emergency calling for immediate action, and there being a superior agent within reach; but the corporation will be bound by the ratification of such contract by the general manager. *Louisville etc. R'y Co. v. McVay*, 49 R. 770.

IV. POWERS, DUTIES AND LIABILITIES IN RESPECT TO THE MANAGEMENT OF THE ROAD.

1. Under the Contract to Carry.

a. Carriage of Merchandise.

42. Obligation to carry.—Railroad corporations are common carriers and they occupy a peculiar relation to the public as invested with certain franchises for the public benefit, and they are bound to use them with fairness and for the common good. *Messenger v. Pennsylvania R. R. Co.*, 18 R. 754.

Railroad companies, as common carriers, must furnish such facilities for transportation as will meet the ordinary demands of the public, but are not bound to anticipate or provide in advance for an unusual influx of freight. *Galena etc. R. R. Co. v. Rae*, 68 D. 574.

A railroad company is liable for the fraud or negligence of its servants in the course of their employment; and if such servants, by reason of bribes or other improper motives, give preference to one person over another, in receiving freight, the company may be held liable for damages for the injury sustained thereby. But because the company, from pressing necessity, takes grain from wagons or boats, while grain is standing in its private warehouse for shipment, if done in good faith, will not impose a liability. *Id.*

*Defects in track, whether engineer must take notice of, see note, 47 R. 480, 481.

For Index to Notes in American Decisions and American Reports, see Volume I.

A railway company is bound to receive the freight cars of other railway companies for transportation, and is subject to the liability of a common carrier in respect to them. *Peoria etc. R. Co. v. Chicago etc. R. Co.*, 50 R. 605.

A railway company is not bound to transport perishable property to the exclusion of other general freight not perishable. *Dixon v. Chicago etc. R'y Co.*, 52 R. 460.

43. Delivery to the company. — A railroad company is not liable as a common carrier until it actually receives the goods for carriage. *Maybin v. South Carolina R. R. Co.*, 64 D. 753.

A railroad company must receive freight according to its usage and custom, and if the company has been used to run cars upon a side track to a private warehouse to receive freight, a readiness to deliver at such warehouse will impose on the company a duty to take the freight therefrom. *Galena etc. R. R. Co. v. Rae*, 68 D. 574.

A railroad company incurs no risk as to the mode adopted in loading cars by shippers who hire the cars to be loaded with freight in such a manner as they might choose. *Ohio etc. R. R. Co. v. Dumbor*, 71 D. 291.

Goods placed for shipment in the car of a railroad company, standing on a side track under exclusive control of the company, with the assent of the company, pass into the possession of the company whether they be placed in the car by its own employees or by other persons. *Illinois Cen. R. R. Co. v. Smyser*, 87 D. 301.

Where plaintiff's agent in loading cattle upon cars discovers upon closing the doors thereof that the fastening is defective, he must inform the station agent of the railroad company, or the latter will not be liable for loss occasioned thereby. The fact that plaintiff's agent secured the door by such means as were at hand, and in a manner which he considered safe, does not change the case. *Betts v. Farmers' Loan etc. Co.*, 91 D. 460.

44. Liability for refusal to carry. — The privilege of making a railroad and taking tolls is a franchise, and the public have an interest in its use. *Beekman v. Saratoga etc. R. R. Co.*, 22 D. 679.

Owners of a railroad are liable for damages sustained by a refusal to transport persons or property, without reasonable excuse, upon payment of the usual fare. *Id.*

A railroad company, as a forwarding agent, is liable for refusing to receive goods without a good excuse, and for neglecting to take reasonable care of them after receiving. *Maybin v. South Carolina R. R. Co.*, 64 D. 753.

A railroad company refused to receive freight at a way station, to be delivered at an elevator five hundred feet beyond their terminus, on a track owned by another company, but which they had sometimes used

for delivery at the elevator. *Held*, that a writ of *mandamus* would not lie compelling the company to receive freight for such delivery. *People v. Chicago & A. R. R. Co.*, 8 R. 631.

45. — for failure to deliver. — A railroad company is not liable as a common carrier, but as a mere bailee for hire, where the agent of the company is guilty of negligence in failing to deliver a piece of machinery consigned to him for shipment with other pieces of machinery. *Foard v. Atlantic etc. R. R. Co.*, 78 D. 277.

The measure of damages against the company for the negligence of its agent in failing to deliver a piece of machinery consigned to him with other pieces of machinery, for shipment, and by which the whole is kept idle, is compensation for the capital invested — that is, legal interest; also for any workmen thus necessarily unemployed, expenses incurred in sending for the missing machinery, and any other damages which are the direct and necessary result of such negligence. *Id.*

The burden is upon plaintiff to prove that the defendant railroad company failed to exercise ordinary care and diligence in the transportation of his goods. *Mann v. Birchard*, 94 D. 398.

Although a railway company cannot be compelled to deliver freight beyond its own line, simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line, yet a writ of *mandamus* will lie compelling the company to deliver at an elevator situated upon tracks operated in common with other companies, notwithstanding the delivery may be at an additional expense and the company may have contracted with other elevators for exclusive delivery to them. *Chicago etc. R'y Co. v. People ex rel.*, 8 R. 690.

46. — or for delay. — A railroad company must use proper diligence in the transportation of freight, and where there is delay, it must answer in damages, unless it can discharge itself by a proper excuse. *Galena etc. R. R. Co. v. Rae*, 68 D. 574.

Tender or readiness to pay freight charges should be proved in an action against the company for failure or delay in transportation of goods. *Id.*

The proprietors of a railroad who negligently delay transportation of goods delivered to them as common carriers, and then safely transport them to their destination, are not liable for injuries to the goods caused by a flood, while the goods are in their depot at the latter place, although the goods would not have been exposed to the injury but for such delay. *Denny v. New York Central R. R. Co.*, 74 D. 645.

The company is liable for damages caused by delay in transporting freight, though

For Index to Notes in American Decisions and American Reports, see Volume I.

such delay was the result of a strike among its servants which rendered the running of trains impossible, of which strike the company had two days' previous notice. *Blackstock v. N. Y. & E. R. R. Co.*, 75 D. 372.

Prima facie evidence of want of ordinary care, on part of the company in carrying goods, is shown by an unusual and unexplained delay and failure to deliver the goods according to the general course of business. It raises a natural presumption of negligence; and it is not incumbent upon the plaintiff to prove that there was not some unavoidable accident, or other unforeseen occurrence, which would relieve the defendant from the natural presumption. *Mann v. Birchard*, 94 D. 398.

The company is bound, by its freight agent's contract to transport goods within a specified time if it be a reasonable time. *Sirohn v. Detroit etc. R. R. Co.*, 99 D. 114.

The company is not an absolute insurer of goods which its agent has contracted to deliver within a specified time; but their non-delivery will be excused if they are destroyed within the prescribed time by the act of God or of the public enemy. *Id.*

A mere statement by a railroad company's agent that the ordinary time for transportation over the proposed route is a certain number of days does not constitute an agreement to carry in that time; nor is it sufficient to overcome the effect of the bills of lading or receipts as evidence of the real contract. *Id.*

47. What is a sufficient delivery.—Common carriers by railway are neither bound to deliver goods to the consignee personally nor to give notice of the arrival of the goods, in order to discharge themselves from liability as common carriers. *Porter v. Chicago R. R. Co.*, 71 D. 286.

The duty assumed by a common carrier by railway, in the absence of a special contract limiting his liability, is to carry the goods safely to their destination, and there discharge them on the platform or other suitable place, so as to put them in readiness for convenient delivery to the consignee or party entitled to receive them. But the carrier is neither bound to deliver to the consignee personally nor give him notice of the arrival of the goods. *Blumenthal v. Brainerd*, 91 D. 349.

And where the destination is a mere flag station, without any agent, depot or warehouse, and this is known to the consignee, and is not unreasonable in view of its business, its liability of every sort terminates with the delivery of the goods in its car on the side track at the destination. *South etc. Ala. R. R. Co. v. Wood*, 41 R. 749.

The owner, consignee, or other person authorized to receive goods, being present at the time of their arrival, and having an opportunity to take them away, this may be

regarded as equivalent to a delivery. After this, they must be understood to remain in charge of the company as bailees for hire. *Moses v. Boston and M. R. R. Co.*, 64 D. 381.

Where goods arrive at a depot at from one to three o'clock in the afternoon, from two to three hours are required to unload them from the cars, the gates of the depot are closed at five o'clock, and the consignee has no reasonable opportunity to see the goods or take them away before they are destroyed, the transit has not terminated, and the railroad company, as carriers, are liable for the value of the goods. *Id.*

The responsibility of the company as carriers in the transportation of wool and such commodities begins with the receipt of the goods, though not put by them at once on the transit, and ceases only when the goods have reached their destination and their control over them as carriers has terminated; the control must continue until delivery, or an offer to deliver, or some act which the law can regard as equivalent to delivery. *Id.*

Whether regulations made by a railroad company are reasonable is a question of fact to be determined by the jury, though their determination, when against the evidence, may be set aside by the court and a new trial granted. *Morris and Essex R. R. Co. v. Ayers*, 80 D. 215.

A regulation is reasonable and valid when it provides that a receipt shall be given for all the goods before any part are removed. *Id.*

The company is not bound to make more than one delivery of any shipment of goods transported by it. The owner has no right to require the company to deliver portions of the goods at different times; but may be required to receive and receipts for the whole at once, having first been afforded an opportunity of seeing the goods and determining whether they were all there and in good condition. *Id.*

48. Company when liable as warehousemen only.—A railroad company may assume a double character of carrier and warehouseman. *Wood v. Crocker*, 86 D. 773.

The liability of a railroad corporation as a common carrier ceases upon the goods being transported to their destination and safely deposited in the company's merchandise depot. It is then responsible only as a depositary, for want of ordinary care in the custody of the goods. *Thomas v. B. & P. R. R. Corp.*, 43 D. 444; *Porter v. Chicago R. R. Co.*, 71 D. 286; *Bausmer v. Toledo etc. R'y Co.*, 87 D. 367. But if the goods should arrive out of time, and the company failed to notify the consignee, its liability as a common carrier might be extended. *Francis v. Dubuque & S. O. R. R. Co.*, 95 D. 769.

A railroad company is liable as warehouseman for goods stored at the place to which

For Index to Notes in American Decisions and American Reports, see Volume I.

they were consigned and have been brought, and as such it is required to keep the goods in store for the consignee for a reasonable time without additional reward. *Bansemmer v. Toledo etc. R'y Co.*, 87 D. 367.

A common carrier by railroad may deliver the goods on his platform at their place of destination; or may store them there if no one is present to receive them. Until the goods are so delivered or stored they are liable as common carriers; but after such storage they are responsible only as warehousemen. *Norway Plains Co. v. Boston etc. R. R. Co.*, 61 D. 423.

If goods carried by a railroad corporation are destroyed by fire after they have reached their place of destination and been stored in the railroad warehouse, the transit being at an end, the corporation is not answerable as a common carrier, but only as a warehouseman. *Norway Plains Co. v. Boston etc. R. R. Co.*, 61 D. 423; *Francis v. Dubuque & S. C. R. R. Co.*, 95 D. 769.

Until goods have passed out of custody and control of a railroad company into the hands of proper parties, it is their duty to preserve the property, even after their responsibilities as common carriers have ceased. *Moses v. Boston & M. R. R.*, 64 D. 381.

The company is responsible as a warehouseman only, and not as a common carrier, for goods to which something remains to be done by the consignor or his agents, after their delivery to the company, before they are in a condition for transportation. Where, therefore, an arrangement exists between two railroad companies by which goods which have been carried to the end of one road, and are destined to some point upon or beyond the line of the other, are delivered to the second company with expense bills, upon receipt of which, if correct, way-bills are made out, such second company is, until the delivery of the expense bills, responsible only as warehousemen, and not as common carriers, for goods so received and stored by it. *Judson v. Western R. R. Corp.*, 81 D. 718.

49. Liability for loss or damage to property carried.—Railroad corporations are liable as common carriers for losses occurring from any accident during the transit of the goods, except those arising from the act of God or the public enemy. They can not escape this liability by showing that the loss occurred from some cause for which neither they nor their agents are chargeable. *Norway Plains Co. v. Boston etc. R. R. Co.*, 61 D. 423. S. P., *Bansemmer v. Toledo etc. R'y Co.*, 87 D. 367; *Seina & M. R. R. Co. v. Butts*, 94 D. 694.

A railroad company's liability for negligence should be strictly enforced on grounds of public policy. *Cumberland Valley R. R. Co. v. Hughes*, 51 D. 513.

The owner of a freight car injured by a defect in the road over which it is running under a "clearance" from the railroad company, owing to the company's neglect to repair, may recover therefor, though the "clearance" was obtained by another person who was at the time in possession of the car. *Id.*

A railroad company is liable as a common carrier for loss of goods destroyed by accidental fire while standing unloaded in a car at their destination. *Porter v. Chicago R. R. Co.*, 71 D. 286.

The company is not liable as a common carrier for loss or destruction of goods deposited at the roadside, where there is no station or agent, though goods are sometimes taken on board there, and though a conductor of a freight train has promised to stop and take the goods lost. *Wells v. Wilmington etc. R. R. Co.*, 72 D. 556.

Goods deposited at a roadside to save trouble of hauling to regular depot are at the risk of the owners until they are put on a freight car, and thus received by an agent of the railroad company. *Id.*

A railroad company is not liable in damages, as a common carrier, to one who hires or charters cars absolutely, in case of injury to his property. The remedy of the latter must be on the contract of hire, and the implied undertaking of the company that the hired cars are substantial, and will be duly carried to their destination. *East Tenn. etc. R. R. Co. v. Whittle*, 73 D. 741.

The duty which the company, in the management of its trains, owes to the shipper of freight while loading his property in one of the company's cars, under authority from the latter, is the exercise of that ordinary care which every man owes to his neighbor, to do him no injury by negligence while both are engaged in lawful pursuits. *Stinson v. N. Y. Cent. R. R. Co.*, 68 D. 332.

A railroad company, in its capacity of warehouseman and forwarder, is bound to exercise ordinary care and diligence over the property in its charge, such as a prudent man would exercise over his own property of like nature. What constitutes ordinary care may depend upon the nature, bulk, and value of the articles, and such care should be in proportion to the loss likely to be sustained by the want thereof. *Baltimore & O. R. R. Co. v. Schmacker*, 96 D. 510.

A railway company, not undertaking to carry dogs, but permitting its servant, as an accommodation to passengers, to receive them for carriage and take pay therefor for himself, cannot be held as a common carrier where the passenger was notified of the rule. *Honeyman v. Oregon and O. R. R. Co.*, 57 R. 20.

Plaintiff, not being permitted to take his dog with him in defendant's passenger car,

For Index to Notes in American Decisions and American Reports, see Volume L.

delivered it to the baggage-master of the train and paid him for its transportation. By the defendant's regulations, which were posted at various stations, "live animals" were "allowed as baggage-men's perquisites," but plaintiff had no special notice of this regulation. The dog was lost through the baggage-man's negligence. *Held*, that the defendant was liable for the value of the dog. *Canfield v. Hannibal etc. R. R. Co.*, 14 R. 476.

50. Liability as carriers of live stock.* — 1. *In general*. — A railway company undertaking to carry live-stock for such persons as chose to employ it assumes the relation of a common carrier, with the duties and obligations growing out of that relation, whether the transportation of cattle be its principal employment or merely incidental and subordinate. *Kimball v. Rutland etc. R. R. Co.*, 62 D. 567.

A railroad company, receiving cattle or live stock to be transported over its road from one place to another, assumes all the responsibility of common carriers, except so far as such responsibility may be modified by special contract. *Kansas Pacific R'y Co. v. Nichols*, 12 R. 494. *Contra*, see *Michigan South. etc. R. R. Co. v. McDonough*, 4 R. 468.

In an action against a railroad company for the value of live stock, alleged to have been killed through its negligence while in its possession as carriers, — *held*, (1) that the company, as to the live stock, was not an insurer, but was only liable for ordinary negligence; (2) that the fact of the injury was *prima facie* evidence of negligence; (3) that the company could not by contract relieve itself from liability for negligence. *Louisville etc. R. R. Co. v. Hedger*, 15 R. 740.

A railroad company undertaking to transport live stock is bound to furnish suitable and safe cars, and is responsible for any loss arising from a neglect of duty in this particular. The mere presence of the owner of the stock does not lessen this responsibility, as the cars are necessarily under the control of the agents of the company. *Peters v. New Orleans etc. R. R. Co.*, 79 D. 578.

A railroad company undertaking to carry live animals for hire is bound to provide cars of sufficient strength to prevent the animals from breaking through the same; and will be responsible for the loss occurring through failure to do so, although the animals were unruly and vicious; but not for an injury to the animals occurring simply from their own viciousness or unruliness, while being carried in a proper car. *Smith v. New Haven etc. R. R. Co.*, 80 D. 166.

It is negligence on part of railroad company to allow straw to be used in its cars for bedding; and if a fire occur from such

use, occasioning the loss of live stock while being transported the company is liable for all loss sustained by the shipper. *Powell v. Pennsylvania R. R. Co.*, 75 D. 564.

A common carrier cannot stipulate against his own gross negligence. And it is such gross negligence as a railroad company cannot stipulate against for one of its conductors to refuse to supply water to hogs that are being transported in its cars, after being requested so to do by the owner of the hogs, where water for that purpose was convenient and abundant, and several of the hogs died by reason of such refusal. *Illinois Cent. R. R. Co. v. Adams*, 92 D. 85.

2. *Fault of, or assumption of risk by shipper*. — Where a railway company, for a given hire, offers to assume the responsibility of a common carrier, and for a less hire offers to furnish the necessary means of transportation to the owner, who may thereby become his own carrier, the owner who chooses to pay the lower rate is bound by his election, and cannot hold the company liable as a common carrier. Whether in such a case there exists a special agreement between the parties, by which the company's liability is limited, is a question of law, to be determined by the court. *Kimball v. Rutland etc. R. R. Co.*, 62 D. 567.

A release signed by the shipper exonerating the company from liability for injury sustained to live-stock during transportation does not excuse negligence on the part of the company. *Powell v. Pennsylvania R. R. Co.*, 75 D. 564.

A party who obstructs the track, or interferes with the transportation of a railroad company, cannot recover from an injury received. *Id.*

The company is not exempted from liability for furnishing defective cars for the transportation of live-stock, under a contract which provides that the owner takes all risks of loss and injury "in loading, unloading, conveyance, and otherwise," whether arising from the negligence, default, misconduct, or otherwise on the part of the company's employees; and unless the owner assented to the use of such cars, after proper opportunities of observation, and with notice of their actual condition, he is entitled to expect that reasonably proper cars would be furnished. *Hawkins v. Great Western R. R. Co.*, 97 D. 179.

A railroad company is not responsible for injuries inflicted by one horse upon another while they were being carried in the company's car, if the injuries were caused by the fault or neglect of the owner of the horses in attaching their halters or not removing their shoes. *Evans v. Fitchburg R. R. Co.*, 15 R. 19.

The shipper of cattle by railway, having assumed, by special contract, the duty of loading and unloading, and having accepted

* See elaborate note on the liabilities and duties of railroad company carrying live animals, 67 D. 68-217.

For Index to Notes in American Decisions and American Reports, see Volume I.

and loaded a car without objection, knowing that it was not "bedded," cannot hold the railroad company for negligence in failing to bed or for insufficient bedding in the car. *East Tennessee etc. R. R. Co. v. Johnston*, 51 R. 489.

Evidence of a custom of shippers of cattle to bed the cars, known to them and acted on by them in previous shipments, is competent to explain such contract. *Ib.*

3. *Loss caused by vicious propensities of animals.* A railroad company acting as a common carrier of animals is not liable for their dying or being injured from causes arising from their animal nature and propensities, and which diligent care could not have prevented; but is liable, in the absence of special agreement or proof of inevitable accident, for loss or damage which might have been avoided by use of care and foresight, whether due to conduct of the animals themselves or to incidents of the company's business. *Clarks v. Rochester etc. R. R. Co.*, 67 D. 205.

In an action against a railroad company to recover for injuries done by one of the plaintiff's pair of horses to his mate, while being carried by the defendants, the defendants requested a ruling that if they used due care and provided a suitable car, and the injuries were caused by the peculiar character and propensities of the horses, such as fright or bad temper, they were not liable; the judge refused this ruling, but ruled that if the horse was injured by its mate in an outbreak of viciousness, quite unusual in horses worked together, the jury might find for the defendants. *Held*, that the defendants had good grounds of exception. *Evans v. Fitchburg R. R. Co.*, 15 R. 19.

51. *Special contracts limiting liability.* — Railroad companies are liable, as common carriers, for goods lost or injured, but they may by special contract limit this liability. *Thayer v. St. Louis etc. R. R. Co.*, 85 D. 409.

A railroad company cannot limit their liability as common carriers by public notice to the effect that they will not be responsible for loss or injury to goods in their hands as carriers, except such as may arise from negligence, even if knowledge of the notice can be brought home to the owner. *Moses v. Boston & Maine R. R.*, 64 D. 381.

The company cannot restrict its liability by merely proving a usage on its part in giving bills of lading to notify shippers that the company would not be liable for certain kinds of losses. *Illinois Cent. R. R. Co. v. Smyser*, 87 D. 301.

The provision of the general railroad law preventing railroad companies from lessening or abridging their common-law liabilities as carriers does not prevent the company from entering into an agreement with a consignor

of goods by which he specially contracts to limit their liability. *McMillan v. Michigan South etc. R. R. Co.*, 93 D. 208.

Printed notices, receipts, and regulations of a railway company, even when brought to the shipper's notice, will not excuse the company, where they carry freights for a reward, from being liable for a failure to use ordinary care in transporting them. *Mann v. Birchard*, 94 D. 398.

Where the defendant's railroad, in consequence of the war, was in a dilapidated condition, and their supply of rolling stock limited, and they had refused to receive freight for shipment unless upon a qualified liability, to secure which they had printed bills of lading limiting their liability, and where plaintiff, through himself and his agents, had knowledge of the condition of the road and the terms upon which goods were received, and where plaintiff, desiring to ship goods, filled out one of said printed bills of lading and brought it to defendant to sign, he will be held to a knowledge of its contents and an assent to its terms. *Wallace v. Matthews*, 99 D. 473.

A railroad undertook to carry cattle at a reduced rate and to carry their owner, and in consideration thereof, it was agreed that the owner should care for the cattle at his own expense, and that the carrier should not be liable for any loss beyond \$50 a head. *Held*, that the contract was reasonable and valid. *South Ala. & W. R. R. Co. v. Henkin*, 23 R. 578.

A stipulation in a bill of lading given by a railroad company for the transportation of goods over its own route and the routes of connecting railroads to a point beyond its own route, for exemption from liability for loss or damage while such goods are in the custody of any of such other connecting railroad companies, is valid. *Taylor v. Little Rock etc. R. R. Co.*, 29 R. 1.

52. *Right to tolls or freight.* — The legislature may regulate the use of a railroad franchise, and limit the amount of tolls thereon, if not deprived of that power by a legislative contract with the owners of the road. *Beekman v. Saratoga etc. R. R. Co.*, 22 D. 679.

A railroad company has a lien for freight charges, and can withhold delivery until payment. *Galena etc. R. R. Co. v. Rae*, 68 D. 574.

The company may demand prepayment of freight charges, but in omitting such demand, the company becomes bound to transport the freight according to its custom, and slight evidence of a willingness to pay will be sufficient to support an action for damages caused by refusal to receive such freight. *Ib.*

Whatever is carried into a passenger-car as baggage is so far in possession of conductor or agent of the road as to authorize him

For Index to Notes in American Decisions and American Reports, see Volume I.

to exercise the right of retainer for dues for passage or freight on the article itself. *Hutchings v. Western & A. R. R.*, 71 D. 156.

A statute authorized railroads to charge for freight "not exceeding the rate of fifty cents per hundred pounds per hundred miles." *Held*, that they might charge fifty cents for less than one hundred pounds. *Murray v. Gulf C. & S. F. R. Co.*, 51 R. 650.

53. Discrimination, and remedy therefor.*—An agreement by a railroad company to carry goods for certain persons, at a cheaper rate than it will carry under the same conditions for others, is void, as creating an illegal preference. *Messenger v. Pennsylvania R. R. Co.*, 13 R. 457.

An act prohibiting not only unjust discrimination but all discrimination in railway freights, is in violation of a State Constitution which provides for the passage of laws to prevent unjust discrimination. *Chicago & A. R. R. Co. v. People*, 16 R. 599.

It seems that the discrimination is unjust where less rates for greater distances are charged only on the ground of the existence of competing lines. *Id.*

In the grant of a franchise of building and using a public railway, there is an implied condition that it is held as a quasi public trust for the benefit of the public, and the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. *Messenger v. Pennsylvania R. R.*, 18 R. 754.

A contract of a railroad company, which gives to certain persons an exclusive advantage or monopoly over all other transporters in the transportation of goods, is unjust and cannot be legally enforced. *Id.*

In order to secure freight which would otherwise go by a different route, a railroad company may discriminate in rates in favor of persons living at a distance from its route, provided its charges against others not similarly situated are reasonable. *Ragan v. Allen*, 42 R. 684.

Discrimination in freight tariffs by railway companies means charging different shippers unequal sums for carrying the same quantity equal distances. *Freight Discrimination Cases*, 59 R. 250.

A statute imposing a penalty on any railroad which shall charge for transportation of any freight over its road a greater amount than shall be charged at the same time by it for an equal quantity of the same class of freight, transported in the same direction over any portion of the same railroad, of equal distance, means that the compensation charged shippers for carrying an equal quantity of the same class of freight, going in the same direction, must be equal in amount for equal distances, no matter on

what part of the road, at any time while its list of charges for carrying freight remains unchanged. *Id.*

A contract between a railroad company and a shipper, that the latter shall pay the regular and established rates of freight, the same as all other shippers, and that the company shall pay back to him a certain portion of the freight so charged and paid, whereby such shipper will pay a less rate for transportation than that paid by others, and the public generally, for like services, under similar circumstances and for like distances, is void as against public policy at common law, and under the statute against unjust discriminations. *Illinois etc. R. R. Co. v. Ervin*, 59 R. 369; *Scofield v. Railway Co.*, 54 R. 846.

Plaintiff was accustomed to ship coal by defendants' railroad for transportation beyond their line upon the Delaware river. Defendants had also allowed plaintiff, for a certain consideration, to use their wharf at the river terminus of the railroad; but subsequently, there not being room for all the shippers, they denied plaintiff the wharf facilities, while they allowed others to use the wharf. *Held*, that although transportation by defendants, common carriers, was necessarily open to the public without discrimination, yet wharfage was within the discretion of defendants, and a mandatory injunction would not lie compelling them to allow wharfage facilities to plaintiff as well as others. *Audenried v. Philadelphia & R. R. Co.*, 8 R. 195.

Where an action was brought against a railroad company for an alleged unjust discrimination in favor of an express company, by affording better and extra facilities to it for transportation than to the plaintiff, and the defendant demurred—*Held*, that an action would lie for damage caused by such discrimination; and also that though the unreasonable preference was practiced in another State, if in violation of the law thereof, the action would still lie. *McDuffes v. Portland and R. R.*, 13 R. 72.

b. Carriage of Passengers and their Baggage.

54. Regulations of passenger traffic.*—A railroad company may make reasonable regulations respecting passengers and other persons using its road or houses and buildings connected therewith, the reasonableness of such regulations depending in some measure upon the locality of the depot at which they are adopted. *Com. v. Power*, 41 D. 465; *Johnson v. Concord R. R. Corp.* 88 D. 199.

The company has a right to require of its

*Rules and regulations which company may make respecting passengers and others not employees, see notes, 41 D. 471-486; 45 D. 192-199. Obligation, to stop for passenger at times advertised, see note 66 D. 605-606.

*Discrimination in freights and fares, see notes, 41 D. 484-486; 44 R. 563, 569; 54 R. 862-865.

For Index to Notes in American Decisions and American Reports, see Volume I.

passengers compliance with all reasonable rules tending to promote comfort, convenience, good order and behavior, and to secure the safety of its trains, and to enable the company to conduct its business as a common carrier with advantage to the public and to itself. *Illinois Cent. R. R. Co. v. Whittemore*, 92 D. 138.

The company is bound to carry a passenger who observes all the reasonable rules of the company. *Id.*

The court must determine whether a rule adopted by the company is a reasonable one. Such question is purely one of law, and must be determined by the court, and not the jury, although it is proper for the court to admit testimony as to the necessity of such rule. *Id.*

Such regulations need not be in form of by-laws, enforced by penalties and forfeitures. *Com. v. Power*, 41 D. 465; *State v. Ouston*, 61 D. 671.

The company may delegate to its superintendent of a particular depot the power to make regulations for the government of persons resorting there. *Com. v. Power*, 41 D. 465.

A license to the public to enter a depot, except for the purpose of taking passage, is revocable. *Id.*

The superintendent of the depot may prohibit innkeepers from coming upon the platform at such depot to solicit custom; and where the rule has been particularly violated by a certain person, he may be forcibly excluded from the platform, although he has a ticket and comes there to take passage on the train, if he does not show his ticket or declare his purpose, and the superintendent has ground to believe and does believe that he comes to solicit custom, and uses no more violence than necessary to expel him from the platform; and such expulsion is not indictable as an assault. *Id.*

It is the duty of the company to treat all persons alike; and if it holds itself out as a common carrier of passengers by steamboat across a navigable bay at the end of its route, and contracts generally with persons to carry them over its road and across the bay, it is bound to contract with and convey over the road and bay all persons who apply and tender the right fare. *Wheeler v. San Francisco etc. R. R. Co.*, 89 D. 147.

Railroads, whether built, owned and conducted by the state or by private corporations, and whether exacting tolls or free, are public highways. In consideration of the franchise they receive from the state, railroad corporations agree to perform certain duties toward the public, and the power of determining those duties and enforcing their performance is vested in the appropriate tribunals of the state. *Railroad Comm'rs v. Portland & O. R. R. Co.*, 18 R. 208.

A statute which prohibits any railroad

corporation from demanding and receiving for the transportation of passengers more than three cents per mile, for a distance of more than eight miles, gives the party aggrieved a right to recover from such corporation a forfeiture of not less than twenty-five dollars for each case of overcharge. *Pittsburg etc. R'y Co. v. Moore*, 31 R. 543.

Even where the charter of a railroad company gives it the right to regulate its charges, the state may create a commission with the power to see that it keeps within its charter limits, to prevent unjust discrimination, and to enforce such reasonable regulations as the state may deem necessary. *Stons v. Yanco etc. R. R. Co.*, 52 R. 193.

55. Railroad tickets; and respective rights of passenger and company.

— 1. *In general.* — The company's liabilities and the passenger's rights are the same, whether the passenger's ticket be purchased at the office of the company, of an agent elsewhere, or of a contiguous railroad company, entitling the purchaser to pass on both roads, and received by the former as an ordinary ticket. *Schopman v. Boston etc. R'y Corp.*, 55 D. 41.

A person holding a ticket, who is about to take a train, has as much right to cross a side-track which is in the way provided by the company to reach the train as he would have to cross a public street or highway. *Indiana Central R'y Co. v. Hudson*, 74 D. 254.

A purchaser of a ticket to a station on the line of the railroad is entitled, in the absence of express stipulations, to be carried to that station in a reasonable time and manner, agreeably to the reasonable rules and regulations of the company. *Johnson v. Concord R. Corp.*, 88 D. 199.

A passenger who purchases a ticket for a distant station and gets off the train temporarily and with no objection or notice, while it is stopping at an intermediate station, does no illegal act, but for the time he surrenders his place and rights as a passenger; but he may return and resume his place and rights as a passenger on the train before it starts, and the officers of the railway are bound to give reasonable notice of the starting of the train. *State v. Grand Trunk R'y*, 4 R. 258.

When a passenger has been lawfully ejected from a railway train, for non-payment of fare, he cannot demand to be carried forward on the same train without paying the disputed fare, and his purchase of a ticket at the point of ejection will not entitle him to readmission to the train. *Stons v. C. etc. R. Co.* 29 R. 458.

A railway ticket marked, "good on passenger trains only," does not imply that all the passenger trains of the railroad company issuing it will stop at the station designated on it, nor impose on the company any obli-

For Index to Notes in American Decisions and American Reports, see Volume I.

gation to stop there contrary to its rules. *Ohio and M. R'y Co. v. Searthout*, 33 R. 104.

A railway company may lawfully issue tickets at a reduced rate and impose the condition of non-transferability; but has no right to take up the tickets and exclude the transferee from the train under the condition that it may refuse to accept it. The measure of damages is the value of such ticket. *Post v. Chicago etc. R. R. Co.*, 45 R. 100.

One who purchased a ticket from New York to Philadelphia from a person who was not an authorized agent of the company, may maintain an action against the company for refusal to carry him, the sale being legal in New York but forbidden under penalty in Pennsylvania, but there being no authority in the statute for refusal to carry on tickets purchased from unauthorized agents. *Sleeper v. Pennsylvania R. R. Co.*, 45 R. 380.

A railway passenger, with a ticket for a station at which the train does not stop, has a right to ride to an intermediate station at which it does stop. *Richmond etc. R. R. Co. v. Ashby*, 52 R. 620.

The plaintiff having purchased at Birmingham a ticket to Hanceville, a station ten miles beyond Blount Springs, entered a freight train which was not authorized to carry passengers beyond Blount Springs; he testified that the ticket agent directed him to take it; being informed by the conductor, after starting, that he could not be carried beyond Blount Springs, he declined to leave the train, as the conductor offered him an opportunity to do, and declared that he would go on, and having surrendered his ticket, which the conductor thereupon cancelled, he travelled to Blount Springs, and was there required by the conductor to leave the train. *Held*, that the company was not liable unless the ticket agent gave that direction. *South etc. Ala. R. R. Co. v. Huffman*, 52 R. 349.

2. *Passengers bound by regulations of company.* — Purchasers of tickets are bound to comply with all reasonable rules and orders of the company or their agents, as much when going to the cars from the station-house, or from the cars to a place of safety beyond a railroad track, as they are when actually on board the train, and while the transit continues. *Warren v. Fitchburg R. R. Co.*, 85 D. 700.

It is the duty of a passenger to inform himself beforehand of the regulations of the company for running its trains, and the fact that a ticket for a certain station is sold to him by the company without notice, and that he is permitted to enter the first train leaving thereafter, does not entitle him to require that the train be stopped at such station if it is not in accordance with the regulations

for running trains. *Pittsburg etc. R'y Co. v. Numm*, 19 R. 703.

A railroad company may lawfully require passengers to exhibit their tickets before entering the cars, and may refuse to receive any person as a passenger although he exhibits a ticket, who is drunk to such a degree as to be disgusting, offensive, disagreeable, or annoying, and likely to violate the common proprieties, decencies, and civilities of life. *Pittsburgh etc. R'y Co. v. Vandyne*, 26 R. 68.

3. *Time-table—changes of time.* — A railroad company, by advertising the times when its trains run, agrees with holders of tickets that its trains will run at the times advertised, but with an implied reservation of a power to change the times upon giving reasonable notice. *Sears v. Eastern R. R. Co.*, 92 D. 780.

Reasonable notice of change of time, as advertised in the newspapers, when a train will run, is not given to one who previously purchased tickets in accordance with the advertisement, by posting up handbills in the cars and stations, without his knowledge, announcing the change. *Ib.*

An express contract cannot be controlled or varied by usage; and therefore, where a railroad company advertises the times when its trains will run, and sells tickets accordingly, evidence of a usage of the company to change the times of running trains, without giving reasonable notice thereof, is inadmissible. *Sears v. Eastern R. R. Co.*, 92 D. 780. And see *Gordon v. Manchester & L. R. R. Co.*, 13 R. 97.

4. *When ticket expires.* — A passenger ticket, dated and having the words "good only two days after date," stamped upon its face, is not valid after the expiration of the two days, and the railroad company may recover its usual fare. *Boston etc. R. R. Co. v. Proctor*, 79 D. 729.

A rule established by a railroad company limiting the time within which tickets over its road should be used, provided that joint tickets should be good for such further time as might be necessary to enable the holders, by the regular trains of the road, to reach the station to which such tickets were sold, is not unreasonable. *Johnson v. Concord R. R. Corp.*, 88 D. 199.

Evidence that in various instances conductors allowed tickets to be used contrary to the provisions of a reasonable rule established by a railroad company, and in violation of instructions, is not competent to show a usage on the part of the company in conflict with the rule, if such instances are not shown to have come to the knowledge of the governing officers of the corporation. *Ib.*

Where a ticket over connecting lines is limited to a specified number of days, the last day falling on Sunday, and the last line runs no train on that day, the passenger is

For Index to Notes in American Decisions and American Reports, see Volume I.

entitled to passage on the next day. *Little Rock etc. R'y Co. v. Dean*, 51 R. 584.

A ticket conditioned "not to be good for passage" after nine days from date of sale does not require the passage to be completed within that time. *Lundy v. Central Pac. R. R. Co.*, 56 R. 100. Compare *Auerbach v. New York Cen. etc. R. R. Co.*, 42 R. 290.

5. *Right to a seat.* — Plaintiff bought a ticket on defendant's road from W. to B. Not being able to obtain a seat in the car, he refused to surrender the ticket, and was ordered to leave the train on its arrival at F. At F. he obtained a seat and tendered his fare from there to B., but refused to either surrender his ticket or to pay the fare from W. The conductor ejected him. In an action for damages based upon the contract entered into at W.,—*held*, that under the contract plaintiff could not maintain the action. *Davis v. Kansas City etc. R. R. Co.*, 14 R. 457.

It seems that a passenger who exhibits his ticket and demands a seat has a right to have that demand complied with before he can be required to surrender his ticket. *Id.*

6. *Separate car for women.* — A regulation of a railroad company, setting apart one car of each passenger train for women and the men accompanying them, is reasonable. *Base v. Chicago etc. R'y Co.*, 17 R. 495.

If there be no sitting room in the ordinary passenger cars for men excluded by the regulation from the car for women, and there be room to seat them in the latter car, it is the duty of those having charge of the train either to admit them to such car, or to make room for them in the ordinary cars by admitting others to the women's car. *Id.*

Where a man is unable to find a seat in the ordinary cars and is not furnished with one within a reasonable time, by the officers of the train, he may enter the women's car, provided there be a seat for him there and he can enter peaceably and unforbidden, and he is entitled to remain, unless furnished with a seat elsewhere; but he has no right to attempt, by force, to enter the car. *Id.*

7. *Excursion and commutation tickets.* — The holder of a special excursion ticket for a round trip, surrendering it and receiving instead a regular ticket, substituted by the company for its own convenience, gets no right to return upon any other than the excursion train. *McRae v. Wilmington & W. R. R. Co.*, 43 R. 745.

If a railway company attempts to discriminate against one by refusing to sell him commutation tickets at the same rate that it sells them to the public generally, the sale may be enforced by *mandamus*. *State v. Delaware etc. R. R. Co.*, 57 R. 543.

D. purchased of a railroad company a

commutation ticket that entitled him to ride upon their road a certain time upon certain conditions; one of the conditions was, that the ticket should be shown to the conductor on every trip the holder might make, and, in case it should not be shown when requested by the conductor, regular fare for that trip should be paid. On one occasion D. by mistake left his ticket at home, and when called for by the conductor, he stated that he had forgotten it and refused to pay the regular fare, whereupon he was ejected from the train at the next station. *Held*, that D. could not recover of the company. *Downs v. New York etc. R. R. Co.*, 4 R. 77.

A commutation railway ticket, conditioned to be "good for 1,000 miles" and "within six months," is not good after six months, although the holder has not travelled 1,000 miles on it; and where, after the expiration of that period, he enters the baggage car of the company, and refuses to pay his fare except by presenting such ticket, he is a trespasser, and may be ejected at any point, and is not entitled to the benefit of a statute which prohibits the ejection of passengers except near a dwelling-house or at a station. *Lillis v. St. Louis etc. R. Co.*, 27 R. 255.

56. *Regulations as to purchase and surrender of tickets, or payment of extra fare.** — A railroad company has power to make all reasonable rules for the government of its trains; and may, as to certain classes of trains, require tickets to be purchased before allowing passage to be taken thereon. *Chicago etc. R. R. Co. v. Flagg*, 92 D. 133.

The company is not required to keep open its ticket-office for the sale of tickets to passengers beyond the advertised time fixed for the departure of trains; and *Chicago etc. R. R. Co. v. Parks*, 63 D. 562, and *St. Louis etc. R. R. Co. v. Dally*, 19 Ill. 353, are not to be considered as holding that such company must keep its office open for that purpose until the actual departure of the train. *St. Louis etc. R. R. Co. v. South*, 92 D. 103.

The company is required to keep open its ticket-office for sale of tickets to passengers for a reasonable time before the departure of each train, and up to the advertised time for its departure, but not up to the time of its actual departure. *Id.*

The company is required to furnish a convenient and accessible place for the sale of tickets, and to afford the public a reasonable opportunity to purchase them; but parties who will not avail themselves of it, are alone at fault, and must pay the extra fare or be ejected from the train on refusal to pay it. *St. Louis etc. R. R. Co. v. South*,

* Rule requiring the purchase and exhibition of tickets, see note, 41 D. 473-476.

Discrimination between fare paid on train and fare paid at ticket office, see note, 41 D. 483, 484.

For Index to Notes in American Decisions and American Reports, see Volume I.

92 D. 103; *Chicago etc. R. R. Co. v. Flagg*, 92 D. 133.

Failure of the company to give a reasonable opportunity for purchase of ticket, by one who desires to take passage on one of its trains, gives such person a right to enter and be carried to his place of destination on payment of the regular fare to the conductor; and his expulsion, under such circumstances would be unlawful. *Chicago etc. R. R. Co. v. Flagg*, 92 D. 133.

A railroad company having opened its freight trains for the conveyance of passengers, is bound to afford reasonable facilities to them for the procuring of tickets shortly before entering the trains, and neglecting to do so, cannot rightfully eject a passenger, offering to pay his fare on the train, for not having previously procured his ticket. *Evans v. Memphis and C. R. R. Co.*, 28 R. 771.

Under a statute permitting railroad companies to make an extra charge for fares paid in the cars, when a reasonable time has been allowed to procure tickets before the starting of the train, it is not necessary to keep open the ticket office at a small station until the very moment of starting. *Everett v. Chicago etc. R'y Co.*, 58 R. 207.

Railroad charges for freights and fares must be uniform, and without favor or prejudice, as between all of each class established by the company. *Chicago etc. R. R. Co. v. Parks*, 68 D. 562.

A railway company may lawfully make and enforce a rule that passengers not procuring tickets before entering a train shall pay a greater specified rate of fare, and passengers are bound to take notice of and conform to such rule. *Toledo etc. R'y Co. v. Wright*, 34 R. 277. *S. P., Hilliard v. Gould*, 66 D. 765; *Jeffersonville R. R. Co. v. Rogers*, 92 D. 276. And this rule applies to a passenger who pays only from one station to another without a ticket, and he may be compelled to pay the extra charge at each station as a new contract made at such station. *Chicago etc. R. R. Co. v. Parks*, 68 D. 562.

A regulation making discrimination in passenger fares in favor of persons purchasing tickets before entering the cars imposes upon the railroad company the obligation to afford passengers the opportunity to avail themselves of the discrimination; and if this opportunity is not offered, the regulation is not binding, and a passenger who after tendering the regular ticket rate to the conductor is expelled from the train may recover from the company. *Jeffersonville R. R. Co. v. Rogers*, 92 D. 276; *St. Louis etc. R. R. Co. v. South*, 92 D. 103.

The rule of a railroad company requiring passengers to surrender their tickets to the conductor, when demanded, is a reasonable one and may be enforced. *Illinois Cen. R. R. Co. v. Whittemore*, 92 D. 138.

By the regulations of defendants, a railroad company, persons taking passage in their cars, at a place where a ticket office was established, without having first procured a ticket, were charged ten cents in addition to the regular fare. The plaintiff, finding the ticket office closed, entered the cars without a ticket, intending to go to M.; made known to the conductor his destination, and gave him fifty cents, which was the regular fare; the conductor demanded the additional ten cents, which was refused, and the plaintiff was expelled at J., the car fare to which was fifty cents. *Held*, in an action for damages: (1) that the conductor, having accepted and retained the fifty cents, could not afterwards eject the plaintiff; (2) that evidence was inadmissible to show the car fare to J.; and, (3) that the company, in order to enforce said regulations, were bound to keep their ticket office open a reasonable time in advance of the departure of the train, to enable passengers to procure their tickets. *Du Lawrence v. St. Paul etc. R. R. Co.*, 2 R. 210.

57. Right to stop over.*—A rule of a railway company that a passenger must go through on same train to his destination, is reasonable, it seems, and forms part of the contract upon the purchase of a ticket, although the rule is unknown to the passenger. *Chaney v. Boston etc. R. R. Co.*, 45 D. 190.

A purchaser of a railway ticket from one place to another can not stop over at an intermediate point and continue his journey on the same ticket on another train, where a rule of the railway company provides that parties holding tickets from place to place must go through on the same train, although the passenger has no knowledge of the rule, and there is no restriction on the ticket itself, especially where he is informed of the rule before he stops off, and his money is tendered back to him, deducting the fare to the point where he leaves the train. *Id.*

A passenger by purchasing a ticket between two points, acquires a right to be carried directly from one point to the other without interruption, but not to be carried from one point to the other at different times and by different lines of conveyance. If he leaves the train before reaching his destination, he forfeits all rights under his contract, and cannot resume his journey on a different train by virtue of the check given to him by the conductor of the original train. *State v. Overton*, 61 D. 671; *McChes v. Philadelphia etc. R. R. Co.*, 6 R. 345.

The company may charge a way-passenger a higher fare for traveling over its road by different journeys than it charges through-passengers. *State v. Overton*, 61 D. 671.

* Passenger's right to stop over, see note, 34 R. 22, 23.

Rules as to stop-over tickets, see notes, 41 D. 479, 480; 45 D. 192-198.

For Index to Notes in American Decisions and American Reports, see Volume I.

The presumption is that a railroad ticket agent at a way station has no authority to change or modify contracts between the company and its through passengers. So *held*, where a conductor's "check" was pronounced good for another train and day (contrary to the face of the check,) by the agent. *McClure v. Philadelphia etc. R. R. Co.*, 6 R. 345.

One travelling on a "drover's ticket," which states that it is "good" only in his hands for one seat, and "good only until" a day named, has no right to stop over without permission, and if he does so, may be ejected when he enters another train the following day, if he refuses to pay fare. *Dictick v. Pennsylvania R. R. Co.*, 10 R. 711.

A railway passage ticket only entitles the holder to a continuous passage, and he is not entitled to stop over without consent of the railway company. In an action by a passenger against a railway company for a breach of contract to carry, it appearing that he was not entitled to passage, and was ejected on that account it is immaterial that the conductor was drunk and used insulting language to him at the time. *Stone v. O. etc. R'y Co.*, 29 R. 458.

A statute of Maine, enacting that the holder of a railway ticket shall have the right to stop over and that the ticket shall be good for six years, has no extra-territorial force. *Carpenter v. Grand Trunk R'y Co.*, 39 R. 340.

A regulation of a company, requiring passengers desiring to stop over between the starting point and the destination to procure stop-over tickets, is reasonable. *Forten v. Milwaukee etc. R'y Co.*, 41 R. 23.

Plaintiff, before purchasing a ticket at a railway station for another station on the same line, informed the company's ticket agent that he wished to stop off at an intermediate station and then resume his journey to its destination. The agent told him he could do so, and he then purchased a ticket to such destination which contained a statement, "good for this day only." He stopped off at the intermediate station and resumed his journey by another train. Upon refusing to pay fare to the conductor, who declined to accept the ticket, he was ejected from the train, no tender of the extra amount he had paid on his ticket being made. To within a few days previous to the time, stop-over tickets had been given by conductors, but the rule had been changed. *Held*, that, under the circumstances, the ejection was wrongful, and a verdict against the railway company for damages therefor was sustained. *Burnham v. Grand Trunk R'y Co.*, 18 R. 220.

Plaintiff was a passenger on the cars of defendants, under a contract to carry him from Charlotte, N. C., to Augusta, Ga., with the privilege of stopping at Colum-

bia. His ticket was a through ticket from New York to Savannah, with coupons for the different roads—for defendant's road there being two, one from Charlotte to Columbia, and one from Columbia to Augusta. On the passage from Charlotte to Columbia, W., the conductor on the train, detached both coupons, and gave plaintiff a conductor's check, which, by the rules of the company and the general usage of railroads, was good only for that trip. Plaintiff stopped at Columbia, and the next day took the train for Augusta, in charge of J., another conductor. On this train his ticket was again demanded, and on his exhibiting the conductor's check, and his ticket, without the coupon, to Augusta, was informed by J. that they did not answer, and that he must either pay the fare to Augusta, or leave the train. He failed to pay, and was ejected from the train. *Held*, that the act of J. in ejecting plaintiff from the train was wrongful, and that defendants were liable in damages therefor. Plaintiff's rights grew out of the terms of his contract, giving him the privilege of stopping at Columbia. He did not owe defendants the duty of giving notice of his intention to stop, or of making inquiries as to the force and effect of the conductor's check; and if he failed to give such notice or make such inquiries, he was guilty of no negligence of which defendants had the right to complain. On the contrary, the duty of taking notice of and regarding his right to stop was owed by defendants to him, and when conductor W. detached the coupon from Columbia to Augusta, he should have delivered in its place some token having the same force and effect. *Palmer v. Railroad Co.*, 16 R. 750.

58. Liability for ejecting passenger from car. — 1. *Grounds for expulsion, and when proper.** — A passenger on a railroad train who refuses to pay his fare may be removed therefrom at a suitable time and place, if no unnecessary force be used in effecting such removal. *State v. Overton*, 61 D. 671.

A statute requiring conductors to eject passengers from train on refusal to pay established fare is applicable to all persons properly acting as conductors, without regard to the formality of their appointment or the source of their compensation. *Hilliard v. Gould*, 66 D. 765.

An attempt of a passenger to use a cancelled ticket, without any explanation of how he became possessed of it, or why he offered it instead of his fare, is presumptive evidence of wrong on his part. *Terre Haute etc. R. R. Co. v. Vanatta*, 74 D. 96.

A passenger may be ejected for refusing

* Ejecting passenger for not producing ticket or paying fare, see note, 41 D. 476-478.

Power of expulsion, when, where, and how may be exercised, see note, 68 D. 570-572.

For Index to Notes in American Decisions and American Reports, see Volume I.

to pay his fare, by the use of all lawful and proper means. *O'Brien v. B. & W. R. R. Co.*, 77 D. 347.

If a railroad company regularly carries passengers by freight train, and holds itself out to the public as so doing, it thereby becomes a common carrier of passengers by such freight train, and has no more right to expel a passenger therefrom without cause than from a regular passenger train. *Chicago etc. R. R. Co. v. Flagg*, 92 D. 133.

A carrier has no right to expel a passenger for non-payment of full fare without first returning the fare paid, the passenger having offered to pay the balance before expulsion but after the train is stopped. *Bland v. Southern Pacific R. R. Co.*, 36 R. 50.

A railway passenger, who ignorantly and in good faith tenders a tax-certificate for his fare, may not be ejected as a trespasser, and if before ejection another person offers to pay his fare for him, the carrier must receive it and carry him; and if notwithstanding he ejects him, he is liable to punitive damages. *Louisville and N. R. R. Co. v. Garrett*, 41 R. 640.

If a passenger asks a conductor for a stop-over ticket, and by his mistake receives only a trip check, the second conductor may lawfully eject him for non-payment of additional fare. *Yorton v. Milwaukee etc. R'y Co.*, 41 R. 23.

Where a railway passenger has *delirium tremens*, annoys and frightens the other passengers, and becomes insensible, he may be removed at a station and put in charge of an overseer of the poor. *Atchison etc. R. R. Co. v. Weber*, 52 R. 543.

It is not only the right of a conductor to expel from a train a drunken, unruly, boisterous passenger, but when such a person endangers by his acts the lives of the people, it is the duty of such conductor to remove such passenger in order to protect others from violence and danger. But this right must be reasonably exercised, and not so as to inflict wanton or unnecessary injury upon the offending passenger, nor so as to needlessly place him in circumstances of unusual peril. If having exercised reasonable prudence, considering the time, place and circumstances, as also the condition of the drunken man himself, the conductor expels such passenger, who is afterward run over and killed by another train not in fault, the expulsion itself is not such proximate cause of the death as will make the company liable. *Railway Co. v. Valleley*, 30 R. 601.

The plaintiff, at Jacksonville, bought a ticket on the defendant's railway to Elkhart, and entered a train pointed out to him by the ticket-seller. The conductor accepted the ticket, but immediately notified him that the train did not stop at Elkhart, and that he could get off at Palestine and there resume his journey for Elkhart. He

refused to get off and was ejected. *Held*, proper. *International G. N. R'y Co. v. Hassell*, 50 R. 525.

2. *Place of expulsion.* — A passenger may be ejected from a railroad car at any regular station, but not elsewhere, if he refuses to pay the fare required by the railroad company's tariff. *Chicago etc. R. R. Co. v. Parks*, 68 D. 562; *Terre Haute etc. R. R. Co. v. Vanatta*, 74 D. 96.

A passenger may recover for injury sustained in being ejected from a railroad car elsewhere than at a station, for non-payment of fare, but if there is no misconduct on the part of the company's agents, nor any peculiar circumstances to justify it, a verdict of one thousand dollars damages for the act will be held to be excessive. *Chicago etc. R. R. Co. v. Parks*, 68 D. 562.

A passenger can only be expelled at a regular station for violating a rule of the company requiring passengers to purchase tickets before entering the train. The willful neglect to comply with that rule and the refusal to pay the fare are substantially the same offense against the rights of the road, and the penalty for the one is no greater than that for the other. *Illinois Cent. R. R. Co. v. Sutton*, 92 D. 81; *Chicago etc. R. R. Co. v. Flagg*, 92 D. 133; *Illinois Cent. R. R. Co. v. Whittemore*, 92 D. 138.

The company is liable for expelling a passenger at a place other than a regular station, where the passenger, on being informed just before the train started of the rule of the company requiring tickets to be purchased before entering the cars, seeks to buy a ticket, but finds the office closed, and afterwards offers to pay his fare to the conductor, who refuses to receive it. *Illinois Cent. R. R. Co. v. Sutton*, 92 D. 81.

"Regular station" means the usual stopping-place for discharge of passengers. *Chicago etc. R. R. Co. v. Flagg*, 92 D. 133.

A water-tank, even if a "usual stopping-place for trains," is not a "regular station," within the spirit of the law. *Ib.*

A "regular station" cannot be created by local usage; thus a local usage adopted by persons of getting on or off a train, for their own convenience, at a place other than the regular station, does not make such place a "regular station" for the discharge of passengers. *Ib.*

The phrase "usual stopping-place," in a statute concerning railroad law, means a regular station for passengers to get on and off the train. *Ib.*

A passenger who refuses to pay fare may be expelled between stations where the charter of the railroad company is silent upon the subject, and there is no general statute requiring the expulsion to be made at a station. *Jeffersonville R. R. Co. v. Rogers*, 92 D. 276; *McClure v. Philadelphia etc. R. R. Co.*, 6 R. 345.

For Index to Notes in American Decisions and American Reports, see Volume I.

A passenger's refusal to surrender his ticket to the conductor when demanded does not constitute the same offense as the refusal to pay fare, and the statutory prohibition against the expulsion of a passenger for non-payment of fare, except at a regular station, does not apply to the former case. *Illinois Cent. R. R. Co. v. Whittmore*, 92 D. 138.

A railroad company may expel a passenger at a place other than a regular station, for the violation of any reasonable rule other than that of non-payment of fare. *Id.*

The company has a common-law right to expel a passenger from its train, where he has wantonly disregarded any reasonable rule; but the company must not select a dangerous or inconvenient place, and must use no more force than may be necessary for the expulsion; and this right has been restricted by statute in cases of non-payment of fare only. *Id.*

A statute providing that if any railway passenger shall refuse to pay his fare, he may be ejected at any usual stopping-place does not prohibit his ejection at any other safe point. *Toledo etc. R'y Co. v. Wright*, 34 R. 277.

A helpless drunken passenger refusing to pay fare, the conductor, knowing his condition, expelled him not at a station, and in the snow, by reason whereof the passenger was severely frozen. *Held*, that the company was liable. *Louisville etc. R. R. Co. v. Sullivan*, 50 R. 186.

3. *Putting passenger off moving train.* — The company is liable for the act of one of its conductors in improperly putting a person off a freight-car while the train is in motion, if it has instructed its conductors not to allow any person to ride in any freight-car attached to its train. *Holmes v. Wakefield*, 90 D. 171.

A conductor, in excluding a person not entitled to remain on the cars, is acting within scope of his general authority, and the company is responsible for the manner in which he performs such duty. *Kline v. Central Pac. R. R. Co.*, 99 D. 282.

The conductor is bound to exercise reasonable care and prudence in removing a trespasser, or one who is unlawfully upon the car; and if he does not do so, and injury results, the company cannot be absolved from liability on the ground that the wrong was mutual. *Id.*

Where a boy sixteen years old sues for damages for injury sustained by being forcibly expelled from a railroad car while in motion, and the testimony tends to show that he was told that he could not ride, and that he was ordered by the conductor, with a show of force, to get off the car, a nonsuit should not be granted. *Id.*

Where such boy leaps from the car while in motion, in obedience to the conductor's command, accompanied by a show of force,

the court cannot say judicially that his act was voluntary, but should leave it to the jury to say whether, under all the circumstances, the conductor's command did not amount to compulsion. *Id.*

Where a trespasser upon a locomotive engine was thrown off by the servants of the company, while the engine was moving at a dangerous speed, and run over and injured, the company is liable therefor. *Carter v. Louisville etc. R. R. Co.*, 49 R. 780.

4. *Ejecting passenger who has paid fare.* — A railroad company sued for ejection by its conductor of a passenger who has paid his fare, has no ground for exception to instruction that if the conductor removed the passenger in wrongful exercise of discretion given him by the company, the company would be liable; and that the conductor would have the right to remove a passenger for refusal to pay fare if there was a regulation to that effect, but if in such a case he put out passengers who had paid their fare the company would be liable. *Moore v. Fitchburg R. R. Corp.*, 64 D. 83.

The company would be liable for the act of the conductor in ejecting a passenger who had paid his fare, though the conductor was authorized to remove only those who had not paid their fare. *Id.*

5. *The force used — resistance by passenger.* — A railroad company must respond in damages if it uses unnecessary violence in expelling a passenger who has wantonly disregarded any of its reasonable rules. *Illinois Cent. R. R. Co. v. Whittmore*, 92 D. 138; *Higgins v. Watervliet Turnpike etc. Co.*, 7 R. 293.

In an action against a railroad company, where plaintiff claims to recover solely for ejection from cars, and not on account of the manner of it, and a legal justification for the ejection is shown, it is immaterial whether unnecessary force was used by the conductor. *Johnson v. Concord R. R. Corp.*, 88 D. 199.

A passenger attempted to be ejected from a railroad car while in motion will, from the dangerous nature of such act, be justified in making the same resistance as he would to a direct attack on his life. *Sanford v. Eighth Avenue R. R. Co.*, 80 D. 286.

Though a passenger is liable to ejection in proper manner for refusing to pay fare, his resistance to an attempt to expel him without stopping the car does not present a case of contributory negligence on his part. *Id.*

Where a passenger on a railroad car has paid his fare and is lawfully upon the train, he has a right to resist any attempt of the train men to remove him, and if he resists to such an extent that extraordinary force is necessary to remove him and he is thereby injured, his resistance will not prevent his recovering damages therefor. *English v. Delaware etc. Canal Co.*, 23 R. 69.

For Index to Notes in American Decisions and American Reports, see Volume L.

6. *Right to pay fare after refusal, and resume journey.* — Passenger has no right to re-enter car from which he has been ejected for non-payment of fare, and demand transportation, upon tendering his fare, especially when he has been ejected at a place where there is no station. *O'Brien v. B. & W. R. R. Co.*, 77 D. 347; *Pease v. Delaware etc. R. R. Co.*, 54 R. 699. And this rule holds good even though the conductor retains the portion of the fare paid, and although after the stopping of the train to expel him and before expulsion the passenger offers the proper balance. *Haffbauer v. Delhi etc. R. R. Co.*, 35 R. 278. Compare *Swan v. Manchester & L. R. R.*, 42 R. 432; *Louisville etc. R. R. Co. v. Harris*, 42 R. 668.

A passenger on a railway train gave to the conductor the fare which he had been accustomed to pay, and the conductor demanded a further sum as due because the passenger had no ticket. This was refused, and the conductor stopped the train. Then the passenger tendered the additional sum, but the conductor refused it, and ejected him. *Held*, an unlawful ejection, unless the passenger's conduct was willful. *Texas and P. R'y Co. v. Bond*, 50 R. 532.

7. *Right of action for wrongful ejection.* — A railroad company is liable for injuries to a passenger, caused by the conductor's negligence or violence in removing him, upon refusal to pay his fare. *Pennsylvania R. R. Co. v. Vandiver*, 82 D. 520; or where the expulsion arose from a mistake of facts or of judgment on the part of the conductor. *Higgins v. Watervliet etc. R. R. Co.*, 7 R. 293; *Maples v. New York etc. R. R. Co.*, 9 R. 434; *Lobs Eric and W. R'y Co. v. Fox*, 45 R. 484; *Murdock v. Boston and A. R. Co.*, 50 R. 307; or was the result of the willfulness or wrong motive of the conductor in doing the act complained of. *Passenger R. R. Co. v. Young*, 8 R. 78; *Clark v. Wilmington and W. R. R. Co.*, 49 R. 647.

Where a conductor of a railway company, acting under his instructions, refuses to accept a ticket issued by another company as agent of the former, and demands full fare, the passenger, if he refuses to leave, cannot recover for the necessary force used by the conductor in putting him off. *Pennsylvania R. R. Co. v. Connell*, 54 R. 238.

If a railroad passenger rides on a train and refuses to surrender his ticket, or pay, for want of a seat, and is ejected, he may not recover for the ejection, but only for breach of contract to furnish a seat. *St. Louis Railway v. Leigh*, 55 R. 558.

Plaintiff purchased a ticket on defendant's line from S. to R., and took passage on a train which only went part of the way. The conductor on the train took up and retained the ticket, without giving any check or other evidence of a right to a passage on the next train. Plaintiff took the next train on defendant's

line for R., and, when called on for his ticket, informed the conductor that the conductor of the preceding train had retained it. The conductor thereupon demanded the fare, and, it being refused, ejected the plaintiff. *Held*, that plaintiff was not justified in such refusal; the wrongful taking of his ticket by the preceding conductor not exonerating him from a compliance with the rule requiring passengers to present a ticket or pay the fare. *Townsend v. New York Cent. etc. R. R. Co.*, 15 R. 419.

Plaintiff purchased a ticket on defendant's railroad from N. to W. He left the train at an intermediate station, and resumed his journey by another train. The conductor on such train took up the ticket and demanded fare from plaintiff, but refused to return the ticket. *Held*, that plaintiff was entitled to a return of the ticket and that by a refusal to return it defendant lost the right to seek to enforce the payment of fare, by an ejection of plaintiff from the train. *Vankirk v. Pennsylvania R. R. Co.*, 18 R. 404.

Where a passenger on a railroad train, who had paid his fare to a point beyond that evidenced by his ticket, refused on the demand of the conductor to pay the regular additional fare, and was consequently ejected from the train; — *held*, that he could not maintain an action of trespass on the case against the railroad company for such expulsion. *It seems*, that his remedy was an action for breach of contract. *Frederick v. Marquette etc. R. R. Co.*, 26 R. 531.

The plaintiff took passage on defendant's railroad, asked the conductor the fare to his destination, which as the plaintiff knew was a short distance off the defendant's line, was informed of the amount, and paid it to the conductor, receiving a check. At W., the end of the defendant's road, he changed cars, giving up his check, and that car was switched off on another road. The conductor had really charged and taken fare only to W., and had no authority to take fare beyond. The new conductor on the second road demanded the additional fare, which the plaintiff refused to pay, and he was ordered off, and left the train without force or indignity on the part of the trainmen. *Held*, that he could not recover. *Haggerty v. Flint etc. R. R. Co.*, 60 R. 301.

8. *Matters of defence.* — A railroad company may give evidence of a regulation concerning passengers who refuse to pay their fare, in justification, in an action against it for ejecting a passenger for non-payment of fare. *O'Brien v. B. & W. R. R. Co.*, 77 D. 347.

A regulation by a railway company, restricting the holder of a certain class of tickets to special trains, nothing of the kind appearing on the tickets, will not justify the expulsion of the holder of such a ticket

For Index to Notes in American Decisions and American Reports, see Volume I.

from the regular trains, he having taken passage thereon without knowledge of the regulation. *Maroney v. Old Colony R'y Co.*, 8 R. 305.

A railroad company is not liable for the act of a brakeman in putting a trespasser off a freight train unless so directed by the conductor, who alone is authorized to order such ejection. *Marion v. Chicago etc. R'y Co.*, 42 R. 36, note.

Plaintiff bought a ticket over defendant's road with coupons attached. A conductor detached one of the coupons and gave him instead a conductor's check. Before reaching the point for which such check was given, another conductor took the train and demanded the check. Plaintiff could not find it, but tendered him the ticket with the remaining coupons, which was refused, and plaintiff was ejected, without unnecessary force. Held, that defendants were justified. *Jerome v. Smith*, 21 R. 125.

9. *Evidence.* — That a passenger was removed from the car by the conductor, that he fell on the road and hurt his head and back, and that he died from the effect of these injuries, is sufficient to justify the court in letting the question of the cause of the death go to the jury, and in refusing to instruct the jury "that under all the circumstances of the case, their verdict should be for the defendant," the railroad company. *Pennsylvania R. R. Co. v. Vandier*, 82 D. 520.

Plaintiff was ejected from defendant's car for non-payment of fare, after he had tendered what he claimed, and what was afterwards held by the court, to be the legal fare. On the trial defendant offered evidence of plaintiff's declarations, subsequent to the ejection, that he took passage in order to test the question of fares and expecting to be ejected and to make money out of the transaction. Held, that the evidence was admissible and such facts being shown, plaintiff was not entitled to exemplary damages. *Cincinnati etc. R. R. Co. v. Cole*, 23 R. 729.

10. *Question of fact.* — It is question for the jury whether a conductor, in ejecting a person from a railroad train, acted within or in excess of his authority. *Hillard v. Gould*, 66 D. 765.

11. *Damages recoverable.* — An attempt by a passenger to impose on a railroad company will mitigate damages in an action by such passenger against the company for unlawfully putting him off its train at a place other than a regular station. *Terre Haute etc. R. R. Co. v. Vanatta*, 74 D. 96.

A passenger attempting to defraud the company by using a canceled ticket to get from one station to another, is entitled to no more than nominal damages against the company for putting him off their

cars at a place other than a regular station. *Id.*

As a railroad company directing its conductor to eject passengers for failure to pay fare is responsible for his act in so doing, it becomes also responsible for any circumstances of aggravation which attends the wrong. *Sanford v. Eighth Avenue R. R. Co.*, 80 D. 286.

A passenger wrongfully expelled from a train may recover more than nominal damages, even though he has received no personal injuries to his body by reason of such expulsion, and has suffered no pecuniary loss. *Chicago etc. R. R. Co. v. Flagg*, 92 D. 133.

The jury, in estimating the damages, may consider not only the annoyance, vexation, delay, and risk to which the person was subjected, but also the indignity done to him by the mere fact of expulsion; and this, although the proof shows that the conductor acted in good faith, without violence or insult, and that no actual damage was sustained. *Id.*

In an action against a railroad company to recover damages for being wrongfully ejected from defendant's car by defendant's servants, exemplary or punitive damages are allowable. *Atlantic etc. R'y Co. v. Dunn*, 2 R. 382; *Palmer v. Railroad*, 16 R. 750; *Cincinnati etc. R. R. Co. v. Cole*, 23 R. 729. Contra, *Pullman Palace Car Co. v. Reed*, 20 R. 232; *Townsend v. New York Cen. etc. Co.*, 15 R. 419.

A passenger, unable to purchase a ticket because of the failure of the company to furnish him an opportunity to do so, may pay the excess demanded on the train under protest, and recover it by suit, or refuse to pay it, and hold the corporation liable in damages for an ejection. But exemplary damages can only be recovered where the expulsion is characterized by malice, recklessness, rudeness, or willful wrong. *Forbes v. Alabama Great Southern R. R. Co.*, 56 R. 801. And see *Jeffersonville R. R. Co. v. Rogers*, 10 R. 103.

Where the passenger is treated with unnecessary and reckless violence and indignity, and the defendant's servants act in a wanton, high-handed and outrageous manner, the jury may award exemplary or punitive damages, even though the plaintiff might in the first instance have rendered himself liable to expulsion on account of his disorderly conduct. *Philadelphia etc. R. Co. v. Larkin*, 28 R. 442.

A brakeman unlawfully removed plaintiff from defendant's car, and defendant with notice of the trespass retained the brakeman in its service and promoted him. Held, that this amounted to a ratification of the brakeman's act, and that therefore the defendant was liable for punitive damages. *Bass v. Chicago etc. R'y Co.*, 24 R. 437.

For Index to Notes in American Decisions and American Reports, see Volume I.

59. Liability for expelling passenger from station house.* — A railroad station-house is open to the traveling public, and any person desiring to go upon the cars has the right to go into such house at the proper time, and remain there until the departure of the train, whether he has purchased a ticket or not. *Harris v. Stevens*, 73 D. 337.

The right to enter and remain at a station-house may be forfeited by improper conduct of the person, or by his violation of the rules of the company, and then the company by its servants may remove him. *Id.*

Such right to enter and remain at a station-house extends only so far as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars, and as to what is a reasonable time will depend upon the circumstances of each particular case. *Id.*

Railroad companies have not only a right to act as common carriers, but are bound to act as such. *Id.*

The company may remove from the station-house one not intending to travel upon their road, if after request he refuses to depart. *Id.*

The right to remain at the station-house depends on the intent of the party to take a train expected soon to leave, and, upon being requested to depart, he should make known his intent to the person so requesting him. *Id.*

A replication in trespass for removal from a station-house should show that plaintiff was there intending to go upon a train that was expected to leave soon, but need not allege that plaintiff went to the station-house for the purpose of traveling on the cars. It is sufficient if such intent was formed after the entry and before the assault. *Id.*

The platform of a railroad company, at its station, is in no sense a public highway, and is not dedicated to public use as such. It is erected expressly for the accommodation of passengers arriving and departing on trains. Being uninclosed, persons are allowed the privilege of walking over it for other purposes, but they have no rights there, and may, after being notified to leave, be removed by whatever force may be necessary. *Gillis v. Pennsylvania R. R. Co.*, 98 D. 317.

60. Liability for assaults upon passengers by employees.† — Where a railroad conductor attempts to seize articles of property in the hands of a passenger for the purpose of enforcing payment of fare, the corporation is liable to an action for assault and battery. *Ramsden v. Boston & A. R. R. Co.*, 6 R. 200.

* Right of, to exclude persons because apprehending danger of annoyance to other passengers, see note, 57 D. 716, 717.

† Assault by employé, when company answerable for, see notes, 28 R. 112, 113; 41 R. 340-343; 42 R. 25-28.

A railroad company is liable for a malicious and criminal assault of a servant upon a passenger when committed in carrying out what the servant supposed to be an order from the company, although such order did not contemplate its enforcement by such means. *McKinley v. Chicago etc. R. R. Co.*, 24 R. 748.

Where the plaintiff came lawfully upon the cab of a railroad freight train, treating with the conductor for passage, as has frequently been done and as was still being done at the time of the trial by others, the company will be liable for a violent and malicious assault upon him by the conductor. *Western A. R. R. v. Turner*, 53 R. 842.

The plaintiff, a passenger in defendants' railway car, gave up his ticket to a brakeman, who was authorized to demand and receive it. Shortly after the latter approached plaintiff, denied that he had received his ticket, and assaulted and grossly insulted him. In an action against the company to recover damages, — *held*, that the defendants were liable, and that plaintiff could recover exemplary damages, and where the defendants retained the servant in their employ after notice of his conduct, the court refused to set aside as excessive a verdict of \$4,850. *Goddard v. Grand Trunk R'y Co.*, 2 R. 39.

Plaintiff entered defendant's car as a passenger, his dog accompanying him. While the train was in motion, a brakeman attempted to eject the dog but was forcibly prevented by the plaintiff. Afterward, the brakeman suddenly attacked plaintiff, inflicting upon him serious injuries. On the trial of an action for trespass therefor against the company, the court charged that if the brakeman "was acting in the performance of his duty as brakeman, he would be justified in using a reasonable degree of force, necessary and proper to accomplish the removal of the dog from the car, but if he used more violence than was necessary, and inflicted on plaintiff blows that were unnecessary to perform his duty, the company would be liable, and the jury may, in that case, award punitive or exemplary damages." — *Held*, correct. *Hanson v. European etc. R'y Co.*, 16 R. 404.

The jury returned a verdict for plaintiff for \$4,000. *Held*, that the damages were not so clearly excessive as to justify the court in setting aside the verdict on that ground. *Id.*

The conductor of a railroad train kissed a female passenger against her will, for which act, upon learning of it, the company discharged him. In an action, by the passenger, against the company, for the assault, *held*, that the company was liable for compensatory damages, and that a verdict for \$1,000 was not excessive. *Crocker v. Chicago etc. R'y Co.*, 17 R. 504.

For Index to Notes in American Decisions and American Reports, see Volume I.

A passenger on defendant's railway, finding no vacant seats in the ordinary coaches, the seats being occupied either by passengers or their baggage, proceeded to a drawing-room car, owned by a private individual, but forming part of the train, and regularly run with it by contract with the defendant, and there took a seat. When called on for extra fare for that seat, he refused, announcing his readiness to go into the other cars if a seat were provided for him there. Thereupon the porter of the drawing-room car, employed by its owner, attempted to eject him. *Held*, that the defendant was liable for this assault. *Thorpe v. N. Y. Cent. etc. R. R. Co.*, 32 R. 325.

A railway ticket-agent left another employee in charge of the ticket office. He returned to a purchaser too little change, and on being asked for it, assaulted him, *Held*, that the company was liable. *Pick v. Chicago etc. Ry Co.*, 60 R. 878.

The plaintiff, a passenger on defendant's road, applied to the baggage master to have his trunk checked, which not being promptly done, the plaintiff became angry and used threatening and abusive language, whereupon the baggage master seized a hatchet and struck him. *Held*, that the company was not liable. *Little Miami R. R. Co. v. Wetmore*, 2 R. 373.

61. **Liability of company in regard to baggage generally.** 1. *When liable as a common carrier.* — A railroad company's liability respecting a passenger's baggage is that of a common carrier, and is only excused by the act of God, or of the enemies of the country. *Dill v. So. Car. R. R. Co.*, 62 D. 407.

A railroad company, as a common carrier, is liable as an insurer for the safe transportation of goods and of the baggage of passengers. *Nashville etc. R. R. Co. v. Elliott*, 78 D. 506.

It appeared that the baggage had arrived at its destination and been placed in the depot by the company, where it was stolen by burglars during the night. *Held*, that the baggage "should have been stored in a safe and secure warehouse to exonerate the company" from liability as a common carrier. *Bartholomew v. St. Louis etc. R. R. Co.*, 5 R. 45.

Where baggage is carried past its destination, stored at the wrong station, stolen, and thereby lost to the owner, the company will be liable as a common carrier. *Toledo etc. R. R. Co. v. Hammond*, 5 R. 221.

2. **Delivery to the company—baggage checks.** — Baggage checks are evidence of delivery of baggage to the company issuing them; and as a trunk is the usual means of conveying baggage, a check is evidence of the delivery of a trunk, the burden of proof being on the railroad company to show that the baggage delivered was not a trunk.

Dill v. South Carolina R. R. Co., 62 D. 407; *Davis v. Mich. South. etc. R. R. Co.*, 74 D. 151.

A railroad company is presumed to receive baggage for transportation, and not for storage, and its liability commences as soon as the baggage is delivered to and received by its agent, notwithstanding the fact that it was not checked at the time it was received, and would not be for several hours, nor until fifteen minutes before the train started, and that the passenger was so informed. *Hickox v. Naugatuck R. R. Co.*, 83 D. 143.

The delivery or non-delivery of a check for baggage is of no importance, as affecting the liability of a carrier, it being merely in the nature of a receipt, and intended as evidence of the ownership and identity of the baggage. *Id.*

By statute, all railroad corporations in Massachusetts must give checks, when requested to do so, to passengers, for the baggage of such passengers, when delivered for transportation. *Najac v. Boston etc. R. R. Co.*, 83 D. 686.

A railway company whose baggageman accepts baggage from an intending passenger before his purchase of a ticket, contrary to the rule of the company, is liable for its loss without regard to that fact. *Lake Shore etc. R. Co. v. Foster*, 54 R. 319.

3. **Delivery by the company.** — The liability of the company as carrier is terminated as to a passenger's baggage by its delivery at the point of destination, either to the passenger or to his authorized agent; but a delivery at such point to the baggage-master of an independent steamboat company, who is not the passenger's authorized agent, but who has, under agreement between the carriers, always entered the cars prior to their arrival at the depot and took the baggage of through-passengers, giving his checks in exchange for those of the railroad company, will not discharge the railroad company from loss resulting after such delivery. *Mobile & O. R. R. Co. v. Hopkins*, 94 D. 607.

A passenger has a right to regard as an agent of the company a person who handles and takes charge of the baggage upon the arrival of the train at a station, and notice to such person by the passenger as to the destination of his baggage is notice to the company; and the act of such person in relation to the baggage is the act of the company. *Ousmit v. Henshaw*, 84 D. 646.

The company's custody of baggage during the night is that of carrier, and not of warehousemen, where trains arrive at a late hour of the night, and stop for a few hours, and it is the usual course of the company upon whose train baggage arrives, upon being informed that it is going on in the morning by the next train over a connecting road, to put it in their baggage-room, and keep it for delivery in the morning to the servants of

For Index to Notes in American Decisions and American Reports, see Volume E.

the other road when called for by the owner, and requested to do so. *Ib.*

4. *Duty of passenger to call for baggage.* — The duty of the company as to baggage that has reached its final destination is to have it, upon its arrival, ready for delivery upon the platform at the usual place of delivery, until the owner can, in the use of due diligence, call for and receive it; and the owner must call for it within a reasonable time, and must use diligence in calling for and removing it; and if he does not so call for it, then the company shall put it in their baggage-room, and keep it for him; and their custody of it then is only that of warehousemen. *Ib.*

Reasonable time is generally, by the custom in such cases, immediately upon the arrival of the train. *Ib.*

The lateness of the hour of arrival will not excuse the passenger from immediately calling for his baggage. *Ib.*

Plaintiff purchased a ticket at a point on the defendant's railroad for New York and received a check for his trunk accordingly. On the second day after his arrival in New York, plaintiff presented his check at the depot and demanded his trunk, which could not be found. *Held*, that the defendant's railroad was liable on its contract of carriage for the proper storage of the trunk, although its liability as insurer had been changed by the delay in calling for the trunk to that of bailee. *Burnell v. New York Cen. R. R. Co.*, 6 R. 61.

5. *Carrying baggage on separate train.* — If the company, by its agent, accepts and undertakes to carry and deliver a passenger's trunk on a subsequent train, it is liable, whether the agent had the authority or not, in the first instance, to bind the company by the agreement to obtain and forward the baggage. The agent's failure to forward the trunk might not make the company liable in case of loss, but it would be liable after assuming the responsibility of carrying it. *Warner v. Burlington etc. R. R.*, 92 D. 389.

Where a passenger pays his fare, and the company, by its agent, undertakes to deliver his trunk by a subsequent train, the company takes upon itself the ordinary liabilities that are assumed by such companies when the passenger goes upon the same train. *Ib.*

The same rules of care and diligence on the part of the company apply whether baggage is forwarded on the same, preceding, or subsequent train, where the passenger has paid his fare, and his baggage is sent forward pursuant to an agreement, and as a part of the consideration moving from the company for the fare prepaid by the passenger. *Ib.*

Baggage, consisting of articles which had been purchased by the plaintiff and in use

by the plaintiff, his wife and their child, was delivered to the defendant, a Pennsylvania corporation, at Scranton, Penn., for carriage to the city of New York. The plaintiff did not accompany it, but took another train, while the wife and child went by the train with the baggage. The baggage arrived at New York, and was there lost by the negligence of the defendant. *Held*, 1. That the contract of carriage was not affected by a Pennsylvania statute limiting the carrier's liability; 2. That it was not necessary that the plaintiff should have been on the same train; 3. That in the absence of proof of a gift to the wife, the husband could recover for the wife's paraphernalia; 4. That defendant was at least liable as a warehouseman. *Curtis v. Delaware etc. R. R. Co.*, 30 R. 271.

6. *Extent and limits of the company's liability.* — A complaint stating the facts, and charging the company generally for loss of baggage, is good; and if the company is liable, either in the capacity of common carrier or as warehouseman, the plaintiff is entitled to recover. *Warner v. Burlington etc. R. R.*, 92 D. 389.

A railway company is liable as an insurer for the loss of sample-trunks of a travelling salesman, accepted by it as baggage, when it knew their contents; but only for a reasonable time after reaching their destination. *Hoeger v. Chicago etc. R'y Co.*, 53 R. 271.

The plaintiff took passage on defendant's railroad at Cleveland, Ohio, for San Francisco. He purchased a ticket entitling him to ride in a certain sleeping-car forming a part of the train. On leaving that car at Toledo, where a stay for dinner was announced to the passengers, he inquired of an employee in that car whether his baggage would be safe if left in the car, and was told to leave it there, that it would be safe. He so left the baggage, and on his return found that car detached and his baggage removed to another, but a hand-bag was missing. He had no notice of the change. In an action to recover for the loss, an offer by the defendant to prove that the sleeping-car did not belong to the railroad company, but to a third person, who under a contract with defendant furnished conductors and servants for it, was rejected. *Held*, 1. That a finding that the bag was lost through the defendant's negligence was warranted; 2. That the ownership and control of the car formed no defense, it not appearing that the plaintiff knew the facts. *Kingsley v. Lake Shore etc. R. R. Co.*, 28 R. 200.

At Montreal the plaintiff purchased of the Grand Trunk Railway Company a ticket for the city of New York etc rail to Troy or Albany, thence by steamboat. His portmanteau was checked for the same route. At Troy a railroad agent delivered it to defendant, and the latter carried it to New

For Index to Notes in American Decisions and American Reports, see Volume I.

York on its railway and put it in its baggage-room. Three days afterward, as soon as the plaintiff had reason to believe that the defendant had it, he demanded it, but it could not be found. It contained thirty-nine sovereigns and some partly worn clothing. *Held*, 1. That the defendant, having taken the portmanteau without the plaintiff's knowledge or assent, was responsible for its contents without regard to their character; 2. That the plaintiff was not limited to the recovery for the cash value of the clothing, but might recover what it was worth for use to him. *Fairfax v. New York Central etc. R. R. Co.*, 29 R. 119.

A railway passenger had merchandise checked without disclosing its character. There was no evidence of any agreement to carry it as freight, nor that the baggage-master had any authority to receive it as freight or as personal baggage. *Held*, that the company was not responsible for its loss, although the baggage-master knew the character of the baggage, and received similar packages from other passengers. *Blumstein v. Fitchburg Railroad Co.*, 34 R. 376.

The plaintiff went to defendant's station at Philadelphia to take passage for Chicago. The baggage master refused checks for his baggage unless he paid for extra baggage. The plaintiff refused this and demanded his baggage. The baggage master declined to deliver it on the ground that it was not accessible before train time. The plaintiff refused to take passage. The next day the defendant's president promised to stop the baggage at Pittsburg and gave him an order for it. He thereupon took passage on defendant's road for Chicago. On arriving at Pittsburg he applied for the baggage, but was told that it had gone on to Chicago, and received an order on the Chicago agent for it. It arrived at Chicago that day, was stored at the station and the next night was destroyed by fire. The plaintiff stopped over at Pittsburg one day and arrived at Chicago the next. *Held*, that there was a conversion of the baggage at Philadelphia and no waiver of any claim therefor. *McCormick v. Pennsylvania Cent. R. R. Co.*, 52 R. 6.

Plaintiff purchased a railroad ticket, and also a sleeping-car ticket, over the Louisville and Nashville railroad, from Cincinnati to Memphis. The sleeping-car ticket had printed upon its face, "wearing apparel or baggage placed in the car will be entirely at the risk of the owners." He gave his valises on entering the sleeping-car to the porter. It was lost. *Held*, 1. The railroad company was liable for the loss; 2. No contracts with the sleeping-car company could relieve the railroad company; 3. The condition printed on the sleeping-car ticket had no bearing in the suit against the rail-

road company. *Louisville etc. R. R. Co. v. Katzenberger*, 67 R. 232.

7. *When liable as bailee or warehouseman only.*—Where a passenger on a railroad train, after arriving at the end of his route, takes his baggage into his own exclusive possession and control, but afterwards, for his own convenience, re-delivers it to the baggage master at the depot, to be kept until sent for, the railroad company is not liable for the baggage as a common carrier. It is a gratuitous bailment, and the company is liable only for gross negligence. *Minor v. Chicago & N. W. R'y Co.*, 88 D. 670.

A railroad company is not liable for a passenger's trunk, where he did not call for it after reaching the place of destination, but left it in the hands of the company over night for his own convenience, and without any arrangement with them, and where it was destroyed by the burning of the depot before morning by an accidental fire, which did not occur from any negligence or fault on the part of the company. The subsequent liability of the company became simply that of an ordinary bailee. *Roth v. Buffalo etc. R. R. Co.*, 90 D. 736.

A railroad company is liable as a warehouseman for loss of baggage, where it receives and undertakes to convey a passenger's trunk by a subsequent train to a given point, but puts it in the common passenger room at the place of destination, instead of the baggage room kept for that purpose, where it is broken open by burglars and rifled of its contents before the passenger has a reasonable time, after its arrival, in which to receive it. *Warner v. Burlington etc. R. R.*, 92 D. 389.

A passenger has a reasonable time after arrival of baggage sent on a subsequent train in which to receive it; and even if the liability of the railroad company ceases, unless the passenger exercises the utmost watchfulness in calling for his baggage, it would still be liable as a warehouseman, at least for a reasonable time. *Id.*

62. *What is baggage.**—C. purchased from defendant for himself and wife a through ticket over several connecting railroads and signed a contract attached, conditioned: "In selling this ticket this company acts as agent and is not responsible beyond its own line." "None of the companies represented in this ticket will assume any liability on baggage except for wearing apparel, and then only for a sum not exceeding \$100." The trunk of the wife was robbed of a watch and chain and a diamond pin. The trunk was delivered in good condition by defendant to the connecting road. — *Held* 1. That the first condition referred only to personal injuries; 2. That the first company was liable for the loss of baggage

* What is baggage to which a passenger is entitled, see note, 71 D. 156-163.

For Index to Notes in American Decisions and American Reports, see Volume I.

by a subsequent carrier of the same line; 3. That common carriers cannot limit their liability for their own negligence; 4. That the watch and chain and diamond pin were wearing apparel. *Coward v. East Tennessee & G. R. R. Co.*, 57 R. 226.

63. What is not. — A trunk in a baggage-car is not a proper place for a passenger to carry money for his traveling expenses, so that he may recover for its loss as baggage. *Davis v. Mich. South. etc. R. R. Co.*, 74 D. 151.

A railroad company cannot be held liable, either to the owner or his agent, on its ordinary contract to carry a passenger, for losing samples of merchandise delivered into its charge by the agent of the owner as his personal baggage; nor in tort, except for gross negligence. *Stimson v. Connecticut R. R. Co.*, 93 D. 140.

A railroad company is not bound to carry a large amount of gold coin as luggage of a passenger, although he is a county treasurer on his way to pay such coin to the State treasurer, and although it has carried such coin as luggage of such officers for some years, and although it allows an express company on the same train to carry such coin for hire. A county treasurer so carrying coin is not a "public messenger." *Pfister v. Cent. Pac. R. R. Co.*, 59 R. 404.

The plaintiff's travelling salesman delivered to the defendant railroad company at Worcester a trunk belonging to the plaintiff, and filled with samples of jewelry belonging to them, worth \$10,000, for transportation as his baggage to Hartford, for which place he purchased a ticket for himself. He did not inform defendant of the character or value of the contents of the trunk. The trunk was of ordinary size and shape, but weighed 135 pounds, and was visibly bound on the outside with heavy iron braces, clamps and hinges. On the arrival of the train at Hartford the trunk was not delivered to the agent, but a bag had been fraudulently substituted by a change of checks, and the trunk was carried to New York, and there delivered to one who presented the check for it, and was afterward found there broken open and robbed of its contents. *Held*, 1. That the defendant was not liable to plaintiff in contract, for the only contract was to carry the personal baggage of the agent, and 2, was not liable in tort in the absence of gross negligence. *Aling v. Boston and A. R. R. Co.*, 30 R. 667.

64. Retention of custody of baggage by passenger. — A railroad company is not liable for loss of a passenger's overcoat, left by him in his seat on quitting the cars, and subsequently stolen. *Tower v. Utica etc. R. R. Co.*, 42 D. 36.

65. Liability of sleeping-car com-

panies. — A sleeping-car company is bound to use reasonable care to guard a passenger on its cars from theft, and if through want of such care the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable. *Lewis v. New York etc. Sleeping Car Co.*, 56 R. 852, note.

The fact that the company has posted a notice in its cars in which it disclaimed liability for the loss of valuables by passengers cannot be availed of by way of a defense to an action by a passenger whose money, which he had placed beneath the pillow in his berth on going to sleep, was stolen, where it appears that the passenger did not see or know of such notice. *Id.*

A sleeping-car company is liable to a passenger who while occupying a berth in its car suffers the loss of his personal effects by theft, owing to the company's neglect to maintain a reasonable watch. *Woodruff Sleeping etc. Coach Co. v. Diehl*, 43 R. 102. Contra see *Pullman Palace Car Co. v. Smith*, 24 R. 258.

A sleeping-car company is liable in an action on the case for excludng a passenger from a berth which it has assigned him and which he has offered to pay for. *Nevin v. Pullman Palace Car Co.*, 46 R. 688. Compare *Lawrence v. Pullman Palace Car Co.*, 59 R. 58.

If a passenger on a sleeping-car leaves his money in the car on leaving the car without the knowledge of the company, and it is stolen by some one not employed by the company, if the company has kept a reasonable guard and watch, it is not liable for the loss; and it is not liable for money stolen by its employees, except a reasonable sum for the expenses of the journey. *Illinois Cent. R. R. Co. v. Handy*, 56 R. 846.

A passenger, who had purchased a ticket for a berth in a sleeping-car, lost it and gave evidence to the conductor that he had done so, and refused to pay over again, whereupon the conductor expelled him, without violence, from the car, and he was compelled to ride in a common car. *Held*, that plaintiff could recover of the owners of the sleeping-car the price he paid for his ticket and a reasonable compensation for his trouble and inconvenience, but that he could not recover exemplary damages, and that a verdict for \$3,000 was excessive. *Pullman Palace Car Co. v. Reed*, 20 R. 232.

The plaintiff purchased of the defendant, a sleeping-car company, at Indianapolis, a ticket purporting to entitle him to accommodations in a designated sleeping-car, in a berth to be pointed out by the conductor, thence to New York city. A certain berth was accordingly assigned him, and designated on the ticket, but at Pittsburgh the

* Their liability for loss of property, see note, 56 R. 850-852.

For Index to Notes in American Decisions and American Reports, see Volume I.

car was detached, and a different and less safe and comfortable berth was offered him in another car, which he declined. In an action for damages for breach of contract, *held*,—that he was entitled to a continuous passage in the same car and berth, or in one equally safe, comfortable and convenient; and that it was no defense that the defendant simply rented the cars to the railway companies for the use of passengers. *Pullman Palace Car Co. v. Taylor*, 32 R. 57.

66. Effect of notices and special contracts.*—A common carrier may limit his liability for baggage of passengers by a general notice that it is at their own risk. *Loring v. Colder*, 49 D. 533.

A limitation on a railroad ticket that it shall be "Good this day only" is reasonable and valid. *Elmore v. Sands*, 13 R. 617.

A carrier cannot limit his liability by words on a railway ticket or baggage check, even when brought to the passenger's notice, unless the latter agrees to such limitation, and it is for the carrier to show such agreement. *Baltimore & O. R. R. Co. v. Campbell*, 38 R. 617. *S. P., Indianapolis etc. R. Co. v. Cox*, 95 D. 640.

A railroad passenger is not bound by a printed notice in his ticket limiting the weight and value of his baggage, unless his attention is called to the notice by the ticket agent, or unless he is aware of it when the ticket is purchased, in which case he will be presumed to have assented to the terms of the notice, in the absence of any objection on his part. *Ransom v. Pennsylvania R. R. Co.*, 8 R. 543.

The law raises no presumption that a passenger on a railroad has read a notice limiting the company's liability for baggage, from the fact that such notice is printed on the back of a check delivered to the passenger, which check has on its face the words "look on the back," nor from the fact that such notice is printed on a placard posted in the car, and containing other notices which the passenger has read. *Malone v. B. & W. R. Co.*, 74 D. 598.

A railroad company, having passenger trains sufficient to accommodate the public, is under no legal obligation to carry passengers on its freight trains; but where it undertakes to do so, that undertaking, and the extra care and expense involved in it form a sufficient consideration for a general contract, made with all passengers thus carried, limiting its liability. *Arnold v. Illinois Central R. R. Co.*, 25 R. 383.

A person was killed while riding on defendants' road, on a season-ticket containing this condition: "The corporation assumes no liability for any personal injury received while in a train to any season-ticket holder." *Held*—that this condition did not

relieve the defendants from their legal liability, on an indictment under a penal statute, for gross negligence. *Com. v. Vermont etc. R. R. Co.*, 11 R. 301.

Plaintiff purchased a ticket of a railroad company marked on its face "Good this day only," and with the date of issue stamped on the back. He did not attempt to use the ticket until seven days afterward, when he presented it to the conductor on the train, but refused to pay his fare. The conductor then ejected him from the train, in accordance with the company's regulations. *Held*, that the conductor was not liable to the plaintiff in damages. *Elmore v. Sands*, 13 R. 617.

67. Effect of free tickets and passes.*—A person travelling on a railroad upon a free pass from the company, upon which is indorsed a statement that "it is agreed that the person accepting this ticket assumes all risk of personal injury and loss or damage to property whilst using the same on the trains of the company," does not assume any risks arising from the gross negligence of the servants of the railroad company in running the train. *Indiana Cent. R'y Co. v. Mundy*, 83 D. 339; *Jacobus v. St. Paul etc. R'y Co.*, 18 R. 360; *Cleveland etc. R. R. Co. v. Curran*, 2 R. 362.

An agreement in consideration of a free ticket to release the company from all liability for negligence of its servants is valid; and the company will not be liable to the holder of such free ticket for an injury which occurred through such cause. *Kinney v. Central R. R. Co.*, 90 D. 675, S. O. 3 R. 265.

A drover riding on the defendant's railroad on a free pass, to take care of his stock, was killed by the defendant's negligence. The pass provided that he took his own risk of personal injury from any cause whatever, and he signed a release to that effect. *Held*, that this did not prevent a recovery. *Carroll v. Missouri R'y Co.*, 57 R. 382; *Ohio & Mississippi R'y Co. v. Selby*, 17 R. 719; *Lockwood v. N. Y. Cent. R. R. Co.*, 10 R. 366. Contra see *Poucher v. N. Y. C. R. R. Co.*, 10 R. 364.

A person riding free and in a baggage-car with the knowledge of the conductor, is not, by reason of such facts, precluded from recovering for an injury caused by a collision, even though he might not, or would not have been injured if he had remained in the passenger car. *Washburn v. Nashville etc. R. R. Co.*, 75 D. 784.

A drover travelling on a railway on a free pass is in effect a passenger for hire, but cannot recover for an injury sustained through the railway company's negligence by reason of his being on top of a cattle car, although he was instructed by a station-

* Exemption, by contract from liability to passengers, see note, 82 D. 290-295.

* Gratuitous passes, acceptor of, liability for injuries sustained by, see note, 57 R. 388-398.

For Index to Notes in American Decisions and American Reports, see Volume I.

agent to ride there instead of in the passenger car, the agent having no authority in the premises, and the person in charge of the train being ignorant that he was in that position. *Little Rock etc. R'y v. Miles*, 48 R. 10.

Where the acceptor of a gratuitous pass from a railroad company "assumes all risks of accident, and especially agrees that the company shall not be liable, under any circumstances, whether of negligence of their agents or otherwise, for any injury to his person," the contract relieves the company from liability for injury to him by reason of a want of ordinary care of its servants unless the same is expressly made a crime, but not from liability for gross negligence. *Assas v. Milwaukee & N. R. R. Co.*, 57 R. 388, note.

A government mail agent was killed by an accident on the defendant's railroad while riding upon a free pass stipulating for exemption from liability for injuries occasioned by its negligence. *Held*, that such stipulation was unauthorized and void. *Seybolt v. New York etc. R. R. Co.*, 47 R. 75.

The plaintiff, desiring to have his horse transported by defendant's railroad, induced A., who had several horses to go by the same train, to include his and have it billed as A.'s. It was the defendant's rule that only one person could go free with stock, and when A. told the conductor there might be another person to accompany him, he replied that he would have to pay fare. The defendant had no knowledge of the plaintiff's intention to go on the train. The plaintiff got no ticket, but intended to pay his fare on the train. Before he could pay there was a collision by the defendant's negligence, and he was injured. *Held*, that he could not recover. *Gardner v. New Haven & N. Co.*, 50 R. 12.

The owner of horses shipped them for transportation on the defendant's railroad. By oral agreement with the defendant's station agent one person was to be allowed to ride free in the car with them to take care of them, and the plaintiff's intestate so rode to the knowledge of the conductor. While so riding he was killed by the gross negligence of the defendant, but owing to his position in the car. It was the custom of the defendant to allow one person to ride free in the car with stock to take care of it, and to exact a written contract from the owner waiving certain liabilities and conditioned that the person so riding should assume his own risk of personal injury, and to require such person to indorse the contract. In this case, after the accident and before the plaintiff's death, the owner and the agent executed such a contract and signed the name of the plaintiff's intestate on the back. *Held*, that the company was

liable in damages. *Lawson v. Chicago etc. R'y Co.*, 54 R. 634.

A boy sixteen years old was employed by the keeper of a restaurant at a station on the defendant's railroad to sell sandwiches and fruit on the trains, and had a free pass for the purpose over the whole road, conditioned that the company should not be liable for any personal injury caused by the negligence of its agents. The boy, while going for a private purpose over a part of the road to which he was not called by his business, and while in a baggage car against the rule of the road, was killed by a collision caused by the gross negligence of the defendant's servants. The company had no interest in the restaurant, but gave the pass as a favor. *Held*, that the defendant was not liable. *Grinwood v. New York etc. R. R. Co.*, 55 R. 115.

Whether a railroad company is liable for the baggage of a passenger, in his wife's trunk, if he rides on a free pass over the road, but buys a ticket for his wife, and checks the trunk on her ticket, *quære*. *Malone v. B. & W. R. R. Co.*, 74 D. 598.

Whether a railroad company is liable as upon an implied guaranty of security of its road to a gratuitous passenger contracting to exempt the company from liability for the negligence of its agents, when the injury resulted from the misconduct of a track master in using bad material in building a bridge, not shown to have been known to the managing officers, questioned. *Perkins v. New York Cent. R. R. Co.*, 82 D. 282.

68. Carrying passengers beyond destination. — Carriers are not bound to put passengers off at their place of destination as they are bound to deliver goods, but must allow them sufficient time and opportunity to leave the vehicle. *Southern R. R. Co. v. Kendrick*, 90 D. 332.

They must distinctly announce stations, and give reasonable warning and time for passengers to alight; but are not required to warn each passenger personally. *Id.*

Passengers must take notice of the established custom of railroads, and use reasonable care to leave the vehicle and to avoid accidents. *Id.*

Want of ordinary care by passenger will preclude recovery. If a passenger is asleep when the station is properly announced, he cannot recover for being carried past his destination. *Id.*

A passenger negligently carried beyond his station may recover from the company compensation for the inconvenience, loss of time, and labor of travelling back. *Pennsylvania R. R. Co. v. Aspell*, 62 D. 323.

A railway company is not liable for the

* Duty of company to halt trains at convenient places, see note, 7 R. 708, 707.

Duty of passenger to ascertain destination of trains, see note, 50 R. 527-529.

For Index to Notes in American Decisions and American Reports, see Volume I.

neglect of its conductor to fulfil his promise to wake a passenger, whereby he is carried beyond his destination. *Nunn v. Georgia Railroad*, 51 R. 284; *Sevier v. Vicksburg and M. R. R. Co.*, 48 R. 74.

Plaintiff entered the defendant's cars and paid his fare to B. The train did not stop there, but ran by two miles to a water tank. Plaintiff demanded that the train should return to B, but the conductor gave him the option to ride to the next station and return to B by the first train free of charge, or to leave the train at the tank. He chose the first alternative, and thus reached B. after some three hours' delay. Plaintiff sustained no bodily injury, mental suffering, insult, oppression or pecuniary loss. *Held*, that the plaintiff had a cause of action against the defendants for failing to set him down at B, but that he could not recover punitive damages. *Thompson v. N. O. etc. R. R. Co.*, 19 R. 12.

69. Indictment for causing death.—A statute imposed a penalty upon railroads by whose negligence the life of a person is lost, to be recovered by indictment to the use of the heirs of the deceased. *Held*, that to bring a case within the statute death must be instantaneous. *State v. Grand Trunk R'y*, 14 R. 552.

Where a railroad company is prosecuted in the form of an indictment, under a statute, for causing death, the same principles of law and rules of evidence are applicable, as in civil actions for damages resulting in a similar manner. *State v. Grand Trunk R'y Co.*, 4 R. 258.

2. Liability for Injuries caused by Negligence.

a. In general.

70. Duty of company as to stations, platforms, etc.—1. *General rules.*—It is the common-law duty of railway companies to provide reasonable accommodations at their stations for passengers who are invited and expected to travel on their roads. *McDonald v. Chicago etc. R. R. Co.*, 96 D. 114.

If the station room is full, or if it is intolerably offensive by reason of tobacco smoke, so that a passenger has good reasons for not remaining there, it will justify his endeavor to enter the cars as early as possible, especially if it is dark and cold without; and if in so doing he receives an injury from the unsafe and dangerous condition of the platform or steps where passengers would naturally go, the company is liable therefor, if the passenger used proper care, and violated no rule or regulation of the company of which he had actual knowledge, or which, as a reasonable man, he would be bound to presume existed. In such a case there is no error in permitting witnesses to testify as to the condition of the passenger-room with respect to tobacco

smoke. *McDonald v. Chicago etc. R. R. Co.*, 96 D. 114.

Railroad companies, as general rule, are bound to keep in safe condition all portions of their platforms, and approaches thereto, to which the public do or would naturally resort, and all portions of their station-grounds reasonably near to the platforms, where passengers or those who have purchased tickets with a view to take passage on their cars would naturally or ordinarily be likely to go. *McDonald v. Chicago etc. R. R. Co.*, 96 D. 114.

Railroad companies are strictly accountable for the safety of passengers. To enable them to properly discharge this duty, they have power to make reasonable rules and regulations respecting the time, mode, and place of entering cars; and these, whether they have ever been written or published, or are posted up or not, when known to the passenger, he is bound to conform to, and he cannot violate them by pursuing another course, and hold the company liable for damages thus occasioned, and which would have been avoided by conforming to the rules and regulations of the company, though the jury may believe that an ordinarily prudent man might have adopted the same course. *McDonald v. Chicago etc. R. R. Co.*, 96 D. 114.

The company has a right to require all passengers about to enter its cars to do so only when the cars are brought up to the platform for that purpose. *McDonald v. Chicago etc. R. R. Co.*, 96 D. 114.

Where a husband and wife sue a railroad company as common carriers, to recover damages for injuries to the wife, caused by defective steps to a platform which the train had backed up to, and which was not the usual place for passengers to get on and off the cars, the jury should be instructed to ascertain from the evidence whether the company had designated or set apart the platform in front of the depot as the place where it required all passengers to enter the cars; if so, and this was known to the plaintiffs, and they, in disregard of such requirement, in advance of time, and without any justification, sought to enter the cars at another place, and in so doing met with the injury, then the company would not be liable as common carriers. *Id.*

If, however, there was no such rule or regulation known to plaintiffs, and they in good faith, and using reasonable care, were seeking to find and enter the cars, the company would be liable for an injury caused by the defective platform or steps leading to it, as the plaintiffs would have a right to presume, it being dark or nearly so, that the platform and its approaches were in a safe condition. *Id.*

Persons who come upon a railroad platform to welcome a coming or speed a parting

For Index to Notes in American Decisions and American Reports, see Volume I.

guest are there by authority of the company, as much as a passenger, and as to all such, the platform must be strong enough to bear them no matter how numerous. *Gillis v. Pennsylvania R. R. Co.*, 98 D. 317; *Hamilton v. Texas and Pac. R'y Co.*, 53 R. 756.

A railroad platform must be strong enough to bear all persons, no matter how numerous, who are on it by authority of the company, or to whom they occupy such relations as require care on their part. *Gillis v. Pennsylvania R. R. Co.*, 98 D. 317.

A person not a passenger, but lawfully on a railroad platform, may recover for injuries received by accidentally stepping through a hole, negligently left in the platform by the company's agent. *Toledo etc. R. R. Co. v. Grush*, 16 R. 618.

A railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station-house, where, at the time of receiving the injury, such person was at such station-house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road. *Pittsburgh etc. R'y Co. v. Bingham*, 23 R. 751.

Where a large crowd gathered upon a railroad platform in order to see a distinguished party of travelers, and the platform breaks under them, the company is not liable to one of the crowd who was injured, as he was on the platform without authority, and the company owed him no duty. *Gillis v. Pennsylvania R. R. Co.*, 98 D. 317.

A regulation by a railway company, forbidding hackmen, peddlers, expressmen and loafers from entering a passenger-room at the station is valid, but a hackman with a check for baggage may enter the baggage-room therefor. *Summitt v. State*, 41 R. 637.

A railroad company may be compelled to furnish and maintain stations for passengers and freight at all proper points on its line. *State v. Republican Valley R. Co.* 52 R. 424.

A railroad company is not liable in damages at the suit of a female passenger, on account of obscene and profane language, indecent exposure of the person, and other disorderly conduct by intruders at the station while plaintiff was awaiting the arrival of a train, when it was not shown that the company had notice of any facts which justified the expectation of such an outrage. *Batton v. South etc. Ala. R. R. Co.*, 54 R. 80.

It is negligent in a railroad company to have a station platform higher than the car steps, and to require passengers to board the trains from a baggage-car. *Turner v. Vicksburg etc. R. Co.* 55 R. 514.

A railroad company is under no obligation to provide stations for passengers or warehouses for freight, unless expressly required

by statute. *People v. New York etc. R. R. Co.*, 58 R. 484.

An agreement to give a railroad company an interest in certain land or town lots, provided it would locate its station at a certain specified place, is void as against public policy. *Pacific R. R. Co. v. Seely*, 100 D. 389; *St. Joseph etc. R. R. Co. v. Ryan*, 15 R. 357. But compare *Louisville etc. R. Co. v. Sumner*, 55 R. 719.

2. *Illustrations.*—A railroad company negligently left its depot platform in a defective condition. A hackman, while carrying a passenger to the depot for transportation, stepped, without fault, into a cavity in the platform, and was injured. *Held*, that the company was liable, and the liability was the same, notwithstanding the platform was within the limits of the highway. *Tobbs v. Portland etc. R. R. Co.*, 8 R. 415.

The plaintiff, without invitation or business, intruded upon a visibly ruinous but uninclosed freight-house of the defendants, used only for storage, and while there a sudden storm blew a fragment of the building upon him and injured him. *Held*, that he was remediless. *Lary v. Cleveland etc. R. R. Co.*, 41 R. 572.

The plaintiff, waiting on the platform of defendant's station for a train, was struck by a mail-bag thrown from the postal car in the approaching train by a clerk in the employ of the United States. It appeared that it had been long the well-known custom to throw off the bags when passengers were on the platform, and it did not appear that the defendant took any precautions to prevent injury. *Held*, that a recovery was justifiable. *Carpenter v. Boston and A. R. R. Co.*, 49 R. 540.

A man waiting at a railway station for his wife, whom he expected by train, having a call of nature, and no special resort being provided, stepped off a walk on the grounds, in the dark, and fell into a hole and was hurt. *Held*, that the company was liable. *McKone v. Michigan Cent. R. R. Co.*, 47 R. 596. But compare, *Montgomery and E. R'y Co. v. Thompson*, 54 R. 72.

71. *Liability for fires occasioned by sparks, etc.*—1. *In general.**—Where a building is set on fire by a spark from an engine of a passing railroad train, and consumed, the company is not liable, in an action of trespass on the case, if it was guilty of no negligence, but used due care and skill in carrying on the business for which it was incorporated by the legislature. *Burroughs v. H. R. R. Co.*, 38 D. 64.

An insurance company paying a loss caused by sparks from a railroad company's locomotive, and for which the company is responsible, may recover from the railroad company such loss in the name of their as-

* Fire from locomotives. Liability for, see notes, 6 R. 597-600; 28 D. 70-78.

For Index to Notes in American Decisions and American Reports, see Volume I.

sured, and a release executed by such assured to the railroad company is no bar to such action by the insurance company. *Hart v. Western R. R. Co.*, 46 D. 719.

A railroad company is liable for injury by fire, caused either by negligence in running a railroad train through a city at an unlawful speed, or in opening gates and flues of the engine in a careless manner, and thereby allowing lighted cinders to be thrown upon the plaintiff's premises. *Martin v. Western Union R. R. Co.*, 99 D. 189.

A railway company is not liable for damage to property adjoining its road by a fire kindled by its section-men for the purpose of cooking their meals, while engaged in repairing the track. *Morier v. St. Paul etc. R'y Co.*, 47 R. 793.

Fire caught from the sparks of the defendant's locomotive on the land of D. The defendant's servants were successfully extinguishing it when D. desired them to desist, as he wished to have it burn up the bogs. They desisted, but it communicated to and injured the plaintiff's adjoining land. *Held*, that the defendant was liable under the statute. *Simmonds v. N. Y. etc. R'y Co.*, 52 R. 687.

2. *The care required of the company.*—The degree of negligence requisite to render a railroad company liable in damages for fire occasioned by its locomotives to property on the line of the road is that which arises from a want of reasonable care and diligence, and not that arising from the absence of the slightest or least care or caution. *Baltimore & S. R. R. Co. v. Woodruff*, 59 D. 72.

The term "reasonable care and diligence," as applied to fires on line of railroad caused by engines running on the same, means having engines, properly constructed, in good order, with suitable fixtures for preventing injuries by fire; the spark-catchers, such as are known to the company to have been used and approved of, and best calculated to prevent the emission of sparks, while allowing sufficient draft to create steam enough to propel the engine at proper speed; and such care and diligence in using the locomotive upon the road as would be exercised by skillful, prudent, and discreet persons having control of the engine, regarding their duty to the company, and having a proper desire to avoid injuring property along the road. *Ib.*

The company has a right to keep at its stations such supplies of wood as are, in its judgment, necessary for its present and future use, and it is not liable for any injury caused by the accidental burning thereof, unless it results from the gross negligence or carelessness of the company, or of its agents and servants. *Macon & W. R. R. Co. v. McConnell*, 76 D. 685.

The company is required to use greater

care in running its trains through villages, where wooden buildings are so near its road as to be exposed to fire from locomotives, than in the open country. *Fero v. Buffalo etc. R. R. Co.*, 78 D. 178.

The company is bound to use the utmost care in running its trains through villages, to guard against fire to wooden buildings near its track, especially at a time when the wind is blowing from the engine towards the buildings. *Ib.*

The use of any ordinary fuel in locomotives is legal, but the latest improvements in its management in practical use must be applied. *Lackawanna etc. R. R. Co. v. Doak*, 91 D. 166.

A railroad company is not liable in damages for the destruction of a bridge by sparks from its locomotive, if it used that degree of care and vigilance which the relative location of its road to other structures demanded. The exercise of ordinary care in procuring a good and safe spark-catcher, such as are in ordinary use, and approved by experienced railroad operators and mechanics, is sufficient on the part of the company. *Frankford T. Co. v. Philadelphia R. R. Co.*, 93 D. 708.

The emission of sparks from the stack of a locomotive is not in itself illegal, and a loss of property adjacent to the railroad from the sparks, apart from misuse, is *damnum absque injuria*. *Ib.*

The law, in conferring a right to use an element of danger, protects the person using it, except for the abuse of his privilege; but in proportion to its danger will arise the degree of caution and care he must use. *Ib.*

It is the duty of a railroad company running its engines in close proximity to buildings to use the utmost vigilance and foresight to avoid injury. *Ib.*

The rule that all persons are required to so use their own as to prevent injuries to others applies to the same extent to railroad companies as it does to private individuals. *Okto & C. R. R. Co. v. Shansfelt*, 95 D. 504.

A railroad company is bound, both at common law and under the statute, to keep its line clear of material likely to be ignited from sparks issuing from its locomotives, although the latter be properly constructed and driven. *Salmon v. Delaware etc. R. R. Co.*, 20 R. 356; *Delaware etc. R. R. Co. v. Salmon*, 23 R. 214.

3. *What constitutes negligence on the part of the company.*—In an action against a railroad company for setting fire to plaintiff's growing grain by means of sparks escaping from its engine, where the proof shows that the result was not probable from the ordinary work of the engine, this establishes *prima facie* that negligence existed where there is no proof that the result happened from any unexpected or uncontrollable accident: and the matter should be left to the

For Index to Notes in American Decisions and American Reports, see Volume I.

jury for them to determine the question of negligence or no negligence. This court will not review their finding. *Hull v. Soc. V. R. R. Co.*, 73 D. 656.

Negligence is implied from the escape of fire from a locomotive engine, and the burden of proof is upon the company, in an action against it for such negligence, to show that the most approved mechanical contrivances were used to prevent the escape of fire. *Bass v. Chicago etc. R. R. Co.*, 81 D. 254.

The company is guilty of negligence, in suffering dry grass and rubbish to be upon its right of way, or in permitting vegetation to grow thereon to such a height and density as to conceal cattle from view. *Bass v. Chicago etc. R. R. Co.*, 81 D. 254; *Richmond & D. R. R. Co. v. Medley*, 40 R. 734. Contra, see *Ohio & C. R. R. Co. v. Shanefelt*, 95 D. 504.

Whether or not a railroad company is guilty of negligence in permitting combustible material to accumulate upon its lands is a question for the jury. *Kenes v. Chicago etc. R. R. Co.*, 6 R. 643; *Kellogg v. Chicago etc. R. R. Co.*, 7 R. 69; *Webb v. Rome etc. R. R. Co.*, 10 R. 389.

Where a building near a railroad was discovered to be on fire as a train drawn by an engine without a spark-catcher was passing, the question of negligence on the part of the railroad company is properly submitted to the jury, though there was no direct evidence that the building was fired by sparks from the engine. *Lackawanna etc. R. R. Co. v. Doak*, 91 D. 166.

Where, from the defect in the construction of a railway engine, carelessness in those operating it, or want of proper appliances to prevent the emission of sparks or coals of fire from the smokestack, property adjoining a railway is destroyed by fire, the railroad corporation is liable for the damages resulting from such fire; and the absence of the best contrivance known to prevent the spread of fire from a locomotive will be construed as negligence on the part of the railroad corporation. *Jackson v. Chicago etc. R'y Co.*, 7 R. 120; *Steinweg v. Erie R'y Co.*, 3 R. 678.

It is evidence of negligence for a railroad company to run an engine without a screen on the smokestack, from which large sparks are emitted so as to set fire to an adjoining dwelling. *Bedell v. Long Island R. R. Co.*, 4 R. 688.

It is a question for the jury whether a railroad company has taken reasonable precaution to prevent the escape of sparks from its engine. *Toledo etc. R'y Co. v. Pindar*, 5 R. 57.

The mere fact of injury from fire, set by sparks emitted from a railroad engine, is not *prima facie* evidence of negligence on the part of the company. The burden of proof

is on the plaintiff to show that due care and caution have not been exercised by the company; but this fact may be satisfactorily established by evidence of circumstances bearing more or less directly upon the fact of negligence, such as the absence of, or defect in, the spark arrester, an unlawful speed or an extraordinarily heavy train. *Gandy v. Chicago etc. R. R. Co.*, 6 R. 682.

In an action against a railroad company for negligently setting fire to the plaintiff's premises, the plaintiff only proved that the fire originated near the track, and shortly after the passing of a train, and that recently the same engine had been seen to drop glowing cinders and to start other fires. The defendant offered to prove that it was an old custom of the farmers in that vicinity to set fire annually to the leaves and underbrush at that season to improve the pasturage. *Held*, 1. That the plaintiff's evidence was competent and sufficient to warrant a finding of negligence; 2. That the defendant's offer was incompetent. *Green Ridge R. R. Co. v. Brinkman*, 54 R. 755.

4. *Contributory negligence on part of plaintiff.*—The owner of buildings near a railroad track is bound to use such care in protecting them against fire from the locomotives as a man of ordinary prudence would have employed under the same circumstances; and he is not deprived of redress against the company for its negligence by the fact that had he been more vigilant, the injury might not have happened. *Pero v. Buffalo etc. R. R. Co.*, 78 D. 178.

The owner of land contiguous to a railroad is equally chargeable with the company for want of care in respect to the dry grass on his own land; and he cannot recover for injuries by fire thus arising, unless it appears that the negligence of the company was greater than his own. *Ohio & O. R. R. Co. v. Shanefelt*, 95 D. 504; *Chicago etc. R'y Co. v. Stimson*, 5 R. 155; *Kenes v. Chicago etc. R. R. Co.*, 6 R. 643; *Murphy v. Chicago etc. R'y Co.*, 30 R. 721; *Richmond and D. R. R. Co. v. Medley*, 40 R. 734; but, on the other hand—*held*, that the failure of a landowner to remove the dry grass or stubble from his own land in order to avoid anticipated danger from fire caused by the default or misconduct of a railroad company was not negligence on his part. *Kellogg v. Chicago etc. R. R. Co.*, 7 R. 69; *Salmon v. Delaware etc. R. R. Co.*, 20 R. 356; *Delaware etc. R. R. Co. v. Salmon*, 23 R. 214; *Pittsburgh etc. R'y v. Jones*, 44 R. 334.

It is a question of fact for the jury, whether leaving the door of a building in course of construction near a railroad track partly open, through which sparks from an engine were driven, constitutes such negligence on the part of the owner or his servants as would preclude his recovery against the railroad company for a fire

For Index to Notes in American Decisions and American Reports, see Volume L.

caused thereby. *Fero v. Buffalo etc. R. R. Co.*, 78 D. 178. S. P., *Martin v. Western Union R. R. Co.*, 99 D. 189; *Louisville etc. Ry Co. v. Richardson*, 32 R. 94.

Railroad companies were made liable by statute for damages caused by fire from their locomotives, and were given an insurable interest in the property exposed along their line. *Held*, that their liability was absolute and not dependent on the question whether adjoining property owners had been guilty of contributory negligence or not. *Roswell v. Railroad*, 24 R. 59.

The plaintiffs owned a warehouse, with a branch track connecting with defendant's railway, and employed the defendants to draw cars upon that track for their accommodation. The engine thus used emitted sparks; the plaintiffs complained of this to the defendants; the defendants promised to repair it, but neglected to do so; and the plaintiffs continued to employ the engine. The warehouse being set on fire by sparks from this engine—*held*, that the plaintiffs had no remedy therefor against defendants. *Marquette etc. R. R. Co. v. Spear*, 38 R. 242.

5. *Proximate and remote cause of injury.*—Where sparks from a locomotive set fire to a shop, and from the shop the fire spreads across a street to a dwelling-house, the owner of such house can recover from the railroad company his loss, under a statute making it liable for an injury done "by fire communicated by its locomotive engine." *Hart v. Western R. R. Co.*, 46 D. 719.

A railroad corporation is liable for injury to woodland by fire "communicated" from a locomotive, under Mass. Gen. Stat., chap. 63, sec. 101, making such corporations responsible in damages to any person "whose buildings or other property may be injured by fire communicated by its locomotive engines," where a spark from the locomotive sets fire to grass near the track, and the fire spreads in a direct line, without any break, across land of several different proprietors, and a highway, to the woodland about half a mile distant from the track. *Perley v. Eastern R. R. Co.*, 96 D. 645. And this, although back-fires were kindled by the owner, in good faith and proper exercise of discretion, in a vain effort to stop the fire, and while burning, were swallowed up in the advancing flame, which went on and destroyed the property. *Id.*

Where a locomotive, which is well constructed and properly managed, nevertheless emits sparks sufficient to set fire to cut and dried grass and weeds which the railroad company had permitted to lie in a combustible state upon its land along the track, and the fire is communicated thence to an adjoining field and, through stubble and uncut but dry grass, to a wheatstack, which is thus consumed, the company is liable for the loss.

Flynn v. San Francisco etc. R. R. Co., 6 R. 595.

The fact that natural agencies, as high winds or drought, contributed to cause the injury, or that the property destroyed was at a distance from the place where it originated, does not affect the question as to the liability of the railroad company, or render the fire the remote and not the proximate cause of the injury done. *Kellogg v. Chicago etc. R. R. Co.*, 7 R. 69.

Through the negligence of the defendant, a railroad company, sparks from a locomotive set fire to a warehouse. The wind was high, and the building of plaintiff's, two hundred feet from the warehouse, took fire therefrom, and was consumed. In an action to recover for the loss of plaintiff's building,—*held*, that the question of proximate or remote cause was for the jury, to be determined under the instruction that the railroad company is to be held responsible, if the loss is a natural consequence of its alleged carelessness, which might have been foreseen by any reasonable person, but it is not to be held responsible for injuries, which could not have been foreseen or expected as the results of its negligence or misconduct. *Fent v. Toledo etc. Ry Co.*, 14 R. 13.

In a time of extreme drought, one of defendant's locomotives, in passing along its road, opposite plaintiff's land, dropped live coals upon the track, which set fire to a tie, the fire thence communicated to weeds, grass and rubbish, which defendant had suffered to accumulate by the side of its track, and thence it spread to plaintiff's land, burning and destroying his growing forest trees. *Held*, that the damages to plaintiff were not too remote. *Webb v. Rome etc. R. R. Co.*, 10 R. 389.

A railway locomotive engine emitted sparks to land adjoining the plaintiff's where they ignited leaves, briars, brush, stumps, and logs, and the fire was continuously conducted by the same, in about two hours, to a pile of lumber on the plaintiff's land, three hundred feet distant, which it consumed. The weather was dry, and the wind was high in that direction. There was some evidence of another origin. *Held*, that it was a question of fact whether the defendant's negligence was the proximate cause of injury. *Lehigh Valley R. R. Co. v. McKeen*, 35 R. 644.

A railroad company is liable for injury to land by fire, caused by its negligence, although there is land belonging to another owner intermediate between the railroad and the plaintiff's land. *Delaware etc. R. R. Co. v. Salmon*, 23 R. 214. S. P., *Clemens v. Hannibal etc. R. R. Co.*, 14 R. 460; *Atchison etc. R. R. Co. v. Stanford*, 15 R. 362; *Poeppers v. Missouri etc. Ry Co.*, 29 R. 518.

By reason of defendant's negligence sparks from one of its locomotives set fire

For Index to Notes in American Decisions and American Reports, see Volume I.

large through the land of a stranger upon its road, under a statute requiring it to guard the sides of its track by fences and cattle-guards, if the injury is solely the result of the company's negligence in not placing and keeping such fences and guards where needful. *Broune v. Providence etc. R. R. Co.*, 71 D. 736.

Whether a railroad company is liable for injuries to cattle straying on its track, in cases where the owner's negligence contributed to the injury, *quare*. *Id.*

Whether or not a company is bound to fence their track, in the absence of a statute requiring them to do so, when their roads run where cattle usually roam, they are bound to use means to exclude them from their track, by fencing, forcing the owner to keep them home, by moderating the speed of their trains, or otherwise. *Sullivan v. Philadelphia etc. R. R. Co.*, 72 D. 698.

The owner of cattle found on an unfenced railroad is not a trespasser or wrong-doer, but is entitled to the exercise of ordinary and reasonable care on the part of the railroad company, under all the circumstances, to avoid any injury to his cattle. *Central Ohio R. R. Co. v. Lawrence*, 82 D. 434.

A company operating an unfenced road is not liable for injuries to cattle found on its track, if its use of the track is reasonable, and it exercises reasonable care under all circumstances to avoid the injury; but for an injury to cattle resulting from the unreasonable and dangerous use of the railroad or from the want of such care, the company will be liable. *Id.*

The company is not bound to consider the increased risk to cattle on its unfenced track in determining the rate of speed at which its train shall run, such speed being otherwise reasonable and proper in view of the object to be accomplished. A high rate of speed, though dangerous, is a reasonable use of the land, because it is for a proper object, and a highly beneficial purpose, and the danger may be avoided by proper care. *Id.*

The owners of cattle who permit them to run at large in the vicinity of an uninclosed railroad track can ask no more than that the agents of the railroad company, in the legitimate conduct of its business, running its trains with a speed regulated by the grade of its road, the capacity of its locomotive power, and the safety of the persons and property carried, shall, with due regard to the safety of the persons and property in their charge as the paramount consideration, exercise ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon their uninclosed road. *Id.*

Where there is nothing in the running of a train or its rate of speed at a particular time and place inconsistent with the general and legitimate conduct of the business

of the railroad company, the occasion and necessity therefor do not concern the owner of cattle running at large, and he cannot inquire whether the rate of speed was greater than usual for a particular train at a particular place, and what was the object of such rate. *Id.*

Where it does not appear that the rate of speed at which a train was running was a rate at which the railroad company, in the ordinary and legitimate conduct of its business, might not reasonably run its train, the inquiry in an action for injuries to cattle on an uninclosed track must be confined to the question whether, under the circumstances of the case, the defendants exercised reasonable and proper care in running their engine to avoid injury to the cattle of plaintiff, and this question is for the jury. *Id.*

If the company fail to fence its track, it is absolutely liable for twice the value of stock injured or killed by reason of the want of such fence, unless the injury is caused by the willful act of the owner. But if such track is properly fenced or inclosed, the company is liable only for gross negligence. Such is the statutory rule in Iowa. *Russell v. Hanley*, 89 D. 535.

A railroad corporation is not liable to owner of sheep killed upon its track, under the Mass. Gen. Stat. ch. 63, where he negligently suffers them to escape from his own land, or where they escape from land adjoining the railroad, upon which he suffers them to be wrongfully, although through a defective fence which the corporation is bound to suitably make and maintain. *Hames v. Salem etc. R. R. Co.*, 96 D. 676.

Where the live stock of plaintiff, running in his field, strayed upon the defendant's unfenced railroad and were killed by a passing train, these facts unexplained make a *prima facie* case of negligence against the defendant. The plaintiff was not chargeable with contributory negligence, from the fact that he knew that the railroad was not fenced when he turned the stock into the field. *McCoy v. California Pac. R. R. Co.*, 6 R. 623.

A horse, while being led on a highway, escaped without his keeper's fault, and running some fifty rods, pursued by his keeper, entered upon an unfenced railway track, and was there injured by a train. *Held*, that the defendant was liable. *Amstein v. Gardner*, 42 R. 421.

A statute making railways liable for stock killed by reason of neglect to fence their tracks, and for attorneys' fees in addition, is not unconstitutional. *Peoria etc. R. Co. v. Duggan*, 50 R. 619.

4. *Effect of negligence of owner.* — If cattle trespass on a railroad track and are run over by the cars, the owner cannot recover damages therefor, though he exercised ordinary care and prudence to take care of

For Index to Notes in American Decisions and American Reports, see Volume I.

them. He is bound at his peril to keep his cattle away from the track where they have no right to be. *Tonawanda R. R. Co. v. Munger*, 49 D. 239.

Negligence contributing to the loss is imputed by law to the owner of animals which escape from his inclosure and stray upon a railroad track, where they are run over; and evidence that his fences were good, or that the animals were quiet and orderly, will not enable him to recover from the company for the accidental or careless killing of them. *Munger v. Tonawanda R. R. Co.*, 53 D. 384.

An owner permitting a horse to run at large upon a highway is chargeable with same degree of negligence, when he knows of the exposure and liability to injuries from passing trains, as is a railroad corporation in not constructing its fences and cattle-guards; and as much care and prudence is required of the owner in keeping his property from exposure to such injuries as is required of the corporation in guarding against their commission. *Trow v. Vermont Cent. R. R. Co.*, 58 D. 191.

A party permitting his cattle to be on a railroad track is not blameless. *Chicago & Miss. R. R. Co. v. Patchin*, 61 D. 65.

In determining whether negligence on part of plaintiff is proximate or remote, as affecting his right to recover, in an action against a railroad company for damages for killing animals, the degrees of negligence (as slight, ordinary, or gross) are as much to be considered as is the question whether his contributory negligence was proximate or remote in the sense of its having occurred, or of his being present, at the time of the alleged injury; and it would be error for a court to instruct the jury that "proximate negligence is negligence at the time of the happening of the injury complained of"; that "remote negligence is that which does not occur at the time of such injury"; that "the plaintiff, in suffering his animals to run at large in the vicinity of the railroad, was only guilty of remote negligence"; and that if so, and if the defendant was guilty of gross negligence, the latter was liable for the damage. *Chicago etc. R'y Co. v. Goss*, 84 D. 755.

A distinction is to be made, in determining whether plaintiff's negligence would preclude his recovery, between the case of an owner whose cattle escape from his inclosure and stray upon a railroad against his will, and that of one who voluntarily permits them to go there, or to range in places where it is probable that they will do so. *Id.*

Plaintiff's horse escaped from his own land on to defendant's railroad and was killed by a locomotive. *Held*, that the plaintiff was not guilty of contributory negligence in turning the horse upon his land knowing that it was not fenced, when it was the legal duty of the railroad company to build the fence. *Wilder v. Maine Cent. R. R. Co.*, 20 R. 698.

S. P., Burlington etc. R. R. Co. v. Webb, 53 R. 809.

5. *Pleading, evidence, damages, etc.*—A declaration against a railroad company for killing stock need not negative the possibility that the stock may have been killed at a properly fenced farm-crossing; in which case, the company would not have been liable under the statute. *Great Western R. R. Co. v. Helm*, 81 D. 226.

Evidence of previous habits and conduct of a person in charge of a train at the time when an accident happened, by which injury was done to the plaintiff's cattle, is admissible in an action to recover for such injury, for the purpose of showing that his alleged misconduct at the time of the injury was in keeping with his general character. *Vicksburg & J. R. R. Co. v. Patton*, 66 D. 552.

To sustain an action for killing cattle the plaintiff must prove negligence on the part of the company, and the absence of contributory negligence on his part. *Perkins v. Eastern R. R. Co.*, 50 D. 589.

Negligence of the engineer in running over cattle must appear to render the company liable therefor. *Danner v. So. Car. R. R. Co.*, 55 D. 678.

Proof of damage done by a railroad train establishes a case of negligence, and not of accident, where nothing more appears; and the burden of proof is thereby thrown upon the railroad company to show want of negligence in its agents in charge of the train; and their absence at the trial creates a strong presumption against the company, for they alone could give the circumstances attending the doing of the injury. *Murray v. So. Car. R. R. Co.*, 70 D. 219; *Danner v. So. Car. R. R. Co.*, 55 D. 678.

Mere proof of killing of cattle on a railroad track is not sufficient to charge the company with negligence. Wanton, willful, or gross negligence on the part of the company must be shown in order to make it liable. *Chicago etc. R. R. Co. v. Patchin*, 61 D. 65.

That a horse was killed in the night-time by a train does not relieve the company of the burden of proof that the killing was accidental, and not by negligence. *Murray v. So. Car. R. R. Co.*, 70 D. 219.

Exemplary damages may be assessed against a railroad company, in an action for killing cattle upon its track, where the evidence shows gross negligence, or a wanton and reckless disposition on the part of its agents to injure or destroy the plaintiff's property. *Vicksburg & J. R. R. Co. v. Patton*, 66 D. 552.

78. *Liability for injuries to strangers assisting employees.*—Where an employee of a railroad company, engaged in its service summons his son, eleven years old, to his temporary assistance, and the son while so assisting is injured by the negligence of

For Index to Notes in American Decisions and American Reports, see Volume I.

another railroad company, the latter is liable to the son therefor. *Pennsylvania Cem. v. Gallagher*, 48 R. 689.

At a station where defendants' train of cars had stopped, the engine, tender and one car ran down to the water-tank in charge of the fireman, who asked a boy ten years old, standing there, to put in the hose and turn on the water. While the boy was climbing upon the tender to comply with the request, some detached cars belonging to the train came down with ordinary force, and struck the car next to the tender, whereby the boy was thrown down and crushed to death. In an action by the parents of the boy — *Held*, that the defendants were not liable. *Flower v. Pennsylvania R. R. Co.*, 8 R. 251.

The conductor of a train ordered a boy standing by, and who was not in the employ of the railroad company, to uncouple the cars, the boy refused, but on being threatened by the conductor uncoupled the cars, and in doing so was injured. *Held*, that the railroad company was not liable. *New Orleans etc. R. R. Co. v. Harrison*, 12 R. 356.

An infant rode upon a freight car in a freight train, without the consent of his parents and without the knowledge of the conductor, and without paying his fare. The rules of the company prohibited the carrying of passengers without fare, or on freight trains except in the caboose. The conductor knowingly suffered him to remain on the freight car. A brakeman, without authority, set him at a dangerous service on the car, in trying to perform which he was injured. *Held*, that the company was not liable. *Sherman v. Hannibal etc. R. R. Co.* 87 R. 423.

On the request of a railway employee, the plaintiff, not in the company's employment, got on a slowly moving car on a switch and applied the brake, and while so occupied was injured by a collision with other cars, negligently produced by other servants of the company. *Held*, that he had no remedy against the company. *Everhart v. Terre Haute and I. R. R. Co.*, 41 R. 567.

b. Injuries to Passengers.

74. The care required from the company.*—1. *General rules.*—A railroad carrying passengers is bound to the most exact care and diligence in all arrangements necessary for their safety, including not only the management of the trains and cars, but also the structure and care of the track. *McElroy v. Nashua etc. R. R. Corp.*, 50 D. 794; *McPadden v. New York Cent. R. R. Co.*, 4 R. 706.

The company contracts with a passenger that they will furnish a safe and sufficient roadway to the place of his destination,

* Degree of care required from the company as carriers of passengers, see note, 43 D. 856-862.

that their cars are staunch and roadworthy, that they have taken means beforehand to guard against any danger that might beset travel, and that their servants are sober, competent men. *Sullivan v. Phila. etc. R. R. Co.*, 72 D. 698.

The company is bound to provide safe and secure carriage for the transportation of passengers. Nothing exempts it from this responsibility but the existence of latent defects which no reasonable degree of human skill and foresight could guard against. This obligation extends to every species of appliance used by the company in the business in which it is engaged. *Curtis v. R. & S. R. R. Co.*, 75 D. 258; *Powell v. Pennsylvania R. R. Co.*, 75 D. 564.

Carriers of passengers on railroads are not insurers of the lives and limbs of their passengers, but the implied contract binds them to exercise the highest degree of care and prudence, and makes them liable for the slightest neglect. *Peters v. Rylands*, 59 D. 746; *Pennsylvania R. R. Co. v. Aspell*, 62 D. 323; *Nashville etc. R. R. Co. v. Elliott*, 78 D. 506; *Thayer v. St. Louis etc. R. R. Co.*, 85 D. 409; *Baltimore etc. R. R. Co. v. Breinig*, 90 D. 49; *Taylor v. Grand Trunk Ry Co.*, 2 R. 229. But the party injured must be free from such negligence as contributes to the injury complained of. *Chicago & Miss. R. R. Co. v. Patchin*, 61 D. 65.

Railroad companies are not distinguished from stage companies in the degree of diligence required and the extent of liability incurred. *Gillemwater v. Madison & I. R. R. Co.*, 61 D. 101.

Public policy demands that the law should be applied as rigidly to railroad companies as to any other species of passenger carriers. *Id.*

Railroad companies must make proper regulations for the running of trains and conform to them, or be responsible for all consequences. *Chicago etc. R. R. Co. v. George*, 71 D. 239.

The public is entitled without distinction to travel upon railroads, but it is entitled to do so only in a particular manner, and in vehicles controlled and managed by the company. This control and management extends to every part of the service. *Powell v. Pennsylvania R. R. Co.*, 75 D. 564.

A railroad company is not bound to receive an unusual number of passengers, beyond what it may be bound to provide with safe accommodations; but if it does receive them without condition or notice of its inability to provide for their safety, it assumes all the obligations usually incumbent upon a carrier of passengers. *Evansville etc. R. R. Co. v. Duncan*, 92 D. 322.

A railroad company is charged with the duty of preserving order on its trains, and is liable for injuries sustained by a passenger at the hands of a fellow-passenger in

For Index to Notes in American Decisions and American Reports, see Volume I.

consequence of a failure on the part of the agents of the company to discharge this duty. *New Orleans etc. R. R. Co. v. Burke*, 24 R. 689.

2. *As to the selection of employees.* — A careful selection of servants with reference to skill and competence by a railroad company, and the occurrence of a negligent act without its sanction, will not relieve it from liability for injury suffered by a passenger from such negligent act. *Gillevater v. Madison & I. R. R. Co.*, 61 D. 101.

The company is bound to employ all necessary officers and agents, and to instruct them in their respective duties, so as to secure to the public a safe transportation. *Powell v. Pennsylvania R. R. Co.*, 75 D. 564.

A scarcity of competent hands does not excuse the company in employing incompetent or intemperate men to run its trains. And testimony on the part of the company to show the efforts it made to secure competent train-hands is not admissible in an action against it for negligence. *Pennsylvania R. R. Co. v. Boots*, 98 D. 229.

3. *As respects access to and from cars.* — Owners of railroads that are public highways are bound to make suitable places of access to their roads, and keep the same in such condition that they may safely accommodate those who may be reasonably expected to use them; but there is no obligation to do anything, either for the convenience or safety of passengers, at points where none are expected to pass. *Murch v. Concord R. R. Corp.*, 61 D. 631. *S. P.*, *Warren v. Fitchburg R. R. Co.*, 85 D. 700.

A railroad company, as a passenger carrier, is bound to the most exact care, not only in the management of its trains and cars, but also in the structure and care of its track, and in all subsidiary arrangements necessary to the safety of passengers; and a wharf, which is a passage way for those going to and from the cars, is a subsidiary arrangement, which passengers have a right to require to be safe. *Knight v. Portland etc. R. R. Co.*, 96 D. 449.

Railroad companies are not required to have special agents wearing badges, to prevent passengers from injuring themselves by negligent acts in getting on or off railroad trains. They have a right to assume that travelers can take care of themselves in traveling upon railroads constructed with proper care and skill. *Detroit etc. R. R. Co. v. Curtis*, 99 D. 141.

4. *Duty towards passengers on freight, or construction trains.* — Railroad companies occasionally transporting passengers upon freight trains are not common carriers of passengers upon such trains, and are not chargeable for the want of accommodations such as would be otherwise justly required. *Murch v. Concord R. R. Corp.*, 61 D. 631.

A railroad company carrying passengers

on construction trains must be held to the same degree of diligence as when regular passenger coaches are used. *Ohio etc. R. R. Co. v. Muhling*, 81 D. 336.

5. *Duty towards persons not passengers.** — A passenger carrier need exercise only ordinary care toward one who enters the cars not as a passenger, but to assist an aged and infirm relative to a seat, and is not bound to give such person any special notice of the time of the departure of the train. *Lucas v. New Bedford etc. R. R. Co.*, 66 D. 406. In such case the carrier is only required to use such care and diligence as would be exercised by skillful, prudent, and discreet persons having the control and management of such business, regarding their duty to the interests of all concerned: such a party is not entitled to recover if his negligence directly contributed to his injury, or if the accident could have been avoided by such care as might under all the circumstances have been reasonably expected to be exercised by one of his age and intelligence. This is true although the injury could have been prevented by the exercise of the utmost care and diligence on the part of the carrier. *State v. Baltimore etc. R. R. Co.*, 87 D. 600.

6. *Illustrations.* — In an action against a railroad company to recover for injuries sustained by an accident, the court charged the jury that "defendants must use such degree of care as is practicable short of incurring an expense which would render it altogether impossible to conduct the business." *Held*, to be erroneous, as making the ability of the corporation the measure of the care and diligence required. While, as a rule, railroad corporations are not bound to exercise such a degree of care as would render it practically impossible to continue this mode of transportation, yet the standard of care and diligence for a particular railroad cannot be made to depend upon its pecuniary condition. It is bound to provide all the agencies suited to the nature and extent of the business it purposes to do, irrespective of any fluctuation in its revenue. *Taylor v. Grand Trunk R'y Co.*, 2 R. 229.

Plaintiff, a passenger on defendant's cars, was assaulted by other passengers and appealed to the train conductor for protection. The conductor, after asking the assailants to desist, became frightened and ran away, and made no further effort to protect the plaintiff, who was thereupon beaten and injured. *Held*, that the conductor having failed to use the means at his disposal to protect the plaintiff, the defendant was liable. *New Orleans etc. R. R. Co. v. Burke*,

*Duty and liability of the company, to persons with whom it has no contract relations, but who are lawfully upon its cars or premises, see note, 90 D. 65-67.

For Index to Notes in American Decisions and American Reports, see Volume I.

24 R. 689. And see *Goddard v. Grand Trunk R'y Co.*, 2 R. 39.

The plaintiff was a passenger on a railway train. On its arrival in New York city, the cars were disconnected and drawn by horses, and the car in which plaintiff was riding was left standing alone, with no employee of the defendant in charge of it. While there, persons, not passengers nor employees, robbed him of \$16,000 in bonds which he had about him. In an action to recover the value of the bonds,—*held*, that they were not a part of the property the risk of which he could impose on the defendant, without notice to or knowledge by them that he was carrying them; and thus could not be considered in fixing the damages for which they were liable by reason of their negligent failure to protect his person. *Weeks v. N. Y. etc. R. Co.*, 28 R. 104.

The plaintiffs, colored persons, purchased tickets over the defendant's road, upon an excursion, and took seats in a car with white persons. There were separate cars provided for colored people but they did not know it. The white persons annoyed and insulted them, and they complained to the conductor. He accepted their tickets, and said they might sit in that car, but that as it was an excursion train he could not control the conduct of the other passengers, and that they might expect rude treatment. The treatment continuing, similar appeals to the conductor met with a refusal of protection. Subsequently the white passengers violently ejected the plaintiffs from that car, and they entered one furnished for colored people, but were obliged to stand up for some time. The instructions of the company to conductors were to advise colored passengers found in cars set apart for white persons, to go to the cars provided for colored persons, but if they declined to do so, to allow them to remain. *Held*, that the defendant was liable for the assault. *Britton v. Atlanta etc. R'y Co.*, 43 R. 749.

75. Who are deemed passengers.

—1. *General rules.*—Every one riding in a railway car is presumed to be there lawfully as a passenger, and the *onus* is upon the carrier to prove that he was a trespasser. *Pennsylvania R. R. Co. v. Books*, 98 D. 229.

One who has been employed by the company, but who, in pursuit of his private business, takes passage on its cars is a passenger, though no fare is collected from him. *Ohio etc. R. R. Co. v. Muhling*, 81 D. 336.

A railroad owes the same duty to mail agents riding in postal cars that it does to passengers. *Seybolt v. New York etc. R. R. Co.*, 47 R. 75.

One who by permission of the engineer of a freight train, acting as conductor, takes passage on such train and pays fare, is entitled to the privileges of a passenger, although the engineer has been forbidden to

receive passengers on the train, provided the passenger does not know of such rules. *Hanson v. Mansfield R'y and T. Co.*, 58 R. 162.

It is not negligent in such passenger to ride on the locomotive by direction of the engineer-conductor. *Id.*

A person who has secured a railroad ticket and is merely crossing a side-track for the purpose of taking the train, is not a passenger, and cannot recover as such, if he is injured by being struck by the train. *Indiana Central R'y Co. v. Hudelson*, 74 D. 254. Contra see *Warren v. Fitchburg R. R. Co.*, 85 D. 700.

In the absence of proof that a railway company is accustomed to carry passengers upon hand-cars, one who is injured while thus riding has no cause of action against the company, although invited thus to ride by the section foreman. *Hoar v. Maine Cent. R. R. Co.*, 35 R. 299.

One who entered a railway train as an escort for a woman, to find her a seat, and who was injured in the endeavor to leave the train while it was under way, with some papers in his hands, is without remedy. *Central R. R. & B. Co. v. Letcher*, 44 R. 505.

One who is injured by the negligence of a railway company while traveling on one of its trains upon a commutation ticket issued to another person, and by its terms not transferable, has no remedy against the company. *Way v. Chicago etc. R. R. Co.*, 52 R. 431.

2. *Illustrations.*—A passenger was riding in the saloon-car of a freight train, contrary to the rules of the railroad company, but the conductor made no objection, and collected fare of him for a first-class passage. *Held*, that he could recover for injuries received from the negligence of the railroad company. *Dunn v. Grand Trunk R'y*, 4 R. 267.

A railroad corporation, in consideration of the payment by a person of a certain sum of money, and of his agreement to supply the passengers on the trains with iced water, issued to him a season ticket over their road, and permitted him to sell popped corn on their trains. *Held*, that while traveling under this contract he was a passenger, and not a servant of the corporation. *Com. v. Vermont and M. R. R. Co.*, 11 R. 301.

An express company had, by contract with a railroad company, the use of a car in which their agent rode without paying fare. The agent, without the authority of his employers, took the plaintiff with him in the car for the purpose of teaching him the business, and the conductor, supposing plaintiff to be an agent of the express company, suffered him to ride without paying fare. An accident happening, plaintiff was injured. *Held*, that plaintiff was not a pas-

For Index to Notes in American Decisions and American Reports, see Volume I.

senger, and could not maintain an action against the railroad company. *Union Pacific R'y Co. v. Nichols*, 12 R. 475.

Plaintiff was injured while riding upon a car attached to defendant's freight train. It appeared that defendant permitted passengers to be carried upon some of its freight trains, but not upon this one; that the plaintiff went aboard said train in good faith, supposing that it was authorized to carry passengers, and was not informed to the contrary until after said accident; that the train was not brought to the passenger platform, and that the ticket office was not open. *Held*, that the jury might find that the plaintiff was a passenger and entitled to recover. *Lucas v. Milwaukee etc. R'y Co.*, 14 R. 735. S. P., *Creed v. Pennsylvania R. Co.*, 27 R. 693. *Contra* see *Eaton v. Delaware etc. R. Co.*, 15 R. 513; *Houston and T. Cent. R'y Co. v. Moore*, 30 R. 98.

The plaintiff's intestate having been riding on the engine, got off at a station where the train stopped, and ran to get into a car, but did not reach it until the train had started, and then stood on the platform until he fell off, owing to the swaying of the train, and was killed. *Held*, that he had not become a "passenger" within the statute, and the railroad company was not liable. *Merrill v. Eastern R. R. Co.*, 52 R. 705.

On the person of a passenger, killed by the negligence of a railway company, were found a non-transferable pass issued to another person, and a conductor's check. *Held*, that it must be presumed that he was a lawful passenger. *Louisville R'y Co. v. Thompson*, 57 R. 120.

76. Duty towards sick passengers.* — Sick persons have the right to enter the cars of a railroad company; and as common carriers of passengers, the company cannot prevent them from entering their cars. *New Orleans etc. R. R. Co. v. Statham*, 97 D. 478.

The company owes no enhanced duty to sick persons and persons unable to take care of themselves. Railroad cars are not traveling hospitals, nor their employees nurses. It is the duty of such disabled persons to provide for themselves proper assistance while traveling in railroad cars. It is not the duty of railroad companies to supply it. *New Orleans etc. R. R. Co. v. Statham*, 97 D. 478. *Contra* see *Sheridan v. Brooklyn & N. R. R. Co.*, 93 D. 490.

The duty of a railroad conductor extends no further than to have stations announced, and to have the train stop long enough at each station for passengers to get on and off. Any assistance he may extend to sick persons getting on or off a train is merely an act of courtesy, and not in the line of his duty. It is not the duty of conductors to

see to the debarkation of passengers, even though they are sick. *New Orleans etc. R. R. Co. v. Statham*, 97 D. 478.

If a passenger is sick, unable to walk, and requires assistance to get from the car, and longer delay than usual is necessary at the station for him to be safely removed, he should give timely notice of the same to the conductor. *Id.*

The rights of well passengers must be consulted and respected as well as those of sick passengers by the employees of railroad companies in the discharge of their public duties. *Id.*

77. For what injuries the company is liable.*—Railroads are answerable for every injury caused by defects in roads, cars, or engines, or by any negligence, however slight, of the company or its agents. *Pennsylvania R. R. Co. v. Aspell*, 62 D. 323; *Black v. Carrollton R. R. Co.*, 63 D. 586.

The company is liable for injury to a passenger by misplacement of a switch constituting part of its road, by the negligence of the servant of another company connecting with such road, by whom such switch is provided. *McElroy v. Nashua etc. R. R. Corp.*, 50 D. 79.

The owner of passenger cars engaged in carrying passengers over a track belonging to the state, by which also the motive power is furnished, is liable for injuries to a passenger from a collision, though it were caused by the negligence of the engineer who is employed by the state; and if there be a common liability, that of the state can not be enforced by action, and this circumstance does not diminish that of the carrier. *Peters v. Rylands*, 59 D. 746.

A railroad company is liable for injury sustained by a passenger in consequence of the breaking of an axle, attributable to a defect in the material of which it was made, notwithstanding the defect was latent and could not have been discovered by ordinary inspection, if it could have been ascertained by any tests known to manufacturers of such articles. The fact that the company purchased the car from experienced and skillful manufacturers does not shield them from liability. *Hegeman v. Western R. R. Corp.*, 64 D. 517.

A verdict against a railroad company for injury to a passenger is warranted, where the passenger, while awaiting a train in a proper place, and believing that she was in danger from the approach of the train in an unexpected direction by reason of the switch being misplaced through culpable negligence of servants of the company, became alarmed, and in running away to escape the apprehended peril, tripped over the rail of the track on which she was running, fell, and was injured, although by

* Whether railroad companies owe any special duty or care to sick, aged and feeble passengers, see note, 97 D. 499, 500.

* See elaborate note on the liability for injuries suffered by passengers, 48 D. 355-367.

For Index to Notes in American Decisions and American Reports, see Volume I.

running she was brought into a more perilous position than she was in had she remained where she was standing. *Caswell v. Boston etc. R. R. Co.*, 93 D. 151.

A railroad company is liable in damages for the death of a child who, being seated in a crowded car, was compelled by the conductor to leave the seat and to stand upon the platform, from which, by the hasty and careless exit of another passenger, he was thrown and killed; and the wrongful act of such passenger would not relieve the company from the consequences of the wrongful act of their conductor in placing the deceased on the platform. *Sheridan v. Brooklyn & N. R. R. Co.*, 93 D. 490.

The rule that there is a legal presumption of negligence on the part of a railway company where an injury to a passenger is caused by a want of diligence or care in those employed by the company, or by any other thing which it can or ought to control, as a part of its duty to carry passengers safely, applies without distinction between accidents arising from negligence in the equipment or management of the train, and those arising from the misconduct of passengers upon it. *Pittsburg and C. R. R. Co. v. Pillow*, 18 R. 424.

A passenger on a railway train was injured through a quarrel between two drunken men, who were also passengers. The conductor of the train witnessed the quarrel, but refused to interfere. *Held*, that the railway company was presumptively negligent and liable for the injury. *Id.*

Plaintiff went on board of defendant's railroad train, not as a passenger, but to find seats for a lady and child whom he had in charge. After finding seats he attempted to get off the train and in so doing was injured. *Held*, that even though he got off after the train was in motion, yet if sufficient notice of a start and a reasonable time to get off were not given, the company was liable. *Doss v. Missouri etc. R. R. Co.*, 21 R. 371.

A railway passenger traveling in the coach of a sleeping-car company, may properly assume, in the absence of notice to the contrary, that the whole train is under one management; and where he sustains injury by the negligence of the sleeping-car company he may maintain an action against the railroad company. *Railroad Co. v. Walrath*, 43 R. 433.

On proof of injury sustained by a passenger on a railroad train, by the fall of a berth in a sleeping-car, and that the passenger was without fault, a presumption arises that the railroad company is liable. *Id.*

Railway companies are bound to afford to passengers on long routes easy and safe modes and reasonable time for obtaining food, and safe ingress and egress to and from refreshment stations, whether con-

trolled by the company or by others; and where a passenger sustains injury on returning from such a station to the train by want of sufficient light and the removal of the train without notice in his absence, the company is liable. *Pentston v. Chicago etc. R. R. Co.*, 44 R. 444.

The plaintiff entered a car of a train of the defendant's railroad, but could find no vacant seat and remained standing for some time and until the conductor told him to go to a forward car and take a seat. The train was moving, and in endeavoring to obey the direction he was either purposely or carelessly jostled from the train by a brakeman. *Held*, that defendant was liable for the injury. *Louisville & N. R. R. Co. v. Kelly*, 47 R. 149.

The plaintiff, while sitting near the front door of a crowded and dark car on the defendant's railway, in passing through a long tunnel attempted to shut the door, there being no servant of the defendant at hand to do it, in order to keep out the smoke and cinders, and received an injury in doing so. *Held*, that the defendant was liable. *Western Maryland R. R. Co. v. Stanley*, 48 R. 96.

78. When the company is not liable.—A railroad company is not liable to a passenger for an injury which he might have avoided by ordinary attention to his own safety, though the negligence of their agents also contributed to the accident. *Pennsylvania R. R. Co. v. Aspell*, 62 D. 323.

A passenger on a train must comply with all the company's reasonable rules for entering, leaving, or occupying their cars. If he is injured through a disregard of these rules, although the negligence of the company's servants concurred in causing the injury, the company is not liable. *Sullivan v. Phila. etc. R. R. Co.*, 72 D. 698.

Where the company has a legal right to run a train upon a side track, it is immaterial whether it was run upon that track by design or accident, no greater degree of care being required in case of such an accident than if the train was thrown upon the track by design; and if the train was managed with due care, one injured thereby cannot recover. *Indiana Central R'y Co. v. Hudson*, 74 D. 254.

Where the company leaves cars on a switch securely fastened for the use of a mill company, the latter thereafter control them on their own account, and if they so move the cars upon the switch that a passenger on a passing train whose arm protrudes from the window is injured by striking the car, the company could not be held liable unless some kind of an agency is established for the company on the part of the mill proprietors. *Louisville & N. R. R. Co. v. Sickings*, 96 D. 320.

When a railway car is perfect in appearance, but imperfect from some latent defect,

For Index to Notes in American Decisions and American Reports, see Volume I.

which the utmost skill and care could neither perceive nor provide against, the railway company is not responsible for injuries to a passenger arising from such defect. Thus, a carrier is not liable for an injury caused by the breaking of an axle of the car caused by a latent defect, while running at a proper speed upon a well-constructed road. *Meier v. Pennsylvania R. R. Co.*, 3 R. 581. S. P., *Ladd v. New Bedford R. R. Co.*, 20 R. 331.

By a sudden and extraordinarily heavy rainfall, about dark, confined to a limited locality, a portion of a railway bed was so undermined that it gave way under the weight of a train, three or four hours afterward, and a passenger was injured. The railway bed was in safe condition before the rainfall; a train had safely passed over it two hours before the accident, and it had been inspected between the time of the passage of that train and the time of the accident, and was apparently in safe condition. The defect was not visible at the time of the accident. The train in question was carefully run at half speed at the time in question. *Held*, that no action would lie against the company. *Railroad Co. v. Halgren*, 37 R. 744.

A railway passenger was ejected from a car at one end of the trestle, and his gun, which was in the baggage car, at the other. He crossed to get it, and in returning, fell and was injured. *Held*, that the company was not liable therefor. *I. & G. N. R'y Co. v. Folhard*, 59 R. 632.

79. Injury to passenger in alighting from train.* 1. General rules. — A railroad company is responsible for injuries to passengers, where too little time is afforded them to alight at their destination. *Pennsylvania R. R. Co. v. Kilgore*, 72 D. 787; *Fairmount etc. R'y Co. v. Stutler*, 93 D. 714; *Toledo etc. R. R. Co., v. Baddeley*, 5 R. 71.

Concurrent negligence on part of passenger, when the railroad is also negligent in not affording the passenger time to leave the train at stations, will not excuse the company. *Pennsylvania R. R. Co. v. Kilgore*, 72 D. 787.

A passenger who voluntarily jumps from cars while in motion, to avoid being carried beyond her destination, where the cars did not stop as they were in the constant habit of doing, is guilty of such imprudence as relieves the railroad company from liability for injuries thereby sustained. *Dumont v. New Orleans & C. R. R. Co.*, 61 D. 214.

One entering the cars of a passenger carrier, not as a passenger, but to accompany an infirm relative to a seat as a passenger, cannot recover for injuries received in leav-

ing the cars, if he attempted to leave the cars after the train was started, or finding the cars in motion as he was going out, persisted in making progress to get out, and if such attempt was the cause of or contributed to the accident, even though there was negligence in the carrier in moving the train and in a jerk occurred after the starting, which concurred in producing the injury. *Lucas v. New Bedford etc. R. R. Co.*, 66 D. 406.

Where a railroad train is stopped on a dark night, merely waiting for a train from the opposite direction to pass, at a place several rods from a passenger station, and no notice is given by the servants of the company to passengers that they may leave the cars, one who leaves the cars and receives a personal injury by walking into an open cattle-guard cannot recover damages of the company therefor; and it makes no difference that he was misinformed by some individual not in the company's employment that he must go and see to having his baggage passed at the custom-house, supposed to have been reached by the train, or that the train was near a passenger station which was not the place of his destination. *Frost v. Grand Trunk R. R. Co.*, 87 D. 668.

A passenger carried in a freight car from which no means of descent is provided, who leaps from the car after the train has stopped at the passenger's destination, and is thereby injured, is not guilty of negligence such as will relieve the carrier from liability, merely because she was not in peril, or had not reason to believe that she was in peril; and an instruction to this effect is properly refused for not containing the further element that the circumstances were such that a person of ordinary prudence would have apprehended danger from the leap. *Beansville etc. R. R. Co. v. Duncan*, 92 D. 322.

A passenger who to prevent being carried beyond her destination voluntarily jumped from the car, from which no means of descent were provided, after the train had stopped at the station, and was injured thereby, was guilty of contributory negligence, since the evidence showed that the leap was dangerous, that she considered it to be such, and that she was warned not to make it. *Id.*

The question of due care on part of plaintiff, and of negligence on part of defendants, should be submitted to the jury in an action against a railroad corporation for an injury sustained by a passenger, who, on a dark night, upon the arrival of a train on the main track next to the station-house, alighted on a narrow platform between that track and a side-track, and in crossing from the platform to the highway was struck by an engine backing on the side-track, if the evidence at the trial has any tendency to show, according to the general knowledge and ex-

* Moving train, injuries received in jumping from or on, see note, 37 R. 264-267.

Contributory negligence, leaping from railroad car, see note, 44 R. 508, 509.

For Index to Notes in American Decisions and American Reports, see Volume I.

perience of men, that the situation, arrangement, and use of the premises were such as to invite the plaintiff to cross to the highway in the manner in which he attempted to do so, that he used ordinary care in the attempt, and that the defendants did not provide proper safeguards against such an accident. *Gaynor v. Old Colony & N. R'y Co.*, 97 D. 96.

One who alights from a train upon a track running parallel therewith, along which he knew another train was due at any moment, was guilty of negligence if he neglected to look up said track to see if the train was coming; and if he did look up the track, and saw the train coming within a few feet of him, and still attempted to cross, he was guilty of greater negligence. *Gonzales v. New York & H. R. R. Co.*, 98 D. 58.

A railway company, inviting a passenger to alight after dark at a freight depot, instead of a regular passenger depot, is bound to keep the platform and approaches in a safe condition for the passenger's reception and egress, and to provide lights if necessary to his safety. *Stewart v. Internat. etc. R. R. Co.*, 37 R. 753.

A passenger is not guilty of negligence in attempting to leave a car, under a reasonable belief that by so doing he will escape injury from an impending accident, where he is injured by the company's negligence in so doing, although he would have escaped had he remained. *Iron R'y Co. v. Mowery*, 38 R. 597.

When a train draws up at a platform so that only the forward end of the smoking car is at the platform, a woman passenger in a rear car is not bound to go through the smoking car to alight, nor to alight from the front end of the rear car, and if she is injured in alighting from the rear end, in consequence of the position of the train, the company is liable. *Curtwright v. Chicago etc. R'y Co.*, 50 R. 274.

2. *Illustrations.*—Plaintiff purchased a ticket at L., on defendant's railroad, for A. and got upon a freight train, while it was moving slowly. The conductor took the ticket; the train did not stop at A., and plaintiff in getting off was injured. *Held*, 1. That if plaintiff left the train voluntarily, although at the suggestion of the conductor, it was a question for the jury whether he acted as a prudent man, under the circumstances; 2. That, as the train was a freight train, and not advertised to stop at A., the taking up of the ticket did not imply an undertaking on the part of the company to put plaintiff off safely at that place. *Chicago & A. R. R. Co. v. Randolph*, 5 R. 60.

In an action to recover for the death of a passenger, it appeared that the train, upon which the deceased was traveling, having stopped at a station, remained a reasonable time for passengers to alight, but he, not

availing himself of the opportunity, waited until the train began to move, when, in attempting to leave the cars, he was fatally injured. *Held*, that the company was not liable, there being no proof of mismanagement of the train or careless conduct of the employees. *Ill. Cent. R. R. Co. v. Station*, 5 R. 109.

Defendant's freight and passenger train, on which plaintiff was a passenger, having reached the station at which plaintiff was to alight, passed several hundred yards beyond the depot, stopping at an unusual place where it was low and icy. Plaintiff demanded of the conductor that the train should be backed, which was refused. In attempting to alight plaintiff dislocated his knee. The jury found negligence in defendant and a verdict for plaintiff. *Held*, on appeal, that defendant had no ground for exception. *Memphis & C. R. R. Co. v. Whitfield*, 7 R. 699.

Plaintiff's intestate was killed in alighting from defendant's train, while moving at the rate of from two to four miles per hour. It appeared that the conductor went with the intestate, who was a passenger, out on the platform, to assist him to alight. *Held*, that "if the intestate, without any direction from the conductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff was not entitled to recover; but if the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the intestate acted under the instructions of the conductor, then the resulting injury was not caused by contributory negligence or want of care." *Lambeth v. North Carolina R. R. Co.*, 8 R. 508.

Plaintiff, a passenger upon defendant's railroad, had a ticket for E., where the train was advertised to stop. The train did not stop, but passed by the station very slowly, and a brakeman told plaintiff that the train would not stop, and that she had better get off, which she did, and in doing so was thrown down and injured. *Held*, that the plaintiff was not, as a matter of law, negligent, but that the question should go to the jury. *Filer v. N. Y. O. R. R. Co.*, 10 R. 327; *Georgia R. R. Co. v. McCurdy*, 12 R. 577.

A passenger, in the night, while asleep, was carried beyond his station, and when the train stopped upon an open bridge over a stream to take water, got up, and without any direction from any one connected with the company, but upon the encouragement of other passengers, stepped off the car and received injury. *Held*, that the company was not negligent in not notifying passengers not to get off, and that the passenger was guilty of such contributory negligence as prevented a recovery. *Illinois Cent. R. Co. v. Green*, 25 R. 255.

For Index to Notes in American Decisions and American Reports, see Volume I.

A train having overhauled a station, a passenger for that station got off while the train was in motion, and was killed by another train while making his way to the station. *Held*, that he had ceased to be a passenger, and the railway company was not criminally liable under the statute. *Com. v. Boston and M. R. R.*, 37 R. 382.

A passenger was aroused at 10 o'clock at night by the conductor, and informed that his station was reached, and told by him and the brakeman to hurry and get off. The train moving very slowly, he stepped off, and as the train had overshot the platform, he fell and was injured. *Held*, that an action therefor was maintainable. *St. Louis etc. R. R. Co. v. Cantrell*, 40 R. 106.

A train not stopping at a station a reasonable length of time to allow passengers to alight, one undertook in spite of warnings to get off after the train had started, and was injured. *Held*, that she was guilty of contributory negligence fatal to recovery. *Jewell v. Chicago etc. R'y Co.*, 41 R. 63.

A railway train, approaching a station where there was a crossing of railways, stopped, as required by law, several hundred feet before reaching the station. The name of the station had been called, and the plaintiff, a woman, hurriedly attempted to alight; the train starting, she fell and was injured. It was daylight, and there was no appearance of any landing place for passengers at that point. None of the employees knew that she was endeavoring to leave the car. *Held*, that the railroad company was not liable. *Mitchell v. Chicago etc. R'y Co.*, 47 R. 566.

A railway brakeman announced a station, and shortly after the train stopped, but short of the station, and in the dark. The plaintiff supposing he had reached his destination, got off as soon as he could, but after the train had slowly started again, fell, and was injured. *Held*, that the company was liable. *Memphis etc. R'y Co. v. Stringfellow*, 51 R. 598.

The plaintiff, in attempting to step from a car on defendant's railroad to a station platform, fell between the steps and the platform and was injured. The car-steps and platform were constructed in the ordinary way, the intervening space being no more than was necessary, and no accident of the kind had happened before. *Held*, that the action could not be maintained. *Lafayette v. Buffalo etc. R. R. Co.*, 60 R. 433.

80. What evidence is sufficient to show negligence on part of the company.*—In an action against a railroad

company, the facts that a collision took place, and that plaintiff was injured, are *prima facie* evidence of negligence and want of skill in the party in charge, and casts the *onus probandi* on the defendant to prove that there has been no disregard of duty, and that the damage resulted from a cause which human care and foresight could not prevent. *N. O. etc. R. R. Co. v. Albritton*, 75 D. 98.

The fact of cattle being on the track at the time of an accident raises a question of negligence on the part of the company which is properly submitted to the jury. *Lackawanna etc. R. R. Co. v. Cheneveth*, 91 D. 168.

Where, by reason of the misplacement of a switch by a servant of the company, a train is diverted from the main track of the railroad to a side track, and there collides with other cars, and imperils passengers on an adjoining platform, it is competent for a jury to find that the omission to replace the switch was culpable negligence. *Caswell v. Boston etc. R. R. Co.*, 93 D. 151.

It is negligence for a railroad to permit its track to get out of repair, and the ties supporting the rails to get rotten. *O'Donnell v. Allegheny F. R. R. Co.*, 98 D. 336.

If the evidence tends to show that a train had come to a full stop, that the persons waiting to get upon it were told to go on board by the persons in charge, and that the plaintiff, in attempting to get aboard, was injured in consequence of the sudden starting of the train, it is not error to submit the question of the negligence of the parties to the jury. *Detroit etc. R. R. Co. v. Curtis*, 99 D. 141.

It is negligence in the servants of the company to tell passengers to go aboard when the train is not ready for their reception. After being told to go on board in any case a passenger has a right to draw the conclusion that the train is ready for his reception, and he cannot be considered negligent in attempting to do so. *Id.*

In an action for injuries sustained in consequence of a broken rail, the mere fact that a train had just passed over the road is not sufficient evidence to raise a question for the jury as to whether the rail was broken before plaintiff's train reached it. *McPadden v. N. Y. Cent. R. R. Co.*, 4 R. 706.

Where a passenger is injured by an accident caused by the washing away of the embankment, the occurrence of the accident is presumptive evidence of the carrier's negligence, and this rule applies to a lessee of the railway. *Philadelphia and R. R. R. Co. v. Anderson*, 39 R. 787.

In such a case the carrier is not relieved from liability, although the embankment was constructed by a competent engineer, and the washing away was the result of an unprecedented storm, provided the pro-

* Negligence, whether presumed from injury to passenger, see note, 43 R. 73-75.

Repair of track, whether admissible as evidence to show prior negligence, see note, 57 R. 125-127.

Running of trains in violation of law and ordinance, whether shows negligence, see note, 58 R. 52-55.

For Index to Notes in American Decisions and American Reports, see Volume I.

vision for drainage at the point in question was defective. *Id.*

81. Negligence of company must be proximate cause of injury. — A railroad train, running three-quarters of an hour behind time, was upset by a gust of wind and plaintiff was injured. The wind did not extend to that part of the road where the train would have been if running on time. *Held*, that the negligence of the company in running behind time was not the proximate cause of the injury, and that it was not liable therefor. *McClary v. Sioux City etc. R'y Co.*, 19 R. 631.

A passenger on a railway train, being directed to change cars at a way-station, entered another car, but was ordered out by an employee as the train was not ready. He stood a short time on the platform of the car, and then stepped to a neighboring track, and while waiting there was there injured by another train. *Held*, that his expulsion was not the proximate cause of the injury. *Henry v. St. Louis etc. R'y Co.*, 43 R. 762.

A railway passenger was carried a little past the station of his destination on a dark night, and on leaving the train was misinformed by the conductor as to where he was, but being acquainted with the neighborhood he soon discovered the mistake. If he had got off where he was told he had, it was his intention to follow the track, and cross a culvert, although he might have avoided it, but he pursued his way intending to cross another culvert. He fell into this and was hurt. *Held*, that the company's negligence was not the proximate cause of the injury. *Lewis v. Flint etc. R. R. Co.*, 52 R. 790.

82. What amounts to contributory negligence on part of passenger.* — Where a passenger permits his arm to extend out of the car, whereby it is broken in crossing a bridge, the company are not liable if they gave timely warning of the danger. *Loring v. Colder*, 49 D. 533. *S. P.*, *Todd v. Old Colony etc. R. R. Co.*, 80 D. 49; *Todd v. Old Colony etc. R. R. Co.*, 83 D. 679; *Spencer v. Milwaukee etc. R. R. Co.*, 84 D. 758; *Louisville & N. R. R. Co. v. Sickings*, 96 D. 320; *Pittsburg & O. R. R. Co. v. Andrews*, 17 R. 568.

A passenger who jumps from a running train to avoid being carried beyond his place of destination cannot recover for injuries thereby suffered. *Pennsylvania R. R. Co. v. Aspell*, 62 D. 323. *S. P.*, *Detroit etc. R. R. Co. v. Curtis*, 99 D. 141; *Bardwell v. Mobile & O. Railroad Co.*, 56 R. 842.

One who is injured by accident while unnecessarily riding in a baggage-car, and who

* See note on the care which passengers must exercise to protect themselves from injuries, 50 R. 277-281.

Contributory negligence of passengers, see note, 48 D. 364-367.

would have escaped had he been in a passenger car, cannot recover. *Houston and T. C. R. R. Co. v. Olemmons*, 40 R. 799; *Kentucky Cent. R. R. Co. v. Thomas*, 42 R. 208.

The announcement of the name of a station before the cars stop, by the conductor, does not indicate any negligence or want of diligence on his part, nor afford any justification for a passenger's jumping off while the train is in motion. *Pennsylvania R. R. Co. v. Aspell*, 62 D. 323.

The question whether a passenger is bound to wait in the station-house until arrival of train at a platform provided for passing to trains, or may cross over an intervening side-track and stand on the platform, depends, in the absence of directions thereto, upon what is a reasonably safe and prudent course for him to pursue, in determining which the jury may consider what is the usage of passengers there, and whether such usage is known to and permitted by the company. *Cassell v. Boston etc. R. R. Co.*, 93 D. 151.

In an action for damages sustained by a person in trying to get on board a train in motion, the court charged, that starting the train at the instant of giving the signal of departure was negligence on the part of the defendant; and that while the attempt to board a train moving rapidly would be negligence on the part of the plaintiff, such an attempt, if the train were moving slowly, would not be negligence on his part. *Held*, error; the question was for the jury. *Texas and P. R'y Co. v. Murphy*, 26 R. 272.

Lumber negligently loaded fell from a freight train against a caboose, frightening a passenger, who thereupon jumped from the train when it was moving at the rate of fourteen or fifteen miles a hour, and was killed. He would have been unharmed had he remained on board. The jury found that he was imprudent in jumping. *Held*, that there could be no recovery. *Woolery v. Louisville etc. R'y Co.*, 57 R. 114.

83. What does not. — Persons in perilous positions on railroad trains are not required to exercise the presence of mind and care of a prudent, careful man, with impending danger. The law makes allowance for them, and leaves the circumstances of their conduct to the jury. *Galena etc. R. R. Co. v. Yarwood*, 65 D. 682.

A passenger is not to be deemed guilty of contributory negligence when injured in attempting to leave a car on seeing a train approaching at such a speed that a collision was inevitable. *Buel v. New York Central R. R. Co.*, 88 D. 271.

An unauthorized change of position by a passenger, if it did not contribute to the injury, will not *per se* prevent a recovery, and the question is properly left to the jury. *Lackawanna etc. R. R. Co. v. Chenoweth*, 91 D. 168.

For Index to Notes in American Decisions and American Reports, see Volume I.

Ordinary capacity and ordinary care in protecting himself is all that is required of a passenger in a railroad car. *Sheridan v. Brooklyn & N. R. R. Co.*, 93 D. 490.

Where the plaintiff, who was employed by a railroad company, when returning from his work as a passenger, left the passenger-car, and went into the baggage-car, without the direction or invitation of the conductor, it is erroneous to instruct the jury that this was improper and negligent, where the evidence showed that he had long been accustomed to do so, and that this course of conduct was within the knowledge and without the objection of the conductor. *O'Donnell v. Alleghany F. R. R. Co.*, 98 D. 336. Compare *Jacobus v. St. Paul etc. R'y Co.*, 18 R. 360.

Where a plaintiff, in attempting to get aboard a railroad train, was injured in consequence of its sudden starting, the fact that he was told by the company's servants to get on the hind car, and that he was injured in trying to get on another passenger-car, is not such conclusive proof of negligence on his part as to take the case from the jury. *Detroit etc. R. R. Co. v. Curtis*, 99 D. 141.

Plaintiff's arm while projecting from a car window was injured by coming in contact with a car standing near the track. *Held*, that defendants were liable. *Chicago & A. R. R. Co. v. Pondrom*, 2 R. 306.

Where a passenger in a horse car is injured by the carelessness of the engineer of a railroad company in the management of his locomotive, it is no defense to show contributory negligence in the driver of the horse car. *Bennett v. N. J. R. R. etc. Co.*, 13 R. 435; *Robinson v. N. Y. Cent. etc. R. Co.*, 23 R. 1.

In an action against a railroad company by a passenger to recover for the negligent breaking of his arm, the evidence tended to show that at the time of the injury the plaintiff had his arm outside the car window. *Held*, that this was not *per se* negligence in the plaintiff, but that whether it contributed to the injury was a question for the jury. *Barton v. St. Louis etc. R. R. Co.*, 14 R. 418.

It is not necessarily negligent in a passenger to jump from a rapidly moving railway train, in the attempt to escape from an impending collision. *Wilson v. Northern Pacific R. Co.*, 37 R. 410.

Where a railroad train overshoots a station and is stopped at a dangerous place in a dark night, it is not necessarily negligent for a passenger to alight. *Terre Haute and I. R. R. Co. v. Buck*, 49 R. 168.

It is not necessarily negligent for a passenger to board a railway train at a place other than the station platform. *Stoner v. Pennsylvania Co.*, 49 R. 764.

Where a railway passenger is injured by the concurrent negligence of his carrier and another, the negligence of his carrier is not

imputable to him. *Hokab v. New Orleans and C. R. R. Co.*, 58 R. 177.

84. Passenger riding on platform.* — Notice that passengers should not stand on the platform does not discharge the liability of the carrier to an injured passenger when the notice was upon the rear of two cars, the passenger's seat was in the forward car, and the passenger, just before the accident, had left his seat and was standing upon the front platform of the rear car. *Zemp v. Wilmington etc. R. R. Co.*, 64 D. 763.

An injured passenger, although standing on the platform of a car at the time of accident, may recover where the accident was caused by derailment, and the track was in an unfinished condition, the cross-ties were too wide apart, the rails were insufficiently spiked, and the accident occurred from the breaking of a cleat at the end of one of the rails. *Id.*

A passenger is wanting in ordinary care, if, knowing that the train is in motion, he goes out on the platform of the car, and steps therefrom upon the platform of the station while the car is still in motion, and he cannot recover from the railroad company for an injury resulting therefrom. *Gavett v. Manchester & L. R. R. Co.*, 77 D. 422.

The company is not absolved from liability for injury to a passenger on a platform, occurring while he was attempting to leave the car to escape a collision, under a regulation, pursuant to statute, prohibiting passengers from standing or riding on the platform. *Buel v. New York Cent. R. R. Co.*, 88 D. 271.

A passenger riding on the steps of a platform of a car is in a place of danger and *prima facie* negligent, and in an action for injuries by a collision, the burden is on him to rebut the presumption of negligence arising from such fact, which may be done by showing that the car and platform were full of passengers, with no room for more, and that the conductor stopped the cars to allow him to get on, and called for and received his fare, as this implied on the part of the defendant an invitation to ride in the place in which he did, and also an implied assurance that such place was a suitable and safe place to ride. *Clark v. Eighth Ave. R. R. Co.*, 93 D. 495.

A passenger on a steam railway train, unable to find a seat, although there was standing room inside, stood on the platform of a car, near the edge and was thrown off by an ordinary jolt and injured. *Held*, that he had no cause of action against the railway company. *Camden and A. R. R. Co. v. Hoosey*, 44 R. 120. *S. P., Gravelle v. Munchattan R. R. Co.*, 59 R. 516.

85. Effect of contributory negli.

* Liability of company to passengers injured while not riding in passenger car, see notes, 41 R. 247-249; 55 R. 42-44.

For Index to Notes in American Decisions and American Reports, see Volume I.

gence.*—The doctrine in relation to mutual negligence of parties in causing injury is applicable to carriers of passengers by railroad; *Galena etc. R. R. Co. v. Fay*, 63 D. 323.

A passenger takes on himself the risk of the mode of travel he adopts; but the care, vigilance, and skill on the part of the carrier must be adapted to the motive power and means employed by him. The carrier and the passenger owe reciprocal duties to each other. *Id.*

As between the company and the passenger, the duty of safe conveyance is measured by a severe rule arising out of the nature of the obligation, and a principle of public policy; and passengers undertake to run those risks only which cannot be avoided by the utmost degree of care and skill on the part of the carrier in the preparation and management of the means of conveyance. *Mad River etc. R. R. Co. v. Barber*, 67 D. 312.

A passenger who voluntarily rides in a baggage-car, by permission of the conductor, but against the rules of the railroad conspicuously posted in that car, and is injured in consequence of riding there, cannot recover from the railroad company on the ground of its negligence. *Pennsylvania R. R. Co. v. Langdon*, 37 R. 651.

86. Burden of proof. — The mere happening of an injurious accident to a passenger raises *prima facie* a presumption of negligence, and throws upon the carrier the *onus* of showing it did not exist. *Laing v. Colder*, 49 D. 533; *Zamp v. Wilmington etc. R. R. Co.*, 64 D. 763.

Negligence is not presumed from the bare fact that a railroad passenger is injured; but the passenger suing for damages must prove that the circumstances attending the injury were such as to raise a reasonable presumption that it was caused by some fault or want of care on the part of the company's servants. Such proof may warrant a verdict in his favor. *Holbrook v. Utica & Schenectady R. R. Co.*, 64 D. 502. Compare *Curtis v. R. & S. R. R. Co.*, 75 D. 258.

The burden of proof, where a person, not a passenger, is injured by a passenger carrier is upon such person to show that he exercised due care, and that the carrier was guilty of negligence, which was the cause of the injury. *Lucas v. New Bedford etc. R. R. Co.*, 66 D. 406.

When a passenger is injured while traveling upon a train without fault of his, the law raises a presumption of negligence on the part of the company, and throws upon it the *onus* of showing that negligence did not exist. This is done by showing that the injury occurred through the act of God, or that it was caused by something against which no human foresight or prudence could

provide. *Sullivan v. Phila. etc. R. R. Co.*, 72 D. 698.

Where a passenger is injured without his fault, by the train being overturned by running over a cow, the presumption of negligence which the law raises against the company remains in force until a countervailing presumption of fact is established to the satisfaction of the jury, and evidence which the court thinks calculated to repel this presumption of negligence should be submitted to their consideration. Whether the point on the road where the injury occurred was not so commonly infested with cows as to require a fence or cattle-guard of some sort; whether the speed of the cars was not too great for a curve exposed at all times to the incursions of cattle; whether the engineer discovered the cow as soon as he might and used his best endeavors to avert the collision;—these were questions which ought to have been submitted to the jury. *Id.*

An accident occasioned by a train running off the track is *prima facie* evidence of negligence on the part of the railroad company, and throws upon them the *onus* of rebutting this presumption by proving there was no negligence. *Baltimore etc. R. R. Co. v. Worthington*, 83 D. 578; *Seybolt v. New York etc. R. R. Co.*, 47 R. 76.

In an action to recover for injuries so occasioned, an instruction that it was a question of fact for the jury to determine, from all the evidence in the case, whether the injury to the plaintiff arose from any neglect on the part of the defendants, or their agents, and if the jury should find that the injury in question was the result of an accident or act against which human care or foresight could not guard, and was not the result of negligence in any degree on the part of the defendants, that the plaintiff was not entitled to recover, and that in considering this question, the jury were to have regard to the character of railway transportation, is correct. *Baltimore etc. R. R. Co. v. Worthington*, 83 D. 578.

After instructing the jury that the presumption of negligence on part of the company arose upon the happening of the accident, the court need not prescribe a measure of proof by which that presumption can be rebutted, as it would be impossible for it to do so. *Id.*

One who sues the company for injuries sustained while traveling on its train must show that it was guilty of some negligence producing or contributing to the injury, and that he was not guilty of any want of ordinary care which directly contributed to the same. Exceptions to this rule are where the injury was intentionally done, or where it could have been avoided by the company by ordinary care. *Louisville & N. E. R. R. Co. v. Sickings*, 36 D. 320.

* Contributory negligence in cases of accident, instances of, see notes, 36 R. 437-439; 64 R. 272-274.

For Index to Notes in American Decisions and American Reports, see Volume I.

In case of a collision of railway trains a presumption of negligence arises against the carrier. *Iron R'y Co. v. Mowery*, 38 R. 597.

87. Liability for injuries to persons stealing rides.* — Where a trespasser rides on the pilot of an engine of a construction train, in violation of the rules of the company but with the assent of the engineer, and is injured in consequence, the company is not liable. *Darwin v. Charlotte etc. R. R. Co.*, 55 R. 32.

Plaintiff jumped upon the baggage car of defendant's train. The baggageman ordered him off; the plaintiff replied that he could not get off because of a pile of wood beside the track. Whereupon the baggageman kicked him off and he fell against the wood, and then under the cars, and was injured. Defendant's rules forbade persons riding on the baggage cars, and required baggagemen to strictly enforce the order. *Held*, that the court was correct in charging the jury that, although the plaintiff was a trespasser, if the baggageman, in the discharge of his duty, pushed him off the train in an improper manner, and at a dangerous place, the defendant was liable; but that if he was acting wilfully and maliciously toward the plaintiff outside and in excess of his duty, the defendant was not liable. *Bounds v. Delaware etc. R. R. Co.*, 21 R. 597.

A boy eight years old jumped upon the steps of a passenger railway car and sat on the platform, to steal a ride. The conductor or brakeman kicked him off the car while the train was moving some ten miles an hour, and he was injured. *Held*, that a recovery against the railway company was warranted. *Hoffman v. New York Cent. etc. R. R. Co.*, 41 R. 337.

A boy fifteen years old wrongfully boarded a freight train to ride without paying fare, and a brakeman ordered him to jump off while the train was moving rapidly, and he tearing being thrown off, jumped and was injured. *Held*, that the company was liable. *Kansas City etc. R. R. Co. v. Kelly*, 59 R. 596.

88. — or riding on free passes. — A railroad company is liable to a passenger, carried free of charge, for injuries caused by its omission to use due and reasonable care. *Todd v. Old Colony etc. R. R. Co.*, 80 D. 49; *Gillenswater v. Madison & I. R. R. Co.*, 61 D. 101; *Norton v. Western R. R. Corp.*, 69 D. 623; *Ohio etc. R. R. Co. v. Muhling*, 81 D. 336.

An agreement exempting the company from liability for any injury to the person or property of a free passenger is valid, so far as the consequences of its ordinary negligence are concerned, but not as regards its gross negligence, recklessness, or willful

misfeasance. *Illinois Cent. R. R. Co. v. Read*, 87 D. 260.

The acceptance and use of a free ticket establishes as an agreement an indorsement thereon to the effect that the railroad company will not be liable for any injury to the person or property of the passenger, so far as it is consistent with the rules of public policy. *Id.*

A railroad company in New York has power to contract that a person riding free must do so at their own risk of personal injury from whatever cause. *Stinson v. New York Cent. R. R. Co.*, 88 D. 332.

A cattle dealer accompanying his cattle on a train, but paying no additional fare for himself, in consideration of the fact that he assumes all risk of personal injury, from whatever cause, while so riding free, cannot hold the carrier liable for injury resulting from negligence of the latter's agents or servants. *Bissell v. New York Cent. R. R. Co.*, 82 D. 369.

Such contract of a cattle dealer to exempt the carrier from liability for negligence, in consideration of the privilege of riding with his cattle, if he pays full fare, is void, as being without consideration, *semble*. *Id.*

The owner of a freight-car which is attached to a passenger train upon his assuming to run all risks assumes all risks arising from attaching the car, not the risk of negligence on the part of the railroad company or its agents; nor could the company contract for such exemption. *Lackawanna etc. R. R. Co. v. Okenowith*, 91 D. 168.

The company cannot repudiate the act of agents so as to free itself from responsibility for negligence, where the agents, at the request of the owner of a freight-car, and upon his agreement to run all risks, attached it to a passenger train contrary to the regulations of the company. *Id.*

The owner of a freight-car who is permitted by the agents of the company to attach his car to a passenger train, contrary to the regulations of the company is not to be treated as a trespasser so as to be barred from recovery for injuries from negligence, if he used no improper influence to obtain the consent of the agent. *Id.*

A mail agent who is transported by a railroad company under a contract with the government to carry its mail agents free of charge may maintain an action against the company to recover damages for injuries arising from negligence. *Hammond v. North Eastern R. R. Co.*, 24 R. 467.

A railroad company is not liable for the accidental death of a boy permitted by the conductor, against its rules, to ride gratuitously on the train to sell newspapers. *Duff v. Alleghany R. R. Co.*, 36 R. 675.

The plaintiff, traveling on defendant's railway, upon a non-transferable free pass issued to another person, passing himself as

* Liability for injuries suffered by persons wrongfully riding on cars, see note, 58 R. 424-436.

Liability for injury to person permitted to ride on engine, see note, 48 R. 16-17.

For Index to Notes in American Decisions and American Reports, see Volume I.

such person, was injured by the alleged negligence of the defendant. *Held*, that he was guilty of such fraud as to prevent a recovery for such injury, unless the negligence was so gross as to amount to a willful injury. *Toledo etc. R'y Co. v. Beggs*, 28 R. 613.

89. Damages recoverable.* — In an action against a railroad company for injuries sustained by a collision, if it is not shown that the engineer in charge was in every respect qualified, and acted with reasonable skill and the utmost caution to prevent such collision, the defendant is liable for all actual and consequential damages proved, and for exemplary damages, in the discretion of the jury, provided it is proved that plaintiff received bodily injury, caused by the gross negligence, or wanton and willful misconduct, of the engineer. *N. O. etc. R. R. Co. v. Allbritton*, 75 D. 98.

c. Injuries to Persons Crossing the Track.

90. Nature of the liability, generally.† — A railroad company's liability for injury to one neither a passenger nor employee is governed by that pervading principle of social duty founded on the common law, that every person must so conduct his own affairs as not to injure the rights of another, expressed in the legal maxim, *Sic utere tuo ut alienum non laedas*. In such cases there is no relation arising out of any privity of contract. *Mad River etc. R. R. Co. v. Barber*, 67 D. 312.

A passenger in the caboose of a railway freight train, on the stopping of the train a quarter of a mile short of his destination, got up to walk to the door and was thrown down and injured by the sudden backing of the train. *Held*, that his negligence prevented his recovery of damages. *Harris v. Hannibal etc. R. R. Co.*, 58 R. 111.

The company must exercise the utmost care and diligence to avoid running over a person on their track. *East Tennessee etc. R. R. Co. v. St. John*, 73 D. 149.

Railroad companies are liable for injuries to persons not passengers, where the injuries arise from negligence on their part, to which injuries the negligence of the injured party does not immediately contribute. *Thayer v. St. Louis etc. R. R. Co.*, 85 D. 409.

That the deceased was rightfully and not negligently or improperly on the track must be shown by plaintiff, either by direct testimony, or by presumption from facts and circumstances proved, in an action against the company to recover damages for negligently running over and killing the deceased. *Donaldson v. Mississippi etc. R. R. Co.*, 87 D. 391.

Railroad companies are liable to strangers

*Injuries, damages recoverable for, proximate cause of, see note, 41 R. 55-56.

†Liability of company for injury to person crossing track, see notes, 90 D. 55-57; 30 R. 687-689.

for failure of their agents and employees to exercise ordinary care and skill in operating their trains. *Louisville etc. R. R. Co. v. Collins*, 87 D. 486.

A railroad company is to be regarded as constructively present through its acting agents, who represent it, within range of their ordinary employment. *Id.*

No relation of contract, trust, or confidence exists between a railroad company and a stranger; each party being in the lawful pursuit of his own business, or the lawful exercise of his own rights, is required only to exercise such reasonable care to avoid injuring the other as ordinary prudence suggests. *Baltimore etc. R. R. Co. v. Breinig*, 90 D. 49. *S. P., Baltimore etc. R. R. Co. v. State*, 96 D. 528.

A railroad company in the lawful pursuit of its business employs useful but dangerous powers, and hence is required to observe a degree of caution and care proportioned to the increased risk and danger of inflicting irreparable injury upon others in like lawful pursuit of their vocations; but the duty is not imposed upon it of using every possible contrivance that human ingenuity might provide. It should, however, be vigilant in making use of every reasonable safeguard, to avoid unjust interference with others, which the nature of its business will admit. *Baltimore etc. R. R. Co. v. State*, 96 D. 528.

The company is bound to exercise more caution and a higher degree of care when running their cars through a village or city than in the open country. *Betsiegel v. N. Y. Cent. R. R. Co.*, 90 D. 741.

A railroad company is not liable for the death of one who while walking on its track without right intermeddled with a torpedo which had been placed there as a danger signal, and was killed by its explosion. *Carter v. Columbia and G. R. R. Co.*, 45 R. 754.

If the public, with the knowledge and acquiescence of a railroad company, have been long and constantly accustomed to walk upon its tracks, although it is a statutory offense to walk upon a railroad track, it amounts to a license, and the company is liable to one injured while so walking, by the negligent act or omission of its servants. *Davis v. Chicago etc. R'y Co.*, 46 R. 667.

Where a trespasser upon a railway track is injured by the negligence of the railway company, he may not recover unless such negligence was willful; mere gross negligence is not sufficient. *Terre Haute and I. R. R. Co. v. Graham*, 48 R. 719.

Plaintiff, while passing, for his own convenience, over a portion of defendants' railroad line, where the public were in the habit of passing and repassing, was injured through the alleged negligence of the defendant. *Held*, that the right of way was the exclu-

For Index to Notes in American Decisions and American Reports, see Volume I.

sive property of the defendant; that the fact that the defendant had passively permitted others to use it as a foot-way gave plaintiff no right thereon, and imposed no duty on the defendant to provide safeguards against the dangers incident to such use, and that the defendant would only be liable for willful injury or gross negligence. *Illinois Cent. R. R. Co. v. Godfrey*, 22 R. 112.

The plaintiff was driving his horse along a highway parallel and adjacent to a railroad, and the horse being frightened by smoke from the engine of a train coming in the opposite direction, the plaintiff was injured in consequence. The engine had been necessarily freshly fired up, which increased the smoke. *Held*, that the company was not liable. *Lamb v. Old Colony R. R. Co.*, 54 R. 449.

91. What is negligence on part of the company.—The rules of the company regulating the distance at which trains shall run from each other are intended solely for the protection of the property of the company, and the safety of their employees and passengers, and not for persons who may be traveling along the highway; and no inference of negligence can be drawn from the proximity of trains, in an action to recover damages for an injury done to a person while crossing the railroad track at a place not known or used as a public crossing. *Philadelphia etc. R. R. Co. v. Spearren*, 86 D. 544.

Where a railroad company has made a private crossing over their track, in a city, allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there is danger, they are liable in damages to one who, using due care, is induced to undertake to cross by a signal from the flagman that it is safe, and who is injured by a collision which occurs through the flagman's carelessness. The case comes within that class in which parties have been held liable in damages by reason of having held out an invitation or inducement to persons to enter upon the pass over their premises. *Sweeney v. Old Colony etc. R. R. Co.*, 87 D. 644.

The company is guilty of gross and criminal negligence in making a "running switch" over a public crossing of its track in the street of a populous village, where travelers are constantly passing; and the question as to whether a railroad company has exercised its right of making a "running switch" at a proper place, and with the use of due care, may be properly submitted to the jury. *Brown v. N. Y. Cent. R. R. Co.*, 88 D. 353.

Damages for injury received by a "running switch" may be recovered without other proof of negligence on defendant's part than the act of making such a running switch over a public crossing in a populous village,

constantly passed by travelers, where the person injured at such crossing is without negligence on his part. *Id.*

A railroad company has a right to establish reasonable signals for starting trains from its stations; but it is the province of the jury to determine, upon the circumstances of the particular case, whether the loud and sudden sounding of a steam-whistle was a reasonable signal for such purposes, and within the rule of ordinary care. *Hill v. Portland etc. R. R. Co.*, 92 D. 601.

It is competent for plaintiff in an action for a personal injury, caused by the fright of his horse at the sound of a locomotive whistle at a railroad crossing, to show that the sound of the whistle frightened other horses at the same time and place, and also to show the usual effect of that whistle on ordinary horses at the same place. *Id.*

Permitting a fireman to run an engine in the absence of the engineer is a fact from which the jury may find negligence and a want of proper care on the part of the railroad company. *O'Mara v. Hudson R. R. Co.*, 98 D. 61.

A person about to cross a track within the limits of a city, where the rate of speed of trains is regulated by ordinance, has a right to assume that trains will not be run at a speed greater than that allowed by the ordinance. *Correll v. B. O. R. & M. R. R. Co.*, 18 R. 22.

If the engineer unnecessarily and wantonly sounds the whistle near a highway, and thus frightens a team of horses on the highway, causing it to run away and kill another horse, the owner of the latter may recover therefor from the railroad company. *Billman v. Indianapolis etc. R. R. Co.*, 40 R. 230.

It is the duty of the company toward a person injured by its train to stop the train, and remove him to a place of safety; and in so doing, the company's agents must be regarded as acting in the course of their employment, and for their negligence therein the company is liable. Where, therefore, a person who was injured by a train, and was apparently dead, was removed by the agents of the company to a warehouse, where he was locked up for the night, and it was found on opening the warehouse in the morning that he had come to consciousness during the night, and had afterwards died from hemorrhage of an artery which had been severed by the collision,—*held*, that the company was liable for the negligence which caused his death. *Northern Cent. R'y Co. v. State*, 96 D. 545.

Plaintiff desired to cross defendant's track at a public crossing, but was prevented from doing so by a train of defendant's cars standing at that point. She then attempted to cross at another place, where there was no public crossing, and, in so doing, was struck and injured by defendant's car.

For Index to Notes in American Decisions and American Reports, see Volume I.

Held, that notwithstanding the fact that plaintiff was not rightfully on the track at the place of the injury, yet, if the injury might have been avoided by the use of ordinary care and caution by the defendant, the latter was liable therefor. *Brown v. Hannibal etc. R. R. Co.*, 11 R. 420.

The plaintiff's intestate was engaged in peddling kindling wood, with a horse and wagon, in a city street, near a railroad crossing. The rails were laid without any planking or filling. While the intestate was very near the team soliciting a customer, an approaching train frightened the horse, and it ran partly across the track, but owing to the absence of planking or filling the wheels of the wagon were prevented from crossing. The intestate instantly started in pursuit on the horse's running, and caught the horse on the track, and while there endeavoring to get it off the track, he was struck by the train and killed. The horse had not been tied, and the intestate was not holding him. There was a city ordinance forbidding any man to leave his horse in the street unless securely tied. The train was running at a rate forbidden by a city ordinance. *Held*, that a verdict in favor of the plaintiff should be sustained. *Wanner v. Delaware etc. R. R. Co.*, 36 R. 608.

92. Omitting to give signal on approaching crossing.—A train should approach a crossing of a public street at a moderate rate of speed, and should give timely warning, by whistle or other usual notice, of approach of train, to those lawfully passing along the street; and if by neglect or omission that duty is not fulfilled, the railroad company is liable for injury or death resulting therefrom, unless it be affirmatively shown that ordinary care was not taken by the party injured to avoid the accident. *Philadelphia etc. R. R. Co. v. Hagan*, 86 D. 541. *S. P., Murray v. S. O. R. R. Co.*, 70 D. 219; *Ernet v. Hudson R. R. Co.*, 90 D. 761; *O'Mara v. Hudson R. R. Co.*, 98 D. 61; *Pennsylvania R. R. Co. v. Barnett*, 98 D. 346; *St. Louis etc. R. R. Co. v. Terhune*, 99 D. 504; *Tabor v. Missouri Valley R. R. Co.*, 2 R. 517; *Louisville etc. R. R. Co. v. Com.*, 26 R. 205; *Pittsburgh etc. R'y Co. v. Brown*, 33 R. 73.

A general law requiring a bell or whistle to be attached to each locomotive of a railroad company, and to be rung or whistled before crossing any other road, is applicable to and binding on a corporation created prior to its passage; and an omission to give the required signal is *prima facie* proof of negligence on the part of such corporation. *Galena etc. R. R. Co. v. Loomis*, 56 D. 471.

Railroad corporations are not liable for any and all damages that a person may sus-

*Duty of company to give warning to person upon its track, see note, 37 R. 443-446.

tain, when they have omitted to give a signal required by law. Until some proof is given tending to show that the injury resulted from a failure to give such signal, the burden of proving that it did not arise from such failure is not thrown upon the corporation. *Id.*

The lessee of a railroad is liable for injury by neglect to keep and ring a bell upon a locomotive, as required by the Massachusetts statute, whereby a collision with a vehicle crossing the track is caused. *Linfield v. Old Colony R. R. Co.* 57 D. 124.

A railroad company neglecting reasonable precautions besides ringing bell, as required by statute, to avoid collision with a vehicle at a turnpike crossing, is liable for an injury arising from such neglect, and it is for the jury to judge as to whether or not such additional precautions have been neglected. *Id.*

Negligence of a railroad company is shown from evidence that plaintiff was injured by a train of the defendant, which approached without signals and ran into a loaded team of the plaintiff, which he was endeavoring to drive over the railroad crossing, which had been recently raised and rendered difficult to cross. *Milwaukee etc. R. R. Co. v. Hunter*, 78 D. 699.

A statutory requirement that a bell on an engine be rung, or whistle blown, for a specified distance at crossings, imposes a duty upon railroad companies, not only in reference to persons approaching or in the act of passing the crossing, but in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing train. *Wakefield v. Connecticut etc. R. R. Co.*, 86 D. 711; *Ransom v. Chi. etc. R'y Co.*, 51 R. 718.

In case of omission to give signal at crossings, as required by statute, and damage ensues in consequence, the railroad company must show that the omission was reasonable and prudent. *Wakefield v. Connecticut etc. R. R. Co.*, 86 D. 711.

No culpable negligence is established by proving that a stage-coach driver, in attempting to cross a railroad track, did not look in the direction from which the cars were approaching until his horses were on the track, where the usual signal of danger was not given as the stage advanced toward the crossing; and this although it appeared in evidence that if he had looked before he would have seen the cars in time to have avoided a collision. *Brown v. N. Y. Cen. R. R. Co.*, 88 D. 353.

A person who on a public highway approaches a railway track, and can neither see nor hear any indication of a moving train, is not chargeable in law with negligence for assuming that there is no car sufficiently near to make the crossing

For Index to Notes in American Decisions and American Reports, see Volume I.

dangerous. *Ernst v. Hudson R. R. Co.*, 90 D. 761.

The degree of care demanded of the company in running its trains depends upon circumstances, and whether it used due care in approaching a bridge, or was negligent in not sounding an alarm, is a question for a jury. *Pennsylvania R. R. Co. v. Barnett*, 68 D. 346.

The obligation of the company to give signals or alarms of approaching trains depends upon circumstances. Where there is no reasonable apprehension of danger, no such notice is required. But if danger to persons or property may be reasonably apprehended from a failure to give notice of an approaching train, it is the duty of the company to give such notice, and its failure to do so is negligence. *Id.*

Whether a railroad train should whistle or give other notice of its approach to where the road crosses the track is for the jury to say from all the circumstances of the case, and they should consider the relative positions of the two roads at the crossing, — whether it was difficult for a traveler to see an approaching train, in which case the care of the company should be increased, whether the wagon-road was much traveled, whether the whistle could be heard on it by a traveler, etc. *Id.*

Where plaintiff was crossing a bridge over a track, and a passing train whistled when directly under the bridge, causing his horses to take fright and run away, overturn his carriage, and injure him, if under the circumstances the sounding of the whistle was negligence, it was a sufficiently proximate cause of injury to warrant recovery against the company. *Id.*

A railroad corporation whose road passes over a highway by a bridge is not liable to a traveler on the highway for damages caused by the fright of his horse at the noise made by a train of cars passing over the bridge in the customary manner, although the corporation know that, because of special circumstances, accidents of a similar character are peculiarly liable to happen there, and although they give no warning of the approach of the train. *Favor v. Boston and L. R. R. Co.*, 19 R. 364.

In an action against a railway company for an injury by collision at a street crossing in a city, it being proved that the whistle was not sounded nor the bell rung, evidence is competent to show an ordinance prohibiting such signals. *Pennsylvania Co. v. Henkel*, 36 R. 188.

An ordinance requiring a railway company to keep a watchman at a street crossing, the omission so to do is not negligent unless it is the proximate cause of an injury. *Id.*

If a traveler, driving on a highway and approaching a railroad crossing, is personally free from negligence, and the railway

company neglects to give warning of the approach of a train, the traveler is not debarred from recovering for injury by collision by the fact that his horse, frightened by the engine, suddenly starts forward, and draws the driver into the danger. *Cosgrove v. N. Y. Cent. etc. R. R. Co.*, 41 R. 355.

It is negligent in a railroad company to run trains so near together at a highway crossing as to make the statutory signals unavailing to warn travelers on the highway. *Chicago etc. R. R. Co. v. Boggs*, 51 R. 761.

93. Effect of contributory negligence on part of person crossing the track. — A railroad company should provide a suitable warning of danger at a common road crossing, so as to prevent injury to others as far as possible; but this duty on the railroad company's part will not justify the omission of any proper act of vigilance to avoid a collision by a person using such crossing, which he must know to be a place of danger; and if he is negligent, he must suffer the consequences, unless the railroad company has been guilty of negligence more gross and willful than his own. *Chicago & R. I. R. R. Co. v. Still*, 71 D. 236. *S. P., Thayer v. St. Louis etc. R. R. Co.*, 85 D. 409; *Baltimore etc. R. R. Co. v. Breinig*, 90 D. 49; *Beisiegel v. N. Y. Central R. R. Co.*, 90 D. 741; *Baltimore & O. R. R. Co. v. State*, 96 D. 528; *Pittsburgh etc. R'y etc. Co. v. Collins*, 30 R. 371.

A traveler and persons running a train whose tracks cross must mutually exercise reasonable care. *Reeves v. Delaware etc. R. R. Co.*, 72 D. 713.

Contributory negligence, in an action against a railroad company for injuries caused by a train running into a team at a crossing, is not shown by evidence that the plaintiff's horse balked at the crossing, where the horse was a young horse whose habits were not confirmed, and where his balking might well be attributed to his inability to raise the loaded wagon over the track, which was being raised at the crossing, and had been left in an unfinished condition. Such evidence is, therefore, not ground for a new trial as newly discovered evidence. *Mishwaukee etc. R. R. Co. v. Hunter*, 78 D. 699.

An adult is guilty of such negligence as will defeat recovery against a railroad company for injuries, where he attempts, in the night time, when he would not probably be seen by the engineer or conductor, to get to a passenger train by passing through a freight train, which he knew was ready to move at any moment. *Chicago etc. R. R. Co. v. Dewey*, 79 D. 374.

One, who without authority, enters upon a railway track, and while there becomes

*Negligence in crossing track, when imputed to person injured, see note, 50 R. 653-656.

For Index to Notes in American Decisions and American Reports, see Volume I.

insensible from providential causes, and while in this state, and in plain view, is injured by a train, may recover damages of the company, although the injuries were not wanton or willful; but otherwise if his insensibility was by reason of his voluntary intoxication. *Houston and T. Cent. R'y Co. v. Symptkins*, 38 R. 632.

One in the full possession of his faculties, who undertakes to cross a railroad track when a train of cars is about passing, and is struck by it, is *prima facie* guilty of negligence. *State v. Maine Cent. R. R. Co.*, 49 R. 622.

A railway company constructed, for its track, in an ungraded and unimproved city street, an elevated embankment, and in connection with it a trestle-work crossing a creek, high above the water, without railings or flooring. The plaintiff's wife while attempting to walk over the trestle-work was injured by a car. *Held*, that the plaintiff was without remedy, in the absence of wanton negligence on the defendant's part, and that proof of a custom of foot passengers to cross the trestle-work was improper. *Mason v. Missouri Pac. R'y Co.*, 41 R. 405.

Where one attempting to cross a railway at a public crossing was found thereon killed by a train, and there was no proof as to his exercise of care, but it appeared that he was a careful man, and familiar with the crossing and the time of the passing of trains, and the evidence showed negligence on the part of the railway company, — *held*, that the question of contributory negligence was properly left to the jury. *Louisville etc. R. R. Co. v. Goetz*, 42 R. 227.

An intelligent boy, ten years of age, was sent by his parents on an errand, on a street in a populous city, and while unnecessarily walking along a steam railway laid in the street was killed by a train. *Held*, that his contributory negligence defeated a recovery by the parents. *Moore v. Pennsylvania R. R. Co.*, 44 R. 106.

94. Duty to look out for trains.* — A traveler on a highway approaching its intersection with a railroad is bound to look out for approaching trains, and his failure to do so is negligence, and not merely evidence of negligence. *North Pennsylvania R. R. Co. v. Heilman*, 88 D. 482. *S. P., Butterfield v. Western R. R. Corp.*, 87 D. 678; *Gonzales v. New York & H. R. R. Co.*, 98 D. 58; *Wilcox v. Rome etc. R. R. Co.*, 100 D. 440; *Pennsylvania R. R. Co. v. Beale*, 13 R. 753; *Pennsylvania R. R. Co. v. Weber*, 18 R. 407; *Tolman v. Syracuse etc. R. R. Co.*, 50 R. 649.

A traveler approaching a railroad track is bound to use his eyes and ears, so far as there is opportunity; and negligence of the

* Duty of traveler to avoid danger at railway crossings, see note, 90 D. 780-787.

railroad company in giving signals will not excuse his omission to be diligent in such use of his own means of avoiding danger. *Ernst v. Hudson R. R. R.*, 100 D. 405; *Gonzales v. New York & H. R. R. Co.*, 98 D. 58; *Wilcox v. Rome etc. R. R. Co.*, 100 D. 440; *Bellefontaine R'y Co. v. Hunter*, 5 R. 201; *Ormsbee v. Boston & P. R. R. Corp.*, 51 R. 354. *Contra* see *Ernst v. Hudson R. R. Co.*, 90 D. 761.

A person crossing a railroad track is guilty of negligence, such as will prevent his recovery for injuries, where he could have seen the cars approach, but turned his back to the direction in which they were coming, and had his ears so bandaged that he could not hear, unless he can prove a greater degree of negligence on the part of the railroad company. *Chicago & R. I. R. R. Co. v. Still*, 71 D. 236.

A deaf person is guilty of negligence, who attempts to drive an unmanageable horse across a railroad track when a train is approaching. It is his duty to keep a vigilant lookout, in order to see and avoid the danger. *Illinois Central R. R. Co. v. Buckner*, 81 D. 282.

Crossing a railroad track without looking to see if a train is coming is not conclusive proof of a want of care, where it appears that there is a double track, that the person injured had just bought a ticket at a station for a train which was to pass upon the farther track, and that the station agent said to him, "The train is coming; we will cross over." *Warren v. Fitchburg R. R. Co.*, 85 D. 700.

When the question whether a traveler used ordinary care and prudence, in any given case, becomes so complicated and involves so many details that honest and intelligent men, acting without bias or partiality, in a single and sincere desire to determine according to the truth, may reasonably differ in their conclusions, then the question should be left to the jury. *Ernst v. Hudson R. R. R. Co.*, 100 D. 405.

It will be presumed that a person injured in attempting to cross a railroad track did not look before crossing, if it appears that, had he done so, he would have seen the approaching train in season to have avoided it. *Wilcox v. Rome etc. R. R. Co.*, 100 D. 440.

In the absence of evidence to the contrary, a person who has been killed by a train at a railway crossing will be presumed to have observed the precautions the law requires, and the burden of proof is on the railway company to show that he has not. *Pennsylvania R. R. Co. v. Weber*, 18 R. 407.

The plaintiff driving over a railway at a highway crossing, his horse caught his foot between the rail and planking, and fell down. For two minutes the plaintiff was busied in trying to disengage the foot, when a train passing broke the horse's leg. *Held*,

For Index to Notes in American Decisions and American Reports, see Volume I.

that the rule that the plaintiff should have stopped, looked and listened before driving on the track, was not applicable. *Baughman v. Shenango and A. R. R. Co.*, 37 R. 690.

95. Effect of obstructed view of track. — A railroad company accumulated on its own land, near a highway crossing, a large quantity of stumps and roots, from excavations in preparing for additional tracks. In an action on behalf of a person killed by the defendant's train in attempting to pass over the crossing, — held, that such accumulation, although it might have a material bearing on the subject of negligence on the part of both parties, yet did not in itself establish negligence on the part of the defendants nor constitute an independent ground of recovery. *Cordell v. New York Cent. etc. R. R. Co.*, 26 R. 550.

In an action for a fatal injury at a street and a railway crossing, it appeared that the deceased was approaching the crossing in a wagon, that the crossing was at an acute angle, and the view was so obstructed by trees and corn that a train could not be seen beyond ten yards from the track and then for only fifty yards. The train was moving forty miles an hour without giving warning. It did not appear that the deceased stopped or looked and listened. Held, that a nonsuit for contributory negligence was improper. *Schem v. Penn. R. R. Co.*, 52 R. 468.

96. Plaintiff must show himself free from negligence. — The use of a railroad track, cutting, or embankment, belongs exclusively to the company except where public ways cross it. *Philadelphia and Read. R. R. Co. v. Hummel*, 84 D. 457.

The company is not liable for injury to a person on its road where he had no right to be, unless want of ordinary care on the part of the company is affirmatively shown. *Id.*

In an action against a railway for killing a person at a highway crossing, it must be affirmatively shown that the deceased was free from negligence. *Indiana etc. R'y Co. v. Greene*, 55 R. 736. Contra see *Pennsylvania R. R. Co. v. Weiser*, 18 R. 407.

97. Injuries to children playing on track. — A railroad company is bound to exercise a high degree of caution at places and under circumstances where persons may be upon its tracks; and if, by its failure to do so, a child of tender years is injured, the company is liable in an action by the child, although the parent or custodian of the child is negligent in permitting it to be upon the track, or in not keeping a proper lookout for the cars. *Bellefontaine & I. R. R. Co. v. Snyder*, 98 D. 175.

If an infant eighteen months old gets upon a railroad track in consequence of the failure of the railroad company to erect a fence as required by law, and is run over and injured by a train on the track, the company

is liable to it for the injury, if the parents exercised ordinary care in guarding the child. *Schmidt v. Milwaukee etc. R'y Co.*, 99 D. 156; *Fitzgerald v. St. Paul etc. R'y Co.*, 43 R. 212.

An infant, six or seven years old, lying insensible or asleep on a railway track, near a highway crossing, was injured by a train. He was perceived by the fireman and engineer in time to stop, but they supposed him a bunch of leaves or weeds, until too late. No warning signal was given. His parents had forbidden him to go on the track. Held, that a recovery was warranted. *Meeks v. Southern Pac. R. R. Co.*, 38 R. 67.

A boy seven years old, without the fault of his parents, wandered to a railroad station, entered a passenger train and was carried to a distant station, where the conductor put him off, leaving him in charge of no one, and giving no instructions concerning him. The child, left to himself, went upon the track near a highway crossing, where he could be seen for three-fourths of a mile by persons in charge of a train coming from the south. A freight train moving northward in the day-time, on an ascending grade, where it could easily have been stopped, ran upon and killed the child. Held, that the railroad company was liable. *Indianapolis etc. R'y Co. v. Pitzer*, 58 R. 387.

A railroad company is not answerable in damages for injury to a five-year-old child, resulting from being struck by one of the company's engines while attempting to cross the track between such engine and a coal train which was running ahead of it, unless there is proof of want of ordinary care on the engineer at the time when and place where the injury occurred. *Philadelphia etc. R. R. Co. v. Spearen*, 86 D. 544.

Defendant's railway train ran over and injured a child four years of age, playing on its track. The place in question was a cutting through a ledge, near which the plaintiff lived with his mother. There were houses on both sides of the track upon the ledge and beyond it, and the cutting was unfenced at both ends. The cutting was 400 feet from any public street, but people were accustomed to pass through it. Held, that the plaintiff was a trespasser, and could not maintain an action for the injury, there being no evidence of malice or gross and reckless carelessness. *Morrissey v. Eastern R. R. Co.*, 30 R. 686.

A boy, four or five years old, unaccompanied, climbed upon a railroad car, standing alone on a switch-track on a slightly descending grade, with brakes fastened, unfastened the brakes, and thus started the car, and then jumping or falling off, was run over by the car and killed. Held, that there was no liability on the part of the railroad company. *Central Branch etc. R. R. Co. v. Henigh*, 33 R. 167.

For Index to Notes in American Decisions and American Reports, see Volume I.

Except at public crossings a railway company owes no duty to the parents of a young child on its track, nor to the child itself. *Casley v. Pittsburgh etc. R'y Co.*, 40 R. 664.

A boy, five or six years old, went for his own amusement on the platform of a railway station, and stood at the edge to watch an approaching train. The train drew up at the rate of three or four miles an hour, and an iron step, bent and projecting a few inches outward, struck and injured him. *Held*, that he could not recover therefor. *Baltimore and O. R. R. Co. v. Schwinding*, 47 R. 706.

A railway turn-table, which was attractive, but dangerous to children, was left exposed and unfastened in a public place, and many children were in the habit of going on it to play. *Held*, that the railway company were liable for an injury done by the turn-table, while being moved by other children, to a child seven years old, and that the fact that the child was a trespasser did not relieve such company. *Keffe v. Missouri Pac. R. R. Co.*, 18 R. 393; *Nagel v. Missouri Pac. R. R. Co.*, 42 R. 418; *Evansich v. G. etc. R'y Co.*, 44 R. 586; *Contra see St. Louis etc. R. Co. v. Bell*, 25 R. 269.

A boy, twelve years of age, was injured while playing on a railway turn-table, left unlooked and unguarded, in an open prairie, where persons frequently passed. *Held*, that the questions of negligence and contributory negligence were for the jury. *Kansas Cent. R'y Co. v. Fitzsimmons*, 31 R. 203.

2. Injuries to Employees.

98. Duty of company to provide against accidents.—A railroad company must furnish its servants safe materials and structures, and keep its road and works and all portions of the track in such repair, and so watched and tended, as to secure the safety of all who may lawfully be upon them, whether passengers, servants, or others; and if the company fails in this respect, its employees not knowing of the defects, and not contracting with express reference to them, and being unable to ascertain them by the exercise of ordinary precaution or prudence, the company will be held liable for such injuries as their employees may suffer thereby. *Chicago etc. R. R. Co. v. Sweet*, 92 D. 206. *S. P., Mad River etc. R. Co. v. Barber*, 67 D. 312; *Nashville etc. R. R. Co. v. Elliott*, 78 D. 506; *Thayer v. St. Louis R'y Co.*, 85 D. 409; *O'Donnell v. Alleghany V. R. R. Co.*, 98 D. 336.

Where a railroad company itself is in fault as to its own peculiar duties, and by means of its neglect of that reasonable and ordinary care which it must be presumed to exercise in regard to its own business an injury is occasioned to one of its conductors

or other employees, the company is liable in damages, unless the servant was also in fault, and his negligence or misconduct contributed as a proximate cause to the injury. *Mad River etc. R. R. Co. v. Barber*, 67 D. 312.

The company is not liable, so far as the simple question of negligence is concerned, to parents, guardians, or representatives of a servant killed upon the road, when they would not have been liable to such person had he been injured simply, and not killed. *Ohio etc. R. R. Co. v. Tindall*, 74 D. 259.

The company's obligation to introduce improvements in construction, apparatus, and machinery important to human safety extends in favor of all persons lawfully using its road; it is not limited to passengers holding tickets issued by the company. *Smith v. New York etc. R. R. Co.*, 75 D. 305.

The duty of the company to furnish its servants safe materials and structures cannot be avoided by the delegation of its power or authority to do so to any other or number of persons; for its undertaking with its servants in this regard is direct. *Chicago etc. R. R. Co. v. Sweet*, 92 D. 206.

A corporation can be held liable for injuries to its servants only when the injury has been caused by the neglect of its board of directors to perform some duty which devolved upon them. *Columbus & I. C. R'y Co. v. Arnold*, 99 D. 615.

The company is not required to provide against all such unforeseen accidents or misfortunes as could not be averted by the utmost care and diligence; and it is misloading and erroneous to instruct, in an action for causing the death of an engineer who was killed by a dead tree falling across the track, that it was the duty of the corporation to keep the road free from all objects and obstructions which might imperil the safe transit of trains. *Louisville & N. R. R. Co. v. Filbern*, 99 D. 690.

A railroad company, receiving a loaded car from another company to be run over its road, is not bound to test the safety of the car for its servants, but may assume its safety unless the contrary appears. *Ballou v. Chicago etc. R'y Co.*, 41 R. 31.

A railroad company is not liable for the death of a brakeman caused by his falling through a bridge in process of repair, upon which the train had stopped at night. *Koons v. Chicago etc. R. R. Co.*, 54 R. 5.

A railroad company is bound to adopt and promulgate rules for the protection of its employees against one another's negligence. So held as to repairmen working under cars. *Abel v. Del. and Hud. Canal Co.*, 57 R. 773.

Plaintiff's intestate was employed by defendant—a railroad company—as a common laborer, for the purpose of loading and unloading freight cars. While thus engaged he was ordered by the depot superintendent

For Index to Notes in American Decisions and American Reports, see Volume I.

to couple a freight car with other cars attached to a locomotive; and, having to go between the cars for this purpose, the engine was so carelessly managed that he was crushed to death. The duty of coupling the cars was entirely different from that for which deceased was hired. *Held*, that plaintiff could recover, on the ground of the misconduct of the company in exposing the intestate to the extra peril and then so carelessly managing the engine as to cause his death. *Lalor v. Chicago etc. R. R. Co.*, 4 R. 616.

Defendant's agent, whose duty it was to make up and dispatch trains and to employ and station brakemen thereon, sent out a train without the requisite number of brakemen. The train parted, and in consequence of the want of necessary brakemen, one part collided with another train, killing plaintiff's intestate, who was also a servant of defendant. *Held*, that the defendant was liable, and that it was no defense that the agent had employed necessary brakemen, who failed to appear in time to go upon the train. *Fiske v. Boston & A. R. R. Co.*, 13 R. 545; *S. P.*, *Booth v. Boston & A. R. R. Co.*, 29 R. 97.

A brakeman in defendant's employ, descending the ladder of a moving freight car, to throw a switch, was struck by a telegraph pole standing only eighteen inches from the car and killed. The pole had been suffered to remain in that position three years, but there was no evidence that the defendant put it there or knew of its existence. There was no evidence that the brakeman knew of it. *Held*, that an action of damages for the killing was maintainable. *Chicago and I. R. R. Co. v. Russell*, 33 R. 54.

The plaintiff, in the employ of a railway company, went under a car standing alone on a repair track, by order of his foreman, to repair it, and was there injured by the starting of the car by an advancing train. The track was usually protected. There was no proof of any precautions to protect it on this occasion. *Held*, that a nonsuit was improper. *Luebke v. Chicago etc. R'y Co.*, 48 R. 483. Compare, *Luebke v. Chicago etc. R'y Co.*, 53 R. 266.

A railway brakeman, suddenly called to supper, by the conductor, slipped on snow and ice accumulated near the station platform, and was injured. *Held*, that the company was not liable. *Piquegno v. Chicago etc. R. Co.*, 50 R. 243.

A railroad company engaged in enlarging a tunnel on its line, constructed a magazine for storing dynamite 32 feet from the main line, and about 160 feet from the mouth of the tunnel, containing a stove and about 1,100 pounds of dynamite. An explosion took place from an unknown cause, killing one of the company's flagmen standing near the track. *Held*, that the question of negli-

gence was for the jury. *Tissue v. Baltimore and O. R. R. Co.* 56 R. 310.

99. Injuries occasioned by defective construction. — Negligence of a fellow-servant cannot be set up as a defense in an action against a railroad company to recover damages for the death of a servant employed on the road, occasioned by accident arising from the defective construction of the road. *Chicago etc. R. R. Co. v. Sweett*, 92 D. 206.

An employee of the company upon a train of cars is not bound to know whether the road and its culverts and bridges have been properly constructed, or not; he has a right to rely upon the implied undertaking of his employers that they have been properly constructed, and are safe for the passage of trains, and that his superiors will exercise all the necessary diligence to keep them in proper repair. *Id.*

Plaintiff was injured, while in the discharge of his duty as brakeman of a freight train, by an awning projecting from a station-house, to the dangerous position of which the attention of the company's agent had been called. In an action against the company, it did not appear that the plaintiff knew of the danger. *Held*, that he could recover; but that \$10,000 was excessive damages, the loss of an arm being the extent of the injury. *Illinois Cent. R. R. Co. v. Welch*, 4 R. 593.

A release of all claims arising from the injury, signed by the brakeman, in consideration of a small sum, would be a bar to an action, unless obtained by false representations. *Id.*

Where a railway company buys the line of another company, embracing a bridge obviously unsafe in plan and construction, and fails to correct the defects, and one of its employees is injured by the fall of the bridge, the company is liable, although the bridge had been in use for several years before the purchase without accident. *Vorburgh v. Lake Shore etc. R'y Co.* 46 R. 148.

It is negligent in a railway company to have cars in a construction train furnished with buffers of unequal heights. *Towns v. Vicksburg etc. R. R. Co.*, 55 R. 508.

A railway is liable for a personal injury to a locomotive engineer caused by an unsafe bridge, while the road was in course of construction and not open for trade or travel. *Van Amburg v. Vicksburg etc. R. R. Co.*, 55 R. 517.

100. — or want of repairs. — A railroad company is liable for injury to one of its servants, caused by a want of repair in the road-bed of the railroad. *Snow v. Housatonic R. R. Co.*, 85 D. 720.

Where the duty of a servant of a railroad company requires him to uncouple the cars of a train, which is ordinarily done while the train is in motion, thereby loosening the bolt sufficiently to enable it to be withdrawn

For Index to Notes in American Decisions and American Reports, see Volume I.

from its socket, and which cannot be done while the train is standing still, and he, in endeavoring to uncouple them while the train is in motion, steps between the cars, but meets with an injury caused by a want of repair of the road-bed of the railroad, the court cannot rule, as a matter of law, that he was careless, and should submit the question to be determined by the jury; although he continued in the employment of the company after he knew of the defect. *Ib.*

Remote negligence of servants in failing to keep the track in repair will not relieve the company from liability to one of their fellow-servants who was injured thereby. *O'Donnell v. Allegheny V. R. R. Co.*, 98 D. 336.

A servant will be held, generally, to have assumed all the risks of his master's business, which the master cannot control; but where an employee of a railroad is injured by the track being out of repair, and the ties rotten, this is not one of those ordinary perils which presumptively every one incurs who takes service with the company, and they are liable. *Ib.*

A railway brakeman can maintain an action against the corporation for an injury sustained through its negligence to have its cars inspected. *Brann v. Chicago etc. P. R. Co.*, 36 R. 243.

Plaintiff, while in the defendant's employ as a brakeman, was injured by a defect in defendant's road-bed, of which the section foreman, whose duty it was to keep the road-bed in repair, had notice. *Held*, that the negligence of such foreman was the negligence of the company, and that defendant was liable. *Lewis v. St. Louis etc. R. R. Co.*, 21 R. 335. *S. P., Patterson v. Pittsburgh & C. R. R. Co.*, 18 R. 412.

An engineer on a railway locomotive was killed by its explosion resulting from its unsafe condition and want of proper repair. The engine was known to be out of repairs, and had been frequently laid up for repair. *Held*, that the defendant, operating the railroad, was liable, although he employed a competent superintendent of repairs and master mechanics, and made proper regulations, and the negligence was that of the mechanics directed to make the repairs. *Fuller v. Jewett*, 36 R. 575.

A brakeman in coupling freight-cars for the defendant was injured by a loose dead-wood on a car which had come from another road. The defendant had competent inspectors whose business it was to reject such cars. *Held*, that the brakeman could not recover of the defendant. *Smith v. Flint etc. R'y Co.*, 41 R. 161.

101. — by low bridges. — A railroad company is not bound to build its bridges high enough to enable its employees safely to stand upright on the top of its cars, and a brakeman or a conductor who in the performance of his duty is injured while in

that position cannot maintain an action therefor, although he was suddenly called upon to discharge that duty. *Baylor v. Delaware etc. R. Co.*, 29 R. 208; *Clark v. Richmond and D. R. R. Co.*, 49 R. 394; *Baltimore and O. R. R. Co. v. Stricker*, 34 R. 291.

An employee of a railroad company, who rides on the top of a freight train, voluntarily and out of the line of his employment, and while there is struck and killed by a low bridge, the situation and character of which he is acquainted with, is guilty of such contributory negligence as prevents a recovery. *Pittsburg and C. R. R. Co. v. Sentmeyer*, 37 R. 684.

A railway company is not liable for the death of a brakeman caused by a low bridge, with the situation of which he was acquainted, and of which he had not complained. *Brosman v. Lehigh Valley R. R. Co.*, 57 R. 479; *Rains v. St. Louis etc. R'y Co.*, 36 R. 459. And this although it had not erected danger signal cords. *Hooper v. Columbia and G. R. R. Co.*, 53 R. 691.

102. Imperfect machinery, tools, etc.* — 1. General rules. — An employer or master is liable for injuries to servants or workmen which happen by reason of improper and defective machinery and appliances used in the prosecution of a work. It is on this principle that the proprietors of a railroad are responsible for accidents happening by tracks improperly laid, etc. *Snow v. Housatonic R. R. Co.*, 85 D. 720.

Where a locomotive, by accident, runs off the track and injures a servant of the railroad company, the latter is liable to the servant for such injury if it was occasioned by any imperfection in the road or machinery, of which the company had knowledge, or of which they, in the exercise of ordinary care, might have known; or by associating the servant with other servants wanting in ordinary skill or care; or by other culpable negligence on the part of the company. *Nashville etc. R. R. Co. v. Elliott*, 78 D. 506.

A railroad company is obliged to see that engines and apparatus are suitable, sufficient, and "as safe as care and skill can make them." This general doctrine is regulated by the proportion and importance of the business, and the perils incident to it. But if an engine, though not constructed according to the latest model, is shown to be safe, and is well adapted, in all respects, to the service, as one of more recent invention but of different construction, it is sufficient. *Ib.*

A complaint charges a sufficient cause of action for injury caused through defective machinery of a railroad company when it states what defects were in the machinery; that the defendant had full notice thereof;

* Liability of the company to employees for defects in machinery, see notes, 41 R. 38-41; 57 R. 727-729.

For Index to Notes in American Decisions and American Reports, see Volume I.

that, nevertheless, it carelessly and recklessly caused the same to be used; that by reason of such use and defects, a fireman, an employee of the company, was injured; and that said servant had no knowledge, or means of knowing, of such defects. *Columbus & I. R. R'y Co. v. Arnold*, 99 D. 615.

An employee of a railway company cannot recover for an injury sustained by reason of an alleged defective brake, unless it was shown that the company was negligent, either in providing the machinery which caused the injury, or in selecting the mechanics whose duty it is to keep it in good order. *Wonder v. Baltimore and O. R. R. Co.*, 3 R. 143.

One employed by a railroad corporation to drive a locomotive engine over its road may recover damages against the corporation for personal injuries caused by a defect in the engine, which was due to the neglect of the agents of the corporation charged with keeping the engine in proper repair, although the directors and superintendent had no reason to suspect negligence or incompetence on the part of such agents. *Ford v. Fitchburg R. R. Co.*, 14 R. 598.

An engineer is not debarred from recovering damages against the corporation for injuries from an explosion caused by a defect in the boiler of the engine, by the fact that he was acting in intentional violation of the rules of the company, unless the accident was due, in whole or in part, to such violation; nor by the fact that such rules provided that the driver of an engine should be held responsible for the condition of his engine, must be sure that it was in good working order, and must immediately stop, draw his fire, station his signal men and procure assistance, whenever any defect was detected in an engine that would make it, in his judgment, unsafe to proceed; nor by the fact that he knew the engine was not in good working order, if he did not know and ought not to have known that it was unsafe. *Id.*

The company is not liable to an employee for an injury occurring through neglect of any defects in an engine which simply diminish its motive power. *Bajus v. Syracuse etc. R. R. Co.*, 57 R. 723.

2. *Notice to company of defect.*—An employee of a railroad company may recover damages for a personal injury received through defects in the machinery intrusted to him to use (here, through the bursting of the boiler of a locomotive on which he was employed as fireman), upon proof that the corporation had been notified of the weak or defective condition of the machinery, and had failed to repair or replace it. *Keegan v. Western R. R. Corp.*, 59 D. 476.

The company is not liable for injury received by a conductor, in consequence of the insufficiency of the cars, or defects in the

machinery, or running apparatus of the train under his charge and control, where such insufficiency or defects were unknown to both parties, and neither party was in fault. *Mad River etc. R. R. Co. v. Barber*, 67 D. 312.

Where a brakeman was thrown from a car and killed by reason of the brakehead coming off the upright shaft, through the nut at the top being loose and coming off, the company will not be liable, as it was the brakeman's duty to see that the brake was in good repair and in fit condition for use, and to report its defects to the company. *Illinois Central R. R. Co. v. Jewell*, 92 D. 240.

Notices to the directors of the company that an engine is out of repair and unsafe for use is not of itself sufficient to render the company liable for injuries which may result from such defect to the employees of the company. Where they have placed it in the hands of a competent and trustworthy master-machinist, and have furnished him with adequate materials and resources for the repair thereof, they must have notice that the engine is being used while unsafe and out of repair, or they will not be liable for injuries to a fireman employed by the company, occasioned by the explosion of the engine's boilers. *Columbus & I. C. R'y Co. v. Arnold*, 99 D. 615.

3. *Knowledge of servant when binds company.*—If an engineer knows that the road or machinery is defective, his knowledge is knowledge of such defect on the part of the company. *Nashville etc. R. R. Co. v. Elliott*, 78 D. 506.

Where a section foreman furnishes to a laborer engaged in driving spikes an iron maul which he knows to be defective, and the laborer is injured in consequence of such defect, the company may be held liable although the laborer might have seen the defect if he had inspected the tool. *Guthrie v. Louisville & M. R. R. Co.*, 47 R. 286; *East Tennessee etc. R. R. Co. v. Duffield*, 47 R. 319.

Where an engineer and fireman were killed by an explosion of a locomotive boiler which had been recently and insufficiently repaired in the shops of the railroad company, the company is not relieved from liability on the ground that the repairers and the deceased were fellow servants, although under the same superintendent. *Pennsylvania etc. Canal and R. R. Co. v. Mason*, 58 R. 722.

4. *Illustrations.*—Plaintiff's intestate, a brakeman on a freight train, was killed on defendant's railroad. The accident occurred while deceased was assisting in making what is termed a "flying switch," which is considered extra hazardous. Deceased was seen to stand upon a car for the purpose of uncoupling it while in motion, and immediately afterward his lifeless body was found under the advancing cars. There was no

For Index to Notes in American Decisions and American Reports, see Volume I.

evidence as to what took place during the interval; but it appeared that the car on which the deceased stood was not supplied with the usual ladder or handle. *Held*, (1) that the plaintiff was not bound to raise, by his proof, more than a reasonable presumption of negligence on the part of defendant, and that if it appeared that the brakeman, by the exercise of due care, had from time to time discharged his duty without injury, this might raise a fair presumption against defendant, and it would be for it to show that his negligence or some circumstance which it could not control contributed to or caused the accident: (2) that it was a question for the jury as to how deceased got under the cars, or what caused him to fall, and they might presume care and caution on his part to save himself from harm. *Greenleaf v. Illinois Cent. R. R. Co.*, 4 R. 181.

An employee of a railway company, while obeying a signal to make a "flying switch" upon a very dark night, was run over and killed. He was run over by four platform cars which had just been detached from a passing train. There was on the four cars only one good brake, which was on the rear car, and only one light, which the brakeman had necessarily carried to the rear car. The defective brakes had been out of order a considerable time before the accident. *Held*, that the company was negligent in providing insufficient brakes and not enough lights, and was liable to the representatives of the employee for his death. *Chicago etc. R'y Co. v. Taylor*, 18 R. 626.

A railway engineer was killed by the explosion of a locomotive boiler. The boiler was made of the best material, and by first-class manufacturers; it had not been used long enough to create a reasonable suspicion of its unsafe condition; the defect could not have been discovered by any of the usual tests, and its appearance did not indicate its unsafe condition. *Held*, that the company was not answerable, being bound only to provide machinery of good material, constructed in a workmanlike manner. *Indianapolis etc. R'y Co. v. Toy*, 33 R. 57.

A railroad locomotive engineer, killed by defects in a foot-board, was shown to have been competent and careful, and exercising due care a few minutes before his death. *Held*, that the question of due care on his part was for the jury. *Missouri Furnace Co. v. Abend*, 47 R. 425.

103. Risks assumed by employees.

—An employee, who voluntarily engages to serve a railroad company, in view of all the hazards to which he will be exposed, undertakes, as between himself and his employer, to run all the ordinary risks of the service; and this includes the risk of injuries, not only from his own want of skill or care, but likewise the risk of injuries from the negli-

gence of his fellow-servants. But this doctrine is subject to the qualification that the employer must take care not to expose the servant to any risk, by associating him with other servants wanting in ordinary skill or care, or by the use of unsafe or unsuitable machinery, or by other culpable negligence. *Nashville etc. R. R. Co. v. Elliott*, 78 D. 506; *Mad River etc. R. R. Co. v. Barber*, 67 D. 312.

A servant or employee of the company, who voluntarily engages to serve it, is presumed to know that there are extraordinary dangers inseparable from such service, which human care and foresight cannot guard against. *Nashville etc. R. R. Co. v. Elliott*, 78 D. 506.

A conductor or other employee of the company waives his own rights, and takes risk upon himself, if, with the full knowledge of the neglect and omission of said company to employ a sufficient number of hands to manage and safely run a train, to employ suitable and competent persons, to keep its road in proper repair, to provide it with sufficient, safe, and sound machinery, or to otherwise perform its own peculiar duties, he continues on in the business of the company, without any correction of such omission or neglect. *Mad River etc. R. R. Co. v. Barber*, 67 D. 312.

A railway company is not bound to change its machinery in order to apply every new invention or supposed improvement in appliances; and an employee who consents to operate the machinery already provided by the company, knowing its defects, does so at his own risk. *Wonder v. Baltimore and O. R. R. Co.*, 3 R. 143.

A railroad company may not contract in advance with its employees for the waiver and release of the statutory liability imposed on such companies for negligence of one employee causing injury to another employee without regard to the negligence of the company. *Kansas Pacific R'y Co. v. Peavey*, 44 R. 630; *Railway Co. v. Spangle*, 58 R. 833.

A brakeman twenty-four years old, who has been warned of the danger of coupling cars, takes upon himself the manifest risk of coupling cars with double dead-woods. *Hathaway v. Michigan Cent. R. R. Co.*, 47 R. 569.

A fireman on a railway locomotive must take the risk of "bucking snow." *Bryant v. Burlington, etc. R. Co.*, 55 R. 275.

In an action by the servant of a railroad company against the company for an injury sustained by means of a car's being thrown from the track by the breaking of a switch, the declaration alleged that the injury was caused by the defendant's negligence, 1st, in not having a proper switch at the place, and 2d, in the imperfection of its cars by the want of proper check-chains. *Held*, 1.

For Index to Notes in American Decisions and American Reports, see Volume I.

That the company was not responsible for hidden defects not discoverable by the most careful inspection; and 2, it appearing that plaintiff knew that some of the defendant's cars had no check-chains and were, therefore, not safe, that he assumed the risk incident thereto, although he had not prior to the accident noticed the absence of them from the particular car. *Ladd v. New Bedford R. R. Co.*, 20 R. 331.

A locomotive engineer, while leaning outside an engine in motion, and looking back for a signal from the conductor, was injured by his head coming in contact with a signal post three feet eight inches distant from the track, and visible half a mile away. There were many other signal posts and other erections along the track at the same distance from it. He knew of those facts, but had not noticed this particular post. *Held*, that he was not entitled to recover for the injury, as he knew the danger and assumed the risk. *Loejoy v. Boston and L. R. R. Corp.*, 28 R. 206.

A brakeman was injured by catching his foot in the guard of a switch. The guard was of T rail, the kind in general use, and it appeared that U rail would have been safer, although not in general use. The brakeman knew the character of the rail and continued in the service without objection. *Held*, that the railway company was not responsible. *Smith v. St. Louis etc. R'y Co.*, 33 R. 484.

A switchman had been sent by the defendants to switch a car owned by another railroad company to be loaded with nitroglycerine by the consignor of that company. Owing to the negligence of the servants of that consignor there was an explosion, by which the switchman was killed. The switchman knew the dangerous character of the work. *Held*, that defendant was not liable. *Foley v. Chicago etc. R'y Co.*, 42 R. 481.

A brakeman was killed in trying to couple a freight car from another road, to a caboose, by reason of the difference in height of the couplings, which was apparent. *Held*, that his employer was not liable. *Kelly v. Abbott*, 53 R. 292.

An employee complained to the yardmaster that the work on which he was engaged was unsafe, because enough hands were not furnished to perform it. No promise to furnish more was given. The employee continued in the service and was injured. *Held*, that he was not negligent as a matter of law. *Thorpe v. Mo. Pac. R'y Co.*, 58 R. 120.

A track-walker sued the company for personal injuries by the fall of a lump of coal from a tender on which it was carelessly piled up. His own testimony showed that he knew the habit of thus overloading tenders and had seen lumps of coal on the track.

Held, that he could not recover, 1. Because he assumed the risk; 2. Because there was not necessarily any negligence in this manner of piling the coal; 3. Because the coal-heavers and firemen were fellow-servants with the track-walkers. *Schultz v. Chicago etc. R. R. Co.*, 58 R. 881.

104. Effect of contributory negligence of servant injured. — A plaintiff seeking to recover damages from the company for injury received by him while acting as conductor, and caused by the company's failure and neglect to provide the train with sufficient hands, and suitable and safe machinery, etc., must lay a sufficient foundation for a recovery and judgment, in addition to the allegation that he had not a knowledge of the insufficiency or defects which were the alleged cause of the injury, that he had exercised due care and diligence in the use and examination or inspection of the cars, machinery, etc., belonging to the train, while the same were in his charge and under his direction. *Mad River etc. R. R. Co. v. Barber*, 67 D. 312.

A conductor was knocked from a freight train and killed by a projecting roof of defendant's depot. He was familiar with the road, had passed over it daily for a long time, and the roof had not been altered after he entered the defendant's employ. *Held*, that the company was not liable. *Gibson v. Erie R'y Co.*, 20 R. 552.

It is not negligent for the engineer of a railway passenger train to stay at his post in the face of an impending collision. *Pennsylvania Co. v. Roney*, 46 R. 173.

Where an engineer is killed by the derailment of the engine in consequence of a negligent defect in the track, he is not chargeable with contributory negligence, although he knew that the air brake was out of order, and if it had been in order the accident might have been prevented. *Flynn v. Kansas City etc. R. R. Co.*, 47 R. 99.

An employee was killed, while coupling cars loaded with iron, by being caught between the projecting ends of the iron. The iron was loaded in the ordinary way, and the deceased knew and had been warned of the danger, and had been specially warned, on the day of his death to stoop when coupling cars. *Held*, that it was error to submit the question of extraordinary risk to the jury, and that there could be no recovery. *Northern Cent. R'y Co. v. Huson*, 47 R. 690.

An employee was sent on a wrecking train in charge of one person as engineer and conductor. In violation of the rule of the company he rode on the engine. By the negligence of the engineer an accident occurred by which he was killed, in consequence of his position on the engine. *Held*, 1. That he was guilty of contributory negligence; 2. That he and the engineer and

For Index to Notes in American Decisions and American Reports, see Volume I.

conductor were fellow-servants, and no action would lie. *Abend v. Terre Haute and I. R. R. Co.*, 53 R. 616.

On the defendant's railway was a bridge with sides five feet high, coming up one foot above the floor of the engine-cab, and thirteen and a half inches from the sides of passing engines. The plaintiff's intestate, a fireman, well knowing the character and situation of the bridge, without orders and in violation of the rules, opened the ash-pan, whereby fire was communicated to woolen waste in a journal box. Then without orders or necessity, he stood outside of the engine on the steps of the engine and tender, and endeavored to extinguish the fire with a hose, and while so employed he was struck by the side of the bridge and killed. *Held*, that the company was not liable. *Shreder v. Chesapeake and O. R. R. Co.*, 59 R. 654.

105. Company when liable for act of co-servant.—A railroad company which employs a servant known by it to be unfit for the business is chargeable with the consequences of such servant's carelessness. *Frazier v. Pennsylvania R. R. Co.*, 80 D. 467. *S. P.*, *Gilman v. Eastern R. R. Co.*, 90 D. 210.

A servant of the company, improperly absent without leave, if received on one of the company's trains, other than that to which he belongs, without objection from the conductor, who is authorized and charged with the duty of excluding all persons not lawfully entitled to be on the train, may recover for an injury caused by a collision while on such train. *Washburn v. Nashville & C. R. R. Co.*, 75 D. 784.

The responsibility of railroad companies for injuries resulting from negligence of engineers is graduated by the class of persons injured. As to strangers, ordinary negligence is sufficient; as to subordinate employees associated with the engineer in conducting the cars, the negligence must be gross; but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient. *Louisville etc. R. R. Co. v. Collins*, 87 D. 486.

Where plaintiff was injured through the alleged intemperance of a switchman in defendants' employ, and it is claimed that he is habitually intemperate, evidence that that is his general reputation is admissible to show that the defendants, if they used due care, might have known that he was habitually intemperate, and therefore an unsuitable servant to be employed by them. *Gilman v. Eastern R. R. Co.*, 90 D. 210.

Where a railroad engineer is wild, reckless, and careless, and is going down grade at such an improper and excessive rate of speed as to necessitate the setting of the brakes, and where the setting of the brakes caused the train to oscillate violently,

throwing the brakeman from the train and killing him, the railroad company is liable for damages for such killing, if the incompetence of the engineer was so generally known that they would be held to a knowledge of it. *Illinois Central R. R. Co. v. Jewell*, 92 D. 240.

The implied undertaking of employees in the same service to risk contingencies which the ordinary skill and care of each, in his line of service, could not avert, does not exonerate the company from liability for damages resulting to one of such co-agents from the extraordinary or gross negligence of another of them. *Louisville & N. E. R. Co. v. Filbern*, 99 D. 690.

The company is liable for the death of an engineer, if the section boss or some other agent of the company than the engineer was alone guilty of willful negligence causing the death, notwithstanding, in his own sphere, the engineer may have been guilty of some neglect of duty. *Id.*

Under a statute making railroad companies liable to their employees for injuries sustained by them by the negligence of their other employees, a railroad company is liable for an injury suffered by a detective in its employ, while in the discharge of his duty, through the negligence of an engineer on a passenger train. *Pyne v. Chicago etc. R. R. Co.*, 37 R. 198.

A railway company is liable for an injury sustained by one of its brakemen, by the fall of a derrick erected by its employees at the side of its track, in such a position as to be liable to cave away with the bank, and negligently suffered so to remain. *Holden v. Fitchburg R. R. Co.*, 37 R. 343.

In an action on behalf of a fireman killed by the washing out of a culvert, the negligence of the company's bridge-builder in constructing, and of the roadmaster in repairing the culvert is attributable to the company, although they were ordinarily skillful and careful men in their several employments. *Davis v. Cent. Vt. R. R. Co.*, 45 R. 590.

A railroad company cannot free itself from liability for negligence, by an agreement of lease placing its employees and trains under the control of the manager of another railroad. *Wabash etc. R'y Co. v. Peyton*, 46 R. 705.

As to whether a brakeman can recover against his company for an injury received in consequence of the conductor's managing the locomotive in the engineer's absence, the court were equally divided. *Rodman v. Michigan Cent. R. R. Co.*, 54 R. 348.

A railway company is liable for the death of its engineer on one train, caused by the negligence of its conductor on another train and its telegraph operator. *Madden v. Chesapeake and O. R'y Co.*, 57 R. 695.

The conductor of a train of cars was in.

For index to Notes in American Decisions and American Reports, see Volume I.

jured in consequence of the mismanagement of the locomotive by a fireman who had been placed in charge of the engine by the agents of the company. In an action for damages against the company,—*held*, that they were responsible on the ground that they were "negligent or unmindful of their duty in employing competent and skillful servants in the execution of their business, and injury resulted therefrom to a fellow-servant." *Harper v. Indianapolis etc. R. R. Co.*, 4 R. 353.

A fireman on a locomotive engine carelessly threw a lump of coal from the tender, which struck and killed a track repairer, servant of the same company, standing near. *Held*, that the company was liable in damages. *Chicago etc. R. R. Co. v. Moranda*, 34 R. 168.

An employee of a railroad company was injured by one of its locomotive engines, owing to the negligence or incompetency of the fireman, who against the rules of the company had been temporarily left in charge of the engine by the engineer. The master mechanic of the company, whose duty it was to employ and discharge the engineers and firemen, knew that the engineers generally were in the habit of so leaving their engines. *Held*, that the company was liable for the injury. *Ohio and M. R'y Co. v. Collarn*, 38 R. 134.

A railway section foreman, returning from work with his crew on a hand car, and meeting a train, transferred the car to a parallel track operated by another company, as had previously been done occasionally, but without the knowledge of either company, and on that track his car was negligently run against a car containing section men of that road, whereby one of the men was injured. *Held*, that the foreman's employers were liable. *Pittsburgh etc. R'y Co. v. Kirk*, 52 R. 675.

106. When not so liable.—A railroad company is not liable to a conductor or other employee for injury resulting from the carelessness, negligence, or misconduct of another employee, when both are engaged in a common service and no power or control is exercised by the one over the other. *Mad River etc. R. R. Co. v. Barber*, 67 D. 312. S. P., *Chicago & A. R. R. Co. v. Murphy*, 5 R. 48.

A railroad company is not liable to one employee for injuries occasioned by another, where both are engaged in the same undertaking; and it makes no difference that the injury is the result of negligence of an employee of higher authority, to whom the injured employee is subject, and from the consequences of whose negligence he cannot guard. *Thayer v. St. Louis etc. R. R. Co.*, 85 D. 409. S. P., *Laning v. New York Cent. R. R. Co.*, 10 R. 417.

A railroad corporation must use every reasonable care in proper construction of its

road, and in supplying it with necessary equipments, including properly constructed engines, and necessary and proper materials for its repair, and the selection of competent, skillful, and trusty subordinates. If these duties are performed with care and diligence by the directors, and one of the employees so employed is guilty of negligence, by which an injury occurs to another employee, the company is not responsible. *Columbus & I. C. R'y Co. v. Arnold*, 99 D. 615. S. P., *O'Connell v. Baltimore etc. R. R. Co.*, 83 D. 549; *Davis v. Detroit & M. R. R. Co.*, 4 R. 364.

Where a brakeman knows his conductor to be habitually careless, and chooses to continue in service with him, and does not inform the company of his known acts of carelessness and refuse to serve with him, he cannot recover against the company for injuries suffered from further carelessness, even though the company also knows it. *Frazier v. Pennsylvania R. R. Co.*, 80 D. 467.

An employee of a railroad, traveling from his home to his post of duty and back upon the cars of the company, free of charge, as stipulated for in the contract of service, is not a passenger, and the company is not liable for his death caused by so traveling by the negligence of a co-employee. *Vick v. New York Cent. etc. R. R. Co.*, 47 R. 36.

One employed about a railway engine-house, to wipe the engines and open and shut the doors, and the like, is not entitled to recover of the company for an injury sustained by him in shutting the doors by the negligence of a co-employee, under a statute giving the right of recovery in such cases when the injury is "in any manner connected with the use and operation" of the railway. *Malone v. Burlington etc. R'y Co.* 47 R. 813.

The fireman of a locomotive was killed through the alleged negligence of a switchman of the road. A prior act of neglect had been charged upon the switchman, but upon investigation by the defendant's general agent, he was retained in his position. He had at all other times appeared competent and faithful. *Held*, that no negligence could be imputed to defendants in retaining the switchman in their employ, and that, therefore, they were not liable for the death of the fireman. *Baulec v. New York and H. R. R. Co.*, 17 R. 325.

A fireman was killed by a collision between his train and another which was behind time. It was the custom and rule of the company, when a train was behind time, to move it in conformity to telegraphic orders from the train dispatcher, to be delivered by the receiving operator to the conductor and engineer in presence of one another. In this instance the train dispatcher telegraphed, directing the late train to await the other at a specified station.

For Index to Notes in American Decisions and American Reports, see Volume I.

The operator gave the message to the conductor but not to the engineer; the conductor receipted for it in the engineer's name, without the engineer's knowledge; and the operator advised the train dispatcher that it had been duly communicated. The conductor forgot to deliver the order to the engineer, and the engineer proceeded, and thus caused the collision. It did not appear but that the conductor and operator were competent and skillful, and it appeared that the rule had worked well for several years. *Held*, that the negligence was that of fellow-servants of the deceased, and there could be no recovery therefor against the company. *Slater v. Jewett*, 39 R. 627.

A mechanic employed in the repair shop of a railway company was killed by the explosion of the boiler of a locomotive engine sent there for repairs, and upon which he was at work. This happened through the failure of other employees, competent and skillful at the last stage of the repairs, to discover and repair defects in the boiler overlooked at a previous stage of the repairs, by other competent and skillful employees. *Held*, that no action would lie against the company. *Murphy v. Boston and A. R. R. Co.*, 42 R. 240.

A gang of track-repairers on a railroad quit work fifteen minutes before the usual hour, by order of the foreman, to take a train for a certain station, whither they were to be carried free, according to a monthly custom, to be paid off. The plaintiff in endeavoring to board the train was injured by a hand-car worked by other men in the company's employment. *Held*, that he could not recover therefor. *O'Brien v. Boston and A. R. R. Co.*, 52 R. 279.

107. Who are co-servants within the rule.*—Whether the rule that a master is not liable for injuries to a servant, caused by the negligence of a fellow-servant, is applicable to servants of railroad companies in different grades of employment, one being subordinate to the other, *quære*. *Washburn v. Nashville & C. R. R. Co.*, 75 D. 784.

An engineer of a construction train, and a workman engaged in repairing the track who rides back and forth on such train, are persons engaged in the same general undertaking, and the representatives of the workman cannot recover of the railroad company for his death caused by the negligence of such engineer. *Ohio etc. R. R. Co. v. Tindall*, 74 D. 259.

A master-machinist who has the immediate charge, control, and direction of the engines and other machinery of a railroad company, and the repairs thereof, and the control and direction of the engineers and firemen on the trains, is a fellow-servant of

such a fireman. *Columbus & I. O. R'y Co. v. Arnold*, 90 D. 615.

A railroad company is not liable to its brakeman for an injury by the neglect of its competent inspector to inspect a car received from another road for transportation. *Mackin v. Boston and A. R. R.*, 46 R. 456; *Smith v. Flint etc. R'y Co.*, 41 R. 161; *Foley v. Chicago and N. W. R'y Co.*, 42 R. 481.

A railway company is not liable to a brakeman for an injury sustained through the negligence of an engineer. *Nashville etc. R. R. Co. v. Wheelis*, 43 R. 317.

A foreman of a railroad company, with power to hire and discharge hands, is a co-employee, with men under him, within a statute authorizing employees to recover from the employer for injuries by the negligence of other employees. *Houser v. Chicago etc. R. R. Co.*, 46 R. 65.

A railroad yard-master and a car repairer are fellow-servants. *Kirk v. Atlanta etc. R. R. Co.*, 55 R. 621.

A railway brakeman was injured by collision with another train, moving in the opposite direction, and which had been negligently sent out by the train dispatcher. *Held*, that he had no cause of action against the railway company. *Robertson v. Terre Haute and I. R. R. Co.*, 41 R. 552.

A declaration alleged that plaintiff was employed as a laborer, in repairing a culvert for defendants, which was in a dangerous condition; that the danger was unknown to him, but known to defendants' agent and road-master in charge of the repairs; and that defendants, by their agent and road-master, so negligently conducted the repairs that plaintiff was injured. *Held*, insufficient; the plaintiff and the road-master were fellow-servants, and the defendants were therefore not liable in the absence of allegations of negligence in selecting competent servants, or that the injury was caused by the dangerous condition of the culvert. *Lawler v. Androscoggin R. R. Co.*, 16 R. 492.

108. Who are not.*—A carpenter employed in building a bridge is not a fellow-servant of those employed in the management of the company's train, while traveling on such train by direction of the company in order to assist at another place in loading bridge timbers; and if he is injured during the journey by the negligence of such employees, the company is liable to him as to a passenger and stranger. *Gilkenwater v. Madison & I. R. Co.*, 61 D. 101. S. P., *O'Donnell v. Allegheny V. R. R. Co.*, 98 D. 336; *Ryan v. Chicago etc. R. Co.*, 14 R. 32.

The owner of a freight-car attached to a passenger train who agrees to attend to the brakes of his car is not an employee of the company so as to prevent him from recover-

* Liability of company to employee injured by negligence of conductor, see note, 49 R. 406-415.

* Fellow-servants, employee and conductor of railway company not, see note, 49 R. 406-415.

For Index to Notes in American Decisions and American Reports, see Volume I.

ing for injuries from negligence. *Lackawanna etc. R. R. Co. v. Chencowith*, 91 D. 168.

The conductor of a railway train material is not a fellow-servant of the trainmen; nor is a section foreman. *Moon v. Richmond & A. R. R. Co.*, 49 R. 401; *Chicago etc. R'y Co. v. Swanson*, 49 R. 718; *Coleman v. Wilmington etc. R. R. Co.*, 60 R. 516.

A railway train-dispatcher and a locomotive engineer are not fellow-servants. *Darvign v. New York etc. R. R. Co.*, 52 R. 590.

A railroad car-inspector and car-coupler are not fellow-servants. *Tierney v. Minneapolis etc. R. R. Co.*, 53 R. 35.

A railway locomotive engineer and a section-master of track-repairers are not fellow-servants within the rule as to master's liability for injury by one servant to another. *Calvo v. Charlotte etc. R. R. Co.*, 55 R. 28. *S. P., Louisville etc. R. R. Co. v. Conroy*, 56 R. 835; *St. Louis etc. R'y Co. v. Weaver*, 57 R. 176.

The plaintiff was a train hand employed by the defendant, a railroad company, in digging gravel under the direction of L., who was engineer, superintendent and conductor and master of the gravel and material train of defendant, and who had entire charge of that branch of the business on a section of the railroad, with power to employ and discharge hands. *Held*, that the plaintiff and L. were not mere fellow-servants, and that the plaintiff might recover of defendant for an injury sustained by L.'s negligence. *Dobbin v. Richmond and D. R. R. Co.*, 31 R. 512.

109. The company's alter ego.—A railroad company placing one person in its employ under direction of another in its employ is liable for injuries to the person placed in the subordinate situation by the negligence of his superior, upon the ground that the injured person, at the time of the injury, was acting under the immediate control and direction of his superior, by whose neglect the injury was received; and thus occupied a position which precluded him from exercising his own discretion in looking to and providing for his own safety. *Mad River etc. R. R. Co. v. Barber*, 67 D. 312; *Cowles v. Richmond and D. R. R. Co.*, 37 R. 620.

An officer of a railroad company having charge of a department of its business in which injury occurs, is the person who is expected to use ordinary care in the employment of proper conductors and other servants. His carelessness in that respect is the carelessness of the company, and his knowledge is its knowledge. It is, therefore, error to exclude evidence that such officer did not know that the person through whose improper conduct the alleged injury occurred was a careless conductor. *Fraser v. Pennsylvania R. R. Co.*, 80 D. 467.

3. Relative Rights and Liabilities of Connecting Lines.

110. Interpretation of contracts and leases between associated companies.*—One railroad company by merely permitting another to use its road is not obliged to put the road in repair, or to make any change whatever in the arrangements of the road, or alterations in the road itself. *Murch v. Concord R. R. Corp.*, 61 D. 631.

A provision in the charter of a railroad company authorizing it to connect with a point at the further end of another railroad "by railroad, canal, or slack-water navigation," justifies the company in making an arrangement with such other company for the joint ownership of locomotives to run over both their roads. *Okott v. Tioga R. R. Co.*, 84 D. 298.

A railroad company is liable as common carrier for injuries to cars of a connecting company while they are in transit over its road, and which it receives with their passengers and freight into its exclusive custody and control. *Vermont etc. R. R. Co. v. Fitchburg R. R. Co.*, 92 D. 785.

A railroad company is liable to a connecting company for injuries to the cars of the latter arising from a defective condition of the road of the former, whether attributable to negligence or not, if the contract be construed to include cars, where the former company agreed to draw over its road the cars of the latter with their passengers and freight, and the latter agreed to save the former harmless from all claims and damages arising from any injury to passengers, or loss of or damage to baggage, goods and freight, while in transit over the same, "unless such injury, loss, or damage shall be clearly shown to arise from or be occasioned by the negligence or default" of the transporting company, "or from some defect in the road." *Id.*

In the absence of any contract between the owners of two connecting railroads, one cannot maintain an action against the other for failing to ship cotton over plaintiff's road which the other road had transported to the point of connection; and the fact that the owners of the cotton had contracted with the plaintiff to ship the cotton over its road does not give it a right of action against the defendant. *Wilmington etc. R. R. Co. v. Greenville etc. R. R. Co.*, 30 R. 23.

By agreement between the parties, connecting railway companies, the defendant was to receive the defendant's cars for delivery at a point on the defendant's line, and to return them in as good condition as when received, ordinary wear and tear by

* Power of the company to transfer franchise and property, see note, 75 D. 548-551.
Lessee of railroad, duties and liabilities of, see note 63 D. 227-231.

For Index to Notes in American Decisions and American Reports, see Volume I.

use excepted. Both parties were to share the profits of the freight so carried, and defendant was to pay the plaintiff a fixed sum for the use of its cars. Without fault on the defendant's part, certain of the plaintiff's cars were destroyed by fire on the defendant's line, while being thus transported. *Held*, that the defendant was not liable. *St. Paul etc. R. Co. v. Minneapolis etc. R'y Co.*, 37 R. 404.

111. Their liabilities as carriers of merchandise. *—1. *When liable beyond own particular line.*—Railroad companies may contract to carry passengers and freight beyond their own routes. *Wheeler v. San Francisco etc. R. R. Co.*, 89 D. 147.

Railroad companies as common carriers may make valid contracts to carry beyond the limits of their own road, either by land or water, and thus become liable for the acts and neglect of other carriers in no sense under their control. *Ib.*

Receiving goods destined beyond the terminus of a particular railway, accepting the carriage through, and giving a ticket or check through, imports an undertaking to carry through, and this contract is binding upon the company. *Ib.*

Each carrier is liable for the whole distance where several companies combine their operations as common carriers, and transport passengers and merchandise by a mutual arrangement over all their lines upon one contract for one price; and a company may be bound, even without any actual arrangement with the connecting lines, if by their agents they hold themselves out to the public as common carriers to a place beyond the limits of their own road. *Wheeler v. San Francisco etc. R. R. Co.*, 89 D. 147; *Bradford v. So. Cal. R. R. Co.*, 62 D. 411.

The company cannot answer that the contract to carry beyond their own route is ultra vires. *Wheeler v. San Francisco etc. R. R. Co.*, 89 D. 147.

If the company holds itself out as a common carrier to a point beyond the termination of its road, it is a common carrier for the whole distance; and if it professes to contract and does contract with and carry persons generally the entire distance, it must treat all alike, and contract with and carry all who apply. This principle applies to the carriage of property as well as passengers. *Ib.*

The company may own and control steamboats, for transporting its passengers and freight across navigable waters on the line of its road and constituting a part thereof; and where the carriage must end in water transportation in order to reach the substantial termini of the company's route, it is as much bound to carry over a navigable

bay at the end of its route as it would be to carry across a navigable body of water in the middle of the route. *Ib.*

A railroad company will be estopped from denying that it is a common carrier beyond the line of its own road, if its agents so represent the company to the public, in such a manner, or for such a length of time, that the corporators may be presumed to know it and therefore assent to it. *Perkins v. Portland etc. R. R. Co.*, 74 D. 507.

Where several companies are sued for delay on a joint contract of transportation, evidence introduced by them as to which of them should have furnished cars at a particular point of the transportation is immaterial, since they were jointly liable for a failure to fulfill the contract, and the plaintiff had no concern with any arrangement of the defendants among themselves. *Sisson v. Cleveland etc. R. R. Co.*, 90 D. 252.

Where a railroad company, whose southern terminus was Chicago, Illinois, received flour at its depot at Neenah, Wisconsin, directed to New York, etc., and gave a receipt containing the written clause, "Contract from Neenah to New York at \$2.25 per bbl.," the contract was *held*, to be one to deliver the flour at New York for a fixed compensation, and the company was held liable as a common carrier for the whole route. *Peet v. Chicago etc. R'y Co.* 91 D. 446.

In an action against a railroad company to recover for the loss of a box of goods, it appeared that the box, marked to the plaintiff at Washington, D. C., was delivered to the company at Peoria, Ill., for which a receipt was given, headed "through freight contract," but stipulating that their responsibility should cease at the terminus of their road. Among the conditions attached to the bill of lading was the following: "The responsibility of this company as a common carrier, under this bill of lading

* * * to terminate when the goods are unloaded from the cars at the place of delivery." The evidence showed that through freight was never unloaded or delivered at the terminus of the company's road, but forwarded to its place of destination in the cars in which it was received. *Held*, that plaintiff could recover whether the loss occurred on the company's road or beyond the terminus. *Toledo etc. R'y Co. v. Merriman*, 4 R. 590.

Defendants received goods as the last of a series of connecting railroads, the first of which had contracted with plaintiff to transport the goods "all rail," and to deliver them, "unavoidable accidents of the railroad and fire in depot excepted." *Held*, (1) that the terms of the contract permitted all necessary transportation by water, as by ferries, and that the connecting companies were entitled to the benefit of the exception in case of loss; but (2) that as defendants

* Connecting lines, respective liability of, see note, 42 R. 664-667.

For Index to Notes in American Decisions and American Reports, see Volume I.

line was out of the usual "all rail" route to destination, and required extended transportation by water, some twenty miles, they were not entitled to the benefit of the exceptions, but were liable as insurers in case of loss by one of the perils excepted. *Maghee v. Camden & Amboy R. R. Co.*, 8 R. 124.

2. *When not so liable.*—A railroad company does not, by merely receiving goods marked to go to a place beyond its terminus, undertake to carry them beyond the line of its own road. Neither an advertisement published by the company, setting forth the facilities for transportation possessed by the company, nor a receipt given by it to the shipper, stating that it has received the goods for transportation, is evidence of a special contract to carry the goods to the place to which they are directed; such receipt proves nothing more than a promise to carry the goods to the end of the road and thence forward them by the usual conveyance. *Elmore v. Naugatuck R. R. Co.*, 63 D. 143. S. P., *Crawford v. Southern R. R. Assoc.*, 24 R. 626.

Where a railroad company transports highly inflammable material, and then delivers it over to a second carrier, where it occasions a conflagration, the company cannot be held liable for the damage, as if their carrying the material, if negligence, was too remote a cause to charge them. *McMillan v. Michigan South etc. R. Co.*, 93 D. 208.

Where a railroad company receives goods marked for transportation beyond its line, it assumes the common-law liability for loss or damage, whether occurring on its own or another line; but a receipt specifying that it will not be liable for any loss unless occurring on its own line, will be construed as a special contract, limiting its liability to its own line if it is found, by a jury, that the consignors understood the terms of the receipt and assented to them. *Illinois Cent. R. R. Co. v. Frankenberg*, 5 R. 92.

Where defendant's station agent at Ludlow, Vermont, billed the plaintiff's goods through to Charlestown, Massachusetts, a point upon a connecting road, and receipted the pay for "transporting the merchandise from Ludlow to Charlestown," this being shown to be in accordance with the usual course of business upon the defendant's road—*held*, that these facts, without further proof, constituted proper and sufficient evidence to warrant the court in submitting to the jury the question whether or not the defendants undertook to transport the goods over the connecting road to the point of their ultimate destination. *Mann v. Birchard*, 94 D. 398.

3. *Right to freight, and how enforced.*—Where one of several connecting lines of railway receives goods from another, and,

without knowledge of any special contract between the shipper and the company first receiving them, pays, in accordance with the usual custom in such cases, the freight and charges demanded at the point where the goods are so received by it, in the absence of any arrangement or understanding between the companies with reference to through transportation, such company may retain possession of the goods until the consignee pays its customary charges for transportation, and also the freight and charges paid by it on its receipt of the goods, although this sum may exceed the amount for which the company which first received the goods agreed that they should be carried to their ultimate destination. *Wells v. Thomas*, 72 D. 228.

4. *Liability as respects the leased road.*—A railroad corporation which has leased a portion of another connecting road is not exempt from liability to the owner of goods delivered to it at a depot on the leased portion of the road, by reason of an agreement with the proprietors of the latter road, by which the two corporations, upon their respective roads, mutually agree to furnish suitable depot accommodations, and receive and deliver freights, and that the liability of the first corporation for upward freight upon the road of the second shall not commence until delivery on the cars of the first. *McCheser v. Manchester etc. R. R.*, 74 D. 624.

A railroad corporation receiving freight for delivery over a railroad leased to them cannot dispute their liability therefor on the ground that such lease is void. *Id.*

112. *Liabilities as carriers of passengers and their baggage.* 1. *Carriers of passengers.*—A railroad company may be bound by a special contract to transport persons or property beyond the line of its own road and this without any actual arrangement with connecting lines, if by its agents it holds itself out to the public as a common carrier to a place beyond such limits. *Perkins v. Portland etc. R. R. Co.*, 74 D. 507.

A railroad company is liable as a common carrier of persons, when cars of another railroad containing passengers are transferred to its road, attached to its engine, and wholly committed to the supervision and control of its agents and conductors. *Schopman v. Boston etc. R. R. Corp.*, 55 D. 41.

A railroad company does not assume duty to passengers of another railroad company by merely giving the latter permission to use its road; nor, it seems, by contracting to make its road safe for such passengers. The remedy of a passenger injured is against the company with whom he contracted. *Murch v. Concord R. R. Corp.*, 61 D. 631.

Railroads are not necessarily public ways; and if it could be inferred from the nature of their chartered powers that they

For Index to Notes in American Decisions and American Reports, see Volume L.

are such, or if the court is bound to take notice that they had become public corporations, it does not follow that all their tracks are public ways. *Id.*

Railroad corporations, both chargeable with negligence causing collision of their trains, are liable to a joint action for damages for injuries sustained by a passenger. *Colegrove v. N. Y. etc. R. R. Co.*, 75 D. 418.

A passenger who buys a through ticket, indicating no particular route, on a railroad, is bound to pursue the usual and direct route from the place of starting to the place of destination, and is not entitled to take a circuitous route from one point to another between those places. *Bennett v. New York Cent. etc. R. Co.*, 25 R. 250.

A passenger by railway, purchasing a ticket over the line of the seller and connecting lines, and injured by the negligence of one of such connecting lines, cannot maintain an action therefor against the seller. *Nashville and C. R. R. Co. v. Sprayberry*, 35 R. 705.

A railroad company selling passenger tickets over its own road and connecting roads is bound for the transportation of passengers to the destination, notwithstanding notice on the tickets that it will not be liable except as to its own road. *Central Railroad v. Combs*, 48 R. 582.

By contract between the Missouri Pacific Railway company and the defendant, the passenger trains of the latter were to be drawn over the road of the former between the town of Pacific, defendant's eastern terminus, and the city of St. Louis, the Missouri Pacific Company using its own locomotives and crews, and the defendant furnishing at its own expense all the train men, the manner of running the trains and the control of the train men being subject to the rules and regulations of the Missouri Pacific Company. *Held*, there could be no recovery against the defendant for the death of a passenger caused by the failure of the train to stop long enough for him to alight at the destination between St. Louis and Pacific, the deceased having purchased his ticket from the Missouri Pacific Company, for transportation from St. Louis to Webster where the accident occurred. *Smith v. St. Louis etc. R'y Co.*, 55 R. 380.

2. *Carriage of baggage—liability of first company.*—A railroad company selling tickets and checking baggage over its own and other lines is liable for loss of baggage anywhere upon the route. *Ill. Cent. R. R. Co. v. Copeland*, 76 D. 749; *Najac v. Boston etc. R. R. Co.*, 83 D. 686; *Hawley v. Screven*, 35 R. 126; *Baltimore and O. R. R. Co. v. Campbell*, 38 R. 617; *Louisville etc. R. R. Co. v. Weaver*, 42 R. 654.

Independent railroad companies operating roads which form a connecting route, under an agreement which authorizes the

agents of each to sell through tickets, are each so far liable for the performance of passage contracts that a passenger may sustain an action against the corporation of whose agent he bought his ticket for loss of baggage, on proof that it was not delivered to him at the end of the trip by the agents of the corporation whose road is the last on the connection. *Hart v. R. & S. R. R. Co.*, 59 D. 447.

A railroad company is under no obligation to carry passengers beyond the termination of its route over connecting lines, or to transport their baggage over such lines. *Pennsylvania R. R. Co. v. Schwarzenberger*, 84 D. 490.

Acceptance of fare over the whole route raises no implied agreement on part of the company to transport passengers and their baggage over connecting lines, where there has been an express disclaimer of personal liability on the part of the company, by giving to each passenger a ticket in which he is informed that the company assumes no responsibility for their carriage beyond its own lines. *Id.*

One railroad company may act as agent for connecting railroad lines. *Id.*

A railroad company is not liable to a passenger for loss of baggage not occurring upon the line of its own road, where the ticket sold by the company to a point upon a connecting road contained a printed stipulation that, in selling, the company acted as agent only, for roads beyond the terminus of its own road. *Id.*

For loss of baggage while being transported over connecting lines, the passenger's remedy is against the company which undertook for that portion of the route upon which the baggage was lost. *Id.*

Mere failure of a railroad company to deliver baggage of a passenger at a point on its road is not evidence of negligence on the part of a connecting railroad which sold the passenger tickets over both roads to such point, and checked his baggage accordingly. *Stinson v. Connecticut R. R. Co.*, 93 D. 140.

Where various railroad companies having connecting lines from Boston to Montreal have arranged among themselves for an excursion train over their several roads, and the company at the Massachusetts end of the route issues tickets with coupons attached for the whole distance, and its agent refuses to give a check for the trunks of one who has purchased such excursion ticket, saying that the same "would be perfectly safe, as he was to go through with them," and the baggage is put into one of the company's baggage-cars, which is sent through the whole distance in charge of its agent, the company is liable if the trunks are lost anywhere upon the route, and interest may properly be allowed from the date of default. *Najac v. Boston etc. R. R. Co.*, 83 D. 686.

For Index to Notes in American Decisions and American Reports, see Volume I.

The plaintiff bought a passage ticket over defendant's road from New York to Niagara Falls. He then had a ticket from the latter place to New Orleans by the "Mobile route." He presented the ticket to defendant's baggage-master at New York, and asked him to check his baggage to New Orleans by the route indicated by the tickets, the baggage-master examined the tickets, and gave him checks, which he put in his pocket without examination. The checks were stamped, "New Orleans and New York," and also with certain abbreviations indicating roads forming the "Great Jackson route." At Niagara Falls the defendant delivered the baggage to the agent of the latter route, and while in transit it was destroyed by accident. *Held*, that defendant was liable. *Isaacson v. New York Cent. etc. R. R. Co.*, 46 R. 142.

On changing from one railroad to another, which used the same baggage-room and platform, an employee of the road took plaintiff's check, agreeing to put her trunk on the train. He did not do so and the trunk was lost. *Held*, that the first-mentioned railroad company, with which plaintiff contracted for the whole distance, was liable. *Rome Railroad v. Wimberly*, 58 R. 468.

2. — *of second company.* — A railroad company must be held to have received baggage, and to be liable for its loss, where it exchanges the baggage-checks of a connecting line for its own, and does not give immediate notice to the passenger, on the exchange, of its inability to find the baggage. *Davis v. Mich. South etc. R. R. Co.* 74 D. 151.

A railroad company selling a through-ticket to a passenger to some point out of the state and beyond its terminus, by a specified route over its lines and the lines of other companies, and receiving the whole fare therefor, is liable to him for injury to his person or baggage occurring on any of the connecting lines; but a connecting carrier is not liable, if at all, unless the loss occurred upon its road or through its negligence. *Candes v. Pennsylvania R. R. Co.* 94 D. 566.

Where a railroad company sells a through-ticket over its own and connecting lines by a specified route, with permission to the passenger to stop at a certain point and go by other named lines to the point of destination, and gives a through baggage-check over one of the specified routes, and the party, on reaching the point designated, elects to go by the other route, the act of the connecting company at that point in changing the baggage-check and giving one of its own through-checks to the point of destination does not constitute a new contract so as to change the liability of the parties, but the first carrier is liable, and the connecting carrier cannot be held re-

sponsible unless the loss is proved to have occurred through his negligence. *Id.*

The plaintiff was a passenger on defendant's road, but had lost her trunk while traveling over a connecting road. A few days after, a conductor on the connecting road found the trunk and left it in charge of the defendant's baggage-master, stating the facts, and requesting him to forward it to plaintiff, which he agreed to do. Nothing was said about freight, nor whether the trunk should go by the freight or passenger train. The trunk being lost, — *held*, that the defendants were liable for its value. *Wilson v. Grand Trunk R'y*, 2 R. 26.

Where a person purchases a through ticket over several railroads, and procures a corresponding check for his baggage, and the baggage was afterward lost, the company on whose road it was lost is responsible therefor; but the evidence must show that it came to the hands of the company charged with the loss, and that it was lost by them. *Chicago etc. R. R. Co. v. Fahey*, 4 R. 587.

Where a passenger with a through ticket over a connecting line of railroad checks his baggage at the starting point through to his destination, and upon arriving it is damaged or has been broken open and robbed, he may sue the company which issued the check, or the company delivering the baggage in bad order. *Wolff v. Central R. R. Co.*, 45 R. 501.

Where baggage, for the transportation of which over three connecting railroads, operated by separate and independent companies, through checks have been issued by one of the terminal roads, is shown to have been in good condition when delivered to the intermediate road, but damaged when delivered at the destination, it does not devolve on the intermediate road, in the absence of any special contract or arrangement between the companies, to show that it was in good condition when delivered to the last terminal road. *Montgomery & E. R'y Co. v. Oliver*, 51 R. 483.

The sale of a through ticket over two connecting railroads is not evidence of a joint contract by which the second is liable for the loss of baggage by the first. *Felder v. Columbia and G. R. R. Co.*, 53 R. 656; *Atchison etc. Railroad Co. v. Roach*, 57 R. 199.

4. *Loss of baggage on leased road.* — A railroad company is responsible for baggage delivered to an agent of another line on whose road it is running, by one taking passage at a station, where such agent has been in the habit of receiving baggage for such company, and it has no agent of its own present at the station. *Jordan v. Fall River R. R. Co.*, 51 D. 44.

113. *Liability for injuries to stock on track.* — A lease and assignment of a railroad by its owners does not relieve the company themselves from any liability for losses or injuries imposed upon them by

For Index to Notes in American Decisions and American Reports, see Volume I.

their charter and the laws of the state. *Whitney v. Atlantic etc. R. R. Co.*, 69 D. 103.

A railroad company which, in pursuance of a contract with another company, is allowed to run its trains over the track of the latter is liable as a matter of public policy for injuries to stock caused by its train, though resulting solely from the failure of the company owning the track to fence it as required by law. But in such case the company owning the road is also liable, the injury being the result of its neglect of duty. *Illinois Cent. R. R. Co. v. Kanouse*, 89 D. 307.

114. Liability of company using line of another company.* — A railroad company is liable for acts of its lessees who are running its road under a long lease. *Nelson v. Vermont etc. R. R. Co.*, 62 D. 614; *Macon etc. R. R. Co. v. Mayes*, 15 R. 678; *Singleton v. Southwestern R. R.* 48 R. 574; *Lakin v. Willamette Valley etc. R. R. Co.*, 57 R. 25; *Balsley v. St. Louis etc. R. Co.* 59 R. 784.

It is immaterial to whom a train causing injury belongs, if it was in the care of the defendant's servants, subject to their exclusive direction and control at the time of the accident. *Fletcher v. Boston etc. R. R.*, 79 D. 695.

A railroad company is not liable for injury caused by a collision with a freight-car of another company which the plaintiff was loading, and which for the purpose of being loaded was placed by such other company upon the side-track of the defendants, which was in constant use by other roads, if such other company failed to use reasonable care that no collision should take place with the freight-car. *Id.*

A railroad company is not liable for injury caused by a collision which resulted from the negligence of another company, which in connection with the defendants made use of the defendants' track under a lease from the defendants, and ran trains on its own account over the track. *Id.*

A railroad company has no implied power to lease its road, and if it does so is responsible to a private person for the negligent operation of the road by the lessees, resulting in injury to him. *Abbott v. Johnston etc. Horse R. R. Co.*, 36 R. 672.

V. HORSE AND STREET RAILROADS.

115. Their right to use city streets.† — The law as well as public policy is opposed to transporters using railroads so as to obstruct public highways and streets. *Rauch v. Lloyd*, 72 D. 747.

An instruction submitting to the jury the question whether an obstruction of a public street by a railroad train was inevitable is

erroneous, if the evidence showed that it could have been avoided by the exercise of proper care and diligence on the part of the conductor; and it is the duty of the court to instruct the jury as a matter of law that such obstruction is unauthorized and illegal. *Id.*

Owners of a train of cars negligently left standing on a public street-crossing are liable for injury caused thereby to a child of tender years who attempts to pass under such train. *Id.*

A railroad company has no right to use a highway as part of its freight-yard, but it may pass and repass upon the highway for any lawful purpose, provided it uses it only to a reasonable extent and in a reasonable manner, without encroaching upon the rights of others who have an equal right to use it. *Gahagan v. Boston etc. R. R. Co.*, 79 D. 724.

A railroad company cannot appropriate and occupy a public street with the track of its road, without the consent of proprietors of lots bounded by such street, or without compensation made to them, and neither the legislature nor the municipal authorities have any power to dispense with the making of such compensation. *Ford v. Chicago etc. R. R. Co.*, 80 D. 791.

The company may be restrained by injunction from laying its track in a public street without first taking steps to acquire the right of way by the assessment and payment of damages to the owners of lots bounded by the street. *Id.*

Railroad companies will be held to exercise of increased care and diligence, commensurate with the greater hazard, in operating their franchises in populous cities and over public thoroughfares. *Toledo etc. R. R. Co. v. Harmon*, 95 D. 489.

A street railway corporation accepts its charter on the implied condition that it will not injure others by the construction or maintenance of its road. *Alton & U. A. H. R'y v. Deitz*, 99 D. 509.

Such corporation is responsible for injuries to property of others, resulting from the defective construction of its road, although constructed, as provided for by its charter, under the ordinances of the city, and the control of the city engineer. *Id.*

The use of a street as a site for a railroad track does not give a right of action to the owners of adjacent lots, unless it materially hinders the ordinary use of the street; but when such use does unreasonably abridge the right of lot owners to use the street as a means of ingress and egress, an action for damages will lie against the railroad company. *Elizabeth etc. R.R. Co. v. Combs*, 19 R. 67.

A municipal license under statutory authority, for the reasonable use of a highway by a street railway corporation, does

* Liability of railroad company for torts of lessees, see notes, 71 D. 295-298; 48 R. 530-532.

† Power of state to authorize railroads in streets, see note, 69 D. 662-665.

For Index to Notes in American Decisions and American Reports, see Volume I.

not create such an additional easement in the highway as will entitle abutters to compensation; and is constitutional. *Attorney-General v. Metropolitan R. R. Co.*, 28 R. 264.

A street railway company, having a franchise to operate its road on a city street, has a right to remove the snow from its track and place it upon another part of the street, and if it exercises ordinary care and prudence in doing these acts it will not be held liable for injury done to adjoining property by reason of such snow obstructing the flow of water in the street. *Short v. Baltimore City Pass. R'y Co.*, 33 R. 298.

A street railway corporation may exclude competing vehicles from the habitual and continuous use of its track. *Citizens' Coach Co. v. Camden Horse R. R. Co.*, 36 R. 542.

A horse railway may not be laid in a city street, solely as a freight transfer track between two steam railways without compensation to the adjoining land owners; and this is so, although the street is on land made by filling below low-water mark in a navigable river or lake. *Carli v. Stillwater Street R'y etc. Co.*, 41 R. 290.

In clearing the snow from its track a street railway company is bound to dispose of it so as not to interfere unnecessarily with the safety and convenience of persons using the street, and in case of extraordinary snowfalls must use extraordinary efforts to that end. *Bowen v. Detroit City R'y*, 52 R. 822.

116. Municipal regulations concerning them. — Compliance with a city ordinance requiring that "when a locomotive engine is used within the limits of the city, a man shall ride on the front of the locomotive when going forward, and when going backward on the tender, not more than twelve inches from the bed of the road," is not due to persons walking on the private way of the railroad company, at an uninhabited point and not at a street crossing, although in a path used by the public with the silent acquiescence of the company. *Baltimore and O. R. R. Co. v. State*, 50 R. 233.

117. Liability as carriers of goods. — In an action against a street-railroad company to recover damages for the loss of a box of merchandise delivered to it to be carried for hire on the front platform of one of its cars, evidence that other persons had paid money to its conductors, with the knowledge of its superintendent, for the carriage of merchandise, is admissible to show the defendant to be a common carrier of goods. *Levi v. Lynn etc. R. R. Co.*, 87 D. 713.

A street-railway company, if proved to be a common carrier of goods, is liable as such for loss of a box of merchandise delivered to it to be carried for hire on the front platform of one of its cars. *Ib.*

118. Fares and tolls. — A municipal ordinance provided that the fare on any

horse railway in the city should not exceed five cents. When it was enacted the defendant was operating a single line of railway. Afterwards it constructed and operated other lines diverging from the main line. *Held*, that the ordinance did not confer the right, upon payment of five cents, to ride on a car bound for one terminus, and at a point of divergence, to take another car to a different terminus. *Ellis v. Milwaukee City R'y Co.*, 58 R. 858.

119. Expulsion of passengers. — The conductor of a street-car may exclude or expel therefrom a person whose condition, by reason of intoxication or otherwise, is such that it is reasonably certain that by act or speech he will become offensive or annoying to other passengers therein, although he has not committed any act of offense or annoyance. *Vinton v. Middlesex R. R. Co.*, 87 D. 714.

A passenger in a street railway car, who is unable to sit up and is sick to vomiting, may lawfully be expelled, whether his sickness proceeds from drunkenness or not. *Lemont v. Washington and G. B. R. Co.*, 47 R. 238.

Plaintiff was a passenger in a street-car, and wishing to alight, passed out upon the platform and asked the conductor to stop the car, telling him that she would not get out until the car had come to a full stop; whereupon he, and while the car was in motion, threw her from the car with great violence breaking her leg. *Held*, a wanton and willful trespass, for which the company was not liable. *Isaacs v. Third Avenue R. R. Co.*, 7 R. 418.

The conductor of a street railroad car was authorized by the company to remove every passenger from the car who should refuse to pay the fare. While attempting to remove plaintiff, a passenger, for non-payment of fare, the conductor struck him in the face, for which he brought action against the company. *Held*, that the company was liable, if the jury should find that the act was without malice or ill feeling toward the plaintiff. *Jackson v. Second Ave. R. R. Co.*, 7 R. 448.

The conductor of a street-car mistakenly gave a passenger a wrong transfer ticket, and the conductor of the second car, refusing it, and the passenger declining to pay his fare, ejected him. *Held*, that he had no cause of action against the company. *Bradshaw v. South Boston R. R. Co.*, 46 R. 481.

120. Liability for injuries to passengers. — A driver of a street-car who checks the speed of his car, after being notified to stop, and then without stopping or notice to the passenger who was about to alight, starts up with a sudden jerk, is guilty of negligence. *Nichols v. Sixth Ave. R. R. Co.*, 97 D. 780.

For Index to Notes in American Decisions and American Reports, see Volume I.

Street railroad companies are carriers of passengers, bound to extraordinary diligence, and liable for negligence of their agents and employees in and about such carriage; and when passengers are injured by riotous fighting among other passengers, the question of negligence is one of fact, and a declaration alleging negligence in the company, in the failure to have a conductor aboard to preserve order, and in the failure of the driver to suppress the fight or to eject the combatants, is good, and should not be dismissed on demurrer. *Holly v. Atlanta Street R. R.*, 34 R. 97.

The plaintiff, while riding on defendant's horse-car, upon invitation of the driver as a passenger without hire, was injured, without fault on her part, through the negligence of the driver, in the course of his employment. *Held*, that defendant was liable. *Wilton v. Middlesex R. R. Co.*, 9 R. 11.

A street-car conductor is not bound to eject a passenger who addresses insulting remarks to his fellow-passengers, although he is intoxicated, provided he remains quiet and inoffensive after being admonished by the conductor; and the company is not responsible for the results of a sudden, unlooked for and violent attack committed by him on a fellow-passenger. *Putnam v. Broadway etc. R. R. Co.*, 14 R. 190.

P., accompanied by two ladies, was riding in a street-car, when F., who was intoxicated, got upon the car and made insulting remarks and signs to the ladies. The attention of the conductor was called to this, and he told F. to be quiet. F. then made threats of violence against P., but in a voice so low that the conductor did not hear. F. then went out upon the front platform and remained quiet. When the car stopped to allow P. and the ladies to alight, F. seized the car hook, ran to the back platform and struck P. blows on the head from which he subsequently died. *Held*, that the railroad company was not liable. *Id.*

The plaintiff signalled a street-car to stop, the car was open with a side step or rail; the driver applied the brake, and while the car was moving slowly, the plaintiff put his foot on the step, took hold of the end of a seat, and raised himself to get on, when the driver, who was looking at him, started the car with a jerk; the plaintiff slipped under the car and was injured. *Held*, that the case was proper for the jury. *Eppendorf v. Brooklyn City etc. R. R. Co.*, 25 R. 171.

Evidence of the fact, that plaintiff was in the habit of jumping upon the defendant's cars in motion, was properly excluded. *Id.*

The plaintiff was a passenger on a car of a street railway having but one track, with occasional turnouts. In turning out to avoid a car coming in the other direction, the car ran beyond the turn-out, and the driver requested the plaintiff to assist him

in backing it upon the turn-out. While so engaged he was injured by the negligence of the driver of the other car. *Held*, that the railway company was liable. *Street Railway Co. v. Bolton*, 54 R. 803.

121. — or other persons. — A flagman charged with duty of protecting the public, at a place constructed and used as a public way by great numbers of people, such as a private railroad crossing in a city, is bound to indicate to persons when it is safe for them to pass as well as when it is necessary or prudent for them to refrain from passing. *Sweeney v. Old Colony etc. R. Co.*, 87 D. 644.

A railroad company will be liable, where its employee performs an act incident to his employment, so unskillfully, negligently, recklessly, or wantonly that the persons whose fault does not contribute are thereby injured; and the company is not released from liability by the fact that the wrongful acts were in violation of rules or by-laws, or against particular instructions of the company. *Toledo etc. R. R. Co. v. Harmon*, 95 D. 489.

A railroad Company in lawful pursuit of its business is liable only for failure to use reasonable care and diligence, such as ordinary prudence would suggest and require in the passage of its locomotives through the thoroughfares of a city. *Baltimore and O. R. R. Co. v. State*, 96 D. 528.

A company failing to conform to city ordinances, providing certain safe-guards in the use of engines, is not in the lawful pursuit of its business, and is responsible, for any injury which it may occasion, if the party injured be not in fault. *Id.*

A street railway company is bound to exercise the highest degree of diligence to discover and avoid injuring a young child on its track. *Galveston City R. Co. v. Hewitt*, 60 R. 32.

Where a railroad company was running its horse-car without light or bells, in the streets of a city on a dark night over a track obstructed by a sewer in process of construction, and it appeared that plaintiff's decedent, a sober cartman, was found dead on such track under circumstances showing that he was struck by defendant's car while groping in the dark for a safe passage for his team, in the absence of any other evidence, there being no witness to the accident, the dangerous tendency of defendant's conduct was such as to authorize the attributing of the accident to the negligence of the defendant and to justify the refusal of a nonsuit, the presumption being that plaintiff had the same regard for his own safety as other men ordinarily have. *Johnson v. Hudson R. R. Co.*, 75 D. 375.

Defendant's street-car was stopped so as to obstruct the street; plaintiff, a foot passenger, wishing to cross the street, stepped

For Index to Notes in American Decisions and American Reports, see Volume I.

upon the platform of the car in order to do so, and was thrown off by the driver and hurt. On demurrer to a complaint alleging these facts, and that the driver acted "forcibly, willfully and violently," and was the "servant and agent" of the defendants, — *Arld*, that the demurrer was properly overruled. *Shea v. Sixth Avenue R. R. Co.*, 20 R. 480.

The plaintiff, a boy ten years old, was riding on one of the defendant's street-cars, with the knowledge and consent of the conductor and driver, but without paying fare. They had no authority to carry passengers free. The driver requested him to take a package from the car and deliver it at the place where he was intending to get off. He took the papers, and without notice to the conductor or driver, while the car was in motion, and before it reached the crossing where it usually stopped, he jumped off the front platform, and was thrown under the wheel and injured. A printed notice was posted conspicuously in the car, forbidding passengers to stand upon, or get on or off at, the front platform, or to get on or off the car when in motion, and declaring that the company would not be responsible for any accident happening thereby. The trial court found that the injury was caused by the careless driving and management of the car; that the plaintiff in getting off under the circumstances used as much care as could be expected from a person of his age, and that no contributory negligence on his part was proved. *Held*, that on these findings the plaintiff was entitled to recover. *Brennan v. Fairhaven etc. R. R. Co.*, 29 R. 679.

A child, six years and nine months old, running at large in the streets, suddenly and unexpectedly attempted to mount the front platform of a street-car, and was injured thereby. The driver, who was also conductor, was on the rear platform at the time, engaged in putting off another boy who was hanging on in a dangerous position. There was no fender on the front platform. *Held*, that *prima facie* there was no negligence to warrant a recovery. *Hestonville Pass. R'y Co. v. Connell*, 32 R. 472.

A child sixteen months old was injured by being run over by a street railway car. The court admitted evidence of how many hours the drivers and conductors were daily employed, in order to show that the driver was physically unable to discharge his duty at the time. *Held*, error. The court charged that if the driver saw the child in the street, approaching the car, and in such close proximity, that the child might reach the track before the car passed, it was negligent not to stop the car. *Held*, error. *Philadelphia etc. Pass. R'y Co. v. Henrice*, 37 R. 699.

Two street-cars were being drawn by a

single horse, in charge of a driver on the front platform, from the stables to the repair shops, when the plaintiff, a lad six years old, in play jumped on the rear platform, and fell off or jumped off, sustaining injury. The driver knew nothing of it. *Held*, that there was no negligence on the part of the railroad company. *Bishop v. Union R. R. Co.*, 51 R. 386.

A city ordinance provided that cars driven in the same direction should not approach each other within three hundred feet except in case of accident, when it may be necessary to connect two cars, and also at stations. *Held*, inapplicable. *Id.*

122. What is contributory negligence on part of person injured. * — It is negligence for a passenger on a street-car to leave or attempt to leave the car while it is in motion, but after he has given notice for it to stop, and there are indications of its doing so, he has a right to prepare to leave. *Nichols v. Sixth Ave. R. R. Co.*, 97 D. 780.

If there is standing room inside a street-car, with pendant straps for holding on, it is negligent to ride on the platform. *Andrews v. Capitol etc. R. R. Co.*, 47 R. 266.

Plaintiff was a passenger on one of defendant's horse-cars; at a crossing of a steam railway, the driver carelessly drove upon the latter track, directly in front of an approaching train; the plaintiff, and all the other passengers but one, seeing the danger, rushed and jumped, and the plaintiff in so doing fell and received injury; the driver got his car across the track in time to escape the train. *Held*, that the question of contributory negligence was for the jury; that the plaintiff was only bound to exercise ordinary prudence, and an error of judgment does not constitute negligence; and that evidence of the conduct of the other passengers was proper as part of the transaction and as showing what ordinary prudence was under the circumstances. *Twomley v. Central Park etc. R. Co.*, 25 R. 162.

123. What is not. — A passenger on a street-car is not required to keep his seat until the very moment the car actually stops. After he has notified the driver to stop, and the speed of the car is checked, it is not negligence for him to go upon the steps of the car so as to be ready to alight. *Nichols v. Sixth Ave. R. R. Co.*, 97 D. 780.

Mere preparation to leave a street-car while it is in motion is not of itself negligence, if there are indications that the car is about to stop. *Id.*

A passenger riding on the rear platform of a crowded street-car leaned his back against the dasher, and was struck and injured by the pole of a following car. *Held*, that he was not negligent. *Thirteenth etc. R'y Co. v. Boudreau*, 37 R. 707.

* Contributory negligence in riding on front platform of street-car, see note, 37 R. 710-712.

For Index to Notes in American Decisions and American Reports, see Volume I.

It is not conclusively negligent for a passenger on a crowded street-car to stand on the front platform, with the assent of the conductor or driver. *Germantown Pass. R'y Co. v. Walling*, 37 R. 711, note; *Nolan v. Brooklyn City and N. R. R. Co.*, 41 R. 345.

It is negligent in a street railway company to have two tracks laid so near together that a passenger's arm projecting a few inches from a car window may be hit by a passing car, and it is not necessarily negligent in the passenger to allow his arm so to project. *Summers v. Crescent City R. Co.*, 44 R. 419.

While it is a reasonable safeguard against accidents to forbid departure from a car while it is in motion, a passenger on the upper floor of a horse-car does not violate this regulation in walking, the car being in motion, towards the rear end for the purpose of descending to the lower platform. *President etc. v. Leonhardt*, 58 R. 113, note.

124. Elevated railroads. — In an action against an elevated street railway by an adjacent lot-owner for damage by occupation of the street, evidence is competent to show that since the building of the railroad the trade and business of the street has diminished and changed. *Druck v. Manhattan R. Co.*, 60 R. 437.

It appeared that the result was partly due to a tendency in business to move "up town." *Held*, that it was for the jury to estimate the proportion of the loss chargeable to the defendant, and that a recovery for such estimated loss was proper. *Id.*

RAPE.

[Includes the offense of sexual intercourse without the consent of the female, whether the same be procured by fraud or force.]

Assault with intent to commit, see ASSAULT, 32-34.

1. Construction of statutes. — In a statute punishing carnal knowledge, or "abuse" in an attempt to have carnal knowledge, of a female child under ten years of age, the word "abuse" applies only to injuries to the genital organs in an unsuccessful attempt at rape, and does not include mere forcible or wrongful ill-usage. *Dankins v. State*, 29 R. 754.

2. What constitutes the offense.* — Where a man has carnal intercourse with a woman (not his wife), without her consent, while she is, as he knows, wholly insensible, he is guilty of rape. *Com. v. Burke*, 7 R. 531.

A statute fixing the age of puberty in females at twelve, carnal intercourse with a female under that age is rape. *State v. Tithman*, 31 R. 236.

*See monographic note on crime of rape, 80 D. 861-875.

Rape, where assent was procured by fraud, see note, 12 R. 290-291.

Sexual connection with a woman of weak intellect by means of a fictitious marriage does not constitute rape. *Bloodworth v. State*, 32 R. 546.

Sexual intercourse without the consent of the woman and under the pretense of a surgical operation is rape. *Pomeroy v. State*, 48 R. 146.

3. — or an attempt to commit it. — A person who stands by when an attempt is made by others to commit a rape, but who does no act to aid, assist or abet its commission, is not guilty of an attempt to commit a rape; the question of his complicity is for the jury. *People v. Woodward*, 13 R. 176.

4. The necessary force and resistance.* — Force is a necessary ingredient in the crime of rape; but the force may be constructive. *Lewis v. State*, 68 D. 113; *State v. Murphy*, 41 D. 79.

Cohabitation procured by means of a fraudulent personation of a female's husband does not amount to crime of rape; there is neither actual nor constructive force. *Lewis v. State*, 68 D. 113.

If the woman consent in the belief that an illegal marriage is legal, upon the fraudulent assertion of the pretended husband, the latter will not be guilty of rape. *State v. Murphy*, 41 D. 79.

Reluctance and resistance on the part of an adult woman are essential to the commission of this offense. Perhaps an exception to this rule exists when the woman shows by her words and conduct that the act was against her will, but finally ceases to resist because of insensibility produced by liquors administered to her by the accused. *People v. Crosswell*, 87 D. 774.

To constitute rape of a woman in possession of physical and mental powers, not overcome by threats nor so placed that resistance would be useless, it must appear that she resisted to the extent of her ability. *Oleson v. State*, 38 R. 366; *People v. Dohring*, 17 R. 349.

One may be convicted of rape on a woman who failed to resist because of imbecility. *State v. Atherton*, 32 R. 134.

Sexual intercourse with a demented or insane woman who does not resist, and who apparently assents thereto, is not rape. If, however, a man, knowing a woman to be insane, takes advantage of that fact to carnally know her, when her mental powers are so impaired that she is unconscious of the nature of the act, and is not a willing participator therein, his offense is rape, though there is no distinct proof of her resistance. *People v. Crosswell*, 87 D. 774.

5. Liability of aiders and abettors. — A woman, aiding and abetting an attempt to commit a rape, is guilty as a principal. *State v. Jones*, 35 R. 586.

*Resistance on part of prosecutrix, to what extent must be carried, see note, 36 R. 860-862.

For Index to Notes in American Decisions and American Reports, see Volume I.

6. What indictments are sufficient.

— An indictment which alleges that the defendant "violently and against her will feloniously did ravish and carnally know" the woman is sufficient. *Com. v. Fogarty*, 69 D. 264.

An indictment need not allege that the woman ravished was not the wife of the defendant. *Id.*

The allegation of "did forcibly ravish," is sufficient without adding, "against her will." *Williams v. State*, 28 R. 399.

An indictment charging an attempt to commit rape upon "Theresa Gaudaloupe," and referring to that person as "her," is good without alleging that person to be a woman. *Battle v. State*, 30 R. 169.

In an indictment for abetting a rape actually committed by a "person unknown," it is not necessary to allege that such person was a male, or capable of committing rape; the use of the word "violently" instead of "forcibly" does not vitiate it; and the omission of the words "against the form of the statute," etc., cannot be urged on motion in arrest. *State v. Williams*, 36 R. 272.

7. Evidence to convict, generally.

— On the trial of a prisoner for rape committed on his ward, a copy or certificate of the grant of letters would be sufficient to prove actual guardianship during the minority of the ward, but the whole record of his guardianship, extending over eight or nine years, might be admitted, to anticipate any resignation or removal of the guardian and establish the continuance of the guardianship up to the time of the outrage. *Turney v. State*, 47 D. 74.

Evidence of an unsuccessful attempt by the defendant a few days previous is competent. *People v. O'Sullivan*, 58 R. 530.

8. Showing capacity to commit.

— On the trial of an indictment for rape, against a boy under fourteen years of age, the burden is on the state to prove his capacity to commit rape, and a statute dispensing with proof of emission does not change the rule. *Hittabiddle v. State*, 35 R. 592.

The presumption that a boy under fourteen cannot commit rape may be rebutted by proof of the actual commission. *Wagner v. State*, 40 R. 36.

9. Proof of complaint made by prosecutrix.*— The testimony of the complainant may be confirmed by evidence not only that she had communicated her complaint to persons out of court about the time of the offense, but the details of such communication may be given by the witnesses. *State v. Kinney*, 26 R. 436; *Benstine v. State*, 31 R. 593.

The particulars of the complaint of the prosecutrix to third persons cannot be ad-

* Complaints of prosecutrix, when admissible in prosecutions for rape, see note, 36 R. 369, 370.

mitted as evidence in chief. *Oleson v. State*, 38 R. 366; *People v. Mayes*, 56 R. 126.

The victim's complaints of the commission of the offense may be proved, but not the details nor the name of the ravisher. *State v. Robertson*, 58 R. 201.

Evidence of the first complaint of the prosecutrix, ten months after the offense, is incompetent. *People v. O'Sullivan*, 58 R. 530.

The delay is not excused by threats of the defendant, a priest, to the prosecutrix at confession, that if she told of him she would go to hell. *Id.*

10. Variance.— Proof of rape sustains an indictment for an attempt to commit rape. *Levis v. State*, 68 D. 113.

The statute of Indiana defines two classes of rape, one upon a woman against her will, the other upon a female child under twelve years of age. *Held*, that an indictment setting forth an offense of one class could not be sustained by proof of one of the other class. *Greer v. State*, 19 R. 709.

11. Examination of prosecutrix.

— The prosecutrix may be asked on cross-examination whether she did not at a certain time and place have illicit intercourse with another person. *State v. Reed*, 94 D. 337.

On the trial of a complaint for indecent assault upon a woman in disordered health, it is proper to show that such persons are subject to hallucinations, and to ask her if she had not made similar charges before, without mentioning the one in question; but not proper to ask her if she had not been undergoing medical treatment at a college in presence of a class, nor to show that the defendant had improperly approached the judge or been charged with buying votes. *Dervin v. Parsons*, 50 R. 262.

12. Corroborating her testimony.

— Declarations of an injured party, made out of court, are admissible on the trial of an indictment for rape, to show that the testimony of such party as given at the trial agree with such declaration. *State v. De Wolf*, 20 D. 90.

A defendant having attempted to discredit the testimony of the prosecuting witness on the trial of an indictment for rape, by showing she had concealed the transaction for more than a year, and assigned as a reason therefor her fear of the defendant, evidence by the prosecution that the prosecuting witness was deaf and dumb, and that such persons have a sense of inferiority to other people, and as a class are easily intimidated, and that they are credulous and submissive, and that such was the character of the prosecuting witness, is inadmissible. *Id.*

Statements by a prosecutrix made soon after the occurrence, detailing the circumstances, are admissible in corroboration of her testimony on the trial, but not as inde-

For Index to Notes in American Decisions and American Reports, see Volume I.

pendent evidence. *Phillips v. State*, 49 D. 709; *Laughlin v. State*, 1 D. 444.

It is competent to introduce evidence of the good character of the person outraged, she being a witness for the prosecution. *Turney v. State*, 47 D. 74.

13. Evidence in defence, generally.

—Any fact tending to the inference that there was not the utmost reluctance and resistance by the prosecutrix, where she is the sole witness, and the defendant is compelled to rely on circumstantial evidence, is always admissible; as, that there was no immediate disclosure, no outcry, though help was known to be at hand, etc. *People v. Benson*, 65 D. 506.

14. — consent. — A female's failure to make any outcry when a violation of her person is attempted, and the fact that her garments do not get injured in the struggle with her assailant, as well as the fact that she keeps the injury silent for several days, tend strongly to show consent, but are not conclusive, and should always be considered in connection with her age and intelligence. *State v. Cross*, 79 D. 519.

Consent involves a submission; but a mere submission by no means necessarily involves consent, as where a child is in the power of a strong man. *Id.*

If consent is shown, there may be a conviction of assault with intent to commit rape, if there was force sufficient to indicate that intent before consent was given. *State v. Atherton*, 32 R. 134.

If a woman finally consents, although such consent is reluctant, and is obtained through fear, duress, and fraud, or partly through fear and partly by force, the offense is not rape. *Whittaker v. State*, 36 R. 856.

15. Bad character of prosecutrix.

—The general character of a prosecutrix for chastity is in issue in prosecutions for rape, but particular acts of lewdness with persons other than the accused cannot be proved on the trial: First, because she is presumed to be unprepared to disprove such specific accusations without previous notice; and secondly, because it would create collateral issues, indecisive of the guilt or innocence of the accused, but well calculated to embarrass and mislead the jury. *McDermott v. State*, 82 D. 444; *State v. Foraker*, 80 D. 132; *State v. DeWolf*, 20 D. 90; *Shartzer v. State*, 52 R. 501. But her previous intercourse with the prisoner, is always admissible as tending to show that the act of which she complains was not against her will. *State v. Reed*, 94 D. 337.

The rule that only evidence of the prosecutrix' general reputation for unchastity, and not evidence of particular acts, is admissible to impeach her testimony, admitting the general soundness of such rule, should not be applied where the prosecutrix

is young, inexperienced, has lived a secluded life, and where her proclivities can be shown only by proof of specific acts of lewdness. *People v. Benson*, 65 D. 506.

The defendant may prove, by the complainant or others, particular acts of unchastity on the part of the complainant. *Bensline v. State*, 31 R. 593; though the prosecutrix was not asked concerning them, for the purpose, not so much of impeaching her as rebutting the presumption of want of assent, when she is the only witness for the prosecution. *People v. Benson*, 65 D. 506.

Evidence of the unchastity of the complainant is competent upon the question of consent. On a trial of W. for a rape upon M., — held, that evidence was admissible to show that M. was in the habit of receiving men at her dwelling for promiscuous intercourse. *Woods v. People*, 14 R. 309.

Evidence of an agreement for sexual intercourse with a third person, made by prosecutrix on the day of the commission of a rape upon her, is inadmissible on the trial of an indictment for the rape. *McDermott v. State*, 82 D. 444.

Allusions to specific reports of the improper intimacy of the prosecutrix with third persons, made on a trial for rape by the witnesses of the accused, without objection from the prosecution, do not authorize the prosecution to introduce evidence contradicting the truth of such reports. The issue is not whether a bad reputation of the prosecutrix for chastity is deserved, but whether it is generally accredited. *Id.*

Inquiries as to bad character for chastity, in cases both civil and criminal, where the character is regarded as involved in the issue are limited to the time previous to the transaction in question. *State v. Foraker*, 80 D. 132.

Witnesses called to impeach the character of prosecutrix for chastity, must confine their testimony to what they knew before the offense was committed. They will not be permitted to testify to any knowledge acquired afterwards. *Id.*

16. Instructions. — The jury should be cautioned against convicting for rape on prosecutrix' testimony alone uncorroborated by other evidence, direct or circumstantial. *People v. Benson*, 65 D. 506.

The jury were instructed that they might convict if they found that defendant procured the woman to have connection with him by fraudulent representations, which she believed, that it was a necessary part of his medical treatment of her. Held, error, for the reason that it did not recognize force as an essential element of the crime. *Don Moran v. People*, 12 R. 283.

17. Conviction and punishment. — A defendant charged with the commission of rape may be convicted of assault with intent to commit rape, upon evidence showing

For Index to Notes in American Decisions and American Reports, see Volume I.

that he intended to gratify his passions upon the person of the female, notwithstanding any resistance on her part, and that the offense was consummated under circumstances satisfying the jury that the assault was made without her consent. And the jury may do this where they are not satisfied that the resistance on her part was so continued and persistent as to prove guilt of the higher crime, when he succeeds in having carnal knowledge. *State v. Cross*, 79 D. 519.

RATIFICATION.

Estoppel by, see ESTOPPEL, 47.
Of acts of public agents, see AGENCY, 106.
Of agent's acts, see AGENCY, 68, 88-101.
Of contracts, see CONTRACTS, 4.
Of corporate contracts, see CORPORATIONS, 125.
Of void contracts, see CONTRACTS, 91.

REAL PROPERTY.

[Includes the general nature of, title to, and ownership of land and chattels real; the rights and liabilities of the owner in the use of realty; the doctrines of accretion and alluvion; and conflicting rights of adjoining proprietors.]

Admissions and declarations as to title, to, or possession of, see EVIDENCE, 151-153.
As partnership property, see PARTNERSHIP, 19, 20.

Charging legacies on, see LEGACIES, 11.
Conclusiveness of judgments on questions of title to, see JUDGMENT, 70.

Contracts for sale of, see VENDOR AND PURCHASER, I.

Contracts relative to — requirements of statute of frauds, see CONTRACTS, 50-52.

Disabilities of aliens respecting, see ALIENS, 8-15.

Disabilities of coverture in relation to, see HUSBAND AND WIFE, 31.

Distinguished from personal, see also PERSONAL PROPERTY, 1.

Enforcement of contracts relative to, see SPECIFIC PERFORMANCE, 3-5.

Enjoining alienation of, see INJUNCTION, 20.

Extent of executions on, see EXECUTION, 141-145.

Levy of attachment on, see ATTACHMENT, 57.

License to enter on, see LIENSER, 4-6.

Management of, by personal representative, see EXECUTORS, etc., 42.

Of infants, sales of, by order of court, see INFANTS, 8-15.

Of lunatics, sales of, by order of court, see INSANE PERSONS, 22.

Of ward, sales and leases of, by guardian, see GUARDIAN AND WARD, 19.

Of wife, rights of husband as to, see HUSBAND AND WIFE, 6.

Power of city to hold, see MUNICIPAL CORPORATIONS, 10.

Power of corporation to acquire, see CORPORATIONS, 93.

Power of corporation to deal in, see CORPORATIONS, 99.

Power of Indians to hold and convey, see Indians, 2.

Presumptions as to title to, see EVIDENCE, 35.

Real estate brokers, see BROKERS, 5-11.

Relative rights of owner and miners, see MINES, etc., 8.

Resulting trusts in, see TRUSTS, 14.

Rights of adjoining owners as respects party walls, see PARTY WALLS.

Rights of littoral owner, see RIPARIAN RIGHTS.

Sale of, for non-payment of taxes, see TAXES, IV.

Sales of, on execution, see EXECUTION, 85-87.

Remedies for trespasses on, see TRESPASS, I, II.

Sales of, on Sunday, see SUNDAYS, 4.

Set-off in actions respecting, see SET-OFF, 17.

Slander of title to, see SLANDER, IV.

Tenancy in common of, see CO-TENANCY, 7-53.

What is taxable, see TAXES, 11.

What lapse of time bars actions for, see LIMITATIONS OF ACTIONS, 46-51.

What may be sold on foreclosure, see MORTGAGES, 97, 98.

When liable to attachment, see ATTACHMENT, 34.

When limitation begins to run against action for, see LIMITATIONS OF ACTIONS, 34.

When passes by will, see WILLS, 9.

When subject to execution, see EXECUTION, 36.

1. How distinguished from personal. — A dam is not necessarily real estate. If built by one person on the land of another, with the latter's consent, it would be personal estate. *Southard v. Hill*, 69 D. 85.

2. The title and possession, generally. — 1. *Nature of the title, generally.* — The foundation of property consists in its being an exclusive right, and persons other than the owner cannot impose burdens on it, or impair its enjoyment without the latter's permission, or by color of legal authority. *Orest v. Jack*, 27 D. 353.

2. The privilege of reclaimed land under water in front of one's premises, under the Maryland statute of 1745, confers no property or possession which can be encroached upon by another until the land is reclaimed. *Casey v. Inloes*, 39 D. 658.

The general rule that a derivative title cannot be better than that from which it is derived, is subject to many necessary exceptions. *McAusland v. Pundt*, 93 D. 358.

Ownership of land carries with it the right to its products, at law and in equity. No change can take place in the title to the fruits of the soil, without the owner parts with his title or possession, or permits its cultivation for the benefit of another. *Rush v. Vought*, 93 D. 769.

For Index to Notes in American Decisions and American Reports, see Volume I.

The labor of others for the owner of the soil creates no title to products, though mingling in the production. *Id.*

2. *Acquisition of title.*—A release when neither of the parties to it have any possession, actual or legal, in the land released, is without effect. *Porter v. Perkins*, 4 D. 52.

One entering upon land under a deed duly acknowledged and recorded, acquires a freehold either by right or wrong; if by wrong, it is an actual disseisin of all claiming the same land under a different title. *Higbee v. Rice*, 4 D. 63.

Actual possession is not necessary to give a valid title. It is sufficient if there be no adverse possession. *Pitts v. Bullard*, 46 D. 405.

A possession in right of the possessor's wife is not seisin in the strict legal sense. *Pearce v. McClenaghan*, 55 D. 710.

Seisin and possession do not mean same thing; seisin is the possession of a freehold estate, created at common law by livery of seisin. *Ferguson v. Wisell*, 57 D. 744.

Where there is no adverse holding, the possession is considered as following the property, and is deemed to be in him who has the title. *Holley v. Hawley*, 94 D. 350.

One who first takes possession of land makes it his own by occupancy as against all the world, except the true owner; and the land remains his as against all persons entering afterwards without his consent, and without title, unless he abandons it, or it is taken from him by some method known to the law. *Moon v. Rollins*, 95 D. 181.

3. *Conflicting titles.*—A party being in possession of a part of a tract of land, under a deed conveying to him the whole tract, may grant the whole by a deed of bargain and sale, without entering on that part of which he is not in possession, notwithstanding an adverse possession of the said part by inclosure. *Gittings v. Hall*, 2 D. 502.

Where two persons are in possession of land, each claiming an exclusive right, the law adjudges the rightful possession to be in the one who has the right to the land. *Mother v. Trinity Church*, 8 D. 663.

Land comprehends, as between a vendor and vendee, a mortgagor and mortgagee, etc., all soil or earth, whether covered by water or not, all minerals, all houses, fences, and structures on the ground, and all vegetable productions standing and growing on it. *Coombs v. Jordan*, 22 D. 236.

B, under the direction of A, purchased for him a tract of land, taking the title thereto in A's name, and permitted A's son to occupy it, he having paid a part of the purchase price. Held that the title both legal and equitable, was vested in A, and that the land was not liable for the son's debts, it appearing that the purchase was

made on A's account alone. *Brown v. Benight*, 23 D. 373.

Only a possessor in good faith, believing himself to be the owner of land, can recover of the true owner for amelioration inseparable in their nature from the soil. *Gibson v. Hutchins*, 68 D. 772.

The doctrine of relation has never been extended by courts further than to hold that a legal title when acquired shall relate back to the period when the right accrued to the property, so as to defeat subsequent claimants or incumbrancers holding adversely to the right. *Laurissini v. Corquette*, 57 D. 200.

A mere possessor of land is presumed to have made any changes in its condition for his own amelioration, and to have received a sufficient reward in the immediate benefit which he reaps from the enhanced production of the soil. *Gibson v. Hutchins*, 68 D. 772.

One who has the mere possession of land has the right to grass growing thereon as against a stranger, although such stranger severs the grass from the soil. *Morse v. Iman*, 89 D. 417.

8. *Possession as notice of title or claim.*—The possession of real estate gives constructive notice of the title under which the occupant claims. *Johnston v. Glancy*, 28 D. 45; but such possession must be notorious and exclusive. *Boyce v. Mculloch*, 30 D. 35.

4. *Effect of law of place upon title.*—Land is held and alienated according to the law of the place where it is situated. *Sneed v. Thwing*, 22 D. 41; *Baxter v. Willey*, 31 D. 623.

The law of the state in which real estate is situated must decide all questions concerning the title thereto, either legal or equitable. *Depas v. Mayo*, 49 D. 88.

5. — or upon transfers of title. — The right to control the disposal of property is fundamental, but must be so regulated as not to conflict with high public interests. *Dobson v. Ball*, 100 D. 586.

6. *Legal and equitable titles.*—The complete legal title is the right and the possession united. *Kishugh v. Croghan*, 19 D. 139.

7. *Evidence to prove title.*—Possession is *prima facie* evidence of legal title. *Jackson v. Town*, 15 D. 405; and no further or higher evidence of title is required to enable a plaintiff to recover in ejectment, until the defendant shows an anterior possession, or traces title from a paramount source. *Keane v. Cannovan*, 82 D. 738; and a purchaser under a judgment against such possessor can recover against any one who can not show a better right or prior possession. *Tuttle v. Jackson*, 21 D. 306.

* Possession as evidence of title, see note 60 D. 601-604.

For Index to Notes in American Decisions and American Reports, see Volume I.

A party in possession having two titles, one valid and the other invalid, will be presumed to have entered under the valid title. *Tuttle v. Jackson*, 21 D. 306.

Prior possession is evidence of title, and this evidence may be destroyed by abandonment. *Bird v. Liebras*, 70 D. 617.

8. **Duty of owner in use of land.***—The absolute dominion of a proprietor over his land to center of earth is restrained by the maxim, *Sic utere tuo ut alienum non laedas*. *Haldeman v. Bruckhart*, 84 D. 511; but it is only when one deviates, either by intention or neglect, from the ordinary use of his property, that he is liable for an injury done thereby to another. *Durham v. Musseman*, 18 D. 133; *Schwartz v. Gilmore*, 92 D. 227. This doctrine is applied to the use of streets by cities, and highways by the state and counties, through their officers, and is to some extent applicable to private corporations. *Wabash and E. Canal v. Spears*, 79 D. 444.

Where an act is unlawful, the actor is liable for an injury done, without reference to the probability that it would occasion that particular injury. *Durham v. Musseman*, 18 D. 133.

Where an act is unlawful, the liability of the actor for an injury occasioned by it depends upon the question whether the injury was the natural or probable consequence of the act, or was merely accidental. *Id.*

A land-owner who, in excavating his land for a contemplated improvement, has cast dirt, stones, and rubbish upon adjoining land, to the injury thereof, cannot defend an action for compensatory damages by evidence that the work was done with care and skill; he is liable for the actual injury, irrespective of negligence. *Tranaka v. Cohoes Co.*, 51 D. 284.

The right of a land-owner to make excavations in his land (such as are involved in making a canal) is subject to the limitation that he must not cast the soil, stones, etc., upon neighboring land, to the annoyance or inconvenience of its owners. *Hay v. Cohoes Co.*, 51 D. 279.

The rightful use of one's land may cause damage to another without any legal wrong. *Haldeman v. Bruckhart*, 84 D. 511.

An act done, causing damage which the law will redress, must not only be hurtful, but wrongful. There must be *damnum et injuria*, an act, not merely hurtful but an infringement of another's right. *Id.*

The owner of property is not an insurer to

* Liability for damage done to others from acts committed on one's own land, see notes, 51 D. 283-284; 17 R. 263, 264.

Liability for injuries suffered by persons on one's premises by his invitation, see note, 26 R. 662-667.

Owner not liable for consequential injuries arising from authorized acts done on his own land, see note, 53 D. 366-370.

all the world against injury from its use or condition; he is liable only for injury arising from a failure to exercise the same intelligence, prudence, and care in regard to his property for the security of others that prudent men would exercise toward their own. *Schwartz v. Gilmore*, 92 D. 227.

The owner of a steam boiler who operates and uses the same upon his own premises, in such a manner that it is not a nuisance, is not liable for damages done to an adjoining owner by its explosion, without proof of fault or negligence on his part. *Loose v. Buchanan*, 10 R. 623; *Marshall v. Welwood*, 20 R. 394.

A person who uses his property in such a manner as necessarily tends to injure the property of another is liable to that other for an injury which may result from such use, without regard to consideration of care and skill therein. *Cahill v. Eastman*, 10 R. 184.

The erection by defendant upon his own land of a high board fence within two feet of plaintiff's dwelling, whereby light and air was shut off from the windows and doors of such dwelling, and the rooms therein rendered dark, unwholesome and unfit for habitation—plaintiff showing no prescriptive right to light and air—held, not actionable. *Guest v. Reynolds*, 18 R. 570.

Where the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining land-owner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked. *City of Tiffin v. McCormack*, 32 R. 408.

9. **Duty as towards trespassers.***—The owner of property is not liable to a trespasser, or to one who is on it by mere permission or sufferance, for the negligence of himself or servants, or for that which would be a nuisance if it were in a public street or common where all had a legal right to be. *Gillis v. Pennsylvania R. R. Co.*, 98 D. 317; such as obstructions or pitfalls. *Sweeney v. Old Colony etc. R. R. Co.*, 87 D. 644; but if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby. *Id.*

The owner of a house must have an approach to it strong enough to support all persons visiting it on business or otherwise; but if a crowd gather upon it to witness a passing parade, and it breaks down, even though it be shown not to have been strong enough for ordinary purposes, the owner is not liable to one of the crowd, as he owes

* Liability of land owner for dangerous traps set on his premises, see note, 83 D. 166, 167.

Liability for injuries to trespassers, see note, 40 R. 667-670.

For Index to Notes in American Decisions and American Reports, see Volume I.

him no duty. So if a railroad bridge which ought to be strong enough to support an engine and train of cars breaks under a footman, the company are not liable to him, as they are under no obligations to him. *Gillis v. Pennsylvania R. R. Co.*, 96 D. 317.

Spring-guns and other deadly engines may in England, after proper notice, be set upon the owner's inclosure without subjecting him to liability for injury occasioned thereby in his absence. *Johnson v. Patterson*, 35 D. 96.

Defendant set a spring-gun in his vineyard to protect his fruit from trespassers who were in the habit of invading it. Plaintiff, having no knowledge of the gun, entered the vineyard for the purpose of stealing fruit, and was injured by a discharge of the gun. *Held*, that he was entitled to recover damages for the injuries sustained thereby. *Hooker v. Miller*, 18 R. 18.

To an action for damages for killing the plaintiff's intestate, the defendant pleaded that the deceased in the night time came on defendant's premises with intent to steal his chickens, and while the deceased was so engaged, and before he had completed the offense, the defendant, to prevent the offense and protect his property, killed him; *held*, 1. That the killing was not justifiable, there being no averment of any attempt to arrest, or that the property could not have been otherwise protected; 2. That the conduct of the deceased did not constitute such contributory wrong as to defeat a recovery. *Marks v. Borem*, 25 R. 764.

Scattering poison within one's inclosure for the purpose of poisoning the fowls of another if they should come there, is not justifiable, though notice thereof be given to their owner, and he may recover for the killing of his fowls resulting therefrom. *Johnson v. Patterson*, 35 D. 96.

A trespasser on the land of another may maintain an action for wanton or intentional injury inflicted on him by the owner. *Gillis v. Pennsylvania R. R. Co.*, 96 D. 317.

10. Right to defend possession by force. — A person having the legal title to land, and being in the actual possession thereof, has a right to repel by force any attempt to molest him in the enjoyment thereof, or in the free use of anything appertaining thereto. *Tribble v. Frame*, 23 D. 439.

A trespassing man or beast may be expelled or removed by force; but may not be destroyed or subjected to permanent injury or unnecessary force. *Johnson v. Patterson*, 35 D. 96.

It is not trespass, and the party cannot be indicted for removing a fence, "unlawfully and without license," put upon his land by another, under a statute making it a misdemeanor "if any person shall unlawfully

and willfully burn, destroy, pull down, injure or remove any fence, wall, or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field, or pasture." *State v. Headrick*, 67 D. 249.

11. Liability for negligence. — The owner of property upon which a building is being erected is not generally liable for injury resulting from the negligence of the contractor or his servants, where entire possession has been surrendered to the latter, and he proceeds with his work according to his own judgment, and is not subject to the control or interference of the owner. But if the injury was caused or contributed to by the fact that the plans for the building were essentially defective, the owner as well as the contractor would be liable. *Schwartz v. Gilmore*, 92 D. 227.

The owner of property has not so far given its control to a contractor for building as to be relieved from liability for the contractor's negligence, where by the terms of the contract the builder is to carry forward the work under the control of a superintendent, and "to remove all improper work or materials upon being directed to do so by the superintendent," to whose judgment, both as to work and materials, he agrees to submit, and whose acts the owner agrees to recognize, and the owner also reserves the right to change his plan, and the architect is declared to be the superintendent for the owner. *Id.*

The owner of a building will not be held liable for damages caused by falling of the walls of his building, though it appears that he was informed on Sunday, the day previous to the injury, that the walls were settling and leaning, and had said that he would attend to the matter, but really did not do so on that day, unless it also appears that the danger was so obvious that a reasonable and prudent man, the safety of whose person and property depended upon the walls, would have taken immediate measures on that day to have secured them. *Id.*

The owner of a city lot let parts of the work of constructing a building to different persons; to one the excavation; to another the stone work; to another the superstructure; while himself delivered stone, lime and sand. *Held*, that the owner, and not the contractors, was responsible for an injury to a traveler caused by the excavation being insufficiently guarded. *Homan v. Stanley*, 5 R. 389.

Defendant, being the owner of land on which was a kiln for drying lumber, leased the same, knowing that the kiln would be used by the lessee for drying lumber, and knowing, or having reason to know, that

* Liability of owner to person injured by dangerous condition of premises, see notes, 26 R. 32-34; 31 R. 206-213; 34 R. 223-236.

Liability of property owner for neglect to repair streets, see notes, 68 D. 356-357.

For Index to Notes in American Decisions and American Reports, see Volume I.

such use would be dangerous to plaintiff's adjoining property. *Held*, that defendant was liable to plaintiff for injuries occasioned to his adjoining property by the kiln. *Hehnig v. Jordan*, 21 R. 189.

The owner of a house which had been burned suffered the walls to stand in an unsafe and tottering condition for three weeks, meantime removing the rubbish. He then contracted for the rebuilding of the house. About seven or eight weeks after the fire, and while the premises were in the charge and possession of the contractor, one of the walls fell on the buildings of an adjoining owner. *Held*, that the owner of the ruinous premises was liable for the damage. *See-seyut v. Poey*, 33 R. 98.

12. — for fires which spread upon another's land. — The owner of land firing a prairie thereon must use reasonable precautions to prevent injury to others, though he is authorized by statute to set such fire, and is liable for a failure to do so, although he may be guilty of no subsequent negligence. *Johnson v. Barber*, 50 D. 416.

If a defendant uses due diligence in firing his land, and notwithstanding, on account of inevitable accident, the fire escapes and burns the plaintiff's rails, the defendant is not liable. *Miller v. Martin*, 57 D. 242.

A man who negligently sets fire on his own land, and keeps it negligently, is liable for injuries done by its direct communication to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner and direction in which it was actually communicated. *Higgins v. Dewey*, 9 R. 63; *Webb v. Rome etc. R. R. Co.*, 10 R. 389.

The statute 6 Anne, chap. 3, § 6, providing that "no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin," is part of the common law of this country; otherwise of the statute 14 Geo. III., chap. 78, § 86, which exempts from liability persons "in whose house, chamber, stable, barn or other building, or on whose estate any fire shall accidentally begin." *Spaulding v. Chicago etc. R'y Co.*, 11 R. 550.

13. Liability for flowage of adjoining lands. — 1. *In general*. — In an action for the overflowing of the plaintiff's land, he need not prove his title, though it be set forth in the declaration, for possession alone is sufficient to support this action against a wrong-doer. *Yeagrain v. Johnston*, 1 D. 581.

The proprietor of land fronting on a bayou cannot maintain an artificial drainage, throwing the water upon the rear plantation, when the natural drainage is lateral, in con-

* Overflow from rivers and other waters, right of land-owner to protect himself against, see note. 97 D. 565-569.

Reservoir, liability for breakage of, see note, 28 R. 101-108.

sequence of being intercepted by a ridge. *Kilgore v. Grevenberg*, 63 D. 597.

The owner of land wrongfully overflowed cannot erect obstructions to such overflow so as to cast it upon the land of innocent third persons. *Amick v. Tharp*, 67 D. 787.

Defendant excavated a tunnel in his own land, extending under the bed of a stream. The pressure of the water having broken in the roof of the tunnel, the water rushed in and through the tunnel and undermined plaintiff's land. *Held*, that defendant was liable for the damage without proof of negligence or want of skill on his part. *Cahill v. Eastman*, 10 R. 184.

So where defendant accumulated water in a reservoir, which by percolation escaped upon the plaintiff's land and injured it, — *held*, that defendant was liable even though plaintiff sold the land to defendant for the purpose of constructing the reservoir. *Wilson v. City of New Bedford*, 11 R. 352.

Defendant employed a contractor to build a drain from the cellar of its building to the common sewer. It was necessary to cut through a plank barrier which had been constructed beneath the surface of the street to prevent the tide from flowing into the cellars in that locality. The contractor so negligently performed this part of his work that the tide water flowed through the opening made by him into the cellar of a building owned by plaintiff, adjoining that of defendant. *Held*, that defendant was liable for the injury done by the tide water to plaintiff's premises. *Sturges v. Theological etc. Soc.* 39 R. 463.

2. *Surface water, rights and liabilities of upper owner*. — The right to have water flow off land through a natural drain belongs to the owner of the land, without the acquisition of the easement by prescription, and he may lawfully remove an embankment erected by another, which obstructs or cuts off such flow. *Overton v. Sawyer*, 62 D. 170.

No right to regulate or control surface drainage of water can be asserted by the owner of one lot over that of his neighbor, where there is no watercourse by grant or prescription, and no stipulation exists between such co-terminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved. *Gannon v. Hargaden*, 87 D. 625.

The owner of land may lawfully occupy and improve it in such a manner as to prevent surface water which accumulates elsewhere from coming upon it, or he may alter the course of surface water which has accumulated thereon or come upon it from elsewhere, although the water is thereby made to flow upon the adjoining land of another, and to stand there in unusual quantities, or to pass into and over the same in greater quantities or in other direc-

REAL PROPERTY.

For Index to Notes in American Decisions and American Reports, see Volume I.

tions than it was accustomed to flow, thereby occasioning loss to the co-terminous owner. *Id.*

The right of a party to the free and unfettered control of his own land above, upon, and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. If such an act causes damages to adjacent land, it is *damnum absque injuria*. *Id.*

The owner of land adjoining a highway may erect upon his land a dam or obstruction to prevent water flowing through a culvert which the public had built for the purpose of draining off the surface water upon the road. Provided he does not exceed the limits of his own land, he may do anything to prevent the surface water upon the highway from being drained upon his premises. *Franklin v. Fisk*, 90 D. 194.

Defendant dug ditches in its own land to drain the surface water therefrom into a stream which was its natural outlet, thereby sometimes increasing and at other times decreasing the quantity of water in the stream, to the injury of plaintiff, who was an inferior proprietor. *Held*, that plaintiff had no cause of action. *Waggle v. New York Cent. R. R. Co.*, 13 R. 467.

One has no right to concentrate the surface-water on his land and discharge it on his neighbor's, although it would naturally flow in that direction. *McCormick v. Kansas City etc. R. R. Co.*, 35 R. 431.

The parties owned adjacent lots on a street. Surface-water naturally and usually accumulated in the street in front of the plaintiff's lot, and sometimes ran off through a natural depression over defendant's lot and other low land to a river. Defendant built a house on his lot, filling in the lot and grading it up to the level of the sidewalk on the street, thereby cutting off the flow of the surface-water and causing it sometimes to flow on plaintiff's lot and flood his cellar. *Held*, that no action would lie therefor. *Barkley v. Wilcox*, 40 R. 519.

The owner of lands may drain them by ditches, although he thereby precipitates the water more rapidly and in greater volume upon the land of an adjoining owner, provided he acts with a prudent regard for his welfare; but he may not turn water upon such adjoining lands which would not otherwise have flowed there. *Hughes v. Anderson*, 44 R. 147.

The owner of upper land, on which there is a pond fed only by surface water, when good husbandry requires it, may drain the same by an artificial drain into its accustomed outlet or natural drain, notwithstanding the flow over the land of a lower

proprietor may thereby be increased. *Pack v. Herrington*, 50 R. 627.

3. *Rights and liabilities of lower owner.*—The owner of a lot upon which a city has diverted a drain, obstructing it so as to throw the water back upon a lot above him, is liable therefor, whether the act of the city was lawful or not. Nor is it material that the plaintiff was street commissioner and superintended the work at the time of the original diversion, where neither party owned his lot at that time. *Awick v. Tharp*, 67 D. 787.

The diversion of surface water from the land of another, by excavations on one's own land; and the backing of water, by means of dams, etc., upon the lands of another, were injuries for which an action lay at common law. *Wabash Canal v. Spears*, 79 D. 444.

A land-owner may, in the reasonable use of his own land, lawfully prevent the flow of surface water on to his premises from the adjacent higher land of another, although such adjacent land is thereby injured; and the fact that such water had been wont to flow upon the inferior land for over twenty years will not amount to a prescription. *Swett v. Cutts*, 9 R. 276.

The erection of an embankment on one's own land, whereby the surface water accumulating on the land of another is prevented from flowing off in its natural courses, and caused to flow in a different direction over his land, is an act for which an action may be maintained by the latter, without showing any actual injury or damage. *Tootle v. Clifton*, 10 R. 732.

Defendant, owning lands adjoining and below unoccupied public lands of the United States, built an embankment along his lands to obstruct the flow of the surface-water from the adjoining lands. Plaintiff afterward purchased said public lands, and brought this action to recover for damages done to his land and crops by means of said embankment. *Held*, 1. That plaintiff had a natural easement to have the surface-water from his lands flow off upon the lands below, and that defendant was liable for injuries occasioned by obstructing such flow; 2. That defendant could gain no prescriptive right against the United States, and that, therefore, the plaintiff was not prejudiced by the fact that the embankment was built before he purchased the land. *Ogburn v. Connor*, 13 R. 213.

The owner of a lower tract of land has no right to throw back surface-water naturally flowing across his land from an upper tract, to the damage of the latter, and a court of equity may enjoin such conduct. *Niminger v. Norwood*, 47 R. 412.

A land-owner may protect his land by an embankment against surface-water flowing through a ravine which ordinarily is dry. *Lessard v. Stram*, 51 R. 715.

For Index to Notes in American Decisions and American Reports, see Volume I.

A farm owner may not erect such barriers as will flood his neighbor's land with surface-water that would otherwise escape over his own, in order to reclaim the bed of a pond that has always existed on his own land, and get rid of the inflow. *Boyd v. Conklin*, 52 R. 831.

4. *Rainwater*. — The owner of a city lot must provide for carrying off the water that falls or accumulates upon it, so as not to allow it to run upon the lot of his neighbor. *Bent v. Armstrong*, 42 D. 265.

The owner of land may, at his pleasure, withhold the water falling on his property from passing in its natural course on to that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming on his own. *Bowlsby v. Spear*, 86 D. 216.

Where the rainwater which fell upon the lands of defendant, and into and upon a certain pond above his place, fed exclusively by rainwater, was accustomed to flow through a kind of channel over defendants' land, and away from plaintiff's, and defendant erects a stable over this channel, by which a part of this flow of surface water was diverted upon the lands of plaintiff, the injury is not actionable; it is *damnum absque injuria*. *Id.*

One has no right by grading the surface of his land, to turn surface water falling upon or running over it upon the adjoining land of another; and it makes no difference that in doing this he has no intention to injure the adjoining owner. *Adams v. Walker*, 91 D. 742.

The owner of a city lot may turn the rain from it to the adjacent street, although it may injure a neighboring lot below grade. *Phillips v. Waterhouse*, 58 R. 220.

14. *Right to lateral support*. — There is incident to land, in its natural condition, a right to support from adjoining land; and if the land sinks or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. *McGuire v. Grant*, 67 D. 49; *Beard v. Murphy*, 86 D. 693; *Lasala v. Holbrook*, 25 D. 524. But this rule does not extend to cases where the owner of the land has, by buildings, or other artificial erections, increased the lateral pressure of his land upon the adjoining soil. *Moody v. McClelland*, 84 D. 770; *Lasala v. Holbrook*, 25 D. 524.

A land-owner cannot, by altering the natural condition of his land, deprive the adjoining proprietor of the privilege of using his land as he might have done before; therefore, the owner cannot, by building near the margin of his land, prevent his neighbor from excavating his own soil, although it may endanger the building. *Moody v. McClelland*, 84 D. 770.

A wall built to the dividing line of ad-

acent lots must be built of such materials and in such manner that the owner of the adjacent lot may excavate with safety the contiguous earth, and dig below it if it becomes necessary to do so, when he desires to build; and if any damage occurs to the wall from such excavations, which are made with reasonable care and diligence, they must be borne by the owner of the wall. *Richard v. Scott*, 32 D. 779.

One who erects a building on his own lot, adjoining the house of another, may lawfully dig a foundation below that of his neighbor, and is not liable for any consequential damage, provided he has used due care and diligence to prevent injury to the adjoining house. *Panton v. Holland*, 8 D. 369.

The owner of a lot, in digging upon his own ground, and for his own lawful purposes, is bound to proceed with a reasonable care and regard for the safety of a neighboring house; and in an action on the case for damages occasioned by a breach of such duty, it is sufficient to allege that the defendant proceeded so carelessly and negligently as to cause the damage complained of. *Shrieve v. Stokes*, 48 D. 401.

A count which alleges that the defendant "dug the earth from under the plaintiff's house, and from his lot, so carelessly and negligently as to cause the house to fall," states an action of case and not of trespass. In such an action, evidence of the probable cost of rebuilding a wall may be considered in estimating the damages sustained by the plaintiff from the falling of the old wall. *Id.*

Evidence as to what was usually done by builders in digging under similar circumstances, is admissible as bearing upon the question of reasonable care. *Id.*

The owner of a lot is not responsible for damages sustained by an adjoining owner by reason of his digging a cellar thereon, unless he knew, or had good reason to believe, that the removal of the earth would occasion the loss before the necessary support could be supplied, or unless the loss could be fairly attributed to his want of ordinary skill or care. *Id.*

The owner of land cannot claim the support of adjoining soil for any artificial structure he may erect upon his land, and which increases the lateral pressure. *Beard v. Murphy*, 86 D. 693; *Tunstall v. Christian*, 56 R. 581.

The owner of a building erected on the line of his lot, cannot by lapse of time acquire a prescriptive right to the lateral support of the adjacent soil. *Mitchell v. Mayor*, 15 R. 669. Particularly as against the municipal corporation. *City of Quincy v. Jones*, 20 R. 243.

A prescriptive right cannot be acquired from a user to which the owner of the property over which the right is claimed could

For index to Notes in American Decisions and American Reports, see Volume I.

not have objected. *Richard v. Scott*, 32 D. 779.

15. — and what is an invasion of the right. — 1. *In general*. — The owner of land making excavations thereon is liable for damage thereby caused to the property of an adjacent owner, if such damage might have been avoided by the exercise of reasonable care in making the excavations. *Charles v. Rankin*, 66 D. 642.

The owner of land making an excavation so near to adjoining land of another as to cause the soil of the latter to break away is responsible for all injury thereby occasioned to the land, and also for the disturbance of a right of way over the land, without proof of carelessness, negligence, or want of skill in making the excavation; but not for injury to buildings which have been placed upon the land. *Foley v. Wyeth*, 79 D. 771.

In an action for injury to plaintiff's land from an excavation by defendant on his adjoining land, whereby plaintiff's soil has broken away and fallen, the fact that the injury would not have occurred but for the acts of persons other than the plaintiff, in erecting buildings upon their own land, is no defense. *Id.*

One who digs a pit on land, so that by the operation of natural and ordinary causes, which he takes no precaution to guard against, the land of another falls into the pit, is liable to an action by the latter for the injury to his land in its natural condition, but not for injuries to buildings or improvements thereon, such as fences and shrubbery, without proof of actual negligence; the measure of damages is the actual loss of, or injury to the soil; and it is immaterial that the defendant is not the owner of the land dug upon, but removes the soil therefrom for his own benefit by permission of the owner thereof. *Gilmore v. Dricoll*, 23 R. 312.

The owner of land is not liable for injuries caused to an adjacent lot, by excavations made for building purposes on his own land by a contractor to whom he had let the job. *Meyer v. Hobbs*, 29 R. 719.

2. *As to buildings*. — Where one built a house on his own land, within two feet of the boundary line, and ten years after the owner of the land adjoining, dug so deep into his own land as to endanger the house, and the owner of the house on that account, left it and took it down, — held that the latter could not recover for injuries done to the building, but was entitled to damages arising from the fall of the soil into the pit so dug. *Thurston v. Hancock*, 7 D. 57.

One who is about to endanger his neighbor's building, by making excavations on his land, is bound to give the owner of the adjacent soil proper notice of the intended improvement, and to use ordinary skill in conducting the same; and it is the duty of

the latter to prop up his own building so as to render it secure in the meantime. *La-sala v. Holbrook*, 25 D. 524.

Certain buildings are entitled to full protection against the consequences of any new excavation; these are ancient buildings, or those erected upon ancient foundations, by reason of prescription, and those which were granted by the owners of the adjacent lot, or by those under whom they claim. *Id.*

The owner of land making excavations thereon, by which an adjacent owner's building is injured, is not protected by the fact that he used such care as his builder, who was a skillful and careful person, deemed necessary. The question as to his liability for such injury depends upon whether or not he was negligent in the performance of the work. *Charles v. Rankin*, 66 D. 642.

A person excavating on his own land, by the side of another's building, is not bound to use such care and caution to prevent injury to such building as a sensible and prudent man, experienced in such work, would exercise if he were the owner of the building. He is bound to use ordinary care to avoid doing harm to his neighbor's building; but the law does not exact from him the same care and expense for the security of his neighbor's property that he may have found it for his interest to have taken for his own. *Id.*

The owner cannot recover for an injury done to a building standing on the boundary line of a lot, which tumbles down by reason of excavations made upon an adjoining lot, where there has been no improper motive or carelessness in the execution of the work. The loss is *damnum absque injuria*. *McGuire v. Grant*, 67 D. 49.

A defendant is personally responsible for his injurious act in removing the natural support of land not subjected to artificial pressure, or not having buildings thereon, if such act were done by himself, or by his direction, or by persons in his employ. *Id.*

16. *Ice, and right of property therein*. — Under a statute making it an indictable offense to remove, without license, from the land of another, "any tree, stone, timber, or other valuable article," ice formed in a stream not navigable is a part of the realty, and a "valuable article." *State v. Pottmeyer*, 5 R. 224.

Ice formed on a pond belongs to the owner of the fee and not to the owner of a mere easement to flow. *Brookville etc. Hydraulic Co. v. Butler*, 46 R. 580.

17. *Accretion*. — Sea-weed which has been thrown upon land by the sea is considered an accretion, and belongs to the owner of the soil. *Emans v. Turnbull*, 3 D. 427.

An act of Congress, laying out the city of Burlington, provided that a strip of land

For Index to Notes in American Decisions and American Reports, see Volume I.

along the river should be reserved for public use. *Held*, that the natural accretions from the river partook of the same character as the original strip. *Cook v. Burlington*, 6 R. 549.

18. **Accession.**—Improvements placed by a stranger upon the land of another, become the latter's property. *Crest v. Jack* 27 D. 353.

If one build a house with his materials upon the land of another, or if he build a house upon his land with the materials of another, the property in the land vests the property in the building by right of accession, and the owner of the land can only be obliged to answer to the owner of the materials for the value of them. *Reese v. Jared*, 77 D. 85.

One who cuts and stacks hay on another's uninclosed land, without permission, cannot maintain an action for its destruction. *Murphy v. S. C. and Pac. R. Co.*, 39 R. 175.

19. **Conflicting rights of adjoining owners.**—1. *Generally.**—A person is entitled to recover damages for any encroachment by another on his legal rights, to the extent of the injury thereby sustained. *Hutchinson v. Schimmelfeder*, 80 D. 582.

A person owning a lot lying below the grade of a street on which it fronts, in grading up to street, must confine the earth within his own line; and if a person owning an adjoining lot has built a wall and erected a house thereon within his own line, the former can neither build to the wall nor throw earth against it; and if he does so, he is responsible in damages. *Id.*

The owner of land may maintain an action against an adjoining owner for erecting a bay-window so as to extend over his, plaintiff's land, although that portion of the land which is covered by the bay-window has been laid out and is used as a highway; and evidence of a custom to so erect a bay-window is inadmissible. *Codman v. Evans*, 81 D. 748.

Each of two persons will be regarded as in exclusive possession of several portions of land, so that neither will have the right to license a stranger to enter on the portion of the other, where such persons inclose a tract of land which does not belong to them, for the purpose of using the grass thereon, and agree with each other that each shall use a certain portion, there being no division fence, and each using his respective portion accordingly. *Morse v. Iman*, 89 D. 417.

Where one person owns the lower story of a building, and another the upper story, with right of way thereto, the latter cannot

* Right to erect buildings over ways, see note, 59 R. 64, 65.

Draining neighbor's land, when not liable for, see note, 9 R. 284, 285.

Cutting embankment, whereby water is turned on land of another, see note, 47 R. 296-298.

recover of the former for necessary repairs of the roof, made by him. *Ottumwa Lodge v. Lewis*, 11 R. 135.

The owner of one part of a building has no action against the owner of the other part for willfully permitting his part to get out of repair, whereby the plaintiff's part is injured. *Pierce v. Dyer*, 12 R. 716.

The owner of one part of a building has no action to recover damages at law for the willful neglect of the owner of the other part in permitting his part to become ruinous and fall into decay, whereby the plaintiff's part is injured. *Id.*

2. *As to growing trees.**—A tree growing near the division line so that its roots extend on each side is wholly the property of him on whose property the trunk stands, *semble*. *Dubois v. Beaver*, 82 D. 326.

Trespass for the destruction of a line-tree lies by the proprietor of the land against an adjoining proprietor, whether the plaintiff's interest be several or as a tenant in common. *Id.*

A tree, the trunk of which is divided by a boundary line, belongs to the adjoining proprietors as tenants in common. *Dubois v. Beaver*, 82 D. 326; but this principle does not apply to a tree standing exclusively on the land of one of the parties, its roots extending into the land of both. Such tree belongs solely to the party out of whose land it grows. *Skinner v. Wilder*, 88 D. 645.

A tree and its produce are the sole property of him on whose land it is situated, and its location and property should be determined by the position of the trunk or body thereof above the soil, rather than by the roots within or branches above it. *Id.*

The owner of land overhanging by the branches of a fruit tree, standing wholly on the land of an adjoining owner, is not entitled to any of the fruit growing thereon. *Hoffman v. Armstrong*, 8 R. 537. Defendant is liable either in trespass or in trover for picking, carrying away, and converting to his own use the fruit. *Skinner v. Wilder*, 88 D. 645.

20. **Abandonment of property.**—The question of abandonment of property is one of intention of which the jury is to judge exclusively, and in order to do so they must take into consideration all the facts and circumstances before them. *Keane v. Cannovan*, 82 D. 738; *Mallett v. Uncle Sam etc. Mining Co.*, 90 D. 484; *Moon v. Rollins*, 95 D. 181.

Abandonment of land does not occur if the person in possession leaves it with the intention of returning. An abandonment takes place only when one in possession leaves with the intention of not again resuming possession. *Moon v. Rollins*, 95 D. 181.

* Line-trees growing across or adjacent thereto, see note, 83 D. 330, 331.

For Index to Notes in American Decisions and American Reports, see Volume I.

Lapse of time is a circumstance, when connected with others, to prove intention to abandon, although bare lapse of time, short of the statute of limitations, and unaccompanied by other circumstances, will, at law, be no evidence of abandonment. *Mallett v. Uncle Sam etc. Mining Co.*, 90 D. 484; *Moon v. Rollins*, 95 D. 181.

Abandonment may be inferred in some cases from a lapse of time, and the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises; but in such cases the leaving of the premises must have been voluntary, and without any expressed intention to resume the possession. *Keane v. Cannonan*, 82 D. 738.

Where a person, when he ceases to occupy premises in person, leaves an agent in charge of them, this fact is in itself sufficient to rebut the presumption of abandonment arising from the fact that he ceased to occupy them, and to render the question whether, in fact, he did or did not abandon them, one for the consideration of the jury. *Id.*

After a title by prior possession is once shown, there is no presumption of its loss; but an abandonment must be made to appear affirmatively by the party relying on it to defeat a recovery. *Moon v. Rollins*, 95 D. 181.

RE-ARGUMENT.

On appeal, see APPEAL, 121.

RE-ARREST.

After escape from arrest on ca. *ex.*, see EXECUTION, 170.

REASONABLE DOUBT.

Doctrine of, as applied to evidence, see EVIDENCE, 6.

Doctrine of, in criminal cases, see TRIAL, 197.

Evidence of insanity to raise, see INSANE PERSONS, 33, 34.

REBUTTAL.

Of the influence of malice, see LIBEL, 20.

Of the presumption of payment, see PAYMENT, 14.

Evidence in, see TRIAL, 48.

RE-CALLING.

Witness — re-examining, see WITNESS, 111.

Sentence — new sentence, see TRIAL, 218.

RECEIPTORS.

Of attached property, see ATTACHMENT, 74-79.

Rights and liabilities of, see EXECUTION, 61-64.

RECEIPTS.

Effect of, as evidence, see EVIDENCE, 244.

Limitation of carrier's liability in, see CARRIERS, 93.

Of warehousemen, see WAREHOUSEMEN, 2, 3.

Parol evidence to explain, see EVIDENCE, 122.

What lapse of time bars action on, see LIMITATIONS OF ACTIONS, 40.

1. Validity and effect, generally. — A receipt executed with a knowledge of all the circumstances, and without mistake or surprise on one part, or fraud or imposition on the other, is a good defense to a claim. *Fuller v. Crittenden*, 23 D. 364.

The court cannot say that an instrument purporting to be a receipt may not carry marks upon its face conclusive to show that it is not a genuine receipt. *Aday v. Echols*, 52 D. 225.

A receipt is not contract, as a general rule. *Pribble v. Kent*, 71 D. 327.

A receipt may be so drawn as to constitute a contract. *Id.*

2. — as evidence. — The validity of a receipt which has been introduced in evidence, but not acted upon as such, may be questioned at a subsequent period by the master to whom it has been referred to determine compensation, where its only use is to swell said compensation, for reasons appearing upon its face. *Aday v. Echols*, 52 D. 225.

3. How far subject to explanation by extrinsic proof. — To destroy the effect of a receipt, such circumstances may be shown at law as would lead a court of equity to set aside a contract, such as fraud, mistake, or surprise. *Fuller v. Crittenden*, 23 D. 364.

4. Receipts in full, and their effect. — Where a receipt in full for a claim was given by the agent, who was fully authorized, the principal is not precluded from giving evidence to show that the receipt was obtained by fraud, misrepresentation and imposition on the part of the debtor. *Trisler v. Williamson*, 1 D. 396.

A receipt in full of all demands is *prima facie* evidence of a settlement between the parties, and of the payment of the balance; and it is not merely evidence of the sum specified in it. *Reid v. Reid*, 18 D. 570.

A receipt expressed to be in full of all demands may be pleaded in bar, though it is not sealed. *Tucker v. Baldwin*, 33 D. 384.

A written receipt expressed to be in full of all demands may at law be shown not to have been intended to release the particular demand sued upon. *Id.*

A receipt given by a constable to a defendant in an execution, for money purporting to have been received by him in full of the judgment in his hands, is not conclusive against him in an action on his bond, but he may show that he did not in fact receive the money, and that he was unable to make it

* Receipt in full for less than amount due whether binding, see note, 28 R. 293, 294.

For Index to Notes in American Decisions and American Reports, see Volume I.

by reason of the debtor's insolvency. *State v. Barnett*, 62 D. 188.

A receipt for a sum designated as in satisfaction of a certain judgment, and containing the following clause: "And said sum is in full satisfaction of all claims and demands I have or hold against said B. and W., or either of them, up to this date,"—will be confined in its effect to the judgment therein named, and not permitted to release another action then pending between the same parties. *Grumley v. Webb*, 100 D. 304.

Under a contract for the delivery of hides, plaintiff was to receive a *bonus* on each hide delivered. At each delivery defendant paid the value of the hides, and received a receipt from plaintiff expressed to be *in full*. The *bonus* was not paid. *Held*, that plaintiff could recover the *bonus*, notwithstanding the receipt. *Ryan v. Ward*, 8 R. 539.

RECEIVERS.

[Includes the appointment, powers, and duties of persons appointed by courts, to take charge of, manage, and sell, or otherwise dispose of, property involved in litigation.]

Attachment of property in hands of, see ATTACHMENT, 33.

In supplementary proceedings, see EXECUTION, 197.

Of insolvent bank, see BANKS AND BANKING, 56.

Of insolvent corporation, see CORPORATIONS, VII.

On dissolution of railroad company, see RAILROAD COMPANIES, 13.

When appointed in suits between partners, see PARTNERSHIP, 63.

1. Power of the court to appoint receivers. — Tenants who have attorned to a receiver will not be permitted to question the right of the court to appoint him, nor to disturb his possession. *Albany City Bank v. Schermerhorn*, 38 D. 551.

2. Its control over them. — Where a receiver is appointed in equity, and sells the property of the defendant, who, before the final decree, and while the fund is still in the receiver's hands, becomes an insolvent petitioner, and has the receiver appointed his permanent trustee, the court of equity in which the fund is found at the moment of insolvency is not debarred from taking all steps necessary to its preservation. *Henry v. Kaufman*, 87 D. 591.

A receiver cannot, by becoming a trustee of an insolvent, defy the authority of the court from which he received his appointment, and refuse to account for the funds committed to him as receiver. *Ib.*

The order of court requiring a receiver to bring the fund in his hands into the court from which he received his appointment as receiver does not conflict with the power of the insolvent court in appointing him the permanent trustee of the party whose prop-

erty he had sold as receiver, but is ancillary to it. The fund being brought in and the amount ascertained, an order to pay over to the insolvent trustee would follow as a matter of course. *Ib.*

When a fund in the hands of a receiver is in the custody of the court of equity which appointed him, his office as receiver is not *functus officio* until his liability as to the fund is determined, and his subsequent appointment by an insolvent court as permanent trustee for the party whose property he had sold as receiver does not release him from responsibility to the court of equity for the faithful discharge of his trust as receiver. *Ib.*

Ordinarily, no appeal will lie from an order requiring a trustee or receiver to bring money into court; such orders rest in its discretion and where they determine no right, are not the subject of review on appeal. *Ib.*

3. In what cases a receiver will be appointed.* — The manifest abuse of a trust by an habitual and prospective course of dealing, bringing the property into danger, is sufficient ground for the appointment of a receiver. *Chase's case*, 17 D. 277.

Property, or its rents and profits must be in danger to warrant the appointment of a receiver. *Ib.*

The insolvency of a party receiving the rents and profits exposes them to danger of loss, and will be a sufficient ground to appoint a receiver. *Ib.*

A receiver will not ordinarily be appointed at a suit of the first mortgagee, as he has his remedy at law by ejectment, whereby he may get into the receipts of the rents and profits; but as subsequent mortgagees have no right to the possession at law, as against the prior mortgagees, they are better entitled to relief, and a receiver will generally be appointed at their suit, if the first mortgagee refuses to exercise his legal rights. *Cortleyes v. Hathaway*, 64 D. 478.

A receiver will not be appointed for a mere inadequacy in value of the mortgaged premises and insolvency of the mortgagor, but in a case where the buildings have been burned down, and the property generally permitted to go to waste through the fault of the person in possession, or where fraud or bad faith is shown by misappropriation of rents and profits, a receiver may properly be appointed. *Ib.*

The rule that where mortgaged premises are inadequate security for the mortgage debt, and the mortgagor is insolvent, a receiver of the premises and of the rents and profits will be appointed, as established by the New York decisions, has not been adopted by the chancery court of New Jersey. *Ib.*

* When, and over what property a receiver will be appointed, see monographic note, 64 D. 482-485.

For Index to Notes in American Decisions and American Reports, see Volume I.

4. When a receiver will be refused. — An order appointing a receiver in a suit to foreclose a mortgage is erroneous, and must be reversed. *Gwy v. Ide*, 65 D. 490.

5. When appointed in creditors' suits. — A bill is insufficient for an injunction and the appointment of a receiver, if it alleges only that the defendant is indebted to the complainants, and that he is disposing of his property, collecting money due him, and secreting the same, with intent to defraud the complainants, and that they are informed and believe that he intends to abscond and defraud his creditors; it does not show that the complainants have any lien as judgment creditors or otherwise upon the defendant's property. *Uhl v. Dillon*, 69 D. 172.

A receiver may be appointed and an injunction granted at the suit of a judgment creditor to restrain the debtor from selling his goods, notwithstanding a prior mortgage thereon, not yet due, to another person. *Rose v. Bevan*, 69 D. 170.

A bill is sufficient for an injunction and the appointment of a receiver if it alleges that executions upon valid judgments have been levied upon goods in a store; that a sale thereof to satisfy the judgments is sought to be prevented by the holder of a prior mortgage thereon; that the property is more than sufficient to satisfy the mortgage, and the debtor has no other property; that since the execution of the mortgage the goods remaining in possession of the mortgagor, some of them have been sold and other goods substituted in their place, and that if the debtor is allowed to retain the possession of the goods he would so dispose of them that the complainants' claim would be wholly lost. *Id.*

A mortgagee, before having the right to foreclose, may have a receiver appointed in case of danger of loss of the goods mortgaged. *Id.*

6. — in actions by or against corporations. — The supreme court has jurisdiction, by statute, to appoint receivers in cases of insolvent corporations; and when an order is made appointing such an officer, the presumption is, that all things were done required by the statute to be done, in order to authorize it to make such order. *Potter v. Merchants' Bank*, 86 D. 273.

7. The application for a receiver. — A claim of the whole title is unnecessary to authorize a party to make application for the appointment of a receiver; hence, a widow claiming dower in the premises may make the application. *Chase's case*, 17 D. 277.

8. Effect of the appointment. — The appointment of a receiver does not affect the title or involve a determination of it, but it can only be made on the application of one having an acknowledged interest. *Chase's case*, 17 D. 277.

The appointment of a receiver in a creditor's suit does not of itself effect a transfer of the debtor's real property; that is accomplished by a deed from the debtor. *Chautauque Co. Bank v. Kelsey*, 75 D. 347.

Evidence of fraud against creditors need not be produced by one who impeaches a deed of land as against a purchaser from a receiver, if the defendant, to show his own title, introduces the decree appointing the receiver and the receiver's deed to him, and these recite that the appointment was made in a suit by other creditors brought on the ground that the deed was fraudulent. Such recitals estop the purchaser from denying the fraudulent character of the deed. *Id.*

9. The receiver's title. — The receiver's possession will be protected by the court. *Albany City Bank v. Schermerhorn*, 38 D. 551.

A particular description of land in an assignment to a receiver pursuant to an order of court in a creditor's suit to set aside a fraudulent conveyance is unnecessary, but a description in general terms of all the debtor's personal and real property is sufficient. *Chautauque Co. Bank v. White*, 57 D. 442.

A manufacturing company in New Jersey had contracted to build a bridge in Connecticut. Becoming insolvent, a receiver was appointed in New Jersey, who purchased iron with the funds of the estate and sent it to Connecticut to complete the bridge. *Held*, that a Connecticut creditor could not attach it. *Pond v. Cooke*, 29 R. 668.

The receiver of an insolvent packet company, appointed in Missouri, there took possession of a barge of the company, and chartered it to a steamboat, and it was brought into Illinois, where it was detained by ice, and given up by the captain to the receiver, who took possession of it. *Held*, that his possession was valid against an Illinois attaching creditor. *Chicago etc. Ry. Co. v. Keokuk etc. Co.*, 48 R. 557.

10. Rights, powers, and duties, generally. — A receiver is not required to take the property forcibly out of the possession of a stranger, or even of the defendant, without the express direction of the court. *Parker v. Browning*, 35 D. 717.

The appointment of a receiver on the application of a subsequent mortgagee is without prejudice to the rights of prior mortgagees or incumbrancers, and such a receiver will be directed to keep down the interest upon the prior incumbrances. *Cortleyou v. Hathaway*, 64 D. 478.

The legal authority of receivers duly appointed is co-extensive only with the jurisdiction of the court by whom they were appointed. *Hunt v. Columbian Ins. Co.*, 92 D. 592.

State comity does not require the courts of one state to permit receivers, appointed by the court of another state, to exercise

For Index to Notes in American Decisions and American Reports, see Volume I.

privileges detrimental to the citizens of the former, while pursuing appropriate legal remedies there. *Id.*

The receiver of a National bank, directed to sell the assets on such terms and in such manner as he deems best for the interest of all concerned, has no power to exchange, barter or trade the assets. *Ellis v. Little*, 41 R. 434.

11. Right to sue. — A receiver must proceed by suit to try his right to property in the possession of a third person who claims the right to retain it, or the complainant must make such claimant a party to the suit, and have the receivership extended to the property in his hands, so that he will be bound by an order for its delivery. *Parker v. Browning*, 35 D. 717.

Where receivers of a bank brings suit in one state in their names as receivers, and at the same time institute suit in another state in the name of the bank, both suits involving the same cause of action, and being against the same defendant, — held, that the receivers having power by law, either in their own names or in the name of the bank, to commence and prosecute suits, in law or equity, on claims in favor of the bank, that a judgment recovered by them as receivers would have the same effect as if recovered in the name of the bank, and would bar the action in the other state. *Bank of North America v. Wheeler*, 73 D. 683.

Receivers of insolvent foreign corporations and assignees of bankrupt and insolvent debtors under the laws of other states and countries are allowed to sue in the courts of New York. It is true, their titles are not permitted to overreach the claims of domestic creditors of the same debtor pursuing their remedies under the laws of that state; but in the absence of such contestants they fully represent the rights of the foreign debtors. *Petersen v. Chemical Bank*, 88 D. 298.

A receiver, duly appointed in another State, may maintain replevin here for property sent here by him for sale, as against an attaching creditor. *Oagill v. Woodbridge*, 35 R. 716.

12. Liabilities, generally. — A receiver of a corporation appointed under State laws is liable in his official capacity the same as the corporation would be. *Meera v. Holbrook*, 5 R. 633.

Certificates of indebtedness issued by a receiver are not negotiable instruments. *Turner v. Peoria & S. R. R. Co.*, 35 R. 144.

The receiver of an insolvent railroad company is liable to an action for the negligence of his agents in operating the road. *Little v. Dusenberry*, 50 R. 445.

13. Suits against receivers — leave to sue. — A court will not protect a receiver who attempts forcibly to take property from the possession of a stranger claiming title

thereto, any farther than the law will protect him, where his authority to take possession of the property of which he is appointed receiver is not questioned. *Parker v. Browning*, 35 D. 717.

An order authorizing a suit at law against a receiver for seizing property in the possession of a third person, and holding it until a certain sum is paid into court to abide its order, should direct that, in case of a recovery against the receiver, the fund in the court be applied in part payment of the damages, and should further direct that the claimants stipulate to abide the result of the action at law, and that, if they fail to recover because the property in fact belonged to the defendant, the fund in court be delivered to the receiver as the property of the defendant. *Id.*

Suing a receiver without leave of court only raises a question of contempt; it does not affect the right involved in the suit. *Chautauque Co. Bank v. Risley*, 75 D. 347.

The owner of a locomotive engine may maintain replevin for it against the agent of a railroad corporation, whose property is in the hands of receivers, without obtaining leave of the court appointing the receivers, if the corporation has no interest in the engine, although it is used on the railroad. *Hills v. Parker*, 15 R. 63.

The custody of a receiver is the custody of the court, and he cannot be sued or garnished without leave of the court that appointed him. *People v. Brooks*, 29 R. 534.

A suit against a receiver of a foreign corporation for damages will not be sustained without leave of the court which appointed the receiver. *Barton v. Barbour*, 36 R. 104.

14. — Jurisdiction. — Jurisdiction of a suit against a receiver for forcibly taking goods from the possession of a third person, under color of authority merely, without any direction from the court to that effect, may be assumed by the court of chancery, or it may, in its discretion, permit the party aggrieved to proceed at law; but where the property is taken under an express direction of the court of chancery, its jurisdiction is exclusive. *Parker v. Browning*, 35 D. 717.

15. Punishment for interference with receiver. — A receiver is a servant of the court, and acts for the benefit of all the parties in the suit in which he is appointed. His possession is the possession of the court, and any attempt to interfere with it, without leave of court, is a contempt. *Morrill v. Noyes*, 96 D. 486.

The levy of an execution on property in the hands of a receiver may be ordered withdrawn, and the sheriff compelled to answer to the court for contempt in making it. *Coe v. C. P. & I. R. R. Co.*, 75 D. 518.

For Index to Notes in American Decisions and American Reports, see Volume I.

RECEIVING STOLEN GOODS.

Consult LARCENY.

1. What constitutes the offense.*—An indictment will lie against the receiver of goods stolen in New Hampshire, and brought into this state. *Com. v. Andrews*, 3 D. 17.

A person is guilty of receiving stolen goods if he takes them under circumstances that would put a reasonable man of ordinary observation on his guard. *Collins v. State*, 73 D. 428.

If a person receives stolen goods, knowing them to be such, not for the purpose of making them his own, or of deriving profit from them, but simply to aid the thief in carrying them off, he is guilty of the crime of receiving stolen goods, knowing them to have been stolen. *State v. Rushing*, 12 R. 641.

2. Indictment.—An indictment for fraudulently receiving stolen goods need not allege the name of the person from whom such goods were received, nor that his name is unknown. *State v. Hazard*, 60 D. 96.

3. Matters of defense.—On trial of an indictment for receiving "three bonds of the United States, each of the value of ten thousand dollars, the property of S., knowing them to have been stolen," it appeared that after the larceny and before defendant received the bonds, they had been fraudulently altered by erasing the name of S. and inserting that of C. The verdict was "guilty of receiving two bonds." *Held*, that the alteration did not destroy the character of the bonds, nor the ownership of S. *Commonwealth v. White*, 25 R. 116.

4. Evidence.—Guilty knowledge of defendant is essential to constitute the offense. Evidence that defendant purchased the goods at a price much below their value; or that he denied that he had them in his possession; or the unsupported testimony of the thief that defendant received them knowing that they had been stolen, though circumstances tending to show defendant's guilty knowledge, will neither of them alone constitute conclusive proof of guilt; and an instruction that either one of these facts is sufficient of itself to establish defendant's guilt is erroneous. *People v. Levison*, 76 D. 505.

On the trial of an indictment for receiving stolen goods, knowing them to have been stolen, evidence that the thief was reputed in the community to be a regular and honest dealer in such goods is admissible. *Com. v. Gamolo*, 25 R. 79.

5. Conviction and punishment.—Receivers of stolen goods, knowing them to be such, are punishable in Connecticut, the same as a principal. *State v. Weston*, 25 D. 46.

* See note on receiving stolen property, 26 D. 261.

Receiving goods, knowing them to be stolen, with a fraudulent intent, at the time, to deprive the owner of them, is a felony although the guilty party may have been authorized by the owner of the goods to receive them for him. *Wright v. State*, 26 D. 258.

RECEPTION OF VERDICT.

In civil cases, see TRIAL, 100, 101.

In criminal trial, see TRIAL, 198-200.

New trial for irregular, see NEW TRIAL, 76.

On Sunday, see SUNDAY, 10.

RECITALS.

In deeds, generally, see DEEDS, 6.

In deeds, as evidence, see EVIDENCE, 207.

In deeds, estoppel by, see ESTOPPEL, 25.

In sheriff's deeds, see EXECUTION, 133.

In tax-deed, see TAXES, 51.

RECOGNIZANCE.

Binding over witnesses to appear by, see WITNESSES, 4.

Of bail, see BAIL, 16-27.

RECONSTRUCTION ACTS.

See WAR, 36.

RECORD.

Bringing up, on error, see ERROR, 14-20.

Certified copies of, as evidence, see EVIDENCE, 229.

Competency of parties to, as witnesses, see WITNESSES, 20-23.

Estoppel by, see ESTOPPEL, II.

Judicial, as evidence, see EVIDENCE, 204.

Liens and equities shown by, see VENDOR AND PURCHASER, 44.

Of corporate meetings, see CORPORATIONS, 116.

Of deeds, as evidence, see EVIDENCE, 211.

Of mortgage, erasures in, see MORTGAGES, 55.

Parol evidence to explain, see EVIDENCE, 123.

Power to allow correction of, see COURTS, 5.

Requisites of, and how brought up on appeal, see APPEAL, 87-101.

Requisites of, on appeal from conviction, see APPEAL, 146-150.

RECORDARI.

Writ of, see WRITS, 2.

RECORDERS OF DEEDS.

See OFFICERS, 56.

RECORDING.

Assignment for creditors, see ASSIGNMENTS, etc., 11.

Assignments of mortgages, see MORTGAGES, 87.

Chattel mortgage, see CHATTEL MORTGAGES, 14.

Deeds, see DEEDS, 46-56.

For Index to Notes in American Decisions and American Reports, see Volume I.

Grants, see GRANTS, 3.
Indictments, see INDICTMENT, 37.
Marriage settlements, see MARRIAGE AND DIVORCE, 22.
Official bonds, see OFFICERS, 45.

RECORDING ACTS.

Rights of purchasers under, see DEEDS, 55.

RECOURPMENT.

What is the subject of, see SET-OFF, 7.

RECRIMINATION.

As a defence to suit for divorce, see MARRIAGE AND DIVORCE, 62.

REDEMPTION.

By tenant in common, see Co-TENANCY, 20.
From foreclosure, see MORTGAGES, VII.
From sales on execution, see EXORCUTION, 146-152.
From tax-sales, see TAXES, 56-58.
Of bank notes, see BANKS AND BANKING, 35.
Of chattel mortgage, see CHATTEL MORTGAGES, 21.
Of securities pledged as collateral, see PLEDGE, etc., 24.
Provisions as to, in foreclosure decrees, see MORTGAGES, 93.

REDEMPTION MONEY.

Distribution of, see MORTGAGES, 129.
Who entitled to, see TAXES, 58.

RE-DIRECT EXAMINATION.

Of witnesses, see WITNESSES, 110.

RE-ENTRY.

For non-payment of rent, see LANDLORD AND TENANT, 37.
Landlord's right of, see LANDLORD AND TENANT, 14.

RE-EXAMINATION.

Of witnesses, see WITNESSES, 111.

REFERENCE.

[Includes the trial of issues, or examination of questions of law or fact, before persons appointed by the court for that purpose; the powers and duties of such referees; and the review of their report.]

In partition, see PARTITION, 20, 21.
To ascertain damages on dissolution of injunction, see INJUNCTION, 63.
To find amount due in foreclosure, see MORTGAGES, 87.
To other papers, in policy of insurance, see INSURANCE, 17.
To title or preamble, in construing statutes, see STATUTES, 42.

1. Power of the court to refer issues.*—The power of reference is not re-

*Jury trial, in what cases legislature may dispense with, see note, 45 D. 185-194.

Power of court to refer actions at law, see note, 70 D. 205-211.

stricted to matters of account, or even to actions arising *ex contractu*, under the New York statute. *Lee v. Tillotson*, 35 D. 624.

References are not prohibited by the seventh article of the constitution of New York, preserving inviolate the right of trial by jury, as "heretofore used," in cases where references were in use before the constitution. *Id.*

A cause cannot be referred unless there is an account, in the ordinary sense of that term, between the parties, even though there may be many items of damage. *Van Rensselaer v. Jewett*, 41 D. 750.

Where the plaintiff sues on a covenant in a lease reserving rent, payable in grain, fowl, and services, and the defense does not go to the items in the claim, but denies the defendant's liability altogether, there can be no reference. *Id.*

Under the Minnesota statute, a referee is a person appointed by the court to perform certain offices in the progress of a cause depending in the court of his appointment, and it may be to try the whole issue. Such appointment is not in conflict with the state constitution, which provides that the judicial power of the state shall be vested in certain courts, naming them. *Carson v. Smith*, 77 D. 539.

The California statute authorizing a reference of cases is solely applicable to proceedings in equity. The right of trial by jury, in all common-law actions, is secured by the constitution of the state. *Grinn v. Norris*, 79 D. 206.

A statute authorized the courts, without the consent of parties, to commit any cause to a referee for trial, and provided that after such trial the cause should, at the request of either party, be tried by a jury, and that upon such trial the report of the referee should be evidence of all the facts stated therein, subject to be impeached by either party. *Held*, that the act was constitutional so far as it authorized a compulsory reference; but *quære*, as to the provision making the referee's report admissible. *Copp v. Hemiker*, 20 R. 194.

2. Reference by consent.—A party may waive the constitutional provision made for his benefit, and may therefore bind himself by submitting to a reference, even where the constitution would secure to him a jury trial. *Lee v. Tillotson*, 35 D. 624.

Parties to an action having stipulated to waive a trial by jury, to take the evidence before a referee, and submit the case to a judge for his decision at chambers, and the evidence having been so taken and submitted, the judge decided the case and entered judgment in term. *Held*, valid. *Roy v. Horsley*, 25 R. 537.

3. Cases of long accounts.—What is a long account.—Courts of equity have a general jurisdiction where there are

For Index to Notes in American Decisions and American Reports, see Volume I.

mutual accounts, and also where the accounts are on one side, but a discovery is sought, and is material to the relief. But where the accounts are all on one side, and mere set-offs on the other, and no discovery is sought or required, courts of equity have no jurisdiction. *McMartin v. Bingham*, 1 R. 265.

Fourteen items, under eight different dates, and two credits, the account being all on one side and no discovery sought, and the defenses being denial, payment and the statute of limitation will not deprive the parties of a right to a jury trial. *Ib.*

4. When reference will be refused, notwithstanding long account. — A court has no power to send an ordinary action at law to a referee for trial, against the objection of either party, whether the action requires the examination of a long account, or not. *Grinn v. Norris*, 79 D. 206.

A statute of Minnesota authorized a compulsory reference when the trial of an issue of fact required the examination of a long account. *Held*, to be in conflict with the provision of the State Constitution, that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law," etc., and void. *St. Paul etc. R. R. Co. v. Gardner*, 18 R. 334.

5. The appointment; who may be appointed. — An order of reference is irregular if one of the parties was not before the court. It is irregular in a chancery proceeding to make any order generally affecting the merits of the case until it is at issue as to all parties; this is not excused by the supposition that the party not before the court was not a necessary one. It is enough that he was represented by the bill as having some interest in the subject-matter of the suit, and is regularly made a party by proper allegations and prayer for subpoena to bring him in. *Belava v. Lepretre*, 56 D. 266.

It seems, a judge cannot appoint himself referee, even by consent. *Woodin v. Phenix*, 32 R. 172.

6. Referee's oath. — A referee is not an officer within the meaning of the constitutional provision requiring all executive and judicial officers to be sworn before assuming their duties. *Underwood v. McDuffee*, 93 D. 194.

Judicial power, in a constitutional sense, is not exercised by a referee in determining facts in a cause submitted to him, but by the court in giving judgment. *Ib.*

7. Powers and duties of referees, generally. — Referees have the power to allow damages for a breach of a special agreement in a cause properly referred to them, under the statute, because requiring the examination of a long account. *Lee v. Tillotson*, 35 D. 624.

A referee has no power to review an action of the court upon an order of reference,

deciding the principles upon which an account should be taken and settled; his duty is to take the account in pursuance of the principles thus settled. *Smith v. Walker*, 99 D. 415.

A statute appropriated a specified sum to be paid to the relator for the purchase of certain relics of General Washington, by the state, to be paid only upon the certificate of three persons named therein, that the relics were genuine, etc. *Held*, that a certificate signed by two of the persons named, which stated that the third met with them, but refused to join in the certificate, was sufficient. *People v. Nichols*, 11 R. 734.

8. The hearing before them. — Referees comparing an account with a book of entries in the absence of one party, the other being present, after the hearing before them has been closed, does not constitute an *ex parte* hearing, where such comparison is not charged to have been fraudulently made, but was in fact made solely to prevent mistake, and the reward is not thereby vitiated. *Small v. Trickey*, 66 D. 255.

Upon a pending action being submitted to a referee, and the submission made a rule of court, plaintiff must proceed for the same cause of action named in his declaration. *Waterman v. Connecticut etc. R. R. Co.*, 78 D. 326.

Questions of variance between a declaration and the proof are considered as waived by reference, provided that the matter set up as the plaintiff's ground of recovery before the referee is that for which he sued. *Ib.*

Every matter which, by the rules of law, could properly have been introduced by way of amendment to the declaration will be considered to have been added, and its absence waived or cured by the reference. *Ib.*

A referee is not bound by a particular declaration and pleadings, but may award upon the subject-matter of the action without regard to them, when the parties agree to a reference of a pending action, under a rule of court, so that the court is to render a judgment on the report; even where it is a part of the submission or rule of reference that the referee is to be governed by the rules of the law. *Cook v. Carpenter*, 89 D. 670.

The power of a referee, under a rule of court, extends to what the parties agreed to submit, and no more; and if he undertakes to try and award upon other matters not submitted, the award is invalid. *Ib.*

9. Review of report, generally. — Unless it is certain that a referee is in error in findings of fact, the court will sustain such findings. *Westerlo v. De Witt*, 93 D. 517.

10. Motion to set aside, and how determined. — An opinion previously formed by a referee upon a case submitted to him is no objection to the report, if it ap-

For Index to Notes in American Decisions and American Reports, see Volume I.

pear that his mind was open to conviction. *Graves v. Fisher*, 17 D. 203.

The report of a referee should be set aside for uncertainty, if, where the statute of limitations is pleaded as a defense, it is impossible to ascertain from the report when the limitation commenced to run. *Doyle v. Reilly*, 85 D. 582.

11. Review by appeal, or error.—The finding of a referee will not be disturbed by the appellate court, if there was any evidence proper to be considered by him tending to sustain his finding, sufficient to justify the defendant's motion to dismiss the complaint. *Olcott v. Tioga R. R. Co.*, 84 D. 296.

A referee's finding on a question of fact may be reviewed in the supreme court of New York, but it is conclusive in the court of appeals. *Stockwell v. Phelps*, 90 D. 710.

12. When a new trial will be granted.—A new trial should be granted for any material error occurring on a trial before a referee, or in the findings of fact by him; but where the only error appearing is in the judgment which the referee directs to be entered on the facts found, the court may correct it by rendering the appropriate judgment. *Beach v. Cooke*, 86 D. 260.

Errors occurring in determining principles upon which an account should be taken cannot be reviewed by the appellate court, on an application for a new trial, on the ground that the referee adopted and applied those principles in the adjustment of the accounts, but can only be corrected in a direct proceeding for that purpose. *Smith v. Walker*, 99 D. 415.

RE-FILING.

Of chattel mortgage, see CHATTEL MORTGAGES, 16.

REFORMATION.

Of contracts, in equity, see EQUITY, 37-39.

REFRESHING MEMORY.

The right of, and by what writing, see WRITINGS, 112, 113.

REFUNDING.

By legatees, see LEGACIES, 39.

REFUSAL.

Of buyer, to accept goods, effect of, see SALES, 49.

Of buyer to complete purchase, action for, see SALES, 94.

Of consignee, to receive goods, effect of, see CARRIERS, 41.

Of continuance, when ground for new trial, see NEW TRIAL, 3-6.

Of corporation, to permit stockholder to sue, see CORPORATIONS, 60.

Of insurer, to receive premium, see INSURANCE, 204.

Of representative to sue, liability for, see EXECUTORS, etc., 151.

Of witness to testify, proof of will in case of, see WILLS, 52.

To accept bill, effect of, see BILLS AND NOTES, 41.

To account, effect of, see EXECUTORS, etc., 127.

To carry goods, liability of railroad company for, see RAILROAD COMPANIES, 44.

To carry passenger, consequences of, see CARRIERS, 59.

To pay over money collected, liability for, see OFFICERS, 31.

When a conversion or evidence of it, see TROVER, 12, 13.

REGISTERS OF DEEDS.

See OFFICERS, 56.

REGISTRATION.

Of deeds, see DEEDS, 46-56.

Of mortgages, see MORTGAGES, IV.

Of vessels, see SHIPPING, 2.

See also RECORDING.

REGISTRY LAWS.

Constitutionality of, see ELECTIONS, 2.

REGULARITY.

Presumptions in favor of, see ERROR, 22; EXECUTORS, etc., 117; EVIDENCE, 33; NATURALIZATION, 5.

REGULATIONS.

As to practice of medicine, see PHYSICIANS AND SURGEONS, 2.

As to purchase and surrender of railroad tickets, see RAILROAD COMPANIES, 56.

As to repeating messages, see TELEGRAPH AND CABLE COMPANIES, 7.

Of carriers of passengers, see CARRIERS, 75.

Of cities, concerning street railroads, see RAILROAD COMPANIES, 116.

Of navigation, by congress, see NAVIGATION, 1.

Of railroads, as to passenger traffic, see RAILROAD COMPANIES, 54.

REHEARING.

In equity, see EQUITY, 55.

Of criminal appeal, see APPEAL, 172.

On appeal, see APPEAL, 122.

On error, see ERROR, 31.

REIMBURSEMENT.

Of expenditures of trustees, see TRUSTS, 40.

Of expenses incurred by sheriff, see SHERIFFS, 13.

Right of surety to, see SURETSHIP, 9-12.

RE-INSTATEMENT.

Of appeal, see APPEAL, 123.

Of expelled member of corporate body, see CORPORATIONS, 52.

For Index to Notes in American Decisions and American Reports, see Volume I.

RE-INSURANCE.

Against fire, see INSURANCE, 47.

REJOINDER.

In common law pleading, see PLEADING, 53.

RELATIONSHIP

Hearsay evidence to prove, see EVIDENCE, 66.

See AFFINITY; CONSANGUINITY.

RELEASE

[Includes the law relative to the operation of written instruments releasing and discharging debts or other obligations or liabilities whether upon contract or in tort.]

By creditors, generally, see PARTNERSHIP, 30.

By creditors, of stockholder's liability, see CORPORATIONS, 81.

Coercing, in assignment for creditors, see ASSIGNMENTS, etc., 25.

Of covenant of warranty, see COVENANTS, 34.

Of dower, see DOWER, 21.

Of firm, by acts of one partner, see PARTNERSHIP, 54-56.

Of guardian, by ward, see GUARDIAN AND WARD, 36.

Of interest of witness, see WITNESSES, 39.

Of mortgage debt, see MORTGAGES, 134.

Of one joint debtor, effect of, see JOINT LIABILITY, 7, 8.

Of payment of rent, by eviction, see LANDLORD AND TENANT, 39.

Of property attached, see ATTACHMENT, 81.

Of stockholder, from future assessments, see MANUFACTURING COMPANIES, 3.

Of sureties, see SURETSHIP, III.

Parol evidence to explain, see EVIDENCE, 124.

Satisfaction of judgment by, see JUDGMENT, 109.

1. What constitutes a release. — A release is a discharge of debt by the act of the party. Extinguishment is a discharge by operation of law. *Baker v. Baker*, 75 D. 243.

The delivery of a release will be presumed from the nature of the writing, if it was executed as such, and was intended to have that effect. *Williamson v. McGinnis*, 52 D. 561.

A written acknowledgment of money as received "in full" for a demand for unliquidated damages is not within the rule which allows a simple receipt to be contradicted by parol; but is treated as a release, and, unless obtained by fraud, etc., bars any further claim. *Coon v. Knop*, 59 D. 502.

2. Who may give a release. — The power to release an absolute debt necessarily includes the authority to release a contingent liability. *Shaw v. Berry*, 58 D. 702.

3. What may be released. — A judgment is a contract of record and demand

within the meaning of an instrument releasing "all demands" of one person against another. *Henry v. Henry*, 71 D. 354.

4. Release by one of several creditors. — Where an action is strictly a personal one, and the plaintiffs are bound to join in it, as in an action of trespass *quare clausum fregit*, brought by tenants in common, a release by two of the plaintiffs will be a bar to the action. *Austin v. Hall*, 7 D. 376.

A release by one of several plaintiffs, in an action on the case in the nature of waste, is a good bar. *Kimball v. Wilson*, 14 D. 342.

5. — or to one of several debtors. — The release of one joint obligor releases both. *Williamson v. McGinnis*, 52 D. 561; even though the release contains a proviso that such other party shall not take advantage of it. *Benjamin v. McConnell*, 46 D. 474.

A release by a creditor of one of several obligors is a discharge of all. *Bosman v. State Bank*, 46 D. 291.

A release of one of two sureties releases the other from one-half the debt. *Gordon v. Moore*, 51 R. 606.

6. — or joint trespassers. — The release of one of several joint trespassers discharges all of them. *Gilpatrick v. Hunter*, 41 D. 370; *Ayer v. Ashmead*, 83 D. 154; though the party giving the release stipulated that it should not discharge the others. *Ellis v. Bitter*, 15 D. 534; *Gumther v. Lee*, 24 R. 504; but to have this effect, it must be a technical release, under seal, expressly stating the cause of action to be discharged without conditions or exceptions. No release will be allowed by implication. *Bloss v. Phymale*, 100 D. 752.

The acceptance of the note of one of several co-trespassers in satisfaction of the wrong done by him, releases the others, although the note remains unpaid, and is brought into court to be canceled. *Ellis v. Bitter*, 15 D. 534.

Where separate actions are pending against several joint trespassers, settlement of one of the actions, and discharge of the defendant therein, will operate as a discharge of the entire cause of action against all, and there can be no recovery in the other suits, either of nominal damages or of costs, although it was the intention of the parties to the agreement for the discharge that it should affect only the cause of action against the defendant, and not the plaintiff's right of recovery in the other suits. *Ayer v. Ashmead*, 83 D. 154.

Where several have jointly trespassed on real estate, the receipt of money from one will not bar an action against the others, the amount received being less than the damage, and it not being understood to be in full satisfaction. *Ellis v. Eason*, 36 R. 830.

7. Necessity and effect of a seal. — A release without consideration, and not

For Index to Notes in American Decisions and American Reports, see Volume I.

under seal, is void. *Jackson v. Stackhouse*, 13 D. 514.

A release not under seal will not operate to release the parties defendant in an action for damages caused by an unlawful assault and battery. *Smithwick v. Ward*, 75 D. 453.

A release need not be averred to be under seal. A release imports a seal, and it is a matter of evidence whether it have a seal or not, if a seal be necessary. *Illinois Central R. Co. v. Read*, 87 D. 260.

A release not under seal is valid, if it expresses or is supported by a consideration, or if evidenced by a valid decree of a court of record. *Benjamin v. McConnell*, 46 D. 474.

An instrument under seal may be released or discharged by an executed parol agreement, although this cannot be done by a mere parol agreement. *Dickerson v. Commissioners*, 63 D. 373.

8. Validity and interpretation, generally. — A release of a debt discharges the mortgage. *Jackson v. Stackhouse*, 13 D. 514.

General words in a release are to be construed against the releasor; but general words following a particular recital are to be qualified by the recital. *Jackson v. Stackhouse*, 13 D. 514; *Grumley v. Webb*, 100 D. 304.

A "release of all demands discharges all sorts of actions, rights, and titles, conditions before or after breach, executions, appeals, rents, covenants, annuities, contracts, recognizances, statutes, commons," etc. *Grumley v. Webb*, 100 D. 304.

A settlement and release of a trespass by which the goods of a party are carried away, necessarily operates as a transfer of the property to the trespasser. *Bradley v. Boynton*, 29 D. 582.

The plaintiff lent his note to the defendant, payable to his order; the latter indorsed it and had it discounted at the bank, and received the money. The note was protested, and the defendant being insolvent, the plaintiff signed a written agreement, discharging him from all debts and demands. The bank as a creditor, also executed the agreement by its corporate seal. The plaintiff afterwards paid the bank the amount of the note, and brought an action against the defendant for so much money paid to his use. It was held that the release of the defendant by the bank did not discharge the plaintiff as maker, especially as the bank did not know for whose accommodation the money was discounted, and that, therefore, the plaintiff did not afterwards pay the money wrongfully. *Smyrnour v. Minturn*, 8 D. 380.

9. How pleaded and proved. — A general release after the commencement of the action need not be pleaded *puis darrein continuance*, where no prior plea has been filed;

nor need it be pleaded in bar of the further maintenance of the action merely; but a plea of such release in bar, generally, is good. *Kimball v. Wilson*, 14 D. 342.

Costs are presumed to have been adjusted by the parties where a general release by one of the plaintiffs is given pending the action; and as the plaintiffs are entitled to have the release pleaded, neither party can claim costs where the plea is adjudged sufficient. *Id.*

A release obtained by defendant after an action commenced must be specially pleaded in the answer, or in a supplemental answer. *Smithwick v. Ward*, 75 D. 453.

10. Impeachment, generally. — The consideration of a release under seal can not be denied at law. *Barnes v. Ward*, 57 D. 590.

11. Relief against, in equity. — Equity will look into the consideration of a release under seal, and if it was obtained by fraud or imposition, or by taking undue advantage of the situation of the party executing it, will either set it aside altogether or restrain the party holding it from making use of it at law. *Barnes v. Ward*, 57 D. 590.

12. Covenant not to sue. — A covenant not to sue made to a portion only of joint debtors does not release any of them. *Matthey v. Gally*, 60 D. 595.

A covenant never to sue one of two joint and several promisors in a note does not, like a release to one, discharge the other obligor. *Goodnow v. Smith*, 29 D. 600; *Boseman v. State Bank*, 46 D. 291; *Harrison v. Close*, 3 D. 444; especially where the obligation is only not to sue for a limited time. *Ward v. Johnson*, 8 D. 729.

Such a covenant is a good defense to the covenantee in an action against both promisors on the note, but the plaintiff, under statute 1834 c. 189, is entitled to judgment against the other promisor. *Goodnow v. Smith*, 29 D. 600.

The payment of half the note before due, and taking at par the note of a third person indorsed by the plaintiff without recourse, for a small sum, constitute a sufficient consideration for such a covenant. *Id.*

A covenant not to sue generally may be pleaded as a release. But a covenant not to sue for a limited period cannot be pleaded in a creditor's action; the debtor's remedy is an action on the covenant. This latter doctrine does not apply to actions of assumpsit; accordingly, where the holder of a note stipulated not to sue the maker for a specified time, in consideration of a mortgage security given by the indorser, the maker may rely on the covenant, though no party thereto. *Clopper v. Union Bank*, 16 D. 294.

A covenant not to sue upon a claim cannot be pleaded to, and presents no bar to

* Effect of release granted on payment of part of sum due, see note, 64 D. 133-143.

For Index to Notes in American Decisions and American Reports, see Volume I.

an action on such claim. The only remedy of the covenantee in such a case is a suit for damages on the covenant or agreement. *Rucker v. Robinson*, 90 D. 412.

A surety is not discharged by an express covenant not to sue the principal debtor for a certain or prescribed time, because, notwithstanding the agreement, suit may be commenced at any time. *Id.*

A covenant not to sue one of two joint trespassers, does not operate as a discharge of the other. *Snow v. Chandler*, 34 D. 140.

Nothing short of a payment of the damages by one joint trespasser, or a release under seal, can operate to discharge the other. *Id.*

RELEVANCY.

Of evidence, see EVIDENCE, 2.

RELIEF.

Against irregular executions, see EXECUTION, 4.

Against irregular service of process, see PROCESS, 19-35.

Against payment of price of land, see VENDOR AND PURCHASER, 71.

Against proceedings at law, see EQUITY, 14-17.

Against release, in equity, see RELEASE, 11.

Against representatives' accounts, see EXECUTORS, etc., 140-142.

Ground for, in equity, to be fully stated, see PLEADING, 56.

On failure of title, on sale of land for payment of debts, see EXECUTORS, etc., 121.

Prayer for, in complaint, see PLEADING, 101, 102.

Prayer for, in bill in equity, see PLEADING, 62-64.

Suits in equity between partners for, see PARTNERSHIP, 60-68.

What granted in cases of mistake, see MISTAKE, 2, 3.

What granted in suits for specific performance, see SPECIFIC PERFORMANCE, 41-46.

What may be granted in judgment or decree, see JUDGMENT, 20-25.

What obtainable by motion, see MOTION, 1.

RELIGIOUS SOCIETIES.

[Includes the organization of churches and other bodies formed for religious purposes; their property rights; powers and duties of their officers, and the rights of members, pastors, etc.]

Exemption of, from taxation, see TAXES, 28.

Mandamus to officers of, see MANDAMUS, 20.

1. Organization. — An ecclesiastical society, established by local limits before the adoption of the constitution of this state, has not been thereby, nor by subsequent statutes, divested of its local character. *Atwater v. Woodbridge*, 16 D. 48.

The church consists of persons who have made a public profession of religion, and who are associated together by a covenant

of church-fellowship for the purpose of celebrating the sacrament, and watching over the spiritual welfare of each other. *First Baptist Church v. Witherell*, 24 D. 223.

A congregation is a voluntary association of individuals or families, united for the purpose of having a common place of worship, to provide a proper teacher to instruct them in religious doctrines and duties, to administer the ordinance of baptism, etc. *Id.*

A religious association formed on the basis of a community of property, each member surrendering to the association the property that he owns, to be enjoyed in common by all, and agreeing to promote its interests by his labor and otherwise, in consideration that he is to receive religious instruction, etc., as well as support for himself and family, and that in case of his withdrawal from the association, the value of his property is to be refunded to him, is not forbidden by law. *Schriber v. Rapp*, 30 D. 327.

The privilege of withdrawal secured to the members of such an association, cannot be exercised after the death of a member by his personal representative so as to enable him to claim compensation for services rendered to the society by the decedent. *Id.*

2. Subscriptions. — Parol evidence is admissible to show that a subscription, expressed in terms to be "for the purpose of building a Catholic chapel," was intended "for the purpose of building a Roman Catholic chapel," to be used as a place of public worship, according to the rights and ceremonies of the Roman Catholic church. *O'Hear v. De Goezbrand*, 80 D. 653.

The question is one of fact, whether the rules of the canon law of the Roman Catholic church, relative to the property in pews, were adopted or recognized by the signers to a subscription for the building of a Catholic chapel. *Id.*

A person subscribed toward the payment of a debt due from the building of a church, and the trustees borrowed money to pay the debt on the faith of the subscription. *Held*, that the subscriber was bound. 1870. *Trustees v. Garvey*, 5 R. 51.

One who had executed his note to the trustees of a church, as a donation to enable them to buy a bell, died before the bell was ordered. *Held*, that the note could not be enforced although the bell was afterward ordered. *Pratt v. Baptist Soc.*, 34 R. 187.

3. Elections. — The appointment of persons to preside at an election of trustees of a church, who are not elders or churchwardens, is illegal, under 3 Rev. Stat. 292, unless there are no such officers present. *People v. Peck*, 27 D. 104.

The term "elders" in this statute does not include preachers in the Baptist church, though commonly called elders. *Id.*

The register of the members is not the only evidence as to the number of qualified

For Index to Notes in American Decisions and American Reports, see Volume I.

electors at elections under this statute, but parol proof is admissible, especially where it does not appear that a register is in existence. *Ib.*

The certificate of such an election, signed at any time afterwards, is admissible evidence, though another certificate has been given. *Ib.*

The statute requiring the presiding officers to certify the results of the election immediately is directory. *Ib.*

The omission to give notice of such an election, in all respects as required by statute, does not invalidate the election, if fairly conducted, and if all the members are present. *Ib.*

4. Rights of members, generally. — A member of the society of Shakers is bound by his covenant with the society, whereby, on becoming a member, he stipulates never to make any claim for his services. *Waite v. Merrill*, 16 D. 238.

The covenant exacted by the society of Shakers of its members is not void, and is not in violation of any constitutional right. *Ib.*

The members of the church have no other or greater rights as corporators than any other members of the society who statedly attend with them for the purposes of divine worship. *First Baptist Church v. Witherell*, 24 D. 223.

Members of the church excluded for heresy may still not only be voters as members of the congregation, but may be also elected trustees, and have the management of the temporal concerns of the congregation. *Ib.*

A member of a church cannot maintain an action against one disturbing him in his devotions there, by making loud noises in talking, singing, and the like. *Owen v. Heeman*, 37 D. 481.

A by-law of a religious society provided that any member should be dropped from the list who had ceased to worship regularly with the society or had failed to contribute to the support of its worship for one year. *Held*, that a member could only be expelled by a vote of the society, after a hearing. *Gray v. Christian Society*, 50 R. 310.

5. Powers of the society, contracts, etc. — Unincorporated religious associations have quasi corporate existence in law, especially in Pennsylvania since the act of 1731, with the power to hold land and build appropriate houses, and to acquire and enforce contract rights. *Phipps v. Jones*, 59 D. 708.

In the absence of evidence as to the manner in which a church makes a contract, but it appearing that there are trustees, of whom the officiating priest is the chairman, it will be presumed that they are empowered to bind the church by contract; but they must act jointly, delegate their power, or ratify the acts of one or more of them; and

where the priest alone employed a sexton for the church, without the authority from, or ratification by the other trustees, — *held*, that the church was not liable for such employment. *St. Patrick's R. C. Church v. Gavalon*, 25 R. 305.

A society incorporated for religious worship has no power to contract for a steamboat excursion, to raise money for the church purposes, and cannot recover for expenses or loss of anticipated profits by reason of the defendant's breach of such contract. *Harrison v. First Bryan Bapt. Church*, 36 R. 117.

6. Property, and how it may be acquired. — Property held in trust for an unincorporated religious society vests in the corporation whenever the requisites of the statute are complied with so as to render them legally competent to take property in their corporate capacity. *First Baptist Church v. Witherell*, 24 D. 223.

A pious use is considered a charitable use, both in England and in this country; and funds devoted to the purposes of an association of Shakers are dedicated to a pious use, and must therefore be held to be appropriated to a charitable use. *Gass v. Wilhite*, 26 D. 446.

A trust under which a society of Shakers holds lands is not repugnant to a law which limits the amount of land which religious societies can hold, to four acres. *Ib.*

A conveyance to certain individuals, of the site of the Dutch church in Garden street, in the city of New York, in 1691, in trust for the use of the ministers, elders and deacons of such church, and their successors, and for no other purpose, was a valid conveyance to a charitable or pious use at the common law, and vested the legal title to the premises in the trustees absolutely and irrevocably, for the uses therein declared. *Reformed Protestant Dutch Ch. v. Mott*, 32 D. 613.

Where real estate is conveyed to trustees for the use of a church or congregation as a place of worship, and such church or congregation is afterward incorporated, to enable the corporation to take and hold the legal title, it will be presumed, after a great lapse of time, that there was a conveyance of the legal title from the trustees to the corporation. *Ib.*

The effect of the Act of March, 1801 (1 R. L. of 1801, 339), upon real estate held by individuals in trust for a Dutch church, incorporated prior to the passage of that Act, was to transfer the legal title to such estate from the trustees directly to the corporation for the use of the corporators. *Ib.*

No subsequent violation of such trust would ever revest either the legal or equitable title to the property conveyed in the original grantor, although a palpable breach thereof might form a proper ground for an application to the court of chancery on the

For Index to Notes in American Decisions and American Reports, see Volume I.

part of the corporators, or by the attorney-general, to compel the due execution of the trust. *Ib.*

The dedication of a meeting-house creates a charitable use in favor of the beneficiaries, over which chancery will exercise jurisdiction to maintain the trust and to enjoin invasions thereof. *Curd v. Wallace*, 32 D. 85.

A building for the sessions of a Sunday school and religious lecture is for a "religious purpose," although occasionally used for fairs and other benevolent purposes. *Orwig v. First Presb. Church etc.*, 32 R. 417.

7. — and how transferred. — Act of 1806 (Laws of 1806, c. 43, sec. 4) gives to religious corporations the power to convey real estate which is held in trust for the corporators; provided, the previous consent of the court of chancery to the alienation is given, as authorized by that act. *Ref. Prot. Dutch Church v. Mott*, 32 D. 613.

Whether the subsequent ratification of a sale made by such corporation, without having previously obtained the consent of the court of chancery, would have the effect of vesting the title in the grantee discharged in equity of the charitable trust or use, *quære. Ib.*

Land was conveyed to certain persons named "and to such as they shall associate to themselves, their heirs and successors forever, for the erection of a house for their assembling themselves together publicly to worship God, as also the erection of a dwelling-house for such minister or ministers as shall be by them and their successors from time to time orderly and regularly admitted for the pastor or teacher to the said church or assembly," "and for no other intent, use or purpose whatsoever." *Held*, 1. Not to constitute a public charity; 2. That the land so conveyed might be sold by authority of the legislature or of a court of equity; and 3. On an application for a sale of the property, that the vote of a majority of the pew-holders or members of the society was not of itself a sufficient authority to enable the corporation to make the sale, nor a sufficient reason to justify the court in authorizing it to be made; but that those seeking the sale must satisfy the court that it was reasonably required for the accommodation of the society as a whole, and that the proposed change would not subject the minority to an unreasonable sacrifice of interest or convenience, or in any way work injustice to them. *Old South Soc. v. Crocker*, 20 R. 299.

Lands were deeded to a Catholic bishop, his successor and assigns, for the purpose of "erecting thereon a Roman Catholic church and other buildings pertaining thereto, or to be exchanged therefor or used in the purchase of other property in the town." Having built the church on part of the land, — *held*,

that he might sell the rest to pay a debt incurred in the erection. *Blanc v. Albury*, 51 R. 666.

A covenant of the society of Shakers, by which the members agree to bring in and devote their property to the uses of the society, does not create a trust void for uncertainty, or for want of *certus que trust*, or because it creates a perpetuity. *Gass v. Wilhite*, 26 D. 446.

8. Effect of church divisions on rights of property. — Religious societies may submit to arbitration their respective claims to the use of a meeting-house. *Curd v. Wallace*, 32 D. 85.

The effect of the statute of 1814 on the rights of seceding church members considered. *Ib.*

The seceding members of such society are not entitled to a distribution of any share of the common property thereof. *Gass v. Wilhite*, 26 D. 446; *Curd v. Wallace*, 32 D. 85.

The seceding members of a church forfeit all right to church property. Where a number of the members of a church congregation, although they constitute a majority thereof, dissolve their connection with the church of which they were members, and the entire ecclesiastical body of which it is a part, and unite with another and distinct religious organization, they forfeit all right to the church property; and as they have attached themselves to a separate and distinct church, they cannot be regarded as a "party," within the meaning of the statute, occasioned by a schism or division of the society, and entitled to a proportion of the use of the property. *McKinney v. Griggs*, 96 D. 360.

The words "schism or division," in a statute providing that in case of such an occurrence each party is to have the use of the church and appurtenances a part of the time in proportion to its numbers, contemplate a division of the society on account of differences among themselves, and not to a difference of faith, or the withdrawal of part of the congregation, and their attaching themselves to another church. *Ib.*

The title to the church property of a divided congregation is in that part, though a minority, which adheres to the ecclesiastical laws, usages and principles of the denomination under which the church was constituted. *Schnorr's Appeal*, 5 R. 415; *Roche's Appeal*, 8 R. 275.

The property of a religious corporation, in case of separation, both parties still adhering to the tenets and discipline of the organization, should be divided between them in proportion to their numbers at the time of such separation. *Niccolls v. Rugg*, 95 D. 462.

The proper mode in making a partition of the property of a religious corporation, in case of a division, is to count church members by virtue of their membership, and, in

For Index to Notes in American Decisions and American Reports, see Volume I.

addition, to count as members of the congregation all pew-holders. *Id.*

The right of voting upon questions affecting the property of a religious corporation should not be confined to church members, but should also extend to those who have contributed to the support of the church, although not members. *Id.*

Certain persons organized themselves under a general statute into a corporation as a "Unitarian Society of Christians," and continued to hold property and conduct public worship as such until the pastor publicly avowed that he was "neither a Unitarian nor a Christian." Thereupon a majority of the members of said society formed a new society and re-employed said pastor. He continued to preach his own doctrines in the meeting-house of the society, and was supported by a majority of the society. The minority filed a bill against the majority and the pastor, praying an injunction to restrain the preaching of such doctrines in the meeting-house. *Held*, that they were entitled to the injunction. *Hale v. Everett*, 16 R. 82.

9. Pews, and rights of pew owners.*

— For a disturbance of an occupant of a pew an action on the case only may be maintained in his behalf in England, because there his right of property is incorporeal—a mere easement. *Shaw v. Beveridge*, 38 D. 616.

A pew owner, if he is improperly disturbed in his right to the use of his pew, may, according to the circumstances, maintain case, or ejectment. *First Baptist Church v. Witherell*, 24 D. 223; or a writ of entry, *Gay v. Baker*, 9 D. 159; or an action of trespass for a disturbance in his possession, for he is here deemed to have an individual right of property therein, and not a mere easement. *Shaw v. Beveridge*, 38 D. 616.

A pew-holder has not an absolute, but a qualified property in his pew, it being subject to the right to make necessary alterations in the meeting-house, or to pull it down and rebuild it; but if he is injured in his property by such alterations, or by the destruction and rebuilding of the house, he may have an action on the case for his damages. *Daniel v. Wood*, 11 D. 151.

The parish may alter the shape and form of the meeting-house or rebuild it on the same ground, an indemnity being paid to those of the pew-holders whose pews are destroyed. *Gay v. Baker*, 9 D. 159; *Jones v. Towne*, 42 R. 602.

The grant of a pew in perpetuity does not give to the owner an absolute right of property, but simply entitles him to the use of the pew, for the purpose of sitting there during divine service. *First Baptist Church v. Witherell*, 24 D. 223.

A member of a religious corporation is not liable for pew rents, where intruders, with-

out authority from the charter of the law, take possession of the church, expel the vestry and choose a new one, although such member retains his pew but refuses to occupy it. *Boagh v. Hendel*, 30 D. 291.

The right to a pew can be transferred only in a manner provided for transfer of realty. *Barnard v. Whipple*, 70 D. 422.

10. Secular officers. — The trustees of a religious society have no right to defend proceedings to test the validity of their election, at the cost of the society. *Harrison v. First Presbyterian So. of Hartford*, 33 R. 34.

11. Ecclesiastical courts. — Legal tribunals have no jurisdiction over the church as such, except so far as is necessary to protect the civil rights of others, and to preserve the public peace. *First Baptist Church v. Witherell*, 24 D. 223.

The church judicatories determine all questions relating to the faith and practice of the church and its members, but cannot interfere with the temporal concerns of the congregation or society with which the church is connected. *Id.*

The canon law of the Roman Catholic church is without force or authority, as such, in Vermont, and is to be considered in determining the legal rights of parties only so far as it is recognized in or made part of some agreement under which those rights are derived. *O'Hear v. De Goebriand*, 80 D. 653.

A classis of the German Reform Church of the United States, sitting as an ecclesiastical court, declared certain offices held by defendant vacant. *Held*, that this decision was binding on the civil courts. *Roski's Appeal*, 8 R. 275.

In a suit to enjoin the plaintiffs in error, as an ecclesiastical court, from proceeding with the trial of the defendant for alleged offenses and misconduct as a presbyter,—*held*, 1. That the fact that the commission issued by the bishop, appointing persons to investigate the charge and make presentment, was irregularly issued, would not affect the jurisdiction of the ecclesiastical court; 2. The ecclesiastical court is the exclusive judge of the sufficiency of the presentment; 3. Such court is not bound by the rules of law as to challenge of jurors; 4. Where there is no right of property involved except clerical office or salary, the spiritual court is the exclusive judge of its own jurisdiction. *Chase v. Cheney*, 11 R. 95.

Where a Presbytery have decided that certain members of a Presbyterian church under its jurisdiction have seceded, the decision binds the civil courts, and the seceders, although a majority, lose their rights to the church property. *Gaff v. Greer*, 45 R. 449.

12. The minister. — The church judicatories cannot remove a minister without

* Nature of pew-holder's title, see note, 80 D. 662-664.

For Index to Notes in American Decisions and American Reports, see Volume L.

the consent of a majority of the members of the congregation, or of their legally constituted trustees, if they are incorporated. *First Baptist Church v. Withersell*, 24 D. 223.

No action lies by a Catholic priest against his bishop for removing him from his office. *O'Donnovan v. Chataud*, 49 R. 462.

13. His compensation. — A clergyman entered into a contract for a year's service with a vestry, who were not legally elected, but who, so far as he knew, were the officers *de facto*. Having performed the duties according to such contract, he was held entitled to recover for his services. *St. Luke's Church v. Mathews*, 6 D. 619.

But when, apprised of the illegality of the election of the vestry, he made with them a contract for the ensuing year, it was considered proof of collusion, which should prevent him recovering for services during this time, and a perpetual injunction was decreed against any suit for services rendered during the second year. *Id.*

The pastor of a religious society got judgment against the trustees for his salary, and a levy was made on the church communion service. Held, invalid. *Lord v. Hardie*, 33 R. 683.

No action lies in favor of a Roman Catholic priest against his bishop for salary or support during a period for which the bishop refused to assign him a charge. *Twigg v. Sheehan*, 47 R. 727.

14. Actions by or against religious societies. — An unincorporated religious society could not sue at common law in its own name, nor in the name of its agents or trustees in whom no right of property is vested; but by the statute of 1814, of this state, the trustees in whom title is vested may sue. *Curd v. Wallace*, 32 D. 55.

A plain equity principle allows the committee of an unincorporated society to sue and be sued as representatives of the whole. *Phipps v. Jones*, 59 D. 708.

Unincorporated religious societies may sue on a contract made with them in their associate capacity and for the legitimate purposes of their association, even though there be no persons named or described in the contract as trustees or committeemen on behalf of the society. *Id.*

Whether chancery can interfere to prevent changes in the doctrines or modes of worship originally established by a religious society, *quære*. *First Baptist Church v. Withersell*, 24 D. 223.

Religious societies have the right to prescribe such rules as they may think proper for preserving order when met for public worship, and evidence tending to prove the violation of their rules is admissible to reduce damages in an action against them. *McLain v. Matlock*, 65 D. 746.

The G. congregation and the L. congrega-

tion entered into articles of association to build a church in which "divine service" only should be held. For a period of twenty years no other than meetings for public worship or preaching the gospel were held in the church. Sunday schools were not in existence in the neighborhood when the church was built. Held, that the G. congregation was entitled to an injunction restraining the L. congregation from holding a Sunday school in the church. *Gass' Appeal*, 13 R. 726.

No action lies against the trustees of a religious society for expulsion from the church organization connected with it. *Hardin v. Second Baptist Church*, 47 R. 556.

RELINQUISHMENT.

By state, of right to tax, see TAXES, 20.
Of ownership of chattels, see PERSONAL PROPERTY, 7.

REMAINDERMAN.

Remedy of, for waste, see WASTE, 4.
What deemed fixtures as between life tenant and, see FIXTURES, 9.

REMAINDERS.

Generally, see ESTATES, 4.
After legacy for life, see LEGACIES, 19.
In land, when subject to execution, see EXECUTION, 38.
What are vested, and what contingent, see DEVISE, 24, 25.
When liable to attachment, see ATTACHMENT, 35.

REMANDING.

For further proceedings below, see APPEAL, 116.
Of prisoner, when proper, see HABEAS CORPUS, 12.

REMEDIAL STATUTES.

Construction of, see STATUTES, 55-57.

REMEDIES.

Constitutionality of statutes relating to, see STATUTES, 30.
For contamination of stream, see WATER-COURSES, 15.
For illegal taxation, see TAXES, V.
For nuisances, see NUISANCE, 10-14.
For obstructions to navigation, see NAVIGATION, 7.
For obstructions to water-courses, see WATER-COURSES, 10.
For usury, see USURY, IV.
For waste, see WASTE, 5-8.
Of *certain que trust*, see TRUSTS, III.
Of purchaser, for defects in title, see VENDOR AND PURCHASER, 27.
On contracts for sale of land, see VENDOR AND PURCHASER, IV.
Power of legislation over, see LEGISLATURE, 6.

For Index to Notes in American Decisions and American Reports, see Volume I.

REMISSION.

Of excessive damages, see **NEW TRIAL**, 33.
Of forfeiture for breach of bail bond, see **BAIL**, 27.

REMITTITUR.

To court below, see **APPEAL**, 131.

REMOTENESS.

Evidence, when inadmissible for, see **EVIDENCE**, 5.
Legacy, when void for, see **LEGACIES**, 22.
Provisions in will, when void for, see **WILLS**, 60.

REMOVAL.

Of buried remains, see **CEMETERIES**, 6.
Of corporate officers, see **CORPORATIONS**, 143.
Of guardian, see **GUARDIAN AND WARD**, 9.
Of highway obstructions, see **HIGHWAYS**, 37.
Of maker of note, when excuses demand, see **BILLS AND NOTES**, 210.
Of nuisances, obstructions, etc., by city, see **MUNICIPAL CORPORATIONS**, 38.
Of officers, see **OFFICERS**, 17.
Of ore, injunction to restrain, see **MINES AND MINING**, 14.
Of paupers, see **POOR**, etc., 8.
Of personal representatives, see **EXECUTORS AND ADMINISTRATORS**, 23.
Of trustees, see **TRUSTS**, 53.

REMOVAL OF CAUSES.

[Includes state court decisions relative to the removal of civil and criminal causes, from a state court to the United States circuit court, under the provisions of the several acts of Congress upon that subject.]

Compelling, by mandamus, see **MANDAMUS**, 10.

1. Under sec. 12 of the Judiciary Act.*—An action brought by a citizen of one state against a citizen of the same state jointly with citizens of another state, is not removable to the circuit court of the United States. *Miller v. Lynde*, 1 D. 86.

Action by a citizen of a state in which it is brought, against a foreign corporation, may be removed for trial to the United States court, if within the provisions of the United States statutes relating to removal of causes from state to federal courts, although the defendant has fully complied with the provisions of a state law directing how service of process shall be made upon foreign corporations. Such state law does not infringe upon the jurisdiction of the courts of the United States. *Hobbs v. Manhattan I. Co.*, 96 D. 472.

The United States statutes relative to transferring causes from the state to the federal courts authorize the transfer where the plaintiff is a citizen of the state where the suit is commenced and the defendant is

* See note on the removal of causes from state to national courts, 12 R. 545-552.

a citizen of another state; where both plaintiff and defendant are non-residents of the state in which the action is commenced, the case is not within the statute. *Wills v. Home Ins. Co.*, 4 R. 180.

A petition, by defendant, to remove a cause into the United States court must show that the plaintiff was a citizen of the state at the time of the commencement of the action; an averment that he is a citizen is insufficient. *Holden v. Putnam Fire Ins. Co.*, 7 R. 287.

A Massachusetts statute required that foreign insurance companies, doing business in that state, should appoint a resident agent, upon whom all lawful processes against them might be served with like effect as if they were domestic companies. *Held*, that a foreign company, by accepting service of process, as provided by the statute, was not precluded from removing a cause from the state court into the United States courts, in a proper case. *Morton v. Mut. Life Ins. Co.*, 7 R. 505.

In an action brought in New Hampshire, by an administrator appointed in that State, but a citizen of Massachusetts, against a Massachusetts life insurance company, upon a policy by which defendants promised to pay a certain sum to plaintiff's intestate, a citizen of New Hampshire, his executor, etc., after his death, for the sole use of his wife, a resident of New Hampshire,—*held*, that the cause could not be removed into the United States court under the act of 1789. *Geyer v. Hancock Mut. Life Ins. Co.*, 9 R. 185.

A state statute requiring corporations organized under the laws of another state, as a condition to doing business in the state, to appoint an agent upon whom service of process may be made, and to agree not to remove suits into the federal courts—*held*, that the statute, so far as it required an agreement against the removal of suits, was repugnant to the constitution of the United States, and that the agreement under it was void. *Morse v. Home Ins. Co.*, 13 R. 297; overruling same case, 11 R. 580.

Corporations are citizens within the meaning of the clause of the constitution of the United States which extends the judicial power of the courts of the United States to controversies between the citizens of different states; and they are citizens only of the state or sovereignty that created them. *Western Union Tel. Co. v. Dickinson*, 13 R. 295.

The right to have a cause transferred from a state court to the United States court is not controlled or abridged by the act of the legislature of a state authorizing the service of process on the agent of a foreign corporation. *Id.*

2. Under act of March 3, 1833 (24 St. at L. 633.)—A state court cannot

For Index to Notes in American Decisions and American Reports, see Volume I.

prevent or oppose the removal of a case to the federal court, if it is legally removable thereto. In a case to which the act of Congress applies, the removal is a matter of right and not within the discretion of the state courts. *Yankey v. Richardson*, 81 D. 769.

Judgment against a defendant was entirely reversed, it appearing that the proceedings in the action were a manifest fraud, with a view to deprive the defendant of his right to remove the case to the United States court. *Ib.*

3. Act of April 9, 1866 (14 St. at L. 27.)—Where it appeared from the affidavit of a person of color, charged with a capital offense, that he could not have full and equal benefits of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and that his right cannot be enforced in the state courts,—*held*, that under the act of Congress of 9th April, 1866, the state courts will proceed no further in the prosecution until certified of the action of the circuit court of the United States under the act of Congress, March 3, 1863. *State v. Dunlap*, 6 R. 746.

It is erroneous in such a case to order the removal of the indictments to the circuit court of the United States; but not to suspend proceedings in the cause till certified to the court under the aforesaid act of Congress. *Ib.*

4. Act of July 27, 1866 (14 St. at L. 306.)—The right of a defendant to a transfer of the cause is not defeated by the fact that the co-defendant is a resident of the same state with the plaintiff, provided a severance can be had, and the rights of the petitioner can be determined separately. *Stewart v. Mordecai*, 2 R. 555.

An affidavit filed in conformity to the acts of Congress, passed 27th July, 1866, and 2nd March, 1867, relating to removal of causes from state to United States courts, cannot be traversed in the State court. *Ib.*

An administrator filed a bill to marshal assets against creditors, some of whom had commenced suits at law. An injunction was allowed, conditioned to allow the claims to be litigated to ascertain the amounts due, the priority of the claims, and the right to payment out of the funds. One of the creditors resided in another state, and made application to have his action at law removed to the United States court. *Held*, that the cause was not subject to removal, as it was merely collateral to the suit in equity. *Burtis v. Loyd*, 12 R. 574.

5. Act of March 2, 1867. (14 St. at L. 558.)—1. General rules.—Act of Congress, March 2, 1867, providing for the removal of a cause from a state to a federal court, where either party believes he will not obtain justice in the state court, because

of prejudice, etc., merely extends the privilege of removal to the plaintiff as well as to the defendant, and does not repeal the previous act of July, 1866, providing for such removal in cases of citizenship of different states, on the petition of the defendant, etc. *Washington etc. R. R. Co. v. Alexandria etc. R. R. Co.*, 100 D. 710.

An order of a state court, transferring a cause to the federal court under the act of Congress of March 2, 1867, is an appealable order, and the state court have jurisdiction to hear and determine the appeal. *Akerley v. Vilas*, 1 R. 166; *Burson v. Nat. Park Bank*, 13 R. 285.

The application of a party to remove a cause to the circuit court of the United States is analogous to a plea to the jurisdiction of the state court, and, when granted, the party against whom it is taken has the right to appeal. The case would be different if the application to remove is refused. In the latter case no irreparable injury would follow, and the appeal would not be allowed. *State v. Judge etc.*, 8 R. 583.

A mandamus will therefore issue, on application, from the supreme court, directing a judge of the district court to grant an appeal from an order transferring a cause to the circuit court of the United States, if the case is in other respects, appealable. *Ib.*

The act of Congress of March 2, 1867, in so far as it gives a non-resident plaintiff the right to remove a cause from the state to the federal courts, is unconstitutional. *Whiton v. Chicago etc. R'y Co.*, 3 R. 101; contra, *Burson v. Nat. Park Bank*, 13 R. 285.

An action was removed, on petition of the plaintiff, from a state court to the circuit court of the United States. The judgment there rendered was reversed by the supreme court of the United States and the cause was remanded to the state court where it began. *Held*, that the removal did not operate as a discontinuance of the original action, and that the plaintiff might proceed with his case as if no removal had been had. *Germania Fire Ins. Co. v. Francis*, 24 R. 674.

On petition for removal of a cause to the federal court, the state court may determine whether the bond is "good and sufficient," but cannot arbitrarily reject one good in form; and technical objections to the affidavit must be taken when the affidavit is read below, or are deemed waived. *Mix v. Andes Ins. Co.*, 30 R. 260.

2. When a removal is proper.—A non-residence insurance company doing business in a state, and accepting service of original process through its agents, in conformity to the laws of the state, is not thereby deprived of the right to a removal to the federal courts in an action commenced against it in the courts of the state by a citizen. *Knorr v. Home Ins. Co.*, 3 R. 26.

For Index to Notes in American Decisions and American Reports, see Volume I.

Where a citizen of one state commences an action against a citizen of another state in the courts of the latter state, the plaintiff is, nevertheless, entitled, afterward to have the cause removed to the United States courts, under the act of Congress of March 2, 1867. The affidavits in such a case need not set forth the facts on which the applicant for the transfer bases his belief that local prejudices exist; it is sufficient if they state that he has reason to, and does, believe that such local prejudice exists as will prevent his obtaining justice. *Meadow Valley M. Co. v. Dodds*, 8 R. 709.

A national bank located and doing business in a state is a citizen of the state within the meaning of the act relating to the removal of causes into the federal courts. *Cook v. State Nat. Bank*, 11 R. 667.

In an action commenced by a citizen of another state against a citizen of Indiana, the court, on plaintiff's application, and after a trial, in which the jury disagreed, ordered the cause to be removed into the circuit court of the United States under the acts of Congress. *Held*, that the cause could be removed at any time before another trial. *Barron v. Nat. Park Bank*, 13 R. 235.

Where, by the law of a state, a county may be sued as a corporation, an action brought against a county by a non-resident of the state is removable into the United States circuit court. *Floyd County v. Hurd*, 15 R. 682.

A corporation of another state sued here may remove the cause into the federal court, and its authorized agent may make the requisite affidavit. *Mix v. Andes Ins. Co.*, 30 R. 260. But see *Cook v. State Nat. Bank*, 11 R. 667.

3. *When not proper*—A corporation cannot remove a cause into the federal court under the act of March 2, 1867, as it cannot make the affidavit required by the act. *Cook v. State Nat. Bank*, 11 R. 667.

In an action by a citizen of New York in a state court of New York, against a national bank located in Boston, — *Held*, 1. That the defendant was a citizen of Massachusetts, within the meaning of the acts relating to the removal of causes to the federal courts; 2. That the joinder in the action as defendants, of the drawers of the check, would not deprive the bank of the right to alone apply for a removal of the case to the federal court, the causes of action being distinct and only properly joined by virtue of a state statute; 3 (by a divided court). That the cause could not be removed by the bank into the federal court, under the act of Congress of March 2, 1867, as being a corporation, it could not make the affidavit required by the act. *Id.* But see *Mix v. Andes Ins. Co.*, 30 R. 260.

In a suit in a court of this state against a railroad corporation established in another

state, the defendants filed an affidavit of their acting superintendent that he believed and had reason to believe that from prejudice and local influence, they would not be able to obtain justice in a state court. He had no authority to make this affidavit, except what was incident to his office. *Held*, that this affidavit was not sufficient for the removal of the case into the circuit court of the United States, under the Act of 1867. *Mahone v. Manchester and L. R. R. Co.*, 15 R. 9.

An officer of a foreign corporation sued in a state court cannot (at least without special authority) make the affidavit required by the act of Congress of 1867, for the removal of the suit to the United States circuit court, as that act requires an affidavit of the defendant's own belief. *Quigley v. Central Pac. R. R. Co.*, 21 R. 757.

In an action pending in a state court, in which some of the plaintiffs were non-residents of the state and the others residents, the non-residents moved to have the cause removed into the United States circuit court, under act of Congress of March 2, 1867. *Held*, that the cause could not be removed. *Beery v. Irick*, 12 R. 539.

A suit in a state court, in which a citizen of the state is plaintiff, and a citizen of the state and a citizen of another state are defendants, cannot be removed on the petition of the citizen of the other state into a United States circuit court, under the United States statute of 1867, chap. 196, as a whole suit; nor can it be so removed, as far as relates to the petitioning defendant, at least if the cause of action is not so divisible that the suit can proceed separately against each defendant in the different courts. *Florence S. M. Co. v. G. & B. S. M. Co.*, 14 R. 579; *Burch v. Davenport etc. R. R. Co.*, 26 R. 150.

By statute of Massachusetts a disputed claim against the insolvent estate of a deceased person, in process of settlement in the probate court, may be tried before a jury in a court of common law, like proceedings being had as in an action at law, except that the judgment is not followed by execution, but is conclusive as to the amount to be allowed by the probate court. *Held*, that such a suit could not be removed into the United States circuit court. *Du Vieser v. Hopkins*, 17 R. 141.

Creditors of an intestate's estate, some of whom resided in New York and others in Georgia, filed a bill against the administratrix, in Georgia, for a marshaling of the assets of the estate. The administratrix, by cross-bill, alleged that the estate was insolvent, and obtained an injunction restraining creditors from suing until the assets were marshaled. The New York creditors thereupon petitioned to remove the suit to the United States court. *Held*, that

For Index to Notes in American Decisions and American Reports, see Volume I.

under the act of 1867 this could not be done. *Büss v. Rawson*, 9 R. 164.

A cause cannot be removed from a state to a federal court, pending an appeal from a decree upon the merits. *Beery v. Frick*, 12 R. 539; notwithstanding the fact that the judgment may have been reversed on appeal, and the cause remanded for new trial or further proceedings. *Akerley v. Vilas*, 1 R. 166; *Home Life Ins. Co. v. Dunn*, 5 R. 642; *Bryant v. Rich*, 8 R. 311; *Crane v. Reeder*, 15 R. 223; *Boggs v. Willard*, 22 R. 77.

An action cannot be removed under the act of 1867, ch. 196, after a trial on the merits in a state court, although such trial has resulted in a disagreement of the jury. *Gapin v. Critchley*, 17 R. 176. But see *Ins. Co. v. Dunn*, 19 Wall. 214.

6. Under U. S. Rev. Stat. Sec. 639 etc. — A citizen of New Hampshire brought action against a Vermont corporation, and afterward, in good faith, moved to and became a citizen of Vermont. Afterward the defendant petitioned for a removal of the cause to the United States circuit court. *Held*, that both parties being citizens of the same state at the time of the petition, the removal could not be had. *Laird v. Conn. and P. Rivers R. R.*, 20 R. 215.

An action by the citizen of a state against a foreign corporation cannot be removed into the United States circuit court under the Revised Statutes after one trial has been had, although the action is one where review will lie. *Whittier v. Hartford Ins. Co.*, 20 R. 185.

When a cause has been called for trial in its order, and a jury has been called to try it, the trial is begun, although the jury has not been sworn, and it is then too late for the defendant to apply to remove the cause into the United States courts. *St. Anthony Falls Water-Power Co. v. King Bridge Co.*, 23 R. 682.

Section 639 of the United States Revised Statutes, providing for the removal of causes at any time before trial, from state to United States courts, on the ground of prejudice or local influence, is not repealed by the act of Congress of March 2, 1875. *Barber v. St. Louis etc. R. R. Co.*, 22 R. 243.

A state court loses jurisdiction of a cause, upon proceedings being taken to remove it into the United States circuit court, and the question of such loss of jurisdiction can be raised by answer. *Shaft v. Phoenix Mut. Life Ins. Co.*, 23 R. 138.

An action was commenced against a non-resident insurance company, by the service of the summons upon the person appointed by such company, under and in pursuance of the statute, as its agent and attorney within the state, upon whom all process against it might be served, and who was also its general managing agent, in the

state. Such agent and attorney, upon entering defendants appearance, filed a petition for a removal of the cause to the circuit court, under U. S. R. S., § 639, which was signed by him as such attorney, and verified by his affidavit which also stated that he was defendant's general managing agent. *Held*, 1. That the petition and the filing of it were the acts of the defendant. 2. *Semble*, that it was not essential that the petition be verified; but, 3. That if a verification was necessary, the affidavit was sufficient, and made by the proper person. *Ib.*

A colored man cannot remove an indictment against him into the federal court for trial, upon the allegations that such prejudices exist against his race in the state that justice will not be done to him, and that none but white men can there sit on the jury. *State v. Strauder*, 27 R. 606.

7. Under act of March 3, 1875 (18 St. at L. 470-471). — After a cause has been once tried in a state court and a verdict rendered, it cannot be removed into the United States circuit court, although the verdict may have been set aside for error and a new trial granted. *Chandler v. Coe*, 22 R. 437.

It is too late to remove a cause into the circuit court of the United States, under U. S. Stat. of March 3, 1875, after a time has passed at which it could have been tried. *New York Warehouse etc. Co. v. Loomis*, 23 R. 372.

On an application to remove a cause from a state to the federal court, the state court has power to inquire into the truth of the facts alleged in the petition. *Burch v. Davenport etc. R. R. Co.*, 26 R. 150.

Where there are several defendants, not residing in the same state, a cause cannot be removed on the petition of one who is a citizen of another state than that where the plaintiffs reside and suit is brought, unless a final determination can be had as to him without the presence of the other defendants. *Ib.*

Exclusive jurisdiction having once attached as against all the defendants, in the state court, and judgment having passed as to some of them, jurisdiction must continue until a complete determination of all the issues between all the parties; jurisdiction cannot be ousted or defeated at any subsequent stage of the action by parties who have appeared and submitted thereto. *Ib.*

In an action of trespass on land, a non-resident defendant sued with residents may remove the cause to the federal court so far as he is concerned. *Simmons v. Taylor*, 31 R. 566.

8. Removal of criminal causes. — After a cause has been fully removed from one court to another, there can be no further proceeding therein in the former court. *State v. Reid*, 28 D. 572.

For Index to Notes in American Decisions and American Reports, see Volume I.

An order of removal made before a plea is entered is premature, and therefore inoperative, and the jurisdiction of the cause remains in the court where it was originally commenced. *Ib.*

The superior court to which a cause is removed, has no power to return it to the superior court whence it came. *Ib.*

The court from which a cause has been removed may, after its removal, amend by supplying an omission in the record of something which occurred prior to the removal, and may then send a new transcript of the amended record to the court to which the cause was removed. *Ib.*

RENDITION.

Of judgment and decrees, see JUDGMENT, II.
Of judgment, in justices' court, see JUSTICE OF THE PEACE, 23.

RENEWAL.

Covenant for, in lease, see LEASES, 19.
Effect of usury on, see USURY, 18.
Of bill or note, see BILLS AND NOTES, 254.
Of chattel mortgages, see CHATTEL MORTGAGES, 16.
Of insurance, see INSURANCE, 24.
Of note secured by mortgage, effect of, see MORTGAGES, 20.

RENT.

Assignee of bankrupt, when liable for, see LANDLORD AND TENANT, 41.
Dispossess proceeding for non-payment of, see LANDLORD AND TENANT, 50.
Interest on claims for, see INTEREST, 12.
Remedies to recover it, see LANDLORD AND TENANT, III.
Transfer of right to, see LEASES, 31.
When descends to the heir, see DESCENT, 4.

RENTS AND PROFITS.

Accountability of tenant in common for, see CO-TENANCY, 22.
Of mortgaged premises, accountability for, see MORTGAGES, 39.
Of mortgaged premises, right to, see MORTGAGES, 36.
Right to, in partition suit, see PARTIES, 31.
When purchaser liable for, see VENDOR AND PURCHASER, 32; see also MERE PROFIT.

RENUNCIATION.

Of personal representatives, see EXECUTORS AND ADMINISTRATORS, 2-9.

REPAIRS.

Duty to make as between parties to lease, see LANDLORD AND TENANT, 17-20.
Extent of liability for, under marine policy, see INSURANCE, 179.
In canals, and liability for defects, see CANALS, 2.
Lien upon vessel for, see SHIPPING, 47.

Of highways, see HIGHWAYS, 24.

Of mortgaged premises, allowances for, see MORTGAGES, 38.

Of turnpike, duty to make, see TURNPIKE COMPANIES, 6.

Of wharves, liability for want of, see WHARVES, 7.

Power of master to contract for, see SHIPPING, 30.

Stipulation for, in lease, see LEASES, 22.

To bridges, see BRIDGES, 3, 4.

Warranty of seaworthiness in respect to, see INSURANCE, 109.

REPEAL.

Of corporate charters, see CORPORATIONS, 24.

Of exemption laws, see TAXES, 22.

Of limitation laws, see LIMITATIONS OF ACTIONS, 19.

Of statutes, see STATUTES, IV.

REPLEADER.

When granted, under common law practice, see PLEADING, 11.

REPLEVIN.

[Includes the remedies provided for the recovery of the possession of personal property wrongfully withheld from plaintiff, or of damages in lieu of such possession.]

Measure of damages in, see DAMAGES, 39.

What subject of, see PERSONAL PROPERTY, 2.

I. WHEN IT LIES.

II. PROCEDURE.

III. REMEDIES UPON REPLEVIN BONDS.

I. WHEN IT LIES.

1. Jurisdiction. — Replevin at common law defined, and the extent of the remedy explained: *Wilson v. Rybolt*, 77 D. 486; *Maxham v. Day*, 77 D. 409.

Detinue for unlawful detentions, and replevin for unlawful takings, were finally made, at common law, to cover the whole ground of unlawful deprivations of personal property, so far as recovering the specific articles was concerned. *Wilson v. Rybolt*, 79 D. 486.

Detinue and replevin, in their fullest scope, were formerly in use in Indiana, but the whole ground for both these actions is now covered by the code provision for the recovery of the personal property. *Ib.*

Replevin is a local action in cases of distress for rent, because the place is material, but not where the object is merely to try the right of property. *Crocker v. Mann*, 26 D. 684.

Replevin, in Missouri, is not a local action in any case, because distress for rent does not exist here. *Ib.*

One court cannot take property from the custody of another by replevin, or any other process. *Lewis v. Buck*, 82 D. 73.

Property held by a United States Marshal

For Index to Notes in American Decisions and American Reports, see Volume I.

under a writ from a district court cannot be taken from him by any process from a state court; and if surrendered upon a writ of replevin, the state court having custody of the property will order its return upon demand, and a showing by the marshal of his authority for holding it. *Ib.*

A plea in replevin that the defendant is a United States Marshal, and holds the property by virtue of a levy under an attachment from the United States district court, is, if not denied, a conclusive defense to an action in a state court. *Ib.*

Where a state court replevies property out of the possession of an officer of a United States court whose jurisdiction first attached, the former tribunal has jurisdiction to inquire into the validity of its own proceedings, and in dismissing the action, take any necessary steps to enforce a redelivery of the property to the officer, who has been divested of its possession by its process. *Booth v. Ahlman*, 84 D. 711.

2. When replevin will lie, generally. — Replevin lies wherever trespass *de bonis asportatis* would lie. *Marshall v. Davis*, 19 D. 463; *Brusen v. Ogden*, 20 D. 593; *Allen v. Crary*, 25 D. 566; *Orocker v. Mann*, 26 D. 684; and therefore lies against an officer by a stranger to an execution, whose property has been seized under color of process. *Phillips v. Harries*, 19 D. 166; or against a plaintiff in execution, by whose direction it is levied upon property of a third person. *Allen v. Crary*, 25 D. 566; or for goods wrongfully detained by a fraudulent purchaser. *Root v. French*, 28 D. 482; or in any case where the plaintiff has a present right to the possession of any personal property in the possession of the defendant. *Shaddon v. Knott*, 58 D. 63; or for any tortious or unlawful taking of goods, and not in cases of distress only. *Pangburn v. Partridge*, 5 D. 280; *Daggett v. Robins*, 21 D. 752.

Replevin lies in Connecticut only in cases where cattle or goods have been impounded and distrained. *Watson v. Watson*, 23 D. 324.

Replevin lies in Pennsylvania wherever one claims goods in possession of another, without regard to the manner in which the possession was obtained. *Herdic v. Young*, 93 D. 739.

3. When it will not lie. — A disseisee cannot maintain replevin for grain sown by him on the land of which he has been disseised, which has been cut and removed by the disseisor. *De Mott v. Hagerman*, 18 D. 443.

Trespass *quare clausum fregit* would lie in such a case for the first entry, and after a recovery in ejectment, damages would follow for the mesne profits. *Ib.*

Title to land will not be tried in an action of replevin, *ex directo*, though it may some-

times come in question incidentally. *Snyder v. Vaux*, 21 D. 466.

4. The necessary wrongful taking. — To maintain an action of replevin, a wrongful taking must be shown; a wrongful detention is not sufficient. *Harwood v. Smet-hurst*, 80 D. 207.

Replevin is founded upon the unlawful taking, which fixes the character of the recovery, and enters directly into the question of damages. *Herdic v. Young*, 93 D. 739.

A wrongful taking from the actual or constructive possession of the plaintiff is necessary to support trespass or replevin in the *cepit*. *Marshall v. Davis*, 19 D. 463.

Delivery by a bailee without authority to one who is ignorant of the owner's rights does not constitute such a wrongful taking of a chattel by the party so receiving it as to support replevin. *Ib.*

The wife of the bailee is a competent witness in such a case, because the bailee's interest is balanced, he being liable in any event. *Ib.*

The possession of property has been changed, so that a writ of replevin may be sued out, where the property is seized by the defendant under an attachment, and an inventory is made, and the defendant locks up a portion of the property in a trunk, takes away a portion, leaves the trunk and the remainder of the property in the office where it was at the time, locks up the office, and takes away the key, but afterwards gives the key to the plaintiff's attorney with the understanding that the rights acquired by the levy should not thereby be lost. *Mazon v. Perrott*, 97 D. 191.

5. — or detention. — A tortious taking is not necessary to maintain replevin; it is sufficient if the property is unlawfully detained. *Badger v. Phinney*, 8 D. 105; *Dearmon v. Blackburn*, 60 D. 160; *Eveleth v. Blossom*, 92 D. 555.

A wrongful detainer after a lawful taking is not equivalent to a wrongful original taking. *Marshall v. Davis*, 19 D. 463.

Property wrongfully taken is wrongfully detained until restored to its owner. *Oleson v. Merrill*, 91 D. 428.

Property is wrongfully detained in replevin, though lawfully obtained, if kept after the plaintiff is lawfully entitled to have it returned to him. *Ib.*

Any act will constitute a wrongful detention in replevin if it amounts to conversion in trover. *Ib.*

A wrongful detention may be shown in replevin by proof of wrongful taking. *Ib.*

6. Replevin in the *cepit*, or in the *detinet*. — Replevin in *cepit* can only be brought when trespass could be maintained, and that will lie for an injury to land only when the plaintiff is in possession. *Stockwell v. Phelps*, 90 D. 710.

Replevin for a wrongful detention would

For Index to Notes in American Decisions and American Reports, see Volume I.

lie, prior to the code, for property wrongfully taken, and the code has not altered the rule. *Oleson v. Merrill*, 91 D. 428.

Plaintiff having a cause of action for a wrongful taking of property, and also for its wrongful detention, may waive the former and sue for the latter, the same as before the code. *Id.*

An action of replevin is always in detinet, under the statute of Michigan, whether the taking be wrongful or not; and where the taking is wrongful, and the plaintiff establishes his right to the property, the action cannot be defeated by a failure to make a prior demand. *Le Roy v. East Saginaw City Ry.*, 100 D. 162.

7. Who may maintain replevin. — The assignee of the buyer of a chattel, who has never had possession, may maintain replevin against the seller. *Woods v. Nixon*, 1 D. 364.

One whose goods, in the hands of his agent, are seized by a sheriff under an execution against the agent, may maintain replevin for them against such sheriff. *Clark v. Skinner*, 11 D. 302.

The owner of property levied upon and sold under a writ of attachment against another may recover such property from the purchaser, and damages for its detention. *Overby v. McGee*, 63 D. 49.

A landlord may bring replevin for chattels wrongfully severed from the freehold by the tenant, as the title to the land is not thereby drawn in question, *semble*. *Anderson v. Hayler*, 85 D. 318.

The owner of land may bring replevin for chattels severed from the freehold, where there was no adverse possession, but not if the land was held adversely, for he cannot assert his title in that manner. *Id.*

A defendant in replevin cannot maintain a second action for replevin, for the same property against the plaintiff in possession during the pendency of the first suit, nor can one deriving title from the defendant after the service of the writ maintain such action. *Hines v. Allen*, 92 D. 574.

An action of replevin cannot be maintained by a part owner of a chattel for his undivided part; and when it appears from the plaintiff's own showing that he is merely a part owner, the court will abate the writ *ex officio*. *Hart v. Fitzgerald*, 3 D. 75.

Where several own cereal grain, of the same kind and value, mingled together by their consent, or by reason of circumstances reasonably to be foreseen, each may maintain replevin for his just proportion. *Pizzack v. White*, 33 R. 211.

8. — and for what property. — Where things are affixed to the freehold, replevin will not lie; but if, after a levy, they are severed, they become personal property, and may be replevied. *Cresson v. Stout*, 8 D. 373.

Replevin may be maintained for goods taken on execution from the possession of the defendant by one having the property therein, and the right to reduce them to actual possession. *Dunham v. Wyckoff*, 20 D. 695.

Replevin lies for trees cut when the defendant had neither possession, title, nor claim to the land, but was a mere trespasser. *Snyder v. Vaux*, 21 D. 466.

A willful trespasser can not acquire title by altering the form of the property, as by working trees into rails and posts. *Id.*

Replevin lies for trees made into posts and rails by the wrongdoer. *Id.*

An action of replevin is authorized by Iowa code to recover possession of personal property taken by legal process from the owner, when such property is exempt from seizure by such process; and the action may be brought at any time before the property is finally sold by virtue of the process, unless the same issue has been *res judicata* on motion. *Wilson v. Strip*, 61 D. 138.

Replevin may be maintained for goods seized by a sheriff, on an execution against their former owner, on proof that plaintiff had possession of them coupled with an interest; and notwithstanding the legal title and right of possession may have been vested in a third person. *Johnson v. Carnley*, 61 D. 762.

Where a portion of chattels cannot be replevied, because defendants have destroyed, concealed, or sold such portion, the plaintiff may replevy that part of the property that can be found, and maintain a separate action to recover the value of that which had been thus severed, *semble*. *Bennett v. Hood*, 79 D. 705.

Where defendants have replevied property from a third person, and it has been delivered into their possession upon their giving a bond, plaintiff may replevin it out of their hands before the settlement of their suit with the third party, if plaintiff was not a party to that suit, as the property was not in the custody of the law. *Hagan v. Dewell*, 88 D. 769.

Replevin may be maintained by the maker to recover the possession of a promissory note which has been paid. *Savery v. Hays*, 89 D. 511.

One whose property has been replevied by a writ against his agent or his bailee can retake it by replevin from the plaintiff in the first action, even during the pendency of that action. *White v. Dolliver*, 18 R. 502.

9. What property is not repleviable. * — Replevin will not lie for property held by an officer by virtue of an execution. *Spring v. Bourland*, 54 D. 243; *Kellogg v. Churchill*, 9 D. 104; nor for specific chattels in a sheriff's custody under a lawful writ

* Replevin of property levied upon, under execution, see note, 9 D. 106-107.

For Index to Notes in American Decisions and American Reports, see Volume I.

commanding him to seize and hold that identical property. *Griffith v. Smith*, 99 D. 90; nor for goods seized upon a warrant issued by an officer under the patrol law. *Gist v. Cole*, 10 D. 616; nor for goods taken on mesne process. *Smith v. Huntington*, 14 D. 331.

Replevin does not lie for property in the custody of the law, nor can cross-replevin be maintained. *Hagan v. Deuell*, 88 D. 769.

A defendant in replevin can not maintain replevin against the officer executing the first writ, on the ground that the property was not subject to seizure, for as to him the property is in the custody of the law. *Dearmon v. Blackburn*, 60 D. 160.

The principle that goods so taken are in *custodia legis*, and can not be replevied, applies only between the officer and the defendant from whose possession they are taken. *Dunham v. Wyckoff*, 20 D. 695.

It is an abuse of the process of the courts to use writs of replevin to procure the seizure and removal of property in a sheriff's hands under the order of the chancellor, and such writs form no justification or color of excuse for the act. *Biggs v. Garrard*, 44 D. 778.

Replevin does not lie for trees cut on land when the defendant was in possession under a claim of title. *Snyder v. Faux*, 21 D. 466; nor for crops severed by the person in possession of the land under claim of title, either at common law or under a statute enabling the owner of the land to maintain replevin for timber, lumber, coal, or "other property" severed therefrom. *Renick v. Boyd*, 44 R. 124; nor for a specific quantity of mineral ore, until such mineral has been converted from real into personal property by being severed from the earth. *Knowlton v. Outter*, 52 D. 156; nor for articles of dress or personal adornment upon the person of the defendant, without his consent, even though he wears them for the sole purpose of keeping them beyond the reach of legal process. *Mazham v. Day*, 77 D. 409.

A statute of Michigan providing that no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax, assessment, or fine, in pursuance of any law of that state, must be construed as applying only to cases in which a valid tax might, by legal possibility, have been imposed and collected by regular and proper proceeding under some statute authority. *Le Roy v. East Saginaw City R'y*, 100 D. 162.

10. The necessary title or possession of plaintiff. — Replevin can not be maintained unless the plaintiff have, at the time of the taking, either the general or special property in the goods. *Sanford Mfg. Co. v. Wiggins*, 40 D. 198.

A person having neither possession nor

right of possession cannot maintain replevin. *Berthold v. Fox*, 97 D. 243.

It is not sufficient for the plaintiff in replevin to have a clear legal title to the property in controversy, but he must also be entitled to the immediate possession in order to warrant a recovery. *Britt v. Aylatt*, 52 D. 282.

Replevin may be maintained by one having the right of possession, whether he has ever had possession or not, and whether his property in the goods be absolute or qualified. *Harlan v. Harlan*, 53 D. 612.

To maintain replevin, in Missouri, all that is necessary is to show actual possession, or the immediate right thereto in the plaintiff, and that the property was subsequently found in the hands of another without the plaintiff's consent. *Crocker v. Mann*, 26 D. 664.

Replevin for slates taken out of a quarry does not lie by one not in possession of the real estate against one in possession under a claim of right. *Brown v. Caldwell*, 13 D. 660.

A disseisor cannot maintain replevin for wheat which he has planted on the land, against the true owner, who re-enters on the land while the wheat is growing and takes actual and lawful possession of the land and of the wheat. *Hooser v. Hays*, 50 D. 540.

The delivery by an owner of goods, of a common carrier's receipt for them, not negotiable in its nature, as security for an advance of money, with the intention to transfer the property in the goods, is a symbolical delivery of them, and vests in the person making the advance a special property in the goods sufficient to maintain replevin against an officer who afterward attaches them upon a writ against the general owner. *First Nat. Bank v. Dearborn*, 15 R. 92.

Plaintiff leased wheat-land to defendant, defendant agreeing to pay as rent one-half the wheat-crop at the threshing time. When the wheat was threshed defendant delivered only one-third, retaining the remainder. Held, that plaintiff could not replevy the balance of wheat due him under the lease. *Lacy v. Weaver*, 19 R. 683.

II. PROCEDURE.

11. Demand before suit. — A party rightfully in possession of property belonging to another, does not unlawfully detain it, until after a demand by the true owner, and a refusal to deliver the possession. *Galtin v. Bacon*, 25 D. 258; *Sargent v. Sturm*, 83 D. 118.

Where the taking of the property is tortious, no demand is necessary. *Galtin v. Bacon*, 25 D. 258; *Sargent v. Sturm*, 83 D. 118.

Whoever takes the property of another, without his assent, express or implied, or

For Index to Notes in American Decisions and American Reports, see Volume I.

without the assent of some one authorized to act in his behalf, takes it, in law, tortiously. *Galsin v. Bacon*, 25 D. 258.

The possession of property acquired by a person purchasing from a bailee, who has no authority to sell, is tortious, and the owner may maintain replevin therefor without demand or notice. *Ib.*

The owner of property may maintain replevin therefor without previous demand, where the person in charge of the property disposes of it without authority, and notwithstanding the property is in the hands of a *bona fide* purchaser, without notice of the real owner's title. *Trudo v. Anderson*, 81 D. 795.

A demand and refusal to deliver goods need not be proved in order to maintain replevin against one who obtained the goods by fraudulent means, or against his vendee, who purchased with knowledge thereof. *Butters v. Haughwout*, 89 D. 401; nor where the parties had stipulated that the goods should be sold and the proceeds paid over to the one entitled. *Ib.*

Proof of a demand and a refusal in replevin, where defendant came lawfully into possession, is not always necessary; for no demand and refusal are necessary in replevin for property wrongfully detained. *Oleson v. Merrill*, 91 D. 428.

Proof of a demand and notice in replevin for property wrongfully detained is but evidence of a wrongful detention, which is the material fact to be alleged in the complaint. *Ib.*

12. Who may sue. — It is not clear that a part of the defendants in an execution can replevy; but if a party do replevy, they will not be permitted to vacate the bond, on the ground that the other defendants are not obligors in it. *Wilson v. King*, 14 D. 84.

13. Parties defendant. — The owner of property may maintain replevin against a sheriff's vendee, although such action would not lie against the sheriff. *Dodd v. McCraw*, 46 D. 301.

The owner of goods carried by an express company may, after tendering the sum legally due for transportation, and demand and refusal, maintain replevin for the goods against the agent of the company who has them in custody. *Boeleth v. Blossom*, 92 D. 555.

Replevin does not lie against a creditor who has directed an attachment of goods not belonging to the debtor, either alone or jointly with the attaching officer, since the attached goods are in the legal custody and possession of the officer only. *Richardson v. Reed*, 64 D. 77.

Replevin cannot be maintained against a person who has no possession or control of the goods to be replevied. *Ib.*

The doctrine that an action lies against each of several co-trespassers, and that

plaintiff may elect *de melioribus dominis*, does not permit that one, after obtaining a judgment in replevin against one trespasser, may afterwards sue the other for damages, or that he may afterwards maintain a joint action against both. *Bennett v. Hood*, 79 D. 705.

An officer, under a general promise of indemnity, but without direction from the execution creditor to levy upon any specified property, seized chattels in execution under a void judgment. In replevin against the officer and the execution creditor, it appearing that the latter never had possession of the goods, — held, that the action could not be maintained as to him. *Grace v. Mitchell*, 11 R. 613.

14. The affidavit. — The affidavit upon which a writ of replevin issues, if substantially in the language of the statute, is sufficient. *Burton v. Curyen*, 89 D. 350.

15. The bond or undertaking. — Property was levied on by a constable by virtue of an execution in his hands, and was afterward replevied by one claiming title thereto by purchase from the judgment debtor prior to the levy. The plaintiff in replevin gave an undertaking, in all respects according to law. Held, that on executing such undertaking, the right of possession, and all the interest which the constable had acquired by his levy, passed to and became vested in the plaintiff in replevin, even assuming that his alleged purchase was fraudulent and void as against creditors; and such right of possession and interest are paramount to any to be acquired by a subsequent levy, and if a subsequent levy is made, and the officer sells the property, such plaintiff in replevin has a remedy by action of replevin against the purchaser. *Crittenden v. Lingle*, 84 D. 370.

The Indiana code gives an action for recovery of possession of personal property which has been wrongfully taken or is unlawfully detained. The plaintiff need not ask for the immediate possession of the property, but may leave the possession to be determined by the final judgment, in which case the bond and affidavit required where an immediate delivery is claimed need not be filed. *Catterlin v. Mitchell*, 89 D. 501.

16. Custody of the property. — The delivery of the property under a writ of replevin to the plaintiff in an action entitles him, as against the defendant, to the right of possession pending the determination of the suit. *Lowry v. Hall*, 37 D. 495.

The person in possession of personal property may contest the right to it, without a redelivery thereof. *Gray v. Allen*, 45 D. 523.

In replevin the officer may take the property described in the writ from the possession of a stranger to whom it belongs, and he is justified by his writ; but the party in

For Index to Notes in American Decisions and American Reports, see Volume I.

whose behalf the writ issued is answerable for the wrong done. *Shipman v. Clark*, 47 D. 264.

The execution of a replevin bond gives the right of possession to the defendant in a suit for certain premises in which a writ of sequestration has issued. *Linard v. Crossland*, 60 D. 213.

By the English law, if the defendant in replevin claims property in the goods or chattels described in the writ, the officer cannot lawfully deliver them to the plaintiff until the question of property has been determined in his favor on a writ of *de proprietate probanda*, sued out by him. In Massachusetts, the question of property is to be tried in the replevin suit. *Willard v. Kimball*, 87 D. 632.

Trespass is maintainable under the English law, against an officer serving a writ of replevin and delivering goods and chattels to the plaintiff, where the defendant in replevin claims property in them, and the plaintiff has sued out his right of *de proprietate probanda*. *Ib.*

When property is taken by plaintiff in replevin, and while in his possession pending the proceedings, it dies or is destroyed without his fault, he is not liable to defendant for its value in case of a verdict in favor of defendant. *Bobo v. Patton*, 19 R. 593.

17. Claim of property by third person. — After a claim of property interposed in replevin, the sheriff cannot remove the property even for safe keeping, or dispossess the defendant until such claim is tried. *Lieher v. Pierson*, 20 D. 612.

A writ *de proprietate probanda* is an inquest of office, and is always issued by the plaintiff upon a return of a claim of property, and the defendant cannot hasten his proceedings. *Ib.*

Property found for the claimant does not conclude the plaintiff, but he may sue out a new writ of replevin. *Ib.*

If the defendant remove or secrete the goods before the claim is tried, the plaintiff may have a *capias in withernam* and take other goods of the defendant in lieu thereof, which cannot be replevied until the original distress is returned. *Ib.*

In an action of trespass for taking away goods, where the defendant justifies the taking as sheriff, under a writ of replevin, and the plaintiff replies that the taking was after a claim of property by him, he must state precisely the time of making the claim. *Ib.*

The averment of a claim "at the said time," etc., referring to the time mentioned in the declaration, is bad on special demurrer. *Ib.*

The party whose goods are taken on a writ of replevin, in an action to which he is a stranger, has a remedy by action to recover for the goods taken. *Shipman v. Clark*, 47 D. 264.

An action cannot be maintained by the owner of goods against a sheriff, or his deputy personally, for taking such goods under a writ of replevin against another person having them in possession. *Willard v. Kimball*, 87 D. 632.

The failure of plaintiff in a replevin suit to maintain his action will not render the officer who served the writ liable in damages to the defendant, or to any other person who may have a claim to the replevied property. *Ib.*

The statute giving a third person a right to contest the title to property replevied before sheriff and jury does not prevent the party from resorting to any other remedy which the law gives him. The statutory remedy is not exclusive. *Hagan v. Duell*, 88 D. 769.

18. The writ. — Writs of replevin, in this state, issue out of the circuit court, as other writs do, and are there returnable; and the suit is docketed, proceeded in, set down for trial, and tried, agreeably to the laws and practice of the court, as other actions are. *Daggett v. Robins*, 21 D. 752.

To the regularity of the writ of replevin it is not essential that the bond should be fully certified thereon, or that it should disclose an impounding and distraining. *Watson v. Watson*, 23 D. 324.

A writ of replevin should contain such a description of the goods, on its face, as would enable the sheriff, with reasonable certainty, to distinguish them from other property of a like nature; and it should state not only the township in which the property was alleged to have been detained, but the particular place in the township, when the description of the place is necessary to identify and describe the property to be replevied. *Stevens v. Osman*, 48 D. 696.

A defect in a writ of replevin must be taken advantage of by special demurrer, as the description would be held sufficient after verdict; it would also be deemed sufficient if the defendant had avowed or pleaded property in himself, as there would then be no controversy between the parties as to what the goods were. *Ib.*

The value of the goods replevied need not be alleged in writ or declaration under the English law. *Pomeroy v. Trimmer*, 85 D. 714.

The value of the goods to be replevied need not be alleged in writ of replevin directed to a deputy sheriff. Such is the construction of the statutes of Massachusetts, and the law is understood to be the same in Maine. *Ib.*

Plaintiff's allegation of value in a writ of replevin to be served by a sheriff or his deputy has, when made, been held admissible against him in evidence of the value, but not to be conclusive evidence of the value of the property, even on the question of the juria-

For Index to Notes in American Decisions and American Reports, see Volume I.

diction of the court; and it is not in any way binding on the defendant. *Id.*

The value of goods to be replevied ought, perhaps, to be alleged in a writ of replevin where it is served by a constable, because his authority to serve it is limited to cases in which the sheriff or his deputy is a party and the property does not exceed a certain value; and because his authority in specific cases must appear on the face of the writ. *Id.*

Describing an animal in a writ of replevin as a "heifer" and in certificate of appraisal as "a cow," is no ground for dismissing the writ, particularly where the description in the appraisal directly refers to the writ, and clearly identifies the animals replevied. *Id.*

Although an alias writ of replevin is unauthorized and invalid, yet where the plaintiff recovers judgment, and the subsequent proceedings up to the judgment must be sustained as in all respects in accordance with the statute, and the judgment is the same which would have been rendered had no alias writ issued, the defendant cannot complain. *Mason v. Perrott*, 97 D. 191.

19. Declaration. — The declaration in replevin must assert property in the plaintiff, either general or special, and an allegation that he was "entitled to the possession" is not enough. *Pattison v. Adams*, 42 D. 59.

The declaration in replevin must allege that goods taken are plaintiff's property, and that they were taken out of his possession. *Luther v. Arnold*, 62 D. 422.

In actions for a tort it is not in general sufficient to allege that the defendant injured or took divers goods and chattels of the plaintiff without giving a description of them; and this more particularly is necessary in replevin and detinue, for the reason that it is only in these forms of action that the goods themselves can be recovered. *Stevens v. Osman*, 48 D. 696.

The right of plaintiff to recover in replevin for one hundred bushels of wheat, which were measured out from a quantity in possession of the defendant, is not affected by the fact that he did not bring the suit for the whole, although the evidence showed that all the wheat belonged to him, and that he did not own as a tenant in common with others. *Crouse v. Derbyshire*, 82 D. 51.

The court will not presume in replevin that defendant came lawfully into possession, because it is not averred that he did so unlawfully, especially as against averments of title in the plaintiff and an unlawful detention by the defendant, all admitted by demurrer. *Oleson v. Merrill*, 91 D. 428.

20. Complaint. * — Place does not become material by being alleged in the com-

plaint in an action of replevin, but may be stricken out as surplusage. *Crocker v. Mann*, 26 D. 684.

Replevin was commenced at common law by an original writ issued out of the court of chancery, and issued only at Westminster; and to remove the inconvenience of procuring the writ when required in a distant part of the kingdom, the statute of Marlbridge was passed, which dispensed with the original writ, and substituted a proceeding, upon a complaint made to the sheriff, which was called a "proceeding by plaint." *Anderson v. Hapler*, 85 D. 318.

"Plaint," in Illinois statute providing that replevin be commenced by plaint, has the same meaning that it had under the statute of Marlbridge, and signifies a complaint that the goods or chattels were wrongfully taken or are wrongfully detained, which is made by means of the affidavit required by the statute. *Id.*

A complaint, in an action under the code, to recover possession of personal property is sufficient, without any allegation of demand and refusal, where it merely alleges that the same is the property of the plaintiff, and that the defendant has become possessed of and wrongfully detains it. *Oleson v. Merrill*, 91 D. 428.

Under the allegation that defendant "wrongfully detains," plaintiff may prove, in an action under the code to recover possession of personal property, either a wrongful taking, a demand and refusal, or facts which render a demand necessary where the original taking was lawful. Proof of any facts showing that the property was wrongfully detained at the time of the commencement of the action will satisfy the allegation of the complaint, and entitle the plaintiff to recover. *Id.*

A description of property in the complaint in replevin as "one white shoat of the value of fourteen dollars," is sufficiently explicit. *Onstott v. Ream*, 95 D. 695.

21. Matters of defense. — Property in a stranger is pleadable in replevin. *Marsh v. Pier*, 26 D. 131.

A trespasser sowing wheat on land can not maintain replevin against the true owner, who enters into actual possession and cuts the grain. Therefore, in replevin brought for cutting grain sown by the plaintiff on land in his possession, evidence is admissible on the part of the defendant to show that he was the real owner of the land, and as such entered into possession and took the crop; and that the plaintiff was merely a trespasser. *Elliott v. Powell*, 36 D. 200.

A defendant in an action of replevin in this state may avail himself of a delivery to him of the same property pursuant to a writ of replevin issued out of a court of competent jurisdiction of another state, previously, while the parties to the action and

* Sufficiency of the description of the property in complaint, see note, 48 D. 696-699.

For Index to Notes in American Decisions and American Reports, see Volume I.

the property in dispute were within the jurisdiction and subject to the law of the place of delivery. *Lovry v. Hall*, 37 D. 495.

A ministerial officer cannot defend under process fair upon its face alone, where the object of the action to which he is defendant, is, as in replevin, but to recover possession of the goods seized under the process: he must, in all such cases, in addition to the process, show by the production of a valid judgment, that the court which issued it had authority to do so. *Beach v. Botsford*, 40 D. 45.

Where a manufacturing corporation assigned its property to one of its creditors (who was also a stockholder, and whose individual property was liable to execution against the corporation), upon condition that he apply it toward the payment of his claim, and pay back any surplus to the corporation, if such property is seized under execution against the corporation as its property, in a suit by another creditor, and the former creditor and stockholder brings an action of replevin against the attaching officer, the latter cannot raise the question whether the property, although belonging to such creditor and stockholder, could be attached for the debt of the corporation, it having been seized as the property of the corporation. *Sargent v. Webster*, 46 D. 743.

The objection to the sufficiency of a plaint in replevin should be urged by motion to quash, and comes too late on the trial. *Brown v. Keller*, 83 D. 258.

That property is in the possession of a United States Marshal by virtue of process of a United States court, is an impregnable defense to an action of replevin for the same property in a state court. *Booth v. Ableman*, 84 D. 711.

A defendant in replevin who prevents an officer from delivering property replevied to plaintiff by attaching it upon a writ in his own favor, cannot object to the prosecution of the replevin on the ground of such non-delivery. *Pomeroy v. Trimmer*, 85 D. 714.

Where the plaintiff, in a writ of replevin, has caused the officer, to whom the writ was committed, to bring an action against the defendant and another officer for taking the replevied property out of his hands by writ of attachment, before its delivery to the plaintiff, such suit is between different parties and for a different cause, is no bar to the replevin suit, and is no ground for dismissing it. *Id.*

Where the plaintiff in a replevin suit has begun an action as executor against the defendant and his officer, for the conversion of the replevied property, and it fails to appear that the conversion relied upon is the same act for which the replevin is brought, it cannot affect the replevin suit. *Id.*

An action to recover the possession of personal property may be defeated by a

showing that during the pendency of the action, and before a trial thereof, the defendant has been required to deliver, and has delivered, the property to a third person, entitled to its possession as against both plaintiff and defendant. *Bolander v. Gentry*, 95 D. 162.

22. Plea or answer. — The general issue in replevin admits the right of property to be in the plaintiff. *Harper v. Baker*, 16 D. 112.

Under the general plea of property without further special plea, evidence of a delivery to a defendant in an action of replevin, of the same property in a prior undetermined action in another state, may be received. *Lovry v. Hall*, 37 D. 495.

The general issue in an action of replevin is simply a denial of the taking, and admits the plaintiff's property in the thing taken. *Sanford Mfg. Co. v. Wiggin*, 40 D. 198.

Where an answer in replevin does not deny the value of the property alleged in the complaint evidence as to its value should not be admitted. *Tully v. Harloe*, 95 D. 102.

23. Plea in abatement. — The remedy where property in *custodia legis* has been replevied is not a motion to quash, especially where the writ has not been returned. The defense should interpose a plea in abatement or in bar. *Hagan v. Deuell*, 88 D. 769.

24. *Non cepit*. — The plaintiff in replevin must show an unlawful taking or detention to support the issue on his part under a plea of *non cepit*. *Simpson v. McFarland*, 29 D. 602.

Non cepit and property in another may be pleaded together in replevin. *Id.*

The plea of *non cepit* in replevin admits property in plaintiff, and takes issue on the caption and detention only. *Mackinley v. McGregor*, 31 D. 522.

25. *Avowry*. — The general issue and notice in replevin under the Massachusetts statute of 1836, c. 273, are equivalent to a common law avowry, or plea of property in another, with a suggestion of a return. *Hoffman v. Noble*, 39 D. 711.

26. Evidence, generally. — The defendant in replevin, under a plea of property in a stranger, may prove that a sale by such stranger, under which the plaintiff claims, was fraudulent. *Quincy v. Hall*, 11 D. 198.

Evidence that the property was taken by force, may be given in an action of replevin, to enhance the damages, although issue is joined on the question of ownership. *Moore v. Shenk*, 45 D. 618.

The plaintiff in replevin may prove, in mitigation, as the defendant in trespass may, a return of the property, or a part of it, to the defendant after the suit was commenced and before judgment. *Booth v. Ableman*, 88 D. 730.

For Index to Notes in American Decisions and American Reports, see Volume I.

In mitigation of damages, payments on a judgment under which the officer had seized goods on execution, though made after the commencement of a replevin suit against the officer to recover the same, should be admitted in evidence for the plaintiff in that suit. But it seems that the plaintiff ought not to be allowed to prove the payment of the judgment after the suit was commenced, in bar of the defendant's right of recovery. *Id.*

A plaintiff in replevin who has obtained possession of the property under the statute, and against whom the defendant seeks judgment for a return of it, or the value in case a return cannot be had, may show that the value is less than that alleged in the complaint, although the answer does not deny such alleged value. *Jenkins v. Steenka*, 88 D. 675.

Evidence as to the kind or quality of lumber in dispute is admissible for plaintiff in replevin as a means of showing its value, and also as bearing upon the question of ownership, where there is a contest over lumber from two different mills, and there is a great difference in the quality. *Id.*

The receipt by a bailee, acknowledging the ownership of a general owner in property bailed, is admissible as part of the *res gesta*, in an action of replevin brought by the latter for the property after the bailee has wrongfully transferred it to another. *Burton v. Curyea*, 89 D. 350.

27. Burden of proof. — The onus of proof is not thrown on defendant by a plea of property in replevin, and therefore he is not entitled to commence and conclude the argument. *Marsh v. Pier*, 26 D. 131; *Turner v. Cool*, 85 D. 449.

The plaintiff in replevin, to recover, must prove that he was entitled to the possession of the property in controversy at the commencement of the action. *Alden v. Carver*, 81 D. 430.

The burden of proof is upon defendant to prove the amount before he can have judgment in replevin for the value of the property and damages for its detention, where his answer in the replevin suit alleges that he holds the goods as marshal or sheriff under an execution, etc., but does not show the amount of the execution. *Booth v. Ableman*, 88 D. 730.

28. Trying question of title. * — Title to realty may be tried, incidentally, in replevin or other transitory action. *Elliot v. Powell*, 36 D. 200; *Harlan v. Harlan*, 53 D. 612.

Where in an action of replevin the issue made is the question, in general terms, of the claimant's right of property in the goods, and the only pleading before the court at that time is the claimant's answer, in which

he does not plead his title or inform the opposing party or court on what title he intends to rely to maintain his claim to the property, but afterwards relies on a trust deed for that purpose, the opposing party must be allowed to impeach the validity of such deed. *Linn v. Wright*, 70 D. 282.

After the conveyance of land on which was a growing crop, the crop was taken under an execution against the grantor. In an action of replevin by the grantee against the sheriff, — *held*, that the latter might show that the conveyance was made to defraud the grantor's creditors. *Pierce v. Hill*, 24 R. 541.

29. Instructions. — Evidence of ownership in replevin, being a disputed fact, is for the jury, and the court cannot instruct them that the evidence shows title in one of the parties. *McDonald v. Scaife*, 51 D. 556.

An instruction, "if you believe from the evidence that the property in question was plaintiff's, you must find the defendant guilty," given to the jury in an action of replevin, is technically erroneous in not embracing proof of a demand; but where the record shows clear proof of demand before suit, and the evidence sustains the verdict, the appellate court will not reverse the judgment. *Jarrard v. Harper*, 92 D. 84.

30. The verdict of finding. — The jury is authorized to assess the value of property in all cases, under sect. 11, chapter 132, Wisconsin Revised Statutes, where they find that the defendant in replevin is entitled to a return, whether he waives it or not. *Farmers' L. & T. Co. v. Commercial Bank*, 82 D. 689.

The verdict in replevin, "we, the jury, find the defendant guilty," is not precisely right; but the finding is equivalent to a finding of property in the plaintiff in a case where the proceedings were *ore tenus*. *Jarrard v. Harper*, 92 D. 84.

A verdict for the plaintiff in replevin transfers title to defendant, it seems, on a plea of property and retention by the defendant. *Herdic v. Young*, 93 D. 739.

31. Recovery of value of property sued for. — The jury are to assess the full value of goods in replevin where the pleadings and evidence show that the party recovering is the general owner, or is a bailee, and connects himself with the general owner. *Booth v. Ableman*, 88 D. 730.

The jury are to find only the value of the party's interest who recovers in replevin if the pleadings and evidence show that he has only a special interest in the property, and that the general property is in the other party. *Id.*

Where property is replevied from a sheriff or marshal who holds it under execution, and who has only the execution creditor's interest in it, the value of the officer's interest is the amount of the execution, with in-

* Raising question of title to land in replevin, see note, 89 D. 429-432.

REPLEVIN, II.

For Index to Notes in American Decisions and American Reports, see Volume I.

terest and costs thereon; and should he recover, the amount of his recovery will be limited to this amount, where the value of the property is greater than the amount of the execution. *Id.*

32. Recovery of damages in lieu of possession.—In an action of replevin the jury may give such damages as they think the plaintiff is justly entitled to, as an equivalent for the injury sustained. *Dorsey v. Gassaway*, 3 D. 557.

The measure of defendant's damages in action of replevin, in the absence of evidence of fraud, malice, negligence, or oppression, is the value of the property at the time it was replevied by the plaintiff, with interest to the time of the trial. *Berthold v. Fox*, 97 D. 243; *McDonald v. Scaife*, 51 D. 556.

Damages, where the property levied upon is replevied from the sheriff, and the verdict is for the defendant, will be the amount of the execution, with interest and costs, if the value of the property exceed such amount; and if it be less, the damages will be for the full value of the property. *Jennings v. Johnson*, 49 D. 451; *Swcliffe v. Dohrman*, 51 D. 450.

The measure of damages in replevin may be less than the value of the property in a proper case, as it may go beyond the value to compensate for injustice and outrage. *Herdie v. Young*, 93 D. 739.

The measure of damages in replevin for logs cut from an adjoining tract through a *bona fide* mistake as to the boundary line, and transported to a boom, is the value of the logs at the boom, less the cost of cutting, hauling, and driving them there. *Id.*

In replevin of property having a usable value (as a horse) the value of its use, during the time of detention, is a proper item of damages. *Allen v. Fox*, 10 R. 641.

Where the defendant in replevin puts it out of officer's power to execute the writ and deliver the property to the plaintiff, the plaintiff may proceed in the cause, and recover damages for the full value of the property as well as for the detention. *Pomeroy v. Trimmer*, 85 D. 714.

Replevin sounds in damages as trespass; and, it seems, exemplary damages may be given where there has been outrage in the taking, or vexation and oppression in the detention. *Herdie v. Young*, 93 D. 739; *McDonald v. Scaife*, 51 D. 556.

33. When defendant is entitled to a return of property replevied.—In replevin by a mortgagee against a mortgagor of chattels, where the mortgage was not recorded in the proper county, and the goods have been attached by a creditor of the mortgagor, the defendant, upon a judgment of non-suit, because no wrongful taking or detention was shown, cannot have a return

of the property awarded, he not being entitled to the possession against the mortgagee, nor liable to the attaching officer. *Simpson v. McFarland*, 29 D. 602.

A defendant cannot have judgment for a return of the property where he prevails under a plea of *non cap* in replevin, but he may have a return awarded where he pleads property in himself or another. *Id.*

The consignee of goods is entitled to a judgment for their return in replevin brought against him by one who claims that they were obtained from him by the consignor by a fraudulent purchase, where such consignee has made advances in good faith, without notice, on the credit of the goods, and a verdict is accordingly returned in his favor, although he has, since the trial commenced, collected the amount of an acceptance belonging to an agent of the consignor deposited with him, by such agent, as collateral security for the same advances, until the arrival and approval of the goods, under an agreement with the agent that if the consignee is not satisfied with the goods on arrival he may require the agent to pay him his advances and commissions and take back the goods and acceptance. *Hoffman v. Noble*, 39 D. 711.

Where the writ commanding an officer to replevy a certain number of barrels of mackerel is, with the assent of the defendant, executed by taking in part two half-barrels as equivalent to one barrel, the defendant cannot claim a return thereof on the ground that the officer seized property not described in his writ. *Gardaer v. Lane*, 85 D. 779.

One co-tenant cannot maintain replevin against the other for the common property. And where he brings such action against his co-tenant, and fails on that ground, the defendant is entitled to a judgment for the return of the property. *Witham v. Witham*, 99 D. 787.

34. The judgment and how entered.—A general judgment for damages in replevin said to be good without otherwise specifying the value of the property sued for. *Marsh v. Pier*, 26 D. 131.

Under the Texas statute, in order to render judgment in an action of replevin, it is essential that the value of the property should be ascertained, and the sheriff is required to assess its value when taking the bond required of the claimant. This estimate may be acquiesced in by the parties to the suit, and taken as the true value for the purpose of rendition and enforcement of judgment, but it has never been held that the estimate of value thus made was conclusive upon the parties. *Lean v. Wright*, 70 D. 282.

The judgment in replevin against one or two joint takers for a portion of chattels taken and nominal damages, under which all the property is recovered, some of it,

* Damages, what may be recovered as, see note, 22 R. 284-287.

For Index to Notes in American Decisions and American Reports, see Volume I.

however, in a damaged condition, is a bar to a subsequent action against both takers for further damages for the taking and detention. *Bennett v. Hood*, 79 D. 706.

The defendant in replevin may waive the return of property and take judgment for its value alone, in Wisconsin, where the plaintiff has obtained possession of the property, and the jury find the defendant entitled to possession. *Farmers' L. & T. Co. v. Commercial Bank*, 82 D. 689.

35 — and how enforced. — An execution issued to enforce a judgment for the return of property in replevin, or its value, may not be resisted upon the ground that the property has been destroyed by the act of God. *De Thomas v. Witherby*, 44 R. 542.

36. Suing out second writ after judgment. — After a judgment in replevin against a defendant, he cannot sue out another writ of replevin to prevent execution against himself, and to procure a restoration of the property to himself; and if such second writ is issued, the court will, on application, supersede the writ if it be not returned, or set it aside as irregularly issued if it is returned. *Tison v. Bowden*, 71 D. 101.

III. REMEDIES UPON REPLEVIN BONDS.

37. Validity of the instrument. — A plaintiff in an action of replevin, when he succeeds on the issue of property, recovers the whole in damages, and a condition in a bond given by the defendant, to return the property to the plaintiff if it should be so adjudged, is void. *Moore v. Shank*, 45 D. 618.

Defendants executed a bond for the purpose of procuring a writ of replevin, which bond a justice of the peace approved and thereupon issued a writ of replevin for certain property in plaintiff's possession, and which he claimed to own. The property was taken under the writ. The value of the property exceeded the amount for which the justice of the peace had jurisdiction, and on the hearing of the cause the justice dismissed the proceedings on that ground, and directed a return of the property to the plaintiff. The defendants' refusing to return the property, this action was brought upon the bond. *Held*, that the justice, not having jurisdiction of the subject-matter, the bond was void and no action could be maintained thereon, and that the defendants were not estopped by the recitals in the bond. *Caffrey v. Dudgeon*, 10 R. 126.

38. Right to proceed upon the bond. — An execution is not an execution upon a judgment in replevin, so that upon its return unsatisfied an action upon the replevin bond can be maintained, where after judgment for the defendant in replevin for the value of the property, the execution is issued in form *in assumpsit*, and purporting to be issued in

favor of a plaintiff. *Williams v. Vail*, 80 D. 76.

39. Matters of defense. — Giving a bond conditioned to return the property replevied will preclude defendant from asserting that less property was replevied than is described in the bond. *Kearles v. Lord*, 34 D. 525.

40. Amount recoverable. — The measure of damages in an action on a replevin bond is the amount of judgment recovered in the replevin suit, when a return of the property is waived and a judgment for its value obtained, in accordance with the statute; and the damages cannot be reduced by showing that the plaintiff in the action on the bond was but a part owner of the property. *Williams v. Vail*, 80 D. 76.

A judgment in an action against the sureties on a replevin bond cannot be given for more than the penalty and costs. Interest is not recoverable. *Fraser v. Little*, 87 D. 741.

REPLICATION.

In actions at law, generally, see PLEADING, 49-53.

In equity pleading, see PLEADING, 89, 90.

Necessity and sufficiency of, under codes, see PLEADING, 130, 131.

Necessity of, to counter claim, see SET-OFF, etc., 39.

REPORTS.

Duty of corporations to make, annually see CORPORATIONS, 148.

Of auditors, see AUDITORS, 1, 2.

Of commissioners in partition, see PARTITION, 21.

Of commissioners in proceedings to sell infants' lands, see INFANTS, 11.

Of referees, review of, see REFERENCE, 9-11.

Of surveyors, as evidence, see EVIDENCE, 225.

REPRESENTATIONS.

As estoppels in pais, see ESTOPPEL, 42.

By vendor, on sale of land, see VENDOR AND PURCHASER, 18.

Distinguished from WARRANTIES, see INSURANCE, 13.

In fire policy, see INSURANCE, 49, 50.

In life insurance, see INSURANCE, 70.

In marine insurance, see INSURANCE, 116-119.

Measure of damages for fraudulent, see DAMAGES, 34.

Of agent, when bind principal, see AGENCY, 82.

Of maker of note, to purchaser, see BILLS AND NOTES, 144.

When fraudulent, see FRAUD, 2-5.

REPRESENTATIVES.

Competency of parties in actions by or against, see WITNESSES, 27.

See EXECUTORS AND ADMINISTRATORS.

For Index to Notes in American Decisions and American Reports, see Volume I.

REPRIEVES.

Effect of, see PARDON, 10.

REPUBLICATION.

Of wills, see WILLS, 21.

REFUGNANCY.

Effect of, in statutes, see STATUTES, 64.

Effect of, in wills, see WILLS, 74.

In verdict, effect of, see TRIAL, 106.

Setting aside verdict for, see NEW TRIAL, 28.

Striking out allegations for, see PLEADING, 184.

REPUTATION.

Of house or inmates charged to be disorderly, see DISORDERLY HOUSES, 7.

Proof of marriage by, see MARRIAGE AND DIVORCE, 16.

When admissible as evidence, see EVIDENCE, 64.

RE-SALE.

By seller of goods, upon buyer's default, see SALES, 112.

Of land, for non-payment of price, see VENDOR AND PURCHASER, 60.

On execution, for failure to fulfill purchase, see EXECUTION, 111.

When proper, see JUDICIAL SALE, 21.

RESCISSIION.

Jurisdiction of equity to grant, see EQUITY, 41.

Of auction sale, see AUCTION, 16.

Of contracts, see CONTRACTS, VIII.

Of contracts for sale of chattels, see SALES, 106-112.

Of contracts for sale of land, see VENDOR AND PURCHASER, 74-80.

RESERVATIONS.

By assignor for creditors, see ASSIGNMENTS, etc., 21, 22.

In deeds, see DEEDS, 90.

In grants, see GRANTS, 12.

In leases, see LEASES, 10.

RES GESTÆ.

What admissible as, generally, see EVIDENCE, 71-74.

On trials for murder, see HOMICIDE, 22.

RESIDENCE.

Defined, see DOMICILE, 2.

Change of, see DOMICILE, 6.

Demand of payment at place of, see BILLS AND NOTES, 175.

Jurisdiction as dependent on, see EQUITY, 24.

Necessity of, to constitute adverse holding, see ADVERSE POSSESSION, 10-12.

Of corporations, see CORPORATIONS, 9.

Of foreign corporation, see CORPORATIONS, 184.

Provisions in life policy respecting, see INSURANCE, 77.

Questions of, in divorce cases, see MARRIAGE AND DIVORCE, 51.

RESIDUARY CLAUSE.

Operation and effect of, see WILLS, 83-87.

RESIDUARY LEGATEES.

Rights of, see LEGACIES, 17.

RESIDUUM.

Right of advanced child to share in, see ADVANCEMENT, 10.

What is a part of, see WILLS, 83-85.

RESIGNATION.

Of corporate officers, see CORPORATIONS, 144.

Of guardians, see GUARDIAN AND WARD, 9.

Of officers, generally, see OFFICERS, 16.

Of personal representatives, see EXECUTORS AND ADMINISTRATORS, 27.

Of trustees, see TRUSTS, 52.

RESISTING OFFICERS.

Right to resist wrongful arrest, see ARREST, 23.

1. Jurisdiction. — An assault on and resistance to an officer acting in the execution of his powers as such, is an offense indictable at common law. *State v. Downer*, 30 D. 482.

An offender may be proceeded against as at common law, though a statute has superadded to the offense a higher penalty. *Id.*

2. What constitutes the offense. — No one is justified in resisting an officer acting under process that he is legally authorized to obey. *State v. McNally*, 56 D. 650.

3. Indictment. — An indictment for impeding an officer in his execution of civil process must show the nature of the process, so far that the court may see whether it was legal, and that the officer had authority to serve it, and the mode of resistance should be set out, as also that in which the process was attempted to be executed, and it must also appear from it that the persons impeding the officer knew of the character in which he acted. *State v. Downer*, 30 D. 482.

An indictment for knowingly and wilfully resisting an officer need not aver that the officer informed defendant at the time that he acted under the authority of a warrant. It is not necessary that the indictment should set forth the acts of the officer at length, or show that in making the arrest he complied in all respects with the requisites of the statute. *State v. Freeman*, 74 D. 317.

The time of the commission of the offense of resisting an officer in the execution of legal process is immaterial, and need not be proved as laid in an indictment; and where it is alleged under a *videâcet*, it is nugatory, and not traversable, and if repugnant to the

For Index to Notes in American Decisions and American Reports, see Volume I.

fact, it does not vitiate the indictment, but the evidence itself may be rejected as surplusage. *Id.*

4. **Matters of defense.**—An officer seizing under attachment property not that of the defendant, cannot lawfully resisted by the real owner, if he had at the time reasonable cause to believe the property to be that of the defendant in the attachment suit; and did, under such belief, attempt the seizure in good faith. *State v. Downer*, 30 D. 482.

An officer is protected in the service of process, and a person resisting him is liable, notwithstanding errors or irregularities in issuing the process, where it is regular and legal in its frame, and appears to have been issued by a magistrate having jurisdiction of the subject-matter and of the person of the respondent. *State v. Weed*, 53 D. 188.

An officer is not to be governed by motives and designs of complainant, in executing criminal process regular and legal upon its face, and he will be protected, although the complainant's objects are illegal, and so known to be by the officer. *Id.*

An officer is presumed, in serving writ, to have discharged his duty, and if a party who resists an officer relies on the fact that he omitted to declare the authority under which he acted, that is a proper matter of defense. *State v. Freeman*, 74 D. 317.

The owner of personal property has no right to resist an officer who attempts in good faith to attach it upon process against a third person, although such resistance be necessary to protect the property from being taken by the officer. *State v. Richardson*, 75 D. 173.

It is no defense to an indictment for resisting an officer in serving a writ of attachment that the property did not belong to the individual against whom the process was issued, but to the defendant, who made only sufficient resistance to prevent his property from being taken into the officer's custody. *Id.*

The unlawful omission of an officer to make a subsequent complaint against a person, whom he has lawfully arrested without a warrant, is no defense to an indictment of the person for assaulting the officer in resisting the arrest. *Com. v. Tobin*, 11 R. 375.

RESTITUTION.

Of possession, to ousted party, see **FORCIBLE ENTRY**, 14.

On reversal, see **APPEAL**, 123, 129; **ERROR**, 29.

Writ of, see **EJECTMENT**, 49.

RESTRAINT OF TRADE.

Bonds when void as in, see **BONDS**, 17.

Covenants in, see **COVENANTS**, 11.

Illegality of contracts in, see **CONTRACTS**, 106-110.

RESTRICTIONS.

In deeds, see **DEEDS**, 91.

In fire policy, see **INSURANCE**, 46.

In grants, see **GRANTS**, 13.

In leases, see **LEASES**, 11.

On marriage, statutes imposing, see **MARRIAGE AND DIVORCE**, 2.

On right to vote, see **ELECTIONS**, 2, 3.

On subsequent marriage, in decree of divorce, see **MARRIAGE AND DIVORCE**, 75.

RESULTING TRUSTS.

When arise, see **TRUSTS**, 14-16.

RE-TAXATION.

Of costs, see **COSTS**, 19.

RETIREMENT.

Of jury, to consider verdict, see **TRIAL**, 133-137.

RETIRING PARTNER.

Rights and duties of, see **PARTNERSHIP**, 91.

RETRAXIT.

Effect of, and how interposed, see **PLEADING**, 40.

Effect of judgment upon, see **JUDGMENT**, 41.

RETROSPECTIVE LAWS.

Constitutionality of, see **STATUTES**, 12.

Interpretation of, see **STATUTES**, 50.

Operation of retrospective limitation laws, see **LIMITATIONS OF ACTIONS**, 4.

RETURN.

Liability for failure to make, see **SHERIFFS**, 22.

Of attachment, see **ATTACHMENT**, 64-67, 72.

Of bill, by governor, without approval, see **STATUTES**, 4.

Of elections, see **ELECTIONS**, 12.

Of execution against the person, see **EXECUTION**, 167.

Of execution against property, see **EXECUTION**, 121-126.

Of officer, as to service of process, see **PROCESS**, 16-18.

Of sheriff, form and conclusiveness of, see **SHERIFFS**, 14, 15.

On *sci. fa.*, see **SCIRE FACIAS**, 5.

To certiorari, see **CERTIORARI**, 9.

To commission to take deposition, see **DEPOSITIONS**, 17.

To defendant, of property replevied, see **REPLEVIN**, 33.

To mandamus, see **MANDAMUS**, 27-29.

REVENUE.

[Includes state court decisions relative to the collection of duties on imports, and the administration and operation of the internal revenue laws.]

I. DUTIES ON IMPORTS.

II. INTERNAL REVENUE.

For Index to Notes in American Decisions and American Reports, see Volume I.

I. DUTIES ON IMPORTS.

1. Collection of. — Giving of additional securities for payment of duties does not relieve the importer from his personal liability; nor will the unauthorized and illegal removal of the goods from the custody of the custom house officers discharge him. *United States v. Murdock*, 89 D. 651.

2. Actions to recover of purchaser, sum paid for duties. — The act of Congress of 1864, chapter 163, section 94, which authorizes persons who before its enactment had made contracts without other provision therein for the payment of duties subsequently imposed on articles to be delivered under them, to recover from the purchaser a sum equivalent to the duties so imposed if the same had not been previously paid by him, is constitutional; and such sum may be sued for and recovered in either a federal or state court. *Amnidown v. Freeland*, 3 R. 359.

3. — to recover back duties paid under protest. — Where a collector levied a tonnage duty illegally, and the same was paid compulsorily, — *held*, he was liable to refund the amount, notwithstanding he had paid over the money to the government, and no notice was given him not to pay over the money so collected. *Ripley v. Gelston*, 6 D. 271.

II. INTERNAL REVENUE.

4. Officers of internal revenue. — A collector of an internal revenue district, under the act of Congress of July 1, 1862, is the recognized agent of the government, and is responsible to the government and to individuals for all money collected and all acts done by his deputy collectors, who are the agents of the collector, and are responsible to him, and not to the government or individuals, and he may or may not, as he pleases, take security from the deputies for the faithful discharge of their duties. *Pickering v. Day*, 95 D. 291.

5. Official bonds, and liability of sureties. — The bond of a deputy collector of internal revenue, executed before the passage of the internal revenue act of June 30, 1864, covered all taxes assessed and collected under the previous act of July 1, 1862, whether the same were collected before or after the act of June 30, 1864; and whether it extended to taxes collected under the latter act is a question not material in this case as between the sureties and the obligee of the bond, since the sureties on this bond, and those on a bond executed after the passage of the latter act, have themselves settled the matter of the appropriation of the payments to be made, by their indorsements on the bonds of the sums agreed upon, and have provided, by their concurrent agreement, for the final adjustment of their respective liabilities upon them. *Pickering v. Day*, 95 D. 291.

Sureties on the bond of a deputy collector of internal revenue are not relieved from liability because of the collector's failure to discharge him immediately upon the discovery of his defalcation, especially where the sureties suffered no detriment by his continuance in office. Nothing less than fraud, actual or constructive, on the part of the collector could relieve them from their responsibility. *Id.*

It is fraud on the sureties of a deputy collector of internal revenue, and they are discharged from liability, if the collector consents to his using the public money in his private business of buying and speculating in grain, wherefrom a defalcation on his part results. *Id.*

The offices of collector and deputy collector of internal revenue, as created by the act of Congress of July 1, 1862, are continued under the act of June 30, 1864, by virtue of the saving clauses of that act, which exclude from the operation of the repealing clause the provisions of the former statute creating the offices; and the bonds given by such officers in qualifying under the former act are continued in full force and effect under the latter act, and it was not necessary for either of them to give a new bond after the passage of the latter act. *Id.*

The giving of a bond by a collector of internal revenue is not a condition precedent to his authority to exercise the powers and perform the duties of his office under either act of Congress relative to the collection of internal revenue; but the provision in question is merely directory to the proper officer of the treasury department, and a bond may be required or waived at his discretion. It is intended solely for the security of the government, and constitutes no part of the contract of the sureties of the deputy collector, and his not giving a bond can in no way affect their responsibility. *Id.*

6. Taxation of distillers and brewers. — The fixtures and furniture of a tenant of a distillery upon which the United States had a lien, were sold under an execution issued on a judgment obtained against him by a creditor in a state court. *Held*, that the property was not sold subject to the lien, but the lien was to be first discharged. The lien of the United States on the proceeds is superior to that of the judgment creditor or of the landlord for rent. *Dungan's Appeal*, 8 R. 169.

7. — of other occupations and commodities. — Molasses manufactured from sorghum is a subject of taxation, under the United States internal revenue acts of July 1, 1862, and June 30, 1864. *Pickering v. Day*, 95 D. 291.

8. Stamps, and effect of omission to affix them. — 1. *In general*. — The failure to properly cancel United States revenue stamps affixed to an instrument does not render it invalid or incapable of being

For Index to Notes in American Decisions and American Reports, see Volume I.

introduced in evidence. *D'Armond v. Deboe*, 2 R. 718.

The provisions in the United States Statutes of 1866, chapter 184, section 9, that no instrument, not duly stamped as required by law, shall be admitted or used in evidence in any court until a legal stamp shall have been affixed thereto, applies only to the courts of the United States. *Green v. Hobay*, 3 R. 339.

United States internal revenue stamps are exempt from all state and local taxation. *Paifrey v. City of Boston*, 3 R. 364.

A deputy collector has no power to remit penalties and stamp instruments that have been left unstamped by inadvertence or mistake, except when he acts by special authority from the collector. *City of Muscatine v. Sterneman*, 6 R. 635.

2. *What instruments must be stamped.*—An *ad valorem* stamp is not required on a deed reforming the description in a prior deed of the same premises. A stamp affixed to such deed as a contract or agreement is sufficient. *Greve v. Coffin*, 100 D. 229.

Congress has no power to impose a stamp tax upon official bonds given to a state by its officers. *State v. Garton*, 2 R. 315.

The provisions of the act of Congress of June 30, 1864, requiring stamps upon written instruments, apply to bonds given by state and municipal officers on entering upon their official duties. *City of Muscatine v. Sterneman et al.*, 6 R. 685.

Congress has no authority to impose a stamp duty on certificates of sale of lands for taxes, and where a stamp is placed upon such certificate and is included in the amount for which the land was sold, the sale is void. *Barden v. Columbia County*, 14 R. 762.

The United States internal revenue laws were not in operation in the Confederate States during the war. It was therefore unnecessary to stamp promissory notes to give them validity. *McIlwain v. Mudd*, 4 R. 106.

3. *Omission of the stamp.*—The internal revenue act of June 30, 1864, prohibiting unstamped instruments from being received in evidence, does not apply to state courts. Therefore an omission, without fraudulent intent, to stamp a promissory note, does not render it void. *Bumpass v. Taggart*, 7 R. 623; *Green v. Hobay*, 3 R. 339; *Dailey v. Coker*, 7 R. 279; *Burson v. Huntington*, 4 R. 497; *Duffy v. Hobson*, 6 R. 617; *Davis v. Richardson*, 7 R. 732; *Sammons v. Halloway*, 4 R. 465. So held in the case of an unstamped chattel mortgage. *Moore v. Quirk*, 7 R. 499; and in the case of an unstamped deed of real estate. *Moore v. Moore*, 7 R. 466.

A written agreement not stamped as required by law—*held*, not admissible in evidence in a state court. *Chartiers etc. Co. v. McNamara*, 13 R. 673; *City of Muscatine v. Sterneman*, 6 R. 685.

A promissory note not stamped in accordance with the United States revenue laws may, in the absence of fraud, be stamped at the trial of an action on the note, and then given in evidence. Mere omission to stamp a note is not evidence of fraudulent intent. *Morris v. McMorris*, 7 R. 696.

When a promissory note for \$120, made June 20, 1865, and bearing only a five-cent internal revenue stamp, was offered in evidence,—*held*, 1. That such note is not invalid under the internal revenue act, approved March 3, 1865, unless the proper stamp was omitted to evade the provisions of such act; 2. That such note is admissible in evidence, and that the provisions of the act of Congress, approved July 13, 1866, were intended to be prospective, and not retrospective, and apply only to instruments issued after such act took effect. *Rhelnstrom v. Cone*, 7 R. 48.

Where a certificate of deposit is inadmissible for want of a stamp, parol evidence is admissible to prove the facts it recites. *Leach v. Hale*, 7 R. 112.

It is not within the constitutional power of Congress to declare that a contract or conveyance between citizens of a state, affecting real estate, is void, for the reason that a revenue stamp has been omitted. *Moore v. Moore*, 7 R. 466.

The clause in the United States internal revenue act, providing that instruments not stamped as therein required shall not be recorded, does not affect the recording of such instruments under state laws. *Moore v. Quirk*, 7 R. 499.

9. *Penalties for violation of internal revenue laws.*—Under the United States statutes of 1862, ch. 119, § 31, or 1864, ch. 173, § 41, an informer cannot sue an internal revenue collector, in a state court, for a share of a penalty paid to the collector, unless the penalty has been recovered by a judgment of a United States court. If a penalty is paid by compromise or agreement, before final judgment, neither of these statutes gives an informer any share therein. *Rice v. Thayer*, 7 R. 516.

REVERSAL.

Effect of judgment of, see *APPEAL*, 127.

Grounds for, in criminal cases, see *APPEAL*, 152–161.

Of judgment, effect of, on execution sale, see *EXECUTION*, 108.

Restitution on, see *APPEAL*, 128, 129; *ERROR*, 29.

When proper in civil cases, see *APPEAL*, 113.

REVERSIONS.

Generally, see *ESTATES*, 5.

Of lands dedicated, see *DEDICATION*, 17.

Right of dower in, see *DOWER*, 5.

Transfers of, by landlord, see *LEASES*, 23.

When subject to execution, see *EXECUTION*, 23.

For Index to Notes in American Decisions and American Reports, see Volume I.

REVIEW.

- Of accounting by representatives, see **EXECUTORS**, etc., 143.
- Of auditor's report, see **AUDITORS**, 2.
- Of condemnation proceedings, see **EMINENT DOMAIN**, 24.
- Of decision of challenge to juror, see **TRIAL**, 159.
- Of decision on *habeas corpus*, see **HABEAS CORPUS**, 15.
- Of extradition proceedings, on *habeas corpus*, see **EXTRADITION**, 18.
- Of foreclosure suit, on appeal, see **MORTGAGES**, 110.
- Of judgment in attachment, see **ATTACHMENT**, 122.
- Of judgment in partition suit, see **PARTITION**, 34.
- Of judgment in slander suit, see **SLANDER**, 42.
- Of judgment of divorce, see **MARRIAGE AND DIVORCE**, 79.
- Of judgment of non-suit, see **TRIAL**, 68.
- Of motion for mandamus, see **MANDAMUS**, 5.
- Of order on motion for new trial, see **NEW TRIAL**, 58.
- Of probate proceedings, see **WILLS**, 54.
- Of proceedings for laying out highway, see **HIGHWAYS**, 22.
- Of proceedings in *quo warranto*, see **QUO WARRANTO**, 13.
- Of proceedings under assessments for local improvements, see **MUNICIPAL CORPORATIONS**, 57.
- Of receiver's report, see **REFERENCE**, 9-11.
- Of referred causes, on appeal or error, see **REFERENCE**, 11.
- Of settlements with guardians, see **GUARDIAN AND WARD**, 37.
- Of suits by or against infants, see **INFANTS**, 61.

REVISING STATUTES.

Construction of, see **STATUTES**, 62.

REVIVAL.

- Of forfeited life policy, see **INSURANCE**, 76.
- Of judgment, see **SCIRE FACIAS**, 4.
- Of judgment, see **JUDGMENT**, 129, 130.
- Of mortgage lien, see **MORTGAGES**, 140.
- Of repealed statutes, see **STATUTES**, 72.
- Of suits abated by death of party, see **ABATEMENT**, II.

REVOCATION.

- Of abandonment to insurer, see **INSURANCE**, 160.
- Of agent's authority, see **AGENCY**, 6-9.
- Of assignment for creditors, see **ASSIGNMENTS**, etc., 17.
- Of dedication, see **DEDICATION**, 18.
- Of devise, see **DEVISE**, 38.
- Of gifts *causa mortis*, see **GIFTS**, 23.
- Of gifts *inter vivos*, see **GIFTS**, 17.
- Of grants, see **PUBLIC LANDS**, 26.

- Of letters testamentary, or of administration, see **EXECUTORS**, etc., 25, 26.
- Of licenses, see **LICENSES**, 10.
- Of liquor licenses, see **INTOXICATING LIQUORS**, 7.
- Of offer of reward, see **REWARDS**, 6.
- Of pardon, see **PARDON**, 6, 7.
- Of powers, see **POWERS**, 9.
- Of powers of attorney, see **AGENCY**, 30, 31.
- Of submission to arbitrators, see **ARBITRATION**, etc., 9.
- Of subscription, see **SUBSCRIPTIONS**, 4.
- Of subscription to stock, see **CORPORATIONS**, 66.
- Of warrant for surrender of fugitive from justice, see **EXTRADITION**, 18.
- Of wills, see **WILLS**, 28-33.

REWARDS.

[Includes the validity and effect of an offer of compensation for services to be rendered by any person who may accept such offer and render such services; and the enforcement of such offer by action.]

1. Offers of, who liable on.—A United States marshal who offers a reward for the arrest of a fugitive from justice, and signs the instrument as "U. S. marshal," acts as a principal, and is liable as such. *Murray v. Kennedy*, 77 D. 189.

An action lies against a town to recover a reward offered under the provisions of a general statute. *Jasaris v. Town of Exeter*, 2 R. 185.

Any person may bind himself by a public offer of a reward for the arrest of a criminal offender, whether the offer is oral or otherwise. *Hayden v. Souger*, 26 R. 1.

2. Offer and acceptance a contract.* —The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal on the part of the person making it to all persons, which any one capable of performing the service may accept at any time before it is revoked, and perform the service; and such offer on one side, and acceptance and performance on the other, is a valid contract made on good consideration, which the law will enforce. *Ryer v. Stockwell*, 73 D. 634.

An advertisement offering a reward for certain information, upon its being furnished, becomes a written contract, against which the statute does not run for four years. *Id.*

3. Notice of acceptance of offer. —A. offered to give \$5,000 to any person who would bring the body of his wife from a burning building, dead or alive. B., a paid member of the fire department, on the faith of the offer, and at great personal peril, but without notice of acceptance of the offer brought the dead body from the building. Held, that he was entitled to the reward. *Reif v. Paigs*, 42 R. 731.

* When advertisement offering reward may become a contract, see note, 73 D. 638, 639.

For Index to Notes in American Decisions and American Reports, see Volume I.

4. When earned. — An offer of a reward by public advertisement is to be regarded as a conditional promise. Whoever would entitle himself to the reward must prove that he has performed substantially the service proposed in the advertisement, though it need not be performed literally. *Bess v. Dyer*, 85 D. 747.

One who gives to the owners of stolen property, who have offered a reward for its recovery and the detection of the thief, information by which, with reasonable diligence on their part, they are enabled to recover the property and detect the thief, is entitled to the reward, although he does nothing further to aid in the recovery of the property and the conviction of the thief. *Id.*

Where a reward is offered for such information as will be sufficient to convict a criminal, a claim to the reward does not attach until the prisoner has been convicted, as the sufficiency of the information can only be determined by the event of the trial. The statute of limitations runs from this time. *Ryer v. Stockwell*, 73 D. 634.

To entitle one to a reward offered for "apprehension and conviction" of a criminal, his services must have been instrumental in procuring both the apprehension and conviction. *Fitch v. Snedaker*, 97 D. 791.

Defendant offered a reward for the "capture and conviction" of each of certain criminals. Plaintiff captured two of them who confessed their guilt: but the indictments against them were dismissed at the solicitation of the defendants' attorneys, in order to use them as witnesses against the others. *Held*, that the plaintiff was entitled to the reward. *Louisville and N. R. R. Co. v. Goodnight*, 19 R. 80.

The defendant, a detective officer, knowing that M. had wrongful possession of plaintiff's watch, offered to recover it for \$50, which plaintiff agreed to pay. Meantime M. sent the watch by express to plaintiff. The defendant however arrested M., and thus compelled him to recall the watch before delivery. *Held*, that defendant had no right to compensation, or lien on the watch therefor. *Hoffman v. Barthelmess*, 36 R. 129.

5. Performance in ignorance of offer. — To claim a reward for the arrest of a person there must have been a contract, i. e., an agreement on the one side to give, and on the other to receive, and there could be no such agreement if the arrest was made in ignorance that a reward was offered. *Stamper v. Temple*, 44 D. 296; *Fitch v. Snedaker*, 97 D. 791.

One who gives information before a reward is offered, which leads to the arrest of a criminal for whose "apprehension and conviction" a reward was afterwards offered, is not entitled to the reward, although in addition thereto he was active in assisting

the prosecuting officers, and in procuring evidence in the hope of earning such reward. *Fitch v. Snedaker*, 97 D. 791.

An offer of reward for the arrest and conviction of a criminal relates to information thereafter to be given, and is not a promise to reward any person for past information gratuitously given. *Id.*

An action will not lie to recover a reward offered for the finding of lost property by one who found the property without knowing of the offer. *Howland v. Lounds*, 10 R. 654.

The plaintiff recovered property stolen from the defendant and returned it to him. Defendant handed him some money, saying "here is something for what you have done." Plaintiff did not, at the time, look at the money, but afterward found it to be \$2. Defendant had on that morning offered a reward of \$50 for a recovery of the property, of which fact plaintiff was at the time ignorant, but for which he brought this action. *Held*, that he could not recover. *Martin v. Treat*, 9 R. 307.

6. Revocation of offer. — In case of an advertisement offering a reward, until performance the offer is a proposal merely, and not a contract, and may be revoked at the pleasure of him who made it. *Ryer v. Stockwell*, 73 D. 634.

7. Rights of finder of lost property.* — Where a reward was offered by public advertisement for the recovery of lost bank bills, — *held*, that the finder of a part was entitled to a *pro rata* part of the reward offered. *Symmes v. Frasier*, 4 D. 142.

A person finding the property of another has no right to a reward from the owner; he is only entitled to be paid his necessary expenses in its preservation. *Amory v. Flynn*, 6 D. 316.

The finder of lost property has a lien thereon for the amount of the reward offered by the loser for its restoration, and he may retain possession thereof until the reward is paid. *Wentworth v. Day*, 37 D. 145.

The discovery of an article voluntarily laid down by the owner in a banking-house, and upon a desk provided for the use of such persons having business there, is not the finding of a lost article, entitling the person discovering it to a reward offered to the finder. *Kincaid v. Eaton*, 93 D. 142.

8. Who may sue for a reward.† — If a promise is made to any one who shall do a certain thing, the person doing it is entitled to the benefit of the promise. *Bull v. Talbot*, 1 D. 62.

An informer is entitled to recover a reward offered for stolen goods, unless it is found that he had possession of the goods, knowing them

* Reward for lost property, right of finder to, see note, 25 D. 189-191.

† When and by whom a reward may be recovered, see note, 26 R. 5-10.

For Index to Notes in American Decisions and American Reports, see Volume I.

to be stolen, before the offer of the reward; or that he was connected with the alleged felony, either as a participator in the felonious taking or in the concealing of the stolen goods. *Jenkins v. Keen*, 74 D. 596.

The selectmen of a town, under the authority of a general statute, offered a reward for the apprehension and conviction of a person guilty of the commission of a high crime. The plaintiff, claiming to have performed that service, brought action to recover the reward. *Held*, on demurrer, that the action was well brought. *Janerin v. Town of Exeter*, 2 R. 186.

In an action for a reward, — *held*, that if two persons jointly perform the service, they must be joined as plaintiffs. *Id.*

In a proceeding to compel the payment of a reward offered by a governor for the apprehension of a fugitive from justice, the defense set up that before said reward was offered the plaintiff had apprehended the fugitive, and that said fugitive had been delivered and was in jail when the proclamation of the reward was delivered to the public printer for publication; that, on learning these facts, the proclamation was withdrawn, and that the plaintiff did not know, when he apprehended and delivered the fugitive, that a reward had been offered. *Held*, 1. That when the proclamation was signed and entered on the executive journal the offer was complete, and that those acts amounted to a publication; 2. That as the evidence was not clear that the delivery to the jailer was made before such signing and delivery, the plaintiff could recover. *Auditor v. Ballard*, 15 R. 278.

A public officer, whose compensation is fixed by law, cannot recover a reward for services rendered within the scope of his official duties. *Matter of Russell*, 50 R. 55.

A deputy sheriff making an arrest in the line of his duty, and when sent by the principal sheriff to attend to it in his stead, cannot, as a matter of public policy, be entitled to claim a reward offered for such arrest. *Stamper v. Temple*, 44 D. 296; but the rule is otherwise where a sheriff was acting outside the line of his official duty, and in reliance upon a reward offered. *Davis v. Munson*, 5 R. 315.

A promise of reward to a constable for arresting a criminal is without consideration. The duty of the constable is to do so without reward. *Smith v. Whilden*, 49 D. 572; *Hayden v. Souger*, 26 R. 1. Otherwise as to a special constable, holding a warrant directed simply to any constable of a county, and who in like manner and with the like reliance makes the arrest; and any special constable may maintain an action to recover the reward jointly with others who assisted in the arrest. *Hayden v. Souger*, 26 R. 1.

A police officer cannot stipulate for extra compensation nor take a reward for services

rendered within the duties of his office, and for which he receives a stated salary. *Kick v. Merry*, 66 D. 658.

One cannot recover a reward where his acts were performed with knowledge of the offer of a reward, but without any intention of claiming it. *Hewitt v. Anderson*, 38 R. 65.

9. Matters of defense. — In an action to recover a reward offered in an advertisement for the arrest and conviction of one who set fire to a certain house, such conviction having been effected, it cannot be urged that the agreement was a *nude pact*, the services being such as any good citizen is bound to perform. Plaintiff put himself to extraordinary trouble to procure the conviction, which it can hardly be said every good citizen is bound to do. *Ryer v. Stockwell*, 73 D. 634.

Where an offer of a reward is made in a newspaper without authority, the alleged promisor is not estopped from denying his liability, although he knew of the publication and did not object to it. *Hugill v. Kinney*, 42 R. 801.

RIGHT (WRIT OF).

1. Title necessary in demandant.*

— The demandant in a writ of right may recover under title by disseisin, unless the tenant can show a better title. *Hunt v. Hunt*, 37 D. 130.

The demandant in a writ of right may recover the proportionate interest to which he shows title, although less in extent than his writ demands. *Shaefer v. Gates*, 38 D. 164.

2. Plea. — *Darrein seisin* is a good plea in a writ of right. *Hunt v. Hunt*, 37 D. 130.

RIOT: UNLAWFUL ASSEMBLY.

Calling out militia in cases of, see MILITIA, 7.

1. What constitutes.† — Where numbers unlawfully combine to disturb another in the enjoyment of a lawful right, the act is a riot. *Com. v. Runnels*, 6 D. 148.

An assembly summoned by a constable to execute lawful process is not an unlawful assembly, and the persons assembling are not indictable for riot, though they use oppressive and abusive means in its execution. *State v. Stakcup*, 35 D. 732.

Under a statute making violent and tumultuous conduct by three or more persons a riot, persons conducting a *charivari* or serenade with bells, horns, tin pans, guns, etc., are guilty of a riot. *State v. Brown*, 35 R. 210.

2. Indictment. — It is sufficient if an indictment for a riot charge that the defendants unlawfully assembled "with force and arms," and being so assembled committed the act, without repeating the words "force

* Nature of, and proceedings under the writ, see note, 50 D. 173-176.

† What essential to the offense, see note, 94 D. 136-138.

For Index to Notes in American Decisions and American Reports, see Volume I.

and arms," as they apply to every distinct allegation. *Com. v. Kunnels*, 6 D. 143.

If an unlawful act is charged in the indictment to have been committed, it is unnecessary to allege that it was done *in terrorem populi*, but where the defendants went about armed without committing any act then that allegation is necessary. *Id.*

Where, on indictment for riot against the defendant and two others named, with "divers other persons, to wit, to the number of five," without alleging that the five others were unknown, or setting out their names, the grand jury find a true bill only against the defendant and one other, to which the defendant pleads guilty, judgment must be arrested. *State v. McDonald*, 10 D. 591.

An indictment for riot need not allege that the defendants riotously fought through and with each other. It is sufficient if it charge that defendants, with force and arms, unlawfully and riotously assembled and gathered themselves together to disturb the peace of the state, and being so assembled, then and there made a great noise, disturbance, riot, and tumult, and then and there unlawfully, riotously, etc., remained and continued together, making such noise, riot, tumult, and disturbance for the space of, etc. *State v. Dillard*, 35 D. 128.

An indictment for riot must aver that defendants unlawfully assembled, and this averment, as well as the subsequent riotous acts of the defendants, must be proved on the trial. *State v. Stalcup*, 35 D. 732.

3. Conviction and punishment. — In an indictment for a riot, if one of several be convicted, and the others are not yet arrested, he is subject to punishment, although the others may afterward be acquitted, because he is estopped by the verdict to deny his guilt. *State v. Pugh*, 2 D. 621.

Rout and riot are kindred offenses, and a general verdict of guilty under an indictment for riot is sufficient though the evidence establishes only rout; and rout will be established by showing the preparation for battle, and staking money upon the issue of a prize fight. *State v. Sumner*, 42 D. 357.

RIPARIAN RIGHTS.

[Includes the rights and liabilities of the owners of land bordering on the sea, or on rivers, creeks, lakes, ponds, etc., as respects the banks or shore, the water, and the land under the water. Other titles analogous to this are FISHING; MILLS, NAVIGATION, WATERCOURSES.]

Compensation to riparian owner, for erecting toll-bridges, see BRIDGES, 8.
Rights of littoral owner as regards fisheries, see FISHING, 5.

See also FISHING, MILLS, NAVIGATION, WATERCOURSES.

1. In general.* — The owner of land is not the owner of timber floating in a stream running over his land, but has an exclusive right to seize such wood. *Rogers v. Judd*, 26 D. 299.

The measure of damage for seizing such timber by another is the injury to the landowner's exclusive right, that is, what his chance of seizing the timber was worth. *Id.*

The maxim, *sic utere tuo ut alienum non ledas*, emphatically applies to riparian proprietors. *Burwell v. Hobson*, 65 D. 247.

The riparian owner inflicts no legal injury on his neighbors by using his property cautiously, prudently, and in accordance with its nature and character, though he thereby occasions them some annoyance and loss. *Neal v. Henry*, 33 D. 125.

The heir of a lessee for years, of a lot fronting on a navigable stream, is not a riparian owner within the meaning of the Maryland act of 1745. *Casey v. Inloes*, 39 D. 658.

A riparian proprietor has no property in the water itself which flows by or through his lands, but a simple usufruct while it passes along. *Stein v. Burden*, 65 D. 394.

A riparian owner of land bounded by navigable water has a right of access to such navigable water of which he cannot be lawfully deprived; and any one doing anything in front of the land of such a riparian proprietor, which makes it less accessible, is liable in damages therefor. *Clark v. Peckham*, 14 R. 654.

2. Right to natural flow of the stream.† — A riparian proprietor has the right to a flow of water in its natural current, without any obstructions injurious to them. *Pillsbury v. Moore*, 69 D. 91; *Evans v. Merriweather*, 36 D. 106; subject only to the right of eminent domain. *Ten Eyck v. Del. & R. Canal Co.*, 37 D. 233. This right is incident to the property he has in his land, and he cannot be deprived of such right but by grant, actual or presumptive. *Tillotson v. Smith*, 64 D. 355; or by use or occupation for such a length of time that a grant will be presumed. *Davis v. Fuller*, 36 D. 334; *Coaker v. Hunter*, 15 D. 726; *Buddington v. Bradley*, 26 D. 386.

Any person situated above or below the owner of land along a stream who shall make any change in the natural flow of the stream so as to materially damage the land of such owner is liable for the damages occasioned thereby. *Tillotson v. Smith*, 64 D. 355; *Omelwany v. Jaggors*, 27 D. 417.

At common law, each riparian proprietor

* Water rights, who entitled to, see note, 45 D. 276-288.

† Right of riparian owner to fishery within non-navigable waters, see note, 38 R. 255-260.

‡ Riparian proprietor's right to flow and use of the stream, see note, 79 D. 638-645.

Right of land proprietor to change flow or obstruct natural course of stream, see note, 36 R. 490-492.

For Index to Notes in American Decisions and American Reports, see Volume I.

has an equal right to the use of the water which flows in the stream adjacent to his land as it was wont to run, without diminution or alteration. No proprietor has a right to use the water to the prejudice of another above or below without a prior right to divert it, or unless it is necessary for domestic uses and watering stock. *Loddell v. Simpson*, 90 D. 537.

A riparian proprietor, whose rights are not limited by usage or convention, has the absolute right to use the water in any manner he may desire while it is passing over his land. He must transmit it by its natural channel to the next occupant, and he is permitted to exact the same condition from the proprietor above. The right thus acquired is not a right to the water itself, but an interest in the manner of its flow. *Cooper v. Williams*, 22 D. 745; *Dilling v. Murray*, 63 D. 385.

A riparian proprietor may appropriate water at a lower place on his premises than the point at which the stream in its natural flow would enter the land of a proprietor below him, if there is no unreasonable or excessive use or unnecessary waste. *Wade-worth v. Tillotson*, 39 D. 391.

A riparian proprietor may erect any work in order to prevent his land from being overflowed by any change of the natural state of the stream, and to prevent its old course from being altered. *Burwell v. Hobson*, 65 D. 247.

Plaintiff was the owner of a reservoir dam erected across a stream running through his land for the purpose of accumulating surplus water for the use, in dry seasons, of his factory, situate several miles below. Defendant, the owner of land situate on the stream between the dam and the factory opened the gates and allowed the surplus water to escape. *Held*, that an injunction would not lie restraining defendant from so doing, although the detention of the water worked no material injury to him. *Clinton v. Myers*, 7 R. 373.

Water in a running stream flowing in its natural channel, is not the subject of property. *Cooper v. Williams*, 22 D. 745.

A surplus of water appropriated for public use for the purpose of a state canal, which continues to flow down the natural channel, and is not required for such use, belongs to the owners of the water-rights on the margin of the stream below, just as if no such appropriation had been made. *Varick v. Smith*, 28 D. 417.

The lessee of such surplus from the state acquires no right, and may be restrained from diverting the same to the injury of the riparian owners below. *Id.*

The riparian owner on one bank is entitled to only half the water in the stream, as against an owner on the other bank. *Olney v. Fenner*, 57 D. 711.

The right to running water, in California, is a right running with land, a corporeal privilege bestowed upon the occupier or appropriator of the soil, and has none of the characteristics of mere personality. *Hill v. Newman*, 63 D. 140.

The right to running water exists, in California, from policy of her laws, without private ownership of the soil, upon the ground of prior location upon the land, or prior appropriation and use of the water. *Id.*

Proprietaries of Pennsylvania and New Jersey never owned the bed of the Delaware river, but their respective grants extended only to low-water mark on either side; and the bed of the river and the river itself remained in the crown, and passed by force of the revolution and of the treaty of peace to the two states, to be owned and enjoyed on the same principle as a navigable river flowing between two coterminous nations. *Ticum Fishing Co. v. Carter*, 100 D. 597.

3. Title to bed of the stream. — 1. *Navigable streams.* — A grant of land bounded on a river in which the tide neither ebbs nor flows extends *ad flum aqua*, but a grant bounded on a navigable river extends to high-water mark only. *Arnold v. Mundy*, 10 D. 356; for a riparian owner on a navigable river owns only to the bank, and his ownership is not extended to the center by a statute declaring the river non-navigable. *Wood v. Fowler*, 46 R. 330.

The ownership of soil covered by the waters of a navigable river is vested in the public. *Stuart v. Clark*, 58 D. 49.

Land between the high and low water mark of tides belongs to the sovereign, and may be granted by the sovereign. *Ward v. Willis*, 72 D. 570.

A statute prohibiting entries of land covered by navigable waters and directing public land bordering on such waters to be surveyed, so that the water should form one side of the survey and the land be laid off back from the water, prohibits the acquiring of title by entry and patent to land between high and low water mark of tides. *Id.*

Land between the high and low water mark of tides is "land covered by a navigable water." *Id.*

A riparian owner whose lands are bounded by a navigable stream above the ebb and flow of the tide has an absolute right to use the land covered by said stream to the centre of the thread thereof, subject to the right of the public to use the stream as a public highway for the passage of vessels employed in its navigation. *Walker v. Shepardon*, 65 D. 324.

Where one holds lands along a navigable stream, and is also entitled to the land the river covers, by virtue of a grant from the state, a conveyance by such person of a tract bounding the same on the river, will pass to

For Index to Notes in American Decisions and American Reports, see Volume I.

the grantee the soil *ad medium flum aqua*, as well as the land expressly granted. *Broune v. Kennedy*, 9 D. 503.

By the common law of Maine beds of tide-water creeks become the property of the owners of the lands through which they flow, subject to the restriction that such owners are not allowed "to stop or hinder any passage of boats or other vessels in or through any creek or cove, to other men's houses or lands." *Low v. Knowlton*, 45 D. 100.

2. *Non-navigable streams.* — In a river not navigable, the owner of the soil on one side is the proprietor of the bed to the middle of the stream. *Horne v. Richards*, 2 D. 574; *Stuart v. Clark*, 58 D. 49; *Ingraham v. Wilkinson*, 16 D. 342; *Brown v. Chadbourne*, 50 D. 641; although the United States survey, under which he holds, meandered the bank, and the bed of the stream was not in terms conveyed. *Ross v. Faust*, 23 R. 655; unless the conveyance denotes an intention to the contrary. *McCullough v. Wall*, 53 D. 715. And the complete control of the use of such land covered with water is in the riparian owner, except so far as limited and qualified by such rights as belong to the public at large, to the navigation, and such other use, if any, as appertains to the public over the water. *Ryan v. Brown*, 100 D. 154; *Lorman v. Benson*, 77 D. 435; *Berry v. Snyder*, 96 D. 219.

And such proprietors have a right to use the water flowing over it in its natural current, without diminution or obstruction, and it is immaterial whether the party be a proprietor above or below on the river. *Covales v. Kiddes*, 57 D. 287; but he possesses this right only in common with every other proprietor. *Rhodes v. Whitehead*, 84 D. 631.

The thread of a stream is ascertained by measurement across, without regard to the depth of the water. *McCullough v. Wall*, 53 D. 715.

A parol declaration of intention cannot vary the description in a deed so as to extend the land to low-water mark instead of to the middle of the stream. *Id.*

The owner of land on both sides of a stream is, in common presumption, the owner of the whole stream, and the burden of proof is on one claiming an easement over it to show his right. *Wadsworth v. Smith*, 26 D. 525.

The owner of such a stream may permit others to pass over it under an agreement for compensation. *Id.*

An agreement will be implied by one using such a stream to pay a reasonable sum therefor, in the absence of an express promise. *Id.*

A stream of water, which has been diverted from its natural channel by reason of an unusual freshet, and allowed by an

adjoining proprietor to flow over his land for the period of ten years, without objection, cannot be restored by him to its original course. *Woodbury v. Short*, 44 D. 344.

4. *Title to islands.* — An island lying on one side of a stream belongs to the owner of the bank on that side. *McCullough v. Wall*, 53 D. 715; *Ingraham v. Wilkinson*, 16 D. 342.

An island lying in the middle of a river, so that the original middle line passes through it, belongs to the owners of the land on the two banks, according to the original dividing line. *McCullough v. Wall*, 53 D. 715; *Deerfield v. Arms*, 28 D. 276; *Ingraham v. Wilkinson*, 16 D. 342.

An island cut off from the mainland by a navigable stream in the ordinary stages of low water cannot be added to the land of an adjacent owner merely because in every dry season the river almost disappears, and no water flows over the intervening dry, sandy, or pebbly bed. *Stover v. Jack*, 100 D. 566.

A patent entitling the patentee to coal and minerals, under the bed of a navigable river from the low-water mark on one shore to the same line on the other, does not entitle him to the minerals of an island within the bounds of his patent, which was subject to application and sale under laws existing before the law under which his patent was granted, and still in force. *Pennsylvania Coal Co. v. Winchester*, 58 R. 740.

5. — *to flats and land under water.*

1. *At common law.* — By the common law, all that portion of land on tide-waters between high-water mark and low-water mark, technically known as the "shore," originally belonged to the crown, and was held in trust by the king for public uses, and was not the subject of private property without a special patent or grant. *Pike v. Monroe*, 58 D. 751; *Barker v. Bates*, 23 D. 578; *Mayor of Mobile v. Eslava*, 33 D. 325; *Lorman v. Benson*, 77 D. 435. And the "shore" is the space between high and low water mark. *Dana v. Jackson Street Wharf Co.*, 89 D. 164; *Storer v. Freeman*, 4 D. 155.

Shores of a sea and navigable rivers, within the flux and reflux of the tide, belong *prima facie* to the king, and may belong to a subject; but the *jus privatum* of the proprietor is subject to the *jus publicum* which belongs to the king's subjects. *Moulton v. Libbey*, 59 D. 57.

A railroad company, in pursuance of an alleged franchise embraced in their charter, constructed their track along the bank of a navigable river, below high-water mark, thus cutting off, without compensation, the riparian owners from the benefits incident to their property from its contiguity to the water. *Held*, that the title of owners of

* Islands arising from sea, to whom belong see note, 53 R. 215-221.

For Index to Notes in American Decisions and American Reports, see Volume I.

lands bordering on tide-waters ends at high-water mark; that below the ordinary high-water mark the title to the soil is in the state; and that the riparian owner has no rights beyond high-water mark, as against the state and its grantees. *Stevens v. Paterson and N. R. R. Co.*, 3 R. 269.

2. *Under ordinances, statutes, etc.* — A proprietary grant, in 1690, of "a piece of land below high-water mark, to set a shop upon, not exceeding forty feet in width," was construed to include the land as far as low-water mark. *Adams v. Frothingham*, 3 D. 181.

The owner of land adjoining tide-waters is the proprietor of the flats to low-water mark, not exceeding the distance of one hundred rods, subject to the right of free fishing of each householder in the waters covering them. But the right to erect weirs upon those flats, or to set nets or seines, "making them fast in the usual way, by grapples to the shore," belongs exclusively to the proprietor of the flats. *Duncan v. Sylvester*, 41 D. 400; *Storer v. Freeman*, 4 D. 155; *Parker v. Outer Mill-dam Co.*, 37 D. 58.

The Massachusetts Colony ordinance of 1641, declaring the proprietor of land on the seashore to be the owner to low-water mark, etc., though never in force in Plymouth colony as a positive law, is a settled rule of property throughout the state. *Barber v. Bates*, 23 D. 678.

The ordinance of 1641 vests tide-lands in proprietor of adjoining upland, subject only to the limitations and qualifications contained in the proviso to the ordinance. *Pike v. Monroe*, 58 D. 751.

The owner of upland owns to low-water mark, under the Massachusetts colony ordinance, where land is bounded on salt water in which the tide ebbs and flows. *Valentine v. Piper*, 33 D. 715.

An ordinance declaring that proprietors of land "shall have property to low-water mark," contemplates and refers to a mark which could be readily ascertained and established, which would be the usual or ordinary low-water line. *Garriah v. Union Wharf*, 46 D. 568.

The owner of a lot upon the water-front of San Francisco, as established by statute, below low-water mark, is not owner upon the "shore," and is therefore not a "riparian proprietor" as that term is used in the law of tide-waters. *Dana v. Jackson St. Wharf Co.*, 89 D. 164.

The title of a riparian owner of land in Illinois bounded by the Ohio river extends at least to low-water mark. *Ensminger v. People*, 95 D. 495.

Riparian proprietors in Pennsylvania take to the ordinary low-water mark unaffected by drought. *Stover v. Jack*, 100 D. 566.

What constitutes the low-water mark of navigable streams in Pennsylvania must be determined by the law of that state, and not by the law of England or sister states. *Id.*

At common law, only those streams are navigable in which the tide ebbs and flows; as to them, low or high water mark is decided by the ebb and flow of the tides. But the common law being inapplicable in Pennsylvania, it has not been adopted. *Id.*

The right to land between low water and ordinary high water on a stream in which the tide ebbs and flows, is in the owner of the adjacent fast land as against an intruder, subject to the use of it by the public as a common highway. *Ball v. Slack*, 30 D. 278.

The possession of the fast land is the possession of the flats in such a case, and is not interrupted by the passage of boats and other craft over the flats at high water. *Id.*

A riparian owner's right of exclusive possession to the shore of a navigable stream does not extend beyond low-water mark. *Harvey v. Thomas*, 36 D. 141.

Flats lying in a cove are to be divided among the riparian proprietors bounding on the cove by lines drawn from their respective lands to a line drawn across the mouth of the cove, so as to give each the same proportion of that line as he has of the line bounding the cove. *Ashby v. Eastern R. R. Co.*, 38 D. 428.

The burden of proof rests on one claiming flats on an arm of the sea as appurtenant or parcel of his wharf, and petitioning for damages for laying a railroad across the same, to show that the line of low-water mark extends so far as to include some part of the soil over which the railroad is laid. *Id.*

A riparian proprietor's ownership of land under water of an unnavigable stream is measured by lines at right angles to the bank, without regard to the course of the lines bounding the remainder of his tract. *McCullough v. Wall*, 53 D. 715.

A riparian owner whose land extends to low-water mark has a right to the exclusive use of the bank to such mark, and may establish a private wharf thereon, and charge what is reasonable for its use by those navigating the river. *Ensminger v. People*, 95 D. 495.

A mussel-bed, between which and the shore no water flows at low tide, belongs to the owner of the adjacent shore. *King v. Young*, 49 R. 596.

But one who plants oysters in the bed of a navigable river, below low-water mark, has not such a property therein that he can maintain trespass against a person taking them away, although he owns the adjacent shore. *Arnold v. Mundy*, 10 D. 356.

A sand-bar in a navigable river is subject of private ownership, and the party holding the title thereto may maintain an action in the nature of trespass against one for enter-

For Index to Notes in American Decisions and American Reports, see Volume I.

ing and removing sand therefrom. *Berry v. Snyder*, 96 D. 219.

Land under the water of a navigable bay or harbor, on Lake Erie, may be held by private ownership, subject to the public rights of navigation and fishery, by title from an express grant made or sanctioned by the general government. *Hogg v. Bearman*, 52 R. 71.

The plaintiff owned land on the sea coast at Far Rockaway, Long Island. Several miles east of his land was the island of Long Beach, bounded on the east by an inlet from the ocean to Hempstead bay. Between 1835 and 1869 the beach from opposite the island to the west of plaintiff's land was overflowed and washed away, and bars, shoals and islands were formed and constantly changing. By sudden, violent and frequent changes the inlet moved to the west of the plaintiff's land, and a continuous bar was formed. About 1869 the inlet closed up and the original one reopened, leaving a continuous beach to the west, with a lagoon inside of it running across the plaintiff's land. *Held*, that the title to that beach was in the plaintiff. *Mulry v. Norton*, 53 R. 206.

3. *The acquisition and transfer of title.*—The owner of upland, to which flats adjoin, may sell the upland without the flats, or the flats without the upland, or both together. *Pike v. Monroe*, 58 D. 751; *Barker v. Bates*, 23 D. 678.

Whether flats pass as appurtenant, by a conveyance of upland, depends upon the intent as ascertained by the terms employed. *Barker v. Bates*, 23 D. 678.

A deed bounded on a river in which the tide ebbs and flows conveys the flats in front of and adjoining the same, to the extent of one hundred rods from high-water mark, if they extend so far. *Pike v. Monroe*, 58 D. 751.

Where lands are under the low-water mark, title is not to be acquired by prior occupancy, while they are part of the public domain. *Gray v. Bartlett*, 32 D. 208.

The presumption of a grant of upland carries with it the adjacent flats to low-water mark, without proof of any actual adverse possession of the flats, where there is no evidence of a separate alienation of the flats. *Valentine v. Piper*, 33 D. 715.

The possession of flats actually taken by wharves and building, and continued for a length of time sufficient to bar actions and entries, affords a conclusive presumption that the division of such flats among the coterminous proprietors has been settled by mutual agreement. *Id.*

That an ancient street has been laid out across flats on the shore of an arm of the sea in conformity with the lines of lots and of wharves on one side of such street, in accordance with which the land and flats on that side of the street have long been held

and occupied, is evidence, to show that the flats on the other side of the street were to be divided according to the same course or system. *Id.*

The question whether the legislature intended to grant the right of building a railroad on soil situated below high-water mark will be determined by an inspection of the charter. A specific grant is necessary to convey such right. *Stevens v. Paterson & N. R. R. Co.*, 3 R. 269.

6. *Ice, and rights relative thereto.*—All persons have a right to travel on the ice over a public river, and any one who cuts a hole in the ice, in or near the traveled way on such ice, is liable for injuries sustained by those passing over said way, without fault or negligence on their part. *French v. Camp*, 36 D. 728.

The plaintiffs, engaged in the ice business at Detroit and lessees of a large portion of the water front at Belle Isle, in the Detroit river, constructed a boom along the same fifteen feet from the shore. The defendant's ferry boat was run up and down the river so near the boom that the swell broke up and destroyed the ice formed inside the boom in the winter, and the weather becoming and continuing warm, new ice did not form. There was room for the passage of the boat at a safe distance from the boom. *Held*, that the defendant's boat was liable for damage to the plaintiffs' business. *Peoples' Ice Co. v. Steamer Excelsior*, 38 R. 246.

7. *Right to erect dams.*—1. *The right to erect, generally.**—The prescriptive right to maintain a dam which causes an overflow of another's land, and to apply the water of the stream to a special purpose, may be acquired by erecting and keeping up such dam and so using the water for twenty years without objection. *Cowell v. Thayer*, 38 D. 400.

The state may authorize a riparian owner upon a stream not navigable at the point in question, but becoming navigable below, to dam the stream and use the water for his purposes, but not to the injury of other riparian owners. *Morrill v. St. Anthony Falls Water-Power Co.*, 37 R. 399.

The statute of 1803 only authorizes the erection of a dam in a navigable stream for the purposes of furnishing water power, and not for the purpose of creating a basin as a harbor for rafts. *Com. v. Church*, 44 D. 112.

A riparian owner on one bank of a river is entitled to the flow of water past his land unobstructed, and undiverted and without material diminution, and may build a dam to the center of the stream. *Olney v. Fenner*, 57 D. 711.

A riparian proprietor to whom water first comes has no right to erect dams across the stream and spread out the water, so that it

* See note on dams and levees causing injuries to property, 57 D. 684-693.

For Index to Notes in American Decisions and American Reports, see Volume I.

is lost by absorption and evaporation to an extent that prevents it from flowing to another riparian proprietor, as it would have done but for the dams. *Perrea v. Knipe*, 87 D. 128.

It is not a reasonable use of water for a riparian proprietor, who desires to use the same for watering cattle and for domestic purposes, to erect dams across the stream, by which the water is spread out and lost by evaporation and absorption so as to injure another riparian proprietor below. *Ib.*

Failing to object to the erection of a dam, and even expressing one's self satisfied with the use about to be made of the water, is only evidence of a license, not a license in itself. *Johnson v. Lewis*, 33 D. 405.

2. *The liability of owners of dams.* — The erection of a dam in a navigable stream is *prima facie* indictable as a nuisance at common law; and a defendant, who claims the right to erect and maintain such a dam, under the provisions of the statute of 1803, must show it. *Com. v. Church*, 44 D. 112.

A statute authorizing the building of a dam protects the persons so authorized from indictment for a nuisance, without limiting their liability for damages resulting from the flowing the lands of others. *Crittenden v. Wilson*, 15 D. 482.

One having a prescriptive right to maintain a dam may repair and tighten it and use the water in a more economical way, so as to raise and keep the water at a greater height on an adjacent proprietor's land than has been usual in the ordinary condition of the dam and customary use of the water, if the dam itself is not raised and the water is not kept at a higher level than the dam was formerly capable of in its ordinary operation when not leaky. *Cowell v. Thayer*, 38 D. 400.

A riparian owner may swell water up to his neighbor's line, when the water is in its natural state, by a dam erected below without being liable for injury done by high water, though increased by such obstruction, but the rule does not apply to a navigation company erecting a dam under a charter. *Monongahela Nav. Co. v. Coon*, 47 D. 474.

A corporation erecting a dam in a stream is liable for injury by high water to a mill proprietor above, which is increased by such dam, under a charter authorizing it to erect the dam and making it liable for "any damages," etc., although in an ordinary stage of the river the dam does not swell the water back upon the mill-wheel. *Ib.*

The owner of a dam must so govern and control it that injury will not result to his neighbors. *Fraser v. Sears Union Water Co.*, 73 D. 562.

The want of reasonable care by plaintiffs to prevent an injury is no defense to an action against the owners of a dam for damages caused by the negligent construction and use of the dam. *Ib.*

Each riparian proprietor has the right to use the waters of a stream on his own premises for any purpose for which it may be legitimately used, and no one has the right by any erection on his own premises to interfere with such enjoyment to the prejudice of another; although, it seems, where proprietors draw water from the same dam, each has the right to continue to use the water, whatever may be the effect on another, unless the latter has acquired by grant or prescription the right to an exclusive use, or to use whenever there is not water enough for both. *Brown v. Bowen*, 86 D. 406.

3. *Remedy of party injured by a dam.* — Raising water by a dam above its natural level, in the part of the channel of a stream owned by another riparian proprietor, does not give him a right of action unless special damages are also shown. *Garrett v. McKie*, 44 D. 263.

The lower proprietor cannot raise any dam or other work to prevent the enjoyment, by the upper proprietor, of a servitude which exists in favor of his estate, notwithstanding the fact of an aggravation of the servitude. The remedy is by injunction. *Barrow v. Landry*, 77 D. 199.

A riparian proprietor has the right to abate as a nuisance a dam erected on the stream below him, and which throws back the water upon his lands. The proper mode of abatement is to lower the dam, if there be a prescriptive right for it, to the height authorized by the prescription, or in the absence of prescription, to such a height as will stop the reflux of the water at his boundary line. *Wright v. Moore*, 82 D. 731.

The erection of a dam across a natural stream, by a riparian owner thereon, and on his own land, may be restrained before the trial of the action, where it appears that it will injure the health of neighboring residents, although the complainant shows no probable special damage to himself. *Oglesby v. McQuagge*, 42 R. 112.

A bill for an injunction against maintaining a dam on the plaintiff's land and to abate said dam as a nuisance, will lie in order to prevent a multiplicity of suits, where the defendants claim the right to keep up the dam under a parol license from the plaintiff's grantor, and have undertaken to maintain their right by force; but the defendants are not liable for the expense of removing the dam erected under the license, though they are liable for rebuilding or repairing the dam after the license was revoked, and for the expense of abating the new or repaired dam. *Stevens v. Stevens*, 45 D. 203.

4. *Right to tolls for logs passing dams.* — Toll thorough, being against a common right, is not to be exacted from citizens but upon good consideration, and under license

For Index to Notes in American Decisions and American Reports, see Volume I.

or authority from the sovereign power. *Wadsworth v. Smith*, 26 D. 525.

The right to exact a toll for the use of a channel, way, passage, or other easement, must be established by proof that the same was exposed and offered for the use of all, at a fixed compensation. It must have become such a common channel, way, or passage, by the consent or acts of the owner, that he cannot maintain trespass against any person who may use it, paying the established toll. *Dwinn v. Barnard*, 48 D. 507.

8. Wharves, piers, or bulkheads.*

—1. *Who may build, generally.* — A riparian proprietor on navigable water has no right, at common law, to wharf out against his own land; and in cases of purpresture, the right of entry is not in the adjacent land-owner, but in the crown. *Dana v. Jackson Street Wharf Co.*, 89 D. 164.

The owner of a lot on the water front of San Francisco has no right, without license, to wharf out from his own land into the bay. *Id.*

The right of the public for purposes of navigation must be appurtenant to ordinary means of navigation; and it can, therefore, never be unlawful to erect such wharves and landings as will accommodate all vessels ordinarily using the stream, unless there are some exceptional circumstances which may render the structures improper. *Ryan v. Brown*, 100 D. 154.

The owner of land bordering on a navigable stream may build a wharf for his own use or for the use of the public, but he must so construct it as not to interfere with the free navigation of the river. *Sherlock v. Bainbridge*, 13 R. 302.

Defendants, being the owners of an estate upon a navigable river, were erecting a wharf against their estate, extending out into said river. At the suit of the complainants, who were the owners of the estate next below them on said river, a preliminary injunction had been issued restraining them from the completion of their wharf. Upon a motion to dissolve said injunction—*held*, the evidence showing that the injury to the complainants caused by the completion of said wharf would be slight and contingent, and that, on the other hand, the wharf would greatly promote the defendant's trade and business, that the injunction could not be maintained, except so far as to prevent the respondents from so constructing the wharf as to spread its materials into the water in front of the plaintiff's estate. *Thornton v. Grant*, 14 R. 701.

A riparian owner on navigable water may extend his occupation beyond low-water mark, to the point of navigability, by wharves, piers, or fillings, subject to the paramount right of navigation, and this

* See title WHARVES.

right may not be taken away by the state without compensation. *Union Depot, etc., Co. v. Brunswick*, 47 R. 789.

The common council of a city has no power to establish a "dock line" beyond which no riparian owner upon a navigable stream might construct a wharf. Such owner, owning the land to the center of the stream, subject to the public easement for navigation, has a right to construct his wharf as he pleases, so that it does not interfere with such easement. To restrict his right to build a dock beyond such line would be taking private property without making just compensation. *Walker v. Sheperdson*, 65 D. 324.

2. *Rights and liabilities of the owners of wharves.* — When persons have acted unlawfully or injuriously in extending their wharf beyond the line of low-water mark, they may be amenable to the sovereign power; but they cannot be called upon by those who have no interest in the land covered by the wharf, to make compensation to them for its use. *Gerrish v. Proprietors of Union Wharf*, 46 D. 568.

The object of the law permitting individuals to build wharves in front of their lands, in navigable waters, is to facilitate commerce, not to allow neighboring docks and wharves to be destroyed. *Frink v. Lawrence*, 50 D. 274.

The wharf-boat of a riparian owner moored to his bank is entitled to the same immunities from trespass or obstruction by vessels navigating the river as the land itself. *Bainbridge v. Sherlock*, 95 D. 644.

A riparian proprietor cannot maintain ejectment for that portion of a wharf, constructed on his land, which extends below the low-water mark. *Coburn v. Ames*, 28 R. 634.

A statute authorizing owners to erect piers and bulkheads and fill up the riverbed in front of their lands, does not justify them in closing up the space between the river and the end of a street which ran over their land, so as to obstruct the passage from such street to the river. *People v. Lambier*, 47 D. 273.

3. *Rights of the public in wharves.* — A wharf is private property, and the consent of the owner must be obtained before the public have a right to use it. *O'Neill v. Annett*, 72 D. 364.

Wharves built by individuals in front of their lands, in navigable waters, must not improperly impede public navigation, and if they do this, they become public nuisances. *Frink v. Lawrence*, 50 D. 274.

The erection of a wharf in tide-waters is not a nuisance, if the navigation is not injured by the erection. *Thornton v. Grant*, 14 R. 701.

A court of equity will not interpose by injunction to prevent the erection of a wharf in such waters, unless it appears that

For Index to Notes in American Decisions and American Reports, see Volume I.

the party petitioning will be materially and substantially injured by such erection. *Id.*

One navigating a river has the right to land at such wharf as suits his convenience, and if in so doing the current of the river or other circumstances carries the stern of his boat down stream so that a portion of his boat's length lies in front of an adjoining wharf, but still in the navigable water of the river, he is not a trespasser and cannot be made liable for any consequential damages which may be sustained by the owner of the wharf, provided he use due care and dispatch, and subject others to no unnecessary inconvenience. *Sherlock v. Bainbridge*, 13 R. 302.

The public may not gain by prescription the right to use the land of an individual, on a navigable river, as a place of landing and of deposit of chattels for an indefinite time. *Thomas v. Ford*, 52 R. 513.

4. *Dikes and levees.*—A riparian proprietor will be enjoined from constructing a dike which will destroy the dike of the opposite proprietor and cause overflow of his lands, which latter dike the opposite proprietor has a legal right to maintain, as he claims, under one who built the dike when he owned the land on both sides of the stream; and the court will cause the abatement of so much of the defendant's dike as will injure the dike or land of the plaintiff. *Burwell v. Hobson*, 65 D. 247.

A proprietor is not bound to yield part of his soil for the construction of a levee for the purpose of reclaiming overflowed lands, when such levee was not originally necessary to prevent his lands from inundation, but was rendered necessary by the closing of a bayou for the purpose of reclaiming lands belonging to the state or individuals. *Cash v. Whitworth*, 71 D. 515.

9. *Remedies for flowage.*—1. *In general.**—In case of injury from flooding, the injury is a consequence which must be shown to have been produced by a specific cause: it is too general to lay the flooding as a consequence without more. *Good v. Mylin*, 49 D. 493.

In an action for flooding plaintiff's land, damages cannot be recovered for the trouble and expense for establishing the plaintiff's right to recover for the injury caused by the flooding. *Id.*

A riparian proprietor has a right to maintain a dike on his land, constructed along the line of a creek, and which in time of flood causes the surplus water to flow wholly over the land on the opposite side of the creek, when both he and the opposite proprietor claim under the same person who erected the dike when he owned the land on both sides of the creek. *Burwell v. Hobson*, 65 D. 247.

* Overflowing or otherwise injuring property of riparian proprietor or other land owner, see note, 87 D. 684-698.

One who owns land at the junction of a creek with a river may change the channel and mouth of the creek on his own land, exercising reasonable care and regard for the rights of other riparian owners. He may not make such change however if it may reasonably be anticipated that it will increase the danger of inundation on the opposite side of the river in cases of unusual but not unprecedented floods; but if such change merely creates a sand-bar in the river, and this contributes to an injury by the breaking of a levee and the overflow of land on the opposite bank of the river in an unusual but not unprecedented flood, it is not a ground of recovery. *Railroad Co. v. Carr*, 43 R. 428.

2. *Liability of the upper proprietor.*—Where the owner of higher lands constructed a ditch to drain the surface-water therefrom, which increased the flow of water upon a lower proprietor, or which threw the water upon his land in a manner different from that in which it would have naturally flowed, to the latter's injury, the former is liable for the injury thus occasioned, even though the ditch was constructed by him in the course of the ordinary use and improvement of his farm. *Livingston v. McDonald*, 89 D. 563; *Lattimore v. Davis*, 33 D. 581; *Miller v. Laubach*, 86 D. 521.

Injuries by flowing surface water, done to a neighbor as a result of ordinary farming operations, such as plow furrows, are not actionable; but where ditches which cause an increased flow of water on the lands of an adjoining owner were dug to reclaim or improve the land, the higher owner is liable. *Livingston v. McDonald*, 89 D. 563.

An upper land owner may not collect the surface water in channels and drains and turn it in increased volume on the land of a lower owner to his detriment, and the latter may defend his land against it by dam or embankment. *Crabtree v. Baker*, 51 R. 424.

And the owner of land may erect an obstruction thereon to prevent the influx of foul water from adjoining premises wrongfully permitted by the owner of the latter, even if it results in turning back the surface water which flows naturally from such premises. *Beard v. Murphy*, 86 D. 693.

The owner of land through which a stream flows may increase the volume of water by draining into it, without any liability for damages to a lower owner. *Müller v. Laubach*, 86 D. 521.

3. *Liability of the lower proprietor.*—A riparian proprietor may not erect any work that in time of ordinary flood will throw the water on the grounds of another proprietor, so as to overflow and injure them; and for such injury he will be liable in damages. *Burwell v. Hobson*, 65 D. 247.

One who erects a dam on his own land is

For Index to Notes in American Decisions and American Reports, see Volume I.

responsible for all injury caused by it to the land of another in times of usual, ordinary, and expected freshets. *McCoy v. Danley*, 57 D. 580; *Casebeer v. Mowry*, 93 D. 786.

The erection of a dam across a stream in such a manner as to throw the water back upon plaintiff's land, being a wrongful act, should render the defendant liable for any injury resulting from its erection and maintenance, such as stopping a flow of ice, and causing it to interfere with plaintiff's mill. *Cousles v. Kidder*, 57 D. 287.

A riparian owner is liable in damages for raising the water of a stream above its natural banks, though he prevent its overflow by embankments, if in consequence of his action the water percolates through the natural banks and his land so as to drown the adjoining land of another. *Pisley v. Clark*, 91 D. 72.

The defendants, in pursuance of authority granted them by the legislature, built a dam which backed the water upon the ancient mill of plaintiff. *Held*, that defendants were liable for the injury occasioned. *Lee v. Pembroke Iron Co.*, 2 R. 59.

The occupant of premises injured by setting back water thereon is entitled to recover damages against the wrong-doer to an amount sufficient to indemnify him for the injury to such interest as he had in the premises. *Brown v. Bowen*, 86 D. 406.

The *allegata* and *probata* must agree; hence, where issue was taken upon an allegation of flooding plaintiff's land by means of a dam across a stream of water, evidence that the water was raised by obstructing two outlets or sluices from the pool of the dam through the left bank, which had carried the water around and below the dam into the natural channel, is not admissible. *Good v. Mylin*, 49 D. 493.

The plea of a prescriptive right to the use of a ditch in draining defendant's land presents no defense to an action for the overflowing of the plaintiff's land, caused by the formation of a dam in a stream from the washings of sand through the defendant's ditch; for the prescriptive right to the use of the ditch does not carry with it an easement of overflowing the plaintiff's land, since the sand bank causing the overflow may not have formed until some time within the period of prescription. *Boundaries v. Bramley*, 73 D. 470.

A corporation authorized by the legislature to construct a boom in a navigable river is not liable for flowage of land caused by an extraordinary freshet, not reasonably to have been anticipated and guarded against, although to some extent occasioned by the boom, the boom having been properly constructed. *Borchardt v. Wausau Boom Co.*, 41 R. 12.

10. Remedies for obstructing navigation. — One who obstructs the flow of

river or streams over their accustomed beds, so as to prevent them from being used as formerly, and turns them into a new channel, thereby authorizes the public to make the same use of them in the new channel, as they had been accustomed to do in the old. *Dwinnel v. Barnard*, 48 D. 507.

The public is not entitled to the use of water diverted from a public stream by an individual proprietor, if such diversion has not caused any obstruction to the former use of the stream. *Id.*

One cannot enter upon the lands of another, and remove an obstruction to a stream, on the ground that it is a nuisance, who has not been injured by its existence. *Id.*

Riparian proprietors on the Mississippi river cannot make any erections on their own lands which would infringe upon the public easement or amount to a nuisance in the river, although great public benefits would result from so doing. *People v. City of St. Louis*, 48 D. 339.

Streams only which are wholly within the state are referred to by article 18, section 4, of the Michigan constitution of 1850, which declares that "no navigable stream in this state shall be either bridged or dammed without authority from the board of supervisors of the proper county." *Egan v. Brown*, 100 D. 154.

Sault Ste. Marie Canal Board have such control over the canal and its approaches as to be authorized to remove such obstructions as are unlawful; but they have no such judicial authority as to make their finding conclusive upon the fact of illegality, and if they interfere with private rights, they act at their peril, and are responsible for their conduct. *Id.*

Erections by riparian owners in waters whose beds are public property are unlawful, not because they are nuisances, in the proper sense of the term, but because they are encroachments on the public domain; but where the ownership is private, and the public rights are simply easements or privileges, the owner may use the beds as he pleases, so long as it does not injuriously affect the public enjoyment; and his use is *prima facie* lawful. *Id.*

The extent to which private improvements in natural watercourses is compatible with public use must depend upon circumstances, and always be a question of fact. *Id.*

Erections in a river at the head of navigation, and serviceable to navigation, do not become unlawful by the subsequent opening of a canal, which is in no sense a part of the river, but an independent water-way connecting the river above the falls with the stream below. *Id.*

11. — for retarding flow of the stream. — Riparian proprietors have a right to the use and enjoyment of the

* Detention of water, see note, 79 D. 643-644.

For Index to Notes in American Decisions and American Reports, see Volume I.

stream as it passes through their land, but as this right is common to all through whose land the stream flows, no one proprietor can wholly destroy or divert it, either by preventing the water from flowing to a lower proprietor, or by throwing it back upon the mills or lands of one above. *Oary v. Daniels*, 41 D. 532.

Property in a stream is indivisible, each proprietor being entitled to the use of the whole of it as it flows through his land, and one proprietor can not appropriate a specific portion of it to his own use to the exclusion of those below him. *Phumleigh v. Dawson*, 41 D. 199.

That plaintiff's dam obstructs navigation is no defense to an action for obstructing the flow of water to his mill. *Hall v. Pine*, 44 D. 762.

An injury is the direct and immediate consequence of the acts of a private corporation, when such corporation constructs an embankment in the mouth of a creek, thereby preventing the water from flowing in its accustomed channel, and depriving the injured party of its use for milling purposes although the property injured is an incorporeal right in the land of another; and it is no defense to an action for damages for such injury that the water flowing in the mouth of the creek is a public navigable river, under servitude to the public interest and subject to legislative control. *Tineman v. Belvidere, etc. R. R. Co.*, 69 D. 565.

Reasonableness of the detention of running water depends upon the size of the stream, as well as the use to which it is subservient. In small streams the water may be detained for a reasonable time in order to accumulate a head which can be made available for practical use; but the right to detain is not limited to the time necessary for repairs, or to extraordinary occasions. *Davis v. Getchell*, 79 D. 636.

A riparian proprietor cannot unreasonably detain water or throw it back beyond his own line, unless he has acquired the right to do so by grant, license, or prescription. *Rhodes v. Whitehead*, 84 D. 631.

19. — for diversion.* — The owner of one bank *ad medium flum aquas* has no such ownership of half the stream as to justify him in diverting the water therein to that extent. *Blanchard v. Baker*, 23 D. 504.

A riparian owner is liable for the diversion of the stream by his agent, though such diversion is forbidden by him, if having notice that it is being made, he makes no objection. *Moans v. Merrhoeather*, 38 D. 106.

The upper riparian proprietor must not materially lessen the quantity of water flowing in the stream. *Miller v. Miller*, 49 D. 545.

The diversion of a watercourse by a ri-

* Diversion of water by riparian owner, see note, 79 D. 633-643.

parian proprietor, without returning it to its natural channel before reaching the land of a proprietor below, is unlawful and subjects the wrong-doer to an action for damages by the lower proprietor. *Phumleigh v. Dawson*, 41 D. 199.

The lower riparian proprietor cannot divert the waters of a stream, so as to prevent it from flowing in a natural state over or past the land of a higher proprietor, which borders on one side of such stream, by conducting the water in sluices past his land, and emptying it into the stream below. *Parker v. Griswold*, 42 D. 739.

A riparian proprietor substantially diverting a watercourse, by so doing encroaches on the rights of a proprietor below, who may maintain an action for the diversion, although he sustains no present damage thereby. *Newhall v. Iveson*, 54 D. 790.

A riparian owner diverting a stream is liable, notwithstanding an obstruction by an intervening owner, for the injury thereby occasioned to a lower proprietor, if the removal of the intervening obstruction would not restore the accustomed flow of the stream. *Olney v. Fenner*, 57 D. 711.

A riparian proprietor has no right to divert a stream, or any part of it, from its accustomed course, to the injury of other persons. *Burwell v. Hobson*, 65 D. 247.

A riparian proprietor is liable for damages to an injured party where he diverts water from its natural channel for artificial uses in quantity sufficient to injuriously affect rights of the proprietor below, and does not return the water to its natural channel before it reaches the lands of such proprietor. *Stein v. Burden*, 65 D. 394.

A riparian proprietor may use water in a stream for domestic and culinary purposes and watering stock, without being liable to a proprietor below for a consequent diminution of the water, if the right be reasonably and properly exercised. *Wadsworth v. Tillotson*, 39 D. 391.

Use of an artificial aqueduct to conduct to one's house or barn the water in a stream running through his land, which he has a right to use, does not render him liable to a proprietor below him on the same stream, if the right is not abused by using more than his fair proportion of the water, and unnecessarily depriving the lower proprietor of water which would otherwise come to his land. *Id.*

The loss of water merely incidental to the proper use and enjoyment of it by a riparian proprietor, as by permitting it to escape through penstocks from an aqueduct employed to conduct it to such a proprietor's house, in order to prevent freezing or stagnation, is not an injurious diversion rendering the party liable to a lower proprietor, although the water so escaping is permanently diverted, if there is no unreasonable

For Index to Notes in American Decisions and American Reports, see Volume I.

use or unnecessary waste, which is a question for the jury upon all the facts. *Ib.*

The right of a riparian proprietor to recover for the diversion of water exists although no particular or actual damage has been sustained by reason of such diversion, and although at the time thereof no beneficial use of the stream was made. *Parker v. Griswold*, 42 D. 739.

A legislative act authorizing the construction by a riparian proprietor of a pipe or culvert to convey a watercourse along and across a highway does not affect the rights of a proprietor below to maintain an action for diversion thereby. *Newhall v. Iveson*, 54 D. 790.

A riparian owner increasing the flow of water equal to the quantity taken from a stream flowing through his land, by means of excavations and ditches, all constituting part of the same improvement, is not liable for a diversion to a proprietor below. *Willot v. Fitchburg R. R. Co.*, 57 D. 85.

A riparian proprietor may show, in mitigation of damages, that the means provided by him for restoration of the water to its natural channel are rendered inefficient for that purpose, after the water has left his land, by the act or interference of a third person, but it is no excuse for his wrong. *Stein v. Burden*, 65 D. 394.

The right of a riparian proprietor to divert water from its channel is conditional, and the condition is his duty to restore the water thus diverted to the stream from which it was taken. It is not an absolute right, but a contingent one, made absolute only by a return of the water. *Ib.*

An upper proprietor of land, in which originates a spring forming a stream, running through his land into that of another, may divert the stream, and cause it to overflow and irrigate his land, provided it resumes its natural channel before it enters the land of the lower proprietor; and he is not liable for injury to such proprietor, unless he wantonly and maliciously uses the stream, and takes more water than is necessary for agricultural purposes. *Tolle v. Correll*, 93 D. 540.

The lower proprietor is presumed to know that the upper proprietor has the right to use the water running through his land for irrigation purposes, and if he erects a mill on his land, he cannot lessen the upper proprietor's vested rights, and the damages he may sustain are *damnum absque injuria*. *Ib.*

A riparian owner has no right by erecting an embankment, to divert the natural course of water overflowing from a river in the time of a freshet, and turn it upon the land of his neighbor. *Shane v. Kansas City etc. R. R. Co.*, 36 R. 480.

An upper riparian owner on a stream has no right to divert the water, by pipes and reservoirs, for the use of his locomotive en-

gines, to the detriment of a lower proprietor, a mill owner; and such conduct may be enjoined. *Garwood v. N. Y. Central R. R. Co.*, 38 R. 452; *Smith v. City of Rochester*, 44 R. 393.

Where a lake, formed by surface water, is situate on the lands of different owners, neither can drain it without the consent of the other. *Schaefer v. Marthaler*, 57 R. 73.

13. — or contamination of the water. — A riparian proprietor has no right to injure or corrupt water to the injury of others, though he own the land in fee over which the water flows, and hold by title derived from the United States. *Lewis v. Stein*, 50 D. 177; *McCallum v. Germantown Water Co.*, 93 D. 656.

The authority to injure water, as by sawdust, will not be presumed in opposition to clear evidence of the legislative will that no one should do so. *Lewis v. Stein*, 50 D. 177.

The right to impair the quality of water cannot be acquired by a riparian proprietor by prescription. *Ib.*

A prescriptive right to render running water unfit for drinking or domestic purposes requires the strictest proof of its existence. *McCallum v. Germantown Water Co.*, 93 D. 656.

An upper riparian proprietor claiming the right by prescription to pollute a stream cannot do so to a greater extent than it was polluted at the commencement of the twenty-one years. The right must be measured by the enjoyment. *Ib.*

Any user of a stream by an upper proprietor which substantially diminishes its volume, or defiles or corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, is improper, and will be enjoined. *Merrifield v. Lombard*, 90 D. 172.

Where several riparian owners, acting independently, discharge refuse from their mills into a stream to the injury of a lower proprietor, an injunction may issue in a suit against all and before any action at law. *Lockwood Co. v. Lawrence*, 52 R. 763.

In an action by a lower against an upper riparian owner on a stream, for fouling the stream by means of a hog-yard, and depriving him of its use for domestic purposes, an instruction, that if the stream in its natural state was more useful to all the owners for stock purposes than for ordinary domestic uses, the upper owner had a right reasonably so to use it, in spite of the injury complained of, is correct. *Hancliffe v. Case*, 32 R. 715.

One operating a coal mine in the usual manner may discharge the percolating water into a stream which naturally drains the land, although this may swell the stream, and render it by impurity unfit for the do-

For Index to Notes in American Decisions and American Reports, see Volume I.

meistic purposes of lower proprietors. *Pennsylvania Coal Co. v. Sanderson*, 57 R. 445.

A coal mining company fouled a natural stream of water by pumping water from its mines into it, to the damage of a riparian proprietor. *Held*, that the act could not be justified either by the importance of the industry or by general custom. *Pennsylvania Coal Co. v. Sanderson*, 39 R. 785.

14. **Accretion.***—A riparian proprietor is entitled to all accessions made to his land by the retreating of the river from its former limits, or by the slow and secret deposit of sand and other substances, so as to leave the soil theretofore inundated uncovered by water. *Hagan v. Campbell*, 33 D. 267.

All accretions to a public landing necessarily attach to it, and form a part thereof. *Godfrey v. City of Akron*, 52 D. 476.

Imperceptible accretions to the bank of a river from washings from the opposite bank belong to the proprietor of the land, to which they become affixed. *Spigener v. Cooner*, 64 D. 755.

A change in the course of a river from a known cause, or by human agency, does not deprive a proprietor of the right to go to the center of the old channel, if it can be ascertained. *Id.*

An accretion between the meander line and the water's edge on a navigable stream belongs to the owner of the adjoining land. *Kraus v. Cranford*, 87 D. 414.

The owner of a lot on the water front of San Francisco does not become the owner of land adjoining the lot and lying in the harbor beyond it, where such land has been gained from the sea by the gradual accretion of sand and earth caused by a purpulture or encroachment in the form of a wharf in the public harbor beyond it. *Dana v. Jackson Street Wharf Co.*, 89 D. 164.

The channel of a river must be regarded as the rightful and accustomed channel, as between the riparian owners, where it has been gradually changed, by wearing away on one side and increasing on the other. *Gerrish v. Clough*, 97 D. 561.

Land formed by accretions on one side of a river belongs to the riparian owner on that side, and is as much entitled to protection as his original land. *Id.*

A riparian owner may protect his banks from the encroachment of a river, by rubbing or other means, provided he does not cause a change in the then accustomed channel of the river, to the material and appreciable injury of other riparian owners. *Id.*

The owner of lands bounded on a lake, whether navigable or not, is entitled to the land left dry by the gradual or imperceptible receding of the waters. *Warren v. Chambers*, 4 R. 23.

* Right of riparian owners to accretions, see note, 53 R. 215-221.

The owner of land bounded "along the high-water mark" of an artificial pond is not entitled to accretions, although the result of natural causes. *Cook v. McClure*, 17 R. 270.

Every riparian proprietor whose land is bounded by water is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way, he cannot be held accountable for his gain. *Lintchicum v. Coan*, 53 R. 219, 221, note.

The proper mode of apportioning accretions among riparian owners is the following: Measure the entire river front as it was when the lots were laid out, and note the aggregate number of feet frontage, as well as that of each lot; then measure a line drawn as nearly as may be with the middle thread of the stream opposite the shore line so measured; then divide the thread line into as many equal parts as there are lineal feet in the shore line, giving to each proprietor as many of these parts as his property measures in feet on the shore line; and then complete the division by drawing lines between the points, designating the lot or parcel belonging to each proprietor both upon the shore and river lines. *Kehr v. Snyder*, 55 R. 366.

15. **Alluvion.***—Land formed by a gradual and imperceptible recession of the waters of a lake or river, whether navigable or not, belongs to the riparian owner from whose shore the water has so receded. *Warren v. Chambers*, 91 D. 538; *Livingston v. County of St. Clair*, 16 R. 516.

Land formed by alluvion, in a river not navigable, by slow and imperceptible accretion, is the property of the owner of the adjoining land. *Deerfield v. Arms*, 28 D. 276.

Whatever addition is made to the shores of rivers or streams by alluvion, from natural causes, or from a union of natural and artificial causes, belongs to the riparian owners of the shores. *Adams v. Forthingham*, 3 D. 151; *Municipality No. 8 v. Cotton Press*, 36 D. 624.

Whether the alluvion forms at or against the shore, so as to cause an extension of the shore or bank of the river, or whether it forms in the bed of a river and becomes an island, is immaterial in determining to whom it belongs. *Deerfield v. Arms*, 28 D. 276.

Land formed by alluvion in a river is, in general, to be divided between the several riparian proprietors entitled thereto, according to the following rule. 1. Measure the whole extent of their ancient line of the river, and compute how many rods, yards, or feet each proprietor owned of such line; 2. Divide the newly-formed bank or river line into equal parts, and appropriate to each proprietor as many of these parts as he owned rods, yards, or feet of the old line;

* See note on the law of alluvion, 33 D. 276-281.

For Index to Notes in American Decisions and American Reports, see Volume I.

and 3. Draw lines from the point at which the proprietors respectively bounded on the old to the points thus determined as the points of division of the newly-formed shore. *Id.*

Such rule is to be modified under particular circumstances, as, where the ancient margin of the river has deep indentations or sharp projections, the general available line should be taken, and not the actual length of the line on that margin as elongated by indentations or projections. *Id.*

Where the mouth of a creek, which is the beginning point of a grant bounded on one side by such stream, shifts gradually, owing to the action of the creek and the stream into which it empties, the change operates to the gain or loss of the parties on the respective sides of the creek; but if it is occasioned by the act of one of the parties, the other party is not injured thereby. *Ball v. Slack*, 30 D. 278.

A lot bounded by a street which faces on tide-water is not entitled to the alluvion that may be formed on the water side of the street. *Mayor of Mobile v. Selava*, 33 D. 325.

The legislature cannot deprive a riparian proprietor of his right to the future alluvion that may be deposited upon his river front. *Municipality No. 2 v. Cotton Press*, 36 D. 624.

A change in the character of property from rural to urban, effected by its incorporation as a city, does not deprive it of the right to future formed alluvion. *Id.*

Principles of the Roman and Spanish laws, with respect to alluvion, explained. *Id.*

The principle that gives alluvion to the riparian proprietor upon whose front it is deposited, is founded upon the consideration that his exposed situation burdening him with the risk of loss through the agency of the river, he should be allowed the benefits which its contiguity may confer, as a compensation. It in no manner depends upon the duty of keeping up levees and embankments to guard against the overflow of the river. *Id.*

The intervention of a public road between a tract and a river does not prevent the gain by alluvion from belonging to such tract. *Id.*

Where a public use exists in the banks of a river, the future alluvial accretions will be subject to the same use; but the right of property therein will be vested in the same person in whom is the property in the bank; and it seems that when, by reason of the increase by accretions, any part of the original bank is no longer needed for the exercise of the use, the owners of the right of property therein will also be entitled to its occupation. *Id.*

Alluvion formed on the shore of a navigable river belongs to the shore-owner, claiming under a government donation and survey,

where such alluvion is formed out of a bar existing at the time of the survey, which was overflowed at high water, and most of it every year, and which was not included in the survey, the government surveyor running the line as near the bank as the land was susceptible of ownership, the lower line not being marked because the river was considered the line, though at low water the distance across the bar to the water from the mainland was nearly half a mile. *Stephenson v. Goff*, 43 D. 171.

A public street extending to a navigable river will not be deemed cut off therefrom by additions made by alluvial deposits, nor by the voluntary act of the owner of the land. The filling in of the land carries with it the extension of the street. *People v. Lambier*, 47 D. 273.

An increase of alluvion caused by pressure or encroachment in the form of a wharf in a public harbor does not come within the rule that lands gained from the sea by the washing up of sand or earth little by little become the property of the owner of the land adjoining. *Dana v. Jackson Street Wharf Co.*, 89 D. 164.

Where a new shore is formed on a river not navigable, by the alluvial deposits taken from the opposite side by the wearing away of the stream, the land on the new shore is to be divided between the owners entitled to it, according to the following rule: "Give to each owner a share of the new shore line in proportion to what he held in the old shore line and complete the division of the land by running a line from the bound between the parties on the old shore to the point thus ascertained on the new." 1871. *Batchelder v. Keniston*, 12 R. 143.

16. Right to wrecks, and property adrift cast on shore.*—The sovereign has the right to wrecks and all property stranded on the sea-beach. *Heifield v. Baum*, 57 D. 563.

A wreck cast on the sea shore belongs to the owner of the shore, as against a mere stranger, if not reclaimed, and he may bring trespass against such stranger for taking the same. *Barker v. Bates*, 23 D. 678.

The value of the wreck may be recovered as damages in such action. *Id.*

Property carried away by flood and stranded on another's land continues to be the property of him who owned it at the time of the flood, and he may enter and take it away. But he is not bound to do so, and may abandon it without incurring responsibility for injury done by it. *Forster v. Juniata Bridge Co.*, 55 D. 506.

The owner of land on which property carried adrift is stranded may, after notice given, disincumber his land by casting such

* Rights and liabilities of owners of property set adrift by wrecks, see note, 55 D. 506-512.

For Index to Notes in American Decisions and American Reports, see Volume I.

property back into the stream; but he has no right to appropriate it to his own use. *Id.*

The refusal of the owner of property cast adrift by a flood to remove it from the land on which it has stranded does not divest him of his right in it, nor bar his entry to reclaim it. A man who has abandoned his property may at any time resume the ownership of it. *Id.*

The owner of land has no lien on property carried upon it by a flood. *Id.*

Trover may be maintained by the owner of property cast adrift by a flood, against the owner of the land upon which it is cast, upon proving property in himself, and actual conversion by the defendant. *Id.*

17. Right to take seaweed.*—The right to take seaweed growing on the bed of a navigable river, below low-water mark, belongs to the public and not exclusively to the riparian proprietor. *Chapman v. Kimball*, 21 D. 707.

Seaweed cast upon the shore between high and low-water mark belongs to the public, and may be lawfully appropriated by any person. *Mather v. Chapman*, 16 R. 48.

18. Relative rights of upper and lower proprietors.—A riparian proprietor is bound to make such reasonable use of a stream of water running through his land as will do the least injury to those below him, consistent with a valuable benefit to himself, and it is a question for the jury whether such proprietor has used more than his just proportion. *Evans v. Merrineather*, 38 D. 106.

The right to have a natural stream of water to flow freely over the land of a lower proprietor carries with it the right to enter on the land below to cleanse out the stream and remove obstructions. *Prescott v. Williams*, 39 D. 688.

A rightful use of one's own estate, whether covered by water or not, may not unfrequently have some effect to diminish the value of an adjoining estate, or to prevent its being used with the comfort which might have been otherwise anticipated; this is *damnum absque injuria*, for which the law does not and cannot make compensation. *Gerrish v. Union Wharf*, 46 D. 568.

Every injury to a riparian proprietor below will not confer a right of action. It is necessary to take into consideration the capacity of the stream, the adaptation of the machinery to it, and all the attendant circumstances; and when all these are properly considered, if the proprietor below is materially injured, when considered in relation to the facts of the particular case he is entitled to redress. *Dilling v. Murray*, 63 D. 385.

* Right of citizens in and upon the seashore, see note, 16 R. 61-63.

The superior owner may improve his lands by throwing increased waters upon his inferior, through the natural and customary channels, but the principle should be prudently applied. *Kaufman v. Grissamer*, 67 D. 437.

A superior owner has no right to dig new channels and cause increased flow of water through them upon his inferior's lands. *Id.*

An inferior owner is not obliged to receive on his land waters which nature never appointed to flow there, and may dam up a channel cut for the carrying of such waters to and upon his land. *Id.*

Owner of higher lands may, in the improvement of his lands, or for his own use, retain all the surface water, that is, water flowing in no regular or definite channel, upon his land, and prevent it from percolating or flowing upon the lower land of an adjoining proprietor; or he may so drain such surface water as to prevent any portion of it reaching such lower lands. *Livingston v. McDonald*, 89 D. 563.

The owner of an upper field may not so concentrate surface-water upon his own land as to increase its natural flow upon a lower field of another. *Templeton v. Vesloe*, 37 R. 150.

Defendant owned a saw-mill and other mills upon a stream above plaintiff's lands. During the winter he deposited upon the ice in the stream refuse matter from such mills, which, during a freshet, was floated on to plaintiff's lands, doing them great injury. *Held*, 1. That the deposit of such refuse, without care or oversight, so that it could be floated on to plaintiff's lands, rendered defendant liable for the injury done to the land thereby. 2. That while defendant was not liable for the freshet, he was bound to know that freshets were liable to occur, and not leave his refuse so as to be carried away on to plaintiff's lands by a freshet. *Washburn v. Gilman*, 18 R. 246.

RISK.

Assumption of by the shipper, see CARRIERS, 32; by passenger, see CARRIERS, 71.

Beginning, end, and what covered by, see INSURANCE, 23, 52.

In marine insurance, when begins and ends, see INSURANCE, 132-134.

Proximate cause of loss must be within, see INSURANCE, 121.

What assumed by employees, see RAILROAD COMPANIES, 103.

RIVERS.

Lands bounded on, see BOUNDARIES, 2.

Navigation of, how far regulated by state laws, see COMMERCE, 7.

Rules to avoid collisions on, see SHIPPING, 53-60.

What are navigable, see NAVIGATION, 2.

For Index to Notes in American Decisions and American Reports, see Volume I.

ROBBERY.

[Includes the offense of feloniously taking property from the person of another by force and violence, or by putting him in fear.]

Assault with intent to commit, see ASSAULT, 25.

1. What constitutes the offense.* —

A person in actual possession of money has such ownership thereof as makes it robbery to take it from his person without his consent. *Stegar v. State*, 99 D. 472.

Masked burglars forcibly took from the possession of a cashier the keys of his bank. At the same time they compelled him to divulge the combination of the lock of the vault. They entered with the keys and robbed the bank. The keys were never returned. *Held*, sufficient to warrant a finding of robbery of the keys. *Hope v. People*, 38 R. 460.

The defendant, falsely pretending to be town marshal, seized the prosecutor, to whom another was showing a trick at cards, shoved him against a wall and threatened to take him to jail unless he paid him money, whereupon the prosecutor paid him money, as he said, to keep from going to jail and being bothered. *Held*, robbery. *Bussey v. State*, 51 R. 256.

Defendant, by means of threats of personal violence and menaces, compelled J. S. to pay to him money which defendant believed to be justly due to him from J. S. *Held*, not to constitute robbery. *State v. Hollyway*, 20 R. 586.

The complainant was fraudulently induced by two confederates to expose some money in his hand; one of them then snatched it from him and ran away, while the other held him so that he should not pursue, and a struggle between them ensued. *Held*, that this did not constitute robbery. *Shinn v. State*, 31 R. 110.

2. The necessary force. — Snatching a thing unawares is not considered a taking by force; but if there be a struggle to keep it, or any violence done to the person, the taking is robbery. *State v. Trezler*, 6 D. 568.

Where the prosecutor in the presence of the prisoner accidentally dropped a bank note, and the prisoner took it up and refused to deliver it, whereupon a struggle ensued for the possession of it which resulted in the prisoner's keeping it and carrying it away, — *held*, that it was a forcible trespass, the note not being the subject of larceny. *Ib.*

Robbery is committed by force, larceny by stealth, and where there is no violence or circumstance of terror resorted to for the purpose of inducing the owner to part with his property for the sake of his person, the crime committed is not robbery, but larceny. *State v. John*, 69 D. 777.

* See monographic note on what constitutes, and the various elements of robbery, 70 D. 178-191.

To constitute robbery, the force used must be either before or at the time of the taking, and of such a nature as to show that it was intended to overpower the party robbed, or to prevent resistance on his part, and not merely to get possession of the property. *Ib.*

The expressed determination of a felonious intent, accompanied by force sufficient to carry the intent into effect, makes a case of taking by open violence or robbery, as distinguished from a secret taking or mere snatching by surprise from the hand of another. *State v. McCune*, 70 D. 176.

The fact that surprise aided the force employed by prisoner will not prevent the force employed from aggravating the case to one of robbery. *Ib.*

Taking a watch from a person is robbery, where the prisoner passed his arm through the arm of the prosecutor and used violence sufficient to break the ribbon watch-guard worn by the prosecutor about his neck, at the same time exclaiming, "Damn you, I will have your watch!" notwithstanding the force did not affright, but merely surprised, the prosecutor. *Ib.*

3. Indictment. — The indictment must state that the property was taken from the person of another; to say that it was taken from him is insufficient. *Stegar v. State*, 99 D. 472.

In an indictment for robbery, the property may be laid as belonging either to the actual owner or the person robbed. *Brooks v. People*, 10 R. 398.

An indictment for robbery of bank bills alleged the value of the bills but not their denomination. *Held*, bad. *Arnold v. State*, 21 R. 175.

4. Instructions. — An instruction that, "to constitute robbery, the person robbed must have been first put in fear of his person or property," is not quite full enough. If the goods be taken either by violence, or by putting the owner in fear, it is sufficient to render the felonious taking a robbery. *McDaniel v. State*, 47 D. 93.

RULES.

For avoiding collisions, see SHIPPING, 53-60.

For examination of experts, see WITNESSES, 138-140.

For weighing testimony, see WITNESSES, 74-80.

Of court, and of decision, see COURTS, 9, 10.

Of equity practice, see EQUITY, 43.

Of examination of witnesses, see WITNESSES, IV.

RUMOR.

Opinion of juror based on, see TRIAL, 148.

When admissible in evidence, see EVIDENCE, 64.

For Index to Notes in American Decisions and American Reports, see Volume I.

SABBATH BREAKING.

[Includes the offense of violating the laws enforcing the observance of the Sabbath as a day of rest. Contracts made on Sunday are treated under SUNDAY; and the effect of the day upon the computation of time is under TIME.]

1. Constitutionalality of statutory provisions.—A general law prohibiting the transaction of business on Sunday is constitutional. *Ex parte Burke*, 43 R. 231.

A statute prohibiting "any worldly employment or business whatever on the Lord's day, works of necessity and charity only excepted," is essentially a civil regulation, made for the government of man as a member of society, and its sole mission is to inculcate a temporary weekly cessation from labor. *Specht v. Com.*, 49 D. 518.

Such a statute is not in conflict with that section of the constitution giving all men the right to worship God according to the dictates of their own conscience, and declaring that no preference shall be given by law to any religious establishment or mode of worship. *Id.*

A municipal ordinance prohibiting the sale of goods on Sunday is not in violation of a constitutional provision which secures to all "the free exercise and enjoyment of religious profession and worship," but is valid as a police regulation. *City Council v. Benjamin*, 49 D. 608.

Such a statute is remedial, and should be liberally construed in respect to the mischiefs to be remedied. *Smith v. Wilcox*, 82 D. 302.

A law authorizing the prohibition of the sale of intoxicating liquors on Sunday is constitutional. *State v. Bott*, 33 R. 224.

The statute prohibiting labor on Sunday is constitutional, although it provides that it shall not affect those who conscientiously observe the seventh day as the Sabbath. *Johns v. State*, 41 R. 577.

A Sunday law, making it a misdemeanor "for any person engaged in the business of baking to engage, or permit others in his employ to engage, in the business of baking for the purpose of sale, between the hours of six o'clock P. M. on Saturday and six o'clock P. M. on Sunday," etc., is a special law, and as such, unconstitutional. *Ex parte Westerfield*, 36 R. 47.

2. What constitutes the offense.—The question of desecration of Sunday by criminal labor is one of fact. It is not unlawful, in the fall, before corn is ripe, to haul corn to feed hogs in the field and to feed them there on Sunday, it being the ordinary practice of good husbandmen to gather the feed daily in the field. *Edgerton v. State*, 33 R. 110.

The owner of a saloon whose clerk, without his knowledge or consent, but while he

was on the premises, opened it on Sunday morning to clean it, and sold a drink to a customer, may properly be convicted of keeping a saloon open on Sunday. *People v. Roby*, 50 R. 270.

An innkeeper sold cigars on Sunday from a stand which was a part of his establishment. *Held*, that he was not punishable under the statute for engaging in common labor and his usual avocation. *Carver v. State*, 35 R. 205.

3. Works of necessity.—In a statute forbidding labor on Sunday except "works of charity or necessity," the word "necessity" does not imply a physical or absolute necessity; such labor as is necessary to the accomplishment of a lawful purpose, under the particular circumstances, is not prohibited. *Wilkinson v. State*, 26 R. 84.

Where the prisoner had hauled to market on Sunday his dead-ripe crop of water melons, which otherwise would have been spoiled,—*held*, that this was a work of necessity within the meaning of the statute. *Id.*

Where the jury have been unable to agree upon a verdict until the morning of the Sabbath, it is a work of necessity then to receive their verdict. *Van Riper v. Van Riper*, 7 D. 576.

It is lawful for a common carrier to transport cattle on Sunday. *Philadelphia, etc. R. R. Co. v. Lehman*, 40 R. 415.

It is lawful to make necessary repairs of a railway track on Sunday in order to avoid delaying trains on week days. *Yonaski v. State*, 41 R. 614.

It is lawful for a railway company to run trains for passengers, mails and express freight on Sunday. It is a "work of necessity." *Com. v. Louisville and N. R. R. Co.*, 44 R. 475.

Selling cigars on Sunday is not a work of necessity. *Mueller v. State*, 40 R. 245.

The court will take judicial notice that carrying on the business of a barber on Sunday is not necessary. *State v. Frederick*, 55 R. 555.

4. Indictment.—An indictment for an offense against public morals, and not against an individual, is sufficient which charges that the defendant, "on Sunday, the second day of April, A. D. 1854," in the county where the indictment was found, "did sell to divers persons a large quantity of ardent spirits, to wit," etc., without stating the names of the persons to whom the spirits were sold, or that they were sold to some person to the grand jurors unknown. *State v. Parnell*, 63 D. 72.

5. Observance of different day as defense.—Seventh-day Adventists, and others who conscientiously keep the seventh day of the week to worship God, are as much bound to refrain from business or worldly employment on Sunday, under a

*Sunday laws, when valid, see notes, 49 D. 616-623; 32 R. 557-560; 56 R. 772-775.

For Index to Notes in American Decisions and American Reports, see Volume I.

statute prohibiting the same, as any other persons. *Specht v. Com.*, 49 D. 518.

Jews are bound to observe the civil regulations made for the observance of the Christian Sabbath. *Society etc. v. Com.*, 91 D. 139.

An indictment lies against one laboring on Sunday, although he belongs to a sect who observes another day as the Sabbath, and conforms to their practice. *Scales v. State*, 58 R. 768.

6. Evidence. — A corporation is liable to indictment for Sabbath-breaking, but in the case of a railroad company its assent cannot be inferred by proof of the passage of a single train over a railroad on Sunday. *State v. Baltimore & O. R. R. Co.*, 36 R. 803.

7. Conviction and punishment. — There can be but one violation, by the same person on the same day, of a statute prohibiting business on Sunday, and but one penalty can be inflicted. *Friedeborn v. Com.*, 57 R. 464.

SAFE-DEPOSIT COMPANIES.

See BAILMENT, 22.

SALARY.

Interest in profits in lieu of, see PARTNERSHIP, 7.

Of judges, see JUDGES, 6.

See COMPENSATION; FEE.

SALES.

[Includes contracts for the transfer of title to personal property, whether absolute or conditional, executed or executory, for a money consideration, or by way of exchange or barter; the effect upon such contracts of the statute of frauds; the delivery or change of possession necessary; the warranties implied; the right of stoppage in transit; and the rules relative to sales by sample.]

Action for price, see also ASSUMPSIT, 14.

At auction, see AUCTION.

By assignee for creditors, see ASSIGNMENTS, etc., 41.

By assignees in bankruptcy, see BANKRUPTCY, 24.

By factors, effect of usage on validity of, see FACTORS, 9.

By mortgagor, of chattels mortgaged, see CHATTEL MORTGAGES, 35-37.

By one co-tenant of chattel, see CO-TENANCY, 5.

By one of two or more joint tenants, see CO-TENANCY, 57.

By order of court, see JUDICIAL SALE.

By trustees, see TRUSTS, 30-35.

Competency of parties to, as witnesses, see WITNESSES, 63.

Distinction between pledge and, see PLEDGE, etc., 3.

Distinguished from bailment, see BAILMENT, 2.

Distinguished from mortgage, see CHATTEL MORTGAGES, 5.

Effect of, before filing notice of lien, see MECHANICS' LIEN, 4.

For non-payment of local assessments, see MUNICIPAL CORPORATIONS, 51.

Implied powers of agents to make, see AGENCY, 23.

In foreclosure, see MORTGAGES, 95-103.

In foreclosure, vacating, see MORTGAGES, 106.

In partition, see PARTITION, 25-30.

Measure of damages between buyer and seller, see DAMAGES, 28-30.

Merchandise brokers, see BROKERS, 3.

Of bill or note, see BILLS AND NOTES, 113.

Of business, when good will passes, see GOODWILL, 2.

Of chattels, by representatives, see EXECUTOR AND ADMINISTRATORS, 69, 70.

Of chattels, when within statute of frauds, see also CONTRACTS, 53.

Of corporate stock, see CORPORATIONS, 33.

Of decedent's land, for payment of debts, see EXECUTORS, etc., 104-122.

Of goods, by one partner, when bind firm, see PARTNERSHIP, 37.

Of infant's lands, see INFANTS, 8-15.

Of land, by personal representatives, see EXECUTORS, etc., 46-58.

Of lands, contracts for, see VENDOR AND PURCHASER, 1.

Of land, for non-payment of taxes, see TAXES, IV.

Of land held in common, see CO-TENANCY, 36-38.

Of lunatic's lands, see INSANE PERSONS, 22.

Of mill property, see MILLS, 6.

Of mineral lands, see MINES AND MINING, 4.

Of ores, or right to mine for ores, see MINES AND MINING, 5.

Of personally, by infants, validity of, see INFANTS, 26.

Of property on Sunday, see SUNDAY, 4, 5.

Of stock, for non-payment of assessments, see CORPORATIONS, 76.

Of vessels, see SHIPPING, 6, 7.

Of wards personally, by guardian, see GUARDIAN AND WARD, 18.

Of water rights, see WATER-COURSES, 9.

On credit, by assignee for creditors, see ASSIGNMENTS, etc., 28.

On execution, see EXECUTION, 76-126.

On execution, powers of sheriff, see SHERIFFS, 6.

On execution, when bar dower, see DOWER, 26.

On execution, when create estoppel, see ESTOPPEL, 18.

Provisions as to, in decree of foreclosure, see MORTGAGES, 92.

To foreclose lien, validity of, see MECHANICS' LIEN, 26.

Under power in mortgage, notice of, see MORTGAGES, 115.

Under power in mortgage, validity, see MORTGAGES, 117.

When a satisfaction of the *f. fa.*, see EXECUTION, 175.

For Index to Notes in American Decisions and American Reports, see Volume I.

When avoided by possession remaining in seller, see FRAUDULENT CONVEYANCES, 11, 13.

When bind wife's separate estate, see HUSBAND AND WIFE, 53.

I. THE CONTRACT; VALIDITY; RIGHTS OF THE PARTIES, ETC.

1. *What constitutes a Sale; Validity.*
2. *Requirements of the Statute of Frauds.*
3. *Rights and Liabilities of the Parties; and herein of Bona Fide Purchasers.*

II. DELIVERY AND PAYMENT. ACCEPTANCE.

1. *In general.*
2. *Conditional Sales.*
3. *When the Title passes.*
4. *Stoppage in Transit.*

III. WARRANTIES.

IV. SALES BY SAMPLE.

V. REMEDIES BETWEEN BUYER AND SELLER.

I. THE CONTRACT; VALIDITY; RIGHTS OF THE PARTIES, ETC.

1. *What Constitutes a Sale; Validity.*

1. What words or dealings import a contract of sale.—A delivery of certain articles in consideration of being paid what they are worth constitutes a sale. *Hill v. Hill*, 1 D. 206.

A "sale" means a contract between parties to pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought and sold. *Huthmacher v. Harris*, 80 D. 502.

A sale or gift may be inferred from circumstances, where there is no proof of an actual sale. *Moon v. Hawks*, 16 D. 725.

A proposition to sell must continue down to its acceptance to constitute a binding contract of sale. *Mactier v. Frith*, 21 D. 262.

In case of a contract of sale by letter between parties at a distance, the will of the party making the proposition to sell must continue until the other party shall have received the letter, and signified, or had an opportunity to signify, his acceptance, in order to constitute the "meeting of minds" necessary to complete the contract. *Ib.*

Acceptance of a subsisting written offer to sell completes the bargain, though the party offering has no knowledge of the acceptance at the time. *Ib.*

A sale of goods to a consignee, whereby title passes, may be inferred by the jury, without proof of an express agreement, from evidence that on consigning the goods and advising the consignee of the fact by letter attached to the invoices, the consignors, at about the same time, drew sundry bills on the consignee, which the latter accepted, particularly where there has been a course of dealing between the parties war-

ranting such inference. *Holbrook v. Wright*, 35 D. 607.

Where timber, or produce of land, or other thing annexed to the freehold, is sold specifically, whether it is to be taken by the vendee, under a special license to enter for that purpose, or whether it is to be severed from the soil by the vendor, in the contemplation of the parties it is still evidently and substantially a sale of goods only. *Smith v. Bryan*, 59 D. 104.

Delivery of an article at a fixed price, under an alternative agreement that the article is to be paid for or returned at the option of the party receiving it, constitutes a sale. *Crocker v. Gullifer*, 69 D. 118.

"Sale" means a transfer for valuable consideration, while "gift" means a gratuitous transfer without an equivalent. *Parkinson v. State*, 74 D. 522.

The distinction between a sale and an exchange or bargain of barter is that in a sale a price is attached to the article sold, which may be received in money or in a chattel at an estimated price; whereas in barter, one chattel is exchanged for another, no price being attached. *Fuller v. Duren*, 76 D. 318.

B received one hundred and seventy-five dollars as an advance to buy barley for W, and agreed to deliver to W one thousand bushels of barley at a certain time and place. Held, that this was a contract of sale, and that B was not an agent of W. *Black v. Webb*, 55 D. 456.

2. What do not.—Where one carries wheat to a mill to be ground into flour, the contract is not a sale, but the property in the flour is in the one depositing the wheat, although it is, with his knowledge, mingled with wheat belonging to the miller. *Inglebright v. Hammond*, 53 D. 430.

Title does not vest in a vendee under a contract in the words, "We have this day sold four hundred tons of pig-metal, now at our landing, or that will soon be delivered there," in the absence of evidence that there was a defined lot of metal in the intention of the parties. *Winslow v. Leonard*, 62 D. 354.

Where one forwards grain to another, and draws on him in favor of a bank which advances money on the draft, the transaction cannot be regarded as a sale of the grain to the bank, so as to divest it of its remedy against the drawer if the drawee fails to pay the draft, or to oblige it to account for the value of the grain in a suit against the drawer. *Kupfer v. Bank of Galena*, 85 D. 309.

A contract for a sale of cattle at a specified price, which contemplates delivery at a future time, and provides for a deduction from the price if upon delivery any of the cattle be dead, is not a bill of sale, and does not pass title, but is merely a contract to sell, and the vendee or his assignee has no right to take possession of the cattle with-

For Index to Notes in American Decisions and American Reports, see Volume I.

out the consent of the vendor. *Lounsdale v. Hunsaker*, 88 D. 465.

3. Sale distinguished from bailment.—A contract to deliver wheat to a miller and to take flour therefor of a specified quality, at the rate of a certain number of pounds for so many bushels of the wheat, is a sale and not a bailment, where there is no agreement to manufacture the flour from the wheat delivered; and one purchasing from the miller flour made from the wheat so delivered, is not liable in replevin to the party delivering such wheat. *Smith v. Clark*, 34 D. 213. Contra, *Foster v. Pettibone*, 57 D. 530.

The contract is a conditional sale, and not a bailment, where property is delivered to one for a certain consideration, and no option is given to the purchaser upon any contingency to return it, and none is given to the seller to reclaim it, except upon the purchaser's failure to make payment or to retain possession. *Bryant v. Crosby*, 58 D. 767.

A contract is one of sale, and not of hiring or loan, where the purchaser at a sheriff's sale of a tailor's stock in trade left the goods with the latter to be made up and sold by him as he pleased, for his own profit, accounting to the purchaser only for the money paid by him; and the goods may be again levied upon and sold, under execution against the tailor. *Dick v. Cooper*, 64 D. 652.

4. — or mortgage.—Whether a contract is a mortgage or absolute sale with a right to repurchase, or a pledge, depends upon the intention of the parties, to be ascertained by the circumstances attending the transaction. *Eland v. Radford*, 42 D. 610.

A contract is not a mortgage, but an absolute sale, with a right of repurchase, where there is an absolute bill of sale of the property, with a defeasance that the purchaser is to give back the property if repaid the purchase money within a year. *Ib.*

An absolute bill of sale cannot be shown to be a mortgage, as against creditors of the vendor, where there is no immediate delivery of the property. *Chenery v. Palmer*, 65 D. 493.

An instruction relative to a chattel mortgage is correct, where vendor and vendee have mutually abandoned a contract of sale, by the vendor's receiving back the property and returning the consideration, but entering into a new arrangement forming an executory contract of sale to the same vendee; if the jury are charged that if they should find that the new arrangement had any connection with the prior purchase, or that the contract of sale was abandoned in contemplation of the new arrangement, then such arrangement was in effect a mere mortgage of the property to the orig-

inal vendor as security for the price, and as a mortgage subject to the ordinary rule forbidding the retention of possession by the mortgagor. *Tomlinson v. Roberts*, 68 D. 367.

5. — or lease.*—The real character of a transaction is not affected by the name given to it. Thus a conditional sale is such, though it be called a lease. *Murck v. Wright*, 95 D. 455.

A lease does not amount to a sale when it provides that the lessor is to furnish ten cows for the lessee, to be kept on the leased property, for the use and benefit of the lessee, the lessor to pay all the taxes and to risk them against all unavoidable accidents, although the lessee agrees at the expiration of the lease to redeliver to the lessor the same cows "or those worth as much in all respects." *Smith v. Niles*, 49 D. 782.

A written agreement is a contract of sale, and not a lease, which purports by its terms to be a "lease" of a certain chattel for a specified term at a stipulated monthly "rent," varying in amount each month, with provisions against waste and subletting, and for a surrender of the property at the end of the term, and that the "lessor" may enter and take possession in case of default in the payment of "rent" when due, and at his option terminate the lease, but that if the "rents" are paid as agreed, the chattel shall "be and become the property of the second party without further consideration or payment." *Miller v. Steen*, 89 D. 124.

An agreement for the hire of a sewing machine at a specified rent payable monthly, the machine to belong to the hirer when a certain sum is paid, is not a sale, and the hirer cannot confer title on one who in good faith undertakes to purchase it from him. *Singer Manf. Co. v. Graham*, 34 R. 572. Compare *Singer Manf. Co. v. Cole*, 40 R. 20; *Latham v. Sumner*, 31 R. 79.

A. agreed in writing with B., "leasing" to him, all the coal beneath the surface of a certain tract of land "owned by A. B. covenanted to mine and pay "royalty" for a certain number of tons every year whether mined or not. There were provisions for distress or forfeiture. The agreement was "perpetual until all the coal was mined," and it extended to the heirs, executors, administrators and assigns of the parties. B. covenanted to pay the taxes on all the coal mined. *Held*, not a lease but a sale of all the coal in place, and that B. was liable for all the taxes thereon. *Delaware etc. R. R. Co. v. Sanderson*, 58 R. 743.

6. Validity of the contract, generally.—The liability of the purchaser of a chattel as surety on the vendor's note, or the discharge of a debt due from the vendor to the purchaser, is a sufficient consideration

* Contracts of sale or lease providing for payments by installments, see note, 89 D. 127-129.

For Index to Notes in American Decisions and American Reports, see Volume L.

for the sale of such chattel. *Fletcher v. Howard*, 16 D. 686.

A transfer of chattels, by which an option is given to the transferee, either to return or pay for the same by a certain day, is a valid sale, and vests the property in the transferee. *Burwell v. Bicknell*, 35 D. 262.

Unsoundness of an article sold amounts neither to want nor failure of consideration. In the absence of warranty, the soundness or unsoundness of the subject-matter of the sale has nothing to do with the consideration. *Egan v. Call*, 75 D. 653.

A sale of property by a debtor, even if void as against creditors, is good as between himself and his vendee, and all the world except his creditors. And such a sale cannot be attacked by a creditor merely because he is a creditor, but only when he has a judgment establishing his debt, and an execution issued thereon, or has some process regularly issued, as in the case of attachment, authorizing a seizure of the property. *Bickerstaff v. Doub*, 79 D. 204.

A sale without reservation, for a full price, for the purpose of paying certain debts of the vendor, and with that intent, is a lawful and honest transaction. And a jury is not at liberty to deduce fraud from that which the law pronounces honest. *York County Bank v. Carter*, 80 D. 494.

A contract of sale is not rendered invalid merely because the seller had knowledge of the illegal purpose to which the articles sold were to be put, and the purchaser will be liable for the contract price unless he can show that the seller participated in the intent to commit, or had some interest in, the illegal act. So held where a citizen of the United States, after the war had been declared, sold to another a lot of hogs, with knowledge that the latter bought them for the use of the confederate army. *Hedges v. Wallace*, 92 D. 497.

A mere possibility or expectancy not coupled with any interest in or growing out of property cannot be made the subject of a valid sale or transfer. *Skipper v. Stokes*, 94 D. 646.

7. Law of place.*—The sale of a vessel then at sea, valid by the law where the sale was made and where the vendor and vendee reside, is valid here, although the law of this state controlling transfers was not complied with. *Thuret v. Jenkins*, 12 D. 608.

Where an article is sold and delivered in one state, to be paid for upon its arrival in another state, the provision respecting payment serves only to designate the time of payment, and does not subject the contract to the operation of the laws of the latter state. *Houghtaling v. Ball*, 59 D. 331.

Where the subject of and parties to a sale of personal property are within the juris-

*Transfers of personal property, extra-territorial effect of, see note 85 R. 129-140.

diction of another state, and the contract is made and executed according to the laws of that state, the validity of the sale must be tested by the laws of the place where the contract is made, and no subsequent removal of the property outside the state for a lawful purpose divests the jurisdiction. *Born v. Shaw*, 72 D. 633.

An action lies in Rhode Island for breach of a contract of sale of goods, the contract being made there and valid there, but the goods to be delivered in New York, where the contract was invalid by the statute of frauds. *Hunt v. Jones*, 34 R. 635.

Where one in Vermont buys goods of another in New York, upon an order by mail, the goods to be shipped by express, C.O.D., the sale is in Vermont. *State v. O'Neil*, 56 R. 557.

Mere knowledge of an illegal purpose for which goods are purchased will not affect the validity of the contract of sale in the country to which they are to be taken and sold, where the goods are sold and delivered in the government where the contract is made, and the sale there is legal, and nothing remains to be done by the vendor to complete the transaction, and he is not in any way to be further connected with it. But if it is an ingredient of the contract between the parties that the goods shall be illegally sold, or that the seller shall do some act to assist or facilitate the illegal sale, or if the goods are to be delivered where the sale is prohibited, the contract will not be enforced. *Smith v. Godfrey*, 61 D. 617.

Laws prohibiting the sale of liquors in New Hampshire can not extend to a sale made in another state in which such sales are lawful, where the sale is complete in the latter state. *Id.*

Defendant ordered, by sample, liquors of plaintiff's agent. The order was sent to plaintiff, and the goods were by him shipped to defendant. The defendant lived and the order was given in a state where the sale of liquors was unlawful. Plaintiff lived in and the goods were shipped from a state where such sale was lawful. *Held*, that the sale was made in the latter state, and that plaintiff could recover the price in an action in the courts of the former state. *Boothby v. Plaisted*, 12 R. 140; *Hill v. Spear*, 9 R. 205; *Tegler v. Shipman*, 11 R. 118. But where a dealer in Ohio received in Michigan an order for liquors, which were afterwards shipped in Ohio and delivered to the vendee in Michigan,—*held*, to be a sale in Michigan, and invalid under a statute rendering void all "sales, contracts or agreements relating" to liquor; and that this was so although the order for the liquor was void under the statute of frauds. *Webber v. Howe*, 24 R. 590.

Davidson, at Ozark, sent a written order,

For Index to Notes in American Decisions and American Reports, see Volume I.

to Carl & Toby, merchants at Little Rock, to send him one gallon of whisky by express, C. O. D. It was sent accordingly, the sellers agreeing with the express company that if it was not taken within thirty days, it might be returned and they would pay freight both ways. Davidson received and paid for it. *Held*, a sale at Little Rock. *State v. Carl*, 51 R. 565.

8. Validity of sales of goods not in possession. A sale of chattels in possession of a third person at a distance, conveys the property to the vendee who with reasonable diligence endeavors to get possession thereof, as against a sheriff who attaches the same in the mean time as the goods of the vendor. *Ricker v. Cross*, 22 D. 480.

Personal property in the adverse possession of another, or subject to the lien of an attachment, may be sold by the owner. *Callins v. Lockwood*, 42 D. 729.

Title passes by sale without delivery from the true owner, though at the time of the sale the goods are in the tortious possession of a third person. *Webber v. Davis*, 69 D. 87.

A contract for the sale of property which the vendor does not possess, to be delivered in future, is not illegal unless both parties understood it to be a mere speculation in the future price, with no intention of delivering or accepting, and the burden of proof is on the party alleging the illegality. *Conner v. Robertson*, 55 R. 521.

9. — or not in case. — That a bargain is in words of either past or present time does not conclusively evidence a perfect sale, for the sale is not perfect if the vendor did not then own the article contracted for, or if it was not then manufactured or in existence, or not yet selected out of a lot of similar articles. *Winslow v. Leonard*, 62 D. 354.

The subject-matter of every executed contract of sale must have an actual or potential existence. *Wheeler v. Wheeler*, 74 D. 421.

Hope or expectation of means founded on a right in being may be the subject of a sale. *Id.*

Possibility or contingency, not founded upon right or coupled with an interest, cannot be the subject of a sale. *Id.*

An agreement made for a valuable consideration to deliver to one the first female colt which a certain mare might produce, vests a property in the colt when produced, for which trover may be maintained. *Fonville v. Casey*, 4 D. 559.

One may transfer title to crops not then in case, and which are to be grown upon the land; and the property will pass as soon as they are grown. *Baxter v. Bush*, 70 D. 429.

10. Effect of fraud or deceit.* — A

sale is void for fraud, if the vendor was induced to make it by misrepresentations made to him by the purchaser in respect to material facts peculiarly within his knowledge, by which the seller was deceived to his injury. *Griffin v. Chubb*, 58 D. 85.

One purchasing goods on credit knowing his insolvency and inability to pay is not guilty of such fraud as will avoid the sale if he purchased without the preconceived design of not paying for them. *Bidault v. Wales*, 59 D. 327.

A vendee purchasing goods with a preconceived design of not paying for them obtains no property in the goods. *Id.*

Such preconceived design may be evidenced by a resale of them at a sacrifice, an assignment in insolvency or to a favored creditor, or absconding with the goods, or other circumstances. *Id.*

A vendee's intention at time of purchase not to pay for the goods, and his knowledge of his insolvency, which he does not communicate to the vendor, do not make the purchase fraudulent, and the sale cannot be avoided after the delivery of the goods. *Smith v. Smith*, 60 D. 51.

A sale is vitiated by any misrepresentation or concealment of material facts respecting the property for the purpose of deceiving, and which does deceive, the buyer. *Wintz v. Morrison*, 67 D. 658.

11. — of false representations. — Fraudulent representations, to avoid a sale, need not be such as would sustain an indictment for obtaining goods under false pretenses. *Nichols v. Michael*, 80 D. 259.

A purchase of personal property by means of false representations of solvency gives no title to the vendee, and the vendor may recapture the property if it can be done without unnecessary violence to the person and without breach of the peace. *Hodgeson v. Hubbard*, 46 D. 167.

A representation by a vendor that a glandered horse has the distemper only, to conceal the fact that he has the glanders, is as much a *suggestio falsi* and *suppressio veri* as to represent an unsound horse as sound, or as to conceal the unsoundness. *George v. Johnson*, 44 D. 288.

A remark of a vendor after the completion of a contract for the sale of a horse, and when the vendee has come to take it away, that he "must take the horse at his own risk," comes too late; and when, in such a negotiation, a fraudulent concealment or false suggestion takes place, such a remark at any stage of the contract, although it might negative the allegation of warranty, would not exonerate the party from the consequences of the fraud produced by the suppression of truth and suggestion of falsehood. *Id.*

Where the seller of a diseased horse represents him as sound at the time of the

* Fraudulent concealment in sales of chattels, effect of, see note, 15 D. 106-108.

Purchase made by one knowing he is insolvent, when fraudulent, see note, 27 R. 504-506.

For Index to Notes in American Decisions and American Reports, see Volume I.

sale, such representation does not vitiate the sale, unless when he made it he knew that the horse was unsound. There is no deceit without a *scienter*. *Staines v. Shore*, 55 D. 492.

It is a false representation if a vendor exhibits a mule to a proposed vendee, and at that time represents the animal sound, if he knows to the contrary, even though the vendor afterwards says to such vendee: "The animal will be sold in a short time at auction, and you will then have a chance to buy him;" and about an hour subsequently the mule is offered for sale at auction, and the proposed vendee purchases the mule upon the prior representations of the seller. The fact that at the auction it was stated that the vendor did not warrant or guarantee the animal in any particular does not alter the rule. *Harris v. Mullins*, 79 D. 320.

12. Sales and purchases prohibited by statute. — Property sold upon an illegal or fraudulent consideration has the effect to pass title to the vendee; but the parties have no remedy against each other. *Ohio L. I. & T. Co. v. M. I. & T. Co.*, 53 D. 742.

An immediate purchase of goods lost at play by the loser or a third person for him would be a palpable evasion of the statute. A note given by such purchaser would be a note given for money lost at play. *Hockaday ads. Wilks*, 40 D. 606.

Where goods are sold, a sale of part of which is prohibited by law, the illegality of the sale of that part can have no effect upon the sale of the other articles made at the same time for a separate, agreed, and ascertainable price, wholly distinct from the price of the prohibited articles. *Walker v. Lovell*, 61 D. 608; *Boyd v. Eaton*, 69 D. 83.

A contract is not invalidated because of knowledge of vendor of goods that his vendee intends to sell them in another state, in violation of its laws. A debt arising upon such a contract may be collected by an action in the courts of the latter state, if the contract of sale was valid in the state where it was made. *Gaylord v. Scragen*, 76 D. 154; *Ross v. Mitchell*, 45 R. 520; *Feineman v. Sachs*, 52 R. 547. This rule does not apply where the contract is so connected with illegal transactions or purposes as to be inseparable from it. *Tatum v. Kelley*, 94 D. 717.

13. Validity, as against creditors, generally. — Personal property delivered to the vendee, under a conditional sale, without payment of the purchase price, is liable to execution by the creditors of the vendee, because as to such creditors the sale is considered fraudulent. *Ross v. Story*, 44 D. 121.

A *bona fide* transfer of goods by a non-resident need not be recorded to render it valid against subsequent attaching creditors,

under the Maryland statute of 1834, where there is actual or constructive delivery. *Van Brunt v. Pike*, 45 D. 126.

No actual removal is necessary to render a sale valid against the creditors of the vendor of logs which were on the ice of a river and on the land of strangers, especially where personal notice was carried home to such creditors. *Samborn v. Kittredge*, 50 D. 58.

A sale of personal property, not followed by delivery, is void at common law as to the creditors of the vendor; but under the Oregon statute such a sale is valid as to creditors, if the bill of sale is recorded within ten days thereafter. *Monroe v. Hussey*, 75 D. 552.

The owner of property can sell it and give good title to a *bona fide* purchaser despite his creditors, up to the time when they shall have acquired a lien. *McMahan v. Morrison*, 79 D. 418.

A sale of chattel, attended with delivery and transfer of possession, which was retained for several weeks, is not a fraudulent transaction in law, and if the sale was collusive, it is for the jury to determine it as a fraud in fact. *Graham v. McCreary*, 80 D. 591.

Where a vendor of goods makes an arrangement with the vendee by which the former shall have the privilege of reclaiming them upon payment of the amount of a claim which the vendee holds against him, such arrangement will create a trust for the benefit of the vendor, and render the sale void as to creditors, if the value of the goods exceeds the amount of such claim. But if the value of the goods did not exceed the amount of the vendee's claim, it is doubtful whether the reservation of the right to buy them back at their full value would constitute such a benefit to the vendor as to avoid the sale. *Grant v. Lewis*, 90 D. 785.

Where a sale is made, in fact, to defraud creditors, the jury have no right to find for the vendee, in an action by him to recover the property which has been levied on and sold by creditors of the vendor, even though the evidence prove an actual delivery and a continuous change of possession. *Gallagher v. Williamson*, 83 D. 114.

A *bona fide* sale of property by a debtor in insolvent circumstances, to his creditor, in payment or satisfaction of his debts, is not fraudulent, merely because such creditor thereby obtains a preference over other creditors, and although he may know at the time that his purchase will have the effect of defeating the collection of other debts from his vendor. *Walden v. Murdoch*, 83 D. 135.

A transaction is a sale, and will be upheld, if *bona fide*, as against the vendor's creditors, although it was agreed that if, when the goods were sold by the vendee, more should

For Index to Notes in American Decisions and American Reports, see Volume I.

be realized than the price paid by them, the excess, after deducting the expenses of the sale, should be credited to the vendors. *Reeves v. Sebern*, 85 D. 513.

While a sale of personal property will be presumed to have been made in good faith, where all the elements of a valid sale exist, such would not be the presumption when, in proving what is claimed to be a sale, some essential requirement is wanting. Thus where a sale of personal property is made without a delivery of possession to the purchaser, as to creditors and subsequent bona fide purchasers, such a sale is presumed to have been made in bad faith. *Corgan v. Frew*, 89 D. 236.

A sale of provisions upon a condition that they shall remain the property of the vendor until paid for, and with the understanding that they may be used and consumed by the vendee before payment is made, is valid as against attaching creditors of the vendee, if there is no fraud in the sale, as the title to the provisions remains in the vendor until the condition of the sale is performed. *Armington v. Houston*, 91 D. 366.

A contract that all the colts to be foaled by certain mares sold by A. to B., and kept in A.'s stables under B.'s care, were to belong to B., is a valid contract of sale, and not void as against creditors for want of delivery. *Hull v. Hull*, 40 R. 165.

14. Effect of possession remaining in seller.* — 1. In general, and as between the parties. — Change of possession is a rule of local policy uniformly required in the transfer of all personal property situated in Vermont, in order to place it beyond the reach of process against the transferor, and is not controlled by the law of the state where the contract is made. *Rice v. Courtis*, 78 D. 597.

Retention of possession of goods by vendor is presumptive evidence of fraud, and the burden of rebutting this presumption, and of showing by satisfactory evidence that there was really no intent to defraud, is cast upon the purchaser. *Grant v. Lewis*, 80 D. 785.

The validity of a sale is not affected as between the parties by possession remaining with the vendor, if it be consistent with the terms of the contract. *Griffin v. Chubb*, 58 D. 85; *Sezey v. Adkinson*, 91 D. 698.

Nor does the rule extend to a state or town levying a poll-tax. *Daniels v. Nelson*, 98 D. 577.

2. As respects creditors and subsequent purchasers. — An open and substantial change of possession is necessary to make a sale of personal property valid as against creditors and subsequent purchasers. *French v. Hall*, 32 D. 341; *Whitney v. Stark*, 68 D. 360; *Rocheblaw v. Potter*, 14 D. 305; *Davis v. Bigler*, 1 R. 393. This rule depends

* Change of possession, when required, see note, 6 D. 287-288.

upon neither the statute 13 Eliz., ch. v., nor statute 27 Eliz., ch. iv., but upon the circumstance that the vendee by suffering the vendor to remain in possession, enables him to commit a fraud upon innocent third persons. The rule is a rule of policy required for the prevention of fraud, and is to be inflexibly maintained. *Davis v. Bigler*, 1 R. 393.

A sale of personal property in the hands of a bailee, without change of possession, is valid as against an execution creditor, where the vendor does not again take it into his possession. So also where actual possession is taken by the vendee, and the property is left with the bailee for a special purpose. *Linton v. Butz*, 47 D. 501.

A sale of property not susceptible of delivery, as a growing crop, is not constructively fraudulent as to creditors or subsequent purchasers merely because the seller retained possession and was to cultivate and deliver it at a stated time. *Cummins v. Griggs*, 87 D. 482.

A statute requiring actual and continued possession in case of sale of goods to render the sale valid against creditors of the vendor and subsequent purchasers, though it does not use the word "exclusive," necessarily implies that the possession should be exclusively in the vendee. *Clafin v. Rosenberg*, 97 D. 336.

The vendee must take actual possession, and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party that the goods have changed hands, and that the title has passed out of the seller and into the purchaser. *Id.*

To constitute a valid sale of all the goods in a store as against creditors of the vendor, there must be a complete change of the dominion and control over the property, and some act which will operate as a divestiture of title and possession from the vendor, and a transference thereof to the vendee, who must exhibit the usual *indicia* of ownership; and though it may not be essential that the goods should be moved to a different house, there must be some open and notorious act clearly indicative of delivery and possession, such as taking an invoice, putting up a new sign, or any other reasonable means which would impart notice to a prudent man that a change had taken place. *Id.*

The vendor may be employed to render services in and about the property in the same manner as any other agent or employee, in such a case, and the sale may still be valid as against creditors of the vendor, provided the requirements of the law concerning change of possession have been complied with; but the law does not permit a joint or concurrent possession of the vendor with the vendee. *Id.*

Where one sells personal property for the

For Index to Notes in American Decisions and American Reports, see Volume I.

consideration of a pre-existing debt, and for the convenience of the purchaser retains possession, such retention is not necessarily fraudulent as against creditors. *Pregmail v. Miller*, 53 R. 684.

The defendant, in the employment of M. on his farm, agreed to buy of M. a horse then on the farm and apply his wages to the payment. Two years afterwards M. sold and delivered the horse to him, taking his receipt in full of wages earned in payment. The defendant continued in M's employment on the farm, the horse remained in M's stable, the defendant taking care of it, breaking it and shoeing it, paying M. for the feed. *Held*, that title did not pass as against M's creditors. *Hull v. Sigsworth*, 40 R. 167.

3. *What amounts to a retention of possession.*—The possession is not changed within the meaning of this rule, where the vendor's servant retains the possession of the articles, though the vendor may have removed from the place where they are kept. *Moore v. Kelley*, 26 D. 283.

Where the vendor retains possession nominally as agent of vendee, but with the right to sell and have all he can make beyond the actual cost, that is such an interest reserved as is utterly inconsistent with good faith in the sale, as against his creditors. *Grant v. Lewis*, 80 D. 785.

Employment of vendor by the vendee in the subordinate capacity of clerk or salesman to take charge of the goods which were the subject of the sale, is not incompatible with an actual and continued change of possession within the meaning of the statute, and is not of itself conclusive evidence of fraud. It is not *per se* a fraud which admits of no explanation, but is a strong circumstance tending to show that there has not been such change of possession as the statute requires. *Godchaux v. Mulford*, 85 D. 178.

Where the vendee so employs the vendor thereof, the latter cannot be allowed to remain in the apparently sole and exclusive possession of the goods after sales, for that would be inconsistent with such an open and notorious delivery and change of possession as the statute contemplates. But if it is apparent to all the world that he has ceased to be the owner, and that another has acquired and openly occupied that position, the statute is satisfied. *Id.*

Where the vendor has been so employed, it is competent for a creditor of the vendor to prove this fact as tending to show that there has been no actual and continued change of possession; but when proved, it does not become conclusive of that question, but is only an element of proof to be weighed by the jury. *Id.*

Giving back possession of personal property to the vendor, after a sale thereof, upon

a hiring, and for a temporary purpose, does not render such sale fraudulent, where there has been a visible and substantial change of possession. *French v. Hall*, 32 D. 341.

A vendor assisting the vendee to thresh grain in a barn, being part of the property conveyed, is not such a retention of possession as will render a sale fraudulent and void as to the creditors of the vendor. *Wilson v. Hooper*, 36 D. 366.

Personal property the subject of a conditional sale, the possession of which is retained by the vendor, either exclusively or jointly with the vendee, is not liable to execution by the creditors of the vendee. *Rose v. Story*, 44 D. 121.

Where a vendor and vendee have mutually agreed to rescind a contract of sale, and the vendor takes the property back and returns the consideration, but a new arrangement is made whereby there is an executory agreement to sell to the same vendee, the new arrangement, regarded independently of the previous transactions, is not to be considered in legal effect a sale and mortgage back, so as to make the vendee's possession fraudulent, but as a mere agreement for a future sale. *Tomlinson v. Roberts*, 68 D. 367.

2. Requirements of the Statute of Frauds.

15. *What is a sale within the statute, generally.**—The sale of bank stock is within the statute, and a broker who disposes of such stock for another, is to be considered the agent of both the owner and the purchaser. *Cobin v. Williams*, 5 D. 417.

The statute applies where a purchase is made by one in his own name and upon his own credit, and it cannot be proved by parol that the purchase was for another's benefit. *Holida v. Shoop*, 59 D. 88.

A contract is within the statute of frauds which is for delivery, and not manufacture and delivery, of certain articles, such contract being a contract of sale. *Fickett v. Swift*, 66 D. 214. Whether this would be the case were the goods to be delivered in the future, to be manufactured by the seller, or were some important alteration in their form to be effected by him before delivery, not decided. *Id. v. Stanton*, 40 D. 696.

An oral contract by one person to deliver to another one hundred sewing-machines, at a time and place designated, upon condition that a part of them not then finished should be completed in season by a third person, who was making them for the former, he not being a manufacturer of machines himself, but having fitted up a shop for their manufacture, and contracted with such third

*Contracts of sale, when within statute of frauds, see note, 64 R. 164-170.

Growing trees, sale of, whether within the statute, see note, 17 R. 596-601.

For Index to Notes in American Decisions and American Reports, see Volume I.

party to occupy the shop and make the machines for him at a certain price each, he furnishing the shop-room, materials, and tools, is a contract for the sale, and not for the manufacture, of the machines, and therefore within the statute of frauds, where at the time of the making of the contract thirty-six of the machines were completed, and the remaining sixty-four were being manufactured in the shop, and the whole were to be boxed up and delivered together. *Axtester v. Hough*, 79 D. 229.

An entire contract cannot be within the statute as to part of it and without the statute as to the residue. An entire contract for the sale of goods which is as to a part of the goods within the statute is wholly within the operation of the statute. *Id.*

The fact that goods sold are to be boxed and transported to the place of delivery by the seller does not take the sale out of the operation of the statute. *Id.*

A sale of growing annual crops is a sale of chattels, it seems, within the meaning of the statute. *Kingsley v. Holbrook*, 86 D. 173.

Plaintiff made a parol contract with defendant, whereby the latter was to raise three acres of potatoes and deliver them to plaintiff at a stipulated price per bushel. In an action for non-delivery,—*held*, that it was a question for the jury to determine, whether, under the contract, the defendant was bound to raise the potatoes himself, in which case it would be a contract for work, labor and materials, and not within the statute; or whether he might procure them by purchase or otherwise, which would render it a contract of sale, and therefore void. *Pittin v. Noyes*, 2 R. 218.

Defendants went to the shop of plaintiff, wagon and carriage-makers, to purchase brewery trucks. Plaintiff having none on hand, ordered them with the defendants' assent from wagon-builders in another city. The trucks were accepted and paid for by plaintiff. Some alterations were made by plaintiff, at defendants' request, and a painter, employed by the defendants, painted their names and business on the sides of the trucks while on the plaintiff's premises. *Held*, a contract for sale of goods within the statute. *Pawelski v. Hargreaves*, 54 R. 162.

16. What is not.—Goods contracted for are not within the statute when they are not in existence at the time of the contract or where some act remains to be done to put them in a condition to be delivered. *Gadsden v. Lance*, 37 D. 548.

The seventeenth section of the statute of frauds of Charles II., which requires delivery by the vendor and acceptance by the vendee of part of the goods sold, or something given in earnest or part payment

to bind the bargain, or some note or memorandum of the bargain, in writing to be signed by the parties, etc., in order to give validity to the contract, was never re-enacted in Texas, and is not a part of the law of that state. *Cleveland v. Williams*, 94 D. 274.

The parties entered into a parol agreement for the sale of a large quantity of bricks to be delivered within a month: after the expiration of the month the defendant called upon the plaintiff's agent, who had charge of the kiln, took away eight hundred of the bricks and told the agent that he would call for the remainder the following week. Defendant did not call for them, nor did the plaintiff separate the bricks from the rest of the kiln. *Held*, that the latter contract was not within the statute of frauds, as part of the goods had been delivered, and its terms could be ascertained by reference to the former contract. *Damon v. Osborn*, 11 D. 229.

17. Sales of goods to be manufactured.*—A contract for the sale of articles to be manufactured, or prepared for delivery by work and labor, and where the work and labor are a part of the contract, is not within the statute of frauds relative to the sale of goods, wares and merchandise. *Reichelberger v. McCauley*, 9 D. 514. S. P., *Mixer v. Howarth*, 32 D. 256; *Parsons v. Loucks*, 8 R. 517; *Goddard v. Binney*, 15 R. 112; *Meincke v. Falk*, 42 R. 722.

The statute of frauds applies to an oral contract for the sale of goods in existence at the time of making the contract, but not to an agreement to manufacture and deliver goods. *Parsons v. Loucks*, 8 R. 517.

A contract, if essentially one for sale of goods, is within the statute, whether the goods are then manufactured or not; but if it be essentially that the promiser is to manufacture and deliver the goods, although from his own materials, it is without the statute. *Pittin v. Noyes*, 97 D. 615.

An oral contract for sale and delivery of an article to be subsequently manufactured by the vendor is within the statute of frauds, unless the agreement calls for the peculiar skill, labor or care of the manufacturer, in which case it is for work and labor and not within the statute. *Prescott v. Locke*, 12 R. 55.

18. Necessity of memorandum.—Upon a joint sale to two, both vendees are principals, though the article sold might have been intended by them for the individual use of one; and therefore the undertaking of the other is not required by the statute of frauds to be in writing. *Wainwright v. Strass*, 40 D. 675.

A contract may be proved by parol, where the chattels have been delivered, and no

* Contract to manufacture article, when no within statute of frauds, see note, 9 D. 188-190.

For Index to Notes in American Decisions and American Reports, see Volume I.

writing is necessary. *Sahman v. Mills*, 51 D. 630.

An oral contract for sale of personal property is valid, though under the statute of frauds some memorandum in writing signed by the defendant may be necessary to enable the plaintiff to enforce it. *Hunter v. Giddings*, 93 D. 54.

19. Execution of the memorandum.

—Signing, by the vendors, of a memorandum of a contract for the sale of goods, is a sufficient compliance with the statute of frauds. *Russell v. Nicoll*, 20 D. 670; *Douglas v. Spears*, 10 D. 588.

A memorandum of sale, written by a vendor in his book, and signed by him, and by the purchaser's agent in his own name, is a valid contract, not to be varied by parol. *Wiener v. Whipple*, 40 R. 775.

An entry made by the vendor in his book of sales, of the name of the buyer and the terms of the contract of sale, which was read to the agent of the vendee making the purchase, and assented to by him, is an insufficient memorandum within the statute, it not being signed by the party to be charged, or by his agent. *Bailey v. Ogden*, 3 D. 509.

Under the statute, there must be a subscription by both parties, as well as an expression of the consideration. *Corbitt v. Salem Gas-light Co.*, 25 R. 541.

A memorandum written by the broker employed to make the purchase, with a lead pencil in his book, in the presence of the vendor, the names of the vendor and vendee, and the terms being stated in the body of the memorandum, which is not subscribed by the parties, is sufficient within the statute. *Merritt v. Olson*, 7 D. 286.

A memorandum in writing signed by the party to be charged is not established by showing that the seller gave to the buyer a bill of items of the property, together with an order for the delivery of the goods where they were stored, and that the buyer stamped with a machine his name and the date thereon, without evidence showing when or for what purpose it was done. *Boardman v. Spooner*, 90 D. 196.

A telegram accepting an offer by telegraph to sell, together with a letter of same date signed by the same party and to the same effect, afford sufficient evidence of subscription by said party to take the case out of the statute. *Trevor v. Wood*, 93 D. 511.

A purchaser signed and delivered to the seller a written agreement to buy shares of stock from him on specified terms. The seller did not sign, but orally agreed to sell on those terms. The seller tendered the stock and requested the price, but the purchaser declined to fulfill. In an action to recover the purchase price—*held*, that the agreement was valid. *Mason v. Decker*, 28 R. 190.

Plaintiffs made defendant a verbal offer

for a quantity of ice; defendant afterward telegraphed that he would accept the offer, and plaintiffs wrote to him inclosing a memorandum of the contract of sale for his signature, but defendant did not receive the letter, owing to a misdirection, until several days had elapsed, and meanwhile he had sold the ice to other parties. Plaintiffs seized the ice on a writ of replevin. *Held*, that there was no memorandum signed by the party to be charged within the statute; and that the seizure, by the officer, of the ice, and delivery to plaintiffs under the replevin process did not amount to a delivery and acceptance within the statute. *Washington Ice Co. v. Webster*, 16 R. 462.

20. Its sufficiency, generally.

—Where, on a sale by commission merchants of goods of their principal, a bill of parcels is made out and delivered to the purchasers, stating them to be such, the acceptance of such bill is a sufficient recognition by the purchaser of the commission merchant's authority to sign his name, and the bill itself is a sufficient memorandum of the contract to take the case out of the statute of frauds. *Batters v. Sellers*, 9 D. 492.

The note or memorandum should contain a warranty of quality of articles sold, if any there be. The omission of such term cannot be supplied by parol, to take the case out of the statute of frauds. *Peltier v. Collins*, 20 D. 711.

The object of the memorandum is not merely to prove that there was a bargain, but to show what the bargain was, at least, the extent and entirety of the consideration for the promise. *Id.*

If the bought and sold note delivered by a broker materially differ, there is no valid contract. *Id.*

The note or memorandum must express the price upon which the sale was effected, or it will be insufficient. *Id. v. Stanton*, 40 D. 698.

Superadding to the terms of the contract words expressing an obligation which the law implies does not change the nature or extent of the obligation or the remedy upon it. *Reed v. Randall*, 86 D. 305.

Where goods are sold, the sale to be subject to the buyer's approval an entry in the broker's books reciting the sale, but omitting to state that the sale was to be subject to the buyer's approval is defective, and does not take the case out of the statute. *Boardman v. Spooner*, 90 D. 196.

A memorandum signed by A. alone, whereby he agrees to furnish B. with a specified quantity of ice, at a specified price per ton, but not specifying time of delivery or of payment is sufficient under the statute, and not to be varied by parol proof of an agreement for a particular time of delivery or payment. *Williams v. Robinson*, 40 R. 352.

For Index to Notes in American Decisions and American Reports, see Volume I.

The plaintiff brought action for the non-performance of an agreement contained in the following memorandum, signed by the defendants: "New York, 13th May 1861. We agree to deliver P. S. Justice one thousand Enfield pattern rifles, with bayonets, no other extras, in New York, at eighteen dollars each, cash upon such delivery; said rifles to be shipped from Liverpool not later than 1st July, and before if possible. W. BAILEY LANG & Co." *Held*, that this memorandum was sufficient to bind the defendants; that there was a good and sufficient consideration for their obligation and that the plaintiff was therefore entitled to recover. *Justice v. Lang*, 1 R. 576.

The defendants orally bargained with Freeman, claimed by them to be the agent of the plaintiffs, and by the plaintiffs to be a broker, for the purchase from the plaintiffs of pork at a price exceeding \$50. Freeman telegraphed to the plaintiffs: "Mendel five bellies, eight. Ehrlich offers seven-eights ten bellies lighter than last." On the same day he made the following entry in his entry book: "Sold account C. H. North & Co., Mendel, 5 bellies, 8." *Held*, not a sufficient memorandum to comply with the statute. *North v. Mendel*, 54 R. 879.

21. What payment or part payment will satisfy the statute.*—The statute provided that contracts for the sale of goods for fifty dollars or upward shall be void unless a memorandum be made or there be a delivery and receipt of part of the goods, or, "unless the buyer shall at the time pay some part of the purchase-money." *Held*, that to take a parol contract out of the operation of the statute, payment must be made "at the time" of the contract, or, if made subsequently, it must be made and received for the express purpose of fulfilling the statute, or when made the parties must substantially re-state and re-affirm the terms of the contract. *Hunter v. Wetzel*, 15 R. 508.

Parties made an oral contract for the sale of goods, void under the statute. Subsequently the purchaser gave and the seller accepted a check for a part of the price. At that time the essential terms of the original contract were restated. The check was good when delivered, and was duly paid. *Held*, a payment, and "at the time" of the contract. *Hunter v. Wetzel*, 38 R. 544.

22. What delivery will satisfy the statute.†—Delivery of an article sold takes the contract out of the statute of frauds. *Houghtaling v. Ball*, 59 D. 331.

* Effect of payment of installment of price to take a sale out of the statute, see note, 56 D. 643-645.

† See monographic note on the sufficiency of delivery and acceptance to take a verbal contract for sale of goods out of statute of frauds, 49 D. 335-340. See also notes, 55 D. 575; 57 R. 16-22.

Effect of symbolical delivery to satisfy the statute of frauds, see note, 49 D. 336-338.

Delivery and acceptance of part of the goods need not be at the time of the sale in order to render the contract valid without a memorandum; under the statute they may be made afterward. *McKnight v. Dunlop*, 55 D. 370.

Actual or manual delivery of goods is not necessary in order to satisfy the statute where they are ponderous and incapable of being handed over from one to another, and where the buyer so far accepts them as to treat them as his own; or where the delivery is symbolical; or where actual delivery is impracticable, and can only be by such symbolical means as the circumstances of the case will allow. *Atwell v. Miller*, 61 D. 294.

Where a contract of sale is verbal, the delivery of the goods, after acceptance, to a carrier designated by the buyer, is sufficient to satisfy the statute. *Cross v. O'Donnell*, 4 R. 721.

Existence of a delivery sufficient to take a sale out of the statute is a question of fact for the jury, under the direction of the court. *Houghtaling v. Ball*, 59 D. 331; *Godchaux v. Melford*, 85 D. 178.

The continued change of possession required by the statute to validate a sale of goods and chattels must be actual, and not constructive. *Fitzgerald v. Gorham*, 60 D. 616.

The California statute providing that a sale of chattels not accompanied by "an actual and continued change of possession" shall be conclusive evidence of fraud against creditors or *bona fide* purchasers, does not require that the vendor, under penalty of forfeiture of the chattels, shall never afterwards have any control over or use of them. The word "actual" was designed to exclude the idea of a mere formal change of possession, and the word "continued," to exclude the idea of a mere temporary change. (Rule of *Bacon v. Scannell*, 9 Cal. 272, overruled.) *Stevens v. Irwin*, 76 D. 500.

To make a sale valid under that statute, delivery must be made, the vendee must take actual possession, that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be continuous; not taken to be surrendered back; not formal, but substantial. But it need not continue indefinitely when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property, and the claim to it by the vendee. *Id.*

A sale of chattels, where the vendee buys *bona fide*, takes possession openly, and holds exclusive possession for a year or more, is not void as to the creditors of the vendor under that statute, because the vendee afterwards puts the property into the possession of the vendor, who is his attorney in fact. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

Where one person by a written contract sold to another trees growing upon the former's land, and the latter, after removing certain of the trees, resold the remainder to the owner of the land by a parol contract, the sale is a contract for the sale of goods, and the purchaser under said parol contract being in possession of the land upon which the trees were growing, the sale *eo instanti*, by force of law, gave possession of the trees to the defendant, and the delivery was perfect. *Smith v. Bryan*, 59 D. 104.

Parties orally agreed for the purchase and sale of a lot of cotton, consisting of six bales, weighed and stored in a warehouse, and the seller gave the purchaser an order on the warehouseman for it. The seller notified the warehouseman of the sale and the purchaser applied to him for the cotton, but delivery was postponed by the agreement of the warehouseman and the purchaser until the next morning. No money passed, and no other writing was executed. *Held*, a valid delivery and acceptance. *King v. Jarman*, 37 R. 11.

23. What will not. — A sale of chattels without immediate delivery is void against creditors, by the statute of frauds, though no levy is made before a subsequent delivery. *Chenery v. Palmer*, 65 D. 493.

An actual delivery of the goods, or a part of them, is not always required by the statute of frauds, but a virtual or constructive delivery may be sufficient. Those circumstances which ought to be held tantamount to an actual delivery, ought, however, to be so strong and unequivocal, as to leave no doubt of the intent of the parties. An agreement with the vendor about the storage of the goods, and the delivery by him of the import entry to the agent of the vendee, are not sufficiently certain to amount to a constructive delivery, or to afford an *inducium* of ownership. *Bailey v. Ogden*, 3 D. 509.

Where a person in Massachusetts sells some hides in a New York warehouse, and gives a bill of the goods and an order on the warehouseman to the buyer, without notifying the warehouseman, this is not such a delivery to and acceptance by the buyer as satisfies the statute of frauds. *Boardman v. Spooner*, 90 D. 196.

An agent of a principal residing in Ohio contracted with a person residing in Indiana to sell him goods exceeding \$50 in price. Nothing was said as to the manner of shipment. There was no memorandum, earnest money, nor payment, and the vendee did not receive any part of the goods. The principal afterward in Ohio, without the knowledge or assent of the vendee, shipped a part of the goods to the vendee, who refused to receive them. *Held*, that the contract was an Indiana contract; that it was an entire contract, and the vendee was not bound to accept part; that the delivery to the carrier,

under the circumstances, was not a legal delivery to the vendee; and that the contract was void under the statute of frauds. *Hawman v. Nye*, 30 R. 199.

24. Necessity and sufficiency of acceptance by buyer — 1. Necessity. — Under that section of the statute of frauds which provides that "no contract for the sale of any goods, wares, or merchandise for the price of thirty dollars or more shall be allowed to be good unless the purchaser shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment," or some writing properly signed, a mere delivery of goods to the purchaser will not be sufficient. There must further be an acceptance by the purchaser, else he will not be bound. *Maxwell v. Brown*, 63 D. 605. *S. P., Caulkins v. Hellman*, 7 R. 461.

To constitute an acceptance and receipt within the statute in case of a verbal sale of goods, there must be a delivery of the goods with intent to vest the right of possession in the vendee, and there must be an actual acceptance by the latter with intent to take possession as owner. *Jones v. Mechanics' Bank*, 96 D. 533.

Where plaintiff called upon defendant and offered to sell him a cargo of coal at a certain rate, defendant to pay the freight, which offer the defendant accepted, and plaintiff accordingly sent him the coal by a vessel which was wrecked on the way, thereby preventing defendant from receiving the same, plaintiff cannot maintain an action against him for the purchase price; as under the statute of frauds, in the absence of a written memorandum of sale, there would have to be an acceptance by the buyer as well as a delivery by the seller. *Maxwell v. Brown*, 63 D. 605.

Defendants verbally ordered lumber of plaintiffs, to be taken from certain lots designated by defendants in plaintiffs' yard, and to be cut by plaintiffs into sizes required by defendants and placed on plaintiffs' dock, and notice to be given to defendants, who agreed thereupon to take it. Plaintiffs filled the order, placed the lumber on the dock and gave notice to defendants, as agreed, but before they removed it, it was accidentally burned. *Held*, that the contract was one of sale under the statute of frauds; that there was no receipt and acceptance of the lumber by defendants; that the title thereto had not passed, and that defendants were not liable for the price agreed to be paid. *Cooke v. Millard*, 22 R. 619.

2. Sufficiency. — Acceptance within the meaning of the statute of frauds, must be by some clear and unequivocal act of the party to be charged, or of his agent duly authorized to receive the property. *Snice v. Warner*, 43 D. 417.

Delivery and acceptance, such as will take

For Index to Notes in American Decisions and American Reports, see Volume I.

a sale out of the statute, cannot be shown by words; some acts transferring possession are necessary. *Shindler v. Houston*, 49 D. 316.

The acceptance and actual receipt of the goods sold, or some part of them, by the vendee, must be intended by the parties to effect a final and complete change of property in order to take the case out of the statute. *Hesse v. Jordan*, 17 R. 578.

Delivery of goods to, and their acceptance by, a carrier named by the purchaser is a sufficient receipt and acceptance to take the sale out of the statute. *Spencer v. Hale*, 73 D. 309. But see to the contrary, *Johnson v. Cuttle*, 7 R. 545.

The acceptance and receipt required by the statute, may be made by an agent of the buyer empowered for that purpose, but an agency to so accept and receive cannot be inferred from the fact that the buyer has designated a particular carrier to whom the property is to be delivered for the purpose of transportation. *Jones v. Mechanics' Bank*, 96 D. 533.

In case of goods sold under a verbal contract, the fact that the vendee sold, or offered to sell, such goods at their place of destination in anticipation of their arrival does not amount to such an assumption of authority or ownership over them as will constitute an acceptance and receipt within the statute of frauds. *Id.*

An oral agreement to purchase all the leather of a certain thickness in a large pile of leather, the same to be selected by the seller, the delivery of a part of the leather thus selected to a common carrier not expressly authorized by the purchaser to accept it, and the acceptance by the purchaser of that part from the carrier, without any intention to accept the remainder, do not constitute a sufficient acceptance to take the sale out of the statute of frauds. *Atherton v. Newhall*, 26 R. 47.

3. Rights and Liabilities of the Parties; and herein of Bona Fide Purchasers.

25. Of the seller; and herein of his Lien. — A vendor who acts as seller and buyer and as agent for the vendee must exercise the utmost degree of good faith. *Weaver v. Lapeley*, 94 D. 671.

The title of a vendor of goods is superior and will prevail, where the goods had come to the possession of the vendee, and ascertaining his insolvency, he deposited them in his warehouse subject to the order of the vendor, and notified him thereof by letter, although before the vendor had signified his assent the goods were attached by another creditor. *Sturtevant v. Orser*, 82 D. 321.

A vendor has a lien on the goods for the price if no credit is given, and the goods are not actually delivered. *Arnold v. Delano*, 50 D. 754.

The vendor's lien is waived by giving credit for the price. *Arnold v. Delano*, 50 D. 754; *Bras v. Torrey*, 13 D. 279.

Unless credit in a sale is expressly given, which is a waiver of any right to demand immediate payment, the vendor's lien continues to exist; and if the buyer is insolvent when he demands delivery, the seller may refuse to deliver, even when credit has been given. *Southwestern Freight etc. Co. v. Standard*, 100 D. 255.

Where goods are sold to be paid for on delivery, if upon delivery the vendee refuses to pay for them, the vendor has a lien for the price, and may resume possession of the goods. *Palmer v. Hand*, 7 D. 392.

If before the delivery is completed the vendee sells or pledges the goods to a third person for value, but without notice to the vendor, the lien the latter may have is not affected, and he can recover from such subsequent purchaser. *Id.*

A vendor of personalty has no lien, after an absolute delivery, for the unpaid purchase money. *Lupin v. Marie*, 21 D. 256.

A vendor has no lien on goods in case of the purchaser's insolvency, where before the insolvency the goods have been delivered to an agent for the purchaser, and the latter has sold them and assigned the contract to a third person for value, and directed the agent to deliver them, and the agent has accordingly charged the goods to the assignee. *Ford v. Sproule*, 12 D. 439.

If a vendor has no lien or privilege on goods at the place where he sells them, he acquires none by their removal elsewhere. *Whiston v. Stodder*, 13 D. 281.

A vendor of movable goods has, by the civil law, a lien on them while they remain in the possession of the vendee. *Hobson v. Davidson*, 13 D. 294.

The vendor's civil law privilege upon movables does not attach at common law, under which he who sells and delivers a movable is, in the distribution of assets of a succession among creditors, a mere ordinary creditor for the price. *Copley v. Sanford*, 46 D. 548.

The vendor may resume his lien in case of insolvency of the vendee before payment, though credit is given, and may retain the goods, if in his actual possession, or stop them *in transitu*. *Arnold v. Delano*, 50 D. 754; *Merchants' etc. Bank v. Hewitt*, 66 D. 49.

In case of a sale where title has passed, and the goods have been constructively delivered, possession cannot be coerced until payment is made, for as long as the vendor retains and has not surrendered possession, his lien exists; and though there may be a delivery which will pass the title, it will not necessarily destroy the lien. *Southwestern Freight etc. Co. v. Standard*, 100 D. 255.

26. Of the buyer; and herein of his title or interest. — These being ne

For Index to Notes in American Decisions and American Reports, see Volume I.

market overt here, a purchase for a valuable consideration and without notice vests no higher title in the vendee than was possessed by the vendor, and in the case of a purchase made in a foreign country, the general principle of law applies, unless some local law be shown which would affect the property. *Wheehright v. Depeyster*, 3 D. 345. S. P., *Saltus v. Everett*, 32 D. 541; *McMahon v. Sloan* 51 D. 601; *Agnew v. Johnson*, 62 D. 303.

When the same goods are sold to two different persons, by conveyances, equally valid, he who first lawfully acquires the possession will hold them against the other. *Lawfar v. Sumner*, 9 D. 119; *Fletcher v. Howard*, 16 D. 686; *Jewett v. Lincoln*, 31 D. 36; *Winslow v. Leonard*, 62 D. 354; *Brown v. Pierce*, 93 D. 57.

A fraudulent purchaser acquires no title to goods purchased, as against the defrauded vendor. *Root v. French*, 28 D. 482; *Cary v. Hotelling*, 37 D. 323.

A mortgage of slaves subsisted when the mortgagor, claiming full title, sold them for a full consideration; though as to the mortgagee, the sale transferred only an equitable interest, yet, as between the vendor and vendee, the sale passed the absolute title to the vendee, and therefore, when subsequently the mortgagor obtained his discharge under the insolvent law, and purchased the slaves from the mortgagee, the title thus acquired will inure to the benefit of the vendee. *Dorsey v. Gassaway*, 3 D. 557.

A purchase of goods for two may be for their equal, without being for their joint benefit. *Hull v. Connolly*, 15 D. 612.

A sale of a chose in action vests no legal title in the assignee, and if tainted with iniquity, fraud, or champerty, in its origin, will not receive the aid of equity in its enforcement. *Fletcher v. Ferrel*, 35 D. 143.

A sale of wood on a tract of land, with a provision that it is to be got off within two years, does not entitle the purchaser or his vendee to take away any wood after that time, though it may have been cut before; nor can he or his vendee recover any compensation for wood so cut which the landowner will not suffer to be removed. *Kemble v. Dresser*, 35 D. 364.

A purchaser at an administrator's sale of a "drill machine," which unknown to the parties, contained money and other valuables, secreted there by the decedent, passes to the buyer the right to the machine and every constituent part of it, but not to the valuables, which, upon discovery, are held by him as treasure-trove, for the personal representative of the deceased owner. *Hutchmacher v. Harris*, 80 D. 502.

One who takes property from a fraudulent purchaser in payment of or as security for a pre-existing debt against such fraudulent

purchaser, cannot hold it against the vendor. Nor will the creditor of the fraudulent vendee, who levies on and sells the property fraudulently obtained, on an execution against the fraudulent vendee, and who becomes the purchaser at execution sale, acquire any title. But a *bona fide* purchaser from the fraudulent vendee, paying a valuable consideration, without notice of the fraud, in the usual course of trade, can hold the property against the original vendor. *Sargent v. Sturm*, 83 D. 118.

A stipulation by the vendee of a newspaper to pay "all of the outstanding liabilities" of the paper, will not make the vendee liable for the damages for libel subsequently recovered against the vendor, in a suit pending when the sale of the paper was made. *Perret v. King*, 31 R. 240.

On a contract by a corporation to purchase certain goods subject to inspection and approval by its agent, the corporation is liable if the agent fraudulently or in bad faith disapproves the goods. *Lynn v. Baltimore and O. R. R. Co.*, 45 R. 741.

A conditional vendee in possession of cattle, under an agreement that he is to keep, feed and work them until a specified time, and then restore them to the vendor, or that if he pays a certain sum by that time, the vendor is to release his right to them, may sell the same within the time, with such right as he has. *Vincent v. Cornell*, 23 D. 653.

The vendor cannot maintain trover for such cattle against such purchaser from the vendee, he having no knowledge of the agreement. *Id.*

The purchaser would be liable in trover after demand made after the expiration of the time, and non-payment of the sum specified, if the cattle were in his possession. *Id.*

27. What protection is accorded to *bona fide* purchasers.—One who *bona fide*, and for a valuable consideration, purchases of the mortgagee a slave held as security for money advanced, and without notice of the complainant's title, will be protected in equity as well as at law. *Bell v. Beeman*, 9 D. 604.

Purchasers without notice are not entitled to protection, further than as they have actually paid the purchase money. *Hoffman v. Strohecker*, 32 D. 740.

The general owner cannot maintain replevin or trover against a *bona fide* purchaser from his bailee if he placed the property in the hands of the bailee for any other than a legitimate purpose, or if he is fairly chargeable with any negligence by means of which the bailee was enabled to impose upon the purchaser. *Burton v. Curyea*, 89 D. 350.

Temporary delivery of possession of a chattel to a purchaser who, after retaining it for a few hours, redelivers it or permits

For Index to Notes in American Decisions and American Reports, see Volume I.

it to return to the possession of the vendor does not pass the property as against a second purchaser from the vendor who subsequently takes possession. *Fletcher v. Howard*, 16 D. 686.

Continued change of possession is necessary to transfer the title as against a subsequent purchaser for value. *Id.*

A verbal sale of standing trees is not binding on a subsequent purchaser without notice. *Gardiner Mfg Co. v. Heald*, 17 D. 243.

A fraudulent sale is not binding upon a subsequent bona fide purchaser from the vendor. *Newson v. Lyman*, 20 D. 156.

A subsequent purchaser of a personal chattel cannot set aside a prior conveyance to another's intestate on the ground of fraud. *Green v. Kornegoy*, 67 D. 261.

A sale voidable by the vendor for fraud, cannot be set aside by the vendor as to a bona fide purchaser from the vendee, for value, and without notice of the fraud. *Rosley v. Bigelow*, 23 D. 607; *Root v. French*, 23 D. 482; *Wineland v. Coonce*, 32 D. 320; *Saltus v. Everett*, 32 D. 541; *Jennings v. Gage*, 56 D. 476; *Sinclair v. Healy*, 80 D. 589; *Fascett v. Osborn*, 83 D. 278; *Stadfield v. Huntsman*, 87 R. 661; *LeGrand v. Buysaula Nat. Bank*, 60 R. 140; and a party making advances on the security of the goods in good faith, without notice of any fraud, is a bona fide purchaser under this rule. *Hoffman v. Noble*, 39 D. 711; but this principle does not apply to sales upon condition, and where the original owner has never consented to the transfer of the property. *Jennings v. Gage*, 56 D. 476.

A purchaser of personal property from one in possession under a sale upon an unfulfilled condition gets only the conditional title of his vendor, although he buys in good faith and in ignorance of the condition. *Sumner v. Woods*, 42 R. 104.

A purchaser of goods from a fraudulent vendor may have the legal and beneficial ownership therein, and may transfer it to a bona fide purchaser at any time before the creditors of the fraudulent vendor take steps to divest him of the property. *Sharp v. Jones*, 81 D. 359.

In consideration of supplies, A., by a written instrument, not recorded, sold to B. so much of a growing crop of cotton as would be sufficient to make two bales of lint cotton, each weighing not less than 500 pounds, the same to be gathered, prepared for market and delivered by the first of the next December. C., an execution creditor, levied on seed cotton in a pen, part of the crop, before the first of December. Held, that C.'s levy had preference, although A., before the levy, intended to gin, bale and deliver that particular cotton to B. *Williamson v. Steele*, 31 R. 652.

Williams bought of plaintiffs, at Savan-

nah, Georgia, 118 bales of cotton, giving therefor his checks on Bryan & Hunter, of the same place, having previously put the latter in funds by his draft on defendants to their order, and otherwise. Plaintiff delivered sixty bales to Williams, and it was shipped by Williams to defendants, at New York, the bill of lading being in his name and having attached thereto the draft indorsed by B. & H. Defendants paid the draft on presentation, the amount being more than the price of the sixty bales, and the transaction being according to their custom with Williams, and received the cotton without knowledge of any claim on it. One of the checks on B. & H., being post-dated, was dishonored, and plaintiffs brought replevin for forty-five bales, part of the sixty, relying on a statute of Georgia which provides that "cotton, rice, and other products sold by planters and commission merchants on cash sale shall not be considered as the property of the buyer, or the ownership given up, until the same shall be fully paid for, although it may have been delivered into the possession of the buyer." Held, that the action could not be maintained; that assuming that the statute was part of the contract, it simply made the delivery conditional, affected nothing but the delivery, and could not affect the rights of a bona fide purchaser in this state; and the sale being absolute and unconditional, title passed to defendants. *Comer v. Cunningham*, 33 R. 626.

The plaintiff in good faith purchased of defendant a non-negotiable certificate of a scrip dividend of a corporation. The certificate had been illegally issued, and so decreed by the Court of Chancery. Held, that plaintiff could recover the purchase-money from defendant. *Wood v. Sheldon*, 36 R. 523.

On receipt of \$75 a piano was delivered by C. to N., under a writing reciting a hiring, and promising quarterly payments of \$50 each in addition, so long as it should be kept, to return it on demand, not to remove it without C.'s consent, and to keep it insured; also stipulating that on further payment of \$350 in equal monthly installments the piano was to become N.'s. N. sold the piano to a purchaser in good faith. Held, that the latter got title, the agreement not having been recorded. *Knittel v. Cushing*, 44 R. 598.

23. Who are deemed to be bona fide purchasers.—In order that a purchaser from a fraudulent vendee may be protected, he must have parted with value upon the apparent title of the wrong-doer and his right to dispose of the property. *Barnard v. Campbell*, 17 R. 208.

A creditor who accepts goods in payment of a pre-existing debt is a purchaser for

* Amount of payment required to constitute one a purchaser for value, see note, 24 D. 401-406.

For Index to Notes in American Decisions and American Reports, see Volume I.

valuable consideration within the meaning of the rule that a *bona fide* purchaser of personal property for value without notice, from a vendee who obtained it by means of fraudulent representations, takes a good title as against the original vendor. *Butters v. Houghton*, 89 D. 401.

29. Who are not so deemed. — Where goods are obtained by fraud, the vendor may reclaim them against all persons except a *bona fide* purchaser without notice, and an officer who takes them in behalf of creditors by legal process does not come within the exception. *Atwood v. Dearborn*, 79 D. 755.

There can be no innocent purchase of void bonds, where the defect is a matter of law, with a knowledge of which every person is chargeable. *Town of Rochester v. Alfred Bank*, 80 D. 746.

Where a purchaser has obtained property from a fraudulent vendee in payment of a pre-existing debt, or as an execution creditor, it is unnecessary, in an action by the original vendor against said purchaser to recover the property, to prove, on the trial, that he participated in the fraud of the fraudulent vendee. *Sargent v. Sturm*, 83 D. 118.

A party who designedly abstains from making inquiry, for the purpose of avoiding knowledge, will not be regarded as a *bona fide* purchaser without notice, and is not thereby relieved from the effects of the knowledge his inquiries would have developed. *Allen v. McCalla*, 96 D. 56.

The transfer of a bill of lading as mere collateral security for a pre-existing debt does not make the transferee a purchaser for value. *Loeb v. Peters*, 35 R. 17.

30. Purchases from one having no title.* — 1. General rules. — A *bona fide* purchaser from one who has no title or authority to sell, acquires no title against the true owner. *Williams v. Merle*, 25 D. 604; *Saltus v. Everett*, 32 D. 541; *Burton v. Curyea*, 89 D. 350; *Wilson v. Crocker*, 97 D. 389; even when the sale is made or confirmed by the transfer of a bill of lading or other document symbolizing and describing the property sold. *Burton v. Curyea*, 89 D. 350.

No one can transfer to another by sale, a right of ownership in a thing wherein he himself had not a right of property, except in the instances of cash, bank bills, checks and notes payable to bearer or transferable by delivery, in the ordinary course of business to a person taking them *bona fide*, and paying value. *Fawcett v. Osborn*, 83 D. 278; *Saltus v. Everett*, 32 D. 541.

The owner of property cannot be divested of it except by his consent, or by operation of law. *Williams v. Merle*, 25 D. 604.

* See monographic note on rights of purchaser of chattels, from one having no authority to sell, 25 D. 606-616.

A certificate of the inspector of pot and pearl ashes, under the statute, does not determine the title so as to protect a *bona fide* purchaser. *Id.*

An honest purchaser under a defective title cannot hold against the true owner. *Saltus v. Everett*, 32 D. 541.

A person to whom personal property is transferred, which property had been in the mere possession of another, but not used for the purposes of trade, must take it at the hazard of a demand by the proper owner. Such possession, though indicative of title, is not title. *Agnew v. Johnson*, 62 D. 303.

If a bailee sell property to an innocent purchaser, without notice, the sale transfers no right of property as against the bailor, and the latter may have recourse either to the bailee or his vendee. *Chism v. Woods*, 3 D. 740; *Bailey v. Shaw*, 55 D. 241; *Burton v. Curyea*, 89 D. 350.

A purchaser of personalty with notice that his vendor is not to have the title to the articles until the performance of certain conditions, acquires no title as against the person on whose behalf performance was to be made, he being the owner of the articles. *Waterston v. Getchell*, 17 D. 251.

A sale and delivery of goods, on condition that title shall not vest in the vendee until payment of the price, passes no title until the condition is performed; and the vendor, if guilty of no laches, may reclaim the property, even from one who has purchased from his vendee in good faith and without notice. *Burbank v. Crocker*, 66 D. 470; *Lane v. Borland*, 31 D. 33; *Zuchtmann v. Roberts*, 12 R. 663; *Marvin Safe Co. v. Norton*, 57 R. 566. If such a transaction be regarded as a sale and mortgage back, the mortgage must nevertheless prevail against a *bona fide* purchaser from the mortgagor in possession, though he has no notice of the mortgage. *Lane v. Borland*, 31 D. 33.

The original vendor, after notice to a second purchaser that he owns part of the goods, may maintain an action against him for a return of the goods, or their value, without more particularly designating the articles claimed by him, where the goods have been sold to the first purchaser upon condition that no title should vest in him until payment of the purchase price. *Burbank v. Crocker*, 66 D. 470.

2. Illustrations. — Where T., by means of fraudulent representations to P., procures the sale to himself of a portion of certain chattels owned by P., but of which T. at the time is in lawful possession, and P. does no act to disaffirm T's title on the ground of such fraud. T. may reclaim and maintain possession of the entire portion so sold to himself against a subsequent *bona fide* purchaser to whom P. has sold and delivered part of the same under the mistaken belief

For Index to Notes in American Decisions and American Reports, see Volume I.

that the total quantity of the chattels was sufficient to satisfy both sales, although such belief was induced by the fraudulent representations of T.; and the second purchaser, in an action against P. on the warranty of title implied in the sale to himself, may recover the value to the chattels so reclaimed from him by T. *Brown v. Pierce*, 93 D. 57.

Goods were bought by means of fraud under such circumstances as entitled the vendor to treat the whole transaction as void, and the vendee, upon getting possession, immediately transferred them, by general assignment of all his property, to an assignee. *Held*, that the vendor could maintain replevin against the assignee. *Farley v. Lincoln*, 12 R. 182.

B. sold a wagon to H. on condition that it should remain the property of B. till paid for. Plaintiff repaired it for H. by putting in new wheels and axles. H. took it from plaintiff's possession without his knowledge or consent, and afterwards agreed with plaintiff that the "running part" of said wagon should remain the property of plaintiff until paid for. H. never paid either B. or plaintiff and neither had notice of the other's claim. B. took the wagon back from H. and sold it to defendant, who did not know of plaintiff's claim. *Held*, that defendant was liable in trover for the wheels and axles. *Clark v. Wells*, 12 R. 187.

J. S., who pretended to represent B. & Co., called upon D. and contracted with him for wool to be consigned to B. & Co. at P. J. S. also called upon B. & Co. and pretended to be the son of D., and contracted to sell them wool. The wool was shipped by D., consigned to B. & Co., but was received by J. S., who delivered it to B. & Co. and received the value of it. *Held*, that D.'s title was not divested and that B. & Co. were liable to him. *Barker v. Dinmore*, 13 R. 607.

A., falsely representing himself to be a member of a firm, bought in the name of the firm goods from B, who sent them by a carrier to the firm. On the refusal of the firm to receive them, A. sold them to C., to whom they were delivered by the carrier at A.'s request. *Held*, that A. had no title to the goods, and that an action for their conversion would lie by B. against C., although the latter was a purchaser in good faith. *Moody v. Blake*, 19 R. 394.

H., relying on the representations of R. that he was the agent of L., agreed to sell chattels of his to L., on credit, delivered them to L., and received part of the price from R. R. was not such agent and had no authority to purchase for L. L. bought the chattels from R. without knowledge of the fraud. *Held*, that title did not pass, and that H. could recover their value of L.,

less the amount paid by R. *Hamel v. Letcher*, 41 R. 519.

The owner of a diamond ring put it in the hands of a jeweller to match it, or failing in that, to get an offer for it. The jeweller sold it to the defendants. *Held*, that even if the defendants acted in good faith, they got no title. *Levi v. Booth*, 42 R. 332.

The plaintiff, refusing to sell to C., a broker, delivered goods to him on his representation that they were for an undisclosed principal in good credit, entering and billing them as a sale to C. It turning out that there was no such principal,—*held*, that the plaintiff might maintain replevin for the goods from the defendant, C.'s *bona fide* pledgee. *Rodliff v. Dallinger*, 55 R. 439.

31. Purchaser from a thief.*—No title can pass through a thief. Those who buy of him should be compelled to give up the property, unless they have converted it, when they should be held for its value. Factors and agents should be held to the same accountability. *Kock v. Bransch*, 100 D. 324.

The owner of stolen property may maintain an action for its value against a person who has innocently bought it from the thief, and resold it in good faith, if the property itself has passed beyond the reach of the owner. *Sharp v. Parks*, 95 D. 565.

A purchaser of stolen goods, either directly from the thief or from any other person, although in the ordinary course of trade and in good faith, will not acquire title as against the owner; and a carrier or bailee stands in no better position than a purchaser. *Bassett v. Spofford*, 6 R. 101.

Acquisition of title by sale in market overt, of stolen property, is not recognized in this country. *Pawcett v. Osborn*, 83 D. 278; *Rogers v. Huie*, 54 D. 300; *Carmichael v. Buck*, 70 D. 226; *Worthy v. Johnson*, 52 D. 399.

A sale of a government bond by a thief to a purchaser in good faith, for value, without notice, passes a good title. Sections 62 and 64 of the criminal code of Illinois do not change the rule of the common law that the *bona fide* holder of money or negotiable paper transferable by mere delivery, and not overdue, who has taken it in the usual course of business, and for a valuable consideration, acquires a perfect title. *Jones v. Nellis*, 89 D. 389.

32. Duty to make inquiry.—One proposing to buy an interest in a business and a stock of goods, having ample opportunity to examine and investigate, may not rely on the seller's representations as to value of the goods or extent of the business. *Poland v. Brounell*, 41 R. 215.

Notice to one of two joint purchasers concerning terms of sale is notice to both.

*Purchase from a thief—market overt, see note. 25 D. 605-610.

For Index to Notes in American Decisions and American Reports, see Volume I.

Hadley v. Clinton County Importing Co., 82 D. 454.

The law prescribes the manner in which property belonging to the United States is to be sold, and parties dealing with agents or officers of the government in this regard are bound to know the extent of their authority. *Johnson v. Friebe*, 96 D. 508.

Bare possession of a horse by an army officer with consent of the quartermaster having charge of horses belonging to the government, and the sale of such horse by him to another, though a *bona fide* purchaser, are not sufficient to pass title to the purchaser. *Id.*

II. DELIVERY AND PAYMENT. ACCEPTANCE.

1. In general.

33. Necessity of delivery.*—Personal property passes by delivery only, and to make a sale of it valid, there must be a delivery. *Boetick v. Keiser*, 20 D. 237; unless the property at the time of the transfer is abroad and incapable of delivery, in which case the vendee may take possession within a reasonable time after the property comes within his reach. *Thuret v. Jenkins*, 12 D. 508.

Delivery is not essential, as between parties, to complete a sale of personal property and the passing of a title when nothing remains to be done but for the purchaser to take possession; but as to creditors and subsequent *bona fide* purchasers, a delivery is indispensable to complete the sale. *Corgan v. Freese*, 89 D. 286; *Peabody v. Carroll*, 13 D. 305; *Wilson v. Hooper*, 38 D. 366; *Hooban v. Bidwell*, 47 D. 386; *Danley v. Recker*, 50 D. 242; *Griffin v. Chubb*, 58 D. 85; *Winslow v. Leonard*, 82 D. 354; *Call v. Gray*, 75 D. 141; *Kohl v. Lindley*, 89 D. 294.

Delivery is necessary to complete a sale, so far as the rights of a second purchaser or judgment creditor without notice are concerned. *Ludwig v. Fuller*, 35 D. 245.

A sale without delivery is valid against the vendor. *Webber v. Davis*, 69 D. 87.

Delivery is not necessary to pass the title, as between the parties to the sale, if the purchase price has been paid. *Costar v. Davies*, 46 D. 311.

Where goods are purchased in a retail store, it is necessary, in order to vest the title in the vendee, and make the sale valid as against the creditors of the vendor, that the goods sold should be separated from the bulk of the other goods, and that possession should be delivered with as little delay as is consistent with the nature of the articles purchased. *Eagle v. Eichelberger*, 31 D. 449.

A marked distinction exists between delivery to pass property in goods to a purchaser, and the actual delivery which will

destroy the vendor's lien. *Arnold v. Delano*, 50 D. 754.

A mere intention of the vendor to deliver to the vendee certain specific goods is not a sufficient identification thereof to pass the title. *Golder v. Ogden*, 53 D. 618.

Mere contract to sell personal property without any delivery, either actual or symbolical, does not pass the title as against third persons, although it may have that effect as against the vendor. *Brown v. Pierce*, 93 D. 57.

Want of delivery may be evidence of fraud, but is not *per se* conclusive of it. *Cocke v. Chapman*, 44 D. 536.

Where personal property is sold to be paid for when delivered, and a part only is delivered under the contract, the property in the part not delivered still remains in the vendor. *Lewis v. Ross*, 59 D. 49.

34. Time and place of delivery.—
1. *Time.*—Under the statute of frauds, a contract for the sale of goods need not specify time or place of delivery; but if plaintiff testifies that time or place was agreed upon, and the contract does not specify it, he cannot recover on it. *Smith v. Shell*, 52 R. 365.

A contract providing for the delivery of a spinning machine at a time and place certain, is sufficiently complied with, if such machine is delivered and received without objection, at a subsequent time. *Baldwin v. Farnsworth*, 25 D. 252.

A vendor engaging to deliver a chattel has no right to require a demand from the vendee, but must tender the chattel at the time specified. *Wagers v. Dickey*, 49 D. 467.

A reasonable time in which to complete delivery of cattle must be given where they have been sold in good faith, but are roaming at large over immense uninclosed plains. Under the rodeo laws of California, a reasonable time after the sale must be given in which to prepare for a rodeo, and to give the proper notices thereof, so that the cattle purchased may be separated from stock owned by others, and be properly marked and branded. In the mean time, the rights of the purchaser will be protected; because such a sale, under these circumstances, is not fraudulent as against the creditors of the vendor, merely because the sale is not followed by an immediate delivery of possession. *Walden v. Murdock*, 83 D. 135.

Reasonable time in which to prepare for a rodeo for the purpose of marking and branding cattle, will depend upon the facts and circumstances of each case, but one day's time is clearly insufficient. *Id.*

The object of counter-branding cattle, or, in lieu thereof, to give a "written descriptive bill of sale," is to show what animals have been sold, and to stop the vendor from subsequently claiming them, because they carry his mark and brand. It does not dis-

* Manufactured property, delivery, whether necessary to vest ownership of in purchaser. see note, 56 D. 642, 641.

For Index to Notes in American Decisions and American Reports, see Volume I.

pense with the delivery required by law, to make the sale valid as against creditors and subsequent purchasers. *Ib.*

The rodeo laws only require counterbranding by a seller of cattle, or a descriptive bill of sale, and not a branding by the purchaser. *Ib.*

2. *Place.*—If no place of delivery is mentioned in a contract to deliver specific articles at a day certain, the creditor has the right to appoint the place. *Aldrich v. Albee*, 10 D. 45.

The place of delivery of articles stipulated in a sealed contract is a condition precedent merely, imposed upon the party bound, which may be waived by the party entitled to its performance without producing any alteration of the original contract. *McCombe v. McKennan*, 37 D. 505.

An agreement to accept delivery at a place other than that specified in the original contract does not constitute a new contract. *Ib.*

Covenant may be sustained upon a contract under seal notwithstanding by subsequent consent of the parties the place at which the articles called for were to be delivered was altered, and performance may be shown by evidence of a delivery at the place agreed upon. *Ib.*

The place of delivery mentioned in a written contract of sale may be changed by a subsequent parol agreement. *Hunt v. Thurman*, 40 D. 683.

35. *What is a sufficient delivery.*—Delivery is a fact dependent upon intention, and must be determined by the jury from a consideration of the whole evidence. *Byer v. Byer*, 41 D. 410.

To constitute delivery, it must be such as waives the vendor's lien. *Messer v. Woodman*, 53 D. 241.

In determining whether delivery has been made, regard must be had to all the facts bearing upon the particular question, and especially to the character of the transaction in which the parties may have been engaged, to ascertain whether the delivery was such as the nature of the case admitted. *Hall v. Richardson*, 77 D. 303.

Slight evidence of a delivery is sufficient to support a *bona fide* sale for value. Obtaining possession by the vendee, with the vendor's consent, before any attachment or second sale, completes the transfer, without formal delivery. Principle applied to furniture sold in a building leased to the vendee, of which he takes possession together with the vendor. *Shumway v. Rutter*, 19 D. 340.

Marking of shingles with the initials of the purchaser under a bill of sale for a specified quantity out of a larger mass, is evidence of a delivery of possession to go to the jury. *Jewett v. Lincoln*, 31 D. 86.

Possession is sufficiently changed upon the sale of a farm with the personal property

thereon, upon which neither of the parties reside, if the vendee records his deed, enters upon the premises, and assumes the entire control thereof. *Wilson v. Hooper*, 36 D. 366.

A sale of personal property is complete, and no subsequent formal delivery thereof is necessary, where, from the date of the bill of sale, the property continued to be on land, or in buildings, in the exclusive possession and control of the vendee. *Nichols v. Patten*, 36 D. 713.

Delivery by a vendor is sufficient where all has been done by him that he may do, though something remains to be accomplished by the vendee. Thus the delivery of wood sold by the cord may be sufficient, though it has not been measured by the vendee. *Hunt v. Thurman*, 40 D. 683.

Delivery of goods by vendor at a place designated by the vendee's agent, who made the purchase, is a good performance of the contract, though the vendor knows that they are to be used by a third person and not by the purchaser. *Melledge v. Boston Iron Co.*, 51 D. 59.

In delivery of goods already in buyer's possession, the same acts of segregation, offer, and acceptance are necessary as in other cases. *Messer v. Woodman*, 53 D. 241.

A good delivery and continued change of possession of cattle roaming at large, and purchased in good faith, is clearly constituted by the act of the purchaser in collecting them together, marking them with his brand, and turning them out to pasture on their accustomed range. *Walden v. Murdock*, 83 D. 135.

Delivery is sufficient to pass title, where by one party purchases four ricks of hay at a stipulated price per ton, the same to be baled and weighed by himself, if he actually bales a small portion of the hay therefrom, and takes it into his possession; and this though he then refuses to take more of the hay, alleging that it is unsound and unfit to be baled. *Kohl v. Lindley*, 89 D. 294.

Mere suppression of facts will not alone constitute fraud such as will avoid a contract; there must be something more than a failure to communicate facts within the knowledge of the vendor; there must be a concealment, as by withholding information when asked for, or by using some device to mislead, involving act and intention. Thus in a sale of hay, where the seller was silent, and used no artifice to induce the purchaser to buy, and the hay was then in ricks, and proper diligence would have enabled him to detect the unsound condition—*held*, that the sale was not fraudulent. *Ib.*

Evidence that a person seeing an unfinished piano in the maker's shop offered to purchase it of him, if he would finish it; that the offer was then and there accepted; that a bill of sale was then and there made;

For Index to Notes in American Decisions and American Reports, see Volume I.

that the price was made at a subsequent day, the piano being left to be finished, will authorize a jury in finding a delivery of the piano sufficient to pass the title as against a subsequent purchaser. *Thorndike v. Bath*, 19 R. 318.

The defendant, H. W. Selby, ordered of the plaintiffs goods, which were shipped by the usual carrier, but by a clerical error they were directed to "W. H. Selby," instead of H. W. Selby. The defendant never received the goods. In an action for their price—*held*, that in the absence of proof that the loss of the goods was attributable to the error in direction, the defendant was liable. *Garretson v. Selby*, 18 R. 14.

36. — as against creditors. — Subsequent purchasers or judgment creditors with notice of a prior sale before their rights attached cannot attack such sale for want of delivery. *Ludwig v. Fuller*, 35 D. 245.

Delivery of a chattel to the vendee before seizure thereof under execution against the vendor is sufficient to vest title in the vendee as against the creditors levying the execution. *Bartlett v. Blake*, 58 D. 775.

A sale of sheep on the land of a third person whom the vendee asks to select the sheep from a larger number pasturing on the land, and who does make such selection, and marks those selected with the initials of the vendee, will constitute a good delivery as against creditors of the vendor, although the sheep remain on the land of the third person, the same as before the sale. *Barney v. Brown*, 19 D. 720.

Delivery of possession of personalty is sufficient as against subsequent attaching creditors of the vendor where the latter executes a deed of certain realty, followed by a bill of sale of the personalty thereon, and delivers possession of everything about the premises to the vendee, and surrenders the keys to the agent of the latter. In such a case, a removal of the personal property from the premises is not necessary. *Sharon v. Shaw*, 90 D. 546.

The plaintiff purchased, in good faith, bales of wool stored in the seller's factory, and the seller agreed to keep the wool for a time where it was on storage for the plaintiff, who had no place to store it. The seller, by the plaintiff's direction, opened some of the bails, took out of them samples, and delivered them to the plaintiff together with a bill of parcels wherein was acknowledged the receipt of the contract price. Plaintiff desired the parcels to resell the wool by. *Held*, that there was evidence to go to the jury of a delivery sufficient as to creditors. *Ingalles v. Herrick*, 11 R. 360.

It was orally agreed between a farmer and his laborer that the latter should accept certain hogs in payment for his services. They were pointed out, but were to remain in the pasture with other hogs, until an op-

portunity should be found for selling them. *Held*, a valid delivery as against the seller's creditors. *Webster v. Anderson*, 36 R. 452.

Failing debtors delivered to a heavy creditor a bill of sale of 12,000 bushels of charcoal in pits on the vendor's land. The vendee a few days afterward sent a person who marked the pits with their name. This person remained in charge of the pits a few days, and after him, a neighbor was requested to look after the pits, and visited them every day. *Held*, a valid change of possession as against other creditors. *Tognini v. Kyle*, 45 R. 442.

37. What is not sufficient. — Delivery is incomplete while anything remains to be done. *Messer v. Woodman*, 53 D. 241.

It is not a delivery of pew panels, contracted to be made and delivered at a meeting-house in process of construction, and to be paid for in cash on delivery, to leave them at the meeting-house in the absence of the vendee from the town, and they could not be attached as the property of the latter. *Woodbury v. Long*, 19 D. 345.

Delivery of boards under a bill of sale, to secure a prior debt, is not sufficient to pass title against a subsequently attaching creditor, where the boards are lying in different piles about a mill-yard, and the vendor, going in sight of them, points towards them and says, "There is the lumber," and tells the vendee to take it away and make the best of it, and the vendee goes away and leaves the lumber as it is, and exercises no ownership over it for two months, and until the attachment is levied. *Cobb v. Haskell*, 31 D. 56.

Mere notification of a servant in charge that personal property has been sold, accompanied with a request by the purchaser to continue in his employment, is not such delivery or change of possession as will vest the property in him as against subsequent attaching creditors of the party from whom he bought. *Sharon v. Shaw*, 90 D. 546.

Where a tenant remains in possession after the termination of his lease and sells to his landlord, in the presence of a third person, his share of the grain raised upon the land but allows the grain to remain in the barn the same as before, without any removal, and retains the key to the barn and the control and possession of the same, — this is not sufficient delivery or change of possession to make the sale valid as against attaching creditors of the vendor. *Lawrence v. Burnham*, 97 D. 540.

Want of immediate delivery, accompanied by an actual and continued change of possession, in the sale of goods and chattels, is conclusive evidence of fraud in the vendor as against attaching creditors whether the latter knew of the sale or not. *Id.*

Readiness of and offer by seller to deliver goods sold, and refusal of the purchaser to

For Index to Notes in American Decisions and American Reports, see Volume I.

receive them, do not constitute actual or constructive delivery, so as to entitle the seller to recover the full contract price. *Webber v. Minor*, 99 D. 688.

Where the plaintiff agreed to manufacture a reaper of a certain kind, and to deliver it to the defendant at a certain time and place, and at the appointed time and place the defendant was shown the separate pieces of a number of reapers, of identical form and size, and was told that one was designed for him and would be put up for him if he would take it, but he refused — *held*, not such a delivery as vested the title in the defendant. *Ganson v. Madigan*, 82 D. 659.

A party had a quantity of hay in a barn upon a farm which he carried on by his hired man. He sold a quantity of it to another person, telling him he could leave it in the barn until he could haul it away. The latter, in the presence of the former, thereupon requested the hired man to take charge of the hay for him, and he said he would do so. The remaining hay in the barn belonged to the seller. *Held*, that there was not such a delivery and change of possession as the law requires to protect the property from attachment by the seller's creditors. *Sleeper v. Pollard*, 67 D. 741.

33. Partial delivery. — Under a contract to deliver wood to a large amount before a day certain, the delivery need not be of the entire amount at the same time, but may be of portions upon several days, and the delivery of each portion vests the title in the vendee, and subjects him to the risk of future loss of the property. *Hunt v. Therman*, 40 D. 683.

If a vendee, on receiving part of a quantity of goods sold, finds they are not of the kind or quality which his contract entitles him to, he is not at liberty to retain such part, and claim damages for the non-delivery of the entire quantity. Nor can he require the delivery of the residue, retaining a claim for damages. He must either receive the article as it is, or he must return the portion delivered, and then enforce his claim for damages. He can recover no damages if he refuse to return the part delivered. *Reed v. Randall*, 86 D. 306.

The plaintiff contracted to sell and deliver 699 boxes of glass to defendant, delivery to be made at one time. Prior to any delivery the defendant wrote to plaintiff asking for immediate delivery of a small portion, and plaintiff thereupon delivered 265 boxes. The defendant received and used this quantity, and afterward wrote that he wished the order completed in a reasonable time. A correspondence ensued as to the terms of the agreement. The plaintiff subsequently offered to complete, but defendant declined on the ground that the time had elapsed. *Held*, that the plain-

tiff could recover for the amount delivered. *Avery v. Wilson*, 37 R. 503.

39. Separation, weighing and measurement. — As between seller and buyer, if anything remains to be done before the goods are to be delivered, a present right of property does not attach in the buyer. But separation is enough to pass the property, though weighing, measuring, or counting may afterwards be necessary to adjust and determine the final amount of the price. *Southwestern Freight etc. Co. v. Steward*, 100 D. 255.

Separation of articles sold out of a large number, where all are of exactly the same quality, is unnecessary to constitute such delivery as will pass the property; as in the case of a number of barrels of flour sold out of a larger number of the same brand belonging to the vendor and stored in a warehouse. *Pleasant v. Pendleton*, 18 D. 726; *Cushing v. Breed*, 92 D. 771; *Russell v. Carrington*, 1 R. 498; *Hurf v. Hires*, 29 R. 232; *Commercial Nat. Bank v. Gillette*, 46 R. 222; *Kingman v. Holmgvist*, 59 R. 604.

The duty is on vendor of separating merchantable corn from unmerchantable, where he has sold with warranty, and, under a local usage, the vendee, after receiving part, refuses to take the residue as of inferior quality, where the vendor claims that enough of the residue is of good quality to cover the purchase money already paid. *Clark v. Baber*, 45 D. 190.

The doctrine of appropriation, as constituting delivery, and thereby passing title, arises in cases of a sale of goods generally, as distinguished from the sale of a specific chattel; where a less quantity out of a larger is sold, no property passes until a delivery. To constitute a delivery, the vendor may appropriate the quantity purchased, by separating it from the bulk; but the appropriation is not complete until the vendee assents to take the separated portion. *Braxier v. Anselv*, 51 D. 408.

Where defendant bid off at auction a portion of a quantity of hay, — *held*, that to constitute a delivery of it, separation of the portion so bid off from the residue, and an offer and an acceptance by the buyer were necessary. *Messer v. Woodman*, 53 D. 241.

Property in twenty-eight barrels of flour passes to vendee as being sufficiently selected and separated, where the vendee purchased fifty barrels constituting part of a larger number at a railroad depot, received an order from the vendor upon the railroad company for a delivery thereof, and presented the same to the company, and obtained in return a "flour check," or order upon a clerk whose business it was to deliver such freight accordingly, under which twenty-two barrels were delivered to the vendee, but the remaining twenty-eight barrels were by mistake delivered to some

For Index to Notes in American Decisions and American Reports, see Volume I.

unauthorized third person. *Hall v. Boston etc. R. R. Co.*, 92 D. 783.

Measuring and marking wood is good delivery to pass the property to a purchaser, where the wood is left on the vendor's land in a common pile with other wood, with license to the purchaser to remove it within a year; but if the buyer becomes insolvent before payment and before the wood is actually removed, the vendor may hold it against the assignee in insolvency until the price is paid, though a credit which is unexpired has been given. *Arnold v. Delano*, 50 D. 754.

Measuring and setting apart goods are not essential to a perfect sale, except when it is necessary in order to define the subject-matter. *Winslow v. Leonard*, 62 D. 354.

Delivery, weighing, and setting aside goods are only circumstances from which the intention of the parties to the sale, as to the vesting of title, may be inferred as a matter of fact. *Id.*

40. Delivery of cumbersome articles. — Constructive delivery of bulky articles, such as pig-iron, at a distance from the place of contract, in care of an agent, is sufficient to pass the title upon a present sale. *Van Brunt v. Pile*, 45 D. 126.

It is a good constructive delivery of bulky goods in care of an agent of the vendor at a distant place, for both the vendor and the vendee to notify him of the sale, and for the vendee to instruct him to ship the articles to his agent at another place, he agreeing to comply with such instructions. *Id.*

Actual delivery of ponderous goods is not required, and constructive delivery may be implied from various acts, among which are designating them for the use of the purchaser by marking, or removing them for the purpose of being delivered. *Hall v. Richardson*, 77 D. 303.

In case of an agreement to manufacture and deliver heavy machinery, an actual tender is not necessary, but readiness and an offer to deliver is sufficient to maintain an action for the price. *Smith v. Wheeler*, 33 R. 698.

Delivery of a lot of iron, of great weight, in a pile by itself, after an agreement as to its price, by the vendor saying to the vendee, "I deliver this iron to you, at that price," is sufficient under the statute of frauds. *Gallins v. Lockwood*, 42 D. 729.

41. Delivery to carrier. — Delivery to a carrier or warehouseman named or indicated by the buyer, is a delivery to the buyer, and the goods so delivered will be at the risk of the buyer, without notice of delivery, unless the parties contract that notice of delivery shall be given. *Bradford v. Marbury*, 46 D. 264. *S. P.*, *Diversey v. Kellogg*, 92 D. 154; *Kruidler v. Ellison*, 7 R. 402.

*Delivery of goods forwarded C. O. D., see note, 51 R. 570-572.

Where the contract of purchase is silent as to the method of delivery, a delivery by the vendor to a common carrier in the usual course of business, transfers the title to the vendee. *Magruder v. Gage*, 3 R. 177. Contra, see *Loyd v. Wight*, 65 D. 638.

Flour purchased for shipment is delivered to purchaser by being marked with the initials of the purchaser and of the ship, and being delivered to the proper agent of the ship. *Hall v. Richardson*, 77 D. 303.

Delivery to the master or agent of a vessel, where goods are designed for shipment, is equivalent to delivery to the purchaser. *Id.*

Where a manufacturer in one city receives an order for goods through his agent in another city for a customer there, and ships them by a common carrier at the place of manufacture, title ordinarily passes at the place of shipment, although payment is made to the agent at the other place. *Sar Becker v. State*, 56 R. 624.

The shipment of goods, pursuant to a contract by which the consignor was to pay the freight, and the consignee, after sale, was to credit the consignor with the proceeds, does not vest title in the consignee, in the absence of a bill of lading or notice to him of the shipment. *First Nat. Bank v. McAndrews*, 51 R. 51.

Plaintiff, a resident of Wisconsin, sued defendant, a resident of Iowa, on account for intoxicating liquors sold and delivered pursuant to an oral order given in Iowa. Defendant answered that the sale was in violation of an Iowa statute. Plaintiff replied that the sale was also void under the Iowa statute of frauds, but that plaintiff had avoided the effect of both statutes by delivering the goods to a carrier in Wisconsin for transportation, in accordance with an agreement at the time of sale. On demurrer, — held, that the answer was good and the reply was bad. *Kehwert v. Meyer*, 30 R. 206.

42. — or other third person. — The personal representatives of a purchaser dying after the contract is closed, may receive delivery of the goods. *Mactier v. Frith*, 21 D. 262.

Delivery of goods to a servant or agent of a purchaser is equivalent to a delivery to such purchaser. *Bonner v. Marsh*, 48 D. 754.

Delivery to a warehouseman may be complete delivery to the buyer, although the seller takes the receipts in his own name, unless his intention in so taking them was to preserve the right of property in himself. *Bradford v. Marbury*, 46 D. 264.

Title to property delivered to a warehouseman indicated by the buyer, vests in him, though the warehouseman may have a lien on it for his charges. *Id.*

43. Constructive and symbolic delivery. — Constructive delivery by a vendor

For Index to Notes in American Decisions and American Reports, see Volume I.

of chattels is insufficient to pass the right of property. *Pleasants v. Pendleton*, 18 D. 726.

In a contract of sale, delivery may be symbolical or by implication, when the article is not in possession of the seller. *Cocks v. Chapman*, 44 D. 536.

In determining whether chattels have been delivered constructively, the intention of the parties, if it can be collected from what they have said and done, will largely govern. *Sahlman v. Mills*, 51 D. 630.

Constructive delivery is a mixed question of law and fact, and the circumstances or facts necessary to constitute it must be found by the jury, as in actual delivery. *Atwell v. Miller*, 61 D. 294.

On a sale of flour in barrels of different brands in a warehouse, where the vendor gives the vendee a bill of parcels specifying the number of barrels of each brand with an order on the warehouseman for their delivery, and receives the vendee's check in payment, giving a receipt in full, the contract is completely executed, and vests the property in the vendee, so that a subsequent loss before actual delivery falls upon him. *Pleasants v. Pendleton*, 18 D. 726.

Where the vendor and vendee of a horse in the keeping of a third person write to that person on the day of sale, the one that he is no longer responsible for the keeping of the animal, the other that he is answerable for the keeping from that date, these acts constitute a sufficient delivery as against a subsequent attaching creditor of the vendor. *Tuxworth v. Moore*, 20 D. 479.

Where the owner of corn gave an order on the agent at the depot where the corn was to arrive, to deliver six hundred and twenty-five bags to a person designated, and the agent recognized the person's right to the property—*held*, that there was a constructive delivery. *Sahlman v. Mills*, 51 D. 630.

It is not a constructive delivery of hay as a chattel, so as to pass title to it, as against third persons, under a sale of grass with an agreement that the vendor shall cut it at the proper time, to pluck a handful of the half-grown grass, and deliver it to the purchaser in the field. *Lamson v. Patch*, 81 D. 765.

To constitute a constructive delivery of wood sold, so as to entitle the seller to recover the contract price, he should set it apart for the purchaser, and relinquish his own control of it, at or as near to the place of delivery as is reasonably practicable. *Webber v. Minor*, 99 D. 688.

Symbolical delivery of a large number of logs landed on a stream, preparatory to driving, is sufficient delivery, even as against subsequent purchasers, where a survey of the logs is made by a person mutually agreed upon by the parties to the sale, and

the vendee's mark is put upon the logs as they are thus landed, although the vendor is bound by the contract of sale to deliver the logs at a specified place which is many miles below the landing. *Bethel S. M. Co. v. Brown*, 99 D. 752.

44 — by endorsement of bill of lading. — A mere endorsement of a bill of lading, without a delivery thereof, does not transfer the property in the goods. *Buffington v. Curtis*, 8 D. 115.

A consignment of goods by bill of lading vests the property in the consignee when made in pursuance of prior contract with the consignee, and not otherwise. *Bonner v. Marat*, 48 D. 754.

45. — or warehouse receipt, or order. — A usage to sell flour in store by order, and to pass it by the transfer of the order from hand to hand, without actual delivery of the flour, is reasonable and lawful. *Pleasants v. Pendleton*, 18 D. 726.

Where one has a large number of barrels of flour in a warehouse, and sells the entire quantity to several separate purchasers, giving to each his delivery order upon his warehouseman, if the purchasers all surrender their several orders to the warehouseman without making any separation, but voluntarily leave the flour standing on the books to the credit of each for his proper number of barrels, the delivery to each purchaser is complete. When each purchaser presented his order, he was entitled to a separation of his number of barrels from the mass, or not, at his election. *Horv v. Barker*, 70 D. 791.

Warehouse receipts were delivered, one for 3,600 hams weighing 50,400 pounds, and another for 8,250 hams, without stating the weight, all marked "K. F. & Co., Eclipse." These hams were part of a great quantity all marked in the same way, and were not separated or distinguished in any way from the rest. *Held*, that such receipts gave no title. *Ferguson v. Northern Bank &c.*, 29 R. 418.

46. Delivery by bill of sale. — Where the property is not in the seller's possession, at the time of sale, but the consideration is paid and fraud is neither alleged nor fairly deducible from the evidence, a symbolical delivery, by means of a bill of sale, is valid, as against a subsequent attaching creditor. *Cocks v. Chapman*, 44 D. 536.

A delivery of a bill of sale to a third person by the vendor, for the use and benefit of the vendee, and possession taken of the property as soon as convenient, constitutes a valid transfer. *Buffington v. Curtis*, 8 D. 115.

A bill of sale of a negro registered, but not proved by two witnesses, passes the title as between the parties. *Williams v. Walton*, 29 D. 122.

The mere delivery, for value, of a bill of sale of a chattel to the purchaser does not

For Index to Notes in American Decisions and American Reports, see Volume I.

vest title in him as against a subsequent attaching creditor of the vendee. *Dempsey v. Gardner*, 34 R. 389.

The mere execution of a bill of sale of cattle roaming at large, in which the brand with which they are marked is described, accompanied by a delivery of the branding-iron, does not constitute a delivery of possession of the cattle. *Walden v. Murdock*, 83 D. 185.

Where a vendor executes a deed of real estate, and also a bill of sale of the personal property thereon, but includes in such bill of sale other personalty not on the land conveyed, the latter-named personal property, without further change of possession, does not vest in the vendee as against subsequent attaching creditors of the vendor. *Sharon v. Shaw*, 90 D. 548.

A husband, for a good consideration, conveyed cattle to his wife by an absolute bill of sale, which he delivered to her. The cattle were at the time upon the husband's farm, where both he and the wife resided. No other delivery of the cattle was made, and they remained and were used upon the farm as before. The cattle having afterward been attached on a writ against the husband,—*held*, in replevin by the wife, that there was no sufficient delivery of the cattle from the husband to the wife. *McKee v. Garcelon*, 11 R. 200.

47. Necessity of acceptance. — A manufactured article continues to be the manufacturer's property until completed, tendered, and accepted by the party ordering it. There must be proof of acceptance, or of acts or words respecting it, from which an acceptance may be inferred. *Moody v. Brown*, 56 D. 640. But if the purchaser has notice of the completion of the articles, and makes no objection to them, his acceptance will be presumed. *McIntyre v. Kline*, 64 D. 163.

Leaving a manufactured article with the party that has ordered it will not transfer title to him, if done against his will. *Moody v. Brown*, 56 D. 640.

Property in a manufactured article passes to the party ordering it, without tender and acceptance of it, when he employs a superintendent, and pays for it by installments as the work is performed. *Id.*

Property in goods of a different quality from those ordered does not vest in purchaser until he accepts them with a knowledge of their quality, or after he has a reasonable opportunity of determining their quality; and the question of acceptance is one for the jury. *Diversy v. Kellogg*, 92 D. 154.

48. Sufficiency of acceptance. — The purchaser's right to repudiate a parol sale of goods must be exercised immediately upon their delivery to him, or he will be regarded as having accepted them. *Spencer v. Hale*, 73 D. 309.

Where articles are partly consumed by the buyer before signifying his acceptance of the offer to sell, the contract is nevertheless rendered binding on both parties by such acceptance. *Mactier v. Fritch*, 21 D. 262.

49. Effect of refusal to accept. — A purchaser is not bound to accept goods of a different quality from those ordered, but may, upon learning of their quality, within a reasonable time, give notice that he declines to receive them, and thereby avoid liability. *Diversy v. Kellogg*, 92 D. 154.

Notice of refusal of buyer to accept goods delivered in pursuance of a verbal sale is not invalid because it does not come from the hand or mouth of the buyer himself, if it comes from a third party by his direction. *Jones v. Mechanics' Bank*, 96 D. 533.

50. Payment, generally. — Payment of earnest money does not necessarily transfer title to the specific property for which it has been given. *Jennings v. Flanagan*, 30 D. 683.

A vendee offering payment in notes of the vendor, after delivery of the goods, where he has promised to pay cash, is not guilty of fraud if he did not contemplate payment in such notes at the time of the purchase or delivery. *Chapman v. Lathrop*, 16 D. 433.

A note or acceptance given at time of purchase does not destroy vendor's right of action on the original agreement for the sale of the goods, but it is a payment *sub modo*, and suspends the right to sue for the price until the expiration of the credit, and operates to pass title to the vendee, subject, of course, to the vendor's lien, if he has not parted with possession, or to his right of stoppage if the goods are *in transitu*. *Hall v. Richardson*, 77 D. 303.

Subsequent failure of the purchaser to pay a draft accepted by him for purchase-price of goods does not affect the question of title. If one sells to another who becomes insolvent before payment, the property in the goods passes to the purchaser, though the seller may have a remedy for the price by lien or stoppage *in transitu*, according to the *situs* of the property at the time of the failure to pay. *Id.*

A sale of merchandise, where the seller draws a draft for the purchase-money on the buyer at one day after sight, is a sale on credit, though indefinite as to time of payment because of the uncertainty when the draft will be accepted. *Id.*

A contract to pay purchase price of land in wheat of a certain quality, at a specified price per bushel, in annual installments of a specified amount, is equivalent to a contract for the sale of the amounts of wheat to be delivered at the times and price specified; the vendor is entitled to the wheat, or in default thereof, he may recover its actual value at the time specified for its delivery; and the vendee has no right to

For Index to Notes in American Decisions and American Reports, see Volume I.

pay in money, instead of wheat, the amount of the purchase price. And more especially will this rule apply where the contract signifies the intention of the parties that the mode of payment shall not be at the option of the debtor, as where it provides that he may pay more in each year, provided that the additional payments shall be made in wheat at the stipulated price, or in cash, as the vendor may elect. *Starr v. Light*, 99 D. 55.

The plaintiff agreed to buy of the defendant the cattle of a certain brand, then running in the defendant's herd, but of an uncertain number, at a fixed price per head, and paid down a certain amount, but no time was fixed for delivery or completing the payment. The plaintiff notified the defendant that he would receive the cattle on a certain day, and on that day the defendant tendered the cattle, and the plaintiff offered in payment a check payable two days after sight. The defendant refused to accept anything but cash, and declined to deliver the cattle. Some days afterwards the plaintiff tendered the balance of the price, and later on the same day the defendant tendered the part paid. Both tenders were refused, and the plaintiff brought replevin. *Held*, not maintainable. *Beauchamp v. Archer*, 41 R. 266.

51. **Delivery a condition precedent to payment.**—Under a contract to sell and deliver a certain amount of cotton within a given time, and at an agreed price per pound, the seller has no right to demand payment until the whole is delivered. He has no right to demand payment, as a part is delivered, and declare the contract forfeited for a refusal to pay for the part so delivered. *Kenigsberger v. Wingate*, 98 D. 512.

52. **When delivery and payment should be simultaneous acts.***—Where one sells goods to be paid for in cash, no time of payment being specified, payment and delivery are simultaneous acts, and the vendor may refuse to part with the goods until payment. *Chapman v. Lathrop*, 16 D. 433.

When nothing is said, and no time stipulated as to payment, the sale is understood to be for cash, and the payment and delivery are concurrent acts, and the vendor may refuse to deliver without payment; and if payment is not made immediately, the sale becomes void. *Southwestern Freight etc. Co. v. Standard*, 100 D. 255.

Delivery of chattels sold and payment of price are concurrent acts when time and place of delivery are not agreed upon; and neither party can maintain an action for non-performance without showing readiness and willingness to perform. *Cole v. Swanston*, 52 D. 258.

* Promise to pay on delivery, what necessary to put promisor in default, see note, 46 R. 307-222.

The vendee is liable for the value of a cow upon delivery, where they directed her to be delivered at their slaughter house, and agreed to pay as much for her as though they had previously seen her, and she was accordingly delivered, but the vendee, not finding her as good as expected, ordered her to be turned out, whereby she was lost. The delivery and sale are unconditional, and the price is conditional; but even if the sale were on condition, the vendee would be liable as bailee. *Neally v. Wilhelm*, 61 D. 118.

53. **Effect of delivery without payment.**—Absolute delivery of goods sold is a waiver of antecedent conditions. *Chapman v. Lathrop*, 16 D. 433.

Delivery of goods, sold for cash, without payment, passes the property, and the vendee may avail himself of any legal set-off, notwithstanding his agreement to pay ready money. *Id.*

A delivery and acceptance of goods, before the day of payment, passes the legal title to the vendee. *Ford v. Sproule*, 12 D. 439.

Upon a contract to deliver articles at a particular time and place for a specified price, the party bound thereby, after making delivery in the manner agreed upon, if the price be not paid, may remove the articles and resell them and may recover upon the original contract as for a breach thereof. *McCombs v. McKennan*, 37 D. 505.

A contract for sale of three hundred barrels of flour, to be delivered in lots of one hundred barrels, each lot to be paid for on delivery, is severable, and delivery and receipt of payment for the last two lots do not constitute a waiver of any rights of the seller arising out of an unauthorized delivery of the first lot by a railroad company to the purchaser without payment made. *Sawyer v. Chicago & N. W. R'y Co.*, 99 D. 49.

2. Conditional Sales.

54. **When a sale is conditional.***—Where property is sold and delivered by one to another, and the vendee admits the title to be in the vendor, and to remain there until such property is fully paid for, the transaction amounts to a conditional sale. *Crocker v. Gullifer*, 69 D. 118.

The delivery of wool to manufacture into cloth, upon the condition that the wool and cloth are to be the property of the deliverer until the payment of the price agreed to be paid for the wool, the price to be paid in six months, is a conditional sale. *Barrett v. Pritchard*, 13 D. 449.

An agreement by a *bona fide* purchaser at a sheriff's sale, that the former owner may repurchase within a given time, is a conditional sale. *Barrington v. Harper*, 20 D. 145.

* See note on condition in sale, reserving title to vendor, 43 R. 124, 125.

For Index to Notes in American Decisions and American Reports, see Volume I.

The *onus* of proving that by the execution of a defeasance simultaneously with an absolute conveyance, the parties intended the transaction to be a conditional sale, lies upon the party maintaining that such was the intention. *Id.*

A sale of chattels is not conditional where an absolute bill of sale is given acknowledging payment at a stipulated price, although it is provided that in case the vendee sells for more than a specified sum, the vendor is to have the overplus after deducting the expenses of sale, and that the vendor is to transport the property to a certain place, free of expense to the vendee. *Jewett v. Lincoln*, 31 D. 36.

The sale is consummated in such a case as between the parties, by designating and setting apart the articles for the vendee from the mass of which they are a part. *Id.*

Whether an alleged sale is absolute or conditional, is a question of fact for the jury. *Ross v. Story*, 44 D. 121.

An absolute sale accompanied by delivery of property, with a stipulation that the purchase-money should be paid at a future day, and that on the payment the vendor should make "proper title" to the wife of the vendee, is not a conditional sale. The retention of title by the vendor is merely a security for the payment of the purchase-money in the nature of a mortgage. *Weaver v. Lapeley*, 94 D. 671.

Where a person gave an instrument in writing to another, stating that he had received from the latter thirty pounds, and had placed in his possession a slave as security, and that if the thirty pounds were not paid on or before a certain day the slave should become his property for the said thirty pounds; — *held*, that this was a conditional sale, which became absolute on the failure to pay the thirty pounds on the day specified. *Chapman v. Turner*, 1 D. 514.

Under a written agreement, a piano worth seven hundred dollars was delivered to a purchaser, who, on taking it, paid fifty dollars, which was called the rent of the piano for the first month, and he was to pay fifty dollars at the beginning of each month thereafter for thirteen months; the piano to become the property of the purchaser in the event of his paying seven hundred dollars within the thirteen months, all past payments of rent to count as a part of the seven hundred dollars, — *held*, that this transaction, though called a lease, was not such, but a conditional sale of the piano, with a right of rescission on the part of the vendor in the event that the purchaser should fail in paying the installments; and that if, while in the purchaser's possession, it was levied upon by his creditors, the vendor's lien would have to yield. *Murch v. Wright*, 95 D. 456.

H. sold and delivered a house car to P.,

under a bill of sale providing that "said H. reserves the right from said car until fully paid, but said P. shall have the use of said car from date; should said P. fail to comply with this agreement, said H. shall have the right to take said car from said P. as his property." *Held*, that it was a conditional sale, and that the car might be taken under execution by P.'s judgment creditor. *Haas v. Linderman*, 3 R. 612.

An organ was delivered on a written agreement for a specified "rent," part of which was paid in a melodeon delivered by the vendee, and part in a note executed by him, payable in about two years, "with the understanding that if I shall have punctually paid all said rent, I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due, all my rights herein shall terminate, and said H. may take possession of said organ." The organ having been returned, — *held*, that no action could be maintained by the vendor on the note, the transaction being not a lease, but a conditional sale. *Hins v. Roberts*, 40 R. 170.

55. *Distinction between conditional sale and mortgage.* — The distinction between a mortgage and a conditional sale is this: if the relation of debtor and creditor remains, and a debt still subsists between the parties, it is a mortgage; but if the debt is extinguished by the agreement of the parties, or the money advanced was not by way of loan, and the grantor has the privilege of refunding if he pleases by a given time, and thereby entitling himself to a reconveyance, it is a conditional sale. *Slowsy v. McMurray*, 72 D. 251.

A contract for the transfer of property, by the terms of which the purchaser advances a part of the purchase money, and the seller reserves the right to abrogate the contract by returning the money so advanced with interest, at a particular time; and if not so abrogated, the contract to be executed by the purchaser paying the residue of the purchase money, and the seller surrendering the possession of the property, is a conditional sale and not a mortgage. *Moss v. Green*, 24 D. 731.

Retention of possession by a vendor will not change the nature of a conditional sale, so as to render the same a mortgage. *Id.*

A contract by which mares are delivered to a person to work and use, keeping them upon the place he was then occupying, the mares to become his property upon the payment of one hundred dollars balance of the purchase price, but to remain the property of the original owner until such payment, is a valid contract, and is a conditional sale, not a mortgage. *Dunbar v. Rawles*, 92 D. 311.

Equity will not treat a conditional sale as

* Conditional sale, distinguished from mortgage, see note, 50 D. 196-197.

For Index to Notes in American Decisions and American Reports, see Volume I.

a mortgage, except upon equitable grounds and to prevent fraud. *Id.*

Equity will not treat a conditional sale as a mortgage at the instance of a purchaser from the vendee in the conditional sale, who within an hour after his purchase was fully informed by the vendee that he had no title, and was tendered back the price paid, but refused to receive it and restore the property. *Id.*

56. Rights of the parties, generally. — On a conditional sale the condition must be strictly performed, and the tender made with all the formalities required by law. *Hickman v. Cantrell*, 30 D. 396.

Failure to comply with the conditions of an agreement to resell, within the time stipulated, will deprive the vendor of the benefits resulting from the agreement, and render the sale absolute and indefeasible. *Munsterlin v. Birmingham*, 34 D. 402.

A conditional sale passes the title to the vendee, with a reservation to the vendor, of a right to repurchase the property at a fixed price and specified time. *Lockett v. Townsend*, 49 D. 723.

A clause in a bill of sale of an unfinished chattel allowing the vendee the right to take the same at will does not authorize the vendee at his election, to repudiate the contract and annul the sale. *Bartlett v. Blake*, 58 D. 775.

A sale on condition that vendee may return the chattel in a specified time becomes absolute, and the obligation to pay the price becomes unconditional, if during that time the vendee disables himself from performing the condition by substantially injuring the chattel. *Ray v. Thompson*, 59 D. 187.

An executory contract of sale binds parties to performance of concurrent acts, and neither party can demand a performance by the other without allegation and proof of his own readiness and ability to perform his part of the agreement. *Grandy v. McCleese*, 64 D. 574; *Slowe v. McMurray*, 72 D. 251.

A waiver of conditions of sale as to price is not effected by asking for and being promised security for payment, no security in fact ever having been given. *Sargent v. Metcalf*, 66 D. 368.

The vendor, if guilty of no laches, may reclaim the property even from a vendee in good faith and without notice. *Crocker v. Gullifer*, 69 D. 118.

A chattel sold under conditional sale is in constructive possession of seller, and an action may be maintained without a demand in case of a conversion by the purchaser. *Id.*

Sale and delivery of goods upon condition that title shall not pass until the payment of price vests in the vendee no title which he can convey to a purchaser in good faith

and for a valuable consideration. Under such contract the vendee takes no more than a mere right of possession. *Dunbar v. Randles*, 92 D. 311; and the vendor's delay of eight months in enforcing his rights against a second purchaser will not prejudice his case. *Burbank v. Crocker*, 66 D. 470.

A vendor in a conditional sale is entitled to recover in replevin or trover from any purchaser from his vendee the full value of the property, if a return cannot be had, though a less sum was due from the vendee on his contract, for the absolute title is in the vendor. *Dunbar v. Randles*, 92 D. 311.

Whether or not the purchaser from the vendee may avail himself of the rights of his vendor to acquire title, *quære*. *Id.*

Under a conditional sale with reservation of right in the vendor to repurchase, he must exercise promptness and precision on his part in the assertion of his right, or it will be lost, especially when the vendee pays a fair valuation for the property. *Beck v. Blue*, 94 D. 630.

Where, in a conditional sale with reservation of right to purchase in the vendor no time is expressed in which such right must be exercised, it must be performed, or an offer made to perform, within a reasonable time. *Id.*

A conditional sale with reservation of right to repurchase in the vendor vests an adverse title in the vendee, subject to the defeasance, and the purchase money paid becomes the absolute property of the vendor. *Id.*

In a conditional sale with reservation of right to repurchase in the vendor, his long delay in offering to repurchase may be excused by and with the consent and approbation of the vendee; but such assent terminates with his death, and the right must be exercised within a reasonable time thereafter. Eleven months after the commencement of the executor's possession, and eight months after his sale of the property, is an unreasonable time at which to seek to exercise the right to repurchase. *Id.*

Where a contract is made for the sale and delivery of specified articles of personal property, under circumstances where the title does not vest in the vendee, and the property is destroyed by an accident before delivery without the fault of the vendor, the latter is not liable upon the contract for damages sustained by the vendee. *Dexter v. Norton*, 7 R. 415.

A. buys from B., administrator, etc., certain property, for which he gives his note, the sale to become absolute when A. should furnish security for the payment of said note; A. is afterwards appointed guardian of the children of B.'s intestate, and A. and B. agree that A. shall hold the above purchase price, and charge himself with it as guard-

* Conditional sales, validity and effect of, see note, 67 R. 572-583.

For Index to Notes in American Decisions and American Reports, see Volume I.

ian: *Held*, that the agreement was good, and that the sale became absolute. *Wilson v. Soper*, 58 D. 573.

A mare, being with foal, was sold on condition that she was to "remain the property of the vendor until paid for,"—*held*, that the colt subsequently foaled continued the property of the vendor until performance of the condition. *Allen v. Delano*, 92 D. 573.

A contract provided that the plaintiff should deliver a certain quantity of lumber, at a certain rate, monthly, commencing at a specified date, to be paid for on arrival with bill of lading. One shipment only was made, three months after the appointed time, with no bill of lading, and was accepted without objection. *Held*, that the plaintiff could recover therefor. *Ohio Falls Car Co. v. Menies*, 46 R. 195.

The plaintiff let and the defendant hired a piano, price \$140, for twenty-seven months, \$5 down, and \$5 to be paid monthly, the piano to become the defendant's property when all was paid, and in case of default the plaintiff to have the right to retake it, the defendant's right to cease, and the money paid to be forfeited. *Held*, a conditional sale and not a lease, and that the plaintiff had no ground of action for failure to pay the monthly rent, but could only retake his property and retain the money paid. *Loomis v. Bragg*, 47 R. 638.

On a sale, on February twenty-second, of iron "for prompt shipment," the iron was the next day put on board ship, in a German river, frozen over and unnavigable, forty miles from the sea, and so remained till April third. *Held*, that prompt shipment was a condition precedent, and that the known unnavigable condition of the river did not excuse the delay. *Tobias v. Lissberger*, 59 R. 509.

57. Conditional delivery, and its effect.—A voluntary delivery of goods sold on condition, without any reference to the condition, and followed by no demand for the performance of the condition, until after the goods were attached by the vendee's creditors, will be a waiver of the condition as regards such creditors. *Smith v. Dennis*, 17 D. 368.

To constitute a conditional delivery the condition must be expressed. *People v. Haynes*, 28 D. 530.

Goods sold on condition that security for the purchase-price be given do not pass absolutely to the vendee, where such security is not given, although the goods were removed by the vendee without objection. *Whitwell v. Vincent*, 16 D. 355.

In such a case, if the vendee sell the goods and take a negotiable note, which he transfers to a creditor having full knowledge of the facts, an action of *assumpsit* will not lie by the original vendor against the creditor, the note being unpaid, as such a

form of action is an affirmation of the sale. *Id.*

Personal property may be sold conditionally, the same as real property. Possession, although *prima facie* evidence of ownership, may be rebutted. *Mount v. Harris*, 40 D. 89.

When a manufacturer and wholesale vendor of wagons sells upon credit and delivers them to a retail dealer for the apparent and implied purpose of resale, a condition that the title shall remain in the vendor until the purchase price is paid, is fraudulent and void as against a purchaser from the vendee. *Winchester Wagon Manuf. Co. v. Carman*, 58 R. 382.

3. When the Title Passes.

58. As between the parties. 1. *In general.*—Delivery of goods to a purchaser on a fair contract, without any fraudulent contrivance to obtain possession, passes the property, and the vendor cannot maintain trover for such goods in case of non-payment of the purchase-money. *Chapman v. Lathrop*, 16 D. 433.

When separation is unnecessary as to part of the articles included in a contract, though it may be as to the rest, title may pass as to the former, though not as to the latter. *Pleasant v. Pendleton*, 18 D. 726.

An absolute delivery of a chattel pursuant to a bargain perfect, or capable of being made so by reference to something else, or to an arbiter, vests the ownership in the purchaser. And therefore, a sale of a raft of boards at so much per thousand feet, and delivery thereof to the buyer, changes the property, although the number of feet contained therein remains to be ascertained. *Scott v. Wells*, 40 D. 568.

Where a chattel has been unconditionally sold and delivered, no subsequent negotiations in reference thereto, that afterwards fail, can alter the terms of the sale so as to affect the title of the property. *Id.*

Title to personal property does not pass to a vendee by sale thereof without delivery until the goods sold are specifically identified by the parties to the sale. *Golder v. Ogden*, 53 D. 618.

Vesting of title to goods sold depends upon intention of parties, except where the vendor has no title, or the subject-matter has not been specified. *Winslow v. Leonard*, 62 D. 354.

Title to goods sold may vest in vendee, even while the vendor has such remaining control over the goods as entitles him to a lien for unpaid purchase money, or to the right of stoppage *in transitu*, or to the right of rescinding the sale, if there be no occasion for the exercise of these rights. *Id.*

The seller's taking a receipt in his own name for goods sold for shipment, upon delivering them to the warehouseman of the

For Index to Notes in American Decisions and American Reports, see Volume I.

ship's agents, will not overcome the legal effect of the delivery to such warehouseman of the goods marked with the initials of the purchaser and of the ship after the acceptance by the latter of a draft for the purchase-money drawn by the seller upon him. From these acts, unexplained, it must be concluded that the property was transferred to the purchaser, and the title of the seller divested. *Hall v. Richardson*, 77 D. 303.

Where a certain number of barrels of No. 1 mackerel are sold, and by mistake some barrels of No. 3 mackerel and some barrels of salt are delivered, no title to the articles thus delivered by mistake passes to the purchaser. *Gardner v. Lane*, 85 D. 779.

Where, under a sale of a number of barrels of mackerel, delivery is made which includes some mackerel packed in half-barrels, the title will pass to the purchaser if the property is of the same kind and quality as that which the parties intended to include in their agreement. *Id.*

Title to chattels does not pass by bill of sale while they remain in the hands of the collector of the port with the duties unpaid, since by the laws of Congress no delivery can be effected until the duties are paid. *United States v. Murdock*, 89 D. 651.

Title to goods does not pass when either the operation of counting, weighing, or measuring is necessary, in order to separate the goods from a larger mass of which they form a part; but when the entire mass is sold and must be measured, etc., simply to ascertain its price for the purpose of a settlement, the title passes. *Cleveland v. Williams*, 94 D. 274.

Plaintiff bought of defendant and paid for a building to be removed by a day designated, but did not remove it within the time stated. Held, that the title to the building did not revert in the defendant. *Davis v. Emery*, 14 R. 553.

On an oral sale of lumber, of unknown quantity, at an agreed price per thousand, nothing being said about measuring it, the question when title was intended to pass is one of fact. *Morgan v. King*, 57 R. 633.

The purchaser's failure to give notes as agreed, if not waived, prevents the title passing. *Lapin v. Marie*, 21 D. 256.

Vendor's title in goods is not divested by a sale to a purchaser who conceals his insolvency, and, at the time of the purchase, has no intention to pay for them, or who, by the fraudulent aid of a creditor to whom he has confessed judgment, buys such goods in order that such judgment creditor may levy execution upon them. *Harris v. Alcock*, 32 D. 158.

Absolute delivery of chattels to a vendee is a waiver of the condition of payment or giving notes or other security, and passes the title to the property. *Lapin v. Marie*, 21 D. 256.

2. *When the sale is complete.*—A sale of personal property is complete as soon as both parties have agreed to its terms. *Shaddon v. Knott*, 58 D. 63.

A sale is complete upon completion of the contract, and the right of property and of possession vest in the purchaser upon payment of the price and delivery of a bill of sale, without actual delivery of the property. *Griffin v. Chubb*, 58 D. 85.

A sale is complete, and passes title to the buyer, although the thing sold has not been measured or the quantity ascertained in any way, when it is apparent that it is the intention of the seller to transfer the title, and of the buyer to accept it. *Sewell v. Eaton*, 70 D. 471.

At common law, a sale is complete, and title passes at once, where the seller makes a proposition and the buyer accepts, and the goods are in the possession of the seller, and nothing remains to be done to identify them, or in any way prepare them for delivery. *Cleveland v. Williams*, 94 D. 274.

A sale is complete and title passes when the goods are delivered and the purchaser put in full possession and control of them; and the transfer of title is not suspended by a provision that payment is not to be made until after a resale. *Blow v. Spear*, 97 D. 412.

3. *When title vests without actual delivery.*—A sale of goods without an actual delivery to or possession by the vendee will vest the property in the vendee as against the administrator of the vendor, if the property be of such a nature and in such a situation that a personal possession is impracticable. Thus, a sale of logs lying in a boom, which were shown to the vendee, was held to be effectual to transfer the right of property. *Jewett v. Warren*, 7 D. 74.

Where a purchaser of chattels takes possession of part of them, and the key to the shop containing the residue is left with a third person for him by the vendor pursuant to an understanding between them, the property thereby passes so as to enable such purchaser to maintain trespass against a subsequent purchaser from the vendor who takes actual possession of the goods in the shop by borrowing the key from the person with whom it is left. *Chappell v. Marvin*, 16 D. 684.

Property in personal chattels may pass by a bargain and sale for sufficient consideration without delivery as between the parties, but delivery is necessary as to other persons. *Fletcher v. Howard*, 16 D. 686.

A bargain struck and payment of the purchase-money vests the property of a chattel in the vendee. *Pleasant v. Pendleton*, 18 D. 726.

A sale of a chattel becomes absolute as between parties without actual payment or delivery, when the terms of sale are agreed

For Index to Notes in American Decisions and American Reports, see Volume I.

upon and the bargain is struck; and the title thereupon passes to the vendee, although the right to the possession does not pass until the price is paid or satisfactorily arranged. *Wade v. Moffett*, 74 D. 79.

A sale of large and cumbrous merchandise, as of grain in bulk, may pass the title without actual separation of the quantity sold from a larger mass with which it is mixed, if the acts and declarations of the parties clearly evince an intent to make immediate transfer of ownership. *Kimberly v. Patchin*, 75 D. 334.

Title to goods sold passes to the purchaser, independent of delivery, upon the acceptance by the purchaser of a draft drawn upon him by the seller for the purchase-money. *Hall v. Richardson*, 77 D. 303.

To pass title on a sale, either sale and delivery or sale and payment is sufficient, and it is erroneous for the court to instruct that the jury must find a sale, delivery, and payment. *Id.*

The sale of a specific, designated chattel, in the possession of a third person, where the purchase-money is paid in full at the date of sale, vests in the purchaser a perfect and complete title, though the actual possession of the chattel is not changed. *Cassell v. Backtrack*, 97 D. 436.

4. *Subsequent liabilities of the parties.*—A vendor of personal property is not liable for defects of any kind in the thing sold, unless there is an express warranty or fraud in him. *Kingsbury v. Taylor*, 50 D. 607.

When a contract of sale has been consummated, and the price paid and the property, though ready for delivery, is not removed by the vendee because not convenient for him to do so, he must bear the loss of its destruction by fire. *Smith v. Nevitt*, 12 D. 571.

A party who buys goods, to be delivered to another at a certain time, before which time they are destroyed by flood, must, if he bought them under a contract to sell, bear the loss; but if he bought them as agent for the second party, the loss is the principal's. *Black v. Webb*, 55 D. 456.

Where the owner of a large quantity of corn in bulk sells to another a certain number of bushels of it, and the vendee pays for the whole of what he buys and takes away a part thereof, leaving the rest for his convenience, without charge for storage, in the vendor's store, the property in the whole of the corn sold passes to the vendee, and is at his risk. *Waldron v. Chase*, 59 D. 56. S. P., *Newhall v. Langdon*, 48 R. 426.

A loss falls on the purchaser of goods, if after shipment of the amount and quality, in the manner directed, a portion is abstracted and others of an inferior quality substituted by third persons, so as to render the whole of an inferior quality. *Diversy v. Kellogg*, 92 D. 154.

A purchaser who receives and appropriates goods of a different kind from those ordered thereby makes them his own, and is liable to pay what they are reasonably worth. *Id.*

The purchaser of a chattel, being dissatisfied with it, re-shipped it to the seller, and, afterward, the chattel not having come to the seller's hands, paid him for it. *Held*, that the right of action against the carrier for its loss was in the purchaser. *Ralph v. Chicago etc. R'y Co.*, 14 R. 725.

59. *As against creditors.**—Where goods are delivered upon lease to be paid for by installments, the title to remain in the vendor until full payment, the judgment creditors of the vendee may seize the same for their claims. *Brunswick & B. Co. v. Hoover*, 40 R. 674.

Goods being sold on credit, and shipped to the buyer, and he becoming insolvent subsequent to the sale, but the goods not being stopped in transit, title vests in his assignee on delivery. *McElroy v. Seery*, 48 R. 110.

A stock of goods, old and new, was sold, the new at invoice prices, the old at prices to be agreed on at a fixed time, the purchaser giving his notes for the estimated price of the whole, to be increased or diminished according to the eventual agreement as to the old goods. The goods were delivered. Before any agreement as to the price of the old goods a creditor of the seller attached the goods. *Held*, that title had passed and the creditor got no lien. *Shealy v. Edwards*, 49 R. 43.

T. sold to plaintiff part of a growing crop of corn, designating the part sold by cutting off the tops of one row. Plaintiff paid \$80 in cash, but, by the terms of the sale, T. was to cut and shock a part of the corn, and to gather the remainder, and the corn was then to be measured and paid for by the bushel. Subsequently, the said corn was levied on by virtue of an execution against T. In a proceeding to try the right of property, there was evidence tending to show that it was the intention of the parties that the sale should be complete and absolute at the time it was made. *Held*, that an instruction to the jury that, if the vendee was to cut and measure the corn, and it was then to be paid for by the bushel, no title passed to the vendee, and the property was liable to the execution, was error. Whether title passed or not was a question of intention, and was for the jury. *Graff v. Fück*, 11 R. 85.

S. agreed in writing to buy of L. five bales of cotton weighing 480 pounds each, at eleven cents a pound. At the time the cotton was in bulk on L.'s premises, and he was to haul it to M.'s gin, and after it was ginned and packed, to haul the bales to

*Change of possession and delivery, what sufficient as against creditors and subsequent purchasers, see note, 97 D. 340-343.

For Index to Notes in American Decisions and American Reports, see Volume I.

Canton. He hauled a portion to the gin, and it was ginned and packed, but before it was hauled to Canton it was attached by a creditor of *L. Held*, that title had not passed to *S. Smith v. Sparkman*, 30 R. 537.

60. Where the sale is conditional. — On conditional sales the title to the goods remains in the vendor, until the performance of the condition, as against creditors of the vendee. *Barrett v. Pritchard*, 13 D. 449; *Hussey v. Thornton*, 3 D. 224; *Lucy v. Bundy*, 32 D. 369; *Ross v. Story*, 44 D. 121; *Parris v. Roberts*, 55 D. 415; *Cole v. Berry*, 36 R. 511; *Leais v. McCabe*, 44 R. 217; and the vendor, in each case of non-performance, may re-possess himself of the goods even as against creditors of the vendee. *Aukman v. Mallory*, 25 R. 478; and the condition is not waived by the seller's merely taking the purchaser's notes for the price. *Heinbockle v. Zuphanna*, 51 R. 59.

Title to a chattel passes by delivery thereof to a person under a promise by him either to return it or pay a sum of money therefor on a certain day, and he may sell the chattel before that day. *Dearborn v. Turner*, 33 D. 630.

Where goods are sold and delivered on a written order, what is used to be accounted for and the balance returned, title to the whole passes on delivery, and parole evidence of a contrary understanding is inadmissible. *Hotchkins v. Higgins*, 52 R. 582.

A conditional sale and delivery of chattels passes no title until conditions are performed, although the vendor knew the purchaser was a dealer, and had no use for the chattels except for resale; and a party who purchases the chattels in good faith from the vendee acquires no right thereto as against the original vendor, if no laches can be imputed to the latter in asserting his claim. *Sargent v. Metcalf*, 66 D. 368.

Where the vendor of personal property expressly stipulates that title shall not pass to vendee until the price is paid, a sale by the latter, before performance of the condition, to a third person who had no notice of the stipulation, conveys no title. *Bailey v. Harris*, 74 D. 312.

On the sale of a dam, reserving an unborn foal, the foal remains the property of the seller, even as against one who innocently buys the dam from the first purchaser before the birth of the foal. *Andrews v. Cox*, 43 R. 68.

61. — or executory.* — In case of a sale and delivery of goods title passes to the vendee, but in case of a mere contract for a sale, the title remains with the original owner. *Jennings v. Gage*, 58 D. 476.

Where, on an executory contract for a sale at a future time, an agreement is made, whereby the goods pass into the possession

of the bargainee, the sale is not completed so as to subject the goods to attachment at the suit of the bargainee's creditors, until the act contemplated is done, or the condition performed. *Reed v. Upton*, 20 D. 545.

A contract to deliver goods, not in case, at a future day, will not operate to vest title to the goods in the proposed purchaser, upon their being tendered to him, if it is provided in the contract that the goods are to be thereafter produced by cultivating the earth, they to be of certain qualities or grades, and to be delivered at a specified time to the vendee. He has a right first to examine them and determine whether they are of the required standard or not. If he refuses them, the title will not pass. *Rider v. Kelley*, 76 D. 176.

Retention of property delivered under an executory contract is an admission that the contract has been performed. *Reed v. Randall*, 86 D. 305.

A sale of personal property to be subsequently acquired conveys no title to such property when acquired, which is valid at law against the vendor or his voluntary assignee, unless after acquisition possession of such property is given to the vendee, or taken by him. *Williams v. Briggs*, 23 R. 518. But if, after acquisition by the vendor, the vendee, by delivery from, or by consent of, the vendor takes possession of the property under the conveyance, the title to the property both in law and equity vests in the vendee without further conveyance or bill of sale. *Cook v. Corthell*, 23 R. 518.

A sale of fish hereafter to be caught, passes no title to the fish when caught. *Lois v. Pew*, 11 R. 357.

A manufacturer cannot recover the value of an article manufactured until the property has passed from him to the customer. *Moody v. Brown*, 56 D. 640. That the work is inspected and approved by the purchaser as it proceeds, and that installments of the price are paid from time to time, make no difference. *Andrews v. Durant*, 62 D. 55.

It is competent, however, for the parties to the contract to agree in express terms that the property in an unfinished vessel shall pass from the builder and vest in the purchaser on the payment of installments of the price, if such be their meaning and intention. *Hall v. Green*, 71 D. 96.

Title to manufactured property is changed from manufacturer to customer only by the assent of both parties. *Moody v. Brown*, 56 D. 640.

A mere order given for the manufacture of an article does not affect the title. *Id.*

Under an executory contract to build a thing not yet in being, where no time is fixed when the property shall vest in the person for whom the thing is being built, a court cannot say, as a matter of law, that because the contract contains a provision

*Title in vessel or article to be built or manufactured, when passes, see note, 62 D. 65-68.

For Index to Notes in American Decisions and American Reports, see Volume I.

for payment of the price by installments according to the progress of the work, it was the intention of the parties that the property in the unfinished article should vest in the party for whom it was built upon payment of the first installment; and especially would this be so where, under the contract, he was not bound to accept the article until after completion and inspection under terms provided in the agreement. *Hall v. Green*, 71 D. 96.

Contract to manufacture and furnish articles from materials to be supplied by the purchaser does not vest the title in him until completion and delivery, and meantime, even though completion is delayed by his unexcused default to furnish the materials as agreed, the articles are at the manufacturer's risk. In the event of their being burned, he cannot recover for labor and materials. *McConike v. New York etc. R. R. Co.*, 75 D. 420.

When the vendor has done everything he was to do under an executory agreement for the manufacture and sale of a specific chattel, which was to be manufactured in accordance with the terms of the agreement, and has given notice thereof to the purchaser, the general property in the chattel vests in the purchaser, and the chattel is at his risk. *Coddard v. Binney*, 15 R. 112.

A agreed to build a buggy for B, and to deliver it at a time certain. B gave directions as to the style and finish of the buggy, and it was built in compliance with his directions, and marked with his monogram. Before the buggy was finished B called to see it and in response to an inquiry of A, asking if he might sell the buggy, replied that he would keep it; when the buggy was finished, A notified B and sent him a bill for it. B retained the bill and promised "to see" A "about it." The buggy was afterward destroyed by fire while in A's possession. *Held*, in a suit by A for the price, that the agreement was not a contract of sale within the Gen. Stats., chapter 105, § 5; and that the property in the buggy had passed to B, and he was liable. *Id.*

Where one contracted for articles to be manufactured, and to pay the price partly in installments during the progress of the work, and the balance on completion, and the manufacturer fraudulently representing that the work was substantially completed, obtained the price in full, without delivery, and then made an assignment in insolvency, — *held*, that the title had not passed as against creditors. *Shaw v. Smith*, 40 R. 170.

62. — or incomplete. — 1. *General rules.* — If some act remains to be done by the vendor before delivery, the property does not vest in the vendee, but continues at the vendor's risk. *McDonald v. Hewett*, 8 D. 241; *Pleasants v. Pendleton*, 18 D. 726; *Lupin*

v. Marie, 21 D. 256; *Jennings v. Flanagan*, 20 D. 683; *Cleveland v. Williams*, 94 D. 274.

This rule is applicable to a contract of sale evidenced by the following memorandum; "Sold to A load of Pine creek lumber, within the neighborhood of five thousand feet of plank, at fifteen dollars and fifty cents, and expenses, taking a note at six months, with interest;" as a measurement is necessary to ascertain the price of such load, and the amount for which the note is to be given. *Nicholson v. Taylor*, 72 D. 728.

Where a person bargained for some corn in pens on the bank of a river, at one dollar per barrel, to be subsequently measured, and the corn is destroyed by flood before being measured, the loss must fall on the seller, and the purchaser may recover money advanced upon the price. *Williams v. Allen*, 51 D. 709.

Where the sale is of a quantity of things by count, measure or weight, their number, quantity or weight must be determined before the sale is perfect, in the absence of an express intention to the contrary; and the same rule applies when delivery is to be made of the sold articles by installments. *Prescott v. Locke*, 12 R. 55.

An agreement to deliver a certain quantity of oats of a specified quality on the cars when demanded, accompanied by present payment, but the identity of the oats not being ascertained, does not vest title to the oats in the purchaser. *Hubler v. Gaston*, 42 R. 794.

Where there is a usage that coöperage necessary on a delivery of flour to the vendee at a warehouse is to be done by the storer at the vendor's expense, it does not constitute a case where something remains to be done by the vendor to complete the contract. *Pleasants v. Pendleton*, 18 D. 726.

Warehouse rent due is no obstacle to delivery of the flour in such a case where the usage is to charge it to the vendor, and not to make it a lien on the flour. *Pleasants v. Pendleton*, 18 D. 726.

Title to personal property passes by delivery, although there remains something to be done to ascertain the value at the agreed rates, unless by the terms of the contract of sale this was to be done before delivery. *Burrows v. Whitaker*, 27 R. 42.

2. *Illustrations.* — Where one purchased and paid for a quantity of hay, to be weighed out of a mow when he should see fit to move it — *held*, that the property did not vest in him before the weighing, so as to enable him to maintain trover. *Davis v. Hall*, 14 D. 373.

A vendor sold corn in his crib before his death, and appointed an agent to measure and deliver it, which the agent did after the death of the principal, but before it was known to the parties. In an action by the administrator of the deceased vendor to re-

For Index to Notes in American Decisions and American Reports, see Volume I.

cover the value of the corn, the jury were charged as follows: "If you find from the evidence that the corn in question, that is, the hundred bushels of corn, was in a bulk with other corn, and had not been measured out and separated from the bulk, so that the same could be identified previous to the death of Hall [vendor], then the sale was incomplete, and you will find for the plaintiff the value of the corn as proved." *Held*, that the charge was correct. *Cleveland v. Williams*, 94 D. 274.

Action of trover against executors for goods claimed by plaintiffs under a verbal contract whereby the testatrix, for a valuable consideration, agreed to sell and convey to them all the personal property she then had and all that she might thereafter acquire and die possessed of. *Held*, 1. That the contract was inoperative to pass title to the subsequently acquired property, and that plaintiffs could recover for the conversion of such goods only as testatrix had when the contract was made; 2. That the burden of proof was on the plaintiffs to show which these were. *Wilson v. Wilson*, 11 R. 518.

Defendant agreed orally to buy of plaintiff what walnut spokes he should saw at his mill, not exceeding 100,000, at \$40 per thousand, to be delivered at the mill in lots of 10,000 each, subject to defendant's selection, each lot to be paid for on delivery. Nothing was said about counting, but each party understood that he was to count them after selection. The defendant selected the first lot but did not count them. The plaintiff afterward counted those selected and charged them to defendant, but did not inform defendant of the number. The spokes having been burned, — *held*, in an action for their value, that the sale was not perfected, and that the title to the property remained in plaintiff. *Prescott v. Locke*, 12 R. 55.

F. agreed to sell, and H. to buy, two hundred cords of hard wood, to be taken thereafter from piles containing an indefinite quantity of hard and soft wood, and to be measured when taken. *Held*, that the measurement was necessary to complete the identification and determine what wood belonged to the purchaser, and no title passed to any portion of the property, until it was measured and thus severed and identified from the rest. *Hahn v. Fredericks*, 18 R. 119.

Defendant agreed to buy of plaintiff all the lumber he should deliver at a specified place on D. river, before a certain time; the prices were agreed on for the good and for the cull. Defendant was to cull and pile, and the lumber was to be counted on the bank or estimated in the raft at that place. The delivery was commenced, and a portion was culled and piled, but before it could be counted or estimated it was carried away by a freshet. In an action to recover the con-

tract price of the amount so delivered—*held*, 1. That the evidence sustained a finding of delivery and acceptance; 2. That delivery of the whole amount contracted for was not necessary to pass title to that delivered. *Burrows v. Whitaker*, 27 R. 42.

G. agreed to sell to B. 1,000 cords of wood "to be delivered from G's pier [in Michigan] over the rail of the vessel * * * and to be delivered from time to time to B's vessel as wanted during the season of navigation; said wood to be piled as taken from vessel, and to be measured and paid for when piled on B's dock in Milwaukee." One cargo of wood was thus delivered on the vessel and lost with the vessel. *Held*, that the contract as to such cargo became an executed sale, and the title vested at once in B., and the piling and measurement having been rendered impossible, either by B's fault or by the act of God, B. was liable for the cargo. *Gill v. Benjamin*, 54 R. 619.

63. — In cases of sales of goods to arrive.* — A contract for the sale of five hundred bales of cotton at a specified price per pound, to be delivered on its arrival before a certain future day, payment to be made on delivery, the cotton to be weighed and tare to be allowed, is an executory contract, and the title does not pass until delivery. *Russell v. Nicoll*, 20 D. 670.

The vendor is not liable for non-delivery until the arrival of the goods, in such a case. *Ib.*

"Sold," means "contracted to be sold," in such a contract. *Ib.*

Unless the goods arrive within the specified time, the vendor is not bound to deliver, nor the vendee to receive them. *Ib.*

The vendor is not bound to deliver part of the goods on their arrival within the time, unless all are received, for the contract is entire. *Ib.*

Where the owner of corn, to arrive at a depot, gives an order for a portion of it, that is a sufficient identification of it, and the first to arrive will be the corn meant. *Sahman v. Mills*, 51 D. 630.

4. Stoppage in Transit.

64. The right of stoppage, generally.† — Stoppage in transitu is a right which a vendor of goods upon credit has to retake them, upon the discovery of the insolvency of the vendee, at any time before they have been delivered to him, or before any third person has acquired a bona fide right to them. *Jones v. Earl*, 99 D. 338. *S. P.*, *Hovatt v. Davis*, 7 D. 681; *People v. Haynes*, 28 D. 530; *Newhall v. Vargas*, 29 D. 489.

Stoppage in transitu does not rescind the

* Title to chattels, when passes by transfer of bill of lading, see note, 65 D. 299-301.

† Stoppage in transitu, right of, who may execute, and upon what grounds, see monographic note, 29 D. 384-394.

For Index to Notes in American Decisions and American Reports, see Volume I.

contract of sale; it simply restores the vendor to his lien, by placing him in the same position as if he had never parted with the possession. *Newhall v. Vargas*, 33 D. 617; *Patten's Appeal*, 84 D. 479.

The right of stoppage does not make the delivery conditional, but is only a lien which the vendor, under certain circumstances, may enforce to secure the price. *People v. Haynes*, 28 D. 530.

The vendor has the same right to the proceeds as he had to the goods where his right is asserted after they are converted into money, under an order of the court issuing the attachment, but before an appropriation of the proceeds or an adjudication of the rights of the parties. *Hause v. Judson*, 29 D. 377.

Admission of proprietorship in purchaser does not affect the right of stoppage *in transitu*, whether the admission is made by the vendor or his agent. *Chandler v. Fulton*, 60 D. 188.

A consignor can stop goods *in transitu* only in two cases: 1. Where he has received no consideration; 2. Where the consignee is insolvent, but not where they have been shipped to pay a precedent debt. *Wood v. Roach*, 1 D. 276.

Such right does not arise on the death of the buyer unless his estate is insolvent. *MacTier v. Frith*, 21 D. 262.

An unpaid vendor of goods, in case of the vendor's insolvency, may reclaim them while on their passage to the vendee, not only against the vendee himself, but also against his creditors, by stopping them while in their transit. *Sawyer v. Joslin*, 49 D. 768.

Goods in the hands of an agent of the vendee are subject to the right of stoppage where they are in his hands merely for the purpose of being forwarded, and not for the purpose of safe custody and disposal by him. *Chandler v. Fulton*, 60 D. 188.

The Louisiana court will recognize the right of stoppage *in transitu* arising from a sale of goods in New York to a vendee in New Orleans, who becomes insolvent before the goods are delivered. *Blum v. Marks*, 99 D. 725.

Where goods are sold on condition that title shall not pass until they are paid for, the vendor retains the right of stoppage *in transitu* as against the vendee, or an innocent third person who purchases of the vendee before the arrival of the bill of lading or the goods. *Pattison v. Culton*, 5 R. 199.

A factor or agent who purchases goods for his principal, and makes himself liable to the original vendor, is so far considered in the light of a vendor as to be entitled to stop the goods *in transitu*. *Newhall v. Vargas*, 29 D. 489.

Where a merchant, pursuant to a previous general agreement, had shipped goods to a party on credit, who after the shipment be-

came insolvent, the shipper has still a right to a stoppage *in transitu*, for the credit is understood to be predicated on the supposed ability of the consignee to pay at the expiration of the credit. *Stubbs v. Lund*, 5 D. 63; *Chapman v. Lathrop*, 16 D. 433; *Chandler v. Fulton*, 60 D. 188.

Insolvency means general inability to pay, evidenced by the stoppage of payment, when the term is used with reference to the right of a vendor to stop goods *in transitu*. *Chandler v. Fulton*, 60 D. 188; *O'Brien v. Norris*, 77 D. 284.

To entitle vendors to the right of stoppage the insolvency of the vendee must have come to their knowledge after the sale. *O'Brien v. Norris*, 77 D. 284.

The seller of goods may stop them in transit on account of the purchaser's insolvency existing before, but not known to the seller until after the sale. *Loeb v. Peters*, 35 R. 17.

A firm in Portland shipped certain goods in their vessel to a Liverpool firm on current account. The latter, on receipt of the cargo, on which they made advances pursuant to agreement, wrote to the Portland firm that they would find freight or ship a return cargo. They accordingly put on board a cargo shipped on account and risk of the Portland firm, bills of lading being signed by the master, deliverable to the said firm, and the goods were charged to their account. Previously to the shipping of the return cargo, the Portland firm had executed a bill of sale to the plaintiffs, purporting to convey all the cargo then consigned as aforesaid. The vessel being detained by contrary winds after the shipment, the Liverpool firm heard of the failure of the Portland firm, and thereupon, by certain threats, induced the master to give up the bills of lading (excepting one which he delivered at Portland, which was endorsed to the plaintiff) and to sign other bills deliverable to the defendant or assigns, their agent. Held, in replevin, that the defendant must recover, as the Liverpool firm had so far a control over the goods after they had been placed on board, and the first set of bills of lading had been signed, as to give them a right to change their destination, or they might at least stop them in their transit; and that if the bill of sale to the plaintiffs could, in any event, operate to pass the property in the return cargo, it must be subject to the claims of the Liverpool firm. *Isley v. Stubbs*, 6 D. 29.

65. When the goods are deemed to be in transit. — Goods shipped are *in transitu* until taken possession of on behalf of the consignee. *Naylor v. Dennie*, 19 D. 319. Unless he shall have before sold them, and assigned the bills of lading to the purchaser. *Stubbs v. Lund*, 5 D. 63. But the receipt of the goods by the master of the vendee's ship,

For Index to Notes in American Decisions and American Reports, see Volume I.

to be transported to the place of the vendee's residence does not end the transit. *Newhall v. Vargas*, 29 D. 489.

Transit is not completed so as to give the vendee constructive possession, and thus determine the vendor's right of stoppage, by the arrival and delivery of the goods to a consignee residing at an intermediate point, by whom they were to be forwarded to the vendee. *Hepp v. Glover*, 35 D. 206; *Chandler v. Fulton*, 60 D. 188.

Transit is at an end whenever the goods, in pursuance of the original destination given them by the consignor, have come into either the actual or constructive possession of the consignee. *Sawyer v. Joslin*, 49 D. 768.

Landing of goods upon a wharf is a delivery, terminating the transit and divesting the right of stoppage, when by such landing all the duties and responsibilities of the transportation line in regard to the goods ceased, and no duty or responsibility was cast upon the wharfinger, and the goods lay on the wharf, subject to the control and direction of the consignee only, and it appears that merchants in the course of business received their goods at the wharf. *Id.*

Whether final delivery determining the right of stoppage has been effected is to be decided according to the intention of the parties in each case by examining whether they contemplated any further and more absolute reduction into possession on the part of the vendee. *Chandler v. Fulton*, 60 D. 188.

A merchant fitted out a vessel and directed the captain to pursue a certain voyage. The captain sailed to Madeira, and there disposed of his cargo, in part payment for wine which he purchased, paying the balance by bills drawn on the owner, and then sailed to Charleston with the wine. *Held*, that the vendors of the wine, the vendee having become insolvent, had a right to stop the goods *in transitu*, as there had been no actual or constructive delivery to the vendee. *Parker v. McIver*, 1 D. 656.

B. & Co., of New York, sold on credit, and consigned in the ordinary way to "Geo. T. Hull, Youngstown, Ohio, A. & G. W. R. R.," goods which arrived at the Youngstown station and were transferred by the railroad company's agent to its freight depot, where they awaited payment of charges as a condition precedent to their removal by draymen to Hull's place of business. On the evening of the day of the arrival of the goods they were seized in attachment at the suit of the creditors of Hull. *Held*, that B. & Co. might assert the right of stoppage *in transitu*. *Calahan v. Babcock*, 8 R. 63.

66. How the right may be exercised. *—The right of stoppage *in transitu*

* When and by whom stoppage in transit may be exercised, see note, 19 R. 87-92.

is ineffectual unless actually exercised. *MacTier v. Frith*, 21 D. 262.

To invest the vendor with the property and the possession of goods after they have been delivered to a carrier, there must be an actual stoppage by a positive exertion of the right by the vendor or his agent. *People v. Haynes*, 28 D. 530.

Chancery may enforce the right of stoppage, especially when the goods are already under the control of that court by an attachment in chancery. *Hause v. Judson*, 29 D. 377.

Charges and expenses of the forwarder in whose hands the goods were attached and by whom they were sold, under the chancellor's order, must be first paid out of the proceeds in such a case. *Id.*

The vendor is not obliged to refund what may have been received in part payment to entitle him to exercise his right of stoppage. *Newhall v. Vargas*, 29 D. 489.

A vendor may ratify an undirected act of his correspondent in claiming the goods, and thereby make a valid stoppage *in transitu*. *Id.*

Notice to the carrier, or to any one having charge of the goods before the transit ends, is sufficient, and does not cease merely by the interposition of a claim on the part of the consignee. *Id.*

Part payment made on account of goods cannot be recovered back by the vendee after a stoppage *in transitu*; but the vendee may have the benefit of such payment in extinguishing a proportionate amount of the vendor's claim for the balance due him on the contract price. *Newhall v. Vargas*, 33 D. 617.

A party by whom stoppage *in transitu* is effected need not have special authority from the vendor; this right may be exercised by commission merchants, to whom the goods have been shipped by the vendor to be forwarded to the purchaser. *Chandler v. Fulton*, 60 D. 188.

The vendor has a right to intervene in an action by a purchaser from the person to whom they have been sold against a forwarding merchant to whom they have been shipped by the seller to be forwarded, and who refuses to deliver them on demand, on the ground that he has stopped the goods in transit for the seller, the latter having ratified his acts. *Id.*

Filing a claim in an attachment case to a fund in court arising from the sale of the goods under an interlocutory order of court is a sufficient exercise by the vendor of the goods of the right of stoppage *in transitu*. *O'Brien v. Norris*, 77 D. 284.

Upon demand by a vendor of goods upon credit, during the continuance of the right of stoppage *in transitu*, the carrier becomes liable for conversion if he declines to deliver the goods to the vendor, or delivers them to the vendee. *Jones v. Earl*, 99 D. 338.

For Index to Notes in American Decisions and American Reports, see Volume I.

Notice by vendor of goods clearly informing the carrier that it is the intention and desire of the former to exercise his right of stoppage *in transitu*, is sufficient to charge the latter. And notice to an agent of the carrier, who is in the possession of the goods in the regular course of his agency, is notice to the carrier. *Ib.*

A claim of a vendor to exercise the right of stoppage is superior to the lien of attaching creditors, when the former shows that he had the right of stoppage, and duly exercised it. *Blum v. Marks*, 99 D. 725.

A vendor may exercise the right of stoppage when he proves that at the time of the sale he was not aware of the insolvency of the vendee; and the discovery of such insolvency before delivery entitles him to exercise the right, though the goods are attached by creditors of the vendee. *Ib.*

67. What will defeat it.*—Stoppage *in transitu* can only take place while goods are on their way; if they arrive at their place of ultimate destination, and come into the possession of the vendee, there is an end of the vendor's rights over them. *Chandler v. Fulton*, 60 D. 189.

The right ceases where the goods are shipped on board a vessel, appointed by the vendee to be transported, not to his residence or to be received by him, but to other markets. *Newhall v. Vargas*, 29 D. 489; *Rowley v. Bigelow*, 23 D. 607.

The vendee may defeat the right of stoppage by sale of the goods to a *bona fide* purchaser for valuable consideration, accompanied by a transfer of the bill of lading; it is not necessary that the purchaser be ignorant of the fact that the goods have not been paid for; if he takes *bona fide*, without a knowledge for any such circumstances as would render the bill of lading not fairly and honestly assignable, he acquires a good title as against the consignor. *Chandler v. Fulton*, 60 D. 188; but the purchaser's knowledge of the original insolvency bears in the question of his good faith. *Loeb v. Peters*, 35 R. 17.

The right of stoppage is not absolutely defeated by a mortgage or pledge of the goods by the purchaser; for if the mortgage is made *bona fide*, the vendor may still resume his interest in them, subject to the rights of the mortgagee, and will have a right to the residue which may remain after satisfying the mortgagee's claim. *Chandler v. Fulton*, 60 D. 188.

A vendor delivered to the vendee a bill of parcels for goods lying in public store, together with an order on the store-keeper for their delivery. *Held*, that the vendor had not the right of stoppage against a person purchasing *bona fide* for a valuable consideration. *Hollingsworth v. Napier*, 2 D. 268.

* When the right to effect stoppage *in transitu* ceases, see note, 60 R. 51-57.

Plaintiff sold goods to C and delivered them to a carrier. Defendant, a constable, holding an execution against C, levied on, and seized the goods while in the carrier's possession and paid the freight charges thereon. Plaintiff demanded the goods from defendant, without paying or tendering the amount of the freight charges, and being refused, brought replevin. *Held*, 1. That plaintiff's right of stoppage *in transitu* was not terminated by the levy and seizure; but 2. That the lien for freight charges, to which defendant had rightfully succeeded, was prior to plaintiff's right, and that plaintiff could only bring replevin after discharging that lien. *Rucker v. Donovan*, 19 R. 84.

The vendor of goods shipped them by defendant's railroad to the vendee as consignee, with bill of lading in the usual form. While the goods were in transit the vendee became insolvent, and the vendor notified defendant to stop the goods. Shortly after such notification the vendee indorsed the bills of lading, in the usual course of business, to plaintiff, who, in good faith and without knowledge of the insolvency or of the stoppage, advanced money thereon. *Held*, that plaintiff, on tender of the freight and charges, was entitled to receive the goods from the carrier as against the vendor. *Newhall v. Central Pac. R. R. Co.*, 21 R. 713.

S shipped goods by railroad to R at A station. When the goods arrived there R paid the freight charges, receipted for the goods, and told the company's agent that he would leave the goods with him until he could send for them. Thereupon L, a creditor of R, attached the goods. Afterward the agent received notice from S not to deliver the goods to R. *Held*, that it was too late for S to exercise the right of stoppage *in transitu*. *Sangstaff v. Stitz*, 60 R. 49.

68. What will not.—The vendor's right of stoppage is not superseded by an attachment of the goods by a creditor of the vendee, while in transit in the hands of a common carrier or forwarder. *Hause v. Judson*, 29 D. 377; *Naylor v. Dennie*, 19 D. 319; *Hepp v. Glover*, 35 D. 206. And a demand of the goods by the vendor, while in the hands of a levying or attaching officer, is a sufficient claim of them; and this, without reference to the question whether the goods but for the levy or attachment would probable have reached the vendee, and thus have destroyed the vendor's right. *Sawyer v. Joslin*, 49 D. 768.

A sale under a *f. fa.* in attachment proceedings, of goods which were subject to vendor's lien or right of stoppage, will not operate to the prejudice of the vendor so as to defeat his prior right, but he will be entitled, by intervening in the attachment proceedings, to have the proceeds applied to the satisfaction of his debt in preference to the attaching creditors. *Hepp v. Glover*, 35

For Index to Notes in American Decisions and American Reports, see Volume I.

D. 204. S. P., *O'Brien v. Norris*, 77 D. 284.

The right of stoppage is adverse to the consignee, yet is not defeated by a relinquishment by him of the consignment. *Naylor v. Denzie*, 19 D. 319.

The right is not affected by taking bills drawn by the master upon the vendee; nor by the receipt of a commission by one who becomes responsible for the value of goods shipped to another. *Newhall v. Vargas*, 29 D. 439.

The right of stoppage is not defeated by showing that the vendee was actually insolvent at the time of the purchase, unless it be shown that such insolvency was known to the vendor, and he contracted with such knowledge. *O'Brien v. Norris*, 77 D. 284.

III. WARRANTIES.

69. Implied warranties, generally.*—Warranties, in sales of personalty, are of two kinds: express and implied. *Osgood v. Lewis*, 18 D. 317.

Implied warranties arise by operation of law, and they exist without any intention of the seller to create them. They are conclusions or inferences of law, pronounced by the court upon facts admitted or proved before the jury. *Id.*

Implied warranties are of two kinds: 1. Those untinctured by actual fraud or deceit, as a warranty of title; 2. Those where fraud and deceit are their very essence, as where a seller knowing of the unsoundness of an article, uses artifice to conceal such defect from the buyer. *Id.*

In all sales of goods there is an implied warranty that the article corresponds in specie with the commodity sold, unless there are facts and circumstances showing that the buyer took upon himself the risk of determining both the quality and the kind of the goods purchased by him. *Borrekins v. Besan*, 23 D. 85.

Where goods are sold on inspection, there is no standard but identity, and no warranty implied other than that the identical goods sold, and no others, shall be delivered. The name given to them in the bill of parcels is then immaterial, for faith was placed, not in the name, but in the quality and kind discovered on the inspection; but if there be fraudulent concealment or misrepresentation, the case is different. *Carson v. Baillie*, 57 D. 659.

No implied warranty of the manufacturer exists in a sale between merchants. *Dickinson v. Gay*, 83 D. 656.

Merchants are bound by the legal usages of merchants as to sales between themselves. *Id.*

Sales of goods "to arrive by" a certain time do not import a warranty that the

goods shall arrive by the day named, and evidence that by the custom of merchants the words "to arrive by" a certain time, mean "deliverable by" that time, is inadmissible as tending to change the legal effect of the contract. *Rogers v. Woodruff*, 13 E. 276.

Implied warranties in sales generally, discussed. *Kohl v. Lindley*, 89 D. 294.

70. Warranty of title.*—In a sale of personal property there is an implied warranty in respect to the title of the vendor; but it is otherwise as to the quality or soundness of the thing sold. *Defreeze v. Trumper*, 3 D. 329; *Chism v. Woods*, 3 D. 740; *Perley v. Balch*, 34 D. 56; *Lile v. Hopkins*, 51 D. 115; *Fawcett v. Osborn*, 83 D. 278; *Burt v. Dewey*, 100 D. 482; and a promise to refund the money paid is implied if the seller has no title. *Barton v. Faherty*, 54 D. 503. But no warranty of title is implied where an agent, public or private, sells. *Forsythe v. Ellis*, 20 D. 218. This warranty is broken immediately, if the vendor has no title, and, therefore, in such case the statute of limitations begins to run from the time of the sale. *Chancellor v. Wiggins*, 39 D. 499.

The law does not imply a warranty of title to personal property not in the vendor's possession at the time of sale, and claimed by another. *Scott v. Hix*, 62 D. 458; *Huntingdon v. Hall*, 58 D. 765. And the seller's subsequent acquisition of a good title will not inure to the benefit of the vendee. But where the vendor is, at the time, in possession of the thing sold, he is held to an implied warranty of title. *Scranton v. Clark*, 100 D. 430.

A warranty of title is implied on the sale of an unnegotiable chose in action, and the purchaser acquires the right, and assumes the risk of its value; where it is, in fact, void, the buyer is entitled to recover the price, although the seller was innocent of any fraud, and ignorant of the defect. Accordingly, when a land warrant was sold, and it was subsequently declared void, the purchaser may recover back the consideration paid. *Boyd v. Anderson*, 3 D. 762.

One who sells personal property that he does not own, is liable in assumpsit on his warranty. *Strong v. Barnes*, 34 D. 684.

The fact that a horse is branded with the letters "U. S." is not *per se* proof of title in the United States. *Plummer v. Newdigate*, 87 D. 479.

The seller must be held to warrant his title where his sale of an exclusive right to manufacture and sell a particular article was procured upon the representation that he owned the exclusive right thereto, and that he acquired it from another under a written agreement which he exhibited. *Costigan v. Hawkins*, 94 D. 583.

*See note on implied warranties in sales of chattels, 24 E. 151-153.

*Implied warranty of title, on sale of chattels, see note, 62 D. 460-468.

For Index to Notes in American Decisions and American Reports, see Volume I.

A sale of standing timber, by the owner of the freehold, is not a sale of a chattel interest, but of an interest in land, and is not controlled by the doctrine of warranty of title in sales of personal property. *Slocum v. Seymour*, 13 R. 432.

On a sale of chattels, announced as made by virtue of a mortgage, there is no implied warranty of title. *Harris v. Lynn*, 37 R. 253.

71. **Warranty of genuineness.**—A vendor is responsible for the genuineness of a bill or note, which he sells without indorsing. *Thompson v. McCullough*, 77 D. 644.

One who sells negotiable bonds impliedly warrants their genuineness, and in case they are forged, is liable for the return of the purchase-money, without any offer to return such bonds, and although the vendee has resold the bonds at a greater price. *Smith v. McNair*, 27 R. 117.

On the sale of accounts there is an implied warranty that they are genuine and owing. *Gilchrist v. Hilliard*, 38 R. 706.

A warranty is implied on a sale of drugs by a druggist. *Jones v. George*, 42 R. 689.

A vendor of personal property does not impliedly warrant that the article sold is of the species or kind contemplated by the parties, where the sale is on inspection, and the vendee's knowledge is equal to that of the vendor. *Lord v. Gross*, 80 D. 504.

A statement made in good faith at the time of the sale, by the vendor, that seed is of a certain kind, such seed, with respect of kind, not being ascertainable by inspection, will lay a ground from which a jury, or a court having power to pass upon facts may infer a warranty as to kind. *Wolcott v. Mount*, 20 R. 425, affirming same case, 13 R. 438; *Van Wyck v. Allen*, 25 R. 136.

The plaintiff, a market gardener, bought Wakefield cabbage seed, of the defendant, in 1881, which produced a good crop. The next year he asked him if he had "any more Wakefield cabbage seed, same as in 1881." The defendant replied that he had some of the old stock, and produced some seed in envelopes, part of the old stock, which the plaintiff bought. It was impossible to distinguish Wakefield cabbage seed by its appearance. The plaintiff planted the seed, and the crop was not Wakefield cabbage, and was almost worthless. *Held*, that the defendant was not liable in damages. *Shieler v. Baxter*, 58 R. 738. See to the contrary, *White v. Miller*, 27 R. 13.

At an auction sale, the auctioneer stated that the article offered was "blue vitriol, sound and in good order." It had the appearance of that article, and by no examination practicable at the time could it be discovered that it was not. It was, in fact, what was known as mixed or "saltsburger vitriol," composed of a small portion of "blue vitriol," the residue

being green vitriol, an article of much smaller value. The defendants having bid off the property, refused to take and pay for it, on ascertaining its true character, and it was sold again on their account. In an action to recover the amount of the loss—*held*, that upon these facts the jury might have properly inferred that there was upon the sale a warranty that the article sold was blue vitriol; that it was, at least, the duty of the court to submit the question of warranty to the jury, instead of directing a verdict for the plaintiff. *Held*, also, that there was a breach of the warranty; the article sold having only a small per cent of blue vitriol in it, and being not an inferior article of blue vitriol, but a different substance with a small admixture of blue vitriol. *Hawkins v. Pemberton*, 10 R. 595.

72. **Warranty of soundness.***—A sale of property for a sound price raises a warranty against all faults known and unknown to the seller; therefore, if a negro had about him, at the time of the sale, the seeds of a disorder which occasioned his death, the loss must fall on the seller. *Timrod v. Shoolbred*, 1 D. 620. But the rule does not extend to the moral qualities of a slave. *Smith v. McCall*, 10 D. 666.

It is true, as a general rule, that a sound price warrants a sound commodity; but where a purchaser is informed fully of all the circumstances, and has a fair opportunity for information, he shall be bound by his contract, however disadvantageous it may be. *Whitefield v. McLeod*, 1 D. 650.

No warranty is implied from a sound price on an executed sale of a chattel, and if there is no fraud or express warranty the buyer takes the risk of the quality and condition of the article. *Moses v. Mead*, 43 D. 676; *Johnston v. Cope*, 5 D. 423; *Dean v. Mason*, 10 D. 162; *Eagan v. Call*, 75 D. 653; *Weimer v. Clement*, 78 D. 411.

When there is no express warranty, and the vendor sells a thing as sound which is unsound, having a latent defect unknown to him, he is not answerable to the buyer; the law will not raise an implied undertaking to make good the defect. *Westmoreland v. Dixon*, 9 D. 763; *West v. Cunningham*, 33 D. 300; *McFarland v. Newman*, 34 D. 407; *Eagan v. Call*, 75 D. 653; *Weimer v. Clement*, 78 D. 411. But this rule is not universal, as where personalty is sold by sample, etc. *Osgood v. Lewis*, 18 D. 317.

In the sale of provisions for domestic use there is an implied warranty that they are sound and wholesome. *Van Bracklin v.*

* Warranty of soundness or fitness, when implied, see note, 6 D. 113-119.

Implied warranty that chattel is sound and merchantable, see note, 1 D. 84-95.

Warranty of soundness, whether implied from sound price, see note, 43 D. 680, 681.

Warranty of horse, what is and effect of, see note, 41 R. 401.

For Index to Notes in American Decisions and American Reports, see Volume I.

Fonda, 7 D. 339. Otherwise on a sale of provisions bought to be sold again. *Moses v. Mead*, 43 D. 676.

A vendor of rice sold here is not liable under an implied warranty for a defect in its quality of soundness which is not discovered until its arrival abroad, and which, if it existed at the time of sale, might easily have been detected by an examination. *Vanderhoof v. MacTaggart*, 2 D. 667.

A manufacturer who sells goods of his own manufacture impliedly warrants that they are free from any latent defect growing out of the process of manufacture; but he is not liable for any latent defect in the material which he is not shown and cannot be presumed to have known. *Hoe v. Sartorn*, 78 D. 163.

The difference between the doctrine of the civil law and that of the common law in respect to implied warranties discussed. *Id.*

When one sells another's horse without his knowledge, and warrants his soundness, and the owner subsequently accepts the purchase-money, he makes himself liable on the warranty. *Lane v. Dudley*, 5 D. 523.

A vendor is liable for selling a blind horse at a sound price, without declaring his blindness, if it was such as not to be discovered at first view. *Hughes v. Robertson*, 15 D. 104.

A warranty of soundness of a horse is not broken by a curable and temporary injury existing at the date of the sale, not injuring him for immediate service. It seems, however, that the warranty is broken if the infirmity, although not permanent or incurable, renders the animal less fit for present use. *Roberts v. Jenkins*, 53 D. 169.

73. **Warranty of quality.***—In the contract of sale the law implies no warranty as to the quality of the goods sold, although it may imply a warranty of title where the vendor has possession at the time of sale. *Lanier v. Auld*, 3 D. 680; *Erwin v. Maxwell*, 9 D. 602; *Hyatt v. Boyle*, 25 D. 276; *Getty v. Rountree*, 54 D. 138. Accordingly, where one sells what was supposed to be barilla, but which turned out to be kelp, an inferior article much resembling it, and of little value, he does not warrant the genuineness of the article in the absence of an express warranty or fraud. *Sweet v. Colgate*, 11 D. 266.

Merely representations as to the quality of goods sold do not constitute a warranty. *Wetherill v. Nelson*, 59 D. 741.

There is no implied warranty in a sale of baled hemp, that the interior of the bales corresponds with the exterior. In the absence of fraud, the vendee cannot recover damages from the vendor, on account of a difference between the interior and the ex-

* Warranty of quality in executory contracts of sale, see note, 86 D. 812-814.

terior of the bales. *Salisbury v. Stainer*, 33 D. 437.

An implied warranty of quality in a sale is not raised by the fact that the seller knew the purpose for which the goods were intended, or that the goods were not present to be judged of by the defendants, if the bad quality could not have been detected by an examination, and it was necessary to put them in use before their unfitness could be discovered. *Dickson v. Jordan*, 53 D. 403.

Implied warranty of quality does not arise where purchaser orders goods from the seller, and has no opportunity of seeing them; in such a case the purchaser constitutes the vendor his agent, to select for him, and only has a right to a fair exercise of the vendor's judgment in place of his own, and he has no cause of complaint because of a defect in the goods unless there be fraud. *Id.*

A seller is not answerable for the quality of an article that has been inspected and received by the buyer, provided it be *in specie* the thing for which it has been sold. *Jennings v. Gratz*, 23 D. 111.

The practical test for determining whether an article is *in specie*, what it was sold for, is that it be merchantable under the denomination affixed to it by the seller. *Id.*

A sale of tobacco as being of "Parkin's crooked brand," imports no warranty as to the quality of the tobacco, further than that it is of that brand, and though the purchaser agrees to pay the full price of a merchantable commodity, he cannot, on discovering it to be unsound and unmerchantable, offer to return it and resist an action for the price, if the tobacco is of the stipulated brand, and there is no express warranty, or knowledge of the unsoundness by the vendor. *Hyatt v. Boyle*, 25 D. 276.

Delivery of any tobacco not of that brand, however excellent its quality, would not in such a case, be a compliance with the terms of sale. *Id.*

When an article is sold for a sound price, the law will imply a warranty that it is what it is represented to be in regard to quality. *Bailey v. Nichols*, 1 D. 83.

A contract to deliver articles at a future day, whether they are to be manufactured or are already on hand, implies that they must be merchantable, at least of a medium quality of goodness. *Howard v. Hoy*, 35 D. 572. *S. P.*, *Rodgers v. Niles*, 78 D. 290; *Reed v. Randall*, 86 D. 306.

A warranty of a fair and merchantable article is implied in an executory contract to deliver a quantity of corn. *Babcock v. Trice*, 68 D. 560.

Such implied warranty is not waived by acceptance of the corn by a warehouseman, or by the purchaser himself; and such an acceptance, even with opportunity of inspection and without complaint, only raises

For Index to Notes in American Decisions and American Reports, see Volume L.

a presumption that the corn was of the quality contemplated by the parties. *Id.*

Where goods are sent by one merchant upon order of another, there is an implied warranty that the goods sent are such as were ordered; where goods are so sent without a special order, but upon a general engagement to forward goods, there is an implied warranty that all goods sent are valuable and merchantable. *Brantly v. Thomas*, 78 D. 264.

Tobacco is not merchantable where it is not well cured and in good condition when it is delivered, but is wet, sweaty, and rotten. *Reed v. Randall*, 86 D. 305.

Breach of contract to furnish in future a merchantable crop of tobacco, by delivering tobacco that is wet, sweaty, and rotten, is not a breach of warranty, but a mere non-compliance with such executory contract. *Id.*

The plaintiffs contracted to manufacture and deliver to the defendant "all the horn chains they manufacture." The chains manufactured and delivered were composed of round and oval links, the round links being hoof and the oval links being horn; and in an action to recover the contract price, — *Held*, 1. That the words "all the horn chains they manufacture" did not imply a warranty that the chains should be made wholly of horn, but that they should be the article known in the market as "horn chains;" 2. That the contract called for articles of a fair merchantable quality and of good workmanship, but not for articles of the first quality. *Sweet v. Shumway*, 3 R. 471.

The plaintiff, at Mobile, Alabama, ordered from defendant at Council Bluffs, Iowa, through his agent at Mobile, "choice sugar-cured, canvassed hams." The plaintiff had no opportunity to inspect them, but they were shipped at Council Bluffs, and payment was demanded and made while they were in transit. *Held*, that the hams were warranted to conform to the order, and defendant was liable for a breach. *Forchheimer v. Stewart*, 54 R. 30.

A pork packer in Dubuque, Iowa, sold to a dealer in Pottsville, Pa., "five car-loads fully cured sweet pickled shoulders, f. o. b. Dubuque." Upon arrival at Pottsville the goods were found to be unmerchantable. In an action upon the implied warranty, the court charged that the defendant was bound to furnish pork that was "sweet and sound and in fit condition to be sold in the trade." *Held*, error. *Ryan v. Ulmer*, 56 R. 210.

74. Warranty of adaptability to use intended."—A warranty that a chattel is fit for a particular use is ordinarily implied, when it is sold for such a use.

* See note on the implied warranty that article manufactured will answer the purpose intended, 24 R. 104-114.

Beale v. Olmstead, 58 D. 180; *Best v. Flint*, 56 R. 570; *Stinch v. Hathaway*, 58 R. 327.

The principle of implied warranties is directed only against those secret defects against which the most skillful cannot always guard; and where the seller was not guilty of any fraud, deceit, misrepresentation, or concealment, and the buyer had opportunity, by the exercise of ordinary diligence, to acquire a knowledge of any fact necessary to enable him to form a correct estimate of the value of the thing he is about to purchase, the law will not raise an implied warranty that the thing should answer the purpose for which it was bought. *Carnochan v. Gould*, 19 D. 668.

Knowledge by the vendor that tobacco is bought for sale, imports no warranty, it seems, that it is suitable for that purpose, where the tobacco is of the particular brand which the vendee contracted to purchase. *Hyatt v. Boyle*, 25 D. 276.

The law implies no warranty in the sale of a Durham cow, that she will prove suitable for breeding purposes, although the price paid for her indicates that it was for that purpose that she was bought. *Scott v. Renick*, 35 D. 177.

A warranty of fitness of an article for a specific purpose cannot be implied from a knowledge on the part of the seller that the article is intended for such purpose, except where the vendor is a manufacturer. *Bartlett v. Hoppock*, 88 D. 428.

Upon the sale of a live cow by a farmer to retail butchers, there is no implied warranty that she is fit for food, although he knows that they buy her for the purpose of cutting her up into beef for immediate domestic use. *Howard v. Emerson*, 14 R. 608.

The vendor of an article for a particular purpose does not impliedly warrant it against latent defects unknown to him, and which have been produced by the unskillfulness of the manufacturer or previous owner, without his knowledge or fault, except where the sale is, of itself, equivalent to a positive affirmation that the article has certain inherent qualities inconsistent with the alleged defects. *Bragg v. Morrill*, 24 R. 102.

Thus, where defendant sold to plaintiff a shaft for the purpose of driving machinery, and defendant was not the maker of the shaft, but had turned and prepared it for the pulleys, and the shaft afterward broke by reason of a defect in the original manufacture, not caused by defendant, and not discoverable by any ordinary inspection or examination, — *held*, that there was no implied warranty, and that defendant was not liable. *Id.*

In executory contracts to furnish articles for a specific purpose, there is an implied warranty that the article delivered shall answer the purpose for which it is designed,

For Index to Notes in American Decisions and American Reports, see Volume I.

inasmuch as the purchaser has not an opportunity of inspecting or testing it. If found defective, he may return it in a reasonable time, and recover its price if paid. *Fisk v. Tank*, 78 D. 737.

In case of an executory contract for the manufacture of articles to be delivered at a future day, there is always an implied warranty that the articles delivered shall answer the purpose for which they were designed. *Woodle v. Whitney*, 99 D. 102.; *S. P., Getty v. Rountree*, 54 D. 138; *Brenton v. Davis*, 44 D. 769; *Rodgers v. Niles*, 78 D. 290; *Pease v. Sabin*, 91 D. 364; *Snow v. Schomacker Manuf. Co.*, 44 R. 509; *Poland v. Miller*, 48 R. 730.

But the manufacturer is not bound to furnish the best that are or can be made, but only such as are usually made and used, and as are reasonably fit for the purpose. *Harris v. Waite*, 31 R. 694.

The manufacturer of an article, according to specifications furnished by his employer, does not impliedly warrant that it will answer the purpose for which it was intended by the projector. In such case the risk is on the latter. *Richetts v. Sisson*, 35 D. 141.

A chattel was sold with a warranty that it was fit for a particular purpose, and that, if it was not, the vendor would make it so. *Held*, that the purchaser could maintain an action on the warranty although he had offered to return the chattel, the right to return being in pursuance and not in avoidance of the contract. *Kimball & Austin Manuf. Co. v. Froman*, 24 R. 558.

Defendant agreed to furnish plaintiff as many boxes as they should need to pack manufactured tobacco during a certain season at a specified time, and did furnish such boxes. It is customary for tobacco dealers to rely on the manufacturers of boxes for the selection of proper material and not to test the boxes received to ascertain if they are suitable. The boxes furnished by defendant were of unseasoned wood, which caused the tobacco packed therein to mould and deteriorate in value. *Held*, 1. That the defendant was liable as upon an implied warranty, that the boxes were suitable for the purpose of packing manufactured tobacco for loss from their not being suitable, and 2, that the measure of his liability was the damage done to the tobacco by its moulding. *Gerst v. Jones*, 34 R. 773.

A farmer bought of a miller a sack of bran for his cows. Before it was removed from the mill two copper clasps accidentally fell into it, without negligence on the miller's part, and one of the cows swallowed them and was killed thereby. The bran was part of a quantity on hand open to inspection. There was no express warranty. *Held*, that the buyer had no remedy against the seller. *Lukens v. Freund*, 41 R. 429.

75. When the maxim *caveat emptor* applies.*—*Caveat emptor* is a maxim which enters into every purchase where the contrary is not stipulated, and equity can not relieve against it. *Lighty v. Short*, 24 D. 334.

Warranty of quality is generally not implied in executed sales of goods, but in the absence of fraud or express warranty the rule is *caveat emptor*. *Beirne v. Dord*, 55 D. 321; *Wetherill v. Nelson*, 59 D. 741.

No fraud arises upon the sale of unsound personal property, where the unsoundness was of a nature to be perceived by the eye, and no attempt at its concealment has been made. *Stewart v. Dugan*, 28 D. 348; *Eagan v. Call*, 75 D. 653.

The rule of *caveat emptor* requires that the vendee shall guard against latent defects, by demanding a warranty, or bear the loss himself. *Welsh v. Carter*, 19 D. 473; *Dickson v. Jordan*, 53 D. 403; *Brown v. Gray*, 72 D. 563; *Bartlett v. Hoppock*, 88 D. 428; *Kohl v. Lindley*, 89 D. 294.

A sale of a spurious and worthless article, fraudulently made to resemble a valuable commodity for which it is sold, will not authorize an action by the vendee against his vendor, who is ignorant of the fraud, and has given no warranty. *Welsh v. Carter*, 19 D. 473.

The fact that the vendor has a remedy over against the person from whom or through whom he obtained an article, does not make him liable to his vendee for defects therein, in the absence of fraud or warranty. *Id.*

The rule of *caveat emptor* applies to every sale of chattels where the possession at the time of the sale is not in the person selling, if there is no express warranty of title; but where the possession is in the party selling, and he sells the chattel as his own, and for a fair price, the law implies a warranty of title. *Long v. Hickingbottom*, 64 D. 118.

A purchaser of goods must attend to those qualities of articles he buys which are supposed to be within reach of his observation and judgment, such as where the articles are equally open to the inspection of both parties; but this rule does not apply where the purchaser has ordered goods of a certain character, and relies on the judgment of the seller, or where goods of a certain described quality are offered for sale, and when delivered do not answer the description given in the contract. *Brantley v. Thomas*, 73 D. 264.

The rule of *caveat emptor* applies to a purchase of depreciated bank bills by a banker or broker who deals in such bills as an article of commerce; and if a bill purchased by him, after ample opportunity to examine it and satisfy himself as to its value, turns out to be worth less than the price paid for it,

* *Caveat emptor*, rule of, when applicable to sales of chattels, see note. 90 D. 424-431.

For Index to Notes in American Decisions and American Reports, see Volume I.

the vendor is not bound to make it good. *Hinckley v. Kerating*, 74 D. 102.

Unless the vendee gives notice or offers to return personal property, his remedy to recover damages on the ground that the article furnished does not correspond with the contract, where it is executory, does not survive his acceptance of the property after opportunity to ascertain the defect. *Reed v. Randall*, 86 D. 305.

Where an article, manufactured in accordance with a special contract, is accepted and retained by the vendee, he will be liable for the full contract price, there being no warranty, and the defects, if any, being obvious and patent; and in such a case a judgment obtained by the vendor for an unpaid balance of the contract price is a bar to an action by the vendee to recover for a breach of the contract. *Gibson v. Bingham*, 5 R. 289.

On a sale of personal property, where the purchaser inspects for himself the specific goods sold, and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer of the goods sold, the doctrine of *caveat emptor* applies, although the seller may suppose that the goods are bought for the purpose to which the purchaser applies them. *Hight v. Bacon*, 30 R. 639.

76. When it does not apply. — The doctrine of *caveat emptor* is founded upon the idea that a purchaser sees what he buys, and exercises his own judgment. Where he has no opportunity of exercising this judgment, but relies upon the judgment of the party with whom he deals, the tendency of the modern decisions is to imply a warranty of quality. *Brantley v. Thomas*, 73 D. 264.

The exception that where there is no opportunity for inspection of an article by the buyer, there is an implied warranty of its quality, applies only where the inspection is, morally speaking, impracticable, as where goods are sold before arrival or landing. *Hyatt v. Boyle*, 25 D. 276.

That the inspection would be inconvenient or difficult, is not sufficient in such a case. *Id.*

Defects visible and easily discovered will not prevent the vendee's recovery therefor, if the seller has disguised them, and by his false statements has induced the vendee to buy. *Hanks v. McKee*, 13 D. 265.

Asthma in a slave is not a disease of such visible character that the vendee is bound to know the stage to which it has reached. *Id.*

The exception of a certain disease named in a bill of sale with warranty, will not render the sale binding if the violence of the disease was so misrepresented as to induce the vendee to buy. *Id.*

The rule as to visible defects does not apply where the property sold was not present

at the sale, and where the vendee was obliged to rely upon the representations of the vendor. *Id.*

The rule of *caveat emptor* does not cover a fraudulent concealment or misrepresentation by the vendor of any material fact inducing the purchaser to buy. *Winds v. Morrison*, 67 D. 668.

Executory contracts of sale must be filled by good, lawful merchandise, of suitable quality and kind. The rule is *caveat venditor*, not *caveat emptor*. If the vendor sues, after being notified of the defects, his recovery, if at all, must be on a *quantum meruit* only. *Howard v. Hoey*, 35 D. 572.

In the sale of a horse, the buyer has a right to inquire if the horse is injured in any way, and the seller, if he makes any representation, is bound to disclose the truth, and the whole truth, as far as he possesses any knowledge upon the subject, and this he must do, not partially, but fully and positively. *Baker v. Seahorn*, 55 D. 724.

It is erroneous to instruct that the rule of *caveat emptor* applies to a case, if there is any evidence in the case which requires a determination by the jury of the question whether there was fraud in the sale. *Hadley v. Clinton County Importing Co.*, 82 D. 454.

An instruction that the rule of *caveat emptor* applies to a case, accompanied by general remarks concerning fraud in the sale, is calculated to mislead a jury in a case where there is evidence of fraud proper to be considered by the jury. *Id.*

Good sense and law more readily authorize a finding that the vendor is bound to disclose a latent intrinsic defect in the article sold, more peculiarly within his knowledge, than extrinsic facts affecting its value, as to which the means of knowledge was equally accessible to both parties. *Id.*

Whether or not failure of vendor to disclose a material latent defect known to the vendor and unknown to the vendee constitutes a fraud, is generally a question of fact upon which a jury should be allowed to pass. *Id.*

Omission to disclose a latent and material defect known to the vendor and unknown to the vendee, is merely evidence of fraud, the effect of which the circumstances may strengthen or destroy. *Id.*

77. What amounts to an express warranty. — To constitute a warranty, neither the word "warrant" nor any particular form of words is necessary; it is sufficient if the language used was made and received as a warranty. *Beeman v. Buck*, 21 D. 571; *Kinley v. Fitzpatrick*, 34 D. 108; *Randall v. Thornton*, 69 D. 56; *Weimer v. Clement*, 78 D. 411.

Any affirmation of the quality or condition of the thing sold, not uttered as matter

* Representations of vendor, when construed to be warranties. see notes. 15 R. 382-386.

For Index to Notes in American Decisions and American Reports, see Volume I.

of opinion or belief, made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by the purchaser, is an express warranty. *Osgood v. Lewis*, 18 D. 317; *Chapman v. Murch*, 10 D. 227; *Randall v. Thornton*, 69 D. 56; *Hahn v. Doolittle*, 86 D. 787.

A warranty, to be valid, must be made at the time of sale; or if made afterwards, must be upon a new consideration. *Towell v. Gatewood*, 33 D. 437.

The vendor's statements ought to be regarded as a warranty of quality, when they form the sole basis of the sale, there being no opportunity to examine the chattel, and no examination in fact attempted; when they are positively made with reference to matters upon which the vendor professes, and is supposed to have, knowledge; or when the chattel was bought for a particular use, and the vendor knew that the vendee would not buy an inferior article. *Beale v. Olmstead*, 58 D. 150.

A sale note or bill of parcels describing goods sold, or designating them by a name well understood, is to be considered a warranty that the goods are what they are so described or designated, even where the goods are examined by the vendee at or before the sale, if they are so prepared and present such an appearance as to deceive skillful dealers. *Henshaw v. Robins*, 43 D. 367. *S. P.*, *Hastings v. Lovering*, 13 D. 420; *Osgood v. Lewis*, 18 D. 317; *Borrekens v. Bevan*, 23 D. 85; *Kearly v. Duncum*, 73 D. 179.

A description of property sold as in "good order and condition" is equivalent to a representation that it was in such condition, and the seller would be guilty of fraud if he knew it was not, although the description is contained in a contract of sale signed only by the purchaser and his surety. *Bryant v. Crosby*, 58 D. 767.

Affirmation that a jack is a good and sure foal-getter, made at the time of the sale is such a representation of fact as amounts to a warranty. *Lamme v. Gregg*, 71 D. 489.

A statement is a contract of sale, descriptive of the thing sold, if intended to be part of the contract, is a condition, on the failure of which the purchaser may repudiate, or, if a rescission has become impossible, it may be treated as a warranty, for the breach of which damages may be recovered. *Wolcott v. Mount*, 13 R. 438.

A statement in an advertisement of sale of railroad bonds, that "the road is in successful operation, and earning net more than the interest on all its bonds," is a warranty that the road was on a paying foundation, and regularly and habitually earning net more than the interest on all its bonds. *Blake v. Watson*, 29 R. 693.

If the facts relied upon to prove an ex-

press warranty rest in parol, it is the province of the jury to determine whether such facts amount to an express warranty; but the court must determine whether an agreement in writing contains an express warranty or not. *Osgood v. Lewis*, 18 D. 317.

Whether an affirmation amounts to a warranty is a question for the jury, and a bill of sale containing the alleged warranty should be submitted to the jury for determination. *Kinley v. Fitzpatrick*, 34 D. 108.

Whether a statement by the seller at time of sale that a "cow is all right" amounts to a warranty of soundness of the cow is a question for the jury. *Tuttle v. Brown*, 64 D. 80.

The vendor's statements should be submitted to the jury to determine whether they constitute a warranty of quality, unless it is apparent that they were understood by the parties at the time as amounting to nothing more than recommendations and matters of opinion merely, and the vendee was still left to understand that he must examine and judge for himself and unless there is a fatal variance. *Beale v. Olmstead*, 58 D. 150.

It is a question of fact, to be determined from all the circumstances of the case, whether a representation, descriptive of the article sold by a name by which it is known in the market, is an expression of judgment or opinion only, or was intended as a warranty. *Wolcott v. Mount*, 13 R. 438.

The vendor of a mare and a mule had them both in a single stall where defects were not easily discoverable. The buyer being about to examine them, the vendor said that the mule had once kicked, but was sound. The buyer being inexperienced, and relying on this representation in the purchase,—*held*, that the representation was a warranty covering even visible defects. *Kenner v. Harding*, 28 R. 615.

Defendant sold a fertilizing preparation, in bags with tags attached, stating the chemical ingredients. He also issued circulars, using the words, "highest standard," "under my own name and guarantee," "prepared under my inspection and control," "compounded of the purest materials;" and referring by name to the chemist who made the analysis, adding "whose name gives a warrant for its high character," etc. *Held*, an express warranty, not dependent upon the correctness of the chemical analysis. *Robson v. Miller*, 32 R. 518.

Where a piano manufacturer offers by letter to sell pianos of his manufacture, stating terms, and directing attention to an accompanying circular, on the front page of which is conspicuously printed, "Every piano warranted for five years," these words constitute a warranty that each piano sold has no inherent defect of materials or workmanship that will cause it to break or give

For Index to Notes in American Decisions and American Reports, see Volume I.

way in five years, but not a warranty of style or grade. *Snow v. Schomacker Manuf. Co.*, 44 R. 509.

On the sale of a patent right to a churn, manufactured by the seller, he exhibited a sample of it, stating that it would produce butter in from three to five minutes; could be operated by a child five or six years old; that it was made of juniper wood, and that the dasher was nickel-plated; whereas in fact it would not produce butter in less than ten minutes, was too heavy for children to work it; was made of white pine and painted, and the dasher was of polished iron. *Held*, a valid warranty, and the court could not pronounce the discrepancies so plain and obvious as to avoid it. *Tabor v. Peters*, 49 R. 804.

78. What does not. — A naked averment of a fact is neither a warranty itself, nor evidence of one. It may with other circumstances be taken into consideration, but the jury must be satisfied from the whole, that the vendor actually, and not constructively consented to be bound for the truth of his representation. *McFarland v. Newman*, 34 D. 497.

No express warranty arises from a mere unfounded naked affirmation of soundness in the sale of a chattel, but for a willful misrepresentation, the remedy is by action *ex delicto*. *Weimer v. Clement*, 78 D. 411.

A warranty of goods after the sale has been completed is void, unless supported by a new consideration. *Summers v. Vaughan*, 9 R. 741.

Where, after a contract for the sale of a horse was made, and as the purchase-money was about to be paid, the seller, in reply to a question asked by the purchaser, said that the horse was sound, the affirmation was held not to be a warranty of quality, having been made after the contract had been entered into and not having been intended as such. *Erwin v. Maxwell*, 9 D. 602.

A statement in a bill of sale describing tobacco sold as "good first and second rate" tobacco, accompanied by any other assurance of quality, can only be regarded as what, in the opinion of the vendors, was its appropriate designation, and not as an undertaking or warranty of its quality. *Towell v. Gatewood*, 33 D. 437.

A warranty is not created by descriptive words in a bill of sale of a vessel, contained in a carpenter's certificate incorporated therein, respecting the capacity of the vessel. *Randall v. Thornton*, 69 D. 56.

79. Mere expression of opinion not enough. — To make an affirmation at the time of a sale a warranty, it must appear by evidence to have been so intended, and not to have been a mere matter of judgment and opinion. *Erwin v. Maxwell*, 9 D. 602; *Sweet v. Colgate*, 11 D. 266; *Kinley v. Fitzpatrick*, 34 D. 108; *Lanane v. Gregg*, 71 D. 489.

A warranty may be created without the use of any particular words or form of expression; but there is a distinction as to the legal effect of expressions when used in reference to a matter of fact, and when used to express an impression or opinion. *Towell v. Gatewood*, 33 D. 437.

A positive representation relating to a matter of fact constitutes a warranty; as that a ship is an American or French ship, or that the crew consists of so many hands. But where the representation relates to that which is a matter of opinion or fancy, as, for example, the value of a horse or painting, it is to be regarded as an expression of opinion rather than such a verification of a fact as will amount to a warranty, unless that idea is excluded by an express warranty, or such other declaration as leaves no doubt of the intention to make a warranty. *Id.*

A statement by a vendor that hogs sold are "suitable and proper for the New York City market" does not constitute a warranty, but is a mere expression of opinion. *Bartlett v. Hoppock*, 88 D. 428.

80. Effect of express warranty. — An express warranty of property cannot be fairly construed to intend an exclusion of the natural implied warranty of soundness. *Houston v. Gilbert*, 5 D. 542.

Scienter of the vendor is immaterial when there is an express warranty of the goods, and an offer to return them in due time after discovering their unsoundness. *Hyatt v. Boyle*, 25 D. 276.

An express warranty includes all defects embraced within the language of the warranty, although of a nature so obvious to the senses, that the buyer might have informed himself of their existence by examination. *Stucky v. Chyburn*, 34 D. 590. Contra see *Connersville v. Wadleigh*, 41 D. 214; *Fisher v. Pollard*, 75 D. 740.

A purchaser's knowledge of the existence of a defect does not exempt the seller from liability upon his express warranty of the soundness of a chattel. *Stucky v. Chyburn*, 34 D. 590.

Failure of the vendee of personal property to return the same upon a breach of a covenant of warranty within the time stipulated for such purpose, vests the title absolutely in him. *Johnson v. McLane*, 43 D. 102.

Plaintiff can recover in an action for price of chattels warranted, but which do not conform to the warranty, no more than the actual value of the chattels at the time of the sale. *Tuttle v. Brown*, 64 D. 80.

81. Parol warranties. — In the absence of fraud, accident or mistake, it is incompetent to show a parol warranty of agricultural implements sold by a written contract containing no warranty. *Mast v. Pearce*, 43 R. 125.

Where the parties to a bill of sale of a ship reduced their agreement to writing by

For Index to Notes in American Decisions and American Reports, see Volume I.

a bill of sale—*Held*, that no action would lie on a parol warranty made at the time of sale, and when no fraud was alleged. *Munford v. McPherson*, 3 D. 339.

A slave having been sold, and a memorandum given, setting forth that "for the consideration of three hundred dollars," the slave was sold, and that the seller "would warrant and defend the slave against the claims of all persons," but nothing was stated as to the soundness of the slave. *Held*, that the buyer could not be permitted to prove and recover on a parol warranty of soundness. *Smith v. Williams*, 4 D. 564.

IV. SALES BY SAMPLE.

82. What constitutes a sale by sample. — Every sale of packed cotton is a sale by sample, of necessity, and by established usage. *Boorman v. Jenkins*, 27 D. 158.

Where any sale of cotton is claimed to be an exception to this rule, the burden of proof rests upon the party asserting that fact. *Id.*

83. What does not. — A sale by sample does not take place when the purchaser of several bales of hemp cuts open and examines some of them and has ample opportunity to do so with the rest. In such a case there is no implied warranty that the bales not examined correspond with those examined. *Salisbury v. Stainer*, 32 D. 437.

84. The warranty implied.* — A sale by sample is in judgment of law a warranty that the bulk of the commodity corresponds in kind and quality with the sample. *Beebe v. Robert*, 27 D. 132. *S. P.*, *Bradford v. Manly*, 7 D. 122; *Boorman v. Jenkins*, 27 D. 158; *Brandley v. Thomas*, 73 D. 264; *Dickinson v. Gay*, 83 D. 656; *Foot v. Bentley*, 4 R. 652; but this exception to the common law rule of *caveat emptor*, though well established, stands on no principle. *Moses v. Mead*, 43 D. 676.

A sale by sample, in the absence of fraud or of circumstances indicating that the sample is to be taken as a standard of quality, implies no warranty of quality, but only that the goods are of the same kind as the sample and merchantable. *Boyd v. Wilson*, 24 R. 176; *Fraley v. Bispham*, 51 D. 486.

A warranty that a bulk of goods corresponds to the sample in quality is implied by law, where the circumstances attending the sale satisfy the jury that the parties intended a sale by sample; but not when the exhibition of a portion may have been merely intended to aid the buyer in judging in the quality of the lot. *Beirne v. Dord*, 55 D. 321.

A sale by sample, and warranty of quality implied, are questions of intent to be judged by the jury. The mere facts that a sample

was shown, and that personal examination of the bulk by the buyer was not practicable, are not conclusive. *Id.*

Evidence of a usage of the local market respecting sales by sample is not admissible as tending to show what was the intent of the parties to a particular sale, in their employment of a sample in their negotiations. *Id.*

There is no implied warranty against a latent defect in manufactured goods sold by sample by a merchant, who is not a manufacturer, where both the sample and the bulk of the goods contain such defect, and which is unknown and undiscoverable by examination; and evidence is inadmissible to show that by usage of merchants the seller is responsible therefor. A commission merchant who makes such sale, but who is not authorized to sell on credit, must account to the consignor for the price, without deduction for such defect. *Dickinson v. Gay*, 83 D. 656.

When property is sold by sample, the sample, and not the name, or other description by which the property is designated, is the sole standard by which the property is to be tested. *Mante v. Gross*, 94 D. 62.

85. Rights of purchasers. — The drawing of fresh samples by a purchaser of packed cotton to ascertain if they correspond with the first samples, does not make it any the less a sale by sample, and the vendor is liable on his warranty, if the bulk of the cotton does not correspond with the samples. *Beebe v. Robert*, 27 D. 132.

The vendor's ignorance of the manner in which goods sold by him have been packed will not exempt him from liability for the difference between the value of the packages in their actual condition and what it would have been if the packages had been uniform and corresponded with the samples by which the sale was effected. The measure of damages in such cases is the difference in value of the actual contents and the contents represented to be in the packages at the time and place of sale. *Fuller v. Cowell*, 58 D. 676.

On a sale by sample, delivery of goods to a carrier will not constitute delivery to the consignee so as to pass title, and make the consignee liable for them, if they do not correspond in quality and quantity with the order; but to entitle him to recover in such a case, the consignor must show that the consignee actually received and accepted the goods. *Barton v. Kane*, 84 D. 728.

On a sale by sample, alleged defects of quality in goods sent to the purchaser are waived, and acceptance is presumed, if the purchaser does not return or offer to return them, or notify the seller of his non-acceptance of them. *Id.*

The fraudulent procuring of the adoption of a sample in a sale by sample will preclude the party who has practiced such fraud from

*Sales by sample, what constitutes, extent of the warranty, etc., see notes, 7 D. 126-132; 55 D. 123, 329.

For Index to Notes in American Decisions and American Reports, see Volume I.

complaining that he is denied any advantage of his wrong. *Maute v. Gross*, 94 D. 62.

The defendants orally agreed to buy of the plaintiff two car-loads of barley by sample. The barley was in the plaintiff's elevator on a public railway track in Minneapolis leading to a point near the defendants' brewery. The defendants requested that the barley be sent down to their brewery, and the cars were sent accordingly, and the defendants inspecting the grain, and finding it inferior to the sample, refused to accept it, and so notified the plaintiff. *Held*, that there was no delivery and acceptance. *Taylor v. Mueller*, 44 R. 199.

V. REMEDIES BETWEEN BUYER AND SELLER.

86. Rights of the seller, generally.

—A vendor cannot treat a sale as valid and recover judgment for the price, and at the same time repudiate the sale for fraud, and proceed to recover the goods from third persons to whom they have been assigned for value. *Lloyd v. Brewster*, 27 D. 88.

A vendor of goods to be paid for by note *in futuro*, if such note is not given, may sue immediately for a breach of the special agreement and recover the value of the goods as damages, though he cannot sue for goods sold and delivered until the term of credit expires. *Hanna v. Mills*, 34 D. 216.

A tender of the purchase price after default by failure to make payment at the time agreed upon, is insufficient unless the costs and expense of the vendor in taking care of the property up to that time be also tendered. *Coffman v. Hampton*, 37 D. 511.

A vendee of goods merely contracted to be sold, but never actually delivered, has no right to the possession of them until the sale is consummated, and if, before consummation of the sale, he obtains possession surreptitiously, and without the consent of the vendor, the latter may recover it again without a rescission of the contract. *Jennings v. Gage*, 56 D. 476.

87. Election of remedies. —A vendor of goods on whom a fraud has been practiced, may elect either to affirm the sale, and proceed as a judgment creditor, or to avoid the sale and follow the goods into the hands of one who has not parted with value on the faith of them. *Lloyd v. Brewster*, 27 D. 88.

The vendor may elect to consider the contract at an end if the vendee disavows all property in the goods and refuses to pay for them. *Mackinley v. McGregor*, 31 D. 522.

The seller, upon refusal of the purchaser to receive and pay for goods sold, may keep the goods and recover by proper action the difference between their value at the time and place of delivery and the contract price ;

or he may sell them with due precaution and diligence, and then sue for and recover the difference between the price received and the contract price; or he may, upon making an actual or constructive delivery of the goods, recover the full contract price. *Webber v. Minor*, 99 D. 688.

88. Seller's right of action for the price. —1. *The right of action.* —A party who violates the provisions of the patent law by making and selling a patented article cannot maintain an action to recover the purchase price thereof. *Bell v. Bouney*, 56 D. 601.

A party to whom credit is originally given by the vendor is liable for the payment to him of the amount credited. *Wallace v. Wortham*, 57 D. 197.

The Maine act of 1851, c. 211, sec. 16, denies the right to maintain any action of which spirituous liquors may be regarded in any manner as the subject-matter. *Lord v. Chadbourne*, 66 D. 290.

No action can be maintained for the value of liquors held in violation of, and for the purpose of violating that act. *Id.*

An action cannot be maintained for the price of goods sold to be paid for by a specific article of personal property, unless the buyer has refused to deliver the specific article after a proper demand. *McBain v. Austin*, 82 D. 705.

A proper demand sufficient to sustain action for price of goods sold by partnership, and to be paid for by a specific article, cannot be made by one partner without an order from his copartner, if the latter made the sale, and stipulated with the buyer that the article should not be delivered except upon his order, and the buyer was unaware of the partnership. *Id.*

The vendor may, notwithstanding his exercise of the right of stoppage, maintain an action against the vendee for goods bargained and sold, provided he be ready and willing to surrender the goods according to the terms of the original contract. *Patten's Appeal*, 84 D. 479.

Where goods are sold to one for the use and benefit of another, by whom they are received and used, the latter cannot be held therefor merely upon his acknowledgment of the correctness of the account and his oral promise to pay it. *Hendricks v. Robinson*, 31 R. 382.

If one sells goods in fact to a second, supposing that the sale is really to a third through the second as his agent, and solely in reliance on the third, although the second sells them to the third, the first cannot recover therefor from the third. *Stoddard v. Ham*, 37 R. 369.

Where a seller of goods gives credit to the buyer, until the latter shall be able to ship them to a certain place and receive returns, he cannot maintain an action for the

For Index to Notes in American Decisions and American Reports, see Volume I.

price thereof, until sufficient time has elapsed for the returns to be received; but a mere gratuitous extension of delay, made after the contract was otherwise complete, will not affect the seller's right to sue. *Bradford v. Marbury*, 46 D. 284.

2. *Form of action*.—The value of an article sold may be recovered, either in debt or *indebitatus assumpsit*, provided the vendor was to be compensated in money; and it is not necessary that a price should be agreed upon for an article sold and delivered in order to maintain either of those actions. *Jenkins v. Richardson*, 22 D. 82.

Where the vendor of goods cannot recover on a written contract of sale thereof, and there has been a delivery of some of the goods sold, he may recover the value of the goods so delivered on a *quantum valebant*. *Bain v. Norton*, 60 D. 618.

Indebitatus assumpsit for goods sold and delivered does not lie where none or a part only of the goods have been accepted by the purchaser; the seller's remedy is an action of special *assumpsit* for goods bargained and sold, not for goods sold and delivered. *Atwood v. Lucas*, 89 D. 713.

Delivery to and acceptance by purchaser of any portion of goods bargained for will satisfy the statute of frauds; but to authorize the maintenance of a suit for goods sold and delivered, there must be a delivery and acceptance of all the goods sued for. *Id.*

Fraud will vitiate any contract, and if the contract be void, on the ground of fraud, the party may waive it, and bring an action of *assumpsit*. Accordingly, where on a sale the vendor takes the note of a third person, payable at a future day, in payment, at his own risk, and there is a fraudulent representation by the vendee as to the note, the vendor may bring his action immediately for goods sold and delivered. *Willson v. Force*, 8 D. 195.

89. *Matters of defense*.—1. *In general*.—Damages for expense incurred by the vendee, in sending for and not obtaining the chattels sold, may be recouped in an action by the vendor for the price. *Cole v. Swanton*, 52 D. 238.

The vendor cannot recover the price of goods actually delivered, although they were received and used by the vendee, where, by the contract of sale, the vendor was to deliver a certain quantity in each of three successive months, and the only quantity delivered was less than required by the contract. *Catlin v. Tobias*, 84 D. 183.

The defendant cannot avoid payment on the ground that the sale was in fraud of the seller's creditors. *Gary v. Jacobson*, 30 R. 514.

In an action to recover the value of goods sold by a verbal contract, void by statute of frauds, the vendor proved delivery to the vendee, whereupon the vendee offered the

contents of a telegram which he had attempted to send to the vendor, to show that he declined to accept the goods. The offer was rejected, on the ground that the vendor had not been shown to have received the telegram. *Held*, on appeal that the acts of the vendee at the time of the receipt of the goods, and his *bona fide* attempts to communicate his rejection of them to the vendor, were material and competent to rebut any presumption of acceptance arising from their retention. *Caulkins v. Hellman*, 7 R. 461.

2. *Illegality of the sale*.—The seller's mere knowledge that the buyer is purchasing a thing with criminal intent, to put it to an unlawful use, does not defeat his action for the price, on the principle of denying relief to a party *in pari delicto*. Thus one who sells stock to a corporation, although he knows that the corporation is purchasing to sell again at a speculation, contrary to a penal provision in the charter, may nevertheless recover, on an implied *assumpsit*, the value of the stock; otherwise when the contract provides for the illegal use of the thing sold, or when the seller does any act to promote it. *Tracy v. Tabnag*, 67 D. 132. S. P., *Wallace v. Lark*, 32 R. 516.

In an action for the price of a billiard table it is no defense that it may be used for gambling, unless it was sold under a contract that it was so to be used; and knowledge of such intended use will not be inferred from the fact that it was accompanied by a pool set and rules for its use. *Brunswick v. Vallean*, 32 R. 119.

It is no defense to a note given for a horse that the horse was purchased for use in, and was actually used in, the Confederate service in the civil war. *Wallace v. Lark*, 32 R. 516.

Goods were sold and delivered by plaintiff to defendant. In an action for the price,—*held*, that the fact that plaintiff was a wholesale dealer, and, during the time when the goods were sold, had not paid the special tax imposed by act of Congress of 1864, ch. 173, sec. 79, did not invalidate the sale or prevent a recovery. *Larned v. Andrews*, 8 R. 346.

3. *Want of title in vendor*.—The purchaser of goods cannot set up vendor's want of title as a defense to an action for the price, if the true owner has not recovered the property, unless the vendor fraudulently represented himself to be the owner, knowing such representation to be false. *Case v. Hall*, 35 D. 606. S. P., *Sumner v. Gray*, 28 D. 39.

In an action for the price of personal property, it is a valid defense that the purchaser discovered after the sale that the vendor had

* Sale of goods for illegal purpose, when a defense to action for the purchase price, see note, 32 R. 122-127.

For Index to Notes in American Decisions and American Reports, see Volume I.

no title, and being threatened with suit by the true owner, paid him the price, the vendor being insolvent. *Matheny v. Mason*, 39 R. 541.

4. *Objections to the consideration.*—A purchaser from a trespasser who has cut logs on another's land, without license, having notice of that fact, and expressly assuming the risk, cannot resist an action for the price, on the ground that there was no consideration, or that the consideration was unlawful. *Baker v. Page*, 26 D. 540.

Partial failure of consideration, or breach of warranty, or deception in the quality or value of goods sold, may be shown in mitigation of damages, in an action to recover the purchase price. *Perley v. Balch*, 34 D. 56.

Mere inadequacy of consideration without warranty or fraud is no defense to the payment of a bill or note given for the purchase-price of goods, and since the unsoundness of the article sold relates only to the adequacy of the consideration, this can furnish no defense. *Eagan v. Call*, 75 D. 653.

5. *Breach of warranty.*—In an action for the price of articles sold, the defendant, by way of equitable defense, may give evidence of a warranty of the articles, and a breach thereof, without his having offered to return the articles, or his having given notice to the plaintiff to take them away. *Steyleman v. Jeffries*, 7 D. 626.

Wherever a defendant can maintain a cross action for damages on account of a defect in personal property purchased by him, or for a non-compliance by the plaintiff with his part of the contract, he may, in defense to an action on the note given for the purchase money, claim a deduction corresponding with the injury sustained. In the case of real estate, the rule may be otherwise. *Peden v. Moore*, 21 D. 649.

Defendant, in an action for the agreed price of goods, is entitled to an allowance in the assessment of damages of the difference between the contract price and the value, where the property proves inferior in quality to that which the vendor expressly agreed to furnish; but he is not entitled to a further allowance of the amount which he has lost by losing the sale of the property at a profitable advance. *McAlpin v. Lee*, 30 D. 609.

A vendee may show breach of warranty in an action for the price of goods sold, in reduction of damages, but must make out such a case as would warrant a recovery in an action therefor. *Mizer v. Coburn*, 45 D. 230.

A vendee may recoup his damages for breach of warranty of quality in an action by the vendor on a promissory note given by the vendee for the price. *Getty v. Rowntree*, 54 D. 133.

Breach of warranty is a defense under the general issue in *assumpsit* on promissory notes

given for the purchase price of the property warranted, though executed subsequent to the time the contract of warranty was made. *Falconer v. Smith*, 55 D. 611.

The degree of polish of machinery will not alone entitle defendant to deduction from the amount of notes given for the purchase price of the machinery, unless it is a material, substantial defect, and something more than a mere matter of fancy, except the polish was contemplated by the parties at the time of the original contract, and so formed a part of the consideration thereof. *Id.*

Inferiority in quality of an article sold to that which it was represented to be, is not a defense in *assumpsit* for the price, if the article has been received and used. *Allisons v. Noble*, 13 D. 230.

Breach of warranty of quality of chattels cannot be set up by way of defense, recoupment, or counterclaim, by the accommodation indorser of a note given for the price of the chattels in an action against him thereon. *Gillespie v. Torrance*, 82 D. 355.

A claim for damages for breach of warranty in a sale does not rest upon a failure of the consideration of the contract on which the action is founded, but is a distinct claim which may be set up by way of defense or counterclaim in an action for the price, or by a separate action, the election to do which rests in a principal, and cannot be made by a surety; though, it seems, a surety would be relieved in equity in case of insolvency of his principal. *Id.*

6. *Fraud or false representations.*—False representations by a vendor, which are not shown to have induced the purchase, and the falsity of which the vendee might have discovered with diligence, do not constitute a fraud avoiding a promissory note given for the purchase-price. *Williams v. Hicks*, 19 D. 693.

In an action for the price of goods sold with warranty, fraud may be set up, under the general issue, though the fraud consisted in representations as to the quality of the goods, which were not covered by the warranty. *Connersville v. Wadleigh*, 41 D. 214.

The vendee may prove in defense, deceit on the part of the vendor, and that the article is of no value; or he may show a partial unsoundness, in mitigation of damages. *Harmon v. Sanderson*, 45 D. 272.

Proof that the chattel was valueless, and that the representations made at the time of the sale were fraudulent, is necessary to warrant a verdict for defendant, however far the evidence might have extended in mitigation of damages. *Id.*

Unsoundness or fraud may be given in evidence as a defense, answering the whole demand or in mitigation of damages, in a suit on an original contract of sale, either upon a warranty as to the goodness of the article sold or upon a fraudulent misrepresent-

For Index to Notes in American Decisions and American Reports, see Volume I.

sentation of its value. Principle applied to a building contract. *McTorkle v. Doby*, 47 D. 560.

Pecuniary injury sustained from fraudulent misrepresentations as to the quality of an article sold may be set up in an action by the vendor on a promissory note given for the purchase price, not as a matter of set-off, but as an equitable defense *pro tanto*, springing from failure of consideration. *Price v. Lewis*, 55 D. 536.

The vendee may set up willful misrepresentation and deceit to resist a recovery, and by proving a failure of the consideration, show that in equity and good conscience the plaintiff ought not to recover. *Wetner v. Clement*, 78 D. 411.

A vendor is guilty of fraud which may be pleaded as a defense to an action for the price when the thing sold has a latent defect of which he is aware, but which he fails to disclose to the vendee, though he knows that the latter is acting upon the supposition that no such defect exists. In this case, it is error to strike out an answer setting up such defense. *Cecil v. Spurger*, 82 D. 140. *Contra see, Frenzel v. Miller*, 10 R. 62.

90. Rules of pleading. — A complaint which alleges that defendant is indebted to plaintiff in a specified sum, for goods sold and delivered by plaintiff to defendant at his request, at, etc., and that there is now due to plaintiff from defendant a sum specified, for which he demands judgment, is sufficient under the New York code of procedure. *Allen v. Patterson*, 57 D. 542.

In an action on a contract of sale of a quantity of "sound rice," the seller, in order to recover on the contract, must show that the rice was sound. *Russ v. Norton*, 60 D. 618.

A plea substantially avers false warranty and damages for its breach when it avers that the seller's representations of the quality of the goods sold, upon which the defendant relied in purchasing, were untrue, and that the seller knew them to be untrue at the time of making them, and knowingly made them with intent to defraud the defendant, and sets out various particulars in which the representations proved to be untrue. *Cunningham v. Smith*, 60 D. 333.

A plea averring untrue representations of quality is defective, and properly rejected, if it does not aver a warranty of the quality of the goods, nor knowledge in the plaintiff of the falsity of his representations, nor the use by him of any fraud or art to disguise or conceal the true quality of the goods. *Id.*

Denial of a sale of a horse raises an issue only on the sale in point of fact, and not on the legality of such sale. *Finley v. Quirk*, 36 D. 93.

Facts tending to establish the defense that a sale was made on Sunday, and is therefore void, constitute new matter by way of

defense, and must be pleaded affirmatively. *Id.*

91. What evidence is admissible and sufficient. — Evidence that glass sold as German cylinder glass was not such as would be known in the market among those conversant with the trade, as answering to that description, is admissible in an action for the price, but evidence that it was not merchantable is inadmissible. *Mizer v. Coburn*, 45 D. 230.

General usages of trade are competent evidence in an action for the price of goods; such as a usage that where glass is sold in boxes the risk of broken glass is on the buyer. *Id.*

A sale and delivery of goods may be established by the deposition, with the bill of goods annexed, of one who was employed in the vendor's store at the time of the purchase, and who went to the vendee's store with the bill and identified a portion of the goods. The vendor's book of original entries need not be produced. *Smith v. Smith*, 60 D. 51.

To maintain a general count of *indebitatus assumpsit* for goods sold and delivered, proof of an actual delivery to and acceptance by the purchaser of the goods sued for is essential. *Atwood v. Lucas*, 89 D. 713.

Where property is sold and delivered to be paid for upon a resale if the property is not returned in a reasonable time, a resale will be presumed. *Blow v. Spear*, 97 D. 412.

In an action to recover the purchase-money of an article made under contract, the defense was that the article was not like the sample. *Held*, that evidence was admissible of the difference in the results produced by the sample and the imitation, as corroborative of their inherent difference. *Tilton v. Miller*, 5 R. 373.

92. What is not. — Evidence of a sale of goods to be paid for by a "satisfactory note" will not support a declaration on a sale for the purchaser's note "to the order of, and indorsed by, a person who should be satisfactory" to the vendor, there being no evidence of a usage attaching such meaning to the words used at the sale. *Hanna v. Mills*, 34 D. 216.

No warranty is implied on a sale of chattels for a sound price, that they are merchantable or sound; and evidence that they are not as good as articles usually sold for that price, is inadmissible in an action for the price. *Mizer v. Coburn*, 45 D. 230.

In an action for the price on a sale by sample, where the defense is set up that the goods were inferior to the sample, and unfit for use, it is erroneous to admit evidence on the part of plaintiff that other goods of the same kind were sent by him at the same time to other purchasers, who made no complaint of their quality. *Barton v. Kane*, 84 D. 728.

For Index to Notes in American Decisions and American Reports, see Volume I.

Common reputation is not admissible to show that the seller of goods, which were bought for an illegal purpose, knew the purpose to which they were to be put, nor to show his intention to participate in the wrongful act. *Hedges v. Wallace*, 92 D. 497.

93. Amount recoverable. — The plaintiff is entitled to recover the amount the articles were worth at the time of the sale, without regard to their subsequent value. *Hill v. Hill*, 1 D. 206.

A vendee who accepts a consignment of goods upon which the prices are marked, is presumed to have taken them at the vendor's prices as marked, or as stated in an accompanying invoice, unless it should appear from a custom with which both are acquainted, or from the course of previous dealing between the parties, that the vendee had a right to reduce the prices according to the estimated value of the goods at the place of consignment. *Mitchell v. McBee*, 36 D. 264.

If, on a sale, credit is stipulated for, there can be no recovery except for the sum due according to the contract, when the suit is commenced. *Bradford v. Marbury*, 46 D. 264.

A vendor or workman may recover what the thing or work is worth, where it is of some use and value to the employer or vendee, though improperly done and not within the stipulated time. *Davis v. Fish*, 48 D. 387.

The stipulated price of chattels actually delivered may be recovered, after deducting damages sustained by non-delivery, when the vendor cannot deliver the whole of the quantity sold. *Cole v. Swanston*, 52 D. 288.

The measure of damages for breach by a vendee of a contract of purchase, in refusing to receive property when it is tendered him under the contract, is the difference between its contract price and its market value at the time it was tendered. *Rider v. Kelley*, 76 D. 176; *Pittsburgh etc. Ry Co. v. Heck*, 19 R. 713; *Dwiggins v. Clark*, 48 R. 140.

The vendee is not bound to pay for an article, valueless as purchased, and for the purpose for which it was purchased; and it is no answer for the vendor to say, in an action by him upon a note given for the price, that the vendee has something which can be made useful in some different manner, or for some other purpose. *Cragin v. Fowler*, 80 D. 680.

Vendors who sue for price of goods obtained by fraud can recover only what is due at the commencement of the action; although they might have treated the sale as a nullity, and reclaimed the goods at once, while in the possession of the vendee, before the term of credit had expired. *Jacobs v. Shorey*, 97 D. 586.

94. Sellers' right of action for buy-

ers' refusal to complete purchase.* — If a vendee has accepted a portion of a quantity of goods contracted for, and they prove inferior to those stipulated for, he cannot for this reason refuse to accept the residue; but if the residue prove inferior, he may refuse to accept them. *Cohen v. Platt*, 25 R. 203.

A purchaser signed and delivered to the seller a written agreement to buy shares of stock from him on specified terms. The seller did not sign but orally agreed to sell on those terms. The seller tendered the stock and requested the price, but the purchaser declined to fulfill. In an action to recover the purchase price—*held*, that the action was maintainable; that the seller might thus sue, or he might sell the stock, apply the proceeds and recover the balance; or retain the stock and recover the difference between the contract price and the market price as damages. *Mason v. Decker*, 28 R. 190.

95. — for deceit of buyer in inducing the sale.† — Trespass, replevin, or trover may be sustained by a vendor whose goods have been obtained from him by a fraudulent purchase. *Cary v. Hotelling*, 37 D. 323.

Possession of the true owner cannot be divested by a tortious or fraudulent taking. *Id.*

A fraudulent vendee of goods and his assignee thereof for benefit of creditors are liable to a joint action by the vendor to recover possession. *Nichols v. Michael*, 80 D. 259.

Where one buys goods intending not to pay for them, the vendor may recover the goods from his assignee. *Belding v. Frankland*, 41 R. 630.

A vendor may maintain replevin for goods which he has been induced by fraud to sell, against a purchaser from the vendee who was a conspirator in the fraud, or who had notice of it, although the vendor transferred the vendee's note for the price for value, and never reclaimed it, the note not having been negotiated by the vendor with such knowledge or under such circumstances as to amount to an affirmation of the sale. *Manning v. Albee*, 92 D. 736.

A contract for the purchase of goods on credit, made with intent on the part of the purchaser not to pay for them, is fraudulent; and if the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. *Talcott v. Henderson*, 27 R. 501.

But where the purchaser intends to pay and has reasonable expectations of being able to do so, the contract is not fraudulent.

* Remedy of manufacturer when purchaser refuses to accept the goods, see note, 56 D. 642-647.

† Goods fraudulently purchased, right of vendor to reclaim, see elaborate note, 38 D. 762-771.

For Index to Notes in American Decisions and American Reports, see Volume I.

although the purchaser knows himself to be insolvent and does not disclose it to the vendor, who is ignorant of the fact. *Id.*

Where a vendor rescinds a sale of goods on credit for fraud, the remedy is trover or replevin, and *assumpsit* will not lie until the expiration of the term of credit, unless the goods have been converted into money or money's worth. *Kellogg v. Turpie*, 34 R. 163.

Where one knows himself to be insolvent, and buys goods on credit, concealing that fact and intending not to pay, and falsely representing himself to be a mayor, the seller may recover the goods from him. *Des Farges v. Pugh*, 53 R. 446.

96. Buyer's right of action, generally. — The vendee must show that he was ready to pay according to the stipulations of his contract of purchase, before he can sustain an action against the vendor for non-performance, and this is true whether the vendor was ready and able to perform or not. *McGehee v. Hill*, 29 D. 277.

Trover or detinue cannot be maintained by a purchaser against his vendor, until he has paid or tendered the entire consideration for the property bought. *Jennings v. Flanagan*, 30 D. 683.

One who receives and sells stolen property may be held liable for damages in a civil action, although it does not appear that the felon has been prosecuted for the theft. *Rogers v. Hyde*, 54 D. 300.

The price paid for a stolen chattel may be recovered from the thief, in *assumpsit*, although the thief has not been tried for the felony. *Barton v. Faherty*, 54 D. 503.

The buyer may recover for breach of contract without showing his readiness to pay the purchase money, where a mutual contract had been made between buyer and seller for the sale and purchase of a horse, but before the execution of the contract the seller disposes of the horse to another party. *Harris v. Williams*, 67 D. 253.

The vendee may recover a chattel from the vendor retaking possession for non-payment of an installment of the purchase-money, but not rescinding the contract, upon paying the balance due, where the contract makes the price payable in monthly installments, and provides that, upon default as to any installment, the vendor may retake the property and at his option terminate the contract, there being nothing to indicate that time is of the essence of the contract. *Miller v. Steen*, 89 D. 124.

In a sale of a drug establishment, if the purchaser has no knowledge of the business and relies on the seller's statements as to the value, and the seller knows of such reliance, and those statements are false, to the purchaser's injury, although the seller believed them true, the purchaser may be relieved. *Bower v. Fenn*, 35 R. 662.

97. Buyer's action for seller's failure to deliver. — 1. *Right of action and defenses.* — A special action on the case is the only proper action to bring against vendors who wrongfully detain and sell goods already sold to another. *Patten's Appeal*, 84 D. 479.

The vendee may at any reasonable time, after vendor has stopped goods, enforce his claim to them by payment of the purchase-money, according to the terms of the original contract. *Id.*

Where goods have been ordered of a firm, the purchaser's acceptance at thirty days received, the goods separated from the common stock and packed, and the invoice delivered, it is a closed contract, and the title to the goods vests in the purchaser, subject to the vendor's right of stoppage *in transitu*, or to abandon the contract for the insolvency of the purchaser. And where the sellers afterwards refuse to deliver the goods because cash was not paid instead of an acceptance given, they will be liable in damages. *Barker v. Mann*, 96 D. 373.

Acceptance and use of wares or goods without complaint, furnishes a strong presumption of a waiver of all objections on account of defective construction or delay in delivery. *Davis v. Fish*, 48 D. 387.

A vendor contracting to deliver goods at the depot of a common carrier cannot excuse non-performance by proving that the vendee did not furnish a place at the depot for the deposit of the goods, as this is the vendor's duty. *Eckel v. Murphey*, 53 D. 607.

The right of action of the buyer for the seller's failure to deliver part of the goods is not waived by the parties subsequently contracting anew for a sale of such goods, including the quantity already delivered. *McKnight v. Dunlop*, 55 D. 370.

2. *Demand and refusal.* — On a promise to deliver goods, a demand before action brought is indispensably necessary. *Benners v. Howard*, 1 D. 583.

A contract to deliver cumbrous articles on demand, is, in legal construction, a contract to deliver on reasonable demand; and evidence showing a reasonable demand proves necessarily a demand at the proper place. *Higgins v. Emmons*, 13 D. 41.

The silence of a party on a demand of the articles which he has contracted to deliver on demand, is equivalent to a refusal. *Id.*

3. *Readiness to receive and pay.* — In an action on a breach of agreement to deliver goods, where the defendant agreed to deliver to the plaintiff or his agent at a certain place, payment to be made on delivery, it is sufficient to aver that the plaintiff has at all times been ready to receive the goods and pay for the same at the place stated, without saying he was to pay at the particular time stipulated for the delivery. *Porter v. Rose*, 7 D. 306.

For Index to Notes in American Decisions and American Reports, see Volume I.

Where two acts are to be done at the same time, as where one agrees to sell and deliver, and the other to receive and pay, in an action for the non-delivery it is necessary for the plaintiff to aver and prove a readiness to pay on his part, whether the other party was at the place ready to deliver or not. *Ib.*

The purchaser has no action for the breach of an executory contract of sale, by the terms of which the purchaser is to send for the goods and pay for them upon delivery, and the seller is to deliver them upon receiving payment, without showing that he, the purchaser, has paid or tendered the purchase price, or was ready and able to do so, or that the seller has done something to discharge him from that duty. *Grandy v. McCleese*, 64 D. 574.

Denial of an executory contract of sale by the seller does not relieve the purchaser from the necessity of proving his readiness and ability to pay or tender the purchase price, though such conduct of the seller will relieve the purchaser from the obligation of actually paying or tendering the money. *Ib.*

Proof of purchaser's readiness and ability to pay the purchase-money at another time and place cannot avail the purchaser in his action for the breach of an executory contract of sale, the terms of which provide for payment at the time and place of delivery, even if this fact was known to the seller, and *a fortiori* if it were not known to him. *Ib.*

4. *Damages, interest, etc.*—The measure of damages for breach of contract in failing to deliver a steam-engine, which the delinquents had been paid for, is the amount of its estimated value as made by the parties, or if they had fixed no price, then its actual value. *Davis v. Fish*, 48 D. 387.

The measure of damages in an action against the seller for failure to deliver goods sold is the difference between the contract price and the market value at the time of default. *McKnight v. Dunlop*, 55 D. 370; *Cohen v. Platt*, 25 R. 203.

Speculative profits, or anticipated profits, on the sale of goods purchased will not be allowed in an action against the vendor for failure to deliver the same, where the vendor notified the purchaser promptly of his refusal, and where no reason is assigned why the purchaser could not have bought the same class of goods immediately in the same market. *Barker v. Mann*, 96 D. 373.

Damages for breach of contract to sell goods where purchaser could have supplied the like goods in the same market, would include the purchaser's necessary expenses, and compensation for his time and trouble in making the purchase, and any advanced price which he was forced to pay. *Ib.*

Damages for failure to deliver goods sold where the seller was informed at the time

of sale that the purchaser had already contracted for their resale, and where he purchased them with a view to perfecting such resale, should include any damage which the purchaser suffered by reason of the vendor's failure to complete his contract; but where the resale is prospective or uncertain, it is too indefinite to be the subject of damages. *Ib.*

The plaintiff in an action for breach of contract to deliver wheat is not entitled to interest from the date of the contract, but only from the time of its breach. *Bracelet v. Edgerton*, 100 D. 211.

5. *Illustrations.*—W. contracted with R. for the sale of salt to arrive, the contract being in these words: "Cincinnati, October 13, 1862. Sold J. H. Rogers one thousand sacks coarse Liverpool, and two thousand sacks fine Liverpool salt, at \$2.10 per sack, to arrive by the 15th of November." In an action on such contract by the purchaser against the seller, for failing to deliver the salt—*held*, (1) that the words "to arrive by the 15th of November" are words of condition and description only, and do not import a warranty that the salt shall arrive by the day named; (2) in such action, testimony offered by the purchaser to show that by the custom of merchants the words "to arrive by the 15th of November" meant "deliverable by the 15th of November" was properly excluded. *Rogers v. Woodruff*, 13 R. 276.

Under a contract for the sale of 500 tons of coal at a specified price, to be delivered on the cars by the defendant at their place of business, as plaintiffs might order, between the 12th September (the date of the contract) and the 31st March following, provided that not more than 200 tons should be ordered "in any one month;" the first order, made in September, being for 200 tons, the defendants were entitled to one month from the date of the contract within which to make the delivery, and to a like period for each successive order of 200 tons. *Johnson v. Allen*, 56 R. 34.

A failure to deliver any part of the quantity ordered would not terminate the contract, unless the plaintiffs elected so to consider it; and a partial delivery being accepted, they could not carry the deficiency over into the next month, and demand it in addition to the maximum quantity specified for each monthly delivery. *Ib.*

Plaintiffs having ordered 200 tons during each of the months of September and October, could only order 100 tons in November, which would exhaust the contract; and the defendants' failure to deliver each month the full quantity ordered, was a separate breach accruing at the end of each month. *Ib.*

The coal being mixed by the defendants at a railroad station where they alone were

For Index to Notes in American Decisions and American Reports, see Volume I.

engaged in the business, and being intended, as they knew, for sale by the plaintiffs in Tuscaloosa, the nearest market, the measure of plaintiff's damages for a breach is the difference between the contract price and the market price in Tuscaloosa, with cost of transportation added; and this is to be estimated for each separate breach, on each partial delivery. *Id.*

After the contract was exhausted by the maximum orders during the months of September, October and November, any subsequent deliveries accepted by the plaintiffs must be applied to the several breaches in the order of their occurrence, beginning with the first. *Id.*

98. Buyer's action for defect in quality. — A vendor is liable in an action on the case for unsoundness of personal property, which was known to him, and not disclosed to the buyer, where there is no express warranty, and nothing said of the soundness. *McFarlane v. Moore*, 3 D. 752.

The purchaser, to recover the purchase money paid or damages on the sale of any article or commodity, on the ground that it is inferior in quality to what it was represented to be, must allege and prove either fraud or an express warranty. *Towell v. Gateswood*, 33 D. 437.

A vendee cannot accept delivery of property under an executory contract, retain it after having had an opportunity of ascertaining its quality, and recover damages if it be not of the quality or description called for by the contract. *Reed v. Randall*, 86 D. 305.

A vendee, having without protest accepted tobacco bought under an executory contract, cannot, after waiting for more than a year and a half after its delivery, maintain an action to recover damages on the ground that the tobacco was in a bad condition when delivered, not having been properly cured, and being wet, sweaty, and rotten. *Id.*

The price of goods at the place of delivery is the measure of damages in an action against a seller for negligently putting up the goods, in consequence of which they were lost. *Bailey v. Shaw*, 55 D. 241.

One who puts it out of the power of the owner to show quality and value of the property whose value is sought to be recovered, by artifice and concealment, is liable for the value of the best quality of such goods. *Id.*

Where parties to a contract for the sale of wheat agree upon a person to inspect and grade it, and that if, upon inspection by him, any of it should prove to be inferior to No. 1, the seller should pay the difference in value, it being left with the purchaser to call on the inspector if he considered any wheat of an inferior grade, the purchaser can only be allowed damages on account

of the inferior quality of the wheat which he had inspected according to the contract. *Brackets v. Edgerton*, 100 D. 211.

In construing a contract which provides that certain machinery shall be set in position by a specified time, and if any of it should prove defective, or in any manner fail to answer the purposes intended, on a trial of twenty days, the manufacturer should make it good by repairing the defects—*held*, that without such provision the vendor could not, as a matter of right, repair defects in the machinery after it was delivered to the purchaser, nor could the latter require him to repair it; that after the expiration of the twenty days such rights ceased; nor was the vendee bound to give the vendor notice of defects discovered after the twenty days expired. His right of action for damages accrued to him from a breach of the contract, if defective machinery had been delivered, and a failure to remedy such defects within the twenty days mentioned in the contract. The vendee need not repair, or even use the machinery, to enable him to avail himself of his right to damages. *Fisk v. Tank*, 78 D. 737.

99. — or quantity. — The quantity of chattels purchased having, by mutual mistake, been supposed to be greater than it really was, the vendee may recover the excess paid by him, or may compel the vendor to make good the deficiency; but the vendee cannot recover remote damages, resulting from such deficiency, as where, while still subject to the mistake, he paid excessive duties on such chattels. *Hargous v. Ablon*, 45 D. 481.

100. Buyer's action for fraud or deceit in inducing the purchase. —

1. When actionable. — An action for selling one article for another will not lie, except where there is fraud or a warranty. *Welsh v. Carter*, 19 D. 473.

Where a vendor sells a horse, sound or unsound, he is not liable to an action by the vendee, although he knew that the horse was unsound when he sold him; but where the vendor makes false representations, calculated to throw the vendee off his guard, and to induce him to assume a risk which he would not have assumed if they had not been made, such vendor is liable, although he sold the horse with all faults, or sound or unsound. *West v. Anderson*, 21 D. 737.

In the sale of a horse, if representations as to his soundness are false, are not believed to be true when made, and are made to induce a purchase, and a damage results from them, they are actionable; nor is it necessary, to constitute the fraud, that a material fact should be directly misrepresented intentionally; if a false impression is produced by words or acts in order to mislead, it is sufficient. *Howard v. Gould*, 67 D. 728.

For Index to Notes in American Decisions and American Reports, see Volume L.

Defendant having a horse which had glanders, and being so informed, and probably believing so, offering to trade him, being asked if his horse had the glanders, replying that some said that he had the distemper, but that plaintiff could examine him, is liable to an action for the false representations, as his answer amounted to an affirmation that he did not believe that the horse had the glanders; and having undertaken to answer the questions put to him, he was bound to make a full disclosure. *Id.*

Where the thing sold is a note and mortgage, the maker of which is known by both parties to be insolvent, and the vendor represents the mortgage to be good, as an inducement for the vendee to buy, and the latter, relying upon such representation, does buy, the vendor is liable to the purchaser for the consideration paid, if it turns out that mortgagor has in fact no title to the mortgaged premises. *Hahn v. Doolittle*, 86 D. 757.

False and fraudulent representations, calculated and intended to mislead and prevent examination and inquiry as to the quality and character of a stock of goods, made by a seller to a purchaser unacquainted with such goods, who exercising ordinary prudence, is induced to make the purchase, relying upon the representations, and is thereby deceived, are actionable. *Stewart v. Stearns*, 56 R. 496.

A false affirmation by a vendor as to a matter whereof the vendee might have ascertained the truth or falsehood, by ordinary vigilance and attention, is not a cause of action. *Moore v. Turbeville*, 5 D. 642.

An action for false representation will not lie for vendor's misrepresenting the value of the thing sold, nor where the purchaser might, by the exercise of common prudence, have ascertained the truth, and saved himself from injury. *Page v. Parker*, 80 D. 172; *Ellis v. Andrews*, 15 R. 379; *Graffenstein v. Epstein*, 33 R. 171; *Chrysler v. Canaday*, 43 R. 166.

2. *Scienter*. — The distinction between a warranty and fraud in a sale of an unsound article is, that if there is a warranty the contract is broken whether the vendor knew of the unsoundness or not; but if he represented the article to be sound knowing the contrary, and the vendee was thereby defrauded, an action will lie though there is no warranty; but the *scienter* must be distinctly alleged and proved, and the action must be based on the fraud. *Bartholomew v. Bushnell*, 52 D. 333.

An action for deceit in a sale, whether of provisions or other articles, can only be maintained where a willful, false affirmation or representation is proved, or is necessarily presumed from the circumstances attending the transaction, and from the situation of

the parties. *Emerson v. Brigham*, 6 D. 109.

A vendor is liable in an action for deceit in the sale of a horse, on account of his false and fraudulent representations of soundness, whether the representations were that the horse was sound, or that he was sound so far as the vendor knew, provided at the time of the sale he knew the horse to be unsound. *West v. Emery*, 44 D. 356.

The seller is not guilty of fraud in misrepresenting the condition of goods sold, unless he knew that his representations were false. *Bryant v. Crosby*, 58 D. 767; *Kingsbury v. Taylor*, 50 D. 607.

Mere silence of a vendor who has knowledge of a latent defect in a chattel sold, that is, such defect as could not be discovered by the exercise of ordinary diligence, constitutes a deceit for which he is liable in damages; proof of the *scienter* and a *suppression veri* is sufficient. *Brown v. Gray*, 72 D. 563.

Mere silence of a vendor who has knowledge of a patent defect in a chattel sold, discoverable by the exercise of ordinary diligence, does not make him liable in damages as for a deceit; there must be a misrepresentation or concealment; there must be proof of the *scienter* and a *suggestio falsi*. *Id.*

A fraudulent representation in the sale of an article consists in some recommendation of it, or statement in regard to its good qualities, which is known to be untrue. *Page v. Parker*, 80 D. 172.

Fraudulent concealment is intentionally omitting to disclose some bad quality, or some fact relating to the property, known to the vendor and unknown to the purchaser, which it is material that the latter should know to prevent being defrauded. *Id.*

3. *Matters of procedure*. — The form of action in case of a fraudulent misrepresentation of quality of an article sold is *ex delicto* to recover damages for the tort. *Price v. Lewis*, 55 D. 636.

In an action for fraud in a sale, it is unnecessary to set forth the contract or the consideration, as that is a matter relating only to the damages. *Barney v. Dewey*, 7 D. 372.

A fraudulent intent on part of the vendor in improperly concealing a material fact to the damage of the vendee, will be presumed in an action by the vendee for damages. *Hadley v. Clinton County Importing Co.*, 82 D. 454.

An instruction that concealment by the vendor of a material latent defect known to vendor and unknown to vendee, constitutes fraud on the part of the vendor, is erroneous, since this does not constitute fraud as a matter of law, but is merely evidence of fraud. *Id.*

It is competent, in an action against a vendor for failure to deliver flour by a car-

For Index to Notes in American Decisions and American Reports, see Volume I.

tain agreed date, for him to show that the vendee had said, after the written agreement had been made, that if the tide did not rise in the river over which the flour was to be transported, it need not be delivered by that time. The effect of this evidence is a question of fact for the jury. *Bryon v. Hunt*, 70 D. 262.

The plaintiff bought certain pretended shares in a corporation fraudulently organized, induced thereto by the alleged false and fraudulent representations of the defendant "that said corporation was all right, and would immediately prosecute the development of its property, and the business for which it was organized." Held, that it was properly left to the jury to interpret these statements, in connection with all the circumstances of the case. *Bradley v. Poole*, 93 D. 144.

Knowledge on the part of plaintiff of the condition of the corporation, — Held, to be insufficient ground, in the particular case, for setting aside a verdict in his favor rendered in an action brought by him to recover money obtained by false and fraudulent representations made in the sale of stock. *Id.*

4. *Damages recoverable.* — An instruction as to the measure of damages in an action against a vendor of diseased horses for fraudulent concealment of the facts respecting such disease, and for the rescission of the contract on account of such fraud, to the effect that the plaintiff is entitled to the cost price of the animals that have died, with interest, and to the difference in value between those yet living which are diseased and sound animals of the same quality, with interest, and also to compensation for necessary care and attention bestowed upon the animals, is sufficiently favorable to defendant. *Wintz v. Morrison*, 67 D. 658.

The vendor of diseased animals is liable for damages for communication of such disease to other animals purchased at the same time, and also, it seems, for the communication of such disease to other animals of the purchaser, in an action by such purchaser for fraud in concealing the fact that they are so diseased. *Id.*

Where plaintiff, in consideration that defendant would appoint him master of a certain vessel, agreed to purchase of him an eighth interest in such vessel at her cost price, and paid to defendant an eighth of what the latter represented to be such price, but subsequently learned that the cost price of the vessel was much less than defendant had represented it to be — held, that the defendant, in misstating such price, had misrepresented a material fact within his knowledge, by which plaintiff was deceived to his detriment, and that plaintiff might recover the difference between the sum so paid and one eighth of the actual cost of the

vessel; and this, notwithstanding the actual value of the share purchased equaled or exceeded the sum so paid for it. *Fredergast v. Reed*, 96 D. 539.

101. *Buyer's action for breach of warranty.* 1. *Right of action, generally.* — The proper remedy for breach of a warranty is an action *ex contractu*. *Price v. Lewis*, 55 D. 536.

A purchaser having paid the purchase money for goods sold to him with a warranty, is not precluded from maintaining an action on the warranty, although he made payment after notice from a purchaser from him that the goods were defective, but before the extent of the damage was ascertained. *Boorman v. Jenkins*, 27 D. 158.

In case of warranty, direct or implied, if the article purchased proves defective or unfit for the use intended, the purchaser may, without returning or offering to return it, and without notifying the vendor of its defects, bring his action for the recovery of damages, or if sued for the price, may set up and have damages allowed to him, by way of recoupment from the sum stipulated to be paid. *Pisk v. Tank*, 78 D. 737; *Borrekins v. Bevan*, 23 D. 85; *Getty v. Rountree*, 54 D. 138.

One who has suffered in the purchase of goods by reason of a false warranty may sue in tort for the deceit and set forth the false warranty as the means of injury. *Carter v. Glass*, 38 R. 240.

2. *Warranty of title.* — A warranty of title in a chattel is broken whenever the purchaser is actually dispossessed by a better title whether there is a recovery at law or not. *Read v. Staton*, 9 D. 740.

An action cannot be maintained for a breach of warranty, whether express or implied, unless there has been a recovery by the real owner. It is necessary in such a case for the pleading to show that the vendee has been evicted or lawfully deprived of the use and possession of the property. *Hynson v. Dunn*, 41 D. 100.

An action on an implied warranty of title may be maintained by a vendee of wood, where he has paid for it, but can obtain no title thereto. *Brown v. Pierce*, 93 D. 57.

A vendee of personal property who is compelled, in order to retain the property, to discharge an incumbrance existing, unknown to him at the time of the purchase, may bring assumpsit for money paid against the vendor within the statutory period of limitation, after discharging the incumbrance. *Sargent v. Currer*, 6 R. 524.

A vendee of chattels, in case of failure of title to a portion thereof, is not bound to rescind the contract *in toto*, but may retain so much as he has secured a title to, and recover damages for the loss of the residue. It is optional with him to recoup such damages in action against him for the purchase-

For Index to Notes in American Decisions and American Reports, see Volume L.

money, or to bring an action therefor; and such option is not defeated by a transfer of the claim against him, and the bringing of an action in the name of the transferee, except in cases where an indorsee or transferee of negotiable paper acquires a title discharged of all equities, and valid against all defenses. *McKnight v. Devlin*, 11 R. 715.

3. *Warranty of soundness.*—In an action on the case for selling one article for another, there must be either an express warranty or fraud on the part of the vendor. A sound price does not imply a warranty of soundness, nor does a description of goods in a bill of parcels amount to a warranty. *Seixas v. Woods*, 2 D. 215; *Fleming v. Slacum*, 9 D. 224; *Dean v. Mason*, 10 D. 162.

In an absolute sale with warranty where there is no subsequent agreement by the vendor to take back the articles, the vendee is put to his action upon the warranty for any unsoundness of the articles, unless the vendor knew of such at the time of the sale. *Allen v. Anderson*, 39 D. 197.

A vendee declaring on breach of warranty cannot recover on the ground of fraud, because the vendor, knowing the article to be unsound, represented it to be sound, if no warranty is proved; nor is the vendor thereby estopped from denying a warranty, whether the declaration is in tort or *assumpsit*, and although there is an allegation of *scienter*, and that the vendor fraudulently and falsely warranted the article. *Bartholomew v. Bushnell*, 52 D. 338.

Upon breach of warranty of soundness of a horse, the purchaser may return the horse and recover the price paid, with interest from the time of the return. *Kuntzman v. Weaver*, 59 D. 740.

4. *Warranty of quality.**—If a seller of goods affirms them to be of a particular quality, and the buyer receives them upon the credit of such affirmation, and they afterwards appear to be of a different quality, the purchaser may return the goods and recover back the money had and received; or he may have his action without a return of the goods, if he gives notice to the seller where they are deposited. And the same rule exists where there is a warranty of soundness. *Rutter v. Blake*, 3 D. 550.

A vendor who affirms his goods to have a certain quality which they do not possess, and when such quality would increase their value, is liable to an action, although he did not know the affirmation to be false. *Thompson v. Tate*, 3 D. 678.

The vendee's remedy for breach of warranty of quality is to retain the chattel and sue on the warranty, or if sued for the price, to recoup his damages. *Getty v. Rountree*, 54 D. 138.

*Warranty of quality, vendee's remedy on breach of, see note, 54 D. 146.

Where goods are sold with warranty of quality, the purchaser on discovering a breach is not bound to rescind, but may use the goods and rely on the warranty. *Brigg v. Hilton*, 52 R. 63.

Whenever an article sold has some latent defect which is known to seller, but not to the buyer, the seller is liable for this defect, if he fails to disclose his knowledge on the subject at the time of the sale. If his knowledge is proved by direct evidence, his responsibility rests upon the ground of fraud; but in a case where the probability of knowledge on his part is so great that the court will presume his existence without proof, he is held responsible upon an implied warranty. The only difference between these two classes of cases is, that in one the *scienter* is actually proved, in the other it is presumed. *Hoe v. Sanborn*, 78 D. 163.

Upon an executory contract of sale, with a warranty as to the quality of the article contracted for, the purchaser is not bound to return, or offer to return, the article on discovering that it is of an inferior quality, but he may retain and use the property, and have his remedy upon the warranty. But the purchaser in an executory sale cannot rely upon a warranty as to open, plainly apparent defects, any more than he could upon a sale of goods in present. *Day v. Pool*, 11 R. 719.

Upon a sale of a machine, with a written warranty, and a provision that in case of failure of the machine to answer the purpose, the warrantors were to have notice "at once," in order that they might cause it to work well, or furnish another that would work well, such notice is a condition precedent to an action for breach of the warranty. *Lewis v. Hubbard*, 27 R. 775.

When one buys machinery, with a warranty, but receives and puts it in operation with knowledge that it is defective, he cannot recover damages for the breach during the time of such use. *Nye v. Iowa City Alcohol Works*, 33 R. 121.

It is no defense against a warranty of a kiln of brick, that the defect might have been discovered if the buyer had gone on top of the kiln. *Meckley v. Parsons*, 55 R. 261.

In an action for breach of warranty, it appeared that the plaintiff purchased rosin from the defendant at Wilson, N. C., to be sold by him in some other market than Wilson, of which defendants had notice, and the rosin failed to come within the description warranted. *Held*, 1. That the contract of defendants was to deliver the rosin at any usual market to be named by the purchaser, the purchaser taking on himself the risk, trouble and expense of the transportation; 2. That the knowledge by the vendor of the purpose which the vendee had in view in making the purchase, was an essential element in estimating the damages likely to be

For Index to Notes in American Decisions and American Reports, see Volume I.

sustained by a breach of warranty. *Leeds v. Roundtree*, 28 R. 309.

102. — pleading. — A declaration alleging a failure of title in the vendor of a chattel, although it sets out no express warranty of the title, will be good after verdict upon the ground of the implied warranty. *Payne v. Rodden*, 7 D. 739.

An averment of scienter is unnecessary in an action of assumpsit for breach of warranty of soundness. *Wren v. Wardlaw*, 12 D. 60; *Bremen v. Buck*, 21 D. 571; *Bartholomew v. Bushnell*, 52 D. 338; *Trice v. Cochran*, 56 D. 151.

An averment of fraud and deceit is immaterial where there is an express warranty. *Osgood v. Leeds*, 18 D. 317.

A declaration for breach of warranty of title must show that plaintiff has been deprived of the thing sold by title paramount, although such deprivation need not be alleged in these precise terms. *Salle v. Light*, 39 D. 317.

Plaintiff may declare upon an express promise, without alleging fraud, in which case he is bound to prove an express warranty, and cannot establish his right to recover by proof of fraud merely. *West v. Emery*, 44 D. 356.

A declaration upon an express warranty, absolute in its terms, is not supported by proof of a warranty of soundness to the extent of the vendor's knowledge. *Ib.*

A declaration for breach of warranty may be in tort or assumpsit, at the election of the plaintiff. *Bartholomew v. Bushnell*, 52 D. 338.

The pleading of a party who relies on a mere general warranty of quality of goods sold need not state whether the warranty is express or implied. A general averment that the vendor warranted the articles to be of a good quality is sufficient, and proof of a warranty of either kind will support the averment. *Hoe v. Sanborn*, 78 D. 163.

A declaration for breach of warranty of soundness of a horse, which alleges that the horse was unsound, is sufficient without specifying the particular kind of unsoundness. *Wheeler v. Wheelock*, 78 D. 617.

It is no variance to prove that the seller represented and warranted the animal to be sound, so far as he knew, and that in fact he knew him to be unsound, in an action for false and fraudulent representations of the soundness of the horse, joined with a count for a false warranty of soundness with knowledge of the unsoundness. *Ib.*

103. — evidence. — In an action on a warranty on the sale of a chattel, where there is no substantive allegation of fraud, evidence of fraud is inadmissible. *Dean v. Mason*, 10 D. 162.

In an action to rescind the purchase, upon the ground of unsoundness concealed at the time of the purchase by the vendor, brought after the property has ceased to exist, as in

the case of the death of a slave, the evidence should disclose the nature and extent of the unsoundness, whether easily detected or not, and whether the loss of the property was due to the unsoundness. *Stewart v. Dugin*, 28 D. 348.

Where, in an action for breach of an alleged warranty of the quality of a lot of tobacco purchased by the plaintiff of the defendants, the plaintiffs introduced in evidence a bill of sale of the tobacco signed by the defendants, which recited that it was "good first and second rate tobacco," and proved by parol that it was not such tobacco, parol evidence is admissible on the part of the defendant to show that the bill of sale was not intended as a warranty of the quality of the tobacco, but was simply a receipt. *Towell v. Gatewood*, 33 D. 437.

Declarations of a slave, made to an attending physician, as to the illness under which she is suffering at the time, the manner of the attack, and the progress of the disease, are admissible in evidence on the question of soundness or unsoundness, in an action for breach of warranty of soundness. *Allen v. Vancleave*, 61 D. 184.

A conversation between the buyer and seller of a cow, after the sale, in which the buyer said, "You said the cow was all right," to which the seller replied, "Well, she is all right," is admissible as evidence of an admission of a warranty at the time of the sale. *Tuttle v. Brown*, 64 D. 80.

Where a breach of warranty that machinery should be put into a steamboat, "adapted for and suitable for the boat," is claimed in a suit, and plaintiff offers proof tending to show that it did not answer the purposes intended, the defendant may prove in rebuttal that it was the weakness of the boat, and not defective machinery or unskillful workmanship, which caused the failure in the operation of the machinery. *Fisk v. Rank*, 78 D. 737.

A stipulation in a contract is not a warranty of the strength of a boat, by a party to such contract, when it provides that such party will furnish to the other party to such contract, and place in a certain steamboat, machinery adapted to and suitable for the boat, and that would drive her from twelve to fifteen miles per hour. The vendee of the machinery is to furnish suitable machinery, but the vendor takes the risk of the boat being strong enough to endure the weight, shock of running the machinery, and of its friction when in motion. *Ib.*

Declarations of the vendor at time of sale, limiting the effect of statements in an advertisement concerning the article sold, are admissible in an action by the vendee for a breach of warranty. *Hadley v. Clinton County Importing Co.*, 82 D. 454.

Where defendant's possession of personal property is accompanied by such circum-

For Index to Notes in American Decisions and American Reports, see Volume I.

stances as rebuts the presumption of ownership, it is error to instruct the jury, in an action for breach of the implied warranty of title on a sale thereof, that possession is *prima facie* evidence of ownership, and that the burden is upon the plaintiff to prove title in another, such instruction being calculated to mislead. *Bryen v. Eiggs*, 85 D. 304.

Burden of proof is upon plaintiff in an action for breach of the implied warranty of title to show ownership in some other person where the defendant was in possession at the time of the sale, unless the circumstances attending the possession rebut the presumption of ownership created thereby. *Id.*

Conversations between the vendee and other persons at the time of the sale tending to show the vendee's knowledge of the real quality of the article may be regarded as part of the *res gestae* connected with the issue of warranty or no warranty; their admission is within the sound discretion of the court, and whether admitted or rejected, it is not error. *Bartlett v. Hoppock*, 88 D. 428.

In an action against a vendor for false and fraudulent representations in the sale of a chattel, it is unnecessary for plaintiffs to aver or prove the negotiation or payment of a note given as the consideration of the contract, for when it was delivered the contract was complete, and the plaintiffs had a right of action immediately. Evidence of subsequent negotiation of payment of the note is, nevertheless, admissible as proof of the value of the consideration, and which may well be considered by the jury in estimating the damages. *Morehouse v. Northrop*, 89 D. 211.

Plaintiffs must not only prove false representations but must also prove that defendant knew them to be false, in an action on the case for certain alleged false and fraudulent representations in a sale of a chattel. *Id.*

In an action on a warranty of soundness of a horse, testimony as to the soundness of the horse by a witness who saw it about the time of the sale, and especially while in the possession of the purchaser, is competent to go to the jury upon that question. *Kunzman v. Weaver*, 59 D. 740.

The fact that a horse proved to be "balky" on trial, three or four days after purchase, is evidence to show that he was "balky" at the time of purchase, for the purpose of establishing a breach of warranty of soundness and gentleness. *Finley v. Quirk*, 86 D. 93.

In an action for breach of warranty of a horse, the value of the horse cannot be proved by evidence that since the commencement of the action a good and responsible party offered a certain sum for him, which sum was refused. *Id.*

An action will lie for breach of an implied warranty of title to a horse in vendor's possession without a judicial eviction, as required in express warranties; but to entitle the plaintiff to recover, the proof of breach should be peculiarly satisfactory. *Plummer v. Newdigate*, 87 D. 479.

The *ex parte* act of a military officer in seizing a horse claimed to belong to the United States can have no effect on the question of ownership without strong proof that his act was right. *Id.*

In an action by a purchaser of a horse against the seller for breach of warranty of title, an order of a United States provost-marshal directing the seizure of the horse as the property of the United States, if proved to have been duly executed and delivered, is admissible to explain how and under what circumstances the horse was surrendered to the federal authorities. *Johnson v. Frieble*, 96 D. 508.

104. — amount of recovery.* — The rule of damages in cases of warranty differs from the rule in cases of deceit and fraud in this: that in warranty the vendor is answerable for all defects covered by the warranty, whether he knew of them or not; while in deceit he is only answerable for the particular defects concerning which he knowingly misled the purchaser to his injury. The rule will be the same only when the warranty covers precisely the same ground as do the false, fraudulent, and material representations. *Page v. Parter*, 80 D. 172.

Damages for the keeping of a horse before plaintiff's offer to return him, cannot be recovered in an action for false affirmation. *West v. Anderson*, 21 D. 737.

An unsound horse warranted sound may be sold by vendee, and damages for deceit will be the difference between what the horse sold for and what he would have been worth if as warranted, if common prudence and discretion were exercised in the sale. *Woodward v. Thacher*, 52 D. 73.

Costs and expenses of suit cannot be included in damages for a mere breach of a contract of warranty. *Bartholomew v. Bushnell*, 52 D. 338.

Vendor, in suit by purchaser to rescind sale for fraud, having transferred purchaser's notes to third persons, so that he cannot deliver them up to be cancelled, is liable for the amount in money. *Wims v. Morrison*, 67 D. 658.

Seller who warrants things sold as fit for a certain purpose is liable for any injury sustained by the buyer in consequence of its unfitness; and the measure of damages is not simply the difference in value between the article contracted for and the article received. *Milburn v. Belloni*, 100 D. 403.

* Measure of damages, in cases of breach of warranty of soundness, see note, 40 D. 303-305.

For Index to Notes in American Decisions and American Reports, see Volume I.

The vendee of a chattel can recover nominal damages only for breach of the implied warranty of title, where a judgment for the value of the chattel is recovered against him by the true owner, but the judgment is not satisfied. *Burt v. Dewey*, 100 D. 482.

105. The right to rescind, generally. — A vendor, by bringing suit and obtaining judgment for the purchase-money, ratifies and confirms the sale, so that it cannot be set aside at his instance. *Nelson v. Carrington*, 6 D. 519.

Rescission must be in *toto* , or not at all, even when several articles are sold at a distinct price for each, and although fraud in the sale is shown. *Voorhees v. Earl*, 38 D. 588.

Rescission of a sale, where the vendee cannot pay the purchase-money, may be made by agreement of the parties, and when made, will cut out liens subsequently acquired against the vendee. *Mount v. Harris*, 40 D. 89.

An endorser compelled to pay a note is subrogated to the right of the creditor to maintain an action to rescind the sale as simulated and fraudulent, against a subsequent purchaser of the property for which the note was given. *Groves v. Steel*, 46 D. 551.

Fraud does not of itself render a sale void, but only voidable at the election of the vendor. Until avoided or rescinded, the contract of sale remains in force, and the title to the property passes to the vendee. The vendor may, if he sees fit, set aside a sale on the ground that it was procured by fraud; but unless a rescission is made, the sale takes effect and the property passes. *Brown v. Pierce*, 93 D. 57.

The sale of a number of articles at the same time, if a separate price be agreed upon for each, though all be included in one conveyance or bill of sale, may be rescinded as to part, and the price paid recovered back, and be enforced as to the residue. *Costigan v. Hawkins*, 94 D. 553.

One party purchased of another, for the sum of one thousand dollars, the exclusive right to manufacture and sell a certain self-rising flour, together with a lot of chattels and fixtures. The value of the latter, as estimated by the parties, was two hundred dollars, and it was understood that the balance of the one thousand dollars was paid for such sole right to manufacture and sell. The purchase was made upon the representation of the seller that he owned such exclusive right, having acquired it from another, and in proof of which he exhibited a writing purporting to be executed by the latter transferring such right. He in fact, however, did not own any such exclusive right, and no such writing was ever really executed. *Held*, that upon these facts a cause of action existed in favor of the purchaser for damages for breach of the seller's

contract, or that the purchaser might aver the sale of the right to manufacture, etc., from the sale of the chattels, and rescind as to the former alone, recovering the purchase price thereof for entire failure of consideration. *Id.*

106. What amounts to rescission. — In a warranty sale conditioned to return the articles upon a breach of the warranty, an offer to return is equivalent to an acceptance by the vendor; the sale is thereby rescinded and the vendee may maintain an action for money had and received, or defend an action brought for the purchase-money. *Allen v. Anderson*, 39 D. 197.

Mutual cancellation of a contract of sale, the vendor taking back the subject-matter, and the vendee taking back notes given in consideration, will, as between the parties, as effectually revert the title in the vendor as would the most formal conveyance; and the presumption of possession by the vendor makes his title good against creditors and *bona fide* purchasers. *Tomlinson v. Roberts*, 68 D. 367.

Where, by mutual annulment of the contract of sale, the seller has become revested with title to property sold, as a horse, for instance, by taking it back and returning the consideration, it is as competent for him to contract with the vendee for the letting of the horse, as with any other person, and the vendee's possession under such letting is not fraudulent as to the possession of the vendor. *Id.*

Vendor's detention of part of a lot of sugar after the vendee's failure, where the latter obtained the other part before such failure, does not annul the sale, but the vendor holds the sugar as security for the payment of the stipulated price. And the subsequent sale of the part detained cannot work a rescission of the sale. *Patten's Appeal*, 84 D. 479.

Neither stoppage of goods sold, while *in transitu*, nor the exercise of the analogous right of detention before any *transitus* has commenced, operates as a rescission of the contract of sale. *Id.*

107. When the seller may rescind. — To authorize the vendor of goods to disaffirm the sale, and to recover against the purchaser with notice, the concurrence of three facts must be shown, 1st, the purchaser must have been at the time of the sale insolvent, or in failing circumstances; 2d, he must have had at the time a preconceived intention not to pay for the goods, or no reasonable expectation of being able to do so; and 3d, there must have been, on his part, an intentional concealment of these facts, or a fraudulent representation in reference to them. *LeGrand v. Eufrasia Nat. Bank*, 60 R. 140.

Mere inadequacy of price, unless it be so gross as to amount to evidence of actual

For Index to Notes in American Decisions and American Reports, see Volume I.

fraud, is not a ground for avoiding a sale, although the court might refuse to decree a specific performance. *Osgood v. Franklin*, 7 D. 513.

A vendor's mistake as to the purchaser's ability to pay, as where he sells to one reputed, and believing himself to be, solvent, but who is in fact insolvent, will not avoid the sale or furnish ground for relief in equity. *Lupin v. Marie*, 21 D. 256.

A sale of goods, tainted with fraud on the part of the vendee, is voidable by the vendor as to the vendee, and as to those claiming under him with notice. *Rowley v. Bigelow*, 23 D. 607; *Thurston v. Blanchard*, 33 D. 700; *Knobles v. Lord*, 34 D. 525; *Hoffman v. Noble*, 39 D. 711.

The vendor may treat as void a sale made to one who purchases with a preconceived design not to pay for the goods bought. *Thompson v. Rose*, 41 D. 121; *Oswego Starch Factory v. Lendrum*, 42 R. 53; unless the property has passed to the possession of a bona fide holder for value. *Nichols v. Michael*, 80 D. 259. But to have that effect the intention of the buyer must have been never to pay for them; and whether or not that was his intention is a question for the jury. *Bidault v. Wales*, 64 D. 205.

Though a party injured may avoid a sale as against a fraudulent purchaser, yet this cannot be done when the rights of third persons have intervened. This exception, however, does not embrace the general creditors of the purchaser seizing the property by attachment or execution, or taking it by assignment as security for a pre-existing debt. *Bidault v. Wales*, 64 D. 205.

Where goods are sold for cash, and delivered, the vendor taking the vendee's check for the price, which on presentment four days thereafter is dishonored, the vendor may rescind the contract and reclaim the goods. *Hodgson v. Barrett*, 31 R. 527.

Where a sale was made by means of false representations of the vendee, and the goods, after coming into his possession, were attached by his creditors—*held*, that the vendor had a right to rescind and reclaim the goods from those who attached them. *Buffington v. Gerriah*, 8 D. 97.

A vendor cannot rescind a contract of sale and reclaim the goods on the ground of fraud, unless it appears that he was induced to part with such goods by deceptive assertions and false and fraudulent representations of the vendee; and the fact that the vendee was insolvent, and the goods liable to immediate attachment by his creditors, which was unknown to the vendor, is no ground for rescission. *Cross v. Peters*, 10 D. 78.

A purchase made to defraud the vendor by selling the goods for a less price and without paying for them, may be treated as void by him, and he may reclaim the goods; but he

must promptly disavow the contract after having notice of the fraud. *Mackinley v. McGregor*, 31 D. 522.

The vendor may rescind the sale and recover the goods on obtaining knowledge of falsehood, where credit was obtained on recommendation of third persons, materially false, and so known to the vendee, so long as the goods remain in the vendee's hands, or are not passed from him on a new and valuable consideration. *Fitzsimmons v. Joslin*, 52 D. 46.

A cloth covering of the bed of a billiard-table, which can be removed without injury to the table, and which the vendor sold under a contract of sale which he had a right to rescind, is not so annexed thereto and inseparable but that it may be removed, as against the owner, by one who was induced by fraudulent representations of a partner of the keeper of a billiard-room to sell it to such partner. *Perkins v. Bailey*, 96 D. 689.

Such vendor may rescind the sale and remove the cloth, although at the same time he sold to the same vendee another table, and took a mortgage on both tables as security for his entire demand. *Id.*

The owner of a billiard-table who, under an executory contract for the sale of it to the keeper of a billiard-room, leaves it in such keeper's possession, has no right of action against a person who takes from it a removable cloth covering, which, by fraudulent representations of a partner of such keeper, such vendor had been induced to sell to such partner, and to put thereon. *Id.*

The right of the vendor of goods to rescind the sale, for fraud on the part of the vendee, is not defeated by his having obtained judgment for the price in ignorance of the fraud. *Kraus v. Thompson*, 44 R. 182.

108. When the buyer may rescind.

— If a purchaser, who has been deceived in a contract of sale without any fault on his part, chooses to rescind the contract, he will be entitled to do so; but in order to do this effectually, so as to entitle him to recover back the whole of the consideration money paid, he must give the vendor notice, within a reasonable time, of the cause of rescission, and tender a return of the property, if within his power. But this is not necessary where the plaintiff's claim to damages is founded on an express warranty, but only where there is an implied warranty, arising from mistake. *Fowler v. Williams*, 4 D. 579.

In some cases the purchaser of property may, at his option, on account of fraud practiced by the seller, rescind, and by action of *indebitatus assumpsit* recover back the price; or by an action of deceit or other proper action recover his damages; but he can, in no case, maintain *indebitatus assump-*

For Index to Notes in American Decisions and American Reports, see Volume I.

as for the purchase-money, without a previous offer to rescind and a demand of repayment. *Warner v. Wheeler*, 6 D. 717.

The purchaser of counterfeit bank bills may recover the amount paid for them upon discovering them to be counterfeit and immediately returning them, where both parties are brokers equally skilled in detecting counterfeits, and equally innocent; and where the purchaser passes the notes away *bona fide* after receiving them, and they are returned to him as counterfeit two months afterwards, and he immediately takes them up and tenders them to the seller, he may recover, notwithstanding the delay in returning the bills, there being nothing to show laches on his part. *Buck v. Doyle*, 45 D. 176.

The purchaser of a chattel cannot, by his own act alone, return and revest the property in the seller, and recover the price when paid, on the ground of a total failure of consideration; nor, by the same means, protect himself from the payment of the price, on the same grounds. *Harman v. Sanderson*, 45 D. 272.

A purchaser of goods becoming insolvent cannot vacate the contract of purchase by agreement with the vendor, after proceedings in insolvency have been commenced, so as to cut off the assignee's right to pay the price, and take the goods. *Arnold v. Delano*, 50 D. 754.

A purchaser is authorized to rescind a contract for the sale of a horse, and return the horse for breach of an express warranty of soundness, although there was no express agreement to that effect, and no fraud. *Bryant v. Ibburgh*, 74 D. 655.

Rescission of a contract cannot be made after the property purchased under the contract has been received in packages, and after using a portion of it which was not put in a case, it being a very small portion, and after credit has been given by buyer to seller on his book-account, if it should afterwards appear upon examination, that there was only a difference in quality in the goods delivered and those called for in the contract. *Hoadley v. House*, 76 D. 167.

Rescission of contract can be made after the property purchased has been received from the seller by the buyer, and after credit has been given to the former by the latter upon his books, if it afterwards appears that it is not of the same kind or class as that called for in the contract. *Id.*

A contract cannot be rescinded if at the time the articles were delivered under it to the purchaser by the seller, the former could have discovered, by using ordinary diligence that they were not of the kind he bargained for. If the articles are packed in barrels and the barrels are headed up, the purchaser need not open the packages

to examine the goods. He must, however, as soon as the cause of rescission is discovered, give notice of his rescission, and return the property. *Id.*

A sale may be rescinded where the articles were to be delivered at a future day, and those sent are not merchantable, and the purchaser notifies the seller to take the property back on account of its inferiority. *Howard v. Hoy*, 35 D. 572.

A vendee has the right to return a defective corn cultivator, manufactured under an executory contract, and to recover money paid on it, with interest, where he has received the cultivator under such contract, kept it long enough to give it a fair examination and trial, and found it to be vitally defective. *Woodle v. Whitney*, 99 D. 102.

A vendee cannot rescind an executed contract of sale, in the absence of fraud, because the goods are not as warranted, unless he has reserved that right. His sole remedy is by action on the warranty. *Voorhees v. Earl*, 38 D. 588.

Willful misrepresentation of quality is not sufficient to avoid a sale of personal property, unless the defendant was deceived by it, and unless it formed an inducement to him to make the purchase. *Commerseville v. Wadleigh*, 41 D. 214.

A suspicion of fraud upon the vendee is sufficient to induce equity to rescind a sale, when coupled with gross inadequacy of price, and the pressure of pecuniary embarrassment. *Lester v. Mahan*, 60 D. 530.

Concealment by a vendor of horses of the fact that they have a contagious disease of a fatal character, to his knowledge, such disease not being discoverable by such examination as a careful man would make before buying, entitles the purchaser to rescind the contract, and to recover damages for the fraud, especially where such concealment is accompanied by actual misrepresentations accounting for any suspicious appearances in the animals. *Wintz v. Morrison*, 67 D. 658.

Where on the sale of a horse known by the seller to be unsound in a certain respect the seller conceals the defect, and gives evasive and artful answers to inquiries, with the intent to deceive, and thereby deceives and injures the purchaser, the latter may rescind. *Croyle v. Moses*, 35 R. 654.

Defendant bought a harvesting machine, reluctantly, upon solicitation of the plaintiff, and upon the stipulation that if it did not work to his satisfaction he might return it. *Held*, that his right to reject was absolute and his reasons could not be investigated. *Wood Reaping etc. Machine Co. v. Smith*, 45 R. 57.

109. Putting in statu quo. — To entitle a vendee to rescind, and recover back the consideration, he must place the vendor in the same situation as before the sale, or

For Index to Notes in American Decisions and American Reports, see Volume I.

offer to do so. *Conner v. Henderson*, 8 D. 103; *Hynson v. Dunn*, 41 D. 100.

A vendee of personal property cannot treat the sale as void on account of the fraud of the vendor, and still retain the consideration. *Johnson v. McLane*, 43 D. 102.

110. Return of goods or price. — To rescind a contract of purchase, the vendee must return the property, unless it be entirely worthless to both parties. *Perley v. Balch*, 34 D. 56; *Burton v. Stewart*, 20 D. 692.

The purchaser of goods with warranty, wishing to rescind for breach of the warranty, must, as a general rule, restore all the goods received under the contract. *Clark v. Baker*, 45 D. 199; *Ware v. Houghton*, 93 D. 258.

An offer to return goods sold with a warranty, either express or implied, is not necessary before bringing an action for damages for the breach of such warranty. *Boorman v. Jenkins*, 27 D. 158.

A purchaser of goods with warranty cannot return the same and recover the price, on breach of the warranty, but must sue upon his warranty, if the vendor had no knowledge of the unsoundness, and does not consent to take the article back, and the contract itself reserves no right to return it. *Kase v. John*, 36 D. 148.

Where there is an express or implied warranty, the vendee of goods may show a partial failure of consideration, in defense of an action against him for the purchase money, without returning the goods; but if he would rescind the sale and recover back the purchase-money, he must within a reasonable time return the goods, or offer to return them; unless the goods are wholly worthless, in which case the vendee is never under obligation to either return or offer to return them. *Brantley v. Thomas*, 73 D. 264.

The return of an article by the purchaser for purpose of repair, where it is defective, is not effective for the purpose of rescission, even though the vendor neglects to repair the article. *Kase v. John*, 36 D. 148.

A party wishing to rescind a sale of a jack, for fraud, by tendering him back to the seller, must do so absolutely, by leaving him in the seller's stable or upon his premises, and must not, after the seller's refusal to accept him, take him home and use him as his own. *McCulloch v. Scott*, 56 D. 561.

One whose tender of a chattel for the purpose of rescinding the sale is refused, and who takes it back and uses it as his own, thereby waives the benefit of his tender, and his remedy is an action at law for damages. In such a case his bill for a rescission must be dismissed without prejudice to such action. *Id.*

Where a purchase is infected with legal fraud, the purchaser is entitled to hold the property until reimbursed the purchase money. *McCaskey v. Graff*, 62 D. 336.

Where a purchase is infected with actual fraud, the purchaser is not entitled to hold the property until repaid the purchase price. His title may be treated as absolutely void. *Id.*

The tender of return of animals to the vendor, in an action for fraudulent concealment of the fact that they are diseased, is not necessary to entitle the vendee to recover his damages; nor is it necessary to entitle him to rescind the contract if the animals are entirely worthless. *Watts v. Morrison*, 67 D. 658.

A vendor rescinding a sale for fraud must restore the consideration if it has been paid. *Thurston v. Blanchard*, 33 D. 700.

A return of the consideration is necessary only when vendor seeks to avoid the contract under which he has parted with his goods. *Jennings v. Gage*, 56 D. 476.

A vendor, to whom the vendee has given his negotiable promissory note for goods, is not bound to tender such note at the time of rescinding the contract; it is sufficient if he produce it upon the trial, and deliver it into the custody of the court. *Nichols v. Michael*, 80 D. 259; *Thurston v. Blanchard*, 33 D. 700.

The vendor must return money already paid on rescinding the sale of a chattel for non-payment of an installment of the price when due, under a provision in the contract, where there is nothing in the contract clearly indicating that money already paid shall be forfeited by such default; and if the vendor rescinds and retakes the property without refunding the money already paid, the vendee may recover the money. *Miller v. Steen*, 89 D. 124.

111. What lying by, or acquiescence will defeat the right to rescind.

— Where the buyer of a clock agrees to pay for it at the expiration of a year, on condition that it performs to his satisfaction, the contract to pay becomes absolute at the end of that time, unless, within a reasonable time, he offers to return it and gives notice of his dissatisfaction. If the residence of the seller is unknown, or if he resides in another state, the buyer must, in order to excuse his failure to give notice and to offer to return, show that he used due diligence to ascertain the seller's residence. *Dewey v. Erie Borough*, 53 D. 533.

The seller of a machine is under no obligation to receive it back, or make it all right, under an agreement so to do at time of sale, if it should prove not to be a good machine, unless called upon to perform within a reasonable time after the sale. *Osborn v. Stanley*, 85 D. 347.

A vendee is not bound to receive and pay for property that he has not agreed to purchase; but if after delivery it is found on examination to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give

For Index to Notes in American Decisions and American Reports, see Volume I.

him notice to take it back, or he will be presumed to have acquiesced in its quality. *Reed v. Randall*, 86 D. 305.

A purchaser of slaves at a sale under a void order of the probate court cannot plead as an excuse for failure to rescind, by returning or offering to return the slaves, the fact that he did not discover the defect of title until after emancipation of the slaves, and that he could not then return them. *Ware v. Houghton*, 93 D. 258.

The defendant bought of the plaintiff hats, caps, collars and gloves, by an order classifying the goods according to kind, style and price per dozen. The parties understood that each article was to be itemized and carried out at one-twelfth of the price per dozen. In the printed heading of the bill rendered by the plaintiff was a statement that "all claims must be made in three days." Some of the articles did not conform to the order, but were not returned for a month. *Held*, 1. That the contract was apportionable, and the defendant could not be held for goods not conforming to the order; 2. That he was entitled to a reasonable time to return such goods; 3. That the question of reasonable time was for the jury. *Cohen v. Pemberton*, 55 R. 101.

112. **Seller's right to sell again and claim deficiency.**—The vendee's refusal to take away the goods entitles the vendor, after proper notice, to sell them on account of the vendee. *Gilly v. Henry*, 13 D. 291. *S. P.*, *Coffman v. Hampton*, 37 D. 511; *Patten's Appeal*, 84 D. 479.

The vendor should, before selling the goods, notify the vendee that he will sell them, and in selling them he ought to dispose of them to the best advantage, so as to obtain the best price he can. He is not bound to give to the vendee notice of the time and place of the sale; and if he gives such notice, he may postpone the sale to another day, if, in his judgment, there be good cause for so doing. *Rosenbaum v. Weelen*, 98 D. 737.

If a vendee refuse to fulfill his contract, the vendor may resell the goods without any notice to him, and look to him for the loss that he may have sustained by reason of the refusal. *West v. Cunningham*, 33 D. 300; *Atwood v. Lucas*, 89 D. 713.

If the vendee of goods unreasonably refuse to accept them, the vendor is under no obligations to allow them to perish on his hands, or to become reduced in value, but may sell them at auction, and hold the vendee responsible for the difference between the sum realized from such sale and that which was agreed to be paid by the vendee. *Van Horn v. Rucker*, 84 D. 52. *S. P.*, as to the damages, *McCombs v. McKennan*, 37 D. 505.

A resale made after a vendee's refusal to complete his purchase is not conclusive in fixing the extent of his liability; he may

show that the sale was unfair or was under circumstances calculated to prevent a full price. *West v. Cunningham*, 33 D. 300.

The right to resell is not defeated by the acceptance by the vendor of a portion of the consideration, prior to the removal and sale by him of the articles delivered. *McCombs v. McKennan*, 37 D. 505.

A resale of a part of a lot of sugar by the vendor after the vendee has obtained the other part, even if wrongful, places the parties in a different situation from their original position. *Patten's Appeal*, 84 D. 479.

The vendor may resell at any time, and in any state of market, goods which the vendee refuses to accept, according to the contract of sale, and the fact that he refrains from selling them for two months upon a falling market will not prevent him from recovering in an action against the vendee for the deficiency. *Rosenbaum v. Weelen*, 98 D. 737.

A cargo of Virginia wheat was sold to a brewer, who knew it to be southern wheat, which is generally more or less heated, though it is not injured thereby for flour, however it may be unfit for malting. A sample of the wheat, taken in the usual manner from the cargo, was exhibited to the buyer before the purchase, which was found adapted for malt. He received part of the cargo, but, finding some of it heated, and unfit for malting, he refused to receive the remainder, though it was good, merchantable wheat, and equal to any southern wheat. The residue of the cargo was tendered and notice given the buyer that unless he received and paid for the whole, the residue would be sold at public auction, and he be held responsible for any deficiency. *Held*, that the sample was a fair specimen of the quality; that a contract and delivery of a part transferred the property; and that the subsequent sale of the residue of the wheat at auction was not a waiver of the contract; the vendor being, by the refusal of the buyer to accept the wheat, at liberty to abandon it, or dispose of it *bona fide* as the buyer's agent to the best advantage. *Sands v. Taylor*, 4 D. 374.

SALES BY SAMPLE.

In general, see SALES, IV.

State laws taxing, see COMMERCE, 2.

SALVAGE.

Lien for, see SHIPPING, 46.

Power of master to contract for, see SHIPPING, 34.

SANITY.

How proved, see EVIDENCE, 258.

Of testator, burden of proof as to, see WILLS, 98.

Opinions on question of, see WITNESSES, 127.

See also INSANE PERSONS.

For Index to Notes in American Decisions and American Reports, see Volume I.

SATISFACTION.

Of chattel mortgage, see CHATTEL MORTGAGES, 30.

Of executions, see EXECUTION, 171-177.

Of judgments, see JUDGMENT, V.

Of judgment, vacating entry of, see JUDGMENT, 113.

Of mortgages, see MORTGAGES, VIII.

SAVING CLAUSES.

Effect of, see STATUTES, 71.

SAVINGS BANKS.

See BANKS AND BANKING, 7.

SCANDAL.

Exceptions to answer for, see PLEADING, 82.

Striking out allegations for, see PLEADING, 182.

SCHEDULES.

Impeaching discharge for omissions in, see BANKRUPTCY, 41.

To assignments for creditors, see ASSIGNMENTS, etc., 10.

To chattel mortgages, see CHATTEL MORTGAGES, 11.

SCHOOLS.

[Includes decisions under, or involving the school laws of the several states; the management of school lands and funds; taxation for school purposes; the powers and duties of school officers; the rights, powers, and duties of teachers; course of study; school discipline, etc.]

Exclusion of negroes from, see CIVIL RIGHTS, 1.

Power of county to hold property for, see COUNTIES, 13.

1. School districts. — School districts are quasi corporations for building and repairing schoolhouses and certain other purposes. *Andrews v. Estes*, 26 D. 521; *Gaskill v. Dudley*, 39 D. 750.

A voluntary neighborhood school is not within the statute relating to the districting of townships in Pennsylvania. *Martin v. McCord*, 30 D. 342.

A school district is liable to be sued without any express statute giving the action. *McLoud v. Selby*, 27 D. 689.

An execution against a school district may be levied on the individual property of an inhabitant thereof. *McLoud v. Selby*, 27 D. 689; without first resorting to corporate property. *Gaskill v. Dudley*, 39 D. 750.

An inhabitant whose property is taken under such an execution cannot impeach the judgment upon which it issued. *McLoud v. Selby*, 27 D. 689.

Where two records of a school district were kept, from only one of which it appeared that a committee had been duly elected at a meeting of the district, and the clerk who made the records testified that both were made by him soon after the meet-

ing from loose memoranda kept at the meeting, — *held*, that the records were not contradictory, and both being originals, that the election of the committee was duly proved. *Williams v. School District*, 32 D. 243.

A school district employed a contractor to repair and improve a schoolhouse, under the direction of the architect of the improvements, who was employed by the district, as to the manner of executing the work. The contractor was not to begin work until vacation. By permission of the architect he began it before, and he negligently injured one of the pupils in the execution of it. Two of the school board visited the building after the work was begun, but did not order it stopped. In an action by the injured pupil against the district, *held*, 1. That the district was not liable for the contractor's negligence. 2. That the permission of the architect, being outside his authority, did not bind the district; 3. That the knowledge and inaction of the two members of the board did not render the district liable. *School District of Erie v. Fuses*, 42 R. 627.

2. School district officers. — A warrant for the annual town meeting held by law, for the purpose of choosing officers, contained articles "to choose all necessary town officers, and "to choose all necessary committees," and the statute allowed either of two modes of choosing committees. It was held under these articles the town was authorized to determine which mode should be pursued, and to pass a vote, "that each school district choose their own committees," this being one of the modes provided by statute. *Williams v. School District*, 32 D. 243.

The clerk of a school district elected under the Rev. Stat., c. 23, sec. 27, is competent to act as such, although he has removed into an adjoining district in the same town, and another has been chosen in his stead, but not sworn. *Id.*

A school treasurer and his sureties are liable on his bond for school funds deposited by him in a bank, which are lost by the subsequent insolvency of the bank, although he was guilty of no negligence in failing to ascertain its financial condition. *State v. Powell*, 29 R. 512.

A school district treasurer deposited school money in a bank to his own individual credit, directing the bank to pay out of it certain school district bonds about maturing, payable at that bank. The bank failed and the money was lost. *Held*, that the treasurer was liable for it in an action on his bond. *Ward v. School District*, 35 R. 477.

A county school superintendent, willfully or corruptly refusing a license to teach to one lawfully entitled, is liable in damages. *Elmore v. Overton*, 54 R. 343.

3. Meetings of school officers. — The proceedings of a school district meeting are

For Index to Notes in American Decisions and American Reports, see Volume I.

void where the statute requires even seven days' notice of the meeting to be given, and only six days' notice is given. *Hunt v. School District*, 39 D. 225.

Where a statute requires the warrant for a school district meeting to specify the business to be done at such meeting, no business not so specified can be legally transacted thereat. *Id.*

The law requiring the secretary of a school district to record all proceedings of the board and of the district meetings in separate books, to be kept for that purpose, is directory only, and proceedings of the board are not void simply because they were recorded on loose sheets of paper instead of in a bound book. *Higgins v. Reed*, 74 D. 305.

Under a statute authorizing the district school board, in conjunction with the county superintendent, to dismiss any teacher for incompetency, cruelty, negligence or immorality, these officers do not constitute a court, but may adopt their own procedure. *School District v. McCoy*, 46 R. 92.

4. Taxes for school purposes. — A statute required that a school district tax should be assessed within thirty days after the clerk of the district should certify to the assessors the sum to be raised. This was held to be directory merely. *Pond v. Negus*, 3 D. 131.

If an illegal assessment be made, the same or succeeding assessors may make a new assessment, for which purpose the district clerk may issue a second certificate. *Id.*

A law declaring a tax on the polls and property of persons of one color for the exclusive education of children of that color is unconstitutional. *Puitt v. Gaston Co.*, 55 R. 638.

5. — how levied. — The provision of the revised stat., c. 23, sec. 37, that an assessment of a school district tax shall be made within thirty days after the clerk of the district shall certify to the assessors the sum voted by the district to be raised, is directory, and does not prohibit an assessment after the expiration of that period. *Williams v. School District*, 32 D. 243.

The omission, through an error of judgment or mistake of law, of an assessor to assess on an individual a school district tax, does not invalidate the assessment as to other persons. *Id.*

Where one of three assessors fails to attend and act in assessing a tax, after proper notice, the other two may proceed without him. *Id.*

The list of persons taxed required by the Iowa code to be posted, by the secretary of a school district, at three or more places in the district, showing the amount of tax due from each, is admissible in evidence in an action of trespass, wherein the defendants justify as school officers by showing that a

schoolhouse tax was levied upon all the property in the district, including the plaintiffs; and that for the purpose of collecting said tax they levied upon and sold the property for which the suit is brought. *Higgins v. Reed*, 74 D. 305.

6. Warrant for collection of school tax. — Whether a warrant under which a meeting was called that elected a committee to levy a school tax is regular or not, cannot be inquired into in an action to recover back money paid for the tax. *Williams v. School District*, 32 D. 243.

That such committee was a committee *de facto* is sufficient to sustain the tax. *Id.*

Where there is a failure to collect a school tax during the year in which it is levied, the power and authority conferred by the warrant do not expire with the year, where the tax levied is upon personal property. If the warrant first issued be lost, its place may be supplied by a new one, and such warrant protects not only the secretary to whom it was issued, but also his successor in office. *Higgins v. Reed*, 74 D. 305.

In trespass against the school officers for taking and selling personal property in payment of a schoolhouse tax, the defendants may give in evidence a bond for the delivery of the property executed by the plaintiff. *Id.*

7. Enforcement of warrant. — Evidence on the part of the plaintiff in an action against a school district to recover the amount of a tax paid for building a schoolhouse, that there was already a sufficient schoolhouse in the district, is inadmissible. *Williams v. School District*, 32 D. 243.

The return of a constable upon a warrant issued to warn a town meeting, that he had warned the inhabitants to meet at the time named therein, dating his return less than fourteen days before the meeting, is not conclusive to show that the required notice of fourteen days before the meeting has not been given. *Id.*

8. Powers and duties of collector. — Whether a collector of taxes has been duly elected and sworn is a question that is not open to a plaintiff in an action against a school district to recover a tax which he has paid such collector. *Id.*

9. Powers and duties of school trustees. — School trustees are not mere ministerial officers bound to obey the illegal resolutions of the district. *Baker v. Freeman*, 24 D. 117.

A school trustee deriving his official character from a general law and the election of the people of a given district is as much a public agent as if he were the immediate agent of the state or of one of its political divisions. *Ogden v. Raymond*, 58 D. 429.

Equity will interfere and control the action of school trustees in changing school districts, if a plain violation of the law,

For Index to Notes in American Decisions and American Reports, see Volume I.

gross injustice, oppression, or corruption is shown. *Metz v. Anderson*, 76 D. 704.

Acquiescence in an unwarrantable act of school trustees in consolidating districts constitutes a good ground for the refusal of equitable interference. *Ib.*

A school director's right to hold office cannot be inquired into on a bill to enjoin the collection of a tax levied by them. The remedy is by *quo warranto*. *Ib.*

The plaintiff obtained a contract for building a schoolhouse for the district of which he was a director, and took part in the proceedings of the board which let the contract. *Held*, that the contract was void, on the ground that it was against the public policy to allow the plaintiff, while holding a fiduciary relation to the district, to place himself in an antagonistic position and obtain the contract for himself, from the board of which he was a member. *Pickett v. School District*, 3 R. 105.

A negotiable note made by school trustees, for the proper purposes of their office, and purporting to be their individual obligation, but with the addition to their signatures of their official description, is binding upon the school corporation. *School Town etc. v. Kendall*, 37 R. 139.

Two persons who had brought a suit against a school district to divest it of certain property purchased by it, being elected directors of the district, discharged counsel employed by their predecessors to defend it, and allowed a decree to pass against the district by default. *Held*, that it should be set aside. *Noble v. School Directors*, 57 R. 832.

Under a statute authorizing school district boards to provide "necessary appendages" for schoolhouses during the time that schools are taught, there is no authority to purchase a stereoscope and stereoscopic views. *School District v. Perkins*, 30 R. 447.

The right to prescribe a general course of instruction and to direct what books shall be used being reposed by the legislature in a school committee, no power of revision being conferred upon any other tribunal, includes the power to make injudicious and ill-advised selections. *Donahoe v. Richards*, 61 D. 256.

A school committee, by expulsion or otherwise, may enforce obedience to all regulations within the scope of their authority, to select and prescribe what books shall be used in schools. *Ib.*

A district school board has power to make a rule suspending any pupil absent without satisfactory excuse, six half days in four consecutive weeks. *King v. Jefferson City School Board*, 36 R. 499.

A school committee which was authorized by statute to adopt all requisite measures for the regulation of the school, excluded children from the school for absence,

contrary to the rules thereof. *Held*, valid, although such absence was pursuant to the command of their Roman Catholic parents and their priest, and for the purpose of attending religious services on a holiday of the church. *Ferriter v. Tyler*, 21 R. 133.

Under a statute authorizing school directors to make and enforce all needful rules and regulations for the government, management and control of the schools, not inconsistent with the laws of the land, school directors made a rule that no pupil should, during the school term, attend a social party, and expelled the plaintiff for a violation of that rule by permission of his parents. In an action for damages for such expulsion—*held*, that the directors had exceeded their powers, but inasmuch as there was no malice, willfulness or oppression, they were not liable. *Dritt v. Snodgrass*, 27 R. 343.

The trustees of free public high schools had statutory authority to direct what branches should be taught, and to adopt and enforce all necessary rules and regulations for the management and government of the schools. A candidate for admission passed a satisfactory examination in all the required branches except grammar, and was refused admission on account of that deficiency. His father did not wish him to study grammar. *Held*, that a rule or regulation denying him admission on that account was unreasonable, and that *mandamus* would lie to compel his admission to study the other branches. *Trustees of Schools v. People*, 29 R. 55.

10. Their liability. — School trustees are liable in trespass for assessing an illegal tax voted by the district to change the site of its schoolhouse, and for issuing a warrant to collect such tax. *Baker v. Freeman*, 24 D. 117.

Statutory powers and duties of a superintending school committee relative to the expulsion of pupils being of a semi-judicial character, for an honest though erroneous decision they are not liable to the expelled pupil. *Donahoe v. Richards*, 61 D. 256; unless they act wantonly or maliciously. *McCormick v. Burt*, 35 R. 163.

The plaintiff, a scholar in a public school in the city of New York, was injured by falling into an excavation carelessly left open in the school yard by workmen in repairing the school building. The repairs had been ordered by the school trustees of the ward, who acted gratuitously, and were under the direction of the superintendent of school buildings. No personal negligence was shown in any of the defendants. *Held*, that neither the trustees nor the superintendent were liable. *Donovan v. McAlpin*, 39 R. 649.

11. The school fund. — The penalty for not paying school money loaned when

For Index to Notes in American Decisions and American Reports, see Volume I.

due, provided by the Illinois school laws, is imposed only on the borrower, is not assignable, and is not a part of the contract contained in the bond or mortgage given to secure the money loaned, and must be enforced by a special count. *Bradley v. Snyder*, 58 D. 564.

12. School lands. — The disposition of school lands provided for by the Wisconsin revised statutes, chapter 24, is a contract of sale, and not a sale; and therefore, allowing such a contract on credit is not repugnant to the constitutional provision prohibiting a sale on credit. *Smith v. Mariner*, 68 D. 73.

A contract to sell school land as soon as the purchaser shall pay therefor may be assigned under the code. But the assignment does not have to be recorded in the office of the commissioner, nor would its being filed there operate as notice to third persons. Consequently a judgment against a holder of such a contract, who prior thereto had assigned the same, does not affect the title of the assignee, although the plaintiff had no notice of such assignment. *Churchill v. Morse*, 92 D. 422.

13. School buildings. — A school district cannot change the site of its schoolhouse, without the consent of the school commissioners. *Baker v. Freeman*, 24 D. 117.

The use of a public schoolhouse for other than school purposes is unlawful and may be enjoined at the suit of any one injured thereby. *Spencer v. Joint School District*, 22 R. 268.

The petition for an injunction to restrain the use of a public schoolhouse, for other than school purposes, alleged that the plaintiff was "a resident of the school district and a taxpayer therein, that his children attended school in the said schoolhouse, and that, by the improper use of the building complained of, the books of his children were torn, soiled, carried away, lost and misplaced," etc. Held, that plaintiff showed such a personal and private injury and interest as would enable him to maintain the action. *Id.*

A statute authorizing school directors to grant the temporary use of public schoolhouses, when not occupied by schools, for religious, literary and other meetings, and for evening and Sunday schools, is not unconstitutional. *Nichols v. School Directors*, 34 R. 160.

14. Compensation of teachers. — In *quantum meruit* for services rendered as a school-teacher, evidence is admissible to prove that the defendant contracted with the plaintiff individually, and not as a public officer. *Ogden v. Raymond*, 58 D. 429.

Teachers' wages are not subject to deductions for recognized holidays. *School District v. Gage*, 33 R. 421.

15. Rights of pupils, generally. — Between a schoolmaster in a public school and the parents or pupils, there is no privity of contract. *Spear v. Cummings*, 34 D. 63.

A schoolmaster in a public school is not responsible to a parent for refusing to receive and instruct his child. *Id.*

A pupil cannot be excused from reading in a duly prescribed text-book because of conscientious religious scruples; and if expelled for refusal to read in such book, he has no action for damages. *Donahoe v. Richards*, 61 D. 256.

The trustees and faculty of a public university may not refuse admission or exclude students because they are members of a Greek letter fraternity or other secret college society. *State v. White*, 42 R. 496.

The legislature may authorize each common school district to admit or exclude children non-resident in the district. *State v. Joint School District*, 56 R. 653.

16. Separation of white and colored children. — An action is not maintainable against school directors, by one who withdraws his children from school because such directors erroneously admitted colored children. *Stewart v. Southard*, 49 D. 463.

A statute establishing separate systems of schools for white and colored children is not in violation of the fourteenth amendment of the Constitution of the United States, and where appropriate schools for colored children are maintained, such children may be lawfully excluded from schools established for white children. *Ward v. Flood*, 17 R. 405; *Cory v. Carter*, 17 R. 738.

District school directors are bound to furnish equal school facilities for blacks and whites, and where they have furnished three months' instruction for the whites, but none for the blacks, and show no intention to do so, and but a few days more than three months remain of the school year; and they have the funds to do it, they may be compelled by *mandamus* to do so, and may not proportion the school term according to the respective number of scholars in each class. *Maddox v. Neal*, 55 R. 540; *State v. Duffy*, 8 R. 713.

17. School discipline.* — 1. Right of teacher to suspend or expel pupil. — Expulsion from school is the proper remedy for persistent disobedience of a pupil. *Guernsey v. Pitkin*, 76 D. 171.

In matters where the board of control of public schools have made no regulations for the government of the schools, the teachers stand *in loco parentis*, and have inherent power to suspend pupils, for cause, and *mandamus* will not lie to compel such a teacher to reinstate such a suspended pupil. *State v. Burton*, 30 R. 706.

* See note on the authority, duties, and powers of teachers, 76 D. 164-167.

For Index to Notes in American Decisions and American Reports, see Volume I.

2. *Right of teacher to chastise pupil.* *—A schoolmaster's authority extends to the infliction of corporal punishment upon his pupils, subject to the qualification that he may not inflict punishment of a nature to produce lasting injury to body or health. *State v. Pendergrass*, 31 D. 416; but he must not chastise wantonly and without cause, and the chastisement must be proportionate to the offense and within the bounds of moderation, or the schoolmaster will be liable for an assault and battery. *Anderson v. State*, 75 D. 774.

He may punish a pupil for all acts of the latter which are detrimental to the good order and best interest of the school, whether such acts are committed in school hours, or after the pupil has returned home, or while he is engaged in the service of his parent. *Lander v. Seaver*, 76 D. 156; and this right is not affected by the fact that a pupil, voluntarily in the school is of lawful age and therefore not entitled to attend the school. *State v. Miner*, 24 R. 769.

A school teacher is not authorized to inflict excessive chastisement; nor to chastise except for a specific offense which the pupil understands; nor to chastise a pupil for refusing to study a branch from which his father had excused him. *State v. Miner*, 32 R. 128. But the teacher of a public school has the right moderately to chastise a pupil for refusing to render an excuse for absence from school without leave. *Damenhoffer v. State*, 35 R. 216. Or for fighting, against the school rules, although away from the schoolhouse and not in school hours. *Hutton v. State*, 59 R. 776.

The proper test of excessive punishment is the general judgment of reasonable men. *Patterson v. Nutter*, 57 R. 818.

A schoolmaster acts judicially in determining the necessity of punishment, and the extent to which it should be administered, and will be liable only when he punishes under pretext of authority, to gratify malicious feelings. *State v. Pendergrass*, 31 D. 416.

3. *Action for assault and battery against teacher.*—A school teacher is not liable to an action or information for assault and battery, for having chastised, in moderation, a disobedient pupil. *State v. Miner*, 24 R. 769.

A schoolmaster is liable in damages for an excessive punishment of a pupil, even though he acted in good faith and without malice in inflicting it, and considered it necessary, and not excessive; but in case of doubt, he is entitled to the benefit of it. *Lander v. Seaver*, 76 D. 156.

In a prosecution for assault and battery, where the relation of schoolmaster and scholar, parent and child, master and ap-

prentice, or any similar relation is established as a defense, the legal presumption is that the chastisement was proper, and to warrant a conviction this presumption must be rebutted by showing that it was excessive, or without any proper cause. *Anderson v. State*, 75 D. 774.

It is a question for the jury to determine whether the instrument used by a schoolmaster to inflict punishment upon the pupil is a proper one for such purpose. *Lander v. Seaver*, 76 D. 156.

To rebut the presumption or proof of malice in punishing a pupil, it is competent for the schoolmaster to prove that the instrument used by him in punishing the pupil was such as was generally used for such purposes by other teachers in the vicinity. *Id.*

It is competent for a schoolmaster, who is defending himself in an action of trespass for assault and battery upon a pupil, to prove that at a former trial of the same case the plaintiff made no claim that the punishment inflicted was excessive, and that then plaintiff only claimed that the master had no right to inflict the punishment, because the offense of the pupil was not committed in school hours. *Id.*

If evidence that a schoolmaster acted maliciously in administering the punishment should be given by those prosecuting him, evidence that the schoolmaster was ordinarily mild and moderate would be admissible. *Id.*

Where excessive punishment of a pupil is charged against a schoolmaster, evidence that the ordinary management of the latter was mild and moderate is not admissible. *Id.*

4. *What rules are reasonable.*—The reasonable requirements of a teacher must be obeyed by his pupils. *Guernsey v. Pitkin*, 76 D. 171.

The requirement to write compositions is reasonable, and teacher may expel a pupil who persistently refuses to comply with the rule. *Id.*

A rule of a public school, that every scholar on returning from recess shall bring in a stick of wood for the fire, is not "needful for the government" of the school. *State v. Board of Education*, 53 R. 282.

A public school teacher may make a rule forbidding scholars from quarrelling and using profane language on their way home, and to punish them for disobedience of it. *Deakins v. Gose*, 55 R. 367.

A school regulation that the doors shall be locked and no scholars admitted during the opening exercises of the morning session, a period of fifteen minutes, is reasonable, but due regard must be had to the weather, and the age, health and comfort of the excluded pupils. The detention of scholars for a short time after the close of sessions,

* Power to inflict corporal punishment, see note, 31 D. 419.

For Index to Notes in American Decisions and American Reports, see Volume I.

for fault or misconduct, is reasonable, and even if exercised mistakenly, it does not amount to false imprisonment unless malicious. *Fertich v. Michener*, 60 R. 709.

18. Course of study and text books.

1. *In general*.—A father directed his child, who attended a public school, to study only certain of the subjects taught in the school. The teacher, with notice of such direction, required the child to study other subjects, and whipped him for not doing so. *Held*, an unlawful assault. *Morrow v. Wood*, 17 R. 471.

An act of the legislature providing that certain state officers shall contract on behalf of the state, with a designated individual, for furnishing the state for fifteen years with suitable text-books for the use of the public schools of the state, within specified maximum prices, of a certain size and quality, and to be approved by a designated commission, is constitutional. *Curryer v. Merrill*, 33 R. 450.

Under the provision of the school law allowing instruction in "such other branches, including vocal music and drawing," as may be prescribed by the directors or voters, any modern language may be taught. *Powell v. Board of Education*, 37 R. 123.

A rule that pupils in a public high school shall employ a certain period in the study and practice of music, and provide themselves with certain books therefor, is valid, and an expulsion for unexcused disobedience thereof will be sustained. *State v. Webber*, 58 R. 30.

2. Reading the Bible in public schools.

The requirement that the Protestant or any version of the Bible be read in public schools, and imposition of the penalty of expulsion in case of refusal, is not in violation of either the letter or spirit of the constitution. *Donahoe v. Richards*, 61 D. 256.

The requirement that the Bible be used in public schools merely as a reading-book is not an interference with religious belief. *Id.*

The requirement of the use of a particular version of the Bible as a reading-book by pupils who may conscientiously believe it to have been erroneously made, is not an imposition of hurt, molestation, or restraint upon religious worship or sentiments, nor of a religious test; nor is it a subordination or preference of any sect or denomination to another within the constitutional provisions of Maine. *Id.*

The constitution of Ohio does not enjoin or require religious instruction, or the reading of religious books in the public schools of the state. *Board of Education v. Minor*, 13 R. 233.

The legislature having placed the management of the public schools under the exclusive control of directors, trustees, and boards of education, the courts have no rightful

authority to interfere by directing what instruction shall be given, or what books shall be read therein. *Id.*

A statute providing that the Bible shall not be excluded from the public schools, but that no pupil shall be required to read it contrary to the wishes of his parents or guardian, is constitutional. *Moore v. Monroe*, 52 R. 444.

SCIENTER.

By owner of mischievous animal, see ANIMALS, 20.

SCIENTIFIC MEN.

As experts, see WITNESSES, 135.

SCIRE FACIAS.

[Includes the nature, and course of procedure under the writ, generally, and its use to revive a judgment; which latter topic is also treated incidentally under JUDGMENT.]

Against bail, see BAIL, 7, 23-25.

To enforce mortgage, see MORTGAGES, 72.

To revive a judgment, see also JUDGMENT, 129.

When necessary, effect, etc., see EXECUTION, 22.

1. *General nature of the proceeding*.—The forty-fifth chapter of 13 Edward I., giving a writ of *scire facias*, is in force here by virtue of the provisions of the act of November 6, 1829, which adopts the common and statute laws of England which are of a general and not a local nature, with certain exceptions and provisos. *Union Bank v. Powell*, 52 D. 367.

2. *Power to issue the writ*.—Courts cannot acquire jurisdiction by the process of *scire facias* over disputed questions relative to grants. *Scire facias* is always founded upon a record, and issues from and is made returnable to the court where the record is kept. *Walker v. Wells*, 63 D. 252.

Courts have no jurisdiction of a bill to set aside a patent, which bill alleges that the complainants are the heirs of a certain person who "gave in for a draw" at a land lottery; that their devisor's name was improperly written; that a third person procured a grant to himself through the use of their devisor's name; and that the defendant had since purchased the land thereby acquired at sheriff's sale. This although defendant had purchased it with full knowledge of these facts. *Id.*

3. *In what cases it will lie*.—*Scire facias* would afford no adequate remedy as a means of inquiring into the manner in which a grant had been issued, as it only reaches such matters as appear upon the face or within the body of the grant. *Walker v. Wells*, 63 D. 252.

Scire facias will lie to recover for a newly discovered breach of an agent's bond, which

For Index to Notes in American Decisions and American Reports, see Volume I.

had passed into judgment, where the bond was given by the agent to secure his accounting and payment of sums collected by him to an insurance company in whose employ he was. The company had no means of discovering that the agent had received the money at the time of the rendition of the former judgment; and the fraudulent concealment, upon its discovery, constituted a new breach and such concealment is a sufficient reason for not including the sum in the original pleading and judgment. *Johnson v. Provincial Ins. Co.*, 86 D. 49.

4. Use of the writ to revive a judgment.*—1. In general.—A pending *scire facias* is not transferred by the act transferring "all suits and causes pending" in one court into another, but may be prosecuted to judgment in the former court, where the record is. *Dougherty's Estate*, 42 D. 326.

A judgment against an heir under the act of 1784, c. 11, sec. 3, subjecting lands acquired by descent to the ancestor's debt, to be valid, the *scire facias* must be served personally on the heir, and, if a minor, with general guardian, upon the guardian also. *Combs v. Young*, 26 D. 225.

A creditor has no right to call upon a person or his heirs for the rents and profits of a tract of land received by them prior to the time that he acquired a lien on such land by judgment or otherwise. *Ib.*

Where the defendant in an action was personally served and suffered default, being at the time subject to the jurisdiction of the court, and subsequently a writ of *scire facias* was issued to give effect to such judgment, and served upon him, by leaving it at his last place of abode, he having in the mean time removed out of the jurisdiction of the court, such service is sufficient to give the court jurisdiction of the defendant in such *scire facias* proceeding. *Adams v. Rowe*, 25 D. 266.

A judgment rendered in such a proceeding is not open to an examination in the courts of the state to which the defendant has removed, where it is attempted to be enforced against him by suits in those courts. *Ib.*

A judgment on *scire facias* reviving a judgment is conclusive as to the existence of the debt, as respects innocent purchasers, though the original judgment was in fact satisfied, and the judgment reviving it was confessed by an attorney without authority. *Irvine v. Nixon*, 51 D. 559.

A defendant in *scire facias* cannot avail himself of any ground of defense which was open to him in the suit of which that is a continuation, *semble*. *Smith v. Eaton*, 58 D. 746.

An objection that the service of *scire facias* to revive a judgment was void, because in-

stead of having a sheriff's return of service upon it, it had an acknowledgment signed by the administrator, that it was personally served upon him, and that consequently the judgment was a nullity, cannot be made so as to defeat an action of ejectment brought by a purchaser on execution under the judgment. *Draper v. Bryson*, 57 D. 257.

2. Who may issue—when may issue.—A clerk of court has no power or authority to issue *scire facias*. Its issuance is a judicial act based upon a suggestion entered of record and it must be awarded by the court. *Frierson v. Harris*, 94 D. 220.

Scire facias before an execution is necessary, only when the judgment is signed under the statute of Charles II., after the first vacation, so that the execution cannot be tested during the life time of the party who died. *Dibble v. Taylor*, 42 D. 368.

Scire facias may be had to make executors or administrators parties to the judgment, in case the defendant dies after interlocutory judgment, and a second *scire facias* is necessary to give them opportunity to plead no assets, or other matter, in their defense. *Ib.*

Scire facias may be had against personal representatives, where there is only one plaintiff or defendant, who dies after final judgment and before execution, but is not necessary if execution be taken out in such time that it may be tested in his life time. *Ib.*

A judgment creditor seeking to subject the real estate of a judgment debtor, who has died after judgment, to the payment thereof, must, before taking out execution, cause the heirs to be summoned by *scire facias*, to show cause why execution should not issue. *Frierson v. Harris*, 94 D. 220.

3. When may not issue.—*Scire facias* issued upon a final judgment, rendered upon the execution of a writ of inquiry, on a judgment by default, to revive the judgment against the personal representatives of the debtor, will be inoperative if it appears that after the judgment by default and before the final judgment, the judgment debtor had died. *Carter v. Carrier*, 24 D. 585.

The object of a *scire facias*, issued against an administrator, is to enforce a lien previously established and fixed upon the property of deceased, and where there is no such lien the *scire facias* is powerless. *Ib.*

If a judgment is signed in the lifetime of the defendant, no *scire facias* is necessary, to have execution against him during the vacation after the judgment term; and if defendant dies after final consideration and before entry, judgment may be entered as at common law, and no *scire facias* is necessary, to have against him an execution which at common law would properly have been tested in his lifetime. *Dick v. Taylor*, 42 D. 368.

* See an important monographic note on *scire facias* to revive a judgment, 94 D. 221-246.

For Index to Notes in American Decisions and American Reports, see Volume I.

Scire facias cannot issue to revive a judgment against the heirs of a deceased judgment debtor. It should issue to show cause why execution should not be issued against the real estate of the ancestor, descended to the heirs. *Frierson v. Harris*, 94 D. 220.

To authorize the issuance of *scire facias* to subject real estate in the hands of the heir to the satisfaction of a judgment against the ancestor, a suggestion must be made upon the record of the fact that real estate has descended to the heir; and without this the *scire facias* is irregular and void. *Id.*

4. *Effect of the proceeding.*—An action of *scire facias* is not original, but is wholly dependent upon a liability previously created by a judgment. *Carter v. Carriger*, 24 D. 585; and is the continuation of an action already commenced, whenever it is used to carry into effect a former judgment against a party to it. So *held*, in a *scire facias* against one who had been charged as a trustee in a process of foreign attachment. *Adams v. Roe*, 25 D. 266; and in a *scire facias* to revive a dormant judgment. *Irwin v. Nixon*, 51 D. 559.

The revival of a judgment by *scire facias* continues its vitality, with the lien and other incidents, from the time of its rendition. *Irwin v. Nixon*, 51 D. 559.

5. *Sheriff's return.*—A sheriff's return to a *scire facias* cannot be controverted. *Blythe v. Richards*, 13 D. 672.

6. *Rules of pleading.*—The writ is properly said to run in the name of a person or the government from whom the command on the face of the writ appears to emanate. *Johnson v. Provincial Ins. Co.*, 86 D. 49.

An objection to the writ, that it is not tested in the name of the people, will not be allowed as an objection that the style of the writ was not in the name of the people, or that it did not run in their name. The courts will not permit the amendment of an objection which is purely technical, and which, as amended, would tend to overthrow substantial justice. *Id.*

SCROLL.

When a valid seal, see SEAL, 2.

SEAL.

As evidence of consideration, see CONTRACTS, 29.

Necessity and sufficiency of, see DEEDS, 21-23; PROCESS, 5; RELEASE, 7.

Of notary, sufficiency and effect of, see NOTARIES PUBLIC, 7.

On execution, see EXECUTION, 3.

Proof of affixing, see EVIDENCE, 183.

To corporate contracts, see CORPORATIONS, 104-108.

To ordinary penal bond, see BONDS, 3.

To protest, see BILLS AND NOTES, 184.

Warrant of arrest must have, see ARREST, 16.

1. *What sufficient.*—Several co-signers of a sealed instrument may adopt the same seal. *Ludlow v. Simond*, 2 D. 291.

Where a seal or scrawl is not affixed to some of the names of the obligors in a bond which indicates upon its face an intention to seal it, it will be presumed that those obligors against whose names no seals appear, adopted the seals affixed by the others, and all will be bound, but the presumption may be rebutted by plea and proof. *Davis v. Burton*, 36 D. 511.

A printed impression of a seal is not a seal, and a contract of insurance having thereon such impression is not, therefore, a sealed instrument. *Mitchell v. Union Life Ins. Co.*, 71 D. 529.

2. *When a scroll is sufficient.*—A scroll annexed to a signature is not sufficient to make a sealed instrument, unless it appear from some expression in the body of the instrument that it was intended as such. *Austin v. Whitlock*, 4 D. 550.

Wax, wafers, or something capable of receiving an impression is, by the law of New Jersey, necessary to constitute a seal, except in instruments for the payment of money, on which a scroll, ink, or other device, affixed by way of seal, is made by the statute to have the same effect as if sealed with wax. *Perrine v. Cheeseman*, 19 D. 388.

To constitute a sealed instrument under the statute, it must express in its body that it is sealed, and the persons executing it must affix scrawls by the way of seals. *Grimsley v. Riley*, 32 D. 319.

A flourish in the continuation of the last letter of a name upon the affixing of a signature, is not such a scrawl as will constitute a seal, where it is not made by way of seal, though the instrument to which the signature is affixed expresses on its face that it is sealed. *Id.*

3. *Effect of unnecessarily affixing seal.*—Affixing a seal, when unnecessary to the validity of a contract, will not vitiate it. *Robinson v. Crowder*, 17 D. 762; *Price v. Alexander*, 52 D. 526.

4. *When objection of "no seal" must be taken.*—The word "seal," embraced in brackets, and appearing in a copy of an instrument embodied in the record on appeal, imports that the proper seal is affixed to the original, unless objection is taken at the trial on this ground. *Touchard v. Crow*, 81 D. 108.

SEALED INSTRUMENTS.

As means of evidence, see EVIDENCE, 205-211.

By lunatics, see INSANE PERSONS, 5.

Disability of wife to execute, see HUSBAND AND WIFE, 33.

Liability of infants on, see INFANTS, 23.

For Index to Notes in American Decisions and American Reports, see Volume L.

Power of partner to bind firm by, see PARTNERSHIP, 45.

What lapse of time bars action on, see LIMITATIONS OF ACTIONS, 41.

When charge on wife's separate estate, see HUSBAND AND WIFE, 51.

SEALED VERDICT.

In civil cases, see TRIAL, 114.

In criminal cases, see TRIAL, 204.

SEAMEN.

Rights and duties of, see SHIPPING, 39-45.

SEARCH.

For best evidence, to let in secondary, see EVIDENCE, 54.

Of person arrested, see ARREST, 18.

SEARCH WARRANTS.

See PROCESS, 37.

SEA WEED.

Right to take, see RIPARIAN RIGHTS, 17.

SEA-WORTHINESS.

Warranty of, in marine insurance, see INSURANCE, 108-112.

SECONDARY EVIDENCE.

Under what circumstances admissible, see EVIDENCE, 45-61.

SECRECY.

Of the ballot, see ELECTIONS, 9.

Of the grand jury room, see INDICTMENT, 5.

SECRETARY.

Of corporation, see CORPORATIONS, 162.

Of state, see OFFICERS, 57.

SECURITIES.

Effect of usury on, see USURY, 17, 18.

Marshaling, in foreclosure, see MORTGAGES, 99.

SECURITY.

For costs, see COSTS, 21.

Of guardian *ad litem*, see INFANTS, 49.

Of public officers, see OFFICERS, 10.

On appeal, see APPEAL, 82-85; VI.

On appeal in criminal cases, see APPEAL, 140.

On motion for injunction, see INJUNCTION, 47.

On writ of error, see ERROR, 13.

Taking new, when discharges guarantor, see GUARANTY, 26.

When required from executor, see EXECUTORS AND ADMINISTRATORS, 4.

When required from legatee, see LEGACIES, 31.

SEDUCTION.

[Includes both the civil action, and the criminal prosecution for seduction. Abduction of a woman for immoral purposes is under ABDUCTION; and the effect of seduction to aggravate damages in actions for breach of promise to marry, is under MARRIAGE AND DIVORCE.]

I. THE CIVIL ACTION.

II. THE CRIMINAL PROSECUTION.

L. THE CIVIL ACTION.

1. Who may sue.*—At the trial it appeared that the injured girl, who was the sister of the plaintiff's wife, was at the time of the seduction, taking care of the plaintiff's household, without paying board, during the sickness of the plaintiff's wife, upon an understanding with the plaintiff, but with no agreement with her father or herself as to the payment of wages, or for any definite period of service. *Held*, that this did not establish the relation of master and servant so as to give a right of action to the plaintiff. *Blanchard v. Haley*, 21 R. 535.

A guardian cannot, as such, maintain an action for the seduction of his ward. *Id.*

2. Time within which to sue.—In case of seduction, followed by repeated sexual intercourse, the statute of limitations attaches to the first act of intercourse. *Franklin v. McCorkle*, 57 R. 244.

3. Right of female seduced to sue.†—No action can be maintained by an unmarried woman for seducing her, under pretense of a design to marry her, there being no allegation of a promise of marriage. *Paul v. Frasier*, 3 D. 95; *Weaver v. Backert*, 44 D. 159; even if seduction is followed by impregnation. *Roper v. Clay*, 59 D. 314.

Where a female has been seduced while a minor, her father has a right of action for such seduction after she attains her majority. This right of action is not taken away or negatived by the provision of the statute which gives to an unmarried female the right to prosecute an action for her own seduction. *Stevenson v. Bellmap*, 71 D. 392.

A statute authorizing a woman to prosecute an action in Indiana, for her own seduction, gives her no right of action where the seduction was accomplished in another state, although the illicit intercourse continued in Indiana. *Buckles v. Ellers*, 37 R. 156.

4. Father's action founded on loss of service.‡—1. When the action may be brought.—If a daughter living with her father and in his service, though above the age of twenty-one, be seduced, *case per quod*

* Right of action, in whom vested, see note, 4 D. 408-407.

See monographic note on actions for seduction, 44 D. 163-179.

† Right of female seduced to sue, see note, 44 D. 165, 166.

‡ Parent's right of action, see note, 44 D. 162-168.

For Index to Notes in American Decisions and American Reports, see Volume I.

servitium amittit will lie in favor of the father, and any slight service will be sufficient to raise the inference that she was his servant. But if she is not in his actual service when the injury is done, the action cannot be sustained. *Mercer v. Walsley*, 9 D. 486.

The father may recover for the seduction of a minor daughter residing with defendant, having left her father's house with his consent and license to appropriate her time and money to her own use, and not intending to return. *Boyd v. Byrd*, 44 D. 740.

A father may maintain an action for the seduction of his minor daughter, though she did not reside with him at the time, if she was subject to his control and he was entitled to command her services. *Hornketh v. Barr*, 11 D. 568; unless he has divested himself of his right to control her and to require her services. *Emery v. Gowen*, 16 D. 233.

The seduction of a female apprentice, while she is a minor and after her master turns her away, or after, with the consent of the master, her return to reside with her father, gives the latter a cause of action against the seducer. *Id.*

A father's liability to a third person for lying-in expenses of a daughter seduced under age, while a *de facto* servant to another, and after a voluntary relinquishment by the father of all claim to her services, and although he has been at no actual expense, entitles him to maintain an action on the case for the injury. *Clark v. Fick*, 20 D. 639.

Such a voluntary relinquishment without a consideration is a mere revocable license, and as the father may recall the daughter into his service at pleasure, the relation of master and servant still subsists. *Id.*

Where a suit is instituted in the father's name, in such a case, the fact whether he authorized it or not, cannot be inquired into on the trial. *Id.*

An action for seduction is not maintainable upon the relation of parent and child, but solely upon that of master and servant. *White v. Nellis*, 88 D. 282.

An action for the seduction of a daughter over the age of twenty-one may be maintained, if the relations of master and servant exists between the parent and child. The slightest acts of service are sufficient to constitute such relation. *Vossell v. Cole*, 47 D. 136.

The old idea of a loss of services, which lay at the foundation of an action for seduction, has given way to the more enlightened and refined views of the social relation. *Stevenson v. Bellnap*, 71 D. 392.

A ruling to the effect that an action for seduction cannot be maintained unless it is followed by pregnancy or sexual disease is erroneous. *Abrahams v. Kidney*, 6 R. 220.

In an action for seducing the plaintiff's daughter, it appeared that she was employed

by a third person, but that the plaintiff required her to spend a part of every Sunday at home, and that while there she did work for him. *Held*, that she was his servant, so that he could maintain the action. *Kennedy v. Shea*, 14 R. 584.

A father may maintain an action for the seduction of his minor daughter while in the defendant's service if he retained the right to receive her services. Exemplary damages are proper. Evidence of the defendant's pecuniary condition is competent. The fact that the sexual intercourse was procured by force does not take away the right of action. *Lavery v. Crooks*, 38 R. 768.

2. *When not.*—An action for seduction cannot be maintained by a father, where his daughter is above the age of twenty-one years, unless she is actually in his service. *Nickleon v. Stryker*, 6 D. 318; nor when the daughter is of full age and not living in the father's family, but in the actual employment of another person, though working under a contract made by her father, who was to receive her wages. *McDaniel v. Edwards*, 47 D. 331.

A daughter of the age of nineteen years, with the consent of her father, went to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work, but there was no agreement for her continuance in his house for any time. While at her uncle's house she was seduced and got with child, and immediately afterwards returned to her father's house, where she was maintained, and the expense of her lying-in paid by him, though if the misfortune had not have happened, she had no intention of returning to her father. It was held that there was such a constructive service on behalf of the father as entitled him to maintain the action for seduction. *Martin v. Payne*, 6 D. 288.

An action for seduction is founded on the loss of services, real or supposed, and cannot be maintained in favor of a step-father for seduction of his step-daughter after she has left his family and service, even though she returned and was maintained by him during her confinement. *Bartley v. Richmyer*, 53 D. 338.

5. *When the mother may sue.*—An action may be maintained by a mother for the seduction of her minor child, although the seduction took place in the lifetime of the father, and the loss of service happened after his death; the loss of service being the ground of the action. *Coon v. Moffatt*, 4 D. 392.

A mother cannot maintain trespass for the seduction of her daughter, *per quod servitium amittit*, committed in the lifetime of the father, with whom the daughter resided, though after her father's death she remained with her mother, who bore the expense of

*When the mother may sue, see note, 4 D. 408.

For Index to Notes in American Decisions and American Reports, see Volume I.

her lying-in, and supported her and her child. *Logan v. Murray*, 9 D. 422; *Vossel v. Cole*, 47 D. 136.

The mother of an infant daughter is entitled, after the father's death, to the daughter's services, and can therefore maintain an action for her seduction, even though she is in the actual service of another person at the time of the seduction. *Furman v. Van Sice*, 15 R. 441.

A woman, whose husband had been absent and not heard from for more than seven years, brought an action for the seduction of her daughter, thirty-one years old, who had always lived with her, assisted in household work, did errands, and from the time she was fifteen years old worked in a neighboring factory, paying her wages to the mother, who used them in the support of the family. *Held*, maintainable. *Davidson v. Abbott*, 36 R. 767.

6. Form of action. — Actions for seduction are founded in pure wrong upon the rights of the master in the person of the servant, for which trespass or case will lie. *Fairmount Ry Co. v. Stabler*, 93 D. 714. But where a man illegally enters the house of another, and debauches his daughter, the father may have an action of trespass *q. c. f.*, and lay the loss of services as consequential, or he may at his election bring case *per quod*, etc. *Mercer v. Wainalea*, 9 D. 486.

7. Declaration or complaint. — An action for seduction is founded upon the supposed loss of service by the plaintiff, and it must be alleged and proved that the relation of master and servant existed between plaintiff and the person seduced, when the injury was committed. *Vossel v. Cole*, 47 D. 136.

8. Matters of defense.† — The connivance of a parent in the seduction of his child, is a bar to an action therefor. *Vossel v. Cole*, 47 D. 136.

Where a former husband brings suit against the seducer of his divorced wife for damages resulting from such seduction, and the offense of the defendant was the result of collusion between the plaintiff and his wife, or of connivance on the part of the plaintiff, evidence of such collusion would bar the action; but evidence of collusion between the husband and wife in bringing the suit is not admissible in bar of such action. *Rea v. Tucker*, 99 D. 539.

The acquittal of a defendant on an indictment for seduction, on the ground of his subsequent marriage with the person seduced, does not affect a civil action brought against him by her father to recover damages for loss of her services by reason of the seduction. *Echar v. Kistler*, 53 D. 551.

The consent of the party seduced does not

bar the right of the parent in bringing action for seduction by loss of service, nor will it serve to mitigate the offense of the seducer. *McAuley v. Birkhead*, 55 D. 427.

An action for the seduction of plaintiff's daughter cannot be defeated by proof of an indenture of the daughter to defendant, whereby the father lost the right to her services, if such indenture was procured as one of the means of accomplishing the seduction. *Dain v. Wyckoff*, 72 D. 493.

Although the female cannot be interrogated herself as to acts of unchastity with others, yet third persons may be called to testify to their own criminal intercourse with her, and the time and place. *Watry v. Ferber*, 86 D. 789.

It is no objection to the maintenance of the action that the sexual intercourse between the daughter and the defendant was had by force. *Kennedy v. Shea*, 14 R. 584.

9. Evidence for plaintiff, generally.* — Continued attentions for several months, followed by improper intercourse, warrant the inference of seduction. *Clark v. Fitch*, 20 D. 639.

To sustain the action, it is not necessary to show that the defendant used deception, flattery, or false promises to accomplish his purpose; it is sufficient if the seduction resulted from the solicitation, importunity, or from any means or arts used by the defendant. *Reed v. Williams*, 73 D. 157.

In an action for the seduction of a minor daughter, proof of the sexual intercourse followed by pregnancy, confinement and childbirth, all while the daughter was living with the father, is sufficient. *Leucher v. Stetten*, 31 R. 104.

An action for seduction of a daughter may be maintained upon proof that in consequence she became nervous and excitable, and did not appear to be herself, without proof of pregnancy or sexual disease. *Blagge v. Illsley*, 34 R. 361.

10. — as to loss of service. — It is immaterial where the seduction happened, if the daughter was frequently assisting in her father's family. *Wallace v. Clark*, 5 D. 654.

The wounded honor of the family and the laceration of the parental feelings may be regarded in estimating damages. When the father of the seduced female is the plaintiff, no acts of service need be proved if she be a minor; but if she be of age, it must appear that she resided in her father's family, and some acts of service, however slight, must be proved. *Emery v. Gowan*, 16 D. 233.

To support the action by a parent actual or constructive loss of service, or payment of expenses, must be proved. *Clark v. Fitch*, 20 D. 639.

* Rules of pleading in actions for, see note, 44 D. 571, 172.

† Matters of defense, see note, 44 D. 171, 172.

* Rules of evidence in actions for seduction see note, 44 D. 172-173.

For Index to Notes in American Decisions and American Reports, see Volume I.

A father cannot recover for the seduction of his minor daughter without showing loss of service. *Ogborn v. Francis*, 43 R. 394.

The action cannot be maintained upon proof of seduction merely; but the plaintiff must show that a direct injury to his rights as master resulted therefrom. *White v. Nelson*, 88 D. 232.

A parent may maintain an action for seduction of his minor daughter, on proof that a venereal disease was communicated to her by the act, rendering her sick and unable to work. *Id.*

11. —in aggravation of damages.* —The damages are very much in the discretion of the jury; where the act of seduction is proved, all the aggravating circumstances that follow come in by way of increasing the damages. *Stevenson v. Bellnap*, 71 D. 392.

Evidence of a promise of marriage previous to the seduction of a daughter, is not admissible in an action by the father. *Clark v. Fisch*, 20 D. 639; and if it be received, though the jury are cautioned not to consider it in giving damages, the verdict will be set aside. *Gillet v. Mead*, 22 D. 578.

The female may be asked whether the defendant paid his addresses in an honorable way. *Gillet v. Mead*, 22 D. 578.

Evidence that the defendant procured an abortion to be made is admissible in aggravation of damages, if such fact is charged in the declaration; and evidence of an offer of marriage by the defendant, after action brought, is not admissible in mitigation. *White v. Mortland*, 22 R. 100.

If defendant visited plaintiff's daughter as a suitor, and used arts, flatteries, persuasions, and promises of marriage to induce her to have connection with him, these facts may be considered in aggravation, and to increase the plaintiff's damages. This evidence does not refer to a promise of marriage, or a breach thereof, evidence of which cannot be given in this action, either as a basis of it or as affecting the damages. *Stevenson v. Bellnap*, 71 D. 392.

Plaintiff may give in evidence the terms upon which defendant visited his house, and that he was paying his addresses to the daughter upon the promise, and with the intention, of marriage. *Id.*

The plaintiff may recover damages on account of his wounded feelings, and on account of his anxiety as a parent of other children, whose morals may be corrupted by the example. *Id.*

Evidence of defendant's pecuniary ability, and also of the plaintiff's pecuniary circumstances, is admissible, and should be considered by the jury in estimating the damages.

* Evidence of pecuniary circumstances of defendant, when admissible, see note, 36 R. 445, 446.

Evidence of promise of marriage in action by father, see note, 22 D. 578-582.

Groble v. Margrave, 38 D. 88; *McAuley v. Birkhead*, 55 D. 427; *Clem v. Holmes*, 26 R. 793.

Evidence of what defendant had told the plaintiff he was worth is incompetent, and so is evidence of his general reputation for chastity. *Watson v. Watson*, 51 R. 111.

12. Evidence in mitigation of damages.—1. In general.—In an action by a father for loss of daughter's services, defendant's marriage with her, after the birth of the child, is not a bar to the recovery of exemplary damages, but may be given in evidence in mitigation of damages. *Eicher v. Kistler*, 53 D. 651.

Evidence of plaintiff's general moral character, and of his character for chastity in particular, is not admissible in mitigation of damages. *Dain v. Wyckoff*, 72 D. 493.

General evidence of plaintiff's reputation as a man of profligate principles and dissolute habits is admissible in an action for the seduction of his daughter, but evidence of a particular fact in this respect is not admissible, such as that some time before the alleged seduction he had labored under the venereal disease. *Reed v. Williams*, 73 D. 157.

The evidence as to the condition in life and pecuniary circumstances of the respective parties is admissible in an action for the seduction of either a wife or daughter. *Rea v. Tucker*, 99 D. 539.

Evidence that the plaintiff's marriage with his reputed wife was void is, in an action for the seduction of his reputed daughter, admissible on the defendant's part to rebut a presumption of actual service by showing that the plaintiff was not legally entitled to her services; and in mitigation of damages. *Howland v. Howland*, 19 R. 331.

2. Character of the seduced woman for chastity.—The defendant cannot give in evidence her whole moral character, but if the plaintiff ask for damages done to his feelings and the reputation of his family, then it may be proper to inquire into her character for chastity. *Wallace v. Clark*, 5 D. 654.

The defendant is always permitted to prove that the general character of the servant or prosecutrix for chastity is bad; and this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances of unchastity. *Watry v. Ferber*, 86 D. 789.

The question of character is involved in the consideration of the measure of damages; and evidence, therefore, of the character and acts of the female seduced is admissible, which would not be admitted as to other witnesses. *Shattuck v. Myers*, 74 D. 236; *Corder v. Forehand*, 14 D. 317.

Evidence of plaintiff's adultery is admissible in mitigation of damages, but not as a bar to the action, where such plaintiff and

For Index to Notes in American Decisions and American Reports, see Volume I.

husband sue another for damages for a criminal intimacy with the wife of the former. *Rea v. Tucker*, 99 D. 539.

Defendant may prove, in mitigation of damages, that the wife of plaintiff had been guilty of adultery with other persons before her connection with the defendant, where the plaintiff and husband has brought suit against her seducer for damages. *Id.*

In an action brought under a statute for damages for the plaintiff's own seduction, evidence of the plaintiff's previous unchastity, although unknown to the defendant or the public, is admissible in mitigation of damages. *Love v. Masoner*, 32 R. 522.

13. Instructions. — At the trial of an action for seducing the plaintiff's daughter, the admission of evidence that she worked for her father after the seduction furnishes the defendant no ground of exception, if the judge instructed the jury that the plaintiff could not recover unless the relation of master and servant existed between him and his daughter at the time of seduction. *Kensedy v. Shea*, 14 R. 584.

14. Damages recoverable. — The rules relating to excessive damages are very liberal. It is only under extraordinary circumstances that the court will interfere upon that ground. *Stevenson v. Belknap*, 71 D. 392.

Exemplary damages may be allowed. *McAulay v. Birkhead*, 55 D. 427. This right is not affected by the statute giving the daughter an action for the same seduction, in which she may recover damages, although it may result in defendants having such exemplary damages twice assessed against him in a civil suit. *Stevenson v. Belknap*, 71 D. 392.

Injuries to the daughter and to her father are separate and distinct, and there is nothing incompatible or inconsistent in the idea that both grew out of the same act by defendant; or, under a statute giving each an action therefor, that exemplary damages should be allowed in each case. *Id.*

II. THE CRIMINAL PROSECUTION.

15. What constitutes the offense. — "Character," in the statute prescribing that a woman be "of previously chaste character," signifies that which the person really is, in distinction from that which she may be reputed to be. *Andre v. State*, 68 D. 708.

A promise to marry a female which is the inducement to sexual intercourse is sufficient, under a statute providing that any man who, under "promise of marriage," seduces any unmarried female of previous chaste character shall be guilty of a misdemeanor. It is not necessary that the promise should be a valid and binding one

between the parties. *Kenyon v. People*, 84 D. 177.

A statute made it felony for any person, under promise of marriage to have illicit carnal intercourse with a female infant of good repute for chastity. *Held*, that the promise need not be a valid one, in fact, if the infant understood it to be valid; and that the indictment need not allege that the defendant was unmarried at the time. *Callahan v. State*, 30 R. 211.

16. Evidence — Burden of proof. — A child, alleged to have been born of the alleged intercourse, cannot be exhibited to the jury as corroborative evidence for the prosecution on account of its resemblance to the defendant. *State v. Danforth*, 30 R. 387.

An indictment for seduction is not supported by proof that the defendant accomplished his purpose by force, and he is entitled to such an instruction if there is any evidence of force. *State v. Lewis*, 30 R. 407.

On a prosecution for seduction of a woman of "good repute for chastity" the state must affirmatively prove such reputation. *Zabriele v. State*, 39 R. 610; *Oliver v. Com.*, 47 R. 704.

On an indictment for seduction the prosecution must prove the actual personal chastity of the complainant, although the statute is silent as to character or repute. *Folk v. State*, 48 R. 17.

17. Matters of defense, generally. — Plea, that at the time of the alleged seduction defendant was lawfully married, whereof prosecutrix had notice. *Held*, that the plea was good. *Wood v. State*, 15 R. 664.

18. Bad character of prosecutrix. — The chaste character of a female is presumed. *Andre v. State*, 68 D. 708.

To establish the unchaste character of an unmarried female it is not necessary to prove that she has been guilty of previous sexual intercourse; it is sufficient to show that she has been guilty of obscenity of language, indecency of conduct, and undue familiarity with men, and the like. *Id.*

"Previous chastity," in the statute, would signify mere actual chastity or freedom from sexual intercourse; but "previously chaste character" does not signify merely this, but also purity of mind and innocence of heart. *Id.*

Evidence of the general reputation of a female for want of chastity is inadmissible in a prosecution for seduction, under a statute which provides that any man who, under promise of marriage, seduces any unmarried female of "previous chaste character" shall be guilty of a misdemeanor. By "chaste character" the statute means actual personal virtue, and not reputation, and requires evidence of specific acts of

*See monographic note on seduction, as a crime, 87 D. 406-411.

For Index to Notes in American Decisions and American Reports, see Volume I.

lewdness for impeachment. *Kenyon v. People*, 84 D. 177.

A statute provided for the punishing of the seduction of any unmarried woman "of previously chaste character." *Held*, that "character" in the statute referred to moral qualities and not to reputation, and evidence of reputation was not admissible upon the issue of character, but only to impeach or corroborate testimony regarding particular acts of unchastity. *State v. Priser*, 31 R. 155.

An unmarried female may reform and gain a character for chastity, within the meaning of section 4209 of the Iowa Revision of 1880, making the seduction of a female of "previously chaste character" a crime, where she has become unchaste by sexual intercourse. *State v. Carron*, 87 D. 401.

Evidence that a mother's house was one of ill-fame is irrelevant on the question of the daughter's chastity, in a prosecution for the seduction of the daughter, who was a minor, residing with her mother. *Kenyon v. People*, 84 D. 177.

The question of the previously chaste character of the prosecutrix is one of fact for the jury, in a prosecution for seduction. *State v. Carron*, 87 D. 401.

Evidence of previous acts of lewdness and unchastity by the complainant with other men is admissible. *State v. Patterson*, 57 R. 374. *Contra*, see *State v. Brassfield*, 51 R. 234.

19. Corroboration of prosecutrix.—Corroborative evidence is not confined to proof of the illicit intercourse, but extends to proof of other material facts, such as the illegitimacy of the child, the regular and frequent visits of the defendant to the female, his being alone with her at late hours of the night, and his confessions made to others on the subject, and an instruction to this effect is correct. *Andre v. State*, 68 D. 706.

The language of the statute concerning corroborative evidence was, "unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense:" *Held*, that the court was justified in modifying a requested instruction, "that this corroborating evidence should be of a character that goes directly to the commission of the offense," by striking out "to the commission of" and inserting "to strengthen and corroborate the testimony of the injured person, and to point out the defendant as having committed" the offense. *Id.*

Declarations of the injured party, made out of court, are admissible on the trial to show that the testimony of such party as given at the trial agrees with such declarations. *State v. De Wolf*, 20 D. 90.

A defendant having attempted to discredit

the testimony of the prosecuting witness by showing that she had concealed the transaction for more than a year, and assigned as a reason therefor her fear of the defendant, evidence by the prosecution that the prosecuting witness was deaf and dumb, and that such persons have a sense of inferiority to other people, and as a class are easily intimidated, and that they are credulous and submissive, and that such was the character of the prosecuting witness, is inadmissible. *Id.*

Statements by a prosecutrix made soon after the occurrence, detailing the circumstances, are admissible in corroboration of her testimony on the trial, but not as independent evidence. *Phillips v. State*, 49 D. 709; *Laughlin v. State*, 1 D. 444.

It is competent to introduce evidence of the good character of the person seduced, she being a witness for the prosecution. *Turney v. State*, 47 D. 74.

The corroboration of a seduced female's testimony as to her chastity, or being unmarried, is not required, but only as to the promise of marriage, and the intercourse, under a statute providing that no conviction shall be had because of the seduction of an unmarried female, under promise of marriage, "on the testimony of the female seduced, unsupported by other evidence." *Kenyon v. People*, 84 D. 177.

20. Instructions.—An instruction, that certain supposed instances of conduct not involving sexual intercourse rendered the female no longer chaste or virtuous in law, is properly refused, as it takes too much from the jury, and such a proposition cannot be laid down as a sequence of law. *Andre v. State*, 68 D. 706.

21. Conviction.—A defendant may be found guilty of fornication on indictment for seduction. *Dinabey v. Com.*, 55 D. 542.

SEISM.

Covenant of, and how broken, see COVENANTS, 21, 22.
Damages for breach of covenant of, see COVENANTS, 55.
In husband, to give widow dower, see DOWER, 12-14.
Of wife, to create tenancy by curtesy, see CURTESY, 2.

SEIZURES.

By military officers, in time of war, see WAR, 4, 23.
Of unfinished counterfeit coin, see COUNTERFEITING, 10.
Of vessels, for violation of municipal law, see INTERNATIONAL LAW, 2.
Right to abandon in cases of, see INSURANCE, 150.
Warranty against, in marine policy, see INSURANCE, 114.

For index to Notes in American Decisions and American Reports, see VOLUME I.

SELECTMEN.

Powers of, respecting highways, see HIGHWAYS, 18.

SELF-CRIMINATION.

Compelling accused to exhibit his person, see HOMICIDE, 36.

SELF-CRIMINATING TESTIMONY.

Privilege as to, see WITNESSES, 116-119.

SELF-DEFENSE.

The defense, generally, see CRIMINAL LAW, 12.

In actions for assault, see ASSAULT, 12.

In homicide cases, see HOMICIDE, 51.

In prosecutions for assault, see ASSAULT, 24.

Resisting wrongful arrest, see ARREST, 23.

SELLER.

Rights of, lien, etc., see SALES, 25.

SENTENCE.

Commutation of, for good behavior, see IMPRISONMENT, 7.

For contempt, see CONTEMPT, 24.

Reversal for improper, see APPEAL, 161.

Upon conviction, generally, see TRIAL, 212-219.

SEPARATE ESTATE.

Of married woman, see HUSBAND AND WIFE, IV.

Of wife, what conveyance will pass, see HUSBAND AND WIFE, 68.

SEPARATE MAINTENANCE.

Agreements for, see MARRIAGE AND DIVORCE, 43-45.

SEPARATE TRIALS.

In civil actions, see TRIAL, 5.

In criminal cases, see TRIAL, 163.

SEPARATION.

Effect of, as respects community property, see HUSBAND AND WIFE, 83.

Liability of husband for necessities after, see HUSBAND AND WIFE, 18, 19.

Of goods sold, see SALES, 39.

Of jury, when ground for reversal, see APPEAL, 158; NEW TRIAL, 19, 74.

Of white and colored pupils, see SCHOOLS, 16.

SEQUESTRATION.

Of witnesses, see WITNESSES, 99.

SERVANTS.

Carrier's liability for negligence or tortious acts of, see CARRIERS, 65, 66.

Competency of, as witnesses, see WITNESSES, 58.

Embezzlement by, see EMBEZZLEMENT, 4.

Larceny by, see LARCENY, 15.

Of railroad companies, powers and duties of, see RAILROAD COMPANIES, 37-41.

See MASTER AND SERVANT.

SERVICE.

Of attachment, see ATTACHMENT, 54.

Of copy of appeal bond, see APPEAL, 85.

Of copy of indictment, see TRIAL, 123.

Of notices, generally, see NOTICE, 7.

Of notice of dishonor, see BILLS AND NOTES, 195-206.

Of notice of taking deposition, see DEPOSITIONS, 4, 14.

Of papers in supplementary proceedings, see EXECUTION, 196.

Of pleadings, proof of, see PLEADING, 166.

Of process, generally, see PROCESS, 9-35.

Of process in foreclosure, see MORTGAGES, 81.

Of process in suits against husband and wife, see HUSBAND AND WIFE, 108.

Of process in suits by or against infants, see INFANTS, 41.

Of process on corporation, see CORPORATIONS, 203, 204.

Of process on Sunday, see SUNDAY, 8.

Of process, rights, powers, and duties of sheriffs, see SHERIFFS, 4-15.

Of process, what sufficient to support judgment, see JUDGMENT, 14.

Of subpoena to testify, see WITNESSES, 1.

Of writ of injunction, see INJUNCTION, 49.

Of writ of mandamus, see MANDAMUS, 26.

Proof of, when evidence, see EVIDENCE, 192.

SERVICES.

[Includes the doctrine of implied contracts to pay for services rendered, and also general principles of construction of express contracts for services. In connection with this title, MASTER AND SERVANT should be consulted, as well as the references given below.]

Actions for, see ASSUMPSIT, 11-13.

Compensation of partner for special, see PARTNERSHIP, 67.

Contracts for, by infants, see INFANTS, 21.

Contracts for, when enforced in equity, see SPECIFIC PERFORMANCE, 7.

Contracts for, when within statute of frauds, see CONTRACTS, 44.

Liability of city for, see MUNICIPAL CORPORATIONS, 62.

Liens for, see LIENS, 14.

Measure of damages in actions for, see DAMAGES, 24.

Of child, right to, see PARENT AND CHILD, 4.

Of representatives, when compensation allowed for, see EXECUTORS, etc., 144.

Of wife, right of husband to, see HUSBAND AND WIFE, 2.

Proof of loss of, see SEDUCTION, 10.

Upon chattels, see BAILMENT, 29.

1. When a contract to pay for services will be implied.* — Where one ren-

* When deemed gratuitous, see note, 58 D. 303, 307.

For Index to Notes in American Decisions and American Reports, see Volume I.

ders services as an act of kindness, they cannot afterward form the foundation of a pecuniary demand on contract. *James v. O'Driscoll*, 1 D. 632. However beneficial such labor may be, he cannot recover therefor. *Bartholomew v. Jackson*, 11 D. 237. A party is only entitled to wages when he has stipulated for them, or when, by implication, the person who received the services promised to pay for them. *Jacob v. Ursuline Nuns*, 5 D. 730.

To constitute liability on an implied contract, where work is performed by one, the benefit of which is received by another, there must not only be no restrictions imposed by law upon the party sought to be charged against making, in express terms, a similar contract to that which is implied, but the party must also be in a situation where he is entirely free to elect whether he will or will not accept of the work, and where such election will or may influence the conduct of the other party with reference to the work itself. *Zottman v. San Francisco*, 81 D. 96.

Where a son supports his decrepit parents in his own house, the presumption that it is gratuitous may be overcome by declarations by the parent of an intention to pay; but the parent's declarations, not in the son's presence, cannot prove a contract more favorable for himself. *Miller's Appeal*, 45 R. 394.

Services rendered a person during his last illness as nurse and housekeeper are not deemed to be gratuitous, but, on the contrary, there is an implied contract that the party receiving such services is to pay a fair compensation therefor. The fact, if it were shown, that the nurse or housekeeper lived with the man she was nursing and taking care of, as his concubine, does not impair or lessen her claim for wages, unless it be alleged and shown that concubinage was the motive and cause of their living together in the first instance, and the services rendered were merely incidental to that mode of living. *Succession of Pereuilhet*, 8 R. 595.

If services are rendered at the request of a party, he is liable to pay therefor, although the services were rendered in expectation of a legacy. *Roberts v. Swift*, 1 D. 295.

2. — as between parties occupying a personal relation. — A promise to pay for services rendered between members of same family will not be presumed. *Williams v. Hutchinson*, 53 D. 301.

Where children work for their parents after arriving at age, the law implies no contract on the part of the parent to pay for the services. *Poorman v. Kilgore*, 67 D. 425.

A son may recover from his father's estate an amount equal to the value of personal services rendered in the lifetime of his parent as overseer upon his plantation, when it appears that there was an understanding that the services were not to be gratuitous, and

there was no provision made for the son in his father's will. *Price v. Price*, 34 D. 608.

A neglect to sue until after the death of a parent, by a son who had rendered certain services in the lifetime of the former, in expectation that provision would be made for him in the parent's will, by way of reward, is not such neglect as will bring the demand within the statute of limitations, so as to bar an action for its recovery. *Id.*

A daughter may recover, as upon an implied contract, for necessary services rendered by her to her insane mother with the intention of charging for them. *Reardo v. Misplay*, 59 R. 13.

If a grandparent receives his grandchild into his family as a member of it, no presumption is raised of a promise on the part of the grandparent to pay the grandchild for services such as a child generally renders as a member of the family. *Dodson v. McAdams*, 60 R. 408.

Where the grandparent declared several times that he intended to give her a part of his property as he would his children, and that she should be paid for the services, — held, not sufficient to prove a promise to pay for her services. *Id.*

Such services are not gratuitous, but are presumed, in the absence of evidence of an express promise, to be rendered as a recompense for the care and protection extended to the child. *Id.*

A promise to pay for work and labor is not implied where the conduct, situation, and mutual relations of the parties do not show that a claim for payment would be just. And therefore, where nephews worked for their bachelor uncle for many years without any contract for compensation, and on his death inherited from him an amount largely exceeding a reasonable compensation, no contract for compensation will be implied. *Weir v. Weir*, 39 D. 487.

An infant at the age of eleven years was taken into the family of his uncle, and remained, without any contract, until his majority, working for his uncle and receiving his maintenance from him. On coming of age he remained with his uncle for five years, working his farm on shares three months of each year, and the rest of the time working for him without any contract, and furnishing his own clothing, washing, and medical attendances. Held, that a contract might be implied on the part of his uncle to pay him the reasonable value of such services after majority. *Morton v. Rainey*, 25 R. 311.

Plaintiff resided with her brother for many years, being supported and cared for by him during that time as a member of his own family, and after his death sued his administrator for services rendered by her for her brother while she so lived with him. Held, that the presumption, created by the

For Index to Notes in American Decisions and American Reports, see Volume I.

near kinship of plaintiff and deceased, that no payment was intended for such services, could only be overcome by clear and satisfactory proof of an express contract to pay for them. *Hall v. Finch*, 9 R. 559.

3. Interpretation of express contracts for services.—When an express contract is in force, the law does not recognize an implied one; and when services are performed under an express contract, the action to recover for such services must be under the express contract, and that only, unless in consequence of the fault or consent of the defendant. *Wake v. Merrill*, 16 D. 238.

A contract for service must be certain and definite as to the nature and extent of service to be performed, the place where, and the person to whom it is to be rendered, and the compensation to be paid, or it will not be enforced. *Parsons v. Trask*, 66 D. 502.

An oral promise of a decedent that if his niece would live with him and his wife, he would give her a good home as long as he lived, and provide for her at his death, and she should never want as long as she lived, is too indefinite for enforcement. *Wall's Appeal*, 56 R. 238.

A special contract fixing the terms and conditions on which one party shall serve another is, in the absence of proof altering or rescinding it, conclusive. *Wallace v. Floyd*, 72 D. 620.

One will serve on old terms if he agree to serve another for a specified time at a stipulated sum and he continues longer in service, in the absence of a special bargain altering or enlarging the original agreement. *Ib.*

In an action for services, it is no defense that the services were rendered while the claimant was an employee of a third person in another line of business, and both during and out of the business hours of such third person. *Wallace v. De Young*, 38 R. 108.

4. Breach by employee, and its effect.—A contract to serve for three months at an agreed salary per month is entire, and if the service is left before the expiration of the three months, no recovery can be had. *Wright v. Turner*, 18 D. 35.

Where one represents himself as a workman, he impliedly covenants that he will skillfully perform the work upon which he is engaged. If, from want of skill upon his part, the work upon which he is engaged prove valueless, he is not entitled to a recovery for his labor. *McDonald v. Simpson*, 38 D. 45.

5. Rules for pleading.—To recover the value of services, no demand is necessary. *Norris v. School District*, 28 D. 182.

6. — of evidence.—The most satisfactory proof of the standard of value of services is that which the parties fix for themselves. *Wallace v. Floyd*, 72 D. 620.

7. Claims for extra services.—A statute provided that "eight hours' work done in any one day shall be deemed a lawful day's work, unless otherwise agreed by the parties." Plaintiff, under a contract for a fixed price per week, worked sixteen hours per day. *Held*, that he could not recover double the agreed price. *Luske v. Hotchkiss*, 9 R. 314.

8. Quantum meruit.—One who engages to serve another for a specified time for a certain sum cannot, against the consent and without the fault of the other, leave his service before the expiration of the time, and recover on a quantum meruit. *Stark v. Parker*, 13 D. 425.

When one performs services for another, under a mutual understanding that the latter will make compensation therefor by a legacy in his will, such services are not gratuitous, and if the recipient of them does not give the expected legacy, an action lies against his representative for their value. *Martin v. Wright*, 28 D. 468.

SERVITUDES.

In favor of owner of burial plot, see CEMETERIES, 4.

Consult EASEMENTS.

SESSIONS.

Of courts, see COURTS, 8.

Of legislature, see LEGISLATURE, 1.

SET-OFF—COUNTERCLAIM.

[Includes the common-law right to offset one cross-demand against another; the doctrine of the set-off of judgments; and the modern practice, introduced by the codes of procedure, of interposing counterclaims. For matters of set-off or counterclaim peculiar to any particular form or cause of action, see its title.]

By or against firm creditors, see PARTNERSHIP, 32.

In actions by personal representatives, see EXECUTORS, etc., 157.

Of agent's debt, against undisclosed principal, see AGENCY, 85.

I. SET-OFF OF CROSS-DEMANDS.

II. SET-OFF OF JUDGMENTS.

III. PROCEDURE.

IV. COUNTERCLAIM.

I. SET-OFF OF CROSS-DEMANDS.

1. General principles.—A set-off means a cross-claim on which defendant might sue the plaintiff, and is not allowable if no such cross-action would lie thereon. *Annan v. Houck*, 45 D. 133.

The law of set-off before judgment is regulated entirely by statute. *Chandler v. Drew*, 26 D. 704.

Under the act of 1705, a defendant who establishes a set-off in excess of plaintiff's demand has no lien upon the latter's real estate for the payment of such excess. It can only be made a lien by judgment in *scire facias*. *Ramsey's Appeal*, 27 D. 301.

For Index to Notes in American Decisions and American Reports, see Volume L

The defendant is not bound to set off his debt against the plaintiff's demand, except in suits before a justice of the peace. *Morton v. Bailey*, 27 D. 767.

Mutual debts do not extinguish each other *per se*, unless by some positive act or agreement of the parties the intention to satisfy and discharge their respective debts is clearly indicated. *Post v. Carmalt*, 37 D. 484.

3. Jurisdiction at law. — The courts of law in Pennsylvania have adopted the equitable doctrine of setting off mutual demands, wherever it is possible. *Morgan v. Bank of N. A.*, 11 D. 575.

The right of set-off before judgment is statutory entirely, and exists only in cases provided for by the statute. *Annam v. Houch*, 45 D. 133.

A cross-demand may be set off in an action at law. *Downs v. Jackson*, 85 D. 289.

3. — in equity. — The right to an offset in chancery exists independently of statute, and is controlled only by the general principles of equity. *Jeffries v. Evans*, 43 D. 158.

Courts of chancery exercised a jurisdiction upon the subject of set-offs before the statutes of set-off existed. *Blake v. Langdon*, 47 D. 701.

The English statutes of set-off were passed mainly to obviate the necessity of a resort to chancery in every case of mutual independent claims upon both sides. *Id.*

The plaintiff was located and doing business in Washington City, and recovered judgment in a court of Baltimore. The defendant had a claim for damages growing out of the same transaction. *Held*, that the mere fact that the plaintiff was a non-resident of Baltimore did not give the court of equity of that city jurisdiction to restrain the judgment against the defendant and to enforce the set-off. *Smith v. Washington Gas Light Co.*, 100 D. 49.

4. Law of place. — Where the law of a state where a contract was made gave a party a right to plead a certain matter by way of set-off, the party, when sued in another state, may plead the same by way of set-off, although such right of set-off is not given under the laws of the latter state; for the right of set-off relates to the merits, and not to the form of proceeding. *Vermont Bank v. Porter*, 5 D. 157.

A set-off allowed by a local law is regarded as part of the remedy, and consequently is admissible against claims sued on in this state by persons belonging to other states or countries, although it would not be admissible by the law of the country where the debt which is sued was contracted. *Davis v. Morton*, 96 D. 345.

The laws of set-off and of tender belong rather to the remedy than to substance, and therefore are always regulated by the laws

of the state in which the action is brought, and not by the law of the place where the obligation sued on was made. *Id.*

A set-off should be allowed against a note executed in Tennessee, and sued on in Kentucky, where it is allowed by the law of the latter state, but would not have been allowed by the law of Tennessee. *Id.*

5. What demands may be set off, generally.* — Nothing can be set off unless it can be sued upon; and any claim coming within the statute can be set off if it can be sued. *Wallace v. Finnegan*, 90 D. 243.

Legal claims only can form subjects of set-off, or be filed in bar to any action at law; they must be such as the party could sue for and recover at law. *Milburn v. Guyther*, 50 D. 681.

All moneyed demands for which either *indebitatus assumpsit* or debt will lie constitute valid set-offs. *Jenkins v. Richardson*, 22 D. 82.

A defendant may set off a note of plaintiff without surrendering collateral securities, since his right to sue on the note is an absolute one, not in any way affected by his possession of the securities, and a court of law has no power to enforce such equities in the securities as may result to the plaintiff from the allowance of the set-off. *Wallace v. Finnegan*, 90 D. 243.

The value of a note received for collection and converted is subject of set-off, and is not unliquidated damages. *Gunn v. Todd*, 64 D. 231.

If the transferrer of a promissory note payable to bearer undertakes to guarantee the payment of it, upon delivery to the transferee, he may be liable on such special contract to him, and such liability is the subject of set-off. *Orenshaw v. Jackson*, 50 D. 361.

A debtor is entitled to set-off in equity payments made by him to discharge indebtedness of the plaintiff to a third person, and this, although the debtor showed no authority to make the payments. *Lofland v. Maulk*, 12 D. 106.

Where a judgment has been satisfied by a levy upon the property of one defendant, the claim which accrues to him may be set off in an action brought against him by his co-defendant, or by his assignee, where, under the statute, the latter is subject to the same set-offs as the former. *Kershaw v. Merchants' Bank*, 40 D. 70.

The unascertained value of services and materials stipulated to be applied in part payment of a debt is properly the subject of a set-off, under the proper plea or notice in *assumpsit* on the debt. *Manville v. Gay*, 60 D. 379.

In an action by or against a trustee, money due to or from a *cestui que trust* may always

* What demands are available as offsets, see note, 12 D. 152-157.

For Index to Notes in American Decisions and American Reports, see Volume I.

be pleaded as a set-off. *Nickerson v. Gilliam*, 77 D. 583.

Where, after the defendant has been defaulted, a subsequent attaching creditor is allowed to defend, he may be allowed a claim of the defendant against the plaintiff in offset to the plaintiff's claim, where there is no other claim on which either the plaintiff or defendant can desire to make application of such offset. *Woodbury v. Woodbury*, 90 D. 555.

A town tax is not a contract, express or implied, which can be applied upon a debt owed by the town to the individual owing the tax. *Johnson v. Howard*, 98 D. 568.

An obligor may plead a set-off, although he has given a bond to secure the payment of the cause of action, not reserving the right of set-off. *Van Sandt v. Does*, 50 R. 759.

6. What may not be. — The defendant in an action cannot set off a bond, executed by the plaintiff to a third person (without mentioning "assigns") for the use of another, and transferred by the obligee to the defendant. *Wolf v. Beales*, 9 D. 425.

Goods held by a consignee are not subject of set-off in an action by the consignee against the consignor for a balance due on account of acceptances paid for the defendants and goods sold to them prior to the commencement of the suit. *Parks v. Ingram*, 55 D. 153.

The statute applies as well to a sum attempted to be set off as to one upon which an action is to be brought. *Nolan v. Blackwell*, 86 D. 206.

Plaintiff lent defendant money with a United States bond as collateral security. After the maturity, but before payment of the note, the bond was stolen from plaintiff. Held, in an action on the note, that the defendant could not set off or recoup the value of the bond. *Winthrop Savings Bank v. Jackson*, 24 R. 56.

A town summoned as trustee or garnishee of an individual cannot set off taxes assessed by it on him against the debt due from it to him. *Hubbard v. Clark*, 22 R. 432.

A debt due to a municipal corporation for taxes cannot be offset by any debt due by the corporation. Thus a tax due for one year cannot be compensated by an overpayment of taxes made by the debtor the year previous. *New Orleans v. Davidson*, 31 R. 228; *Gatling v. Comm'rs of Carteret*, 53 R. 432.

A person lawfully taxed by a municipal corporation cannot set off a debt due him from the corporation against the tax; nor will equity enjoin the collection of the tax until the debt is paid; nor because of a failure to recover the debt through the ordinary legal remedies; nor because of irregularities in the notice of time and place of sale. *Flanagan v. City of Fernandina*, 21 R. 292.

7. What may be recouped.* — Damages may be recouped in action on a sealed instrument, as well as on an unsealed one, by showing a partial failure of consideration, under 2 New York Revised Statutes, page 406, section 77; but notice of the defense is necessary, and it cannot be pleaded where it does not go to the whole consideration. *Van Eype v. Harrison*, 40 D. 314. Or by an employer, in an action for wages for service in a family, for the seduction of his daughter. *Bixby v. Parsons*, 44 R. 246. Or for a failure to execute a contract at the time stipulated, in an action to recover the contract price. *Abbott v. Gatch*, 71 D. 635. Or in an action for the price of an engine, for delay in not furnishing it by a stipulated time; and the damages should be estimated by the value of the use of the engine during the period of delay, not by the profits which would have been realized from running it in connection with the machinery it was intended to drive. *Griffin v. Coleer*, 69 D. 718.

A and B traded horses, each fraudulently representing his horse to be sound. A sued B for his (B's) fraud. Held, that B could recoup damages for A's fraud. *Carey v. Guillou*, 7 R. 494.

8. Demands not yet due not subjects of set-off. — Payment of debt not yet due cannot be enforced by way of set-off until it is due. *Hayes v. Hayes*, 73 D. 709.

A debt not due cannot at its face be offset against another at its face where they bear different rates of interest. *Halleck v. Guy*, 70 D. 643.

A note given by A to B, and not yet due, cannot, in equity, be set off against a note given by B to A, upon which A has brought an action for the benefit of C, to whom he assigned it, although C knew, at the time of the assignment, that A was insolvent, and A was subsequently declared a bankrupt. *Spaulding v. Backus*, 23 R. 391.

The assignment of a non-negotiable demand, arising on contract, before due, defeats a set-off by the debtor of an independent cross-demand, on which no right of action had accrued at the time of the assignment. *Fuller v. Steiglitz*, 22 R. 312.

9. Unliquidated demands. — Uncertain or unliquidated damages arising on a breach of contract cannot be made the subject of a set-off, either in a court of law or equity. *Dugan v. Cureton*, 31 D. 727; *Drew v. Towle*, 59 D. 380; *Smith v. Washington Gas Light Co.*, 100 D. 49. But a decree may be deferred, to enable the claimant to have it liquidated. *Nims v. Rood*, 34 D. 669. Nor can cross-demands for unliquidated damages be set off against each other. *Christian v. Miller*, 23 D. 251. Accordingly, on a bill of discovery, and for an account of arrears of rent, the defendant cannot be allowed to set

* See monographic note on recoupment in actions for breach of contract, 46 D. 320-327.

For Index to Notes in American Decisions and American Reports, see Volume I.

off damages for the breach of a covenant on the part of the grantor to allow him sufficient common of pasture and estovers. *Livingston v. Livingston*, 8 D. 562.

Unliquidated damages for a tort arising out of a different transaction are not allowable as a set-off. Accordingly, in an action for goods sold and delivered, the defendant cannot set off a claim arising from the fact that other goods consigned to the plaintiff for the defendant were sent by the plaintiff to other persons. *Gogel v. Jacoby*, 9 D. 339.

A set-off of a claim for unliquidated damages for breach of an agreement in no way connected with the mortgage debt, such demand not being a proper subject of set-off at law, cannot be allowed in a suit in equity to foreclose a mortgage, where there is no peculiar equity to take the case out of the general rule; and an allegation that the complainant has put some of his property out of his hands, and is threatening to do so with the rest, is not sufficient to raise such an equity. *Jennings v. Webster*, 35 D. 722.

The rule as to set-off in equity, as at law, is, that there must be mutual debts between the parties, and it does not apply to unliquidated damages for breaches of covenants. *Duncan v. Lyon*, 8 D. 513.

Damages for a breach of covenants in a deed may be set off in an action of *assumpsit* for the consideration, where the amount of such damages is to be ascertained by mere calculation. *Drew v. Towle*, 59 D. 380.

A right of action for breach of warranty is not the subject of set-off; the debt must be for a money demand, and of a liquidated nature, and for which debt, or *indebitatus assumpsit*, or some other action *ex contractu* will lie. *Crenshaw v. Jackson*, 50 D. 361.

10. The demands must exist when suit is brought. — A debt or demand to be used as a set-off must exist at the commencement of the suit, and must have at that time belonged to the defendant. *Smith v. Ever*, 60 D. 73. Therefore a demand once barred by the statute of limitations, and afterwards revived by a new promise, cannot be pleaded, at law, as a set-off in an action commenced during the existence of the statutory bar. *Lee v. Lee*, 76 D. 681.

So a person is not entitled to a set-off against a bankrupt, unless it existed when the bankruptcy happens; nor against an administrator, unless entitled to the set-off against the decedent. *Shepherd v. Turner*, 18 D. 631.

A defendant who offers a promissory note, negotiated to him as a set-off, must show that he received it in the proper time. Its mere possession by him, indorsed in blank, affords no presumption of such fact. *Smith v. Ever*, 60 D. 73.

11. The demands must be mutual. — In equity, as at law, a set-off is only allowed where there is a mutuality in the de-

mands, and the amounts are liquidated and certain. *Smith v. Washington Gas Light Co.*, 100 D. 49; *Annan v. Houck*, 45 D. 133. Therefore, in an action to recover a debt due a partnership, a debt due from one copartner cannot be set off. *Gregg v. James*, 12 D. 151.

In equity, where demands are in reality mutual, they may be set off, though they are not nominally mutual. Thus where a note executed to a firm has become the separate property of one of the partners, a demand due to its maker by this partner may be set off against the judgment obtained by him on the note in the firm name. *Foot v. Ketchum*, 40 D. 678.

The statutory right of set-off is designed to prevent an unnecessary multiplication of suits, and allows the defendant to oppose in the same suit his debt against the plaintiff to plaintiff's debt against him; but defendant cannot set off his debt against a stranger to the action, against plaintiff's debt against him, or litigate in plaintiff's action a claim of which plaintiff is ignorant, not being a party to it, and one of the contracting parties to which is no party to the action. *Trafford v. Hall*, 82 D. 589.

The statutory right of set-off attaches to claims legally transferable, only while they constitute mutual debts of the parties to the suit. The status of such claims, as mutually binding the parties in the same right and capacity at the time of action brought, determines this right; before this period the right is collateral to and not attached to them, and contingent upon their existence as mutual debts down to the period of the suit. *Id.*

12. — and in the same right. — To authorize a set-off, the debts must be between the parties in their own rights, and must be of the same kind or quality, and be clearly ascertained or liquidated. *Smith v. Washington Gas Light Co.*, 100 D. 49; *Coffman v. Hampton*, 37 D. 511.

A set-off can only be made against the real party in interest. *Flournoy v. City of Jeffersonville*, 79 D. 468.

A set-off necessarily flows from a contract, and the injury flowing from an independent tort cannot be averred in defalcation of a demand founded on contract, nor as a substantive defense, commensurate with the injury inflicted on the defendant, since it in no way touches the consideration of the contract sued on. *Price v. Lewis*, 55 D. 536.

Under an ordinance to raise supplies, taxes were assessed upon plaintiff's property by a municipal corporation, and the treasurer of the corporation being about to enforce payment under the provisions of a general ordinance requiring all taxes to be "paid in specie or in the notes of specie-paying banks," plaintiff offered as payment a debt of equal amount with the taxes due him by the corporation. *Held*, that the

For Index to Notes in American Decisions and American Reports, see Volume I.

plaintiff had no right, legal or equitable, to compel the corporation to receive the debt as payment or satisfaction of the taxes, or as a counterclaim, or as a set-off or discount. *Trenholm v. Charleston*, 16 R. 732.

A town summoned as trustee or garnishee of an individual cannot set off taxes assessed by it on him against the debt due from it to him. *Hibbard v. Clark*, 22 R. 432.

13. No set-off between joint and separate debts.* — A joint debt cannot be set off against a separate one, nor a separate debt against a joint one, either at law or in equity. *Milburn v. Guyther*, 50 D. 681; *Dart v. Sherwood*, 76 D. 223; *Richardson v. St. Joseph Iron Co.*, 33 D. 460; *Henderson v. Lewis*, 11 D. 733. But in particular cases in equity, joint and separate debts may be set off against each other, as where the debts are in reality mutual, though prosecuted in the names of others nominally interested. *Blake v. Langdon*, 47 D. 701.

A and B formed a copartnership, A furnishing capital, and B paying him a certain sum every year in lieu of his profits. Subsequently, A and C formed a copartnership as successors of A & B, C being the active partner. The firm of A & B continued only for the purpose of closing their business. C, at the request of B, from time to time paid debts, with property of A & C, due from A & B, and charged the same to A & B upon the books of A & C. C received from B a note signed with firm name A & B, and for the purpose of paying a note due from a third person to A & B, executed a negotiable note to B alone. This note was sued upon in the name of an indorsee while the statute existed allowing the makers of negotiable notes the benefit, as against indorsees, of all legal and equitable defenses to the notes; and on a bill in equity by A & C against B and the indorsee, — *held*, the charges on the books of A & C to A & B, and the note held by A & C, signed by A & B, could be set off against the note signed by A & C to B, and sued upon in the name of the indorsee, it appearing that B was insolvent. *Id.*

If B under the above facts would seek in such case to avoid the contract entered into between himself and A, upon the ground of inequality, he should file his cross-bill setting forth the facts upon which he claims relief. *Id.*

One of several defendants is entitled to set off a debt due him individually from the plaintiff. *Stewart v. Coulter*, 14 D. 680.

A debt due one of two joint obligors may be set off under their joint plea in an action of debt brought by the administrators of the obligee on the joint bond. *Pücker v. Patrick*, 12 D. 54.

"He" does not mean "he and others," in

* No set-off between joint and separate debts, see note, 12 D. 153-155.

a statute permitting defendant to "plead discount of any claim he may have against the plaintiff." *Milburn v. Guyther*, 50 D. 681.

In an action on an undertaking against a principal and surety, the principal may set off a demand due him from the plaintiff. *Raymond v. Green*, 41 R. 763.

14. — nor against suit for price of exempt property. — A housekeeper, with a family, sold his only cow to enable him to buy one that gave milk, the purchaser knowing at the time the object of the sale. *Held*, that the seller was entitled to recover the whole price of the cow in money from the purchaser, and the latter could not set off against it any debt he might hold against the former. *Mulliken v. Winter*, 87 D. 495.

15. Actions by or against carriers. — In an action by a common carrier for freight of goods transported and delivered, the defendant may recover, over and above the freight so earned, a balance for damage to goods carried, occasioned by the carrier's negligence. *Schwinger v. Raymond*, 38 R. 415.

16. Actions upon negotiable instruments. — In an action by the indorsee against the maker of a promissory note, the latter cannot set off a bill of exchange on which the plaintiff is responsible, unless it appear that the defendant had received such bill before notice of the indorsement of the note to plaintiff. *Ritchie v. Moore*, 7 D. 688.

The maker cannot set off against the indorsee of a promissory note, although discredited, demands which he may have against the indorser, the payee. *Chandler v. Drew*, 26 D. 704.

The maker of a note indorsed when overdue cannot set off an independent demand due him from the indorser at and before the indorsement, where the indorsee took it *bona fide*, without notice, and for value. *Annan v. Houck*, 45 D. 133.

A maker of a note may set up against the indorsee after due any defense he has against the payee. *Cochran v. Wheeler*, 26 D. 732.

In an action by the payee upon a promissory note, the consideration of which was an agreement, signed by the plaintiff, to convey to the defendant, on or before January 1, 1866, two thousand five hundred dollars of the capital stock of the King Gold Mining Company, at subscription price, — *held*, that the defendant might defend against the action by showing that no transfer or tender of the said stock was made to him until after August, 1866, and might recoup his damages arising from the plaintiff's failure to perform his agreement. *Hill v. Southwick*, 11 R. 250.

Defendant, for valid consideration, assumed and promised to pay the debts of R., which included three promissory notes held by N. Afterward, and before maturity, N. duly transferred these notes to plaintiff. *Held*, in an action on the notes, that the de-

For Index to Notes in American Decisions and American Reports, see Volume L.

defendant could set off a claim held against N. *Barlow v. Myers*, 21 R. 582.

17. Actions respecting real property. — A vendee claiming a set-off against the purchase price on account of claims held against the vendor, the account should be sent to a commissioner, if the evidence justifies it. *Clarke v. Curtis*, 37 D. 625.

Where plaintiff was the owner of one third of land and her infant child the owner of two thirds, and an order of court had been made confirming her sale of the land, the vendee will not be entitled in an action for the purchase-money to set up a discount for the infant's share. *Martin ad. Bobo*, 40 D. 557.

A vendee may recoup damages for fraudulent misrepresentations by the vendor as to the condition of the land sold and its adaptability for the use for which the vendor knew that the vendee wanted it, in an action for the price, where the vendee trusted to the representations in making the purchase. *Van Epps v. Harrison*, 40 D. 314.

A vendor's fraudulent misrepresentations as to the price paid by him for the land sold are admissible in evidence by way of recoupment in an action against his vendee for the purchase-money. *Id.*

A recoupment of damages for a breach of a covenant of quiet enjoyment implied in a lease is allowable in an action for the rent reserved. *Mayor etc. of New York v. Mabie*, 64 D. 538.

18. What demands may be set off in actions where partners are parties. — In an action against a partnership, a set-off of a debt due an individual member of the firm will not be allowed. *Ritchie v. Moore*, 7 D. 688.

The debt due from one partner cannot be set off against a debt due to the firm; hence one partnership may prove a debt against another, though one of the partners is a member of both firms. *Ward v. Brandt*, 13 D. 352.

Mutual credits are a ground of set-off in equity, though not at law. Hence a decree in favor of the plaintiff seeking a partnership account may be set off against a judgment at law in favor of the defendant in the decree and against the plaintiff. And this right of set-off is not affected by the fact that, by the decree, balances were made payable to other partners also, provided the partners are entitled severally under the decree. *Lockwood v. Bates*, 12 D. 121.

One member of a firm will be allowed in equity to offset his own judgment against an insolvent debtor seeking to enforce a judgment against such firm. *Jeffries v. Evans*, 43 D. 158.

In an action against a surviving partner, upon a partnership debt, he may set off a debt due him individually from plaintiff. *Lewis v. Culbertson*, 14 D. 607.

A defendant may set off in a suit by a surviving partner upon a debt due the firm a debt due to him by such surviving partner individually. *Holbrook v. Lackey*, 46 D. 726.

19. Right of set-off as between principal and agent. — A executed his promissory note to B, in 1861, payable in United States currency. In 1862, A gave B certain claims, also payable in United States currency, for collection, directing him "to exercise his discretion as to procedure to be taken in enforcing collection." B accepted payment of the claims in confederate currency. In an action against A, on the note, brought in 1868, by the administrator of B, — held, that the full amount of the collected claims in United States currency was a valid set-off. *Mangum v. Ball*, 5 R. 488.

In an action on a bond for the faithful and honest discharge of the obligor's duty as agent, the defendant may set off his services as such agent. *Baltimore & O. R. R. Co. v. Jameson*, 31 R. 775.

20. — principal and surety. — A counter-demand arising from a payment of money to a principal cannot be set off against the sureties in an action brought by them, unless the plaintiffs are shown to be legally responsible for the sum paid. *Bunting v. Ricks*, 32 D. 699.

21. What demands may be set off in actions by assignees. — The trustee of an insolvent debtor stands, in regard to cross-demands, in the same position as the debtor himself; and therefore, in a suit by such trustee to recover from administrators with the will annexed, a legacy given to the insolvent's wife, payments made by the defendants for the insolvent are available as an equitable defense. *Krause v. Beitel*, 23 D. 113.

A debtor may set off against an assignee a draft drawn by the assignor in his favor before he received notice of the assignment, although the liability of the assignor did not become complete until after he received notice of the assignment. *Northampton Bank v. Balliet*, 42 D. 297.

Where a corporation put money in the hands of its general agent, as trustee, for safe-keeping and disbursement in the business, and afterward made a general assignment for creditors, — held, that he could not offset a debt due him from the corporation. *First Nat. Bank v. Barnum Wire etc. Works*, 55 R. 660.

22. — in actions against assignees. — Where an insolvent assigns, for the benefit of his creditors, a note past due, a court of equity will not set off against such note in the hands of the assignee an acceptance of the insolvent which was not due at the time of the assignment. *Lockwood v. Beckwith*, 72 D. 69.

23. — in actions by personal representatives. — A debt accruing in the

For Index to Notes in American Decisions and American Reports, see Volume I.

testator's lifetime cannot be set off against a debt which accrues to the executor, after the death of the testator. *Mills v. Lumpkin*, 44 D. 677; *Patterson v. Patterson*, 17 R. 384.

A claim against an insolvent estate of a decedent may be offset in chancery against one in favor of the estate, although the claimant, owing to an agreement of the administrator to allow it, neglected to present his claim to the commissioners on the estate. *Nims v. Rood*, 34 D. 669.

Where an estate of a decedent is notoriously insolvent, set-off is not allowed in suits by or against his executor or administrator, if the debt sought to be set off was not due at the time of the death of the testator or intestate, although it became due before the commencement of the suit; otherwise if the estate is solvent. *Boeler v. Exchange Bank*, 45 D. 665.

A debt due from a decedent cannot be set off by the defendant in an action brought by an administrator to recover the difference between the sum at which he bid off, at orphan's court sale, part of the real estate of the decedent, and the sum at which it sold on a resale, made necessary by his refusal to comply with his bid. *Singerly v. Swain*, 75 D. 581.

The burden of proof is on defendant pleading a set-off to show that his claim filed in set-off is due from the plaintiff in the same right with the cause of action declared on in the writ; and if the plaintiff describes himself in the writ as administrator of the estate of a deceased person, and declares upon a promissory note signed by only one person, and running to him as administrator of that estate, this will not be sufficient to afford a presumption that his claim is in his representative capacity. *Lovell v. Nelson*, 87 D. 706.

24. — in actions against personal representatives. — In an action by a husband and wife for a bequest made to the wife "for her own use," which is the same as a bequest for her separate use, a debt due from the husband to the testator cannot be set off. *Jamison v. Brady*, 9 D. 460.

A legacy, now payable, cannot be set off in equity against legatee's debt to the estate not yet due. *Hayes v. Hayes*, 73 D. 709.

Upon a creditor's exhibiting a claim against an estate, the administrator is not bound to set off against such claim a debt due the estate from the creditor. *Morton v. Bailey*, 27 D. 767.

A set-off will be applied on unsecured rather than secured claims presented by the same creditor against a decedent's estate, and the representative of the deceased debtor cannot require its application to the secured debts. *Putnam v. Russell*, 42 D. 478.

25. — in actions by or against banking corporations.* — The appointment of a receiver of a bank does not affect the right of its debtors to set off demands held by them against the bank when it stopped payment. *In re Middle District Bank*, 19 D. 452.

A debt which becomes due after the stoppage of payment may be set off. *Id.*

An indorser has the same right of set-off in such a case as the principal debtor, if he is unindemnified and is compelled to pay because the principal cannot but not otherwise. *Id.*

Overdrawing is a debt due the bank, and bills held *bona fide* when the bank stopped payment by the person so overdrawing may be set off against such debt. *Id.*

Bills obtained by a debtor after the stoppage of payment of a bank cannot be set off against debts due it. *Id.*

A debtor of a bank may set off its notes against a claim of the assignee of the bank, provided he was the owner of the notes sought to be set off, at the time when he received notice of the assignment; but if he acquired them after notice of the assignment, they cannot be set off against the assignee. *Northampton Bank v. Balliet*, 42 D. 297.

In an action by a national bank on negotiable paper discounted by it, the defendant may set off the amount of usurious discounts on other transactions. The interest paid by the defendant beyond that authorized by the act of Congress belongs to him, and the bank can hold it only for his use. *Lucas v. Government Nat. Bank*, 21 R. 17.

In the absence of facts entitling it to equitable relief, a bank, in an action by the administrator of its deceased customer to recover a deposit due to the intestate in his lifetime, cannot set off a claim against the deceased not due until after his death, the statute of set-off not permitting such a course. *Jordan v. Nat. Shoe etc. Bank*, 30 R. 319.

A depositor in an insolvent savings bank, who also owes it for borrowed money, cannot set off his deposit against such debt, although the deposit consisted of the borrowed money. *Hannon v. Williams*, 38 R. 378.

26. — in actions against the government. — The drawer of a draft, accepted for his accommodation, delivered it to the state in payment of his debt to it. He afterward filed a bill against the state and the acceptor to set off against such draft a demand due from the state to him and growing out of a distinct transaction. *Held*, that the bill could not be maintained. *Raymond v. State*, 28 R. 382.

II. SET-OFF OF JUDGMENTS.

27. What judgments may be the subject of set-off. — A judgment to be set

* Offsets in favor of depositor in insolvent bank, see note, 33 R. 333, 334.

For Index to Notes in American Decisions and American Reports, see Volume I.

off must be owned absolutely by the party seeking to set it off. *People v. Common Pleas*, 28 D. 495. It is not sufficient that he had an equitable interest in it. *Lee v. Lee*, 76 D. 681. But under the Alabama code a transferred judgment may be subject of set-off in the hands of the owner, whether he has the legal title or not. *Skipper v. Stokes*, 94 D. 646.

A judgment may be purchased for the purpose of set-off if it be done *bona fide*, but not where the nominal assignee is a mere trustee. *People v. Common Pleas*, 28 D. 495.

An insolvent debtor cannot object to a want of consideration for the assignment of a judgment against him, which the assignee has obtained for purposes of set-off. *Id.*

The subject-matter of an original suit may be used as a set-off by plaintiff, during its pendency, when he is sued by his adversary; and if it is a final judgment, it is a set-off as a judgment. *Gunn v. Todd*, 64 D. 231.

Where an indorsee of a bill sues the maker thereof, a judgment against the payee obtained by the maker in another separate and distinct action, and after payee had negotiated the bill, cannot be available as a set-off against the indorsee's suit, unless the original payee still owns the draft sued on, or has some beneficial interest in the suit. *Thatcher v. Mills*, 65 D. 95.

A judgment in favor of a defendant for costs, based upon a finding of one of several issues in his favor, is not void, even if erroneous, and while unreversed, is to be treated, for the purpose of set-off, as a valid judgment. *Porter v. Liscom*, 83 D. 76.

28. What may be set off against a judgment. — The assignee of a judgment takes subject to right of set-off existing at the time of the assignment, although he be a purchaser for a valuable consideration and without notice. *Porter v. Liscom*, 83 D. 76; *People v. Common Pleas*, 28 D. 495.

To a judgment there can be no set-off of a debt not in judgment. *Thorp v. Wegfarth*, 93 D. 789.

A national bank association was organized from a state bank. Such association recovered judgment for a debt due it, and afterwards became insolvent. The debtor then procured notes of the original state bank, which the association was liable for, to pay his debt. Held, that he had no right of set-off against the judgment. *Id.*

29. Settling off one judgment against another.* — Judgments of different courts may be set off against each other by the court in which one of the judgments was recovered. *People v. Common Pleas*, 28 D. 495.

Costs are included in such cases, the attorney's lien for his costs being subordinate to the equities of the parties. *Id.*

* Set-off of one judgment against another, see note, 18 D. 729-731.

The judgment of a justice may be set off against a judgment of a court of record, if the time for appeal has expired. *Cox v. State Bank*, 14 D. 417.

Mutual judgments may be set off, whether obtained in the same court or in different courts, even after an assignment of one of the judgments, if such assignment was made so promptly as to excite a reasonable suspicion that it was done to prevent the set-off. *Duncan v. Bloomstock*, 13 D. 728; *Hovey v. Morrill*, 60 R. 315; although the parties to the two records are not identical, and although one of the judgments has been assigned to a third person for a valuable consideration, and without notice of the existence of the other judgment, provided the right of set-off existed at the time of the assignment. *Graves v. Woodbury*, 40 D. 296; provided the rights of third persons are not affected thereby; but where the rights of an equitable assignee for value would be affected, this right cannot be exercised. *Ramsey's Appeal*, 27 D. 301.

Third persons cannot take advantage of an irregularity in the assignment of a judgment, if the assignor makes no objection. *Id.*

It is competent for courts of law, in the exercise of their legitimate and incidental powers, on motion, to order one judgment to be set off against another, between the same parties in the same court; and such an order is not subject to revision on error. *Scott v. Rivers*, 21 D. 646. And the larger judgment will be discharged *pro tanto* by the smaller. *Skrine v. Simmons*, 91 D. 771.

A judgment founded on contract may be set off against one founded on tort. *Puett v. Beard*, 44 R. 290. But to a judgment ripe for execution, there can be but one answer, to wit, payment pure and simple. *Thorp v. Wegfarth*, 93 D. 789.

The right to set off one judgment against another does not arise until judgment is actually entered on both sides; and therefore there can be no set-off in a case where a claim which has been referred is assigned before judgment is entered upon the report of the referee. *Graves v. Woodbury*, 40 D. 296.

A judgment in favor of a sole plaintiff may be set off against a judgment in which he is joint defendant, under the Iowa revision of 1860, which abrogates all distinctions between joint and joint and several liabilities. *Ballinger v. Tarbell*, 85 D. 527.

A person may receive money due on a judgment rendered in favor of himself and several others, co-plaintiffs, but he cannot, without authority from his co-plaintiffs, set off a judgment due to him and them jointly against another judgment held by the defendant in such joint judgment against him alone. *Corwin v. Ward*, 95 D. 93.

A proceeding by petition and motion is sufficient to bring into court the assignee of

For Index to Notes in American Decisions and American Reports, see Volume L.

a judgment, against which a right to set off another judgment rendered in the same action exists, and such assignee will be bound by an order made therein directing a set-off. *Porter v. Liscom*, 83 D. 76.

An assignment of a judgment to one who has illegally furnished money to carry on the action is subject to the right of the judgment debtor to set off a judgment against the assignor. *Puett v. Beard*, 44 R. 280.

Where a judgment debtor has no property save a judgment for less than the amount exempted by statute from execution, the defendant in that judgment may not satisfy it by set-off of another judgment. *Id.*

III. PROCEDURE

30. Under what plea a set-off may be given in evidence.—The notice or plea of set-off should contain the substance of a declaration. *Brady v. Hill*, 13 D. 503.

The plea of set-off, which professes to go to the whole action, where the amount of the set-off is less than the amount sued for, is demurrable. *Kershaw v. Merchants' Bank*, 40 D. 70.

31. Filing items of set-off.—Items of set-off, filed and withdrawn, may be filed anew in the discretion of the court. *Mineral Point R. R. Co. v. Keep*, 74 D. 124.

32. Sufficiency of notice of set-off.—A notice of set-off need not be as precise and formal as a declaration, but it must describe with reasonable certainty the demand sought to be set off. *Lewis v. Culbertson*, 14 D. 607; and the party cannot, on the trial, prove a claim of a different character. *Gogel v. Jacoby*, 9 D. 339.

33. Proceedings to establish set-off in equity.—The onus of proving the existence of debts sought to be set off by the defendant is not thrown upon him where the plaintiff excepts to the defendant's sworn account filed in answer to the bill. *Lofland v. Maull*, 12 D. 106.

A party seeking to establish the right of set-off in equity, beyond that given by the statutes of set-off, must affirmatively show the existence of those facts necessary to raise the equity. *Lockwood v. Beckwith*, 72 D. 69.

The consideration of a debt by simple contract sought to be set off must be alleged in equity as well as at law. If it is not so alleged, the decree on a bill taken *pro confesso* will be reversed. *McKean v. Reed*, 12 D. 318.

The set-off for money advanced is available in chancery as against a bond and mortgage on which suit is brought, and a cross-bill is not necessary for its assertion. *Chapman v. Robertson*, 31 D. 284.

A set-off exceeding complainant's demand may be set up in the answer to a bill under the New York Revised Statutes, and a decree may be made for any balance found due the defendant. *Jennings v. Webster*, 35 D. 722.

34. How far equity follows the law.—Set-off in equity is governed by the same rules as at law. *McDonald v. Neilson*, 14 D. 431; *Jennings v. Webster*, 35 D. 722; *Hayes v. Hayes*, 73 D. 709; *Lee v. Lee*, 76 D. 681. Therefore equity will not allow a set-off of debts accruing in different rights. *Robbins v. McKnight*, 45 D. 406; nor set off mere cross-demands. *Downs v. Jackson*, 85 D. 289; unless there exist special equities growing out of the transaction itself which require it. *Lockwood v. Beckwith*, 72 D. 69; *Mills v. Lamplin*, 44 D. 677.

IV. COUNTERCLAIM

35. General nature and requisites.—A counterclaim, in order to constitute a set-off in equity, must be mutual, or it will not be allowed. *Bunting v. Ricks*, 32 D. 699.

Under Indiana code a counterclaim is more than recoupment at the common law, and embraces also the cross-bill in equity against the plaintiff. *Woodruff v. Garner*, 89 D. 477.

36. What may be interposed as a counterclaim, generally.*—In an action on a note, a counterclaim for use and occupation cannot be the subject of set-off, where the possession is adverse, and the relation of landlord and tenant has never subsisted between the parties. This is so under the Minnesota statute. *Folsom v. Carli*, 80 D. 456.

A breach of an agreement to forbear to bring suit upon a note for a reasonable time cannot be made available by way of counterclaim. *Newkirk v. Neild*, 81 D. 383.

In a suit by a grantor to rescind a conveyance on the ground of fraudulent representations, a counterclaim denying the fraud, and alleging that the plaintiff has wrongfully kept the defendant out of possession, and asking judgment for possession and for rents and profits, is good on demurrer. *Woodruff v. Garner*, 89 D. 477.

Causes of action cannot be joined in a counterclaim which cannot be united in a complaint. *Id.*

37. Claims arising out of torts.—Where a contract is basis of a transaction, and a breach of it may amount to a trespass, or entitle the injured party to an action for negligence, fraud, or otherwise, in form *ex delicto*, such party is not deprived of his right to plead a counterclaim as a set-off against the action. The wrong-doer is not allowed to deprive the injured party of the advantage of the contract by having tortiously violated it. *Folsom v. Carli*, 80 D. 456.

In an action for damages for assault and battery, defendant cannot set up, by way of counterclaim, a libel published by the plaintiff of and concerning the defendant. *Macdougall v. Maguire*, 95 D. 98.

An objection to a libel set up in an answer

* Counterclaim, scope and office of, under the codes, see note, 80 D. 452-492.

For Index to Notes in American Decisions and American Reports, see Volume I.

as a counterclaim, in an action for an assault and battery, is not waived by a failure to demur, and evidence to support it is inadmissible. *Id.*

A laid down B's fence, and turned his cattle in upon B's pasture-land. *Held*, that B might waive the tort and set up a claim for pasturage of the cattle as a counterclaim in an action of contract brought against him by A. *Norden v. Jones*, 14 R. 782.

38. How the counterclaim should be interposed. — An answer does not set up a counterclaim where it alleges that the contract in a complaint upon a note for money borrowed was usurious, and that a certain sum, less than the principal, has been "paid on the note," if the law makes a note given on a usurious contract of loan valid to secure the repayment of the principal sum loaned, and no more. No statements of such an answer can be taken as true without proof. *Schmitz v. Schmitz*, 88 D. 681.

39. Necessity of a reply. — A set-off is admitted by failure to reply. *Gunn v. Todd*, 64 D. 231.

Where the defendant in an action sets up a counterclaim in his answer, the court has no authority to grant plaintiff leave to discontinue the action, except as to his own claim or demand. *McLeod v. Bertschy*, 14 R. 755.

SETTING ASIDE.

Corporate election, see CORPORATIONS, 142.
Decree for partition, see PARTITION, 24.
Decree of foreclosure, see MORTGAGES, 94.
Judicial sale, see JUDICIAL SALE, 16-20.
Nonsuit, see TRIAL, 67.
Probate of will, see WILLS, 55.
Referee's report, see REFERENCE, 10.
Sale in foreclosure, see MORTGAGES, 108.
Sale in partition, see PARTITION, 30.
Sale of decedent's land, see EXECUTORS AND ADMINISTRATORS, 56.
Surveys of land, see SURVEYS, 4.
Verdicts, see TRIAL, 111.

See also VACATING.

SETTLEMENT.

Of bill of exceptions, see APPEAL, 97, 144.
Under poor-laws, see POOR, etc., 5-8.

SETTLERS.

Upon public lands, rights of, see PUBLIC LANDS, 10-14.

SEVERABLE CONTRACTS.

See CONTRACTS, 72.

SEVERANCE.

Of causes of action, see ACTIONS, 12.
Of estate held in joint tenancy, see CO-TENANCY, 60.
Of fixtures from realty, see FIXTURES, 14.

3 A. D. R. — 190

SEWERS.

Powers of city as to, see MUNICIPAL CORPORATIONS, 34.

See DRAINS.

SHACKLES.

Trying prisoner in, see TRIAL, 102.

SHAM PLEADINGS.

Striking out, see PLEADINGS, 177.

SHARES.

Of corporate stock, when taxable, see TAXES, 13-15.
Of profits, effect of agreements for, see PARTNERSHIP, 5, 6.
Raising crops on, see LANDLORD AND TENANT, 25.

SHELLEY'S CASE.

Applications of rule in, see DEVISE, 22.

SHERIFFS.

[Includes the appointment or election, term of office, rights, powers, duties, and liabilities of sheriffs and their deputies; procedure in actions against them; and remedies upon their bonds. For similar matters the titles of the various writs should be consulted; also OFFICERS, and PROCESS.]

Competency of, as witnesses, see WITNESSES, 80.

Delivery of *f. fa.* to, see EXECUTION, 24.

Liabilities of, in respect to executions, see EXECUTION, 10, 45, 53-67, 120-125.

Liability of, as garnishees, see ATTACHMENT, 19.

Liability of, for escapes, see also ESCAPE, 2.

Liability of, for wrongful attachment, see ATTACHMENT, 135, 136.

Rights and liabilities of, as to attachments, see ATTACHMENT, 68-73.

I. NATURE AND DURATION OF THE OFFICE.

II. RIGHTS, POWERS, AND DUTIES.

III. LIABILITIES.

IV. UNDER-SHERIFFS, DEPUTIES, ETC.

V. MATTERS OF PRACTICE IN ACTIONS BY OR AGAINST SHERIFFS.

VI. REMEDIES UPON SHERIFFS' BONDS.

I. NATURE AND DURATION OF THE OFFICE.

1. Election, qualifying, etc. — One notoriously acting as sheriff may rightfully be intrusted with the collection of parish taxes, whether he be a sheriff *de jure* or not. By so acting he becomes a *de facto* sheriff, and his sureties are bound for the faithful performance of his duties. *Police Jury v. How*, 20 D. 294.

The constitutional prohibition against the re-election of sheriffs does not apply to those persons who hold such office at the time of the adoption of the constitution, but only to such as should be elected under it. *State ex rel. Dunning v. Giles*, 52 D. 149.

For Index to Notes in American Decisions and American Reports, see Volume I.

sheriff will be liable for all the damage thus done, however remote or unexpected. *Id.*

A sheriff is the proper officer to execute all writs returnable to court, unless another is appointed, by special order, for that purpose. *Washington v. Sanders*, 21 D. 336.

A writ placed in a sheriff's hands on Sunday is not considered officially received by him on that day, nor is it officially in his hands until Sunday has expired. *Whitney v. Butterfield*, 73 D. 584.

Where a sheriff receives one writ of attachment on Sunday, and another against the same defendant is placed in the hands of a deputy at a quarter past twelve on Monday morning, and without the sheriff's knowledge, and the first levy is made under the last writ at one o'clock on Monday morning, the sheriff is not guilty of negligence in executing the first writ, where no other special circumstances are shown why more diligence should have been used in executing the writ. *Id.*

A sheriff is incompetent to act when he is a party to the record or interested in the suit; and in such case, the execution of process by him or his deputy is unlawful and void. *Stewart v. Magness*, 88 D. 598. But a sheriff who is a member of a banking corporation may serve process thereon, because, not being personally liable, he is not a party to the action. *Adams v. Wisconsin Bank*, 10 D. 88.

5. Powers and duties in respect to executions. — The sheriff is the agent of the law, and not of the execution creditor, except for certain purposes, and the latter is bound by his acts only within his lawful authority. *Sims v. Campbell*, 16 D. 595.

A sheriff having applied to one execution the money which of right belonged to another, the court has no jurisdiction to compel the creditor receiving the money to pay the same to the other execution creditor; but the latter must pursue his remedy against the sheriff. *Washington v. Sanders*, 21 D. 336.

A sheriff, in executing a *f. fa.* must be governed by the sum indorsed on the back of the writ, and not by that contained in the body of the writ. The indorsement on the writ is the official act of the prothonotary, and is presumed to be right until the contrary is shown. *Com. v. McCoy*, 34 D. 445.

A sheriff who pays the amount of the execution to the plaintiff without intimating that he had advanced the money cannot keep the judgment alive to sue the defendant upon the same as assignee either in law or in equity. *Whittier v. Hemmway*, 38 D. 309.

Where a sheriff of Mississippi, having acquired a special property in goods by attachment, brings the goods into the state of

Louisiana, without authority of law or of the parties litigant, for the accomplishment of an unlawful purpose, he thereby divests himself of any special property in them, and the original owner may assume control over them in the latter state, or they may be seized at the suit of one of his creditors. *Dick v. Bailey*, 46 D. 561.

The receipt by a sheriff of money due on a judgment when he has no execution in his hands is unauthorized, and neither discharges the judgment nor binds his sureties; yet if he subsequently pays the money to the plaintiff's attorney of record, a receipt thereof by the attorney in satisfaction of the judgment discharges the debt, if the payment was made in lawful money. *Chapman v. Conoles*, 91 D. 508.

6. — and sales thereunder.* — A sheriff of one county has no authority to levy on and sell land situated in another county. *Stephenson v. Doe*, 46 D. 489.

7. — in respect to arrests and custody of prisoners. — The sheriff of a neighboring state has not the right to pursue and recapture in Vermont a prisoner held on civil process, who has in such neighboring state escaped from his custody. *Bromley v. Hutchins*, 30 D. 465.

8. Bonds of indemnity.† — A sheriff, called upon to execute a writ of attachment or execution, may demand indemnity of the plaintiff in the writ, it seems, before he can be required to seize property in the possession of third persons claiming to be the owners; and if he is not indemnified on demand, and thereupon returns the writ *nulla bona*, an action for a false return cannot be maintained against him, although it should turn out that the goods belonged to the defendant in the writ. *Long v. Neville*, 95 D. 199.

A sheriff, called upon to serve a writ by attaching property or arresting the person, has a right to demand an indemnity of the plaintiff in the writ, it seems, before executing the writ, if there is reasonable doubt as to the ownership of the property or the identity of the person. *Id.*

A sheriff levying upon goods as the property of A, in which B claims a partnership interest, may, on refusal of plaintiff upon request made, to indemnify him, either return the writ *nulla bona*, or refuse to sell anything but the interest of the defendant in the goods. *Patterson v. Anderson*, 80 D. 579.

A sheriff, under the statutes and decisions of Louisiana, cannot demand an indemnity bond upon a seizure of goods and demand for release. He must either call a jury to

* Sheriff's duty to inform purchaser of existence of prior encumbrance, see note, 42 D. 143, 144.

† Indemnity, right of sheriff to, see note, 16 D. 561-564.

For Index to Notes in American Decisions and American Reports, see Volume I.

determine whether the goods belong to the defendant or act at his own peril. *Dunlap v. Freret*, 63 D. 590.

A sheriff who takes an indemnity from a defendant in custody, and acknowledges satisfaction on the execution, is liable to the plaintiff for the whole debt. *Treasurers v. McDowell*, 26 D. 166.

An agreement to indemnify a sheriff for an act to be done by him in plain violation of his duty is invalid; but in case of a disputed right in goods, bonds of indemnity given to induce a levy upon the goods are clearly lawful. *Shotwell v. Hamblin*, 55 D. 83; *Collier v. Windham*, 62 D. 767.

When a jury, called by a claimant to property seized under execution, fails to find a verdict, the officer is not entitled to indemnity before selling, and a bond so given to indemnify him is without consideration, and void. *Mitchell v. Vance*, 17 D. 96.

A bond of indemnity is valid where there was a dispute about the appropriation of assets received on sales under various executions, and it was given by the defendant, one of the contestants, to induce the sheriff to pay over the proceeds to him. *Shotwell v. Hamblin*, 55 D. 83.

A sheriff may show by parol evidence, in an action on an indemnity bond, that the defendant, an execution creditor, purchased the property sold by the sheriff under various executions, and then entered into a settlement with the plaintiff by which he paid over to him only the excess over his debt and retained the balance, which the plaintiff receipted for him on the executions; such a settlement is in effect a payment; and such evidence does not contradict a return which recites that the property had been sold to the defendant, but does not say that the money had been paid over, nor the purport of such a return. *Id.*

Where a sheriff levies an execution upon sufficient property which is taken from his possession under a replevin suit, in which he obtains judgment, it is his duty to prosecute the sureties in the undertaking of the plaintiff in such replevin suit, and he is not entitled to indemnity from the plaintiff in the execution as a condition of his prosecuting the undertaking. *Swezey v. Lott*, 78 D. 160.

Sureties in a bond of indemnity have the same justification and defense as the officer in an action of trespass against the officer and the sureties for wrongful levy. *Hutchinson v. Lord*, 60 D. 381.

A sheriff attached goods as the goods of B, in an action by A against B. C afterward claimed the goods, and although A offered a bond of indemnity, the sheriff surrendered them. The statute made no provision for a bond of indemnity in such cases. A recovered judgment in the attachment suit, and being unable to make anything on the execution, brought action against the sheriff.

Held, that although the offered bond of indemnity was good at common law, the sheriff was not liable at all events, but that the burden was on him to show that the goods did not belong to B. *Wadsworth v. Walliker*, 24 R. 788.

A statute substituting sureties, on an undertaking indemnifying a sheriff against a levy, as defendants in an action against him for such levy, is not unconstitutional. *Hein v. Davidson*, 48 R. 612.

9. — and other security to sheriff. — An implied promise of indemnity arises, where a person gives a sheriff a writ with directions to serve it in a particular manner. *Ranlett v. Blodgett*, 43 D. 603.

An agreement with or security executed to a sheriff or other officer to induce him to omit the levy of a writ or performance of other duty will not protect the officer against a party at whose suit the writ issued; and the agreement, being without consideration so far as concerns the officer, cannot be enforced by him or for his benefit, and is also void from considerations of public policy. *Cole v. Parker*, 71 D. 439.

A bond taken by an officer to induce him to omit a levy of a writ or performance of other duty required by law, being void as against public policy, is not such a security as plaintiff in the writ, or other person, by adopting, can render valid. *Id.*

10. Right to fees, and how enforced, generally. — Where an execution is paid to the creditor before levy or service, and that fact is indorsed on the writ, the officer is not entitled to fees, for he has performed no act to earn any; and as there is nothing due on the writ, no levy can be made. *Barnard v. Stevens*, 16 D. 733.

11. Poundage. — If an officer levy under an execution, he is entitled to fees for poundage as well as travel, though the parties compromise before a sale. *Barnard v. Stevens*, 16 D. 733. But he is only entitled to the statutory poundage and fees on executing a judgment. *Croft v. Brandt*, 17 R. 213.

A sheriff levied on property under execution, and charged for expenses in keeping and watching the property, for boxing it, for cartage, storage, insurance, and for services in preparing it for sale. *Held*, that these charges were not allowable. *Id.*

On a levy on lands, the sheriff is not entitled to poundage until sale or collection of the debt. *Peck v. City Nat. Bank*, 47 R. 577.

12. Commissions. — A defendant in an execution is not liable to a sheriff for his commissions, where, after a levy on, and advertisement for sale of, the lands of the defendant, the judgment is satisfied by a payment to the plaintiff. *Gordons v. Maupin*, 47 D. 118.

A sheriff, or one acting as his agent, is entitled to no compensation for services in

For Index to Notes in American Decisions and American Reports, see Volume I.

sheriff will be liable for all the damage thus done, however remote or unexpected. *Id.*

A sheriff is the proper officer to execute all writs returnable to court, unless another is appointed, by special order, for that purpose. *Washington v. Sanders*, 21 D. 336.

A writ placed in a sheriff's hands on Sunday is not considered officially received by him on that day, nor is it officially in his hands until Sunday has expired. *Whitney v. Butterfield*, 73 D. 584.

Where a sheriff receives one writ of attachment on Sunday, and another against the same defendant is placed in the hands of a deputy at a quarter past twelve on Monday morning, and without the sheriff's knowledge, and the first levy is made under the last writ at one o'clock on Monday morning, the sheriff is not guilty of negligence in executing the first writ, where no other special circumstances are shown why more diligence should have been used in executing the writ. *Id.*

A sheriff is incompetent to act when he is a party to the record or interested in the suit; and in such case, the execution of process by him or his deputy is unlawful and void. *Stewart v. Magness*, 88 D. 598. But a sheriff who is a member of a banking corporation may serve process thereon, because, not being personally liable, he is not a party to the action. *Adams v. Wiscasset Bank*, 10 D. 88.

5. Powers and duties in respect to executions. — The sheriff is the agent of the law, and not of the execution creditor, except for certain purposes, and the latter is bound by his acts only within his lawful authority. *Sims v. Campbell*, 16 D. 595.

A sheriff having applied to one execution the money which of right belonged to another, the court has no jurisdiction to compel the creditor receiving the money to pay the same to the other execution creditor; but the latter must pursue his remedy against the sheriff. *Washington v. Sanders*, 21 D. 336.

A sheriff, in executing a *f. fa.* must be governed by the sum indorsed on the back of the writ, and not by that contained in the body of the writ. The indorsement on the writ is the official act of the prothonotary, and is presumed to be right until the contrary is shown. *Com. v. McCoy*, 34 D. 445.

A sheriff who pays the amount of the execution to the plaintiff without intimating that he had advanced the money cannot keep the judgment alive to sue the defendant upon the same as assignee either in law or in equity. *Whittier v. Hemmway*, 88 D. 309.

Where a sheriff of Mississippi, having acquired a special property in goods by attachment, brings the goods into the state of

Louisiana, without authority of law or of the parties litigant, for the accomplishment of an unlawful purpose, he thereby divests himself of any special property in them, and the original owner may assume control over them in the latter state, or they may be seized at the suit of one of his creditors. *Dick v. Bailey*, 46 D. 561.

The receipt by a sheriff of money due on a judgment when he has no execution in his hands is unauthorized, and neither discharges the judgment nor binds his sureties; yet if he subsequently pays the money to the plaintiff's attorney of record, a receipt thereof by the attorney in satisfaction of the judgment discharges the debt, if the payment was made in lawful money. *Chapman v. Cowles*, 91 D. 508.

6. — and sales thereunder.* — A sheriff of one county has no authority to levy on and sell land situated in another county. *Stephenson v. Doe*, 46 D. 489.

7. — in respect to arrests and custody of prisoners. — The sheriff of a neighboring state has not the right to pursue and recapture in Vermont a prisoner held on civil process, who has in such neighboring state escaped from his custody. *Bromley v. Hutchins*, 30 D. 465.

8. Bonds of indemnity.† — A sheriff, called upon to execute a writ of attachment or execution, may demand indemnity of the plaintiff in the writ, it seems, before he can be required to seize property in the possession of third persons claiming to be the owners; and if he is not indemnified on demand, and thereupon returns the writ *nulla bona*, an action for a false return cannot be maintained against him, although it should turn out that the goods belonged to the defendant in the writ. *Long v. Neville*, 95 D. 199.

A sheriff, called upon to serve a writ by attaching property or arresting the person, has a right to demand an indemnity of the plaintiff in the writ, it seems, before executing the writ, if there is reasonable doubt as to the ownership of the property or the identity of the person. *Id.*

A sheriff levying upon goods as the property of A, in which B claims a partnership interest, may, on refusal of plaintiff upon request made, to indemnify him, either return the writ *nulla bona*, or refuse to sell anything but the interest of the defendant in the goods. *Patterson v. Anderson*, 80 D. 579.

A sheriff, under the statutes and decisions of Louisiana, cannot demand an indemnity bond upon a seizure of goods and demand for release. He must either call a jury to

* Sheriff's duty to inform purchaser of existence of prior encumbrance, see note, 43 D. 142, 144.

† Indemnity, right of sheriff to, see note, 16 D. 561-554.

For Index to Notes in American Decisions and American Reports, see Volume I.

determine whether the goods belong to the defendant or act at his own peril. *Dunlap v. Freret*, 63 D. 590.

A sheriff who takes an indemnity from a defendant in custody, and acknowledges satisfaction on the execution, is liable to the plaintiff for the whole debt. *Treasurers v. McDowell*, 26 D. 166.

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For Index to Notes in American Decisions and American Reports, see Volume I.

making a crop with negroes levied on, the proceeds of which are brought into court for the benefit of the creditors, but only to the expense of keeping them. *Price v. Cutts*, 74 D. 52.

13. Right to reimbursement for expenses incurred. — Where the sheriff is bound to board his prisoners, the compensation provided therefor by law is an "emolument," not to be changed during his term. *Apple v. County of Crawford*, 51 R. 205.

14. Formal requisites of return. — The return to a summons signed by a deputy, without mentioning the sheriff's name, is void. *Duch v. Edwards*, 26 D. 414.

An unsigned return of a sheriff is admissible in evidence in an action against him, and binds the sheriff the same as if it had been properly signed. *Rudy v. Com.*, 78 D. 330.

15. Conclusiveness of return. — The plaintiff is not estopped from showing the falsity of a return, in an action against a sheriff because of offering the return in evidence, but he must prove the judgment, writ, and return, and then show the return to be false. *Dunkap v. Freret*, 63 D. 590.

When it is shown by *prima facie* evidence that a sheriff's return is incorrect, the burden of proof is upon the sheriff to show its correctness. *Id.*

III. LIABILITIES.

16. In general. — A sheriff is no further bound by an official bond than he would be without it. *Forsythe v. Ellis*, 20 D. 218.

For clerk's tickets, delivered after the 1st of June, in any year, the sheriff is not bound to account until the 1st of November of the next year. *Coplin v. McCalley*, 19 D. 748.

A sheriff assuming to act *virtute officii*, warrants that he is possessed of such authority, and if not authorized, is liable to persons who have suffered damage, from steps undertaken under the belief that he was. So a sheriff is liable to purchasers at a sale assumedly made under proper authority, from a court which does not in fact exist. *Stoney v. Shultz*, 27 D. 429.

A sheriff is liable for defects in the title of chattels sold under an execution. *Forsythe v. Ellis*, 20 D. 218.

A sheriff or other state officer having a vessel in custody under state law must not surrender it upon federal process; for if he does so, he is liable to the creditor in the state court. *Keating v. Spink*, 62 D. 214.

Damages against an officer for a neglect of duty on mesne process are estimated by the injury sustained, and not by the amount of the debt. *Kirksey v. Pryor*, 48 D. 47.

The judgment in a suit against the debtor is *prima facie* evidence of the measure of the injury sustained, without producing the note on which the judgment was recovered. *Id.*

In mitigation of damages for a neglect of

duty, the officer may prove any facts which show that the creditor has not suffered. *Id.*

17. How far protected by process.* — A void process will not justify acts done under it previous to being set aside. *Coltraine v. McCaine*, 24 D. 256; but an irregular process will. *State v. Page*, 40 D. 608.

A sheriff has nothing to do with the propriety of the process under which he acts, provided the court had jurisdiction, and the process is regular upon its face. *Keniston v. Little*, 64 D. 297.

An officer, sued for taking property, may justify by showing an execution against his adversary which is regular upon its face. *Clay v. Caperton*, 15 D. 77.

18. Liability for wrongful levy. — A sheriff is liable in trespass to the owner of property sold without authority. *Forsythe v. Ellis*, 20 D. 218.

19 — for neglect to levy.† — Where an execution is placed in the hands of a sheriff before his term of office expires, and he has the means and opportunity to levy it upon the property of the defendant, but neglects to do so, he and his sureties are liable for the damages sustained by the plaintiff by reason of such neglect. *State v. Roberts*, 21 D. 62.

A sheriff is liable for failing to levy a mortgage *fa. fa.* upon the mortgaged property, although it belongs to a third person, and is in his possession adversely to the mortgagor, and the mortgage lien is superseded in consequence of a failure to record it, where the process commands him to levy upon and sell the property, designating it by full description. *Wallace v. Holly*, 58 D. 518.

Where a sheriff receives an execution to levy and return according to law, and without the creditor's consent delivers the same to a deputy, and informs the debtor that the writ is out against him, who, in consequence of the information, avoids the service of the writ, such officer is liable in damages for not serving and returning the writ. *Isham v. Eggleston*, 19 D. 714.

Whether the sheriff performed the service himself, or procured it to be done by another officer, to whom it was directed, would be of no importance; for if performed by any one in the manner required by law, and without prejudice to the plaintiff, it would be a complete answer to the action. *Id.*

In an action against the officer for failing to serve and return the writ, the creditor may show, without any allegation to that effect in his declaration, that the execution failed of service, that he has sustained damage by reason of the defendant's not retaining the execution in his hands, or in consequence of some act or omission of duty in regard to

* Sheriff abusing process becomes trespasser, see note, 14 D. 345-353.

† Diligence required in making levy, see note, 12 D. 203, 204.

For Index to Notes in American Decisions and American Reports, see Volume I.

it, for which he would have been liable if he had retained it. *Id.*

20. — for moneys collected. — An action against a sheriff does not lie for money made by him under execution until demand made therefor; and the statute does not begin to run in his favor until such demand is made. *Wright v. Hamilton*, 21 D. 513; for the reason that he cannot acquit himself by paying the money into court, but only by its payment to the plaintiff in execution, and the sheriff is not bound to seek the plaintiff to make a tender. *De la Garza v. Booth*, 91 D. 328.

A sheriff is liable for interest on such money only from the time the demand is made. *Wright v. Hamilton*, 21 D. 513.

A sheriff is presumed to have collected the amount of a *f. fa.* which he has held in his hands for several years without returning, and the burden of proving that he did not collect it is upon him or his sureties. *Com. v. McCoy*, 34 D. 445.

An officer who collects money under an invalid process must pay the same, and his securities are responsible for its misapplication. *Rollins v. State*, 53 D. 151.

The statutory penalty is not recoverable of a sheriff refusing to pay over money collected on execution, where he acts in good faith in such refusal, being unable to decide between conflicting claimants of the money. *Johnson v. Gorham*, 65 D. 501.

A sheriff collecting money, and of his own accord depositing it in a bank which subsequently fails, is personally liable to the plaintiff in execution therefor. *Phillips v. Lamar*, 73 D. 731.

A deposit by a sheriff to the credit of his official account is *prima facie* evidence only that the money came to his hands in some official transaction. *Stair v. New York Bank Co.*, 93 D. 759.

21. — for failure to make debt or costs out of goods levied on. — A sheriff negligently losing the property upon which he has levied is liable to the owner therefor; and no demand of restoration is necessary if the owner pays the plaintiff his debt. The loss of the property is enough, whether it occurs before or after payment. *Conover v. Com.*, 12 D. 451.

A sheriff selling attached goods at a private sale before judgment is liable to account to the creditor only for what he has received, where the sale was for a fair price, and was necessary to prevent loss of the goods. *Lovett v. Pike*, 66 D. 248.

A sheriff is answerable to the plaintiff in execution, as for conversion of goods sold, where, after the sale, he retains possession until payment of bid, and then refuses delivery to purchaser, who was plaintiff in execution, and who offered indemnity; but on the other hand, delivered possession to a person claiming to be the partner against

whom the purchaser afterwards established his title to the goods. *Patterson v. Anderson*, 80 D. 579.

22. — for failure to make return.*

— A judgment against a sheriff for not returning an execution will not be enjoined merely because the judgment debtor has obtained an injunction to stay proceedings on the judgment upon which such execution issued; and where the sheriff applies for an injunction against the judgment against himself, the court may inquire into the grounds on which the debtor obtained the first injunction. *Fowler v. Lee*, 32 D. 172.

A court of equity will not arrest an execution of the judgment against the sheriff unless it would be unjust and unconscientious to enforce it. *Id.*

The amount of an execution is *prima facie* the measure of damages against a sheriff, who, through mere neglect, fails to collect the money on it or to return it; and the damages cannot be mitigated by merely showing that the original debtor was solvent and able to pay. *Evans v. Governor*, 54 D. 172.

If, after the neglect of a sheriff to collect money on a writ or to return it, the plaintiff should cause subsequent executions, upon which the succeeding sheriff could have made the money, to be returned to await his remedy against the prior sheriff for the default, this constitutes no bar to his action for such default, and does not reduce the damages. *Id.*

In an action against a sheriff for not returning an execution, where no excuse is shown for his not prosecuting the undertaking in replevin, except the absence of an indemnity for costs, the sheriff is liable for the amount of the debt, and has no counterclaim for expenses in the replevin suit, although they may be within the terms of the bond to indemnify him. *Swaney v. Lott*, 78 D. 160.

Though a sheriff and his deputies are regarded as one officer, for many purposes, this rule cannot be extended so far as to make the sheriff chargeable with notice of all that has come to the knowledge of any of his deputies. Where, therefore, an execution is delivered to a deputy sheriff, who returns it unsatisfied because he could find no property upon which to levy, and the sheriff, without notice of the senior execution in the hands of his deputy, levies a junior execution upon the property of the same defendant, he will not be liable to the senior execution creditor for having first satisfied the junior execution. *Russell v. Lavton*, 80 D. 769.

23. — for false return. — Where a subsequent attaching creditor acts as auctioneer at the sale of the premises levied upon under a prior execution, and does not disclose that he has levied on the same prem-

* Failure to return execution, liability for, see note, 25 D. 571-574.

For Index to Notes in American Decisions and American Reports, see Volume I.

issa, and the officer's return stated that he had advertised the place of sale, which was not true, the attaching creditor, having obtained judgment, may maintain an action against the sheriff for a false return, and recover the amount of his judgment and interest, that being less than the sum realized on the execution sale. *Whitaker v. Sumner*, 19 D. 298.

An action against a sheriff for a false return on a *f. fa.* cannot be sustained without showing a judgment to authorize its issuance; and a mere memorandum of the clerk, showing the date and amount of an award of judgment, is not sufficient evidence of a judgment for that purpose. *Tombeckee Bank v. Godbold*, 20 D. 80.

The misconduct of a sheriff in falsely returning the service of a writ which he never served is not of itself sufficient ground for setting aside the judgment founded upon such false return. *Fowler v. Lee*, 32 D. 172.

24. — for acts of subordinates. — The sheriff's officers being his known and recognized deputies, he will therefore be held liable civilly for their misconduct in the execution of a writ. *Hazard v. Israel*, 2 D. 438; *King v. Chase*, 41 D. 675; *State v. Moore*, 61 D. 563; and when responsible, suit may be brought against him and his sureties on their bond. *Forsythe v. Ellis*, 20 D. 218.

But a sheriff is liable for his deputy's acts only in the ordinary execution of his office; hence he is not liable for acts performed by the deputy out of the usual course, under instructions from the plaintiff or his attorney. *Gorham v. Gale*, 17 D. 549; or for neglect of any duty which the law does not require him officially to perform. *Harrington v. Fuller*, 36 D. 719. For where the sheriff has no redress against the deputy or his sureties, he ought not to be liable for the deputy's acts. *Gorham v. Gale*, 17 D. 549.

A sheriff and his deputy are one person in law, so far as to make the former responsible for the acts of the latter, but not so far as to require impossibilities of the sheriff, or to impose unconscionable exactions. And the mere omission of a deputy to inform the sheriff that he has process in his hands is not such negligence as to charge the sheriff in case a writ last in hand was executed first. *Whitney v. Butterfield*, 73 D. 584.

The acts of a deputy are not to be regarded as acts of the sheriff, in the sense of either agency or identity, but rather in the sense of official relation and of responsibility cast by law upon the sheriff for the acts of his deputy; that is, for what the deputy does, the sheriff is made responsible, the same as if he had officially done the same thing. *Flanagan v. Hoyt*, 86 D. 675.

Although a sheriff is liable for a trespass committed by his deputy alone, he cannot

* Liability of sheriff for acts of deputy, see note, 11 D. 145, 146.

be sued therefor jointly with the deputy, nor will an action lie against him after a judgment against the deputy, upon which execution has been issued. *Campbell v. Phelps*, 11 D. 139.

A deputy sheriff, in levying upon property, acts for his principal, and if he fails to sell as directed by the writ, or by any act of his suffers the property to be eloiigned, or rights to be acquired in it by others, preferable to plaintiff in the writ, his principal is liable for its value. *Governor etc. v. Vanmeter*, 33 D. 221.

The sheriff remains liable for property wrongfully taken by his deputy, and sold, as long as the property in the goods taken or the money received from their sale remains unchanged. But when the owner of the goods sues the deputy for the trespass, recovers judgment, and takes out execution against him, the property in them becomes changed, and the deputy no longer holds in his official capacity, but in his own absolute right, and the sheriff is no longer responsible. *Harrington v. Fuller*, 36 D. 719.

Trespass on the case for a mere non-feasance of the deputy will not lie against the sheriff; this is never sufficient to make the latter a tort-feasor *ab initio*. *Abbott v. Kimball*, 47 D. 708.

A sheriff making a deed ratifies the levy and sale by his deputy, for the purchaser's protection, though the deputy acted without any regular appointment. *Brooks v. Rooney*, 56 D. 430.

25. — for failure to make arrests. — A sheriff who refuses to execute a *ca. sa.* will not be protected because the writ was erroneously dated, so that at its date the person whose name it bore *teste* was not a judge of the court from which it issued, as such defect is a mere irregularity, and does not render the process void. *Jordan v. Porterfield*, 63 D. 301.

Negligence in serving a *capias* is committed by a sheriff when the person to be arrested is on a temporary visit in the state, and resides out of the state, and the officer has information of that fact, and also that the party will be at a certain place on a certain day, and the officer fails to be there to arrest him, and gives no excuse why he was not there, and the party succeeds in leaving the state without being arrested, by reason of the said failure of the officer. *State v. Troutman*, 75 D. 459.

A sheriff living in a city is guilty of gross negligence and disregard of official duty, where he refuses to execute a writ of arrest with proper diligence, when it is placed in his hands at an early hour in the evening, with the request and demand that he execute it, and with notice that the party named in the writ is at a hotel and will depart before morning; for the statute authorizes the officer to break into any house or inclosure

For Index to Notes in American Decisions and American Reports, see Volume L.

at any time, whether night or day, to execute the writ, after first giving proper notice of it, and of his purpose to execute it. *Phillips v. Ronald*, 96 D. 216.

The sheriff and his sureties are at all events liable for nominal damages for a refusal by the sheriff to execute a writ of arrest with reasonable and proper diligence, and if such reasonable discharge of his duty would have secured plaintiff's debt or any part of it, the damages should be increased to that extent. The measure of damages in such case is the probable loss sustained by plaintiff. *Id.*

26. — for permitting prisoner to escape. — In an action against a sheriff for an escape and false return, on mense process, the plaintiff can recover no more than he might have done in the original action, and his actual recovery ought to be the amount of his loss, in consequence of the escape. *Potter v. Lansing*, 3 D. 310; *Russell v. Turner*, 5 D. 254.

If the plaintiff, having sufficient security from the defendant for his debt, relinquish it, after knowledge of the escape, the sheriff, in an action against him, may avail himself of this fact in mitigation of damages; and where the jury, in such a case, gave nominal damages only, the court refused to set aside the verdict. *Russell v. Turner*, 5 D. 254.

Where a defendant is taken in execution, and the sheriff allows the prisoner voluntarily to escape, he cannot afterward lawfully retake or detain him without a new authority from the plaintiff; but he can lawfully retake or detain the prisoner after a negligent escape. *Lansing v. Fleet*, 1 D. 142.

When the prisoner is voluntarily permitted to escape, his voluntary return and assent to custody will not prevent the liability of the sheriff for the escape. *Id.*

A sheriff who, knowing that the judgment is unsatisfied, permits the defendant to go at large by the direction of the plaintiff's attorney, acting merely under his general authority, is liable for an escape. *Kellogg v. Gilbert*, 6 D. 335.

A sheriff may permit a prisoner to go within the jail liberties without taking security; and if the prisoner, without his knowledge, goes beyond the limits, but returns again, the sheriff cannot be held liable for an escape. *Peters v. Henry*, 5 D. 196.

If a sheriff, who has a prisoner in custody on a *ca. sa.*, necessarily takes him out of the county in obedience to a *habeas corpus ad testificandum*, and returns with him when the exigency of the writ is answered, and without unnecessary delay, he will not be liable as for an escape, should the prisoner stroll about, and sometimes be out of his view. *Hassam v. Griffin*, 9 D. 184.

On the appointment of a new sheriff, the prisoners remain in the custody of the old sheriff until they are delivered to his succe-

sor. Hence, if the old sheriff omit to assign over to the new sheriff a prisoner who has been permitted to go within the liberties, this is not an escape for which the old sheriff is liable, as long as the prisoner remains within the limits. *Hempstead v. Weed*, 11 D. 244.

A sheriff's return of a rescue on a writ is not conclusive evidence in his favor in an action against him for an escape. *Whitehead v. Keyes*, 81 D. 672.

By opposing a defendant's discharge from custody, under the insolvent law, the creditor does not waive an existing right of action against the sheriff for a previous escape. *Dash v. Van Kleeck*, 5 D. 291.

27. Liability of strangers assisting sheriff. — If an officer, in executing a process, be a trespasser, those who aid him or act by his command are trespassers. *Elder v. Morrison*, 25 D. 548; *Hooker v. Smith*, 47 D. 679.

If a stranger aids an officer in doing a legal act, but the officer, by reason of some improper act, becomes a trespasser *ab initio*, the stranger does not thereby become a trespasser. Where a sheriff has power to do a particular act, his authority is a justification to all who come in his aid. *Elder v. Morrison*, 25 D. 548; *Hooker v. Smith*, 47 D. 679.

Men are bound to know the law if they obey his unauthorized commands; or if they disobey his lawful commands, they act at their peril. *Elder v. Morrison*, 25 D. 548.

Indemnifying an officer does not confer on him any authority which he did not have before. *Id.*

One who, in aid of an officer, and in obedience to commands which he had no power to make, lays hands on another, is liable for an assault and battery. *Id.*

IV. UNDER-SHERIFFS, DEPUTIES, ETC.

28. Appointment of deputies. — A warrant appointing a deputy sheriff, if filed with the clerk, is valid, although not indorsed by him. *Haines v. Lindsey*, 19 D. 586.

Farming the office of sheriff to a deputy, who is to discharge all the duties of the office and receive all the emoluments, in consideration of a gross sum paid to the sheriff, is not prohibited in Virginia. *Salling v. McKinney*, 19 D. 722.

29. Powers, duties, and liabilities of deputies. — A deputy sheriff cannot make a valid attachment of chattels already attached by another deputy of the same sheriff, although the value may be more than sufficient to satisfy the first attachment. *Vinton v. Bradford*, 7 D. 119.

A deputy sheriff has the power to make conveyances of lands sold under execution. *Haines v. Lindsey*, 19 D. 586.

The acts of a deputy sheriff *de facto* are good as to third persons. *Brooks v. Rooney*, 56 D. 430.

For Index to Notes in American Decisions and American Reports, see Volume I.

The authority of a deputy sheriff continues after the expiration of a sheriff's term with respect to all duties which may be performed by deputy, unless the authority is revoked or the sheriff dies. *Tyree v. Wilson*, 58 D. 213.

Where the defendant was induced to purchase certain real property by the representations of the plaintiff, at the time deputy sheriff, that there were no liens on the same, when at the time the deputy sheriff had in his hands an execution binding the property, or it was in the hands of the sheriff, within the knowledge of the deputy, who purchased the same when sold under the execution, — held, that the deputy sheriff was estopped from setting up the title obtained under the execution sale, to the prejudice of the defendant, and that he will be compelled to convey to the defendant the title so obtained. *Gill v. Denton*, 17 R. 8.

Seem, that a sheriff's sale is not within the statute of frauds. *Warfield v. Dorsey*, 17 R. 582.

30. The deputy's bond, and how enforced. — The sureties of a deputy are responsible only for his defaults in his official duties. *Gorham v. Gale*, 17 D. 549.

If an officer appoints a deputy who agrees to pay the principal a specific sum, and perform the duties of the office, this is a sale of the office; and a bond for the performance of such an agreement is void. *Salting v. McKinney*, 19 D. 722.

A bond given to a sheriff for faithful performance of duty by a deputy, conditioned "that the said sheriff shall not sustain any damage or molestation whatever, by reason of any act done or any liability incurred by and through said deputy," means that the sheriff shall not sustain any damage, that is, any actual damages, through the deputy. Although a judgment has been recovered against the sheriff for a default of the deputy, yet, so long as the sheriff has not paid it, his right of action against the sureties is not complete. *Gilbert v. Wiman*, 49 D. 359.

The sureties on a deputy sheriff's bond of indemnity are liable by subrogation to sureties on sheriff's official bond, when the sheriff's sureties have been compelled to pay money collected by the deputy sheriff; but not paid over to his principal. *Brinson v. Thomas*, 67 D. 224.

A judgment against a sheriff, for the neglect of his deputy to pay over moneys collected on execution, is conclusive as to the fact of the deputy's neglect, not only against the deputy who defended the suit, but also against the sureties on a bond given by the deputy to the sheriff, conditioned to indemnify and save the sheriff harmless from "all actions, suits, troubles, costs, charges, damages, and expenses whatsoever on account or by reason of any malfeasance, misfeasance, or non-feasance" of the dep-

uty, although the sureties had no notice of the suit. *Chamberlain v. Godfrey*, 84 D. 690.

V. MATTERS OF PRACTICE IN ACTIONS BY OR AGAINST SHERIFFS.

31. Rules of pleading. — A count in case in an action against a sheriff, alleging misfeasance by which plaintiff lost his debt is properly joined with a count in trover and conversion against him individually, for goods belonging to plaintiff, and detained by the defendant. *Patterson v. Anderson*, 80 D. 579.

In an action against a sheriff for a violation of his duty in the service of an attachment, if he relies on matters occurring after its issuance and operating to dissolve it, such matters must be specially pleaded. *McComb v. Reed*, 87 D. 115.

32. — of evidence. — When an officer is guilty of negligence in not serving a writ, the *onus* is on him to show that the defendant was insolvent, and that plaintiff was not damaged by his neglect. *State ex rel. Jenkins v. Troutman*, 75 D. 459.

Evidence that a defendant against whom a writ is directed was indebted to others than the plaintiff is not material upon a question of his insolvency, and should not be allowed. *Id.*

A sheriff refusing to execute a writ is presumed to have known his duty, and to have acted in willful violation of it. *Chapman v. Thornburgh*, 76 D. 571.

33. Summary motions against sheriffs. — The remedy under the Texas statute, by motion against a sheriff and his sureties, for failure or refusal to pay over money collected on execution, is not cognizable in any court but that from which the execution issued. But this statutory remedy is cumulative only, and not exclusive, and an action may be maintained against the sheriff and his sureties on his official bond in the court of a county other than that in which the execution issued; but in such an action the damages allowed on the statutory remedy by motion are not recoverable. *De la Garza v. Booth*, 91 D. 328.

The statute giving the remedy by motion against a sheriff and his sureties for failure or refusal to pay over moneys collected on execution is penal in its character, and should be strictly construed and followed, and therefore if it designates a tribunal for and mode of enforcement of the remedy, it is not enforceable in any other mode or tribunal. *Id.*

VI. REMEDIES UPON SHERIFFS' BONDS.

34. The right of action, generally.* — A sheriff and his sureties are liable on the official bond of such officer for torts com-

* Official bonds of sheriffs and constables, what constitutes breach of, see note, 46 D. 53-517.

For Index to Notes in American Decisions and American Reports, see Volume I.

mitted by him under color of his official right. *Charles v. Haslins*, 77 D. 148.

A sheriff who, having an execution against the goods and chattels of one person, levies upon and sells those of another, is not guilty of a breach of the condition of his official bond; and his sureties are not thereby rendered liable. *State v. Conover*, 78 D. 54.

35. Who may sue.—A suit upon a sheriff's bond is properly brought in the name of the state. *State v. Moore*, 61 D. 563.

36. Liability of the sureties.—The sheriff's bond is an annual bond, and his sureties are liable for his defaults during the time only between the giving the bond passed by them, and the execution of the next year's bond. *Heutt v. State*, 14 D. 259.

A sheriff's recognizance is conditioned for the discharge of his official duty, and for the payment to suitors and parties interested in the execution of writs and process, the money belonging to them which shall come to his hands. To this extent his sureties are bound, but no further. *Com. v. Swope*, 84 D. 518.

The plaintiff in a suit against the sureties of a sheriff must show the damage sustained by him though the sheriff's neglect or failure in the performance of his duty. *Com. v. McCoy*, 84 D. 445.

Fees of officers are not recoverable in an action against the sureties of a sheriff to recover money collected by him on an execution, except where such fees were previously advanced by the plaintiff. *Id.*

Property attached, but not sold after judgment, is, in contemplation of law, in the hands of the sheriff until the return day of the *renditioni exponas*; and the sheriff's securities are liable for his loss of it, though their bond be made only the day before the return. *Garrett v. Hamblin*, 49 D. 53.

The application for a writ of attachment by a plaintiff is not such an interference as will make the sheriff who executes it his agent so as to release his sureties. *Rollins v. State*, 53 D. 151.

A sheriff's sureties for his first term are liable for a deputy's default, after the expiration of a second term of the same sheriff, in collecting and not paying over money made on a *renditioni exponas* issued on an execution levied by the deputy during such first term, where different sureties were given for the second term, and the same deputy again qualified, and was never removed, but continued to serve as deputy for such sheriff's successor, and as such returned the *renditioni exponas* "satisfied." *Tyree v. Wilson*, 58 D. 213.

The sureties of a sheriff are not discharged from their obligation to the county by the neglect of the county commissioners to deduct from sums due said sheriff the amount

which they had previously determined to be his indebtedness to the county. *Com. v. Brice*, 60 D. 79.

In an action under a statute to make the sureties of a sheriff parties to and bound by a judgment of amercement against their principal, such judgment is not conclusive on the sureties, but only *prima facie* evidence of liability. *Graves v. Bulkley*, 37 R. 249.

The sureties of a sheriff are liable: For money collected by him after return day of the execution, but while he had property of the defendant in execution in possession by virtue of a levy made when the execution was in full force. *Evans v. Governor*, 54 D. 172.

For his trespass committed in seizing property exempt from execution. *State v. Moore*, 61 D. 563.

For trespass committed by the sheriff, in taking the property of one in attempting to execute a valid process of execution against another, although it seems the sureties would not be liable if the sheriff had taken the property without any process. *Holliman v. Carroll*, 84 D. 606.

For a sheriff's failure to give notices prescribed by law; though it does not follow that because the duty to advertise is official, that the duty to pay is also official. *Com. v. Swope*, 84 D. 518.

For a breach of official duty occurring after the expiration of his term of office; as where in his official capacity he receives during his official term notes for part of the purchase-money of land sold on partition, and after his official term refuses to deliver them to the proper parties, but converts them to his own use by collecting the money due on them and surrendering them to the maker. *Brooks v. Skillen*, 88 D. 458.

For redemption money received by him after his term has expired, upon land previously sold by him. *Elkin v. People*, 36 D. 541.

The sureties of a sheriff are not liable: For money collected by him, after his successor had been appointed and had qualified, upon an execution which he had failed to deliver to such successor in office, even though the execution debtor has been compelled to pay the amount a second time. *McDonald v. Bradshaw*, 46 D. 385.

To a printer, for advertising notices, rules, audits, inquisitions, and sales ordered by the sheriff, though it was a part of his official duty to cause such advertisements to be made, and for the neglect of which his sureties would have been responsible. *Com. v. Swope*, 84 D. 518.

37. Rules of pleading.—In a suit on a sheriff's bond, where a special breach is assigned, a plea of covenants performed is inappropriate; and the jury may inquire of damage if a better plea be not filed. *Potts v. Com.*, 20 D. 213.

For Index to Notes in American Decisions and American Reports, see Volume I.

The declaration in an action against the sureties, on the official bond of a sheriff, for neglect to levy an execution, must aver that such neglect was after the execution of the bond, and that, at the time, the defendant had property upon which the sheriff might have levied. *State v. Roberts*, 21 D. 62.

38. Matters of defense.—Sureties by signing a sheriff's bond thereby acknowledge him to be an officer *de facto*, and they cannot, for any informality or defect in his appointment, be permitted to deny that he is such an officer. *Police Jury v. Haw*, 20 D. 294.

Sureties of a sheriff whose election is void, and whose induction into office was illegal, but who assumes its duties, and becomes sheriff *de facto*, cannot, having voluntarily bound themselves for the faithful performance of his duties, absolve themselves from their obligation by insisting that he was not sheriff. *Jones v. Scanland*, 44 D. 300.

The sureties on the official bond of a sheriff are released if, subsequently to the time that they go upon his bond, an act is passed which at once curtails the duties and emoluments of his office. *Roman v. Peters*, 38 D. 222.

A sheriff paid the surplus of a sale on execution, to another than the person entitled thereto, by order of the military authorities in Missouri. In an action on the sheriff's bond, — *held*, that the section of the state constitution providing that no person should be prosecuted for any act done in pursuance of military authority was void, as impairing the obligation of contracts, in so far as it applied to acts done in violation of the sheriff's bond. *State v. Gatsweiler*, 8 R. 119.

39. Amount recoverable.—The measure of damages in an action on a sheriff's bond for the conversion of notes received by him in his official capacity is the value of the notes, and it cannot be urged in mitigation, even by the sureties, that the plaintiff may still resort to the maker for payment, the collection and surrender of the notes by the sheriff having been unauthorized. *Byrds v. Skillen*, 88 D. 458.

A sheriff and his sureties in an action on his official bond are liable for all money he may return as received from a sale, though it may exceed the amount that the purchaser was required by the terms of the sale to pay in cash. *Id.*

The measure of damages in an action against a sheriff upon his bond for a failure or refusal to pay over money collected on execution is the amount so collected and not paid over, with interest from time of demand of payment. *De la Garza v. Booth*, 91 D. 328.

SHERIFFS' DEEDS.

As evidence, see EVIDENCE, 208.

Office and effect of, generally, see EXECUTION, 127-140.

SHIPPING.

[Includes the title, ownership, and employment of vessels as carriers, or in towing other vessels; the authority, powers, and duties of the master; the rights of seamen; the enforcement of liens upon vessels in state courts; and the liability of ship-owners for collision.]

Ship-brokers, see BROKERS, 13.

See also ADMIRALTY; CARRIERS; FORWARDERS; NAVIGATION.

I. THE TITLE AND OWNERSHIP OF VESSELS.

II. EMPLOYMENT OF VESSELS.

III. THE MASTER AND CREW.

IV. ENFORCEMENT OF LIENS UPON VESSELS.

V. LIABILITY FOR COLLISIONS.

1. Rules for Avoiding Collisions.

2. Actions for Collision.

I. THE TITLE AND OWNERSHIP OF VESSELS.

1. Title to vessels, generally.—Part owners of distinct fractional portions of vessel are tenants in common of the vessel. *McLellan v. Cox*, 58 D. 736; not joint tenants. *Knox v. Campbell*, 44 D. 139; nor partners in trade. *Milburn v. Guyther*, 50 D. 681; *Hopkins v. Forsyth*, 53 D. 513; *Donald v. Hewitt*, 73 D. 431. For there may be joint property in a steamboat without the existence of a partnership. *Donald v. Hewitt*, 73 D. 431. But as respects earnings of the vessel, they are partners on any voyage on which it is sent by them. *Donnell v. Walsh*, 88 D. 361.

Part owners of a vessel using the same in trade, and participating in the profits springing therefrom, will be considered partners, and, as such, liable for responsibilities incurred in that trade. *Jones v. Pitcher*, 24 D. 716; *Carroll v. Waters*, 13 D. 316.

The holders of the legal title to a vessel are not considered liable as owners, if they have parted with both possession and control of the vessel, and only retain the title for the purpose of securing future payments of the purchase-money. *Jones v. Pitcher*, 24 D. 716.

Property in a vessel follows the keel, and if one repairs his vessel with another's materials, the property in her remains in him. *Perkins v. Pike*, 66 D. 267.

To prove the ownership of a vessel, it is not necessary to produce the register of the vessel or a certified copy thereof, but evidence of possession and acts of ownership are clearly competent. *Stearns v. Doe*, 74 D. 608.

The evidence of a name and port painted on the stern of a vessel is admissible to show to what port she belongs, and the latter affords *prima facie* evidence of the residence of her owner. *Id.*

2. Registration.—The certificate of registry of a vessel is not competent evidence to prove or disprove its ownership by any particular person; but the oath of a

For Index to Notes in American Decisions and American Reports, see Volume I.

party made to procure such registry is evidence against him of the facts therein stated. *Lincoln v. Wright*, 62 D. 316.

The register of a vessel is not evidence of title, even against the person named in it as owner, without extraneous proof that it was made with his authority or assent, and even then is not conclusive; and it is not evidence in his favor at all, being nothing more than his declaration. *Bradbury v. Johnson*, 66 D. 264.

3. Enrollment. — The indorsement upon the enrollment of a boat is simply made for the purpose of giving notice of a pre-existing statutory lien, and is not designed to evidence the declaration of a new trust. *Donaki v. Hewitt*, 73 D. 431.

4. Who are deemed to be owners. — Where one hired a vessel for the period of six months, agreeing to bear all the expenses except that of repairing, and to pay to the owners one half the earnings, and sailed in her himself as the master, — held, that the hirer was so far the owner of the vessel as not to be charged with barratry. *Taggard v. Loring*, 8 D. 140.

If a vessel is let to the master, on the shares, he victualing, manning her, and paying a part of the port charges, and having absolute control of her, but yielding as compensation for the use a part of the net earnings, the liability of the general owners ceases. The master in such a case is the owner *pro hac vice*. *Thompson v. Snow*, 16 D. 263.

If the owners of a vessel let her to the master, accepting as their compensation for her use a certain portion of the net profits, this does not create a partnership. *Id.*

An owner *pro hac vice* of a vessel is one who has the entire control and direction thereof, so that the general owner, for the time being, has no right to interfere in its management. *Emery v. Hersey*, 16 D. 268.

Where a master runs a vessel on shares, pays all expenses, has entire control of her course of employment, and makes all contracts in respect to her employment in his own name and of his own behalf, he is *pro hac vice* owner, and may maintain an action to recover damages in the nature of demurrage. *Wordin v. Bemis*, 85 D. 255.

A master of a vessel becomes owner *pro hac vice*, and not a partner of the owner, where he sails her under a contract at the halves, — he to victual and man her, and the owner to have half of her earnings. And the freight money earned during the continuance of such contract belongs to the master alone, and may be held under a timely foreign attachment against him. *Bridges v. Sprague & P. Iron Co.*, 99 D. 788.

The general owners of a vessel are not liable for damages occasioned by a collision, happening through the fault or negligence of the master of the vessel who controls her *pro*

hac vice and is sailing her "on shares." *Somes v. White*, 20 R. 718.

5. Relative rights and liabilities of joint or part owners. — 1. *Rights and liabilities, generally.* — Owners of a majority of the interest in a vessel have right to control her, and to direct the manner of her employment. *Gray v. Allen*, 45 D. 523.

A negotiable note given for supplies for a vessel given by one of two joint owners, who was also the master, jointly in his own and the other owner's name, but without authority of the latter, is void as to him; but both owners are liable to the promisee on the general counts. *Wilkins v. Reed*, 19 D. 211.

A part owner of a ship is answerable to his co-owner for ordinary negligence, and for not taking such care of his co-owner's property as he takes of his own. *Ralston v. Barclay*, 12 D. 483; and in a home port, cannot be allowed to incur an expenditure for repairs, without the knowledge and consent of the other, and then recover from him his proportion of the expense. *Benson v. Thompson*, 46 D. 617; but he may commit barratry against the other owners. *Phoenix Ins. Co. v. Moog*, 56 R. 31; and acting as agent for all the owners concludes all the part owners. *Chouteau v. Goddin*, 90 D. 462. Yet a ship's husband, being also part owner, cannot by mere virtue of such relation bind the co-owners by obtaining bail for the release of the vessel from seizure under civil process for collision and for repair. *Mitchell v. Chambers*, 38 R. 167.

Part owners of ships are tenants in common, holding distinct but undivided interests; and each is deemed the agent of the others as to ordinary repairs, employment, and business of the ship, in absence of any known dissent. *Elder v. Larrabee*, 71 D. 567.

Each part owner of a vessel is, in general, liable *in solido* for cost of making repairs or for necessities actually supplied to the vessel in good faith. *Id.*

The authority of a part owner of a vessel to bind his co-tenants therein for necessary repairs, though ordinarily implied, is not conclusively presumed, but is subject to be modified, controlled, or negated by facts or circumstances to the contrary. *Id.*

The owner of a two-thirds interest in a boat has the right to continue her in her usual employment, and is not liable to the other part owners for any loss sustained by reason of such employment. *Thoms v. Southard*, 26 D. 467.

An agreement with some of the owners of a vessel, that freight shall be carried thereon for a compensation, which is to redound to the sole benefit of those owners with whom the agreement is made, will not bind the owners who were not parties thereto, to any liability for the loss of the

* Part owners, rights and liabilities of, see note, 28 L. 364-368.

For Index to Notes in American Decisions and American Reports, see Volume I.

freight that may be shipped thereunder. *Jones v. Sims*, 33 D. 312.

2. *Actions by and against.* — A part owner of a ship may maintain an action on the case against his co-owner, to recover his proportionate share of the damages recovered against a sheriff, on account of his tortious taking and detaining of the vessel. *Knox v. Campbell*, 44 D. 139.

Part owners of a ship cannot sue separately for their respective shares of the proceeds of the sale of the whole vessel, or for freight in the hands of a third party. *Milburn v. Guyther*, 50 D. 681.

A bill in equity asking the delivery of the possession of a vessel, brought against part of the owners in possession, by the other part owners, without charging that the defendants are unwilling to employ the vessel, without averring that the plaintiffs seek the possession for the purpose or with the intention of employing her, and without mentioning any object whatever for which they ask the possession, cannot be sustained. *Southworth v. Smith*, 71 D. 72.

An injunction to compel part of owners in possession of a vessel to deliver her specifically to the other part owners will not be granted by either a court of equity or admiralty, when the bill praying for such injunction contains no averment of any injury meditated by the part owners who have possession of the vessel. *Id.*

Repairs to a vessel in the home port, by order of one part owner, if made by a person knowing who the other owners are, will be presumed to have been made on the credit of the part owner employing him, if he had opportunity to consult the other owners but neglected to do so, unless he can show that they all assented to the repairs; and his remedy is against the owner employing him alone, or against the vessel itself by proceedings *in rem*. *Elder v. Larrabee*, 71 D. 567.

An action at law for a breach of contract for building a vessel may be brought by one party against the other, although both are to be part owners. The rule that equity must be resorted to by part owners for the adjustment of their affairs only applies to cases relating to the vessel's earnings and disbursements, when no settlement has been made or account stated. *Ripley v. Crooker*, 74 D. 491.

6. *Sales of vessels.* * — The sale of a vessel and cargo, abroad at the time, by a *bona fide* bill of sale, is valid against the vendor's creditors, provided the vendee takes possession thereof without delay, upon the return of the vessel. *Portland Bank v. Stacey*, 3 D. 253.

The purchaser of a ship at sea takes her subject to all encumbrances on her, and to all lawful contracts made or to be made by

the master, as to the employment of the ship, before notice of the transfer. *Portland Bank v. Stubbs*, 4 D. 151.

A perfect transfer of a ship at sea may be made by assignment and delivery of a grand bill of sale and other documents relating to the ship. Actual delivery of possession is necessary only when it is possible, as when the ship is in the country of its owner at the time of the sale. *Southern Bank v. Wood*, 74 D. 446.

A change of the papers relative to the registry of a vessel is not necessary to pass the title to a purchaser; the object of the registry act is to regulate and establish the national character of the vessel. *Begley v. Morgan*, 35 D. 188.

The transmission of a bill of sale by mail is equivalent to a delivery to the vendee, and the transfer of title is perfected from the instant that the letter containing the bill is mailed, so as to entitle the vendee to the possession of the ship as against attaching creditors of the vendor, though the bill of sale is not received by the vendee prior to the levy of the attachment. *Id.*

A sale of a vessel may be ordered by the state courts, at the instance of a part owner desirous to end the joint ownership. *State v. Judge Watts*, 26 D. 507.

7. *Bills of sale.* — Blanks of a bill of sale of a ship after its execution and delivery were filled out by consent of vendor and vendee. It was held that the bill of sale was not thereby affected, as a deed after execution may be altered in a material part with the consent of the parties without affecting its validity. *Woolley v. Constant*, 4 D. 246.

8. *Mortgages of vessels.* — An equitable mortgage is created by an indorsement at the time of her sale, on a ship's register, which is thereupon retained by the vendor, that the vessel shall not be sold until the notes given for her purchase-money have been paid. *Welsh v. Usher*, 29 D. 63.

Such equitable mortgage will be enforced against creditors who obtain a subsequent legal lien, as by attachment, but not as against subsequent purchasers for value, without notice. *Id.*

An unrecorded mortgage of a vessel is invalid, according to the Maine statute of 1839, chapter 390, unless delivery and possession accompany the mortgage. *Greeley v. Waterhouse*, 36 D. 730.

A vessel used exclusively in North Carolina waters was enrolled under the act of Congress. It was mortgaged, and the mortgage was recorded in the custom-house, as required by the act, but not registered as required by the state law. *Held*, that the recording was valid. *Lawrence v. Hodges*, 53 R. 436.

9. — and rights and liabilities of the parties thereunder. — When a mort-

* Vessels at sea, transfers of, see note, 12 D. 511, 512.

For Index to Notes in American Decisions and American Reports, see Volume I.

gage is given on a ship at sea, the mortgagee is bound to take possession as soon as practicable on her return to port. *Portland Bank v. Stabbe*, 4 D. 151.

A ship at sea bound to a port in Massachusetts was mortgaged in another state by a deed of mortgage stipulating for the possession by the mortgagor until default in payment of the notes for which the security was given. Upon the arrival of the vessel in Massachusetts, she was attached in an action against the mortgagor and another part owner. Subsequently, and within a reasonable time after the mortgagee was entitled by the terms of the mortgage to take possession, his agent gave notice of his claim by memorandum on the certificate of enrollment at the customhouse. It was held that the mortgagee had a valid title, but that the attaching officer was entitled to the possession of the vessel on account of the interest of the part owner, and for that purpose might maintain trover against the agent who had replevied her. *Badlam v. Tucker*, 11 D. 202.

The owner of a vessel is not liable for supplies furnished after he has sold her, if she ceases to be in his possession or employment, although she is mortgaged to him and remains enrolled in his name. *Brooks v. Bondsey*, 28 D. 313.

The owner of a vessel liable for supplies is he who has control and management of her and the right to receive her earnings, having also some claim or title. Therefore, a mere mortgagee or pledgee, having no control of the navigation of a vessel or right to her earnings, is not liable for supplies. *Duff v. Bayard*, 39 D. 73.

A bona fide mortgagee is deemed a purchaser within the meaning of the ninth section of the chapter on boats and navigation (R. S. 205), providing that liens therein given shall not be enforced against a purchaser, without notice thereof, unless suit shall be instituted within one year from the cause of action accrued, or unless such notice be indorsed on or attached to the enrollment of the boat. *Halbert v. McCulloch*, 79 D. 556.

Claimants under a mortgage upon a boat, against which an attachment has issued, do not preclude themselves from the right to assert their claim to the property, or to contest the validity of the attachment, by executing a bond to the effect that they would pay such sum as might be adjudged in the action, or to have the boat forthcoming for the satisfaction of such judgment, whichever shall be ordered. *Ib.*

The holders of a bill of sale of a vessel, absolute on its face, but intended as a mortgage, may maintain an action for its conversion against a person claiming under a barratrous sale by the master, notwithstanding the fact that, on learning of the barratrous sale, they abandoned her to the

underwriters and received payment as on a total loss. *Clark v. Wilson*, 4 R. 532.

10. Validity and enforcement of bottomry bonds. — To constitute a bottomry, where more than legal interest is reserved, it is essential that the money lent and interest should be put at risk. If they are payable at all events, or if there is collateral security given for them, which is payable at all events, no matter by what name the contract is called, it is not a bottomry. *Jennings v. Ins. Co. of Pennsylvania*, 5 D. 404.

Bottomry is a contract by which the owner of a ship hypothecates or binds it as security for the repayment of money advanced for the use of the ship. It is a contract in the nature of a mortgage of the ship, and the interest to be paid is generally called "marine interest." *Braynard v. Hoppock*, 88 D. 349.

One essential feature of bottomry is, that the money lent is at the risk of the lender during the voyage, and that the repayment thereof depends on the event of the successful termination of the voyage. It is the very essence of the contract that the lender runs the risk of the voyage, and that both principal and interest be at hazard. *Ib.*

It is not bottomry if money loaned is to be repaid at all hazards; for the principal and extraordinary interest reserved is not put absolutely at hazard by the perils of the voyage. The lender must run the maritime risk, to earn the maritime interest. *Ib.*

There can be no personal responsibility in valid bottomry. The money must be advanced on the faith of the ship, and at the sole risk of her loss or safety. So if by the terms of the contract the owner binds himself personally to repay the loan, it is not a bottomry loan. *Ib.*

If a vessel is lost at a time when money on bottomry loan becomes payable, the lender cannot recover either principal or interest; and where her arrival in safety entitles him to repayment, he is confined to the security of the ship, and cannot enforce his claim personally against the owner beyond the value of the pledged fund which may come into his hands. *Ib.*

A loan is not a bottomry loan where collateral security is given for its absolute repayment, as where insurance policies and the vessel itself are assigned as security. *Ib.*

A contract of loan, falsely called bottomry, is usurious and void, where it reserves to the lender a greater interest than the lawful rate, claiming it as "marine interest." *Ib.*

Money collected by the lender on securities collateral to a usurious loan, falsely called bottomry, may be recovered by the borrower in an action properly brought for that purpose. *Ib.*

Where a bottomry bond executed by the master, after the usual recital and clause hypothecating the vessel for the payment of

For Index to Notes in American Decisions and American Reports, see Volume I.

the money advanced, contained the following clause: "And for the better performance of all the covenants and agreements herein contained, I, the said N. B." (the obligor), "for the consideration aforesaid, do grant, bargain, and sell the said ship John, and premises, to the said G. R." (the obligee), "his executors," etc., with the usual proviso that on payment, etc., the whole was to be void, — *held*, that these words did not destroy the character or operation of the bond. *Robertson v. United Ins. Co.*, 1 D. 166.

Valid bottomry bonds may be executed by the owner of a vessel at the home port, if the money obtained thereon is given on maritime risks, and at the hazard of the lender, although not applied to the purposes of the ship or of the voyage. *Greeley v. Waterhouse*, 36 D. 730.

The recited consideration of a bottomry bond may be inquired into, and contradicted by the creditors of the owner of the vessel. *Id.*

II. EMPLOYMENT OF VESSELS.

11. *Liability as carriers of merchandise.* — 1. *In general.* — In the contract of affreightment it is not a tacit or implied condition that the ship is seaworthy, as it is in insurance. *Forbes v. Rice*, 4 D. 589.

A contract to carry goods is not dissolved by the existence of temporary obstructions to the prosecution of the voyage. *Hand v. Baynes*, 33 D. 54.

Dangers of navigation do not include dangers arising from a canal's becoming impassable. *Id.*

A vessel supplied with proper ventilators is not liable for damage to goods caused by "sweating of the hold." *Montgomery v. Ship Abby Pratt*, 54 D. 562.

Goods receipted for in good order found to be in a damaged condition at the end of the voyage renders the vessel liable, unless it can be shown that the damage resulted from the act of God, inevitable accident, or the public enemies. *Id.*

Article 3204, section 11, of code of Louisiana, gives a shipper sustaining loss through the fault of the master or crew a privilege upon the vessel for the amount of such loss. *Tardos v. Ship Toulon*, 74 D. 435.

Where a cargo is transported by water, and there is no specific agreement between the shipper and carrier in respect to the particular wharf or spot at the port, where the cargo shall be landed, or any known custom of the port, the shipper or his agent must be there ready to receive the cargo, on notice of the arrival of the vessel, and upon his failure to do so, the carrier may treat the contract as broken, land the cargo at the usual place, if there is any such, or procure a suitable place at the expense of the shipper, or await his or his agent's tardy movements, and rely upon obtaining compensation

in an action for the breach of the implied contract to receive the cargo in a reasonable time. *Wordin v. Bemis*, 85 D. 255.

Delivery is essential to the discharge of a contract of affreightment, and as there can be no delivery without the act of two parties, it is indispensable that the freighter should be apprised when and where the ship-owner or his agent is ready to hand over the goods. *Morgan v. Dibble*, 94 D. 264.

2. *Liability of the owners.* — The owner of a ship carrying goods on freight upon a circuitous voyage is bound to have her in a state of repair at every port where she may be; and he is liable to the freighter for any damage to the goods for want of such repairs, no matter whether the defect in the ship was known or unknown to the ship-owner. *Putnam v. Wood*, 3 D. 179; *Whitall v. Brig William Henry*, 23 D. 483.

Several hogsheads of gin were received on board by the master of the vessel, to transport from Hartford to Boston, at usual freight, and were stowed on deck, and thrown overboard by reason of tempestuous weather. It was held that the owners were liable, unless such stowage was authorized by consent of the shipper, or by custom. *Barber v. Brace*, 8 D. 149.

Where by the usage of the place goods shipped on freight are consigned to the master for sales and returns, the owners of the vessel are liable for the payment of the proceeds to the shippers. *Emery v. Hersey*, 16 D. 268.

The owners of vessels as carriers are liable: For damage to goods caused by improper stowage. *Montgomery v. Ship Abby Pratt*, 54 D. 562.

For goods stolen on the voyage which were shipped on a contract with the master, without their knowledge, and which were not put on the freight list, although one of the owners was on board as supercargo, but not shown to have been exclusively attending to the shipment of the cargo. *Ward v. Green*, 16 D. 437.

For the master's negligence, though they are not on board the vessel at the time the accident happened, where the master entered into an agreement within his authority to transport certain goods, and fails, through his negligence, to deliver them. *Kelly v. Benedict*, 39 D. 530.

3. *Liability of the master.* — Where a master received goods on board under a contract to deliver them at a certain port, and being with the shipper at a port short of destination, there refused to proceed with the goods, the shipper may replevy or maintain trover for the goods. *Portland Bank v. Stubbs*, 4 D. 151.

The master and owners of a ship are responsible for the goods which they have agreed to carry, if stolen or embezzled by

For Index to Notes in American Decisions and American Reports, see Volume I.

the crew or any other person, although no fault or negligence may be imputed. *Schieffelin v. Harvey*, 5 D. 206.

The master and owner of a vessel may be severally held liable for loss of goods delivered for transportation, but they cannot be held so jointly. *Patton v. Magraith*, 33 D. 98.

A joint action of *assumpsit* cannot be sustained against the master and owner of a vessel, to recover for goods destroyed through negligence. *Ib.*

A master who sails a vessel on shares, and not the general owners, is liable to the shipper for the value of part of the cargo which was used for fuel during the voyage. *Sproat v. Donnell*, 45 D. 103.

The act of the master of a vessel in subjecting cargo to risk of being taken and condemned under the local laws of the port of discharge is not a ground for the recovery of damages against him, in the absence of proof that the cargo was so taken, or that any loss resulted therefrom. *Gaither v. Myrick*, 66 D. 316.

A cargo landed before sale and before reaching the port of destination will impose on the master of a vessel liability for charges of landing and reshipment to port of destination, and the shipper will not be liable therefor. *Ib.*

4. *Deviation from prescribed route.*—A deviation from a prescribed route is not justified by any ordinary or temporary obstruction. On discovering temporary obstructions to his voyage, the master should not take a route different from the one agreed upon, but should await their removal, or notify the shipper of the impracticability of proceeding. *Hand v. Baynes*, 33 D. 54.

The alteration in a voyage, whereby the vessel proceeded by sea, instead of through a canal, renders the carrier responsible for the loss of the property, although the canal was temporarily obstructed. *Ib.*

Where there has been unnecessary deviation, and injury to cargo ensues, the master and owner of the vessel are liable only for the damages actually resulting from the deviation or from a breach of the contract of affreightment. *Souter v. Baymore*, 47 D. 518.

A cargo must be carried according to the projected voyage by use of every reasonable and practicable method, and the master and owners will be responsible for every act not strictly in furtherance of this duty. *Gaither v. Myrick*, 66 D. 316.

The right to have cargo carried and delivered according to projected voyage is superior to power to sell vessel, and a claim for damages for a sale of the vessel before delivery of the cargo is not affected by the fact that the shipper knew that the vessel might possibly be sold. *Ib.*

5. *Loss by fire.*—The United States statutes of 1851, chapter 43, exempting the

owners and charterers of vessels from responsibility for losses arising from accidental fires, does not apply to expressmen or other common carriers who avail themselves of steamboats and other vessels for the transportation of packages in the fulfillment of contracts under which they assume the common-law liability. *Hill Mfg. Co. v. Boston & L. R. R. Co.*, 6 R. 202.

A loss of goods by fire on board the vessel upon which they are shipped, the fire happening by the neglect of the corporation owning the vessel, is not a loss incurred without the privity or knowledge of the owners of the vessel, under the United States statute of 1851, chapter 43, limiting the liability of ship-owners. *Hill Mfg. Co. v. Providence etc. S. S. Co.*, 18 R. 527.

The jurisdiction of a state court over an action against a ship-owner for damage to goods by a fire on board the vessel, happening by the alleged neglect of the ship-owner, cannot be affected by subsequent proceedings instituted by the ship-owner in a federal court under United States statute, 1851, chapter 43, and the rules of practice in admiralty. *Ib.*

Where a cargo of cotton was received by a carrier for transportation on an inland river, in a steamboat carrying freight and passengers, and was destroyed by fire on the boat, the carrier cannot avail himself of an exemption from liability for loss by fire, if he neglected to protect the cotton on deck "by a complete and suitable covering of canvas, or other suitable material, to prevent ignition by sparks," as required, under penalty, by act of Congress, "for the safety of the lives of passengers," and this is so although the act was repealed before the trial of the cause. *Grey v. Mobile Trade Co.*, 28 R. 729.

12. *Right to freight.*—Freight is a compensation for the transportation of goods from port to port, and is not claimable until the voyage is completed. *Patsiparo Ins. Co. v. Biscoe*, 28 D. 219; *Griggs v. Austin*, 15 D. 175; and when paid in advance must be repaid, if by reason of any event not imputable to the shipper the goods are not carried and delivered, unless there be a special agreement to the contrary. *Atwell v. Miller*, 69 D. 206; *Griggs v. Austin*, 15 D. 175; or unless delivery was prevented by dangers of the sea, or other unavoidable casualties. *Hahverson v. Cole*, 40 D. 603.

A ship-owner's right to freight rests in contract, and performance or excuse of performance of the conditions of the contract is necessary to entitle him to freight. *Crawford v. Williams*, 60 D. 146.

An agreement to waive the right to reclaim money paid in advance for freight is not to be inferred from a clause in the bill of lading, stating that the goods are to be delivered safely, "the dangers of the sea excepted." *Griggs v. Austin*, 15 D. 175.

For Index to Notes in American Decisions and American Reports, see Volume I.

Freight on merchandise lost by shipwreck or stranding, or by pirates or enemies, cannot be collected, and if wholly or partly paid in advance, must be refunded. *Id.*

An advance of freight means the same thing as a payment of freight beforehand, and neither implies a stipulation that the amount paid or advanced shall not be returned if the goods are not carried. *Id.*

If a cargo is delivered at the place of destination, the whole freight will be earned, no matter how deteriorated in value by the perils of the sea. *Tio v. Vance*, 30 D. 715.

It is not necessary to transport the cargo in the same vessel; in case of necessity arising from *vis major* during the voyage, the captain or owners have a right to repair, if it can be done within a reasonable time, or to employ another vessel and earn the freight. *Id.*

Owners are entitled to full freight, where, on an accident happening to the vessel the first day out necessitating repairs, she was repaired within ten days, and was ready to proceed, but the charterers refused to go on with the voyage. *Id.*

A vessel was chartered from New York to St. Domingo and return, the charterer to pay an entire sum for the whole voyage, in sixty days after the return of the vessel to New York. Arrived in sight of St. Domingo, the vessel was turned away by a British cruiser, because of a blockade of that point; thereupon she returned, with her original cargo, to New York, where the owners refused to deliver the cargo until freight was paid. In an action of trover to recover the value of the goods, — held, that no freight was due. *Scott v. Libby*, 3 D. 431.

A blockade of the port of destination dissolves the charter-party, and thus all claim for freight under it must be given up. No *pro rata* freight can be recovered, unless the goods have been accepted at a place short of the port of destination. *Id.*

The master may save freight where the vessel is wrecked or disabled in the course of the voyage, and cannot be repaired without great delay and expense, by forwarding the cargo by another competent vessel. *Crawford v. Williams*, 60 D. 146.

The fact that a shipper insures freight is a circumstance tending to show that he assumed risk of its loss, and taken in connection with parol evidence of a special agreement that the freight should be at his risk, is sufficient to be submitted to the jury as going to show an agreement to that effect, suppletory to that in the bill of lading. *Atwell v. Miller*, 69 D. 203.

The owner of a vessel who is also a carrier has a lien upon goods for their transportation, but it does not follow that he who has the title to the property employed in the transportation is necessarily the owner for the voyage. The owner of a vessel may lease it,

give up all possession and control, reserving only rent, and in that case the lessee, although the lease assumes the form of a charter-party, becomes the owner for the term. *Adams v. Homseyer*, 100 D. 391.

The general owner may let his ship with a master and crew of his own choosing, and if there is evidence of intention to part with the possession, it is held to be a demise. But a covenant that he shall have the right to appoint the master to control and navigate clearly indicates an intention not to trust the property in the hands of others, but to control it by his own agents for the use of the charterer. *Id.*

Whatever agreement exists between the consignees of a cargo and the charterer of a vessel, for an appropriation of return freights, the right of the master to collect them from the consignees after delivery to them of the goods, at least to the amount due on the charter-party, cannot be questioned. The delivery of the goods to the consignees, and their acceptance of them under the bill of lading, raises an *assumpsit* against them to pay freights according to the stipulations of the bill of lading; and this implied obligation becomes a positive one when the goods are received with notice that the freights must be paid to the master, and not to the charterer. *Id.*

The consignee and receiver of a cargo is liable for the freight, although the master, owing to a dispute with the person who loaded the vessel about the price of trimming the cargo, sailed without signing the bill of lading, and he cannot deduct that price from the freight. *Hatch v. Tucker*, 34 R. 707.

13. — and how enforced. — A consignor who is the owner of goods shipped by general ship is liable for the freight, independent of the bill of lading, and whether the ownership appears upon the face of such bill or not. *Grant v. Wood*, 47 D. 162.

An owner shipping goods is not released from liability for freight on them by a clause in the bill of lading which provides that the consignee shall pay it, where the goods have been delivered by the captain without payment having been made. *Id.*

Where a master of a vessel takes in payment of freight a bill of exchange drawn by the consignee on the consignor, who is the owner of the goods, and the bill is by him dishonored, such owner is not released from his original liability. *Id.*

A master is not bound at his peril to enforce payment of freight from consignees. He may waive his right of lien, deliver the goods without receiving payment of the freight, and yet his right to resort to the shipper for compensation still remains. *Wooster v. Tarr*, 85 D. 707.

A shipper named in a bill of lading is liable to the carrier for freight, although he does not own the goods, and the carrier has waived

For Index to Notes in American Decisions and American Reports, see Volume L.

his lien upon them; as he is the party with whom the owner or master enters into the contract of affreightment. *Ib.*

Partners in the earnings of a vessel should all be joined in an action to recover freight earned. *Donnell v. Walsh*, 88 D. 361.

14. Lien for freight.—The right to retain goods for freight does not exist where the parties have expressly regulated the time and manner of paying freight, in a charter-party, and especially if the cargo is deliverable before the arrival of the periods of payment. *Chandler v. Belden*, 9 D. 193.

The master of a vessel has a general lien on his cargo for freight and charges which passes by assignment. *Everett v. Coffin*, 22 D. 551.

Trover cannot be maintained against the assignee of the master, who has paid or become responsible for the freight and charges in such a case, before payment or tender by the plaintiff of the amount of the lien. *Ib.*

The subsequent fraudulent conduct of the master, in relation to the goods, cannot divest or affect the lien previously acquired by his assignee. *Ib.*

Such a lien is not waived by the assignee by mere failure to assert it when the goods are demanded, unless he distinctly puts his right to hold them upon some other ground. *Ib.*

A vendor is liable for freight and charges on goods stopped *in transitu*, while on board a ship belonging to his vendee, and the latter has a lien on the goods for the same. *Newhall v. Vargas*, 33 D. 617.

A lien for freight is not lost if the goods be taken from the possession of the owners *in itinere*, or by operation of law. *Ib.*

The vendor cannot set off against a lien for freight, any claim of his against the estate of his vendee, after a commission in insolvency has issued upon such estate. *Ib.*

A master of a ship has a lien on the cargo for freight to be paid thereon, and is not bound to part with any of the goods until entire freight is paid. *Frothingham v. Jenkins*, 52 D. 286.

Offering to give good security for the payment of freight is not payment. *Ib.*

The delivery of a part of goods shipped under one bill of lading to consignee does not defeat lien on remainder for whole of unpaid freight. *Ib.*

The delivery of a cargo and the payment of freight are concurrent acts, and neither party is obliged to perform without the other being ready. *Ib.*

A cargo of ice arrived at Washington, District of Columbia, in the middle of July. The consignee, wishing to inspect it before paying freight, proposed to the master of the vessel to proceed to deliver on receipt of the freight as fast as delivered, or to land the cargo, and store it in a convenient ice-house of the consignee on the wharf. The

master refused to do either, demanding freight in full before delivery. The consignee refused this, and in consequence of the disagreement the ice melted in the vessel. Held, that the master was liable for the loss. *Barker v. Schooner E. M. Wright*, 47 R. 234.

15. Freight pro rata.—*Pro rata* freight is earned only where there is a voluntary acceptance at an intermediate port justifying the inference that further carriage was dispensed with. *Western Transp. Co. v. Hoyt*, 25 R. 175; *Hunt v. Haskell*, 41 D. 387; *Gray v. Wain*, 7 D. 642; *Welch v. Hicks*, 16 D. 443; *Crawford v. Williams*, 60 D. 146; *Coffin v. Storer*, 4 D. 54.

The master's refusal to repair his ship, or to procure others and send on the goods, entitles the owner to receive the goods at the intermediate port without paying freight *pro rata*. *Welch v. Hicks*, 16 D. 443.

Where a master at first refused to repair the ship and proceed with the voyage, or to procure other vessels and forward the goods, but afterwards consented to repair and proceed, under circumstances calculated to excite doubts of his sincerity, and the owner then received his goods, it is for the jury to decide whether the offer to repair was *bona fide*, and the acceptance was voluntary, so as to entitle the ship to *pro rata* freight. *Ib.*

Where freight is to be paid after the return of a vessel from a voyage, her return is a condition precedent, and freight *pro rata itinere* is not demandable if the vessel does not return. *Hamilton v. Warfield*, 20 D. 448.

A contract is indivisible in such case, the freight depending on the performance of the whole voyage. *Ib.*

If "dangers of the sea" are excepted in the charter-party in such case, *pro rata* freight is demandable if the loss occurs from such dangers, but not otherwise. *Ib.*

An agreement to pay *pro rata* freight in case of loss, in such a charter-party, refers only to a loss by perils of the sea. *Ib.*

The owner or master of a vessel is not entitled to freight *pro rata* on the cargo, where his vessel is wrecked on the voyage, and he transships the goods and forwards them to their destination under a contract for freight, which the owner of the goods is compelled to pay, largely exceeding the original freight for the whole voyage. *Crawford v. Williams*, 60 D. 146.

16. Average and contribution.—1. Generally.—Elements of a general average are a purpose, a means, and a result; a design to avert a common danger by a voluntary sacrifice, the issue of which is successful. *Nimick v. Holmes*, 64 D. 710.

The freight actually gained or earned at the time a voyage is broken up should be the basis for estimating a rule of contribution. *Magrath v. Church*, 2 D. 173.

For Index to Notes in American Decisions and American Reports, see Volume I.

Upon a contract of affreightment, where the shipper assumes the perils of the sea, and the owner is to receive a share of the profits in lieu of freight, if damage be caused by the perils of the sea, the loss is to be deducted out of the profits, so as to be sustained by the owner and freighter jointly. *Putnam v. Wood*, 3 D. 179.

If a vessel be captured during her voyage, the freight will be chargeable up to the day of such capture, in a settlement of proportion for general average. *Leavenworth v. Delafield*, 2 D. 201.

The amount on which a general average, in case of capture, is to be calculated, is the first cost or invoice price of the cargo, and charges at the port of departure; on the vessel, four fifths of its value at the same place; and on the freight, at one half agreed to be paid. *Id.*

The adjustment of a general average made by a broker on the protest and evidence furnished by the master may be set aside at the suit of owners of goods, by showing the culpable negligence or want of skill of the master. *Chamberlain v. Reed*, 29 D. 506.

The master, on an adjustment of general average, has a lien upon goods liable for contribution. *Id.*

Evidence that a shipper had received from underwriters the amount for which goods lost were insured is not relevant, in an action by the shipper against the owners of the vessel for general average, nor is the amount so received evidence of the value of the goods. *Nimick v. Holmes*, 64 D. 710.

In an action on a general average bond it is a good defense that the loss was occasioned by the unseaworthiness of the vessel. *Cheraw & S. R. R. Co. v. Broadnax*, 58 R. 733.

2. *What are subjects of.* — Expenses incurred for seamen's wages and subsistence are items of charge, proper to be included in the adjustment of general average. *Barker v. Baltimore etc. R. R. Co.*, 10 R. 726; *Leavenworth v. Delafield*, 2 D. 201.

Damage by application of water or steam in extinguishing a fire, or by tearing up part of the vessel in order to get at it, such fire not being caused by fault of the crew, is general average, whatever the means used to extinguish the fire may be, whether by fire-engines on land, or by means of steam, or by scuttling the vessel. *Nimick v. Holmes*, 64 D. 710.

Where a vessel, in consequence of damages, was obliged to seek a port of safety in order to refit, the wages and provisions from the moment of bearing away to the period of setting out again on her original voyage constitute a subject of general average, the proportion of which may be recovered in an action of *assumpsit*, by the owners of the ship against the proprietors of the cargo; and consequently it is a charge for which

the insurers on the cargo are liable. *Warden v. Le Roy*, 2 D. 236.

No contribution is allowed for goods shipped on deck, and which had been thrown overboard, nor is the owner of the vessel liable as a carrier for the value of such goods. *Smith v. Wright*, 2 D. 162.

General average for the voluntary sacrifice of a cargo of lime, by scuttling a vessel, cannot be claimed where the lime was of no value, there being no possibility of saving it. *Crockett v. Dodge*, 28 D. 170.

Where a ship disabled by stress of weather puts into an intermediate port, and from her necessities part of the cargo is sold at a loss, its whole amount is not general average, but only such proportion as the general average charges bear to the whole amount disbursed. *Hassam v. St. Louis Perpetual Ins. Co.*, 56 D. 591.

When a vessel puts into a port of distress, and there transships a portion of her cargo, the freight paid the substituted bottom is not an expense or loss to be contributed for in general average, where the transshipment is made for the purpose of earning full freight. *Hugg v. Baltimore & C. Smelt. etc. Co.*, 6 R. 425.

A bark being in inevitable danger, without her fault, of collision with a steamer, changed her course so as to strike the steamer stem on, thereby probably saving herself from being sunk with her cargo. In consequence of the collision she was obliged to go for repairs into a port of a country where the duty of a steamer to keep out of the way of a sailing vessel was not recognized, and where she was compelled, at the suit of the owner of the steamer, by a decree of court, to bear half the damage to both vessels, and, therefore, to pay a certain sum to the steamer. In a suit in equity by the owner of the bark against the owners of her cargo for contribution, — *held*, that neither the expenses of the repairs rendered necessary by the collision, nor the sum paid to the steamer, nor the costs of defending the suit, was a subject for general average. *Emery v. Huntington*, 12 R. 725.

If a fire in a vessel at a city wharf is extinguished by the city fire department, acting under municipal authority, and not at the request or direction of the ship-master, the cargo saved is not liable to contribute to a general average loss. *Wamsutta Mills v. Old Colony Steam. Co.*, 50 R. 325.

All damage directly resulting from a jet-tison should be contributed for, though it happen to articles described as perishable, and which remain in specie. *Magrath v. Church*, 2 D. 173.

Goods shipped on deck and lost by jettison are not entitled to the benefit of general average. *Cram v. Aiken*, 29 D. 503; *Dodge v. Bartol*, 17 D. 233.

Nor does the fact that it is customary for

For Index to Notes in American Decisions and American Reports, see Volume I.

vessels plying between the ports between which the plaintiff's goods were being transported, to carry merchandise on deck when the hold is full, entitle the plaintiff to contribution from the owner of the vessel. *Oram v. Allen*, 29 D. 503.

Nor does the payment of full freight for goods stored on deck entitle their owner to contribution if they are lost by jettison. *Ib.*

Jettisoned goods stowed on deck of a steamer navigating Long Island Sound are entitled to the benefit of general average, especially if it is the usage to stow goods on deck. *Harris v. Moody*, 86 D. 375.

All property on board a vessel at time of jettison is liable to contribution, except that attached to the persons of the passengers. *Ib.*

Bank bills on board a steamer, for transportation, at the time of jettison, are property, liable to contribute to the general average loss, although they are carried in a crate for the owners by an express company, which by agreement pays the owners of the steamer a fixed sum annually for carrying a certain number of crates with their contents. *Ib.*

17. Charter-parties; their form, execution, and validity. — A vessel may be chartered for a voyage or for a time certain, without an instrument in writing. *Taggard v. Loring*, 8 D. 140. And the parol charterer, not the general owner, is answerable to the shipper of goods. *Thompson v. Hamilton*, 23 D. 619.

18. — Interpretation and effect. — Where a vessel is chartered for a voyage out and home for an entire sum, payable on her return, her return is a condition precedent to entitle the owner to freight; and if the vessel is lost before commencing the homeward voyage, no recovery can be had, either on the charter-party or on an implied assumption for the freight of the outward voyage. Nor if the freighter had accepted the outward cargo could he have recovered a pro rata freight, because of the entirety of the contract. *Penoyer v. Hallett*, 8 D. 239.

Where a charter-party stipulated that "if the vessel entered the port of Lisbon, the voyage should be determined," and the vessel having arrived at the outer port of Lisbon, remained a short time, and then proceeded to another port, — held, to be a question of fact for the jury whether the voyage was thereby terminated. *Goddard v. Bulow*, 9 D. 663.

The hire or rent of a vessel is due, when it depends alone on the will of the hirer or lessee to enjoy the thing, or when he has not been prevented from enjoying it by the lessor. *Tio v. Vance*, 30 D. 715.

19. — Rights and liabilities of the parties. — 1. Generally. — Where a vessel is chartered without any limitation of time, it is an indefeasible hiring for every voyage

undertaken before notice from the owner of his intention to put an end to the contract. *Outler v. Winsor*, 17 D. 385.

Facts held not to render a charterer and owner partners. *Ib.*

A captain who is unable to obtain the cargo intended, on account of his vessel being ordered away by the officers of the government, is at liberty to act upon his best judgment for the interest of all concerned, and obtain a cargo at another place. *Benson v. Atwood*, 71 D. 611.

Defendant hired the plaintiff's barge, with captain and crew, for ten months, used her three months, and abandoned her at a dock, where she remained three months suffering from exposure. The plaintiff notified the defendant that unless he used the barge the plaintiff would do so for the rest of the term, crediting him with the net earnings. Defendant made no response. Held, that plaintiff could recover the amount unpaid on the contract, less such net earnings. *Johnson v. Meeker*, 48 R. 609.

2. Liability of the charterer. — When a vessel chartered for a voyage becomes disabled by an accident while loading the cargo, the freighter will not be bound bound by the charter contract, unless she is repaired and rendered fit for the voyage within a reasonable time, of which the jury are the proper judges. *Purvis v. Tunno*, 2 D. 664.

The shipper should look to the charterer in case of loss, and this rule is the same, whether the general owner is to receive of the charterer a proportion of the profits for the use of the vessel, or is to receive a determinate sum. *Thompson v. Hamilton*, 23 D. 619.

The refusal of a foreign government to permit a captain to take a cargo does not relieve the charterers from liability to the owners for a failure to do so, where the charter-party fails to provide for such a contingency. *Benson v. Atwood*, 71 D. 611.

Damages for a freighter's failure to supply a cargo according to the terms of the charter-party are to be ascertained by the jury, according to the liberal principles of interpretation usually applied to commercial contracts, upon consideration of all the circumstances, and of the real injury sustained by the owners. *Ib.*

A second charter-party executed by the owner after a breach of the first does not relieve the charterer from the consequences flowing from their breach of the first. *Ib.*

3. Liability of the owner. — The general owner of a vessel hired by another for a particular voyage by a contract of charter-party, stipulating that the hirer is to have the exclusive possession and management of the vessel, and the exclusive profits of the voyage, is not liable for the non-delivery of

* Liability of owner of vessel when it is hired to another, see note, 18 D. 87-90.

For Index to Notes in American Decisions and American Reports, see Volume I.

goods shipped for such voyage after the execution of the charter-party. *Pitts v. Brainerd*, 13 D. 79.

False colors held out by the owner inducing a reasonable belief in the shipper that the vessel will sail on the owner's account and under his direction will render him liable, even without any fraudulent intent on his part. *Ib.*

Where the chartering and surrender of control and possession of the vessel are clearly proved, although the custom-house papers showing ownership of the same are not changed, it will not be sufficient evidence to show a fraudulent intent on the owner's part, or to warrant a reasonable belief that he is interested in the voyage, to prove that he was introduced by the charterer to certain merchants as owner, and did not disclaim any concern in the voyage, but made inquiries as to the prospect of procuring freight from said merchants. *Ib.*

20. Demurrage.—A delay in a voyage caused by a failure of the charterers to furnish orders, and by their default in furnishing a cargo according to the terms of the charter-party, is a proper subject of damages. *Benson v. Atwood*, 71 D. 611.

In estimating damage for a delay and loss of time, the sum agreed upon as demurrage is properly left to the jury as *prima facie* evidence. *Ib.*

Lay days provided for in a charter-party should be allowed a charterer, who, failing to load according to the terms of the contract, is sought to be charged for the extra time and delay in obtaining another cargo. *Ib.*

The time consumed in bringing a vessel nearer home will not be charged to the defendants, where, failing to obtain a cargo at the port of destination, according to the terms of the charter-party, she sails to another port for another cargo. *Ib.*

The cost of advertisement and protest made by a captain, to find out who the agent of the charterer is, is allowable in an action for delay in a voyage, through the charterer's failing to have an agent from whom the captain is to receive orders, according to the terms of the charter-party; such cost is not covered by an allowance for demurrage. *Ib.*

Demurrage includes the hire and maintenance of the crew; and in an action for delay through the owners having no agent at the port from whom the captain can receive orders, where the captain has to pay a bonus to a crew, which he discharges in consequence, such sum cannot be claimed in addition to the demurrage. *Ib.*

The expense of hiring an additional crew and port charges must fall on the charterer, where there is no one from whom the captain can receive orders at the port of destination, and he is ordered away by the

government, and sails for another port, where he is compelled to pay port charges, and hires another crew at additional expense, in consequence of his own crew leaving. *Ib.*

Demurrage, strictly speaking, is a sum of money due by an express contract for the detention of a vessel in loading or unloading one or more days beyond the time allowed for that purpose in the charter-party. *Wordie v. Bemis*, 85 D. 255.

Demurrage being a certain sum due by force of an express contract, general *assumpsit* will lie for it. *Ib.*

Damages in the nature of demurrage are recoverable for the detention of a vessel beyond a reasonable time in unloading only, where there is no express stipulation to pay demurrage. Such damages are recoverable for a breach of the implied contract of the shipper that he will receive the goods in a reasonable time, and can be recovered only in special *assumpsit*. *Ib.*

Damages in the nature of demurrage cannot be recovered for an unreasonable delay to a vessel in discharging her cargo, when such detention is caused by an accidental and unexpected accumulation of vessels at the same dock where all must discharge and where each in turn does discharge her cargo. *Ib.*

The consignee of a vessel is not liable for demurrage if the bill of lading contains no provision for the payment thereof; and certainly not if he assigns the bill of lading before any of the cargo has been delivered. *Gage v. Morse*, 90 D. 155.

A contract to deliver freight at a port implies at a wharf or other convenient or customary place of discharge; and where a master was unable to bring his vessel to any wharf for several days on account of ice,—*held*, that he was not entitled to demurrage for such delay, although he notified the consignee, and although the consignee made a way through the ice for another vessel. *Hodgdon v. New Haven etc. R. R. Co.*, 33 R. 21.

21. Duties and liabilities as carriers of passengers.—The law of the place where a contract is to be performed governs, although the law of the person's domicile against whom the contract is sought to be enforced differs; and where the owner of a ship, residing in New Orleans, had sent her to carry passengers from Vera Cruz to Havana,—*held*, that contracts made by the master within the scope of his authority were binding upon the owner, and that the same were governed by the laws of Mexico. *Arayo v. Currell*, 20 D. 286.

The owner of a vessel is liable for the torts of the master, within the scope of his employment, according to the laws of the country where the same are committed. *Ib.*

The master is liable as for a breach of

For Index to Notes in American Decisions and American Reports, see Volume I.

duty for inhuman and indecent conduct towards the passengers, by himself and crew, where incited by him. *Kearns v. Lissardi*, 25 D. 197.

The owners of a vessel are liable for all breaches of duty of the master in his conduct towards passengers. *Id.*

The contract of passage is broken by depriving the passengers of the use of the cabin, or by failure to furnish them with the stipulated food, or by the permitting them to be molested by the seamen. *Id.*

The owners of a vessel are liable for the master's breaches of the contract of freight or of passage, and may be held, therefore, for such breaches, though they are involved in tortious acts, and though, by the law of the contract, the owner is excused from the consequences of the master's torts. *Id.*

Female passengers stipulate, in addition, for exemption from rude, indecent, or brutal behavior. *Id.*

22. — and their baggage. — The master of a vessel is bound to take care of the effects of a passenger who dies on board, and he is liable for a failure to do so. Such liability is not limited to the value of the vessel and freight earned. *Malpica v. McKown*, 20 D. 279.

Whether the owner and master of a vessel are liable for money brought on ship-board in a trunk without their knowledge, *quære. Id.*

23. Contracts for towage, generally. — A signal for a tow-boat, and its arrival in response, do not constitute a contract between the signaling vessel and the tow, by which the former engages to be towed by the latter to her place of destination. *Clark v. Gifford*, 26 D. 511.

Towing of a vessel is "transportation of property," within the meaning of the California statute giving a right of action for malperformance or non-performance of contracts for transportation. *White v. Mary Ann*, 65 D. 523.

The interpretation of a contract between a towing company and the master and owner of a boat to be towed, the relations of the parties, and their relative rights and obligations are questions of law and not of fact. *Arctic Fire Ins. Co. v. Austin*, 25 R. 221.

The defendant contracted to tow the plaintiff's barge, by means of a steam-tug, from Bay City, Michigan, to Buffalo, New York. After the voyage had been commenced, and been partly performed, it was voluntarily suspended and delayed by the defendants, the barge during the delay being exposed to none of the perils peculiar to the voyage. After the voyage was resumed, and while it was being duly prosecuted, a storm was encountered by which the barge was lost. *Held*, that the defendants, by the mere fact of the delay, did not become responsible for the loss of the barge, although

the delay was unreasonable and unnecessary, and although, as the event proved, the barge, but for the delay, would probably have been safely towed to its place of destination. In such case, the storm must be regarded as the proximate and the delay as only the remote cause of the loss. *Daniels v. Ballantine*, 13 R. 264.

24. Liability of tow-boats as common carriers, generally. — The owner of a tug-boat is liable as a common carrier, it seems, in the towage of vessels. *White v. The Mary Ann*, 65 D. 523. *Contra, Varble v. Bigley*, 29 R. 435.

A tow-boat used in towing barges or other water-craft, which are loaded with freight, from one point to another on the river, is a common carrier, and the persons owning such tow-boat, who undertake to tow a barge loaded with freight or merchandise, from one given point to another on the Mississippi River, first giving a bill of lading for the transportation of the cargo on board of the barge, are liable for the delivery of the cargo at the port of destination, the same as if it had been placed on board the tow-boat herself. *Bussey v. Miss. Valley Transp. Co.*, 13 R. 120.

The use of reasonable care and diligence only is required of one who, without expressly agreeing to insure against all losses or injuries that may arise, undertakes to tow a vessel out of a harbor, through the ice therein; such contractor is not liable to the same extent as a common carrier. *Pa. etc. Nav. Co. v. Dandridge*, 29 D. 543; *Leonard v. Hendrickson*, 55 D. 587; *White v. The Mary Ann*, 65 D. 523; *Bussey v. Miss. Valley Transp. Co.*, 13 R. 120.

Plaintiff employed C., who was the owner of a scow, to transport thereon cattle and horses across the St. Lawrence River. C. employed defendant, who was the owner of a tug, to tow the scow across. The plaintiff had knowledge of the employment of defendant, and agreed to pay a portion of the contract price. By the negligent and unskillful management of the tug, several of the cattle were lost. *Held*, 1. That plaintiff could maintain an action against the defendant for the loss; 2. That a state court had jurisdiction of such an action; and 3. That the act of Congress of March 3, 1851 (5 U. S. Stats. at Large, 635), did not oust the state court of jurisdiction. *Baird v. Daly*, 15 R. 488.

The captain of a steam-tug, having a canal-boat in tow at the risk of its master and owner, is not master of the canal-boat, and has not such charge and control of the canal-boat that its master and crew can be deemed for the trip the servants and agents of the owner of the tug, so as to make the latter chargeable with negligence of the master and crew of the canal-boat. *Arctic Fire Ins. Co. v. Austin*, 25 R. 221.

For Index to Notes in American Decisions and American Reports, see Volume I.

Nor is the owner of the tug a common carrier, and so liable for the negligence of those in charge of the canal-boat. *Id.*

25. — for injuries to tow. — It is the duty of a flat-boatman, when a tug has a flat-boat in tow, to aid in managing the tow and to obey the directions of the pilot of the tug. But if the pilot fails to give sufficient orders, or fails to give them in time, negligence may be imputed to the master of the tug, as well in this as in any other respect. *Hays v. Paul*, 88 D. 569.

The time and sufficiency of necessary orders fall within the duty of a tug when a steam-tug takes a boat in tow, undertakes its management and control, and assumes to give the necessary orders. *Id.*

It is negligence on the part of a tug, where its officers, with a boat in tow, give the boat insufficient orders, or give them too late. *Id.*

One who uses a tug for towing must know the capacity of the tug and its practical effects upon the boats in tow. *Id.*

When the character and loading of a tow are visible and open, and her depth in the water and everything in regard to her are patent to all, it would be negligence on the part of the tow-boat captain to undertake to tow such a flat if too heavily loaded. *Hays v. Paul*, 88 D. 569.

A tow-boat captain is the best judge of what his tow-boat can do, and when asked to tow a craft too heavily loaded, or otherwise unfit to be towed, he should decline, or apprise the owner, and make special terms as to the risk. *Id.*

The towing of boats is an undertaking implying sufficient knowledge and skill to perform safely. *Id.*

Where a vessel in tow of a steamboat employed in the business of towage, through the negligence of the master and crew of such steamboat, comes in collision with another vessel, the owner of the towed vessel is not liable for damages occasioned thereby. *Sproul v. Hemmingway*, 25 D. 350.

The proprietors of steam tow-boats plying between New Orleans and the Gulf of Mexico are common carriers, and responsible as such. They are bound to bring the vessel towed safely to its destination, unless prevented by uncontrollable accidents, or such as are not within the control of human foresight or power. And they are liable for any damage caused to such vessel by neglect to procure the necessary means to secure its safe towage. *Clapp v. Stanton*, 96 D. 417.

The owners of a tow-boat are not common carriers, and if a boat which is being towed is injured, the *onus* is upon owners of such injured boat to show that the injury was caused by the negligence of those in charge of the tow-boat. *Hays v. Millar*, 18 R. 445; *Brown v. Clegg*, 3 R. 522.

When, however, evidence has been given

to show that the injury was caused by the negligence or unskillfulness of those managing the tow-boat, evidence showing the general skill, competency, and carefulness of such persons is not admissible to rebut the evidence of particular negligence. *Hays v. Millar*, 18 R. 445.

26. Pilots, and the obligation to employ them. — The master is bound to secure the services of a pilot when entering a foreign port where pilots are employed, and must approach pilot ground with caution. *McDowell v. General Mut. Ins. Co.*, 56 D. 619.

A state law requiring masters of vessels bound to ports in the state to accept the services of the first licensed pilot offering is not unconstitutional. *Thompson v. Sprague*, 47 R. 760.

Members of a board of pilot commissioners are not civilly liable for wrongfully revoking a pilot's license, such board being a *quasi* judicial body, intrusted with duties requiring the exercise of judicial discretion. *Downer v. Lent*, 65 D. 489.

The master has power to employ a pilot on a river steamboat, within the duration of his own term of service, for a longer term than one trip. *Hight v. Robbins*, 75 D. 118.

27. Quarantine regulations. — A quarantine statute applies to vessels having other contagious diseases on board as well as to those afflicted with the plague, although formerly only the latter class of vessels were subject to quarantine. *Mitchell v. Rockland*, 66 D. 252.

Health-officers cannot take possession and control of vessels in quarantine to the exclusion of the owners or their agents. *Id.*

A city is not liable for injuries to a quarantined vessel by negligence of health-officers, or their agent or servant, where they have unlawfully taken possession of the vessel. *Id.*

The president of a board of health, without lawful authority or necessity ordered the fumigation of a vessel laden with fruit coming from a foreign port. The master, claiming that the fruit would be ruined, was offered the opportunity to discharge the cargo, but at his own expense. He refused, and the fruit was damaged by the fumigation. *Held*, that an action would lie against the president therefor. *Beers v. Board of Health*, 48 R. 256.

III. THE MASTER AND CREW.

28. Powers and duties of master, generally. — Upon a general retainer for no particular voyage, the owners of a vessel may dismiss the captain at any time without cause assigned. *Montgomery v. Henry*, 1 D. 223.

The master is bound, when the ship becomes disabled during her voyage, to procure another vessel, if in his power, to bring the cargo to the port of destination; but he

For Index to Notes in American Decisions and American Reports, see Volume I.

is not bound to seek another vessel out of the port of distress, or out of a port immediately contiguous thereto. *Saltus v. Ocean Ins. Co.*, 7 D. 290.

The master of a vessel who is also part owner does not, by virtue thereof, have a special privilege, called or known as a sailing or master's interest, which will prevent the owners of a majority interest in the vessel from displacing him as master at their pleasure. *Ward v. Ruckman*, 93 D. 479.

A vessel of which defendant, a resident of New York City, was the nominal owner, was libeled in Buffalo, while in charge of J. S., the master and real owner, for a penalty incurred by carrying passengers without license. J. S., without defendant's knowledge, procured plaintiff to become bail for her release, and on appeal from the decree enforcing the penalty, plaintiff became bail on the appeal bond also. The decree was affirmed, and paid by plaintiff, who brought action against defendant to recover the money so paid, claiming as surety in the appeal bond. *Held*, that as the vessel was libeled in a home port, and within communicating distance with defendant, J. S. had no right to bind him; also, that plaintiff must be deemed to have made the payment as defendant in the decree, and not as surety on the appeal bond. *Gager v. Babcock*, 8 R. 532.

29. — as general agent of owners. — The master is the confidential agent of the owners at large, intrusted with the conduct and management of the ship. *Ward v. Green*, 16 D. 437.

The master of a general ship abroad has power to make contracts in relation to freight which will be binding on the owners. *Id.*

A general ship is one in which the master or owners engage separately with a number of persons, unconnected with each other, to convey their respective goods to the place of the ship's destination. *Id.*

The consignees selected by the ship-master or supercargo, in a foreign port, according to usage, and *bona fide*, are so far the agents of the owner of the ship and cargo that, upon the death of the captain or supercargo, his representatives are not responsible for the acts of such consignees after his death, not imputable to instructions given during his lifetime. *Payson v. Donnell*, 19 D. 213.

The master of a vessel may bind the owners so far as the usual employment of the vessel in the carriage of goods is concerned, but has no power to purchase a cargo on their account without an authorization for that purpose. *Hewitt v. Buck*, 35 D. 243.

The authority of a ship's husband to bind the owners is limited to contracts concerning the outfit, care, and employment of the vessel, and does not extend to the purchase of a cargo on their account. *Id.*

The powers and duties of ship-masters when in foreign ports, and in case of dis-

aster, are very extensive. They are then the general agents of the owners so far as respects acts necessary to the successful prosecution of their voyage. *Duncan v. Reed*, 63 D. 635.

The master of a vessel in a foreign port, where there is no consignee, if he have no other means, may pledge the credit of the owners of the vessel for money needed to pay the officers and crew, and money so lent may be recovered of the owner, if the loan has been made in good faith and after due diligence to ascertain the necessity; and the questions of the necessity, good faith, and diligence are for the jury. *Stearns v. Doe*, 74 D. 608.

The owner of a vessel is liable for the acts of the master, although tortious, within the scope of his employment. *Malpica v. McKown*, 20 D. 279.

The master is the agent of the owner, who is liable for his defaults, although the whole vessel is chartered; unless the charterer engage the master and seamen, so that the hull only belongs to the owners. *Purvis v. Tunno*, 2 D. 664.

An owner of a vessel is liable for the master's contracts, when it appears that the vessel was in the employment of the owner, and the master was appointed by him, and that the latter acted within the scope of his authority. *Reynolds v. Toppan*, 8 D. 110; *Ward v. Green*, 16 D. 437.

The owner on board exclusively attending to the shipment of the cargo is not bound by the master's contracts, but to exempt himself from liability he must show that he was exclusively attending to that business. *Ward v. Green*, 16 D. 437.

The owner of a vessel is liable as a common carrier for the act of his agent, who, without his knowledge, receives goods for carriage, when the latter was accustomed to act for him generally in the capacity of master, and had entire charge of the vessel, although it was usually employed in transporting the goods of the owner only, and not those of other persons, except that, occasionally, when his own goods were insufficient to form a complete cargo, he had received and carried the goods of others, taking freight therefor, upon personal application being made to him for that purpose by the shippers. *McClure v. Richardson*, 33 D. 105.

If the registered owner of a vessel appoints her master, with an agreement that the master is to have the entire control of the vessel, and victual and man her, and make contracts of affreightment, and divide the gross earnings with the owner, the owner is liable on contracts of affreightment made by the master with shippers who have no notice of the arrangement between the master and owner. *Oakland Cotton Mfg. Co. v. Jennings*, 13 R. 209.

Actual notice to the master of a boat, of

For Index to Notes in American Decisions and American Reports, see Volume I.

the existence of a lien against it, operates as constructive notice to its owners. *Case v. Woolley*, 32 D. 54.

30. Power to contract for repairs and supplies.—The authority of masters or commanders of steamers extends to the purchase of necessary supplies, and to that extent they may bind the owners; in general, however, they have no authority to bind either the boat or the owners, by purchases of other kinds; any such authority must be specially conferred by the owners. *Calef v. Steamer Bonaparte*, 38 D. 190.

The owner of a vessel is liable for supplies furnished for her use by the master's orders, where the credit is not expressly given to some one else. *Duff v. Bayard*, 39 D. 73.

A master may bind the owners for necessary supplies and repairs of their vessel, when he is their agent, but he cannot bind them where no agency, express or implied, exists. *McLellan v. Cox*, 58 D. 736.

A person may be the legal and registered owner of a vessel without being liable for supplies ordered by her master. *Lincoln v. Wright*, 62 D. 316.

A master hiring a vessel on shares, and having the sole control and management of her, and sailing, victualing, and manning her on his own account, is the owner *pro hac vice*, and has no agency or authority from the general owners to furnish her with supplies, and cannot bind the owners for them. *McLellan v. Cox*, 58 D. 736; *Lincoln v. Wright*, 62 D. 316.

In an action by the owner of a cargo against the owners of a vessel to recover for the contributory share for certain jettisoned cargo and expenses chargeable to the vessel and freight for certain bottomry bonds, in a general average contribution it appeared that the vessel and freight being insufficient to meet this contribution, the cargo was taken for the payment of the deficiency, and the owner of the cargo claimed indemnity of the owner of the vessel. *Held*, that the owners of the vessel were not bound by the acts of the master, it being conceded that no prudent owner, if present, would have made or authorized such expensive repairs as were made by the master without any special authority. *Stirling v. Nevada Phosphate Co.*, 6 R. 372.

31. Power to bind vessel by bottomry bond.*—The owner of a vessel is not liable on a bottomry bond given by the master, unless the necessity of a loan at the time it was made is shown. *Clark v. Laidlaw*, 39 D. 526.

A bond itself is not evidence of the necessity of a loan, nor of the absence of other means of obtaining the money. This must be shown *abundant*, and otherwise than by the assertion of the master, as he cannot ac-

quire an authority from his own assertion only. *Ib.*

Repairs to a vessel in a foreign port must be made without any unnecessary delay, and if the master of a ship lacks means to meet the expenses of such repairs, or cannot raise funds on the credit of the owners, he should hypothecate the vessel for that purpose. He cannot delay making the necessary repairs until he has received instructions from the owners to do so, without subjecting the latter to liability to the shippers for such delay. *Rathbone v. Neal*, 50 D. 579; *Harned v. Churchman*, 50 D. 573.

32. Power to draw negotiable instruments.—A master of a vessel has no power of buying and selling, incident to his office as master, and where he is authorized by a letter of instructions from the owner to draw bills for the purpose of making purchases for such owner, he acts as agent or factor, and not as master, in drawing such bills. *Newhall v. Dunlap*, 31 D. 45.

The master of a vessel has a lien upon property purchased by him with the proceeds of a bill drawn under a letter of instructions from the owner, upon which he is personally liable, by reason of its being drawn in his own name, though directed to be charged to the cargo of his vessel, and this lien is not divested by the owner's death. *Ib.*

Though the master of a vessel departs from the strict letter of his instructions in drawing a bill for purchases for a shorter date than he is authorized, if the owner or his administrator claim the proceeds, he cannot deny the agency. *Ib.*

33. Power to sell or dispose of vessel or cargo.—1. *When he may sell.**—A master of a ship acts for the owners and insurers because they cannot act for themselves, and he is not justified in selling ship or cargo, except in case of extreme necessity. *Pike v. Balch*, 61 D. 248; *Butler v. Murray*, 86 D. 355; *Gates v. Thompson*, 99 D. 782; *Saltus v. Everett*, 32 D. 541; as where it cannot be carried to its port of destination, or would be worthless on its arrival there. *Myers v. Baymore*, 49 D. 586; or when the voyage is broken up by ungovernable circumstances; but the sale must be in good faith, for the good of all concerned, and in case of supreme necessity, which sweeps all ordinary rules before it. *Pike v. Balch*, 61 D. 248; and the master must employ due diligence to discover whether other available means of saving either were within his reach. *Caldwell v. Western M. & F. Ins. Co.*, 36 D. 667.

Due diligence in such a case depends upon the facts. The master is invested with a discretion depending upon the circumstances, and if it appear that he exercised this power with ordinary good judgment, fairness, and

* Master's power to hypothecate ship, freight, or cargo, see note, 68 D. 641-643.

* Master's power to sell, see note, 68 D. 638-641.

For Index to Notes in American Decisions and American Reports, see Volume I.

promptitude, the necessity of the sale will be presumed. *Ib.*

The duty of the master of a ship in case of a disaster is, to save her if possible, if not, to so dispose of the wreck that the owners may realize the most that can be saved therefrom; nor does his duty cease until the proceeds which may be saved are placed at the disposal of the owners. *Duncan v. Reed*, 63 D. 635.

Where a continuance of the voyage to the port of destination is impracticable, the master should, if possible, transship goods to such port, but if this cannot be done, a return or safe deposit may be made, and if possible the shipper consulted; and in any case, the master should do that which would be most conducive to the interest of all concerned. *Gaither v. Myrick*, 66 D. 316.

The master owning a part of a disabled vessel sold on account of injury is justified in making such sale under the same circumstances which would justify him if he were not such part owner. *Prince v. Ocean Ins. Co.*, 63 D. 676.

A survey upon a disabled vessel is presumed to be correct, but is not conclusive, as it does not control the rights of the parties, but is to be considered as an important transaction, designed to protect the rights of all interested. *Ib.*

A master may sell the whole or any part only of a vessel, according to the extent of his authority. *Gates v. Thompson*, 99 D. 782.

2. *What constitutes a necessity for the sale.*—The master of an insured vessel which becomes disabled is authorized to sell her when for the best interest of those concerned, and whether he was justified in selling in a particular case is a question to be determined by the circumstances and condition of the vessel at the time and place where the sale was made; and the master must show that such sale arose from necessity, which imports no more than a faithful performance of the duty imposed on him to make that decision, when a vessel is injured, which will best promote the interests of all for whom he has become agent. *Prince v. Ocean Ins. Co.*, 63 D. 676.

Instructions to the jury as to the necessity under which a master may effect a sale of a disabled vessel requires no particular form of words, but is sufficient if the jury is given to understand that to justify such sale the master, under the circumstances, acted for the best interests of all concerned; and an instruction that there must be an apparent necessity for the sale, existing at the time and place, is sufficient, without any further qualification, to intensify the term "necessity." *Ib.*

The necessity to justify a sale of a cargo and ship before arriving at the port of des-

tination must be such a necessity as supercedes all human laws, and a sale by the master without such necessity will render him and the owners liable to the shipper. *Gaither v. Myrick*, 66 D. 316.

To justify a sale of the cargo by a master at an intermediate port, there must be a necessity for it, arising either from the nature or condition of the property, or from the inability to complete the voyage by the same ship, or to procure another; the master must have acted in good faith; and he must, if practicable, consult with the owner before selling. *Butler v. Murray*, 86 D. 355.

The advice of persons called by a master to examine a cargo is not conclusive as to necessity of sale, but should be taken into consideration by the jury in determining the question, and is entitled to very considerable weight, where the master, at an intermediate port, found his cargo of hides to be in a bad and perishing condition, and summoned three dealers in and shippers of hides, to examine the hides and declare what it was proper for him to do under the circumstances, who, in good faith, advised a sale, and the hides were sold accordingly. *Ib.*

The question as to the necessity of a sale of a cargo by a master should be submitted to the jury if a doubt exists, on the facts, as to the necessity. *Ib.*

3. *Duty to notify the owner.*—A master justified in selling the cargo of a shipwrecked vessel is bound to give such notice as will warn parties of the time and manner of sale. *Rugely v. Sun Mut. Ins. Co.*, 56 D. 603.

The master must communicate with the owners by any available means in his power before selling ship and cargo in case of emergency, if this can be done before they will probably be lost. *Pike v. Back*, 61 D. 248.

The master must communicate with the owners by such other means than mail as may be in his power, and by which notice may be speedily communicated to them, before selling a ship and cargo in an emergency, when the calamity occurs in a place from which transmission of intelligence by mail would be obviously fruitless. *Ib.*

Whether a master has exercised sound judgment and discretion in selling a ship and cargo in an emergency without communicating with the owners is a matter of fact for the jury. *Ib.*

4. *When he may not sell.*—Where the injury sustained by a vessel insured is not of such a nature and extent as to warrant an abandonment, it is not such a case of necessity as will warrant a sale by the master. *Orrok v. Commonwealth Ins. Co.*, 32 D. 271.

The master of a ship is not an agent of the consignor, to judge for him when the goods are so damaged as to make a sale necessary before they reach their destination. *Halverson v. Cole*, 40 D. 603.

For Index to Notes in American Decisions and American Reports, see Volume I.

Bona fides in selling a damaged cargo and an honest exercise of discretion on the part of the master will not protect him or his employers, if there existed no necessity for the sale. *Myers v. Baymore*, 49 D. 586.

The master has no authority to sell any part of a cargo, when the voyage is broken up at an intermediate port, to pay for advances to him to repair the ship for a new voyage, or to pay seamen's wages. *Hassam v. St. Louis Perpetual Ins. Co.*, 56 D. 591.

The master has no legal right to sell the cargo of a shipwrecked vessel, where it is in condition to reship, and the means of transportation can be procured. *Rugely v. Sun Mutual Ins. Co.*, 56 D. 603.

A sale by a master of a vessel of such parts of her as belong to part owners who might have been notified of her peril in time to act in the matter before the sale, but who were not so notified, is void. *Gates v. Thompson*, 99 D. 782.

34. Power to contract for salvage service. — The master has authority, where a vessel is sunk, to employ persons to recover the submerged property, in the absence of the owners. *Creevy v. Cummings*, 48 D. 444.

In the absence of a stipulation as to the rate of compensation, the law implies a promise to pay a reasonable compensation. The things to be taken into consideration in estimating the compensation, discussed, and facts considered in which an allowance of one half the net proceeds of the property saved, is reasonable. *Id.*

One purchasing a cargo at a sale by the master, but acquiring no title, the sale being unnecessary, has no claim for salvage when sued at law by the owner for the possession of the property, though he might have such a claim if sued in admiralty. *Pike v. Balch*, 61 D. 248.

An equitable claim for salvage by one purchasing a cargo of a wrecked vessel at master's sale, but acquiring no title, the sale being unnecessary, is enforceable only in a court of admiralty jurisdiction. *Id.*

35. His liability for negligence. — In an action against a master of a vessel for goods damaged in a voyage, it is not necessary for plaintiff to show that he has sold any part of the goods. *Shackelford v. Patrick*, 12 D. 632.

The master of a vessel cannot escape responsibility for its safe management by intrusting it to a charterer. *Cuddy v. Horn*, 41 R. 178.

36. His right to compensation. — The owner of the ship and cargo has the uncontrolled power of breaking up or changing the voyage, and the effect of the exercise of such power upon the contract between the owner, and master or supercargo, must be governed by these principles, in the absence of all commercial usage on the subject. If

special injury be done thereby to the captain or supercargo, the ship-owner must bear the loss. If the captain or supercargo be thereby necessarily discharged from the performance of all the duties, for which a remuneration has been stipulated, the claim to such remuneration becomes extinguished. If part of the duties have been performed, such proportion of the remuneration should be allowed as appears just on comparing the services rendered, under the voyage originally contemplated, with those remaining unperformed. *Pawson v. Donnell*, 19 D. 213.

The parties should be placed, as nearly as may be, in the same condition in which they would have stood had a previous contract for the voyage as changed been entered into between them. *Id.*

The captain's privilege agreed to be allowed from a certain port contemplated by the original voyage necessarily expires when that port ceases to be one of the termini of the voyage, by reason of a change of instructions given by the owner. *Id.*

The compensation of a ship-master ceases when a voyage is broken up by shipwreck, and he can no longer act in capacity of master. *McGilveray v. Stackpole*, 61 D. 245.

A ship-master may receive the wages of a master after shipwreck during the time he stays by the wreck rendering services to protect and secure the owner's property, until the wreck and other property of the owners are sold. *Id.*

A ship-master is entitled to reasonable compensation as the agent of the owners for services rendered and expenses incurred in securing and transporting or transmitting funds of the owners, after shipwreck and the termination of his services as master. *Id.*

A ship-master becomes the agent of the owners and all concerned after an interruption of the voyage by shipwreck or other casualty. *Id.*

A ship-master is not entitled to compensation after shipwreck for services rendered or expenses incurred in his own behalf, and not in the implied employment of the owners. *Id.*

The master of a vessel is entitled to reasonable compensation for services rendered in disposing of the wreck of his vessel, and also remuneration for his necessary incidental expenses. In these expenses the items charged for physicians' bills, board, and the amount paid for his return passage are properly included. *Duncan v. Reed*, 63 D. 635.

The captain of vessel cannot be allowed for shortage in the amount of money returned by him; at least without showing that the loss was not occasioned by any fault on his part. *Id.*

37. — and how enforced. — The misconduct of the captain producing neither

For Index to Notes in American Decisions and American Reports, see Volume I.

injury nor inconvenience to the owner is no defense to an action for the payment of wages. *Pawson v. Donnell*, 19 D. 213.

The master of a vessel has no lien for his services by the maritime law. *Case v. Woolley*, 32 D. 54.

38. The supercargo.* — A supercargo, being also a part owner, was empowered by the owners to take credit in a foreign port, for goods to a certain amount, for which he could draw bills on them. He, however, secured an advance of money, within the amount, and gave a bond on behalf of himself and his owners. Held, that an action of *recompense* would not lie in favor of the obligee of the bond against the owners, for the money so advanced. *Banorges v. Hovey*, 4 D. 17.

A shipment of prohibited merchandise by the supercargo, on the owner's account but without his knowledge or consent, is at the supercargo's risk. *Pawson v. Donnell*, 19 D. 213.

The acceptance by the owner, of the letters and invoices sent to him by the consignee in a foreign port, is not such a ratification of their acts as would throw on him the loss arising from the seizure of prohibited articles exported by them on his account. *Ib.*

A supercargo who is also master of the vessel, after arriving at the end of the transit acts as the agent of the consignor in disposing of the goods. *Stone v. Wait*, 52 D. 621.

A supercargo acting as an agent of the consignor, being obliged to leave port with his vessel, is justified in committing the consignor's goods to a responsible commission merchant for sale, when he has failed to effect a sale. *Ib.*

The master who is part owner and supercargo is liable for injury to cargo, resulting from sale of the vessel before the cargo is landed, and then landing it before a sale was effected or storage obtained, in order to deliver the vessel in compliance with the contract of sale. *Gaither v. Myrick*, 66 D. 316.

Supercargoes are bound by the principles which regulate the conduct of factors abroad, and are liable for injuries to the employer caused by want of reasonable skill or ordinary diligence. *Ib.*

The term "reasonable skill" imports such a skill as is ordinarily possessed and employed by persons of common capacity engaged in the same trade. *Ib.*

Ordinary diligence means that degree of care which persons of common prudence are accustomed to use in the conduct of their own business. *Ib.*

Supercargoes must act in good faith and exercise proper judgment in their transactions in that capacity. *Ib.*

A supercargo having a venture of his own

* Supercargoes, who are, rights, duties, and liabilities of, see note, 66 D. 325, 326.

in the same vessel must exercise as much diligence and care about his factorage transactions as he does about his own venture. *Ib.*

A supercargo is chargeable with negligence in making a sale without proper inquiry, where he has had notice sufficient to put a person of prudence on his guard. *Ib.*

Supercargoes cannot generally delegate their authority, but the necessity of the case, the usages of trade, or the law and custom of the country where the agency is to be executed, may at times give rise to exceptions to this rule. *Ib.*

The duties and liabilities of a master of a vessel, who is also consignee of the cargo, are as separate and distinct as to each capacity as if confided to different persons. *Ib.*

The master of a vessel, who also acts in capacity of supercargo with knowledge of the shipper, cannot wholly abandon his duty in the former capacity to discharge that of the latter; but he must act in both, as far as possible, with reference to the respective interests of his principal in each capacity. *Ib.*

A supercargo who abandons his trust or delegates his agency, merely because the cargo could not be disposed of at one of the ports reached prior to the port of destination, is guilty of a violation of duty, and liable therefor. *Ib.*

A supercargo is not liable in damages because another party, wrongfully and without his privity, assumes authority to sell and does sell the cargo. *Ib.*

The provision in a contract of affreightment for the transportation of cargo "to Valparaíso and a market," authorizes the ship to visit such other ports beyond the named port as may be deemed expedient by the master and supercargo, in the exercise of a sound discretion, and imposes on the ship the carriage of the goods until a market is found, or the goods left on deposit for sale, under circumstances of necessity authorizing a departure from the original contract; but such provision does not impose on the supercargo the duty of selling at the first or any other port, if he has reason to believe that he will find a better market by going farther, and acts in good faith. *Ib.*

39. Rights and duties of seamen. — When a seaman willfully disobeys his captain's orders, and is discharged for so doing, he is not entitled to any rights which he might have had if he had continued doing his duty. *Ties v. Radovich*, 63 D. 592.

It is a seaman's duty, in case of disaster, to exert himself to save the cargo, and as long as there is any prospect of saving the cargo, he is bound to obey the commander. *Ib.*

A United States shipping commissioner had illegally charged a seaman, who had paid the legal shipping fee, an additional shipping fee, for reshipments on the same

For Index to Notes in American Decisions and American Reports, see Volume I.

vessel for subsequent successive voyages. The seaman paid the fees without protest. *Held*, that an action would lie to recover them in the state court. *American S. S. Co. v. Young*, 33 R. 748.

The engineer of a tug-boat was injured by an explosion on the boat at the home port of Philadelphia. The officer in charge summoned a physician, who attended him on the boat and at his own house, whither he was carried at his own request. *Held*, that the owner was liable for the physician's services. *Holt v. Cummings*, 48 R. 199.

40. Nature and form of shipping articles.—The master has no right to insert any stipulation or agreement repugnant to or inconsistent with the laws of the United States, but he may add any provision harmonizing with them. *Webb v. Duckingfield*, 7 D. 383.

Shipping articles, fixing the wages to be paid, furnish the only legal evidence of the contract, and will limit the amount of a mariner's recovery. *Johnson v. Dalton*, 13 D. 564.

41. Authority and discipline of the master.—A master of a vessel cannot cause the imprisonment on shore of a mariner, when his vessel is lying in a foreign port, as a punishment for a previous offense. He is allowed to resort to this in cases of pressing necessity only, and as a precaution against a danger that may threaten the vessel or crew or master by reason of the mariner's presence. *Buddington v. Smith*, 33 D. 407.

The jury are the judges of what constitutes a pressing necessity that will justify a master in imprisoning a mariner on shore. *Ib.*

42. Right to wages, and when earned.—Seamen's wages are not recoverable if no freight is earned, where the failure is not due to the fault of the master or owners. *Van Beuren v. Wilson*, 18 D. 491.

The loss of freight, through the master's or owner's fault or fraud, as where the ship is seized for a debt of the owners, or is captured and condemned for a violation of neutrality laws, occasions no loss of wages. *Ib.*

The loss of freight by a disaster or peril arising from accident or superior force carries with it the loss of the seaman's wages. *Ib.*

That freight was lost without the seamen's fault is not enough to entitle them to wages, if there was no fraud or fault on the part of the master or owners. *Ib.*

Civil process issued against a vessel in a foreign country to try a private right of property therein is not such superior force as to deprive the seamen of their right to wages, though it may break up the voyage and prevent the earning of freight; for it is the owners' duty to furnish the master with the means of procuring the liberation of the vessel in every such case by giving security. *Ib.*

Unfounded claims and lawsuits constitute a peril, the consequences of which should fall exclusively upon the owners. *Ib.*

Damages for a loss of wages for the return voyage may be recovered where the ship, being unseaworthy, is abandoned to the insurers in a foreign country, though wages *eo nomine* would not be recoverable. *Ib.*

A seaman cannot sue the owners for wages under the act of Congress of February 28, 1803. *Ib.*

43. Who liable for wages.—The hirer of a vessel on shares is the owner for time in which he controls her under the contract, and the general owner is not liable on the hirer's contracts of shipment for supplies or for seamen's wages. *Giles v. Vigoreux*, 58 D. 704; *Sheriffs v. Pugh*, 94 D. 600.

A hirer of vessel on shares being regarded as the owner, and having the benefit of the services of seamen hired by him, no implied *assumpsit* for compensation for such services can arise against the general owner. *Giles v. Vigoreux*, 58 D. 704.

The enrollment or registry of a vessel does not make the owner liable for seamen's wages when the vessel is let on shares. *Ib.*

The existence of a remedy *in rem* for seamen's wages lays no foundation for a right of action *ex contractu* against the general owner who has let the vessel on shares. *Ib.*

The general owner of a vessel is not relieved of his liability for seamen's wages merely by the fact that he has waived his lien for freight by taking the charterer's notes therefor. *Sheriffs v. Pugh*, 94 D. 600.

The owner of a vessel remains liable for the seamen's wages under a charter-party by the terms of which the charterers were to pay the running expenses not to exceed a certain sum, which sum the captain was to retain for that purpose out of the freights, the captain to "sail her himself," and attend to the collection of freights, etc.; for the phrase "sail her himself" is construed to mean that the captain, as agent for the owner, was to employ the crew. *Ib.*

The master of a vessel is personally liable for the wages of a seaman earned while he is a master, although the seaman was hired by a former master. *Smith v. Oakes*, 55 R. 487.

44. Lien for wages.—Seamen or mariners, other than the master, are entitled to a lien on the vessel for services rendered on the high seas, or where the tide ebbs and flows. *Cass v. Woolley*, 32 D. 54.

A court having a vessel in custody is competent to recognize and enforce the seamen's paramount lien for wages; and a state court acquiring such jurisdiction cannot be deprived of it by process issuing upon proceedings instituted in admiralty for the recovery of seamen's wages. *Keating v. Spink*, 62 D. 214.

45. Forfeiture of wages by desertion.—Where a seaman signs shipping ar-

For Index to Notes in American Decisions and American Reports, see Volume I.

ticles, by which he engages not to go out of the vessel until the voyage be completed and the cargo discharged, without leave first obtained, but left the vessel without leave after she was moored in her last port of discharge, and refused to assist in discharging the cargo, he was held to have forfeited his wages by such desertion. *Webb v. Duckingfield*, 7 D. 383.

Desertion of the vessel during the continuance of the contract *animo non revertendi*, and without sufficient cause, connected with a continued abandonment, works a forfeiture of seamen's wages by the maritime law. *Spencer v. Austin*, 38 D. 277.

The proper entry in the log-book must be made when statute desertion is interposed as a forfeiture of wages. *Id.*

IV. ENFORCEMENT OF LIENS UPON VESSELS.

46. Liens for salvage. — A master cannot refer the question of salvage to arbitrators without consulting the owners, especially when the courts of the United States can be readily applied to. *Robinson v. Georges Ins. Co.*, 35 D. 232.

The cargo of a sunken or abandoned vessel is not "wrecked property," and the provisions of 1 N. Y. R. S., p. 690, sec. 1, regulating keeping of wrecked property for its owner, do not apply to it. *Baker v. Hoag*, 59 D. 431.

A sunken vessel or cargo is the subject of salvage, and the salvor has a lien upon it for compensation, provided the place where the rescue of it is effected is within admiralty and maritime jurisdiction. *Id.*

A lien given by the maritime law, for salvage, may be recognized and protected by a common-law court, in replevin by the owner of the res against the salvor, without proof of a request or promise to pay. *Baker v. Hoag*, 59 D. 431.

47. — for repairs and supplies. — No lien upon a ship is created by the sale of part of its cargo, at a port of necessity, to pay for repairs. *Depau v. Ocean Ins. Co.*, 15 D. 431.

One furnishing necessary supplies to a vessel has a remedy to enforce payment therefor, against either vessel, owners, charterers, or master. *Henshaw v. Rollins*, 25 D. 180.

That such a person has charged such supplies to the charterer will not *per se* act as a novation and release the other parties. *Id.*

A lien for repairs done or supplies furnished to a vessel does not exist if the owner was present at the port when and where the repairs were made or supplies furnished. *Cass v. Woolley*, 32 D. 54.

A lien for repairs done or supplies furnished a maritime vessel in a foreign port is implied by the law of the United States. *Id.*

A home port is any port in which the owner happens to be with his vessel; but, in

England a home port is any port within the jurisdiction of the common-law courts of that island, if the owner resides in that country. *Id.*

The vessel lien law of New Jersey applies to foreign as well as to domestic vessels. *Randall v. Roche*, 32 D. 233.

A lien for supplies furnished a foreign vessel on the credit of the owner or master is not a maritime lien, within the jurisdiction of courts of admiralty of the United States, but may be provided for by state statutes, and enforced by state courts. *Id.*

A lien for supplies furnished a foreign vessel is not excluded from state cognizance, by the provision of the United States constitution giving to Congress the power to regulate commerce with foreign nations, and among the several states, if Congress has not legislated on the subject. *Id.*

Where a contract was entered into between a ship-owner and a ship-chandler, both citizens of the state, for the supply of sails, cordage, ropes, etc., for a schooner built and launched in another state, — *held*, 1. That the contract, being for the original equipment of the vessel, was not a maritime contract, and so not within the admiralty jurisdiction of the federal courts; 2. That the state statute creates a lien upon the vessel in such cases, which may be enforced, notwithstanding subsequent changes of ownership; 3. That such lien attached as soon as the vessel reached this state, and that all persons acquiring a subsequent interest in her, acquire it subject to such lien; 4. That the act of Congress concerning the necessity of registering bills of sale, mortgages, etc., relates to written conveyances only, and contains nothing which can defeat liens under the state law. *Thorsen v. Schooner J. B. Martin*, 7 R. 91.

The lien given by the water-craft law of the state, on contracts for repairs or supplies to a domestic boat or craft engaged in interstate commerce on the Ohio River, cannot be enforced by a proceeding *in rem* against the boat or craft in the state court; for that proceeding in such cases is within the exclusive jurisdiction of the United States district court. *Steamer Petrol v. Dumont*, 23 R. 397.

48. — for advances. — A ship's husband has no such lien for advances as a sheriff can satisfy out of the proceeds of a sale of her. *Hopkins v. Forreth*, 53 D. 513.

The question of a lien of a part owner of a vessel for advances considered at length, but the decision thereof held to be unnecessary. *McDonald v. Black*, 55 D. 448.

49. Liens of material-men. — Mechanics and material-men have, by general maritime law, a lien on foreign vessels for the price of their labor and materials, but not on domestic vessels. *Pertins v. Pike*, 66 D. 267.

For Index to Notes in American Decisions and American Reports, see Volume I.

The statutes of Maine give a lien on all vessels to those who perform labor or furnish materials for or on account of the building or repair thereof, for their wages or materials, which lien may be secured by an attachment of the vessel within four days after she is launched or such repairs are completed. *Id.*

A material-man's lien on a vessel extends only to the materials used in her construction or repair, and not to such as are promised and agreed to be so used. *Id.*

The lien on a vessel is not secured by an attachment made under a writ which simply commands the officer to attach the goods and estate of the defendant therein named, without anything indicating a lien claim. Such an attachment gives the plaintiff no special or peculiar rights by reason of any materials he may have furnished, but he stands on the same footing as any other creditor, and his rights must be postponed to those of a prior mortgagee of the vessel. *Id.*

Contracts for building ships or vessels, or for labor done or materials furnished in their construction are not maritime contracts. *The M. Tuttle v. Buck*, 13 R. 270; see also *Edwards v. Elliott*, 13 R. 463.

Under the act to provide for the collection of claims against steamboats and other water-craft, one who furnishes materials for the construction of a vessel has a lien on the vessel, and such lien may be enforced in the courts of the state in the mode prescribed in the act. *The M. Tuttle v. Buck*, 13 R. 270.

50. What will divest or dissolve a lien. — If creditors who libel a boat have no notice of a pre-existing lien, a purchaser under their judgment becomes subrogated to their rights, and acquires title free of such lien, though he had actual notice of it. *Cass v. Woolley*, 32 D. 54.

The consignee of a vessel who advances money for necessary repairs, pilot charges, supplies, and towage, for which he accepts a bill of exchange drawn by the master on the owner, waives his lien on the vessel by so doing. *Harned v. Churchman*, 50 D. 573.

An agreement to forbear to enforce a lien in admiralty is a sufficient consideration for a promise by one of the owners of the ship to pay the claim should a libel then about to be brought against the ship on a similar claim be sustained. *Fish v. Thomas*, 66 D. 348.

The seizure and sale of a steamboat in Missouri for a debt contracted there will not divest lien of citizen of Iowa for supplies furnished in that state, since by the laws of Missouri non-resident creditors, or those having debts contracted out of the state, cannot enforce their liens at such sale. *Haight v. Steamboat Henrietta*, 68 D. 669.

The maritime law that a sale of a libeled vessel is *in rem*, and binds all who have claims, since they may within specified time establish them, does not apply to a sale of a vessel

under a state law which permits only resident creditors to establish their claims at such sale. *Id.*

There are good reasons why maritime liens should have their superiority recognized over domestic liens. *Donald v. Hewitt*, 73 D. 431.

Sound public policy does not require that liens upon boats navigating our inland rivers should have conceded to them a priority over other liens acquired in other states to which they may have been taken. *Id.*

The purchase of a steamboat at an execution sale in another state does not divest liens held against her in Missouri. They may be enforced by the courts of the latter state whenever the boat returns within their jurisdiction. *Phegley v. Steamboat David Tatum*, 84 D. 57.

51. Constitutionality of state laws creating liens. — An Ohio water-craft law authorizing proceedings *in rem* against vessels is merely a cumulative remedy given by statute for the recovery of a claim against the owner himself, and was designed to avoid the difficulty which often exists of ascertaining and proceeding against the owner or owners in person. *Thompson v. Steamboat J. D. Morton*, 59 D. 658.

An Ohio statute providing for the collection of claims against steamboats and other water-craft navigating waters within and bordering on the state, and authorizing proceedings against the same by name, is not unconstitutional. *Id.*

Cases to which the water-craft act of February 28, 1840, extends are those of which admiralty and common-law courts have concurrent jurisdiction, and not those of exclusive admiralty and maritime cognizance. *Keating v. Spink*, 62 D. 214.

The act of a state "providing for collection of claims against steamboats and other water-crafts, and authorizing proceedings against the same by name," is a valid and constitutional enactment. *Id.*

A statute providing for the seizure and sale of vessels, on a mere assertion of debt or demand, without any proof to substantiate the claim being made before a judicial tribunal, and without any judgment or decree of any such tribunal, allowing the sale, is unconstitutional, being in conflict with the provision that "no person shall be deprived of life, liberty, or property without due process of law." *Parsons v. Russell*, 83 D. 728.

A demand for wharfage is a maritime demand cognizable in the courts of admiralty, and a state statute attempting to confer jurisdiction upon a state court, by proceedings *in rem* therefor, is void. *Brookman v. Hammit*, 3 R. 731.

A state statute, a portion of whose provisions give a lien upon vessels and furnish a means of enforcing it in cases of contracts not maritime, and as to which there is no admiralty jurisdiction, will be upheld even

For Index to Notes in American Decisions and American Reports, see Volume I.

though such statute is unconstitutional and void in relation to particular cases covered by its terms. *Sheppard v. Steele*, 3 R. 660.

The plaintiff performed blacksmith-work on a vessel being built at a ship-yard in New York. *Held*, that the statute of that state entitled "An act to provide for the collection of demands against ships and vessels," passed April 14, 1862, was not in conflict with the United States constitution or the judiciary act, so far as it is applied to a lien claimed by plaintiff. *Id.*

The plaintiffs attached a sea-going vessel, under the New York law (Laws 1862, c. 482), upon a claim for wharfage. *Held*, that a demand for wharfage being a maritime demand, cognizable in the courts of admiralty, a state statute attempting to confer a remedy for such a demand by proceedings *in rem* is void. *Brookman v. Hammill*, 3 R. 731.

Any state law which attempts to provide for the enforcement of a maritime claim or contract by any but a common-law remedy infringes upon the exclusive jurisdiction of the federal courts, and is a clear violation of the federal compact. *Id.*

But in so far as the state laws create lien and provide remedies for claims not maritime over which the courts of admiralty have no jurisdiction, they are valid and operative. *Id.*

A state law creating a lien by attachment on vessels for supplies furnished in her home port,—*held*, valid. *Tug Boat Dorr v. Waldron*, 14 R. 86.

No maritime lien arises on a contract for repairs or supplies furnished to a boat or vessel in her home port; therefore it is competent for the states, in such cases, to create liens therefor, and to provide remedies for their enforcement not inconsistent with the exclusive jurisdiction of the admiralty courts. *Steamer Petrel v. Dumont*, 22 R. 397.

53. Power of state courts to enforce them.*—Under section 268 of the Civil Code of Kentucky, concerning the delivery of any vessel attached, upon the execution of a bond to the effect that the obligor will pay such sum as may be adjudged against him, or that the vessel shall be forthcoming to satisfy any judgment which may be rendered, "whichever shall be directed by the court," the latter clause does not confer upon the court an unlimited and arbitrary discretion, either to render judgment for such sum as plaintiff may show himself entitled to recover, and then require the obligor in the bond to pay that sum, or to order the forthcoming of the vessel, subject to the order of the court, for the satisfaction of such sum. Such judgment should be rendered as will protect all the parties, according to the facts

as they appear. *Halbert v. McCulloch*, 79 D. 556.

Where a lien against a vessel is sought to be enforced by attachment, and it transpires that the equity of redemption of the mortgagor of such vessel is all that can be subjected to plaintiff's demand, such should be the judgment of the court; and to satisfy such judgment, the forthcoming of the vessel may be ordered. To this extent only can the obligors in a bond to the effect that they will pay such sum as may be adjudged against them, or have the vessel forthcoming to satisfy such judgment, be held liable for a failure or refusal to comply with the order. The value of the equity of redemption should be ascertained by reference to a master. *Id.*

The enforcement of a lien created by state laws for labor performed and materials furnished in building vessels belongs exclusively to state tribunals. *Foster v. The Richard Busteed*, 1 R. 125; *Sheppard v. Steele*, 3 R. 660; *Sinton v. Steamboat Roberts*, 7 R. 229; *Scow Tuttle v. Buck*, 13 R. 270.

An attachment was issued against a vessel navigating the Yazoo and Mississippi rivers, to recover for repairs. These rivers were navigable by vessels of ten tons burden and upward from the sea, the vessel was a steamboat owned and having her "home port" in Mississippi. *Held*, that the vessel was within the maritime jurisdiction of the United States; that the state courts had no jurisdiction of the subject-matter, and could not be invested with such jurisdiction by the legislature of the state. *Dever v. Steamboat Hope*, 2 R. 643.

State laws giving a lien on vessels for labor performed and materials furnished in their construction are constitutional, and the enforcement of such liens belongs to the state tribunals. *Foster v. The Richard Busteed*, 1 R. 125; *Sheppard v. Steele*, 3 R. 660.

A claim for labor upon the hull of a vessel, while yet in process of construction before launching, is not a maritime contract, and the United States admiralty courts have no jurisdiction for its enforcement. *Sheppard v. Steele*, 3 R. 660.

A proceeding by attachment or provisional seizure, when taken out against a vessel belonging to a port of one state, while lying in a port of another state, to enforce a claim for repairs and materials furnished at the latter port, is a proceeding *in rem* or in admiralty, and the state courts are without jurisdiction, notwithstanding an act of the legislature authorizing such a proceeding. But in such a case, where the master has also been personally cited and is sought to be made liable in his individual capacity, the state courts, although without jurisdiction to proceed *in rem* by provisional seizure, have jurisdiction of a personal action. *Southern Dry Dock Co. v. Steamboat Perry*, 8 R. 585.

A tug was attached for supplies furnished

* Actions against vessels in state courts, see note, 62 D. 234-246.

For Index to Notes in American Decisions and American Reports, see Volume I.

in port, and was released on the giving of a bond. The attachment suit was discontinued, another suit commenced for the same cause, and the tug again seized. *Held*, that the seizure was valid, notwithstanding the bond given in the former suit. *Tug Boat Dorr v. Waldron*, 14 R. 86.

Contracts for repairs or supplies furnished to a boat or vessel at her home port are maritime contracts, and therefore come within the admiralty jurisdiction of the United States district courts. But contracts for boat or ship building are not maritime contracts, and therefore do not fall within that jurisdiction. *Steamer Petrel v. Dumont*, 22 R. 397.

V. LIABILITY FOR COLLISIONS.

1. Rules for Avoiding Collision.

53. In general. — The weakness of a boat injured by collision on a navigable stream does not relieve the defendant from the duty of exercising all reasonable care and effort to prevent the collision. *Inman v. Funk*, 46 D. 626.

The rules of admiralty are not necessarily part of the common law, although they may be such as to commend themselves to judicial wisdom. And it is not proper to give them to the jury as rules of the common law. *Souyer v. Eastern Steamboat Co.*, 74 D. 463.

The rules of navigation and usages of the sea are not regarded, in courts of common-law jurisdiction, as positive in their nature; at least, not so as to bind masters or owners in all cases with the force of law. *Id.*

54. Collision between steamers. — Damages for a collision cannot be recovered when the plaintiff did not exhibit a proper prudence and might with ordinary care have avoided it, although the collision was caused by the gross fault of the captain of the other steamer. *Carlisle v. Holton*, 48 D. 440.

Damages to a sunken steamboat are not recoverable from owners of boat sinking her if the sunken boat contributed to the collision by her own carelessness or unskillful management, or if the collision was the result of inevitable accident, and not occasioned by negligence or want of skill on the part of either boat. *Duggins v. Watson*, 60 D. 560.

The owner of freight damaged by a sunken steamer cannot recover damages for its injury, unless upon the same state of case as proved her owners are entitled to recover. *Id.*

Damages for injury to one's property occasioned by a collision of two steamboats are recoverable from the owners of the boat sinking the other, if the officers and agents of the former then engaged in the service of the owners willfully, or without orders or against orders, produced the collision. *Id.*

55. — between steamer and sailing vessel. — A vessel propelled by steam

* Between steamer and sailing vessel, see note, 46 D. 55, 56.

must alter her course to avoid a collision with a sailing vessel, where the latter, at the time that the collision is threatened, has not the use of her sails. *Same v. Tourne*, 29 D. 452.

A custom that a steam-vessel ascending has a right to a certain side of the river applies as to other vessels of the same class, but not as to sail vessels, and therefore cannot excuse a collision with a vessel of the latter description. *Id.*

When a collision happens on a dark night between a steamer and a sailing vessel, the mere fact of such collision raises no presumption of negligence against the steamer, in the absence of proof to the contrary, and is not sufficient in itself to make her liable. But if such collision occurs in the daytime, and in good weather, it may be reasonably presumed that it was occasioned by her fault. *Union Steamship Co. v. Nottingham*, 91 D. 378.

When a collision occurs in the night-time between a steamer and a sailing vessel, it will be presumed, in the absence of proof to the contrary, that the steamer kept the proper lookout, and showed the proper number and description of lights. *Id.*

A steamer is not bound to change her course for a row-boat, under the federal navigation laws, and in case of collision it is error to charge that the party committing the injury is only excused by such inevitable accident as human foresight under the circumstances could not have prevented. *Philadelphia etc. R. R. Co. v. Adams*, 33 R. 721.

56. — between vessel in motion and vessel at anchor. — The master of a vessel in motion colliding with a vessel at anchor is bound to know that the latter cannot be got out of the way so readily as his own vessel can clear it, and to take measures accordingly. *Simpson v. Hand*, 36 D. 231.

A steamer or vessel under sail must avoid one at anchor. *Knowlton v. Sanford*, 52 D. 649; and in case of injury to the latter by the former, no excuse will avail but unavoidable accident, or that *vis major* which no human skill or precaution can guard against or prevent. *Baker v. Lewis*, 75 D. 598.

The law requires those in charge of moving vessel to exercise constant care and vigilance to avoid collision with others. *Id.*

A person mooring his craft at an accustomed landing is bound to leave sufficient room for the passage of other craft; but this is all that the law requires of him. *Id.*

The defendant's steamer, *St. John*, in attempting to pass a grounded tow belonging to the plaintiff, instead of taking the ordinary channel, which was on the west side of the tow, went to the east side, the pilot supposing that the channel had changed. The pilot knew that the tow was aground. *Held*, that the pilot was guilty of negligence, and the owners of the *St. John* liable for dam-

For Index to Notes in American Decisions and American Reports, see Volume L

ages done by collision with a vessel belonging to the tow. *Austin v. N. J. Steamboat Co.*, 3 R. 663.

He was negligent, although the accident may have been caused by an obstacle which had been recently and suddenly formed, and could not be seen by him. A party cannot avail himself of the defense of "inevitable accident" who, by his own negligence, gets into a position which renders the accident inevitable. *Id.*

The *St. John*, before reaching the tow, signaled that she intended to go to the east. No answer was made by those on the tow, though it had been grounded by its pilot making a mistake similar to that of the pilot of the *St. John*, and some of those in charge had sounded and discovered that the channel had changed. *Held*, that those managing the tow were not guilty of contributory negligence. *Id.*

There was no legal duty on the part of the tow to either signal or impart any information as to the channel to the *St. John*. A steamer with full control of its machinery, desiring to pass a vessel, whether stationary or moving, must do it on its own responsibility, and is bound to select its route at its peril. *Id.*

57. — with tugs and tows.* — Where a canal-boat in tow was sunk by collision with another tow owned by the owner of the towing tug, — *Held*, that the owner of the cargo on the canal-boat could not recover of the owner of the tug for the loss, it appearing that the omission to display proper lights on the canal-boat contributed to the loss. *Arctic Fire Ins. Co. v. Austin*, 25 R. 221.

58. Lights.† — No positive rule of law or usage requires the master of a vessel to always exhibit in the night a light on his vessel while at anchor in a harbor. *Carsley v. White*, 32 D. 259.

Whether the omission to exhibit such light will amount to such negligence as to bar a claim for an injury received from another vessel running foul of her depends on the circumstances of the case. *Id.*

A failure to keep a signal-light burning on a vessel anchored in the channel of the Delaware River at night, and to maintain a proper anchor watch on board the vessel, is such negligence as to prevent a recovery by the owner of goods carried thereon against the owners of a vessel in motion colliding with such anchored vessel, for an injury to the goods, although the master of the vessel in motion is also guilty of negligence, and the burden of proof lies on the plaintiff. *Simpson v. Hand*, 36 D. 231; *Innis v. Steamer Senator*, 54 D. 305.

It is not to be understood that all vessels

should set a guard or exhibit lights, but only such as are moored or anchored in "harm's way." *Innis v. Steamer Senator*, 54 D. 305.

A steamer employed in towing boats was navigating the bay of New York, with lights forward and aft and a red light on the pilot-house, which were the usual lights for such vessels, but which did not conform to the requirements of an act of Congress prescribing lights for vessels of that character. *Held*, that the omission to carry the lights prescribed by law did not of itself preclude a recovery for damages negligently and recklessly produced by another vessel running upon her or her tow. *Hoffman v. Union Ferry Co.*, 7 R. 435.

59. Lookouts. — A failure of a moving vessel to keep a proper lookout is, in case of collision, by the maritime law, regarded as negligence on her part, especially if the omission may have contributed to the disaster. *Baker v. Lewis*, 75 D. 598.

60. Rules peculiar to river navigation. — The owner of a vessel is liable for the non-observance, by the master, of an established custom, by which a vessel descending a river is required to give way to one ascending. *Jones v. Pitcher*, 24 D. 716.

Anchoring a vessel in a regular path of river steamers can only be justified by necessity, and such vessel must remain no longer than the necessity exists. *Knowlton v. Saaford*, 52 D. 649.

The master's duty upon anchoring in the path of river steamers is to exercise a reasonable degree of care and skill and have due regard for the rights of others, and whether he does is a question for the jury. *Id.*

The degree of necessity which will justify anchoring in the path of river craft is not such as renders it impossible to anchor elsewhere. It is sufficient if prudent and skillful navigators would deem it hazardous to do so. *Id.*

Officers of vessels must exercise the utmost vigilance and secure the best means of avoiding accidents when crossing the usual track of steamers in a river, in order to be entitled to damages resulting from collision. *Reese v. Steamer Mary Foley*, 54 D. 557.

2. Actions for Collision.

61. Jurisdiction and right of action.*

— Courts of common law have concurrent jurisdiction with courts of admiralty in cases of collisions at sea. *Sawyer v. Eastern Steamboat Co.*, 74 D. 463.

An action for damages caused by a steamboat running into a flat-boat should be brought against the boat itself, and not against the persons named in the attachment

* Between tug and tow, see note, 45 D. 56, 57. Liability for injury caused by towed vessel, see note, 25 D. 354, 355.

† Rules relative to lights, see note, 45 D. 55.

* Jurisdiction in suits for collision, see note, 45 D. 59.

Collision, when not regarded as being within act of God, see note, 45 D. 592.

For Index to Notes in American Decisions and American Reports, see Volume I.

as its owners. The fact that the defendants are admitted by the affidavit on which the attachment issued to be the owners of the steamboat, and that the attachment bond which is made payable to them as such, makes no difference. *Steamboat Farmer v. McCraw*, 62 D. 718; *Walters v. Steamboat Mollis Dozier*, 95 D. 722.

The owner of a vessel is liable for a collision occasioned by the negligence of the officers and crew, although the vessel was at the time under the control of a licensed pilot. *Sauker v. New York & W. S. S. Co.*, 43 R. 736.

62. Measure of damages, generally.*

— If a vessel sink from the effects of a collision, the other vessel, if in fault, will be responsible for the loss thus occasioned, though proper exertions on the part of the master and crew of the injured vessel might have kept her afloat. *Phares v. Stewart*, 33 D. 317.

63. — where both vessels are in fault.† — The common-law rule for assessing damages for injuries caused to vessels by collision is, that where both vessels are at fault, neither can recover. And this is the rule that must be applied in case of a collision between two steamboats on the Ohio River, even though the suit be brought in the chancery court. *Broadwell v. Swigert*, 45 D. 47; *Steamboat Farmer v. McCraw*, 62 D. 718; *Baker v. Lewis*, 75 D. 598. But in admiralty the loss would be apportioned or divided equally between them. *Knowlton v. Sanford*, 52 D. 649; *Union Steamship Co. v. Nottingham*, 91 D. 378.

The admiralty rule which assesses the damage equally upon two vessels, the negligent management of which has occasioned loss or injury, has no application in common-law courts. *Arctic Fire Ins. Co. v. Austin*, 25 R. 221.

In collisions of vessels, the one in fault is responsible if the other does not contribute to the injury. *Knowlton v. Sanford*, 52 D. 649.

The judiciary of Kentucky have no power to adopt the marine code of Europe in determining the liability of owners of vessels for injuries done by collisions on the Western waters. *Broadwell v. Swigert*, 45 D. 47.

SHIPPING ARTICLES.

Nature and form of, see SHIPPING, 40.

SHIP'S LOG.

Effect of, as evidence, see EVIDENCE, 246.

SHORE.

Lands bounded on, title to, see BOUNDARIES, 8-10; RIPARIAN RIGHTS, 3-5.

* Liability of vessels and their owners for injuries caused by collision, see note, 45 D. 51-60.

† Rules of damages where both vessels are in fault, see note, 45 D. 58.

SIDEWALKS.

Liability of county for defects in, see COUNTIES, 17.

Liability of city for unsafe condition of, see MUNICIPAL CORPORATIONS, 70.

SIGHT DRAFTS.

Presentation of, see BILLS AND NOTES, 169.

SIGNALS.

Neglect of engineer to give, at crossing, see RAILROAD COMPANIES, 92.

SIGNATURE.

To bill of exceptions, see APPEAL, 97, 144.

To indictment, see INDICTMENT, 34.

To judgment, see JUDGMENT, 10.

To will, what sufficient, see WILLS, 16.

SILENCE.

Admissions by, in civil cases, see EVIDENCE, 157.

Admissions by, in criminal cases, see EVIDENCE, 167.

Estoppel by, see ESTOPPEL, 48.

When amounts to fraud, see FRAUD, 7.

When ratifies agent's act, see AGENT, 93.

SIMILITUDE.

Between forged and genuine writings, see FORGERY, 5.

Between genuine and base coin, see COUNTERFEITING, 4.

SIMPLE TRUSTS.

Distinguished from special, see TRUSTS, 10.

SINKING FUND.

Commissioners of, see COMMISSIONERS, 4.

SISTER STATES.

Conclusiveness of judgments of courts of, see JUDGMENT, 59.

Effect of letters of administration issued in, see EXECUTORS, etc., 13.

Interpretation of statutes of, see STATUTES, 49.

Judgments of courts of, as evidence, see EVIDENCE, 201.

Judicial notice of laws of, see EVIDENCE, 15.

Presumptions as to laws of, see EVIDENCE, 33.

Presumption that common law prevails in, see COMMON LAW, 3.

Rights of citizens of, see CITIZENSHIP, 3.

Statutes of, as evidence, see EVIDENCE, 217.

SITUS.

Of offense of conspiracy, see CONSPIRACY, 10.

Of property attached, see ATTACHMENT, 2.

SKILL.

What required from attorney, see ATTORNEY AND CLIENT, 27.

For Index to Notes in American Decisions and American Reports, see Volume I.

What required from expert, see WITNESSES, 132-137.

What required from physicians, see PHYSICIANS AND SURGEONS, 4, 5.

SLANDER.

[Includes defamation by spoken words; also slander of title to land. Defamation by written or printed words, or representation, constituting libel, is treated under that title.]

- I. WHAT WORDS ARE ACTIONABLE.
- II. PRIVILEGED COMMUNICATIONS.
- III. PROCEDURE.
- IV. SLANDER OF TITLE TO LAND.

I. WHAT WORDS ARE ACTIONABLE.

1. In general.* — 1. *When an action lies.* — Words need not be necessarily defamatory in order to be actionable. *Bentley v. Reynolds*, 38 D. 251.

The consequence of the words spoken must be to occasion some injury or loss to the plaintiff, either in law or fact. *Abrams v. Foshee*, 66 D. 77.

To say of a man that he, while a member of a convention, "openly avowed the opinion that government had no more right to provide by law for the support of the worship of the Supreme Being than for the support of the worship of the devil" is libelous, as tending to deprive him of the esteem of mankind, and to render him odious and detestable. *Stow v. Converse*, 8 D. 189.

To call a woman a hermaphrodite is actionable, without alleging special damages. *Malone v. Stewart*, 45 D. 577.

Words spoken of a female which have tendency to wound her feelings, bring her into contempt, and prevent her from occupying such position in society as is her right as a woman, are actionable in themselves. *Id.*

Repetition of a slanderous report already in circulation is actionable, although it was not repeated with any design to extend its circulation, or confirm it, or cause the person to whom addressed to believe it to be true. *Kenney v. McLaughlin*, 66 D. 345.

The repetition of slanderous words must be done from good motives and without malice, and the repeater must give not only the precise words of the author, but the name of a responsible person against whom the injured party may bring his action. *Jarnigan v. Fleming*, 5 R. 514.

Plaintiff may in good faith make inquiry through a third person of defendant if he has made a slanderous charge against plaintiff, and if defendant in malice reiterates the charge in reply, the words spoken at that time are actionable; but if the inquiry is made as a trick for the purpose of inducing defendant to utter a slander, the words thus elicited are not a ground of action. In such case, the question of malice is for the jury. *Nott v. Stoddard*, 88 D. 633.

* What words are actionable *per se*, see notes, 12 D. 39-46; 41 E. 590-592.

Words actionable *per se* must impute a crime indictable and punishable in a temporal court of criminal jurisdiction, or must charge an infectious disease. *Little v. Barlow*, 71 D. 219.

2. *When no action lies.* — Where words are innocent or justifiable, they will not support an action, although they may have occasioned some special damage. *Mayrant v. Richardson*, 9 D. 707.

No action lies for calling a man opprobrious names, such as liar, cheat, rascal, swindler, blackleg, and the like. *Van Tassel v. Capron*, 43 D. 667.

Defamatory words uttered only to the person concerning whom they are spoken, no one else being present or within hearing, do not constitute slander, so as to sustain an action therefor. *Sheffill v. Van Deusen*, 74 D. 632.

If one assert a slander generally, without stating his author, it is actionable; but if he mentions, at the time, his authority, it should be such an authority as would induce reasonable belief. *Hersh v. Ringwalt*, 2 D. 392.

Slanderous words may be retracted or so qualified and explained as not to convey a slanderous meaning, and where such retraction, qualification, or explanation is made at the time of the speaking of such words, or before the separation of the persons who heard them, the words will not be actionable. *Trabue v. Mays*, 28 D. 61; *Shecut v. McDowell*, 5 D. 536.

The explanation of such words, made by another person present at the time, which explanation was adopted by the speaker of the words, and so understood to be by all present, will prevent the words from being actionable. *Trabue v. Mays*, 28 D. 61.

3. *How the words are to be construed.* — In slander the words are to be construed as they were, or should have been, understood by the person to whom they were addressed. *Sawyer v. Eifert*, 10 D. 633; *Watson v. McCarthy*, 46 D. 380; *Stallings v. Newman*, 62 D. 723; *McGowan v. Manifee*, 18 D. 178.

The words are to be taken in their plain and obvious meaning; the old rule that they are to be taken in *mitiori sensu* has been exploded. *Ogden v. Riley*, 25 D. 613; *Stallings v. Newman*, 62 D. 723; *Little v. Barlow*, 71 D. 219; *Harrison v. Findley*, 85 D. 456.

Words are not to be taken in the milder sense after a verdict which finds them to have been spoken maliciously. *Beers v. Strong*, 1 D. 10.

The slanderous sense of the words spoken is not to be determined by the understanding of the hearers, where the language is plain and direct. *Jarnigan v. Fleming*, 5 R. 514.

2. *When special damages must be shown.* — To say of a candidate for Congress that his mind was weak, and never could

For Index to Notes in American Decisions and American Reports, see Volume I.

be depended upon, is not actionable *per se*. *Mayrant v. Richardson*, 9 D. 707.

An action will not lie for orally imputing insanity to plaintiff, without the averment of special damage. "*The Count Joannes*" v. *Burt*, 83 D. 625.

Words which charge a man with gross dishonesty, for which, if true, he would be liable in a civil action, but which do not import a charge of burglary, larceny, or other crime, are not actionable *per se*. The rule is here applied to words spoken by one partner against the other. *Alfele v. Wright*, 93 D. 615.

Falsely to charge that a merchant has executed a chattel mortgage is not actionable *per se*, and special damage cannot be predicated of such a charge without explicit proof connecting it therewith. *Newbold v. Bradstreet*, 40 R. 426.

Where one falsely reports to third persons that a clerk in the employ of the government has spoken disrespectfully of his chief, and this coming to the knowledge of the latter he discharges the clerk in consequence, an action of slander will not lie. *Knight v. Blackford*, 51 R. 772.

The defendant's wife, a stockholder in a street-railway company, informed her husband that she heard persons boast that a car of the company driven by the plaintiff was "a good dead-head car" for them, and the defendant informed the foreman of the company, who thereupon without investigation or notice discharged the plaintiff. *Held*, that an action of slander would not lie, there being no proof of actual malice. *Haney v. Trost*, 44 R. 461.

3. What charges of crime are actionable, generally. — 1. *The general rule.* — Words are actionable *per se*, when they charge a person with having committed an act for which, if the charge were true, he would be punishable criminally by indictment. *St. Martin v. Deenoyer*, 61 D. 494.

Whether slanderous words are actionable in themselves as imputing criminality, without alleging special damages, depends upon whether the charge, if true, would subject the party charged to indictment for a crime involving moral turpitude, or subject him to an infamous punishment. *Alfele v. Wright*, 93 D. 615; *Brooker v. Coffin*, 4 D. 337.

A charge need not be direct and positive to make it slanderous; it is sufficient that from it the imputation of criminality may be inferred. *Waters v. Jones*, 29 D. 261.

Expressing a suspicion, or speaking ironically or by way of comparison or interrogation, may make one guilty of slander. *Id.*

2. *Its scope and extent.* — An accusation is actionable which, if proved, would subject the party falsely accused to a punishment which would bring disgrace upon him. *Abrams v. Foshee*, 66 D. 77.

* Imputing a crime, when actionable, see note, 13 D. 41-45.

A charge of felony may be made by a question as well as by a direct allegation, if it was so meant, and this is a question of construction. *Sawyer v. Eifert*, 10 D. 633.

The injury to plaintiff is not affected by the truth or falsity of the facts and principles which may or may not constitute an impossible crime and an impossible fact. Hence an action for slander will lie for charging an impossible crime and an impossible fact. The court will not say that sexual intercourse between a dog and a woman is impossible, nor that if possible, conception might not follow; but if such connection and conception are impossible, it is not known to the people; and the people, though bound to know the law, are not bound to know philosophy or the facts and principles of science. *Ausman v. Veal*, 71 D. 331.

The following charges of crime have been held actionable per se within the rule: The words "You are a vagrant"; as a statute subjects such a person, on a conviction before a justice of the peace, to imprisonment at hard labor, for a term not exceeding one month. *Miles v. Oldfield*, 2 D. 412.

To say of a woman, "What is a woman that makes a libel? She is a dirty creature, and that is you. You have made a libel, and I will prove it with my whole estate." *Andres v. Koppenhefer*, 8 D. 647.

Words charging one with stealing boots from a dead body cast ashore from a wreck. *Wolson v. Sayward*, 23 D. 691.

To say of one, "He makes his money easy; he keeps a gambling-place," or to say of him, "He makes his money easy; he keeps a gambling-hell." *Buckley v. O'Neil*, 18 R. 466.

Words imputing to a wife the commission of a felony jointly with her husband, but not in his presence. *Nolan v. Traber*, 33 R. 277.

3. *Its limits and exceptions.* — Words are not actionable *per se* unless they impute a crime liable to punishment. *Brite v. Gill*, 15 D. 122.

Words charging the crime against nature are not actionable *per se*. *Coburn v. Harwood*, 12 D. 37. *S. P.*, *Melvin v. Weiant*, 38 R. 572.

The word "thief" is not actionable unless intended to impute a felony; hence, if it be accompanied by other words showing that it was spoken with reference to a mere breach of trust, an action will not lie. *Brite v. Gill*, 15 D. 122.

Charging one with being in a suspicious place under suspicious circumstances does not impute a crime to him. *Waters v. Jones*, 29 D. 261.

To charge a person with causing or procuring an abortion is not actionable *per se*, when there is no law punishing such act at the time of the speaking of the words. *Abrams v. Foshee*, 66 D. 77.

For Index to Notes in American Decisions and American Reports, see Volume I.

Alleged slanderous words do not impute any criminal offense, unless it appears from the record that the words set forth, by their natural signification, when interpreted in the light of the extrinsic facts alleged, are fairly capable of such a meaning. *Goodrich v. Hooper*, 93 D. 49.

In an action of slander, for calling plaintiff a "deserter," without alleging special damage, — *held*, that as the offense alleged was only cognizable by a court-martial, the action could not be maintained. *Hollingsworth v. Shaw*, 2 R. 411.

The words charged to have been spoken by the defendant were, that the plaintiff "had stolen corn out of G.'s field." *Held*, that if the conversation in the course of which the alleged words were spoken showed that the defendant referred to "standing corn," the plaintiff could not recover, the larceny of standing corn being only an indictable offense, made so by statute, but not of an infamous character or subject to an infamous or disgraceful punishment. *Stimell v. Reynolds*, 5 R. 396.

The words "A stole windows from B's house" are not in their ordinary sense actionable as imputing either larceny or an act of malicious trespass upon real estate. *Wing v. Wing*, 22 R. 548.

Words merely charging that the plaintiff administered morphine to another on the day he made his will, and that if it had not been for that, the plaintiff's daughters would not have got what they did, are not actionable *per se*, nor with an innuendo that the plaintiff had unlawfully administered poison causing death. *McFadin v. David*, 41 R. 587.

4. Words charging crime committed in another state.* — To impute the commission of a crime to one is actionable *per se*. And it makes no difference that the person of whom the words were spoken is not in the state where he is punishable; for although the crime may have locality, the effect of the imputation has not. *Shipp v. McCraw*, 9 D. 611.

In an action of slander, if the alleged slanderous words charge an act to have been done in another state or country, which is not a crime by the common law, in order to make them actionable, the pleading should show, and the evidence establish, its criminality by the laws of such state or country. *Bundy v. Hart*, 2 R. 525.

In an action for slanderous words spoken in Pennsylvania, and charging the commission of adultery in Georgia, the words, if charging an offense of moral turpitude, punishable by the law of the state where they were uttered, are actionable *per se*. *Klumph v. Dunn*, 5 R. 355.

4. Charges of arson. — Charging one with burning the gin or cotton-house of an-

other is actionable *per se*. *Waters v. Jones*, 29 D. 261.

To say of one, "I believe, or I have reason to believe," he committed arson or larceny, is equivalent to charging him with a crime, and is actionable. *Waters v. Jones*, 29 D. 261; *Logan v. Steele*, 4 D. 659.

To say of one, "I have been informed he is guilty of arson," the name of the informant not being stated, is actionable. Hence it is actionable to say of one that it is the general opinion of the people in the neighborhood that he burned the gin-house of another. *Waters v. Jones*, 29 D. 261.

5. Charges of forgery. — A writing given to a slave to facilitate his escape, by certifying falsely that he had been made free by the will of one represented to have been his master, etc., is an instrument calculated to deceive, and might prejudice the owner of such slave, and if genuine, might subject the person signing it to damages for the loss of such slave; it is therefore forgery to counterfeit such an instrument, whether actually used to facilitate the escape of a slave or not; and words charging one with the forgery of such a writing are actionable *per se*. *Arnold v. Cost*, 22 D. 302.

6. Charges of larceny. — A key in a door may be the subject of larceny. It is not so far real estate as to prevent a conviction for its theft. Words are therefore slanderous which accuse a person of stealing a key out of a door in the room of a house. *Hoskins v. Turrense*, 35 D. 129.

Where one said "he would venture anything the plaintiff had stolen the book," the words being proved to be spoken maliciously, were held to support a verdict for damages. *Nye v. Otis*, 5 D. 79.

Where the defendant charged the plaintiff with having stolen a certain note in Virginia, the parties being in North Carolina at the time these words were uttered, such charge was held slanderous, it appearing that stealing notes was larceny in Virginia. *Shipp v. McCraw*, 9 D. 611.

A statute defined larceny as the taking and carrying away of any personal property or valuable thing. In an action of slander for charging plaintiff with stealing a dog, — *held*, that a dog was property or valuable thing within the statute, and that the words were therefore actionable *per se*. *Harrington v. Miles*, 15 R. 355.

The following charges are actionable *per se*: Falsely to say of another that he is a thief; although it does not necessarily impute a felony. *Quigley v. McKee*, 53 R. 320.

To say of a person that he is a thieving puppy. *Little v. Barlow*, 71 D. 219.

The words "You have stolen my belt." *St. Martin v. Desnoyer*, 61 D. 494.

To charge one with stealing that which cannot be stolen is not of itself actionable. *Ogden v. Riley*, 25 D. 513.

* Words charging commission of offense in a foreign state, see note, 9 D. 613, 614.

For Index to Notes in American Decisions and American Reports, see Volume I.

The words "John Ogden has stole my marle"; "You are a thief; you have stolen my marle," are not actionable. *Id.*

7. Charges of perjury. — In slander, words bear that signification which they have in common parlance; hence to charge one with swearing falsely in court is actionable, as here it will be understood to mean a court having power to administer an oath. *Hamilton v. Dent*, 1 D. 552; *Rue v. Mitchell*, 1 D. 258. Contra, *Ward v. Clark*, 3 D. 383.

Slander is not maintainable for saying one is forsworn, but it is otherwise when it is said that he is perjured. *Hopkins v. Beedle*, 2 D. 191.

Saying to another, "You swore to a lie, for which you now stand indicted," is actionable. *Pelton v. Ward*, 2 D. 251.

Saying to a witness while giving his testimony in a cause in court to a point material to the issue, "That is false," is actionable; for when spoken maliciously it is equivalent to a charge of perjury. *McLaughery v. Wetmore*, 5 D. 194.

It is actionable *per se* to say of another, "He has sworn falsely, and I will attend to the grand jury respecting it." *Gilman v. Lowry*, 24 D. 96.

Perjury is imputed in the words, "I have made the charge against him, and I will go on with it," where there is a colloquium and proper innuendoes showing that they were spoken concerning the plaintiff and his testimony in a cause depending, and such words so laid are actionable. *Thompson v. Lusk*, 26 D. 91.

Words imputing to a person the crime of perjury are in themselves actionable, with or without a colloquium, and without proof that such person has taken oath in a judicial proceeding, and without production of proof of such proceeding. *Commons v. Walters*, 27 D. 635.

8. Charges of unchastity. — To charge a female with want of chastity is not actionable at common law. *Elliot v. Aileberry*, 5 D. 631.

Words charging a female with want of chastity, or which have a tendency to wound her feelings, bring her into contempt, and prevent her from occupying such position in society as is her right as a woman, are actionable *per se* in Ohio. But this rule is not extended to one of the male sex, where the words are of similar character. *Alfale v. Wright*, 93 D. 615.

Words imputing adultery to a married woman are actionable by statute, but not at common law. *Smalley v. Anderapn*, 15 D. 121. To render such charge actionable at common law, special damages must be alleged and proved. *Buys v. Gillespie*, 3 D. 404; *Berry v. Carter*, 24 D. 762. And sickness produced by the charge is not such damage. *Shafer v. Ahalt*, 30 R. 456.

An imputation that a woman is unchaste is actionable in itself. A charge that a woman has slept with a man not her husband is an imputation of unchastity. A charge that a woman has slept with a specified man, who bears a different name from her husband, is *prima facie* a charge of sleeping with another man than her husband. *Barnett v. Ward*, 38 R. 561.

Saying of a person, "She is a common prostitute, and I can prove it," or that "She was hired to swear a child on me; she had a child before this, when she went to Canada; she would come damned nigh going to the state prison," is not actionable without alleging special damage. *Brooker v. Coffin*, 4 D. 337.

The word "bitch" when applied to a woman, though a word of reproach, does not charge the crime of adultery or prostitution, and is not actionable. *K— v. H—*, 91 D. 397.

Words are not actionable *per se* which charge a married woman with seating herself upon the lap of a man not her husband, and insisting upon his "screwing" her. The words clearly charge a desire to commit the crime of adultery, but not the act. *Id.*

Words charging a female with self-pollution are not actionable *per se*. *Anonymous*, 19 R. 174.

The words used were held actionable *per se* in the following instances: Words charging a woman with keeping a bawdy-house; for if true, they would subject her to an indictment as for a crime involving moral turpitude. *Martin v. Stillwell*, 7 D. 374.

To say of another, "You got to bed with Sarah M.," also "He is such a whoring fellow that it is with difficulty he can keep a girl about the house, being continually riding them," and "He has committed fornication," although the person to whom the words referred may have been a married man. *Watson v. Singleton*, 10 D. 472.

Calling a woman a whore. *Smith v. Silence*, 66 D. 137.

The words, spoken of an unmarried woman, "She is in the family way, and I can prove by A that she has been taking camphor and opium pills to produce an abortion." *Miles v. Vanhorn*, 79 D. 477.

These words spoken of a woman, "Baden saw or told me that on Sunday, at the camp-meeting, he either scared or drove Jane Owens and a man supposed to be Jo. Dearmond, up from behind a log; he and others supposed it to be Jo. Dearmond; they broke and ran; I [Baden] got her paracel and handkerchief, and if any one don't believe me, they can come and see them." *Proctor v. Owens*, 81 D. 341.

Words calculated to induce the hearers to suspect that the plaintiff was guilty of adultery. *Id.*

The words, "Malvina [plaintiff] has been

For Index to Notes in American Decisions and American Reports, see Volume I.

to swear a young one." *Patterson v. Wilkin-*
son, 92 D. 568.

Words spoken of a woman, charging that she had intercourse with a beast, or had committed sodomy. *Haynes v. Ritchey*, 6 R. 642.

9. What words touching one's office or vocation are slanderous *per se*.

— 1. *General principles*. — In slander, where the words used have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability, when from the nature of his business great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of the plaintiff. When, however, they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application be made. *Sanderson v. Caldwell*, 6 R. 105.

To call a clergyman a drunkard is actionable, because these words, if believed, must deprive him of that respect, veneration, and confidence, without which he can expect no hearers as a minister of the Gospel. *McMillan v. Birch*, 2 D. 426; *Chaddock v. Briggs*, 7 D. 137; *Hayner v. Cowden*, 22 R. 303.

It is actionable to utter such falsehoods of a candidate for public office as will cause persons not to vote for him. *Brewer v. Weakley*, 5 D. 656.

Words impugning the solvency of a person and affecting his credit are actionable, though not spoken in relation to his particular trade or business. *Davis v. Ruff*, 34 D. 584.

False assertions productive of actual damage to the person concerning whom they are uttered will enable him to sustain an action of slander, provided that the damage of which he complains was not the result of any acts of others, to whom such words were spoken, of so unlawful a character that an action for relief might have been sustained against such persons themselves. *Bentley v. Reynolds*, 36 D. 251.

An action may be maintained for false and malicious assertions by which creditors of plaintiff were induced to cause attachments to be levied against his property, which otherwise might not have been levied, and it is not material whether the words were spoken in relation to any particular trade or employment of the plaintiff. *Ib.*

Damage is implied from the false and malicious uttering of words calculated to injure another in his business credit. *Phillips v. Hafer*, 44 D. 111.

An action lies for conspiracy to defame and injure a person in his vocation. *Wildee v. McKee*, 56 R. 271.

The following words were held actionable *per se*: Saying of a drover, whose business it is

to purchase cattle, drive them to market, and sell them, that he is a bankrupt. *Lewis v. Hawley*, 2 D. 121.

To say of a blacksmith, in relation to his trade and business, "He keeps false books, and I can prove it." *Burtch v. Nickerson*, 8 D. 390.

Falsely and maliciously to say of a farmer that he is not able to pay his debts, that he owes more than he is worth, and that those whom he owed had better push him, or they would lose. *Phillips v. Hafer*, 44 D. 111.

Falsely and maliciously calling a justice of the peace "a damned fool of a justice." *Spiering v. Andra*, 30 R. 744.

2. *Illustrations*. — The declaration stated that the defendant, with intention to injure the reputation of the plaintiff as a merchant, falsely and maliciously spoke of him, then being a merchant, the following words: "Mr. Young, I must tell you that you have received more tobacco than you have accounted for to the house," meaning the mercantile house of which the plaintiff and defendant were partners. No colloquium was laid. *Held*, that these words were clearly actionable, as importing a charge against the plaintiff in his mercantile character. *Boyle v. Young*, 1 D. 446.

Defendant, in speaking about G., a justice of the peace, who had decided a case tried before him against defendant, said "G. perjured himself in deciding the suit against me, contrary to all law and evidence, etc. It is the damndest erroneous decision I ever saw any justice give; it was a damned outrage, and was done for spite." *Held*, that the words imported that plaintiff violated his official oath in deciding the case, and were actionable *per se*. *Gove v. Blethen*, 18 R. 380.

A declaration stated that the defendant privily loosened the nails from the shoe of a horse which he had shod, with intent to induce the owner to believe that the plaintiff had done the work badly, and to injure him in his trade of blacksmith, whereby the plaintiff lost the custom of the owner. *Held*, to show a cause of action. *Hughes v. McDonough*, 39 R. 603.

10. What are not. — To sustain an action for words spoken of a magistrate which are not actionable *per se*, they must appear to have been spoken of him in his official character, and it is not enough that they tend to injure him in his office. *Van Tassel v. Capron*, 43 D. 687; *Oakley v. Farrington*, 1 D. 107.

Calling a magistrate a "damned blackleg," and charging him with being in a "combined company to cheat strangers," is not actionable, where no official misconduct or neglect of official duty is alleged against him. *Van Tassel v. Capron*, 43 D. 687.

Charging a magistrate with omitting to give information to a judgment plaintiff in

For Index to Notes in American Decisions and American Reports, see Volume I.

his court, that his execution has not been returned in time, and that therefore he has a right of action against the constable, where it is not charged that he possessed such information, or was requested to communicate it, imputes no neglect of official duty, and is not actionable. *Ib.*

Speaking of a magistrate as "squire," in using opprobrious words concerning him, is mere *descriptio personae*, and does not import that the words are spoken of him in respect of his office. *Ib.*

Slandering a partner by declaring him to be insolvent is no slander of the firm of which he is a member. *Davis v. Ruff*, 34 D. 584.

Semble, that an action for slander or libel injurious to plaintiff's business cannot be maintained, in the absence of malice or willful purpose to inflict injury. *Hovey v. Rubber Tip Pencil Co.*, 15 R. 470.

11. Imputations of venereal diseases. — Words charging a man with being afflicted with a venereal disease are actionable in themselves. *Kaucher v. Blinn*, 23 R. 727.

To charge a person with having the gonorrhea is actionable *per se*, as it is charging him with a disease which would wholly or partially exclude him from society, most certainly from all good society. *Watson v. McCarthy*, 46 D. 380.

II. PRIVILEGED COMMUNICATIONS.

12. What communications are privileged. — 1. *In general.* — Words spoken in the discharge of a duty, and in good faith, or spoken to those who have an interest in the communication, are not actionable, unless actual malice be proved. *Bradley v. Heath*, 22 D. 418; *Faris v. Starke*, 33 D. 536. Saying of a voter at a town meeting that he put in two votes comes within this rule. *Bradley v. Heath*, 22 D. 418.

Words spoken of the plaintiff before a presbytery of the Presbyterian church in the course of his defense against charges for which he had been summoned there by the plaintiff are not actionable, provided he does not designedly and maliciously wander from the point for the purpose of slander. *McMillan v. Birch*, 2 D. 426.

If words actionable *per se* be spoken between members of the same church during religious proceedings connected with the discipline of the church, and without malice, no action will lie; and the question of malice is to be determined by the jury. *Jarvis v. Hatheway*, 3 D. 473.

A representative is not liable for defamation when the words charged were uttered in the execution of his official duty, and although spoken maliciously; nor if not uttered in the execution of his official duty.

* Privileged communications, what are, see notes, 27 D. 158; 31 R. 708-71A.

and not maliciously, or with intent to defame. *Coffin v. Coffin*, 3 D. 189.

One who hears a slander may repeat it, if he does so in the same words, and gives his author at the same time. *Tailors v. Jaquett*, 26 D. 399.

Confidential communications made in the usual course of business, or of domestic or friendly intercourse, should be liberally viewed by juries. *Stallings v. Newman*, 62 D. 723.

The different classes of privileged communications enumerated. *Ib.*

2. Words uttered in a regular course of justice,* however defamatory, are not actionable. *Hardin v. Cumnock*, 12 D. 427.

If an attorney inserts slanderous matter in the pleadings, without his client's direction, the latter is not responsible. *Ib.*

Words spoken by counsel or by a party conducting his own case, in the course of judicial proceedings, if relevant and pertinent to the question before the court, are privileged, and not subject to an action for slander, however false, malicious, and injurious they may be. *Hastings v. Lusk*, 34 D. 330; *Stackpole v. Hennen*, 17 D. 187.†

Words spoken by counsel when the client is present are presumed to be authorized by him. *Stackpole v. Hennen*, 17 D. 187.

Words not relevant or pertinent to the matter in question, spoken in the course of judicial proceedings, are nevertheless privileged if spoken in good faith, under a belief that they were relevant and proper, and without actual malice, of which the jury are to judge. *Hastings v. Lusk*, 34 D. 330.

Neither parties nor their counsel are liable to an action of slander for words spoken *bona fide* in the ordinary course of judicial proceedings; but a party claiming this protection must have spoken the words in the reasonable and necessary defense or pursuit of his rights, and words spoken by counsel, to be privileged, must have been spoken in the discharge of his duty to his client, and must have been pertinent to the matter in question. *Mower v. Watson*, 34 D. 704.

The privilege of the counsel and the client in this respect are co-extensive. *Ib.*

Words spoken in a judicial proceeding, though actionable *per se*, are *prima facie* privileged, and to sustain an action for slander in speaking such words, the complaining party must show that they were not pertinent or material, and that the speaker was animated by ill-will and hatred. *Callins v. Sumner*, 80 D. 738.

An action for slander will not lie against a witness, if what he said was pertinent and material to the issue, no matter how much he may be actuated by hatred or ill-will. *Ib.*

* Privileged expressions occurring during trial of actions, see note, 2 D. 431-433.

† Words spoken at trial, liability of attorney for, see note, 17 D. 194, 196.

For Index to Notes in American Decisions and American Reports, see Volume I.

A witness is not answerable in damages for any statements he makes responsive to questions put to him, and which are not objected to and ruled out by the court; or concerning the impertinency or impropriety of which he receives no advice from the court or tribunal before which the proceeding is had. *Id.*

Words spoken before a justice of the peace, on an application for a warrant for felony, are not actionable if spoken in good faith and for the purpose of instituting proceedings. *Bunton v. Worley*, 7 D. 735; *Shock v. McChesney*, 2 D. 415; *Allen v. Crofoot*, 20 D. 647.

13. What are not. — The words "That is a lie," spoken to a witness while testifying to a material point in a cause then on trial, are actionable if spoken by a party maliciously, and with intent to defame such witness. *Mower v. Watson*, 34 D. 704.

The question as to privileged communications relates only to legal malice as contradistinguished from actual malice in slander. *Jellison v. Goodwin*, 69 D. 62.

III. PROCEDURE.

14. Jurisdiction. — Slander is a transitory action, and may be brought in one state for words spoken in another. *Offutt v. Earlywine*, 32 D. 40.

15. The right of action. — A person who repeats slander heard from others incurs it, and is liable therefor. *Evans v. Smith*, 17 D. 74.

Copartners need not join in an action of slander for words affecting the mercantile character, credit, or solvency of one of them. *Davis v. Ruff*, 34 D. 584.

16. The declaration or complaint, generally. — In a declaration for slander, where there are some counts good and others bad, a general verdict or finding will support the good counts. *Neal v. Lewis*, 1 D. 640.

A general count, as charging the plaintiff with stealing, is good. *Nye v. Otis*, 5 D. 79.

A declaration which charges that defendant said of plaintiff, "He swore a lie," in reference to an affidavit made before a justice of the peace for the purpose of having the defendant bound to keep the peace, states a cause of action, and may be proved by showing that such words were used with reference to such affidavit, without further proof of the proceedings before the justice. *Commons v. Walters*, 27 D. 635.

In an action for slander, in having accused plaintiff of murdering defendant's son, the declaration need not aver that at the time said accusation was made the son was dead. *Stallings v. Newman*, 62 D. 723.

A declaration alleging that defendant called plaintiff a thieving puppy is not demurrable, where it does not appear therein

that the words were used in a connection not imputing a criminal charge; and if such is the case, the defendant must avail himself of it by plea in defense, unless it appears in the plaintiff's evidence on the trial. *Little v. Barlow*, 71 D. 219.

A declaration alleging words not actionable except as applied to a person and circumstances in reference to which the words were spoken, should contain, by way of inducement, proper averments to admit proof of these facts. *Id.*

The word "screwed" does not of itself import sexual intercourse, but it may, when spoken in certain localities, involve the charge of whoredom; and when it is thus used, a complaint for slander founded upon such a use of the word should affirmatively allege its import at the time and place it is used. *Miles v. Vanhorn*, 79 D. 477.

The court may permit plaintiff to amend his complaint, after the trial has been entered upon, by inserting additional words, or by correcting those already in the complaint, but not by inserting an entirely new set of words essentially different from those previously alleged. *Proctor v. Owens*, 81 D. 341; *Miles v. Vanhorn*, 79 D. 477.

If any set of words charged in any one of the paragraphs of the complaint is actionable, a demurrer to that paragraph should be overruled. *Harrison v. Findley*, 85 D. 456.

A complaint which charges no crime does not state facts sufficient to constitute a cause of action. *K— v. H—*, 91 D. 397.

The sufficiency of the complaint for words spoken in German is to be tested by English translation. Even though the German words are actionable, the complaint does not show a cause of action if those used in the translation are not. *Id.*

A complaint for words spoken in German is defective unless it avers that the words spoken in German were understood by those who heard them. *Id.*

Where the declaration stated that the plaintiff, at the time of publishing, etc., was, and long before had been, a blacksmith, and carried on the business and trade of a blacksmith honestly, and found and provided all such iron as was necessary in his business, and made correct charges, and had always kept honest, true, and faithful accounts with all persons in relation to his trade, etc., yet the defendant, in order to injure the plaintiff in his business, and cause to be believed, etc., in a certain discourse of and concerning the plaintiff in his said business, spoke, etc., — *held*, sufficient, without a more special averment, that there was a discourse of and concerning the plaintiff's trade, and that the words were spoken of his trade. *Burtch v. Nickerson*, 8 D. 390.

Where the declaration commenced, "J. W., by her next friend, H. A., by her at-

For Index to Notes in American Decisions and American Reports, see Volume I.

torney, J. D. B., sues F. C. B. W. for: 1. The said J. W. is of the age of twenty-one years and a *feme sole*," etc., and then charged the slanderous words,—*held*, that the words "by her next friend," in the commencement of the *narr.*, being followed by other words, "by J. D. B., her attorney," were obviously misrecital and mere surplusage, *utile per inutile non vitiatur*, the previous entries of the record showing that she acted by attorney. *Wilms v. White*, 90 D. 113.

The plaintiff in his declaration alleged that he was and had been engaged for many years in compiling and publishing bi-annual county directories, at great labor and expense, and had acquired a large advertising patronage therefor, and a large list of subscribers; that he had prepared to and would have published the same in 1885, but that by reason of the false and fraudulent statement of the defendant that he had gone out of the business, and disparaging his business, he had been prevented from doing so, and the defendant had published such a directory, to his injury; but he did not allege that he had been deprived of the benefit of any contract or property, or that the defendant published the directory as the plaintiff's, nor any infringement of copyright. *Held*, no cause of action. *Dudley v. Briggs*, 55 R. 494.

17. Setting out the defamatory matter.—A count in slander not setting out the words alleged to be slanderous is bad, even after verdict. *Parsons v. Bellows*, 25 D. 461.

Different actionable words, spoken at different times, constitute several and distinct causes of action, and should be embodied in separate counts. *Patterson v. Wilkinson*, 92 D. 568.

18. The colloquium.*—Colloquium and innuendoes are necessary generally in an action of slander, where the accusation has not been bluntly made, to connect it with facts giving a particular hue to the meaning, and to designate the persons and things alluded to, so as to disclose a charge of guilt intelligible to a hearer of ordinary capacity. *Thompson v. Lusk*, 26 D. 91.

Where words are alleged to be slanderous by reason of some extrinsic fact, such fact must be averred in a traversable form, with a proper colloquium. *Patterson v. Wilkinson*, 92 D. 568.

To make the word "forsworn" slander, it must be introduced by a colloquium setting forth some judicial proceeding in which the party was sworn. Hence in an action for slander, where the words charged were that "he, the said J., swore false and swore to a lie, . . . innuendo meaning that the said J. had taken a false oath before a magistrate,"—*held*, not to be actionable. *Sheely v. Biggs*, 3 D. 552.

* See note on the colloquium and innuendo, 4 D. 348-351.

Saying "I have lost a calfskin out of my cellar, the day that you and Bornman got the leather, and there was nobody in the cellar but you, Bornman, and Gray; and I do not blame you nor Gray, but Bornman must have taken it," is actionable, and without a colloquium of a felony, an innuendo that the defendant thereby meant that Bornman had stolen the said calfskin, was held good to support a judgment after verdict. *Bornman v. Boyer*, 5 D. 380.

The words spoken need not designate the person; this may be done by the colloquium. *McGowan v. Manisee*, 18 D. 178.

A declaration is insufficient which alleges that defendant falsely and maliciously said of plaintiff, "She is a bad girl, a very bad girl, and unworthy to be employed by any company in Lowell; meaning thereby that she was a lewd, lascivious, and wanton person, and was guilty of the crimes of fornication, prostitution, lewdness," etc., for want of an averment or colloquium that would warrant the innuendo. *Snell v. Snow*, 46 D. 730.

The declaration was, that defendant charged plaintiff with keeping "a bad house," innuendo a bawdy-house. *Held*, that the declaration was bad for want of a sufficient colloquium to justify the innuendo. *Peterson v. Sentman*, 11 R. 534.

19. Necessity of an innuendo.—No innuendoes are necessary under the Massachusetts system of pleading; but if the natural import of the words is not intelligible without further explanation or reference to facts understood, but not mentioned, or parts of the conversation not stated, the declaration should contain a concise and clear statement of such things as are necessary to make the words relied on intelligible to the court and jury in the same sense in which they were spoken: See Gen. Stats., c. 129, sec. 87. *Goodrich v. Hooper*, 93 D. 49.

20. Its form, sufficiency, and effect.—The office of the innuendo is to explain doubtful words, where there is matter sufficient in the declaration to maintain the action; but if the words in themselves are not actionable, their meaning cannot be extended by the innuendo to make them actionable. *Sheely v. Biggs*, 3 D. 552; *Patterson v. Wilkinson*, 92 D. 568; *Coburn v. Harwood*, 12 D. 37. The language must be read and interpreted by the court as it would ordinarily be understood by mankind. *Goodrich v. Hooper*, 93 D. 49.

Saying of a man "he has sworn false" is not actionable, the colloquium being of an extra-judicial affidavit before a justice of the peace; nor are the words helped by an innuendo of perjury. *Shafer v. Kinser*, 2 D. 488.

The objection that an innuendo is in the disjunctive, in that it alleges an intention to charge bestiality, or "crime against nature," is invalid; for an inference expressed

For Index to Notes in American Decisions and American Reports, see Volume I.

In the colloquium or innuendo in a complaint for slander, if not correct from the words alleged to have been spoken, cannot affect the sufficiency of the averments of the declaration. This is on the ground that a declaration in slander may be sufficient without the colloquium or innuendoes, which, in such case, may be regarded as surplusage. *Ausman v. Veal*, 71 D. 331.

A complaint in slander must aver that words not actionable *per se* were used in a criminal sense. The want of such averment cannot be supplied by the innuendo, for the reason that that branch of the pleading cannot aver a fact, or change the natural meaning of the words. *Miles v. Vanhorn*, 79 D. 447.

An innuendo added to alleged slanderous words cannot extend the sense of those words so as to make them charge the crime of adultery or prostitution, where there are no appropriate introductory averments of which the innuendo is explanatory, or to which it refers. *K— v. H—*, 91 D. 397.

21. Allegation of special damage. — If no special damage is laid, proof of particular damage will not be received. *Hersh v. Ringwalt*, 2 D. 392.

Special damage need not be alleged or proved in an action for slander upon words actionable *per se*. Some damage is implied by law in such case, and the jury determines the amount, having reference to the degree of malice exhibited by the defendant, and the injurious consequences necessarily resulting to the plaintiff. *Newbit v. Statuck*, 58 D. 706.

22. The plea or answer, generally. — In slander, the allegation of the plaintiff's character is merely matter of inducement, and not traversable; the gist of the action is the injury done to it. *Eastland v. Caldwell*, 4 D. 668.

No inducement setting forth the previous reputation of plaintiff is necessary under the code. Every woman is presumed to be chaste and every man to be honest until the contrary is shown, and this being necessarily implied, the rules of evidence in mitigation of damages must be the same as if such inducement were averred. *Shilling v. Carson*, 92 D. 632.

A plea to the whole action must answer all the declaration. *Smalley v. Anderson*, 15 D. 121.

The relation in which words were used, which are charged as slanderous, may be shown under the general issue, or by a special plea in bar, to prove that they were not intended to impute a crime; and if specially pleaded, it is the province of the court to decide whether the words are slanderous or not. *Brite v. Gill*, 15 D. 122.

Other slanders not pleaded, but given in evidence in aggravation, to show malice, may be justified without pleading as to them. *Tatlow v. Jaquett*, 26 D. 399.

Defendant in slander cannot plead the general issue and also matters amounting to the general issue. *Ib.*

An answer in slander cannot contain both denial and justification of the slanderous words, where the statute requires the pleadings to be verified. *Atteberry v. Powell*, 77 D. 579.

23. Sufficiency of plea of justification. — Where the words spoken are proved to be true under a plea of justification, no action lies, however malicious the motive. *Gilman v. Lowell*, 24 D. 96.

The plea of justification admits malice, and excludes every defense based on the absence of malice. *Ib.*

An unsuccessful attempt to justify enhances the damages. *Ib.*

To sustain a plea of justification in charging perjury, the defendant must give as conclusive proof as would be necessary to convict the plaintiff of perjury on an indictment. *Newbit v. Statuck*, 58 D. 706.

An answer merely stating that the alleged slanderous words are true is insufficient, under the code system, as a justification; it should state the facts which go to constitute the crime or offense imputed, so that an issue of either law or fact may be framed. *Atteberry v. Powell*, 77 D. 579.

The Vermont statute authorizing notice of justification as a substitute for a special plea dispenses with the form but not with the substance of the plea. Such notice, to let in evidence as a defense not admissible under the general issue, must contain all the facts necessary to constitute a good special plea. *Nott v. Stoddard*, 88 D. 633.

A plea of justification need not justify the colloquium. It is sufficient to justify the words which constitute the slander as charged in the declaration. *Ib.*

Where the words charged are divisible without materially changing the sense, or constitute two distinct slanders or charges against plaintiff, defendant may justify one and rely on the general issue in defense of the other. *Ib.*

Where the words charged as slanderous are ambiguous, plaintiff may allege the meaning of defendant in the language which he used, and if the defendant pleads justification, he must justify the words in the sense in which they are alleged in the declaration. It is not sufficient to justify the very words used. *Ib.*

If the defendant wishes to rely on the truth of the charges of justification, he must plead it; but he may introduce evidence tending to prove its truth, to rebut malice, under the general issue, and without notice. *Huson v. Dale*, 2 R. 66.

The complaint alleged that defendant accused plaintiff of being a thief. The answer admitted the speaking of the words, but denied malice, and averred that he believed

For Index to Notes in American Decisions and American Reports, see Volume I.

the charge to be true, and averred that the defendant had bought a farm of the plaintiff, and that the plaintiff afterward unlawfully entered thereon, and converted certain fixtures, "and other things belonging to the defendant, by reason of the purchase aforesaid," to his own use. *Held*, that the answer did not set forth a complete defense. *Trimble v. Foster*, 56 R. 440.

24. — its effect to aid defective declaration. — If a count be insufficient, and the declaration do not contain any introductory matter or colloquium by reference to which the charge can be made certain, the defect in the count cannot be overcome by a justification and confession of the words in bar. *Pelton v. Ward*, 2 D. 251.

A declaration for charging perjury, defective in not stating how the alleged perjury was said to have been committed, may be aided by a plea of justification setting out the circumstances. *Atteberry v. Powell*, 77 D. 579.

If a complaint fail to show that the sexual intercourse implied by the words charged as slanderous was illicit, the defect would be cured by answer admitting the speaking of the words, and alleging that defendant had so had illicit intercourse with the plaintiff, and that she had consented thereto. *Llack v. Kelley*, 87 D. 362.

25. What may not be set up in defense, generally.* — Whether slanderous words were spoken in jest or earnest is immaterial in an action therefor. *Hatch v. Potter*, 43 D. 88; *Hosley v. Brooks*, 71 D. 252.

That a woman was quarrelsome does not affect her general character for chastity, nor excuse, nor in the least palliate, a groundless charge against her of incontinence. *Hosley v. Brooks*, 71 D. 252.

Slander is not justified by the circumstance that the first harsh expression was used by the one slandered. *Id.*

The repetition of slanderous words, unless justified or privileged by facts attending the repetition, renders the person repeating them liable; the fact that he uttered them avowedly and only as what he had heard from others is not a defense. *Tervoilliger v. Wanda*, 72 D. 420.

In slander in imputing unchastity to a woman, it is no defense to show that defendant spoke the words of her, having been led to do so by her general conduct, and especially by her deportment towards a particular man, believing the same to be true. *Parkhurst v. Ketchum*, 83 D. 639.

It is no defense that the defendant was intoxicated at the time of speaking the slanderous words. *Reed v. Harper*, 95 D. 774.

Neither drunkenness nor an unaccepted

apology is a defense. *Williams v. McManus*, 58 R. 171.

Provoking acts are not a defense to the slander of one who did not participate in them. *Id.*

26. Evidence, generally. — The substance of the words only need be proved; but the proving of words of similar import is not proving the substance of the words laid. *Stocumb v. Kuykendall*, 27 D. 764.

Proof of the speaking of words slanderous *per se* entitles the plaintiff to some damages as a matter of right, where the words have been neither explained nor justified. *Yeates v. Reed*, 32 D. 43.

Proof that words, actionable in themselves, were spoken to plaintiff or in his presence, need not be made; it will suffice to show that they were spoken to a different person. *Ware v. Cartledge*, 60 D. 489.

A letter stating that the writer had heard of a slanderous report is admissible in evidence to prove the circulation of the report, and may be read for that purpose, the handwriting of the person being proved; but it is not admissible to prove that the defendant had propagated the report. *Schwartz v. Thomas*, 1 D. 479.

Where the defendant, in justification of his charge of unfairness as revenue collector, has shown that the plaintiff refused to receive the bills of a certain bank in payment of taxes, it is competent for the plaintiff to prove that he acted under instructions from the commissioner of the revenue. *Stow v. Converse*, 8 D. 189.

An injunction of secrecy by the defendant to a witness is no reason why his evidence should not be admitted to show the publication of slanderous words. *McGowan v. Manifee*, 18 D. 178.

Proof that defendant said to plaintiff, "Are you not afraid, as you have perjured yourself?" is sufficient to sustain an allegation that the former said of the latter, "You are perjured." *Commons v. Walters*, 27 D. 635.

Evidence is admissible of the report abroad in the community, caused by the charge made by defendant in uttering the slanderous words, as tending to show the extent of injury to plaintiff, and the extent and necessary consequences of defendant's wrongful act for which he was responsible. *Not v. Stoddard*, 88 D. 633.

The position in life and the family of the plaintiff are admissible in evidence on the question of damages. *Klump v. Dunn*, 5 R. 355.

27. Evidence of malice. — Evidence showing express malice on part of defendant is admissible for plaintiff. *Ware v. Cartledge*, 60 D. 489.

Express malice may be shown in an action for words spoken, imputing to plaintiff, an unmarried female, a want of chastity, by

* Judgment in malicious prosecution as a bar to prosecution for slander, see note, 55 D. 303, 304.

For Index to Notes in American Decisions and American Reports, see Volume I.

evidence of other acts and words of defendant occurring subsequent to cause of action, but before commencement of suit, implying unchastity on part of plaintiff, and indicating a desire to harass, insult, and degrade her, but not forming of themselves a separate cause of action. *Ib.*

Evidence of actual malice is admissible to enhance damages, and disproof of it goes only in mitigation. *Jellison v. Goodwin*, 69 D. 62.

Evidence of similar slanderous words, spoken on other, previous occasions, is admissible to show that the words which are the basis of the action were spoken with malice and ill-will, and thereby to aggravate the damages. *Markham v. Russell*, 90 D. 169.

The question of malice is never to be determined by the opinion or understanding of the hearers. *Jarnigan v. Fleming*, 5 R. 514.

Express or actual malice need not be shown except in cases of privileged communications. *Ib.*

Actionable words having reference to the slander complained of may be given in evidence for the purpose of showing malice, even though they were uttered after the commencement of the action, and particularly when the intention with which the words charged in the declaration were spoken is doubtful. *McIntire v. Young*, 39 D. 443.

The same words, spoken after action brought, may be given in evidence to prove malice. *Miller v. Kerr*, 13 D. 722; but not as an independent ground of damage. The same is true of an unproven justification. *Ward v. Dick*, 36 R. 75.

Plaintiff may show repetition of the actionable words, although there be but one count in the declaration; but he will not be allowed, in doing so, to prove any words that might be the subject of another action. *Root v. Lowndes*, 41 D. 762.

In an action for charging plaintiff with the commission of a crime, the record of acquittal in a criminal prosecution for the same crime is not admissible either to prove the truth of the charge or to show malice. *Corbrey v. Wilson*, 22 R. 98.

The defendant having offered to prove that the plaintiff had uttered the words charged, the latter may give in evidence, to prove the former's malice, a newspaper containing an account of the debates in the convention, prepared by the defendant as reporter, in which the words in question did not appear. *Stow v. Converse*, 8 D. 189.

28. When malice will be presumed. — The distinction between actual malice and legal malice in slander is, that the former implies a desire and intention to injure, while the latter is not necessarily inconsistent with an honest or even laudable purpose. *Jellison v. Goodwin*, 69 D. 62.

Legal malice in slander is a presumption of law, but actual malice is a question of fact for the jury. *Ib.*

Legal malice alone is sufficient, in slander, to support the action. *Ib.*

Malice is necessary to sustain an action for slander, but if actionable words are proved, malice is inferred. *Estes v. Antrobus*, 13 D. 496; *Jellison v. Goodwin*, 69 D. 62; *Mousler v. Harding*, 5 R. 195; and this inference must be overcome by the defendant by countervailing proof. *Byrket v. Monohon*, 41 D. 212. That the words were spoken in the heat of passion does not tend to rebut the malice thus implied. *Hosley v. Brooks*, 71 D. 252. In such case, the question of malice is generally not submitted to the jury, except upon the question of damages, unless the occasion of speaking the words is such as to rebut the inference of malice, and render the speaking *prima facie* excusable. In the latter instance there must be malice in fact to warrant recovery. *Nott v. Stoddard*, 88 D. 633.

Neither damage nor malice requires proof in an action of slander, if the words are actionable *per se*. *Gilman v. Lowell*, 24 D. 96.

Malice is presumed from speaking of actionable words, and therefore it is not error of which the defendant can complain, that a witness was allowed to state that from his manner of speaking the defendant seemed to be in earnest. *Hatch v. Potter*, 43 D. 88.

Malice is not implied in cases of confidential communications. In these cases, malice must be proved by extrinsic evidence, or inferred as matter of fact by the jury from the circumstances. *Nott v. Stoddard*, 88 D. 633.

29. Evidence of special damage. — Special damages, to support an action for slander, must be some positive loss arising directly and legitimately as a fair and natural result from the speaking of the words; that the feelings of the person aspersed were wounded by repetition of the words to him, even to the extent of causing prostration of health, is not such special damage as the rule requires. *Terwilliger v. Wands*, 72 D. 420.

The commencement of a malicious suit by a third person against plaintiff may be proved as the result of the slanderous words. *Jarnigan v. Fleming*, 5 R. 514.

In an action for charging plaintiff with self-pollution, it was alleged, as special damage, that the father of the plaintiff, with whom she lived, and upon whom she was dependent, had, by reason of the charge, withheld from the plaintiff a dress and a course of lessons in music, which, prior to the charge, he had promised her. The father testified that he did not believe the charge. *Held*, that such damages would not maintain the action. *Anonymous*, 19 R. 174.

30. — or in aggravation of damages. — The plaintiff may give evidence of

For Index to Notes in American Decisions and American Reports, see Volume I.

his own rank and condition in life, to aggravate the damages; and the defendant may also avail himself of such evidence when it legally tends to mitigate the damages. *Larned v. Buffinton*, 3 D. 185.

Evidence of distress of mind and anxiety suffered by plaintiff is admissible so far as it tends to prove the extent of the direct and natural consequences of the defamatory words spoken. *Nott v. Stoddard*, 88 D. 633.

Repetition of the actionable words at other times within the statute of limitations, even after the commencement of the action, may be proved in aggravation of damages, after proving the charge as laid in the declaration in an action of slander. *Hatch v. Potter*, 43 D. 83. But see *Fraser v. McCloskey*, 19 R. 193.

One who utters a slander is not responsible for its voluntary and unjustifiable repetition by others, over whom he has no control, and without his authority or request. *Hastings v. Stetson*, 30 R. 683; *Shurtleff v. Parker*, 39 R. 454.

A plea of justification cannot be considered in aggravation of damages, if the evidence introduced in its support shows that defendant had reason to believe the charge true. What would be the rule if no evidence in support of the plea were offered, not determined. *Byrket v. Monahan*, 41 D. 212.

In the absence of a statutory rule of damages in an action for slander, where exemplary damages are sought to be recovered, the fact of the wealth of defendant is admissible in evidence and pertinent to the issue, to show his rank and influence in society as the result thereof, and the consequent increased damages from his high standing. *Wilms v. White*, 90 D. 113. S. P., *Hosley v. Brooks*, 71 D. 252.

The pecuniary standing of the defendant may be shown to indicate the influence of his speech, but not in itself to enhance damages. *Brown v. Barnes*, 33 R. 375.

Evidence of defendant's wealth is inadmissible for plaintiff in slander. *Ware v. Cartledge*, 60 D. 489.*

31. Evidence in defense, generally. — Where the defendant pleads justification, he may prove the truth of the matter spoken, which will constitute a sufficient defense. *Jarnigan v. Fleming*, 5 R. 514.

Defendant may prove that he was acting from a sense of moral and legal duty. *Id.*

Where the defendant pleads the truth in justification, he cannot give evidence of common report that the plaintiff had been guilty of the crime charged, nor that others had charged him with the commission of the crime. *Wolcott v. Hall*, 4 D. 173.

General reports of the truth of the charges are not admissible for any purpose. *Pease v. Shuppen*, 21 R. 116.

* Evidence of defendant's wealth to enhance damages, see note, 83 R. 877-880.

Where a defense of insanity is set up, evidence is admissible, showing insanity at the time of speaking, and for several months before and after, but no further. *Dickinson v. Barber*, 6 D. 58.

Actionable words spoken on another's authority may ordinarily be justified on that ground, if it be proved that the name of the author was given at the time, and that the defendant actually heard them from such person, because the presumption of malice is thereby rebutted; but not where the authority of another is used merely as a cover for the actual malice of the defendant; as where the defendant spoke the words with the qualification that he could prove that another person said the same. *Miller v. Kerr*, 13 D. 722.

The defendant may show that the words related to a known particular act which did not amount to the offense the words would otherwise import. *Norton v. Ladd*, 20 D. 573.

The alleged perjured testimony, having been introduced by defendant under a plea of justification, is evidence of its own truth, although the plaintiff could not testify in his own case. *Newbit v. Statuck*, 58 D. 706.

Where unchastity is imputed to a female, evidence of actual prostitution two months after the speaking the words is not admissible. *Beggarly v. Craft*, 76 D. 637.

In slander for calling a woman "a whore," proof that she had sexual intercourse with her affianced husband before marriage does not amount to a justification. *Sheehy v. Cokley*, 22 R. 236.

Evidence is admissible to show that words apparently actionable in themselves were not used in an actionable sense. *Fawcett v. Clark*, 30 R. 481.

32. Evidence in mitigation of damages. — 1. In general. — If, through the fault of the plaintiff, the defendant, at the time of speaking the words, and when he pleaded the justification, had cause for believing them true, he may show this in mitigation of damages. *Larned v. Buffinton*, 3 D. 185.

The declarations of a husband, made pending an action for slander of his wife, that he believed defendant had not originated the slander, but only repeated the same, are admissible in mitigation of damages. *Evans v. Smith*, 17 D. 74.

An attempt of the husband to prevent the circulation of the slander spoken by his wife cannot be proved, in mitigation of damages, in an action of slander brought against the two. *Yeates v. Reed*, 32 D. 43.

Defendant may prove, in mitigation of damages, in slander for words spoken against the chastity of the plaintiff's wife, that said wife, before her marriage with the plaintiff, had lived alone with him in the same house, where the fact of their so living was known.

For Index to Notes in American Decisions and American Reports, see Volume I.

to the defendant when he spoke the words. *Reynolds v. Tucker*, 67 D. 353.

In an action for slander, alleging general damages only, evidence is not admissible in mitigation that the plaintiff has stated that the slander did him no injury. *Porter v. Henderson*, 82 D. 59.

Where exemplary damages are claimed, evidence of the defendant's poverty is competent. *Rea v. Harrington*, 56 R. 561.

2. *Same charge by others, prior reports, etc.*—Proof that others spoke the same words, and that the report was current, is not admissible either in justification or mitigation. *Anthony v. Stephens*, 18 D. 497.

The defendant cannot, in mitigation of damages, prove that others had told him that the charge was true before he made it. *Id.*

Reports in circulation, that the plaintiff had been guilty of the crime charged, may be given in evidence by the defendant as evidence of character to mitigate damages. *Treat v. Browning*, 10 D. 156.

Evidence of prior reports charging plaintiff with the same crime imputed to him by defendant, without any offer to explain their extent or effect upon the plaintiff's character, is inadmissible in mitigation of damages under a plea of justification. *Sanders v. Johnson*, 36 D. 564.

Defendant may prove that when the slanderous words were spoken there was a general report current to the same effect as the words spoken. *Wetherbee v. Marsh*, 51 D. 244; *Farr v. Rusco*, 80 D. 88.

3. *Particular facts indicative of truth of charge.*—Particular facts forming links in the chain of evidence against the plaintiff cannot be received in mitigation of damages. *Wormouth v. Cramer*, 20 D. 706; *Purple v. Horton*, 27 D. 167.

Possession of stolen property is such a fact where the charge is larceny. *Wormouth v. Cramer*, 20 D. 706.

Evidence of circumstances creating a suspicion of plaintiff's guilt of the offense imputed, but not proving such guilt, is not to be considered in mitigation of damages in slander for charging plaintiff with a crime, to which justification is pleaded, where there is no proof of such glaring misconduct by plaintiff as to cause defendant to believe the charge and his plea of justification to be true. *Sanders v. Johnson*, 36 D. 564.

As plaintiff is permitted to prove malicious intent in order to aggravate the damages, so the defendant, to repel it, may show grounds of suspicion of the truth of the charge, by facts and circumstances; not in bar of the action, but in mitigation of damages. *Shilling v. Carson*, 92 D. 632.

Particular instances of misconduct are not admissible to diminish damages where general character is the subject of defamation, for the plaintiff is required to be prepared to maintain only his general reputation. *Id.*

4. *Provocation, excitement, and passion.*—Defendant may, in mitigation of damages, show that he was excited and provoked to say what he did by some act or declaration of the plaintiff coincident with the speaking of the slanderous words, or nearly concurrent therewith. *Moore v. Clay*, 60 D. 461; *Mousler v. Harding*, 5 R. 195; *Jauch v. Jauch*, 19 R. 699.

Words alleged to be the immediate or proximate cause or provocation for slanderous words of defendant are inadmissible unless they are shown to be part of the *res gestae*; it is insufficient to show that they were communicated to defendant before the speaking of the slanderous words. *Moore v. Clay*, 60 D. 461.

Damages cannot be mitigated by evidence of a provocation given to defendant by plaintiff on the evening before the slanderous words were uttered. *Sheffill v. Van Deusen*, 77 D. 377.

Defendant cannot give in evidence, in a suit for charging plaintiff with perjury, that plaintiff called him "a liar and a perjured wretch," on an occasion not shown to have any connection with the matter in controversy. *Porter v. Henderson*, 82 D. 59.

83. *Evidence under the general issue.**—The defendant may give in evidence, under the general issue, facts tending to mitigate the damages, but this will be refused when he has pleaded the truth in justification. *Larned v. Bufinton*, 3 D. 185.

The defendant, under the general issue, cannot give evidence of the truth of the words used, to mitigate the damages. But evidence is admissible in mitigation to prove facts that would afford ground for suspecting, though not actually proving, the guilt of the plaintiff, or that would rebut the presumption of malice, or that show the fame of the plaintiff to have been disparaged by reports of similar practices as imputed to him by the defendant. *Bailey v. Hyde*, 8 D. 202. But compare *McGee v. Sodusky*, 20 D. 251.

A defendant in slander having pleaded the general issue, and also a special plea in justification, admitting the speaking of the words, which was adjudged bad on demurrer,—*held*, that such special plea was admissible evidence, under the general issue, to prove the speaking. *Alderman v. French*, 11 D. 114.†

Where a defendant in slander has not attempted to justify the charge, he may prove, under the general issue, anything short of a justification which does not necessarily imply, or tend to prove, the truth of the charge, but rebuts the presumption of malice. *Wormouth v. Cramer*, 20 D. 706; *Gilman v. Lowell*, 24 D. 96.

* Evidence in mitigation, what receivable under general issue, see note, 11 D. 183-184.

† Separate plea as evidence in slander, under the general issue, see note, 11 D. 180-182.

For Index to Notes in American Decisions and American Reports, see Volume I.

The occasion on which the words were spoken, and the conduct of the plaintiff inducing them, are admissible under the general issue. *Bradley v. Heath*, 22 D. 418.

To show that the defendant honestly believed that he spoke the truth in charging the plaintiff with swearing falsely in testifying that he was a freeholder, evidence is admissible under the general issue to prove that before making the charge the defendant searched the records without finding any land in the plaintiff's name, owing to a mistake in the index, if the falsity of the charge is expressly admitted. *Gilman v. Lowell*, 24 D. 94.

Such evidence will not defeat a recovery, but is admissible only to mitigate the damages. *Id.*

The general issue is abolished under the code system of pleading, and a defendant cannot, under a denial, show that alleged slanderous words were not maliciously spoken, or did not amount to slander; but, in such case, he must state the circumstances under which they were spoken, in order to show absence of malice. *Atteberry v. Powell*, 77 D. 572.

Action for slander for words actionable *per se*, claiming general damages only. *Held*, that the defendant could not show, in mitigation, under the general issue, that "during the six years prior to the suit, inveterate feelings of hostility had existed between the plaintiff and the defendant, and that the plaintiff had taken every opportunity to irritate the defendant." *Porter v. Henderson*, 82 D. 59.

The defendant may give in evidence on the general issue, in mitigation of damages, the manner and circumstances of speaking the words, and that they were in circulation, and reported by others, and that he only repeated them. *Cook v. Barkley*, 2 D. 343.

All the circumstances of hearing the slander first published, and the manner of repeating it, ought to be considered by the jury in mitigation or aggravation of the damages. *Easterwood v. Quin*, 3 D. 700.

Evidence on the general issue without notice, for the purpose of mitigating damages, which amounts to a justification of the charge is not admissible. *Treat v. Browning*, 10 D. 153. *Contra*, see *Huson v. Dale*, 2 R. 66.

Under the general issue, in an action of slander, evidence of the truth of the charge, or of prior reports of the plaintiff's guilt of the crime imputed to him, is not admissible in mitigation of damages. *Alderman v. French*, 11 D. 114.

Mitigating circumstances tending to prove the truth of the words are not admissible in evidence under the general issue. *Gilman v. Lowell*, 24 D. 96.

84. Evidence of character. — 1. General rules. — The question of character in

actions for slander is necessarily involved. *McGee v. Sedusky*, 20 D. 251.

The moral or intellectual character of the person in whose hearing words are spoken is immaterial on the question of damages. *Sheffill v. Van Deusen*, 77 D. 377.

The general character of plaintiff is a proper subject of inquiry in ascertaining the amount which he is entitled to recover. *Gilman v. Lowell*, 24 D. 96.

The defendant has a right to go into evidence as to the plaintiff's general moral character, and is not to be confined to evidence of the particular species of immorality charged in the words laid. *Eastland v. Caldwell*, 4 D. 668.

The general character of plaintiff for truth and integrity may be considered by the jury in an action of slander, where the slanderous words charge perjury, and defendant pleads the truth of the charge, if this defense has been doubtfully sustained. *Byrnes v. Menahan*, 41 D. 212.

2. Evidence of plaintiff's bad character. — Evidence of the plaintiff's general bad character, but not of a particular criminal act other than that imputed to him, is admissible in mitigation of damages. *Sauser v. Ewert*, 10 D. 633; *Anthony v. Stephens*, 13 D. 497; *Lamos v. Snell*, 25 D. 468; *Wadars v. Jones*, 29 D. 261; *Wetherbes v. Marsh*, 51 D. 244; provided the defendant has not justified. *Douglass v. Tousey*, 20 D. 616.

General bad character subsequent to the speaking of the words cannot be proved, even though such character could not possibly have been caused by the words spoken, as where the charge was that the plaintiff was a thief, and it was sought to be proved that she was subsequently reputed to be a common prostitute. *Id.*

The evidence as to general character is not confined to the plaintiff's character in respect to the matters charged in the slander. *Lamos v. Snell*, 25 D. 468; *Parkhurst v. Ketchum*, 83 D. 639.

General reputation for want of chastity is admissible in mitigation of damages in an action of slander, the subject-matter of which is the reputation of a woman for chastity; for she must be expected to be ready to vindicate her character in that particular in which it is impugned. *Shilling v. Carson*, 92 D. 632.

Admission of evidence in mitigation of damages in action of slander, being either to show absence of malice or want of reputation, whatever circumstance tends to prove the one or the other is within the reason of the rule. *Id.*

Defendant may show that plaintiff's reputation in regard to the particular crime or fault charged, prior to the time the alleged slanderous words were uttered, was bad. *B—— v. I——*, 94 D. 604.

Under the general issue only, while the

For Index to Notes in American Decisions and American Reports, see Volume I.

plaintiff's general character may be assailed, neither particular reports nor the general currency of the particular charge can be given in evidence. *Pease v. Shippen*, 21 R. 116.

3. *Evidence of plaintiff's good character.* — Evidence of the good character of plaintiff is not admissible until his character has been attacked by the defendant, either by plea upon the record or by evidence at the trial. *Rhodes v. James*, 42 D. 604. Contra, see *Williams v. Hay*, 45 D. 774.

Plaintiff cannot introduce evidence of good character, where the defendant, under a plea of justification, has proved facts and circumstances tending to show the truth of the charge uttered, but has not attempted to impeach the general character of plaintiff. *Miles v. Vanhorn*, 79 D. 477.

Where the defendant, in justification of his charges that the plaintiff had seduced his early companions to join an infidel club, had attempted to destroy the religious institutions of the state, and had insulted the clergy, offered evidence of plaintiff's conduct for many years previous to the publication, — held, admissible for the latter to prove, by his conversation and conduct, that he had from youth been a believer in the Christian religion. *Stow v. Converse*, 8 D. 189.

It is not competent for the plaintiff to give evidence of his character as an honest man, to rebut specific charges made by the defendant of plaintiff's official misconduct. *Id.*

In an action for calling a woman "a whore," there was evidence that plaintiff had sexual intercourse with her affianced husband before marriage, and also tending to show that she made an indecent exposure of her person, and otherwise conducted herself in a licentious manner. Held, that evidence was admissible to show that plaintiff's general reputation for chastity was good. *Sheehy v. Cokley*, 22 R. 236.

35. *Evidence to disprove malice.* — Under the general issue defendant may show anything which repels the presumption of malice, and does not imply the truth of the charge or tend to prove it true. *Gilman v. Lovell*, 24 D. 96; *Purple v. Horton*, 27 D. 167.

Reports of a similar nature prevalent in the neighborhood are inadmissible under the general issue, because, though they tend to disprove malice, they tend also to show the truth of the words. *Gilman v. Lovell*, 24 D. 96.

All who repeat a slander are responsible therefor, and general reports previously in circulation to the same effect are no justification, although they are admissible in mitigation of damages as extenuating malice. *Calloway v. Middleton*, 12 D. 409.

The defendant, to mitigate the damages, and repel the presumption of malice, cannot give in evidence facts of which he was igno-

rant at the time of uttering the words complained of. *Bailey v. Hyde*, 8 D. 202.

A justification does not disprove malice, but confirms it. *Purple v. Horton*, 27 D. 167.

Mere secrecy in a communication is not sufficient to remove the implication of malice; but taken in connection with other circumstances, it may confirm the inference that it was done from a good motive. *Faris v. Starke*, 33 D. 536.

In an action for slander, in having charged plaintiff with murdering defendant's son, evidence that at the time the words were spoken defendant said that his wife was very much distressed over the death of their son is admissible as tending to show that the communication was prompted by grief rather than malice. *Stallings v. Newman*, 62 D. 723.

Evidence that words charged were spoken to an intimate friend, to whom alone they were communicated, even though they do not come within the class of privileged communications, is receivable as tending to disprove malice. *Id.*

Proof that the words were privileged communications repels legal malice, and is a complete justification. *Jellison v. Goodwin*, 69 D. 62.

Plaintiff's mother may be asked, on cross-examination in an action of slander for imputing plaintiff's chastity, whether or not before the defamation complained of the witness had spoken to others and complained to them, and had frequent misunderstandings with them on the same subject, as this is evidence, not of mere rumor or report, but of facts which go to show that the words were spoken under an impression of their truth, and not with any malicious intention, and the evidence is admissible under the general issue. *Shilling v. Carson*, 92 D. 632.

36. *The burden of proof.* — 1. *Upon plaintiff.* — All the words laid need not be proved, but so much of them must be proved as is sufficient to sustain the cause of action; evidence of equivalent words will not suffice. *Wheeler v. Robb*, 12 D. 245; *Commons v. Walters*, 27 D. 635.

The substance of the words, or the words themselves as laid, must be proved to sustain the plaintiff's action upon the general issue. *Wheeler v. Robb*, 12 D. 245.

Where the defendant, a justice of the peace, voluntarily stated before the grand jury the charge against the plaintiff, as having repeatedly come to him as a rumor, the occasion on which the words were spoken furnishes a *prima facie* excuse for their having been spoken, and it falls upon the plaintiff to show that the occasion was only used as a colorable pretense, and to establish express malice in the defendant. *Sands v. Robison*, 51 D. 132.

On plea of the statute of limitations, the burden is on plaintiff to show that the cause of action accrued within the statu-

For Index to Notes in American Decisions and American Reports, see Volume I.

tory period, prior to the commencement of the action. *Pond v. Gibson*, 81 D. 724.

When the slander is in a foreign language, it is necessary to prove that the hearers understood the language. This rule does not apply to a libel in a foreign language. *Palmer v. Harris*, 100 D. 557.

It is not necessary to prove the words beyond a reasonable doubt. *Zimmerman v. McMakin*, 53 R. 720.

2. *Upon defendant.* — Defendant pleading the truth of the slanderous words has the burden of proof upon himself to establish their truth. *Offutt v. Earlywine*, 32 D. 40; *Hinchman v. Lawson*, 27 D. 622.

In an action for slander by words imputing a crime, a plea of justification may be sustained by a preponderance of evidence; it is not necessary that it should be proved beyond a reasonable doubt. *Sloan v. Gilbert*, 23 R. 708; *Barfield v. Britt*, 62 D. 190; *Ellis v. Buzzell*, 11 R. 204; *Bell v. McGinness*, 48 R. 673.

The defendant can prove the truth of a charge of perjury only by two witnesses, or by one witness and strong corroborating circumstances. The defendant is held to the same proof that is required of the people on the trial of an indictment for perjury. *Byrket v. Monohon*, 41 D. 212.

37. *Variance, when material.** — Plaintiff must prove the language laid in the declaration, or so much, at least, as fully sustains the charge; equivalent words in meaning will not be sufficient. All the words need not be proved if those which are proved fully establish the slander; but if other words not laid are proved, which limit or change the meaning of those counted on, the action cannot be sustained. If all the words laid are necessary to constitute the slander, they must be proved as laid. *Baker v. Young*, 92 D. 149.

The words charged and the words proved must be substantially the same; that they both convey the same idea will not be sufficient to sustain the action. *Bundy v. Hart*, 2 R. 525.

The words "I have f—ked Rebecca Kelley one hundred times" are actionable *per se*, the word "f—ked" having a recognized meaning; but the words "I have screwed Beck Kelley one hundred times" are not actionable, unless the word "screwed" is aided by other averments. *Linck v. Kelley*, 87 D. 362.

38. — *when immaterial.* — It is sufficient if the plaintiff proves that the defendant spoke words substantially the same as those laid in the declaration, and the precise words need not be proved. *Hersh v. Ringwalt*, 2 D. 392; *Desmond v. Brown*, 4 R. 194.

The plaintiff is not bound to prove the slanderous words precisely as laid; the sub-

* Variance between allegation and proof, see note, 12 D. 246-248.

stance of the charge will be sufficient. And when he proves only a part of the charge, and that amounts to a cause of action, he ought to have an action *pro tanto*. Accordingly, where it was alleged that defendant said, "J. H. stole corn," etc., proof that in a conversation about J. H., the defendant said, "He stole the corn," is sufficient. *Hume v. Arrasmith*, 4 D. 626.

The words charged were, that "the plaintiff had had a bastard child"; and the words proved were, "If I have not been misinformed, the plaintiff had a bastard child." *Held*, no variance. *Treat v. Browning*, 10 D. 156.

A charge that defendant said, "Antrobus took or stole a sufficient quantity of corn to feed two horses, out of my crib; he is a thief," is sustained by proof that defendant said Antrobus had come to his house, and took his (defendant's) corn out of his crib, and fed his horses of nights, and would not open his bells until defendant had gone to bed. *Ketes v. Antrobus*, 13 D. 496.

It is not a fatal variance in slander that all the words laid in the declaration are not proved; it is sufficient that enough be proved to sustain the action. *Purple v. Horton*, 27 D. 167.

Slanderous words laid as spoken affirmatively are supported by proof that they were spoken in answer to a question. *Yeates v. Reed*, 32 D. 43.

The time when the slander was spoken, as laid in the declaration, is immaterial. *Hosley v. Brooks*, 71 D. 252.

A variance does not exist between words laid and words proved because more words were proved than laid, where the injury complained of was charging the plaintiff, an unmarried woman, with fornication, and the additional words proved did not alter the charge, but only specified with whom the offense was committed, and that an effort had been made to produce an abortion. *Baker v. Young*, 92 D. 149.

Where it is alleged that the defendant charged the plaintiff with sleeping with another man than her husband, and the proof is, that he charged that such a person was in bed with her, — *held*, no variance. *Barnett v. Ward*, 38 R. 561.

It cannot be said, as matter of law, that there is any substantial difference between the words charged, "public whore," and the words proved, "whorish bitch." *Zimmerman v. McMakin*, 53 R. 720.

39. *Instructions.* — The court should instruct the jury as to the law, and leave to them the *animus* with which the words charged to be slanderous were spoken. *Buxton v. Worley*, 7 D. 735.

An instruction is likely to mislead the jury when it refers to them to determine whether the defendant, "in substance," spoke or published the words charged, with-

For Index to Notes in American Decisions and American Reports, see Volume I.

out explaining what meaning the law attaches to those words in such a connection. *Atteberry v. Powell*, 77 D. 579.

An instruction is not erroneous, as being calculated to mislead the jury by implying that it did not matter how the words were connected, nor as assuming that a sufficient number of words had been proved, where, in an action for slander in charging the plaintiff with fornication, the jury were informed that if they believed a sufficient number of words laid in the declaration to amount, in their common acceptation, to a charge of fornication, had been proved to have been spoken by the defendant, they should find for the plaintiff. *Baker v. Young*, 92 D. 149.

An instruction is not erroneous, as assuming the guilt of defendant, or the circumstances of the case, where the jury were informed that the law implied damages from the speaking of actionable words, and that the defendant intended the injury the slander was calculated to effect. *Id.*

It is not error to refuse to charge the jury that if the defendant, without reasonable cause, believed the charge to be true, they could not award exemplary damages, where there is evidence tending to show that he uttered the words in a wanton and reckless manner. *Hayner v. Cowden*, 22 R. 303.

40. Questions of law and fact. — Both judges and jurors shall understand words in that sense which the author intended to convey to the minds of the hearers, as evinced by all the circumstances of the case. The jury are to decide, as a matter of fact, to be collected from all the concomitant circumstances, whether the words were used maliciously and with a view to defame; and it is for the court to determine whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action. *Harrison v. Findley*, 85 D. 456.

Whether words are actionable or not is within the province of the court upon demurrer, or upon a motion in arrest of judgment. *Hume v. Arrasmith*, 4 D. 626.

Legal malice, being a question of law, is for the court, and not for the jury, upon the evidence. *Jellison v. Goodwin*, 69 D. 62.

The question as to what is a privileged communication is for the court to determine. *Id.*

Malice is an essential ingredient of slander; but whether or not words were spoken with malicious intent is a question of fact for the jury, and it is error for the court to instruct the jury that words were spoken with malicious intent. *Trabue v. Mays*, 28 D. 61.

Malice in speaking slanderous words may be inferred from their falsity; but when the motive of the defendant is inquired into, the jury must be left free to judge of such motive. *Id.*

The intent with which words were spoken is a question that may be left to the jury, in an action for slander, where the words are of doubtful import, with the instruction that if there was an intent to charge the crime of stealing, the words were actionable. *St. Martin v. Desnoyer*, 61 D. 494.

The party to whom the words were spoken may testify that although the defendant did not enjoin secrecy upon him, he understood the communication as private and confidential; but whether the words spoken were so intended by the defendant is a question for the jury. *Stallings v. Newman*, 62 D. 723.

When words charged are susceptible of a twofold meaning, one imputing a felony, and the other a trespass only, it is the province of the jury to determine from the circumstances in what sense they were uttered and understood. *Dedway v. Powell*, 96 D. 283.

It is a question for the jury to determine whether answers given by a person in the course of his testimony as a witness, and claimed to be slanderous, were so given under the belief that they were pertinent and relevant to the question at issue, or from malice. *White v. Carroll*, 1 R. 503; *Dedway v. Powell*, 96 D. 283.

41. The damages recoverable. — Exemplary damages may be awarded in slander. *Tallov v. Jaquett*, 26 D. 399.

The measure of damages is a question for the jury to consider relatively with that of malice. *Davis v. Ruff*, 34 D. 584.

Punitive as well as compensatory damages may be given, where the defendant obtruded himself into the plaintiff's house, and there offered insult to the plaintiff's wife, at the time of uttering the slander. *Hosley v. Brooks*, 71 D. 252.

The jury are not restricted to nominal damages, although the slanderous words, which charged theft, were spoken in the presence of only a single witness, who testifies that they did not affect his opinion of the plaintiff, and that he still believed the plaintiff to be honest, if the words are shown to have been spoken maliciously. *Markham v. Russell*, 90 D. 169.

The jury, in assessing the damages, may consider the degree of malice with which the alleged slanderous words were spoken, as shown by the subsequent acts and declarations of the defendant; but they cannot give damages for such acts and declarations, however infamous or criminal they may be. *Stitzell v. Reynolds*, 5 R. 396.

42. Review of assessment of damages. — Where entire damages are assessed upon several counts in an action of slander, one of which is bad, the judgment will be reversed, and a venire de novo awarded. *Shaffer v. Kintzer*, 2 D. 488. Or judgment may be arrested, and the plaintiff may, on the payment of costs, have a venire de novo. *Hopkins v. Beedle*, 2 D. 191.

For Index to Notes in American Decisions and American Reports, see Volume L.

IV. SLANDER OF TITLE TO LAND.

43. **When actionable.***—A state court has no jurisdiction of an action for slander of title or property in a patent right where such action involves the validity of the letters patent. *Hovey v. Rubber Tip Pencil Co.*, 15 R. 470.

H. was prevented from making an advantageous sale of lands belonging to him, and containing an iron-ore mine, by the misrepresentations of P. to the proposed buyer, to the effect that an experienced iron manufacturer was of opinion that the iron mine was but a "pocket," or nest, that would suddenly run out. *Held*, that H. could recover damages from P. in a suit in the nature of an action of slander for defamation of title. *Paul v. Halferty*, 3 R. 518.

44. **Parties.**—An action for verbal slander of title to land cannot be maintained against two persons jointly. *Webb v. Cecil*, 43 D. 423.

45. **Malice, and when presumed.**—An instruction that malice is presumed where one injuriously slanders another's title is erroneous, and well calculated to mislead a jury. *McDaniel v. Baca*, 56 D. 339.

Malice does not accompany a publication of caution as to title made by a grantor of land, when the circumstances warranted a strong presumption that fraud had been attempted upon him to get possession of his estate. *Id.*

Where plaintiff brings an action against defendant for slander of his title to certain land, and the evidence shows that plaintiff offered the land for sale at auction; that defendant was present and forbade the sale, declaring that plaintiff had only a dower interest in the land, and that the title was in himself; that in so declaring defendant was acting under advice of counsel, but that such advice was procured by false representations made to his counsel by defendant, — it is proper for the court to submit the question of the latter's malice or *bona fides* to the jury. *Gent v. Lynch*, 87 D. 558.

SLAUGHTER-HOUSES.

Regulation of, by city, see MUNICIPAL CORPORATIONS, 35.

SLAVERY.

[Includes title to and transfers of slaves; rights and powers of the master; suits for freedom; manumission; abolition of slavery, etc.]

1. **Nature and extent of the right of property in slaves.**—Slaves are personal property, in Kentucky, in every respect except as to descents and last wills. *Sneed v. Ewing*, 22 D. 41.

Slaves pass according to the *lex domicilii*, and in declaring them real estate for certain

* Action for slander of title, see note, 87 D. 562, 563.

purposes, the legislature did not intend to abrogate this rule. *Id.*

The relationship of parent and child did not, under the laws of Spain, prevent such persons from holding each other as slaves, neither did it prevent their holding each other as a *statu liber*. *Valsain v. Cloutier*, 22 D. 179.

The ownership of the mother carries with it the property in her children born during the period of such ownership, and the mother and issue are treated, in respect of the title and rights of the owner, as an aggregate property. Whatever affects the rights or remedies of the owner as respects the mother equally affects his rights and remedies in respect to her issue, while the unity of interest and possession is unsevered; and if the right of the owner is saved from the statute of limitations for a definite period as to the mother, it is saved likewise as to the issue born of her during such period. *Seay v. Bacon*, 67 D. 601.

2. **Rights of slaves.**—Slaves are chattels merely; they have no *status* in court, and cannot enforce the execution of a trust. *Blackman v. Gordon*, 44 D. 241.

A bequest to slaves is not void for want of capacity in the legatees to take. *Wade v. Am. Col. Soc.*, 45 D. 324.

3. **Constitutionality and operation of various statutes relative to slaves.**—Whether the Mississippi act of 1842 in regard to the removal of slaves theretofore liberated is constitutional, *quære*. *Wade v. Am. Col. Soc.*, 45 D. 324.

An ordinance of a state convention declaring all contracts for the sale of lands made between certain dates prior thereto, and the consideration of which was slaves, null and void, at the election of either party, impairs the obligation of a contract, and is void. *Roach v. Gunter*, 4 R. 132.

4. **Transfers of slave property.**—Possession of a slave for a great length of time is ground for presuming a conveyance thereof. *Gathings v. Williams*, 44 D. 49.

Slaves in whom a life estate is given vest, by the assent of the executor, in the tenant for life and remainder-men. *Johnson v. Corpenning*, 44 D. 106.

Slaves, though movable in Mississippi, are immovable in Louisiana, and the vendor, to preserve his privilege upon an immovable, must record it. *Copley v. Sanford*, 46 D. 548.

A private sale, by an administrator, of a slave, the property of his intestate's estate, does not divest the title of the estate, but estops the administrator himself from recovering the property from his vendee. *Bragg v. Massie*, 79 D. 82.

Such sale, perfected by delivery, estops the administrator from relying on the invalidity of the sale, if he subsequently acquires possession; while a subsequent recovery by

For Index to Notes in American Decisions and American Reports, see Volume 7.

the purchaser against the administrator does not bar the title of the estate in the slave. *Id.*

Where certain slaves were bequeathed to the testator's wife for life, and then to his children equally, and the widow and some of the children joined in a sale and conveyance of one of the slaves to a third person, for value, — *held* that the accumulated interest of the vendors in such slave and her increase, accruing upon the death of some of the other children, inured to the purchaser. *Jones v. Zollicoffer*, 11 D. 795.

5. Rights of master. — A legacy or donation made to a slave, inured, under the laws of Spain, to the master's benefit. *Valtain v. Cloutier*, 22 D. 179.

6. Master's remedy for killing slave. — A party who fires on a slave while the latter is attempting larceny, and kills him, will be liable *in solido* for his value. *Carmouche v. Bouie*, 54 D. 558.

Three persons are jointly liable in damages for the act of one of them in killing a slave, where the three, fearing a rumored insurrection of slaves, seized and tied the slave without justifiable cause, and upon his attempting to escape all pursued him and one killed him, contrary to the intention of the other two. *Kirkwood v. Miller*, 73 D. 134.

A person is not justified in killing another's slave by mere rumors of an insurrection among slaves, but there must be facts implicating the slave in an actual insurrection. *Id.*

A publication in newspapers on the subject of an apprehended insurrection among slaves, and other proof in that respect, not implicating the slave killed, is inadmissible in an action for damages for killing the slave. *Id.*

A railroad company is liable to the owner of a negro boy eight years old who is run over and killed while sleeping on the track, the engineer having failed to sound the whistle or check the speed of the train; and it is no excuse that when the boy was discovered the train could not have been stopped before reaching him, or that the whistle would not have alarmed him in time. *East Tenn. etc. R. R. Co. v. St. John*, 73 D. 149.

Contributory negligence is no defense in such a case, for the child is too young, and the master of the slave is not chargeable with negligence in not watching his negro slave children and keeping them away from the road. *Id.*

7. Marriages between slaves. — A marriage between slaves, void at the time, is made valid by ratification of the parties after they become free, and their children have heritable blood. *Jones v. Jones*, 11 R. 505.

8. Manumission by deed or will. — A declaration of the mother and owner of a

slave child, that she gives to her daughter her freedom upon her, the donor's, death, makes such daughter a *status liber* until the death of her mother, upon the happening of which she becomes free. *Valsain v. Cloutier*, 22 D. 179.

Where a person bequeaths to another slaves, with a request that they shall have the result of their own labor, such bequest is for emancipation, and is by the law of North Carolina illegal and void. *Sorrey v. Bright*, 28 D. 584.

Slaves can only be held as property, and deeds and wills having for their object their emancipation, or a qualified state of slavery, are against public policy, and a trust results to the next of kin; therefore, where slaves are bequeathed to a legatee, with the understanding that he is to hold them as freedmen, a trust results to next of kin to the testator. *Thompson v. Newton*, 42 D. 169.

Slaves may be emancipated by nuncupative will under the statute of Virginia: 1 Rev. Code, p. 433, sec. 53. *Phabe v. Bogges*, 42 D. 543.

A bequest intended to emancipate slaves, valid at the death of the testator, may be avoided by an act of the legislature at any time before it is carried into effect. *Blackman v. Gordon*, 44 D. 241.

A mere intention of a testator to emancipate slaves confers a right to freedom, which, though it cannot be asserted in a court of law, may be enforced in a court of equity, *semble*. *Wade v. Am. Col. Soc.*, 45 D. 324.

Under fraudulent acts of an executor no one can acquire any right; so where the executor prevented manumitted slaves from going from the state, — *held*, that the Mississippi act of 1842, which gives twelve months for the removal of liberated slaves, and declares the bequest void if they do not so remove, did not apply to that case, and that the fraud of the executor in detaining them had placed him beyond the pale of the act. *Id.*

The American Colonization Society, organized for the purpose "of colonizing, with their own consent, upon the coast of Africa, the free people of color residing in the United States," may transport thither slaves who have, under a will, an inchoate right to freedom. *Id.*

Where a testator directs that his slaves be transported to Africa under the direction of the American Colonization Society, and that the executors sell certain property and pay the proceeds to the society to defray expenses, the trust is valid; both executors and the society are trustees; the executors must deliver the slaves to the society for the purposes of the will, and if they fail or refuse, a court of equity will enforce performance. *Id.*

An owner domiciled in Virginia cannot emancipate slaves in Mississippi by testa-

For Index to Notes in American Decisions and American Reports, see Volume I.

ment, there being a law there to prevent emancipation. *Mahorner v. Hooe*, 48 D. 706.

9. Evidence on question of freedom or slavery. — The right to freedom is a right of a public nature; and common reputation regarding the *status* of the person whose right thereto is disputed, or of his ancestors, is admissible as evidence in his favor. *Vaughan v. Phebe*, 17 D. 770.

A judgment between other parties may be admitted in those cases where hearsay evidence of the facts upon which the judgment is grounded would be unobjectionable. Therefore, in an action involving the plaintiff's right to freedom, the court may receive in evidence the record of a judgment between strangers to the present action, establishing the right to freedom of a maternal aunt of the plaintiff. *Id.*

In a suit to determine the freedom of one claimed as a slave, the white appearance of the person is only *prima facie* evidence of freedom. *Chancellor v. Milly*, 33 D. 521.

After the lapse of forty years proof of pedigree is material. *Id.*

10. Offenses by slaves. — In Arkansas, a slave committing arson must be prosecuted as for a felony, though he is not to be punished by imprisonment in the penitentiary. *Mary v. State*, 81 D. 60.

11. Abolition of slavery, and its effect. — The presidential proclamation declaring universal manumission of slaves within any of the seceded states was nothing but a war measure, of no operative effect until carried into execution by force of arms. *Weaver v. Lapeley*, 94 D. 671.

Slavery being established by the municipal law of Maryland, its abolition by the constitution of 1864 did not defeat a pending action of trover brought to recover the value of a slave. *Williams v. Johnson*, 96 D. 613.

By the abolition of slavery, all contracts existing at the time relating to the sale of slaves were annulled. The sale of a slave being only the sale of his services for life, there was no difference between the right of an owner and of a hirer except in duration; obligations for the sale, and also for the hire of slaves, were canceled by such abolition, and it is of no importance that the period of hire had terminated before the extinction of slavery, or that the contract was valid prior to that time. *Cornier v. Bienvenu*, 2 R. 728.

A promissory note for the purchase price of slaves sold after the date of the emancipation proclamation is valid. *McElvain v. Mudd*, 4 R. 106.

A warranty made in 1856, on the sale of slaves, "that the title of said slaves was warranted for the life of said negro slaves," is not broken by the emancipation of the slaves by the government of the United States during the civil war. *Fitzpatrick v. Hurne*, 4 R. 123.

Plaintiff, on a judicial sale had in October, 1863, became security for the purchase price of a lot of slaves sold thereat. Held, that his bond was valid, and its payment obligatory, notwithstanding the emancipation proclamation made before, and that it could be enforced after the adoption of the thirteenth amendment of the United States constitution. *Hendlerlike v. Thurman*, 12 R. 526.

12. The slave trade. — History of negro slavery and slave trade in Maryland stated. *Williams v. Johnson*, 96 D. 613.

SLEEPING-CAR COMPANIES.

Liabilities of, see RAILROAD COMPANIES, 65.

SNOW.

City ordinances relative to, see MUNICIPAL CORPORATIONS, 23.

SOCAGE.

Guardians in, see GUARDIAN AND WARD, 2.

SOCIAL CLUBS.

See ASSOCIATIONS, 11.

SOCIETIES.

See ASSOCIATIONS; BENEVOLENT SOCIETIES; RELIGIOUS SOCIETIES.

SOLDIERS.

Acts of, when justified by command of officer, see WAR, 6.

SOLE CORPORATIONS.

See CORPORATIONS, 6.

SOUNDNESS.

Warranty of, see SALES, 72.

SOVEREIGNTY.

Of the general government, see UNITED STATES, 1.

Of the states, see STATES, 4.

Release of right of, see ESCHEAT, 4.

Transfer of, by conquest, see WAR, 5.

See CONSTITUTIONS, 6.

SPANISH GRANTS.

Of mineral lands, see MINES AND MINING, 2; see also GRANTS; PUBLIC LANDS.

SPECIAL AGREEMENTS

For compensation, see ATTORNEY AND CLIENT, 41, 42.

Limiting carrier's liability, see CARRIERS, 10, 102, 103; RAILROAD COMPANIES, 51, 66.

SPECIAL DAMAGES.

Allegation of, see SLANDER, 21.

Evidence of, see SLANDER, 29.

When must be shown, see SLANDER, 2.

When recoverable, see DAMAGES, 15.

For Index to Notes in American Decisions and American Reports, see Volume I.

SPECIAL DEFENSE.

Notice of, with general issue, see PLEADING, 34.

SPECIAL DEMURRER.

At law, see PLEADING, 45.

SPECIAL DEPOSITS.

Generally, see BAILMENT, 21.

In banks, and liability therefor, see BANKS AND BANKING, 19.

In national banks, see BANKS AND BANKING, 75.

SPECIAL INDORSEMENT.

See BILLS AND NOTES, 101.

SPECIAL LAWS.

Constitutionality of, see STATUTES, 16.

Interpretation of, see STATUTES, 48.

SPECIAL PARTNER.

Rights and liabilities of, see PARTNERSHIP, 105-107.

SPECIAL PLEAS.

In actions at law, see PLEADING, 33.

In criminal cases, see INDICTMENT, 47.

SPECIAL RELIEF.

Prayer for, in bill in equity, see PLEADING, 64.

SPECIAL TRUSTS.

Distinguished from simple, see TRUSTS, 10.

SPECIAL VERDICTS.

In civil cases, see TRIAL, 113.

In criminal cases, see TRIAL, 203.

SPECIFIC DENIALS.

Sufficiency of, in answer under code, see PLEADING, 110.

SPECIFIC LEGACIES.

How distinguished from general, see LEGACIES, 9.

SPECIFIC LIENS.

See LIENS, 10.

SPECIFIC PERFORMANCE.

[Includes the jurisdiction and procedure of courts of equity to compel the performance of contracts as distinguished from actions at law for damages for non-performance or breach.]

Of awards, see ARBITRATION, etc., 34.

Vendee's action for, see VENDOR AND PURCHASER, 65, 66.

Vendor's action for, see VENDOR AND PURCHASER, 63.

What lapse of time bars suits for, see LIMITATIONS OF ACTIONS, 56.

I. WHEN SPECIFIC PERFORMANCE WILL BE ADJUDGED.

II. SUITS FOR SPECIFIC PERFORMANCE.

I. WHEN SPECIFIC PERFORMANCE WILL BE ADJUDGED.

1. What contracts may be enforced, generally. — Specific performance is decreed, as a matter of course, when the contract is in writing, is certain, fair in all its parts, for an adequate consideration, and capable of being performed; and also, in a proper case, where the party has lost his remedy at law; provided time is not essential to the substance of the contract. *Rogers v. Saunders*, 33 D. 635.

If a party object to an instrument on the ground that a stipulation is omitted, and the other promises to rectify it, whereupon it is executed, equity will decree a specific performance of the promise. *Coyer v. McGee*, 5 D. 610.

Where a donor destroyed a voluntary deed fairly obtained, after it was delivered to the grantee, but before it was registered, a court of equity will compel such donor to convey the same property to the donee. *Tolar v. Tolar*, 18 D. 598.

Equity will enforce performance of the condition of a bond, and leave the party to his action at law for the penalty, where the penalty is merely accessorial, being designed to secure the enjoyment of a collateral object which is regarded as the principal intent of the deed. *Towles v. Burton*, 24 D. 409.

Specific execution of a contract for sale of real and personal property for a lump sum will be decreed. *Clarke v. Curtis*, 37 D. 625.

An agreement to make a certain division of property by will, upon a sufficient consideration, is valid, and may be enforced in a court of equity against the estate of the decedent, if not complied with. *Green v. Broyles*, 39 D. 156.

Specific performance of such an agreement will be decreed by a court of equity, upon the recognized principles governing it in the exercise of this branch of its jurisdiction. *Johnson v. Hubbell*, 66 D. 773.

2. What may not be. — It is a general rule that if an action at law will not lie upon a contract to recover for its breach, equity will not decree its specific execution. *Hickman v. Grimes*, 10 D. 714.

Equity will not specifically enforce an implied agreement to surrender the possession of slaves. *Waller v. Demint*, 25 D. 134.

Equity will not attempt to compel a husband to the specific performance of his contract made with reference to his wife's property. *Clark v. Seiver*, 32 D. 745.

Specific execution of a contract will not be decreed where a party has treated it as rescinded, by bringing an action to recover back the consideration paid. *Herrington v. Hubbard*, 33 D. 426.

A person cannot recover, in an action at law, the consideration paid on a contract, and at the same time proceed in a court of

For Index to Notes in American Decisions and American Reports, see Volume I.

equity for a specific performance of the same contract. *Ib.*

But *semble* that an action to recover damages for the non-performance of a contract may be proceeded in concurrently with proceedings in equity to compel a specific performance. *Ib.*

Equity will not enforce a mere verbal, voluntary, executory agreement, although it be founded on the meritorious consideration of love and affection. *Dugan v. Gittings*, 43 D. 306.

An agreement of a husband to procure his wife to join him in a deed, and to release her right of dower, is not such an agreement that equity will compel the specific performance of it. *Weed v. Terry*, 45 D. 257.

A contract to be performed when another's wife signs a deed, and if she does not sign it the contract to be null and void, cannot be enforced if the wife dies without signing such deed. *Pendergast v. Meserve*, 53 D. 234.

Specific performance of a contract contravening the design and policy of the law will not be decreed. *Dial v. Hair*, 54 D. 179.

A contract by which defendant was to take possession of a quarter-section of public land, to occupy it until he became entitled to a pre-emption, and on obtaining a title from the government, which was paid for by the plaintiff, to make a title of one half to the plaintiff, is illegal; and if, in pursuance of the agreement, the defendant enters into possession, and obtains title, equity will not decree a specific performance in favor of the plaintiff. *Ib.*

Specific performance will not be decreed where the parties themselves have agreed upon the damages for the breach of the contract, or have provided the means by which such damages may be ascertained. *Bodine v. Glading*, 59 D. 749.

Equity will not enforce a contract to take stock in a company to be afterwards incorporated. The remedy at law is full, adequate, and complete. *Strasburg R. R. Co. v. Eichternacht*, 60 D. 49.

Equity will not decree a conveyance directed to be made by a marriage settlement, when such settlement operates itself as a conveyance, and has every effect which could possibly be produced by the conveyance which it directs to be made. *Adams v. Guerard*, 76 D. 624.

Where a contract grows immediately out of or is connected with an illegal or immoral act, equity will not lend its aid to enforce it. *Dodson v. Swan*, 98 D. 787; *Martin v. Zellerbach*, 99 D. 365. So held of a contract to purchase lands of an accused person in order that he may escape from the county and avoid trial. *Dodson v. Swan*, 98 D. 787.

The fact that defendant is benefited by the refusal to enforce an illegal contract affords no reason for enforcing it. *Dillon v. Allen*, 26 R. 145.

Specific performance of a contract to sell shares of a national bank will not be enforced where it appears that the shares were designed to give control of the bank. Whether the contract would be enforced if lawful, *quære*. *Folt's Appeal*, 36 R. 671.

3. Contracts for sale of land. — 1. *When enforced.* — If a parent, in consideration of love and affection, make a deed to his family, which is inoperative for want of delivery in his lifetime, equity will aid the grantees, and secure them the legal title. *Jones v. Jones*, 16 D. 35.

An agreement to purchase land with payment of the purchase-money gives an equitable title which a court of chancery will enforce. *Whitbeck v. Whitbeck*, 18 D. 503.

Equity will not enforce a mere voluntary agreement; but a voluntary bond from a father to his son, for the conveyance of land, will, in some instances, be specifically enforced. *Anderson v. Green*, 23 D. 417.

A contract to convey specifically will be enforced in equity, though the party may have a remedy at common law. *Buck v. Swasey*, 56 D. 681.

An agreement to convey land and transfer shares of stock is one of which a court of equity will compel specific performance. *Leach v. Fobes*, 71 D. 732.

Specific performance of a contract whereby one party sells a tract of land to another, and puts him in possession, agreeing to execute to him, on payment of the purchase-money, a title bond, conditioned for the execution of a deed, as soon as he, the vendor, obtains his deed, will be decreed in the vendee's suit to compel the execution of the title bond, where he alleges therein the payment of the purchase-money. *Sterling v. Klepeattle*, 87 D. 319.

Equity will enforce a parol agreement between two that one will purchase land for the other, and take the title to himself and hold it for such other until the latter can pay for it, and when paid for will convey it to him. *Cohn v. Chapman*, 93 D. 600.

Specific performance will be decreed of a contract by which a husband, at the request of his wife, agreed to convey land, the legal title to which the husband held in trust for his wife. *Rostetter v. Grant*, 98 D. 93.

In an action against husband and wife, for specific performance of an agreement to convey real estate, if the wife pleads her coverture, a decree may still be rendered against the husband, conditioned that if the wife refuse to join in the conveyance, the purchase price shall be diminished by the value of the wife's inchoate interest. *Martin v. Merritt*, 26 R. 45.

A parent made a parol promise to convey land to his child, whereupon the child took possession, and made extensive and valuable improvements. *Held*, that specific perform-

For Index to Notes in American Decisions and American Reports, see Volume I.

ance could be enforced. *Kurtz v. Hübner*, 8 R. 665; *Hardesty v. Richardson*, 22 R. 57.

Where A made an agreement for the sale of lands with B and C, and took the notes of the latter, with D and E as sureties; and A gave his bond, conditioned to make titles to the lands when the notes were paid; and immediately afterwards B and C assigned the bond to D and E to indemnify them for becoming sureties; and, subsequently, A dying, and D and E being in possession of the land, and D exercising a control over them, paid the last note due, after suit, and took from A's representatives and heirs a bond conditioned for the executing of a title to D, within a specified time, and on the expiration of this time brought his action upon the bond, — *held*, on a bill filed by A's representatives and heirs for a specific performance, — 1. That A's administrator was entitled to a specific execution of the contract of his intestate, and that A's heirs were proper parties as complainants; 2. That the bond executed by the representatives and heirs was without consideration, and void; 3. That it was proper for the complainants to make the matter of their bond a part of the case, and that equity might decree a cancellation thereof; 4. That the delay in filing the bill did not prevent the court from decreeing a specific execution of the agreement, because the parties holding the bond of A could have applied to the orphans' court to have perfected their title. *Hays v. Hall*, 30 D. 530.

2. *When not enforced.* — A written contract for the sale of land, varied by parol in a material particular, will not be enforced in equity, as where the written contract requires the vendee to search for coal, and if he finds it in paying quantities within a given time, to pay an increased price for the land, and the time for the search is afterwards extended by parol. *Heth v. Woolbridge*, 18 D. 751.

A covenantee having elected to sue at law for damages for breach of contract, equity will not compel him to give up his judgment and accept specific performance, unless the judgment has been procured unfairly, or he has been guilty of fraud or negligence. *Craig v. Martin*, 19 D. 157.

Equity will not enforce an equitable title purchased by a party, which, if the legal title, would subject him to the penalties of the statute against buying and selling a pretended title. *Ruffners v. Lewis*, 30 D. 513.

This principle does not apply to every purchaser of equitable rights, as where a creditor purchases his debtor's property to protect himself. *Id.*

A unilateral or optional contract to convey land or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy or consideration, will not be enforced in equity; but

if made upon proper consideration, or if the consideration forms part of the contract or lease, it may be enforced. *Haurvally v. Warren*, 90 D. 613.

Equity will not decree specific performance of a written contract of sale at the instance of the vendor, when all that is to be done by the vendee is the payment of money, for which the vendor may maintain an action at law after a tender of performance on his part. *Jones v. Newhall*, 15 R. 97.

A husband contracted to sell land; the wife, without collusion with the husband, refused to join in the deed. *Held*, that the vendee could not compel specific performance by the husband alone, and retain part of the purchase-money as indemnity against the wife's contingent claim of dower. *Burk's Appeal*, 15 R. 587.

An agreement to convey land at a specified price also provided that the vendees should prospect the land for coal, and if they found enough, in their opinion, to warrant them, should organize a company, and issue to the vendor a certain amount of unassessable stock, but if not, the vendees might abandon the contract on notice in writing. *Held*, not a case for specific performance. *Sturgis v. Galindo*, 43 R. 239.

4. *Contracts for leases of land.* — Where a contract for a lease provides that the lessee may terminate the lease in whole or in part, on certain notice, specific performance will not be decreed. *Rust v. Conrad*, 41 R. 720.

Equity will not enforce specific performance of a covenant in a lease, on the part of the lessor, to repair damages by fire. *Beck v. Allison*, 15 R. 430.

5. *Various other contracts relating to real property.* — Where a parol license amounting to an easement has been given, and where the enjoyment of it has been necessarily preceded by expenditure of money or capital, or where the grantee has made improvements in good faith, under the grant, or invested his capital in consequence of it, the grantee becomes a purchaser of the easement granted by parol for a valuable consideration, and will be entitled to have it specifically performed in equity unless the party will reimburse him in his expenditure, or pay him for his improvements, provided this will put the grantee in *status quo*. *Wynn v. Garland*, 68 D. 190.

The plaintiff contracted to sell and the defendant to buy a leasehold interest in land to commence in the future. Before the day an ocean storm washed away part of the land. *Held*, that specific performance should not be decreed. *Huguenin v. Courtenay*, 53 R. 688.

A mere oral license to construct a railway track over the land of another, as distinguished from an oral agreement of sale of the right of way, cannot be enforced in

For Index to Notes in American Decisions and American Reports, see Volume I.

equity, even after the expenditure of a large sum of money in constructing the road on the faith of it. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 54 R. 243.

A testator devised certain property to his wife for life, and the remainder in fee to his wife's daughter by a former marriage. The wife went into possession, and held the property until her death. During her lifetime the wife entered into an agreement with her said daughter, in pursuance of which the former, who was possessed of property in her own right, as well as said life estate, was permitted to devise to John J. Frisby, a son of the daughter, the property so devised to her by her husband, in consideration that she would devise to her said daughter a life estate in the whole property, including as well the property so devised to her by her late husband as that which she held in her own right, with the right to the daughter to give the latter property to her children, except John J. Frisby, in such shares and proportions, and for such estate or estates, as she by her last will and testament might determine. After the death of the mother the daughter made her will, confirmatory of the will of her mother, and in the exercise of the power of appointment. After the daughter's death a contest arose as to the right to the proceeds of the property devised to the son. *Held*, that the agreement was binding upon the daughter, and was such as equity and good conscience would require to be enforced against her creditors, in favor of the creditors of the son. *Frisby v. Parkhurst*, 96 D. 503.

6. Contracts for chattels.—As a general rule, the court will not decree the specific delivery of a chattel, because in such case the party has a simple and adequate remedy at law; and to obtain such a decree it is necessary to show that the articles have acquired from some cause a value for the loss of which no damages would be a compensation. *Lining v. Geddes*, 16 D. 606; *Cowles v. Whitman*, 25 D. 60; *Kimball v. Morton*, 43 D. 621; *Womack v. Smith*, 54 D. 51. The rule is limited to cases where compensation in damages furnishes a clear and adequate remedy. *Clark v. Flint*, 33 D. 733; and does not apply where chattels have been deposited upon a trust. *McGowan v. Remington*, 51 D. 584.

Where one buys shares in the name of another, a bill against the administrator of that other for the transfer of these shares will lie, it being a case of trust. *Cowles v. Whitman*, 25 D. 60.

Transfer of stock in a bank will be decreed where the party holding it received it with the understanding that he should transfer it to other parties. *Kimball v. Morton*, 43 D. 621.

The assignee of a vessel may be decreed specifically to perform a written agreement,

entered into by his assignor with the plaintiff for a valid consideration, to hold half the vessel subject to the plaintiff's order, where the assignment is taken with notice of the agreement. *Clark v. Flint*, 33 D. 733.

Specific performance will be decreed of an agreement to turn over choses in action to indemnify the complainants against any loss they might sustain by reason of their suretyship for the defendant. *Shockley v. Davis*, 63 D. 233.

7. Contracts for personal services.—Covenants for personal service cannot, as a general rule, be specifically enforced, either at common law or by statute. The case of apprentices depends on parental authority; that of soldiers and sailors, on national policy. *Clark's Case*, 12 D. 213.

Where a free negro woman over the age of twenty-one years bound herself by indenture in Indiana, for a valuable consideration, to serve the obligee as a menial for twenty years, —*held*, that a specific performance of the contract could not be enforced, and that upon a writ of *habeas corpus* she was entitled to be discharged from custody. *Id.*

That the service is involuntary, within the meaning of the constitution, is shown by the application to be discharged on *habeas corpus*. *Id.*

An indenture executed by a negro or mulatto out of the state of Indiana is considered void in that state, and can neither be specifically enforced nor made the foundation of an action for damages. *Id.*

A bill *quia timet* will not be sustained on the ground of the complainant's fear that the defendant might not be willing to perform an engagement for personal services; and where, from the peculiar nature of those services, they could not be performed until a future day. *De Rivafinoli v. Corsetti*, 25 D. 532.

Specific performance will not be decreed of verbal contracts, vague and uncertain in their terms, for materials and labor, made by a decedent for the improvement of his real estate, even upon the application of parties to the contracts. *Gray v. Hawkins*, 72 D. 600.

8. Contracts to indemnify.—When administrators make an agreement with one to whom a contract is assigned, that he shall indemnify and save them harmless, etc., the administrators are entitled to a specific performance of the covenant; and a want of personal estate cannot be set up against the relief sought. *Champion v. Brown*, 10 D. 343.

Where a testator is induced to omit a bequest or devise which he had expressed an intention of inserting in his will, in favor of a particular person, by the promise of another to give such person the same amount of property, or to provide for him in some other manner, such promise may be enforced in equity at the suit of the person for whose

For Index to Notes in American Decisions and American Reports, see Volume I.

benefit it was made. *Owings's Case*, 17 D. 311.

Equity will not decree a specific performance of a contract to indemnify and save harmless, before the party has been actually damaged. *Michigan State Bank v. Hastings*, 41 D. 549.

9. Awards of arbitrators. — Specific performance of an award, made pursuant to a voluntary submission of the parties, in writing, may be decreed, although there may have been no acquiescence in the award, or part performance of it. *Jones v. Boston Mill Corp.*, 16 D. 358.

An award directing the execution of releases may be specifically performed in equity. *Ib.*

An award decreeing a conveyance will be enforced in equity. *Brown v. Burkenmeyer*, 33 D. 541.

10. Requisites of the contract, generally. — Specific performance of a contract is not decreed as a matter of course, but only in the exercise of a sound legal discretion. The complainant must present a contract which is fair, just, and reasonable, entered into upon an adequate consideration, and free from fraud, misrepresentation, or surprise, and not hard, unequal, or unconscionable. *Seymour v. Delancy*, 15 D. 270; *Patterson v. Bloomer*, 95 D. 218.

If a contract, when entered into, is certain, mutual, fair in all its parts, and for an adequate consideration, it is immaterial that by force of subsequent circumstances it has become less beneficial to one party, unless such change is in some way the fault of the party seeking its specific execution. *Brewer v. Herbert*, 96 D. 582.

The fairness or hardship of a contract, like all its other qualities, must be judged of at the time it was entered into, not by subsequent events. *Ib.*

11. Assent. — Specific performance will not be decreed when it appears doubtful whether the party meant to contract to the extent to which he is sought to be charged; and the payment of the consideration does not change the rule. *Rider v. Gray*, 69 D. 135.

12. Mutuality. — Where the remedy is not mutual, or where only one party is bound, a bill for a specific performance of an agreement will not be sustained. *Benedict v. Lynch*, 7 D. 484; *De Cordova v. Smith*, 58 D. 136; *Bodine v. Glading*, 59 D. 749. Contra, see *Rogers v. Saunders*, 33 D. 635.

Mutuality of contract is a prerequisite to a decree for specific performance. It is sufficient that this mutuality exist when the contract is made; subsequent events destroying this mutuality do not render the contract inoperative. *Moore v. Fitz Randolph*, 29 D. 208.

Mutuality of remedy at time of action brought is all that is necessary to enable a

plaintiff to maintain his action on a contract. *Ives v. Hazard*, 67 D. 500.

The remedy becomes mutual by filing a bill for specific performance of a contract for the sale of land upon a memorandum signed by the defendant alone, the bringing of the bill rendering the complainant chargeable as on a memorandum signed by him. *Ib.*

Want of mutuality in the remedy for breach of a contract is an insuperable objection to a decree for its specific performance, where there is no compliance with its requirements, although it is no objection where there has been such compliance. *Rogers v. Saunders*, 33 D. 635.

A preliminary agreement cannot be enforced in equity if it contains no words designed to make it mutually binding upon the respective parties. *Rider v. Gray*, 69 D. 135.

The court will not generally compel specific performance, unless it can at the time execute the whole contract on both sides, or at least such part of it as the court can ever be called upon to enforce; but this rule is subject to some exceptions, and among the exceptions are the cases of contracts where the consideration is entire, but the performance separate. *Sterling v. Klepsattle*, 87 D. 319.

An agreement for purchase of land at option of the vendee only is not so devoid of mutuality as to prevent its being enforced specifically. Nor will the vendor's refusal to accept the consideration destroy the mutuality of such contract, although the vendee might, upon such refusal, have retracted his election. *Corson v. Mulbary*, 88 D. 485.

The jurisdiction of equity to specifically enforce a contract entered into by a husband to sell his wife's land, in a suit by the husband and wife against the purchaser, is doubtful, because there is no mutuality in the contract, inasmuch as it could not be enforced against the wife at the suit of the purchaser. *Watts v. Kinney*, 23 D. 266.

A decree rendered in such a suit, specifically enforcing the contract, but suspending its operation until the husband and wife shall execute a deed for the land to the purchaser, is erroneous; if jurisdiction is entertained at all, it should be only upon condition that a deed executed so as to convey the wife's title to the land is offered before the decree is entered. *Ib.*

An agreement for distribution of a father's estate, made by an adult friend on behalf of minor heirs, with their adult brother, will be specifically enforced against the latter. There is sufficient mutuality about the contract to support it. *Smith v. Smith*, 91 D. 761.

An agreement between minor children and their adult brother for the distribution of their deceased father's estate is not void as to said minors, but voidable only at their election upon attaining their majority. The adult brother continues bound during this

For Index to Notes in American Decisions and American Reports, see Volume I.

interval, and the agreement may be specifically enforced against him. *Id.*

The court will not interfere to specifically enforce a contract which by its nature is not practically enforceable on both sides. Accordingly, where an agreement had been made for a partnership between plaintiff and defendant, by which defendant was to contribute an amount of money and plaintiff only his services, — *held*, that an action would not lie to compel the performance of the agreement. *Buck v. Smith*, 18 R. 84.

13. *Certainty*. — A contract to be specifically enforced must be certain in every part. *Rankin v. Maxwell*, 12 D. 431.

Specific performance will not be decreed unless the terms of the contract are clear and definitely ascertained. *Robbins v. McKnight*, 45 D. 406.

A parol agreement part performed or executed will not be specifically enforced, unless the contract be established by competent proofs to be clear, definite, and unequivocal in all its terms. *Hazleton v. Putnam*, 54 D. 158.

A parol contract for sale of land will not be enforced unless a contract, clear, definite, and unequivocal in its terms, is admitted by the answer or satisfactorily established by competent proof. *Poland v. O'Connor*, 93 D. 327.

14. *Completeness*. — As a general rule, equity will not enforce a voluntary agreement, or perfect a merely promised or imperfect gift. There is a *locus penitentie* as long as it is incomplete. *Taylor v. Staples*, 5 R. 556.

In a deed from plaintiff to a railroad company conveying land, it was stated that the conveyance was made "in consideration of five hundred dollars, and the covenant to build a depot, hereinafter mentioned." Therein after it was set forth that the conveyance "is made upon the express condition" that the company should erect and maintain on the land a station-house, "suitable for the convenience of the public," and that one train "each way shall stop at such depot or station each day, and that freight and passengers shall be regularly taken at such depot." In an action to enforce specific performance or recover damages for non-performance, — *held*, 1. That the provision in the deed was not a covenant, but an express condition subsequent, and not specifically enforceable as a covenant; 2. That the agreements could not be enforced, as being by nature insusceptible of execution by the court, and as wanting details and lack of particularity and specification; and 3. That damages could not be given for the failure to perform. *Blanchard v. Detroit etc. R. R. Co.*, 18 R. 142.

*See monographic note on the requisite certainty in contracts to warrant a decree for their specific performance, 26 D. 661-671.

15. *Reasonableness*. — Equity will not compel a specific performance, unless the contract was fair and reasonable, and not then if he who seeks the execution has been in default in performing all that was to be done on his part. *Bowman v. Irons*, 4 D. 686.

Owners of adjacent premises in the city of New York mutually covenanted that only dwelling-houses should be erected thereon, and not to carry on or suffer any kind of manufacture, trade, or business thereon. Subsequently the value of the premises for any but trade purposes was greatly impaired by the advance of business, and the erection and operation of an elevated railway in the street. *Held*, that the covenant ran with the land, but owing to the change in circumstances and the defeat of the scheme of the original covenants, it would not be specifically enforced against a subsequent purchaser. *Columbia College v. Thacher*, 41 R. 365.

16. *Effect of misrepresentation, fraud, or mistake*. — 1. *Generally*. — A bill for specific performance is addressed to the sound legal discretion of the court. It is not necessary to authorize its denial that an agreement is so tainted with fraud that it may be decreed to be canceled; and it is requisite to its being granted that the agreement should have been entered into with perfect fairness, and without misapprehension, misrepresentation, or oppression. *Frisby v. Ballance*, 39 D. 409; *Patterson v. Martz*, 34 D. 474.

Equity will not decree a specific performance of a contract obtained under unfair advantages or circumstances of hardship not amounting to legal duress. *Edwards v. Handley*, 3 D. 745.

The habitual intemperance of one of the contracting parties may be a ground for denying a decree for specific performance, where it is sufficient to cast a suspicion on the fairness of the transaction. *Seymour v. Delancy*, 15 D. 270.

An agreement induced by a mistake of fact of one of the parties will not be specifically enforced against him in equity. *Frisby v. Ballance*, 39 D. 409.

A contract invalid under statute of frauds will not be sustained if the conduct of the party setting up the invalidity of the contract has been such as to raise an equity outside of and independent of the contract, and nothing else will be adequate satisfaction of such equity. *Hunt v. Turner*, 60 D. 167.

Equity will not decree a specific performance in cases of fraud or mistake, or of hard and unreasonable bargains, or where the decree would produce injustice, and generally in any case where such decree would be inequitable under all the circumstances. *Trigg v. Read*, 42 D. 447; *Old Colony R. R. Corp. v. Evans*, 66 D. 394.

For Index to Notes in American Decisions and American Reports, see Volume I.

A mutual mistake as to the quality of land from which defendant has undertaken to dig gravel for plaintiff's benefit is not ground for dismissing a bill for the specific performance of another and subsequent contract made after the defendant knew of the character of the land, and by which other land was substituted, and the defendant agreed to pay for the first land. *Old Colony R. R. Corp. v. Evans*, 66 D. 394.

2. *Contracts for conveyance of land.*—A court of equity will not enforce the specific performance of a contract for a conveyance of land, which has been brought about by fraud or mistake, or which has been attended with hardship occasioned by the delay of the complainant in performing his part of the contract. *Meaux v. Helm*, 2 D. 716.

Where the vendor, in a contract for the conveyance of real estate, died, and a bill was brought against his heirs for a specific performance, the fact of the vendor's executor having obtained a judgment for the purchase-money will not be considered such a confirmation as will bind the heirs to a specific performance of a hard and unconscionable bargain; and the contract and judgment should be set aside upon equitable terms. *Id.*

To entitle to a specific performance of a contract in favor of an assignee of a bond conditioned for the conveyance of land, on the ground of the representations of the obligor, upon which the assignee was induced to rely, it is necessary that the representations should be made deliberately, with the belief that they would be relied upon, and that they were relied upon, and occasioned injury to the person confiding therein. *Casey v. Allen*, 10 D. 750.

Chancery will not, by the aid of parol evidence, rectify an agreement for sale of lands and then enforce it as rectified, in a case where the agreement is contained in two independent writings, and by mistake, each of the parties signs only the writing intended to be signed by the other. *Osborn v. Phelps*, 48 D. 133.

Specific performance of a contract to exchange a farm for tenement-houses will not be decreed in favor of the owner of the houses, who induced the defendant to enter into the contract by means of material misrepresentations of the amount of rent yielded by the houses; although such representations were not fraudulent, and the plaintiff offers to make good the deficiency in the rent, and although the contract was partially executed before the representations were discovered to be untrue. *Boynston v. Hazelboom*, 92 D. 733.

Where a party bought a tract of land, and agreed to pay for it in forty days, in continental currency, which he knew was depreciating rapidly, and would soon become worthless, of which depreciation the vendor was not fully informed, and the vendee

delayed payment for a number of years, and until the currency became worthless, — held, that a court of equity should not decree a conveyance of the land at the instance of the vendee or his assignee. *Meaux v. Helm*, 2 D. 716.

A vendor was held justified in refusing to convey real estate, and ought not to be compelled to convey, in the exercise of the discretion of a court of equity, where he, residing in the state of New York, made a contract for the sale of a quarry in Connecticut, and of personal property valued at twenty-five thousand dollars connected with it, the whole for fifty-five thousand dollars, of which five thousand dollars was to be paid down, the balance to be secured by a mortgage back, but where he made the agreement under the mistaken belief that a chattel mortgage would be a valid security in Connecticut without a retention of possession by him; and where the purchaser was insolvent. *Patterson v. Bloomer*, 95 D. 218.

17. *When the contract to be enforced must be in writing.**—The conveyance of land cannot be decreed in equity by reason merely of an oral agreement therefor, against a party denying the alleged agreement, and relying upon the statute of frauds, in the absence of evidence of change of situation or part performance, creating an estoppel against a plea of the statute. *Glass v. Hulbert*, 3 R. 418; *Hoen v. Simmons*, 52 D. 291.

A mere oral promise to convey a certain tract of land to a son in consideration of blood and affection is not sufficient to warrant a decree of specific execution, even in favor of a purchaser from the son. *Hickman v. Grimes*, 10 D. 714. But compare *Moore v. Pierson*, 71 D. 409.

A parol sale of land cannot be established by declarations merely, and specific performance cannot be decreed under such sale, in the absence of all proof of possession taken and maintained under it. *Workman v. Guthrie*, 72 D. 654.

18. *What is a sufficient writing.*—In bills for specific performance, the contract laid must be clear and satisfactory as to the description of the land, the amount of the purchase-money, and time of payment, and the proof must be equally clear and satisfactory. *Johnston v. Glancy*, 28 D. 45.

Specific execution of a contract in writing for the transfer of property will be decreed in equity as between the parties, although some circumstances to give it legal validity are omitted, provided it contain proper and apt terms whereby the intention of the parties can be clearly ascertained. *Tiernan v. Poor*, 19 D. 225.

Specific enforcement of a contract in writing for the sale of land, which contains no

* Specific performance of contract within statute of frauds, see note, 14 D. 278, 279.

For Index to Notes in American Decisions and American Reports, see Volume L.

description or reference identifying the land, cannot be decreed consistently with the statute of frauds. *Hanly v. Blackford*, 25 D. 114.

Specific performance of a contract at auction will be decreed, where the sale is *bona fide*, the title good, and the quantity of land the same, and the description substantially true, although it may vary in a slight degree. *King v. Bardeau*, 10 D. 312.

An auctioneer's memorandum may be specifically enforced at the instance of the vendor, although it does not state the credit on which the land was sold. *Smith v. Jones*, 30 D. 493.

Specific performance of a written instrument may be enforced when it contains all the facts of the contract except such as may be legitimately proved by parol evidence. *Colerick v. Hooper*, 56 D. 505.

Where parties entered upon land under a license from the owner, who afterwards gave them a memorandum in writing whereby he promised to sell to them the premises, or give them a lease in fee, and it appeared that these parties were induced to make valuable and permanent improvements, relying upon the representations of the owner that no advantage would be taken of them, — *held*, that although the memorandum was in itself uncertain, yet as the conduct of the owner was fraudulent as to the parties entering on the premises, parol evidence might be connected with the memorandum to establish a contract, and that a specific performance thereof would be decreed. *Parkhurst v. Van Cortlandt*, 7 D. 427.

Bill for the specific performance of a contract, of which the following was the only written evidence: "Received of [plaintiff] one hundred dollars as part payment on a piece of property on the corner of," giving street, city, county, and state, and signed by the defendant, — *held*, not a sufficient memorandum within the statute of frauds. *Holmes v. Evans*, 12 R. 372.

19. Necessity of a consideration. — Equity will not decree the specific execution of a contract where there is no consideration. *Shackleford v. Handley*, 10 D. 753.

Promises founded solely on benevolent intentions will not be specifically enforced. *Mercer v. Stark*, 12 D. 583; *Owings's Case*, 17 D. 311.

Specific performance will not be decreed of an agreement to pay a certain fund to one creditor in preference to others, where the creditor claiming the fund has no superior right to it over the other creditors, except such promise by the debtor. *Boomer v. Cunningham*, 74 D. 155.

20. What is a sufficient consideration. — The consideration, to warrant specific performance of a contract, must be valuable or meritorious. *Woodcock v. Bennet*, 13 D. 568.

Specific performance cannot be resisted on the ground that the consideration was a draft which was not paid, if the defendant has been negligent in demanding payment and giving notice. *Id.*

A promise made by a father to a child, to convey land to him if he will take possession and improve it, when followed by possession and the expenditure of labor and money in improvements, by the child, rests upon a valuable consideration, and will be enforced in a court of equity when clearly proved. *Langston v. Bates*, 25 R. 466; *Moore v. Piereson*, 71 D. 409.

21. Effect of inadequacy of price.* — Inadequacy of price alone is not sufficient ground to vacate a contract, but the enforcement of a contract may be refused where the consideration is so inadequate as to make the contract hard, unfair, and unreasonable. *Seymour v. Delancy*, 15 D. 270.

Inadequacy of price without fraud or other ingredient is not sufficient to stay the power of chancery to enforce a contract for the sale of land, unless the inadequacy is so gross as to be evidence of fraud. *Id.*

22. Effect of part performance to take the contract out of the operation of the statute of frauds. — 1. Generally. — Specific performance of a contract will be decreed in equity whenever it is impossible to place a party *in statu quo* who has performed a valuable part of his agreement, and is in no default for not performing the residue. *Hays v. Hall*, 30 D. 530; *Ryan v. Dox*, 90 D. 696.

Specific performance of a parol agreement will be compelled where one party has wholly or partially performed it on his part, so that its non-fulfillment by the other party is a fraud. *Johnson v. Hubbell*, 66 D. 773.

Mutuality in contracts is ordinarily necessary to authorize a court to decree specific performance of them; but if a man has performed a valuable part of an agreement, and is in no default for not performing the residue, then it is but reasonable that he should have a specific execution of the other part of the contract. *Wynn v. Oarland*, 68 D. 190.

An agreement by a man and his wife to adopt a child, provide and care well for her, and leave her their property at their death, performed on the part of the child, is enforceable as to the property upon their death. *Sharkey v. McDermott*, 60 R. 270.

2. Contracts relative to land. — A specific performance of a parol agreement for a conveyance, though made sixty or seventy years previously, will be decreed when the agreement had been fully performed on both sides except the execution of a deed to the purchaser. *Somerville v. Trueman*, 1 D. 389.

Where either party has performed a valu-

* Inadequacy of price as ground for refusing a decree, see note, 15 D. 299-301.

For Index to Notes in American Decisions and American Reports, see Volume I.

able part of his contract for the sale and purchase of an estate, and is in no default for not performing the residue, he is entitled to a specific performance of the other part. *Hays v. Hall*, 30 D. 530; *Simmons v. Hill*, 1 D. 398; *Pugh v. Good*, 37 D. 534.

Chancery will decree specific performance of a parol contract affecting lands, where it appears that one of the parties has in good faith executed his part of it, and cannot be compensated in damages, or where it would operate as a fraud to one party. *Wynn v. Garland*, 68 D. 190.

Part performance of a parol agreement respecting land, to warrant a specific enforcement of the contract, must be in consequence of the contract. *Squire v. Harder*, 19 D. 446.

Specific performance of a parol agreement to divide land will be decreed, if there has been sufficient part performance to take it out of the statute of frauds. *Weed v. Terry*, 45 D. 257.

The doctrine of part performance, in reference to parol contracts respecting lands, is applicable to licenses executed, where one of the parties has done all on his part that he assumed to do. *Wynn v. Garland*, 68 D. 190.

The validity of the contract is not an indispensable element of the cause of action for specific performance; and a parol agreement between parties as to the disposition of land by will, upon good consideration, and partly performed, will be enforced by specific performance, though the will be void for want of a sufficient number of attesting witnesses. *Maddox v. Rowe*, 68 D. 535.

Equity will enforce specific performance of a contract for the exchange of lands, though within the statute of frauds, where it has been partly executed; great caution should be exercised, however, in determining what is a part execution. *Overstreet v. Rice*, 96 D. 279.

Payment of the consideration, possession, and the making of improvements will take a case out of the statute of frauds, and are sufficient for a decree for specific performance. *Westmore v. White*, 2 D. 323.

Delivery of possession to a vendee pursuant to the contract is a part performance. *Pugh v. Good*, 37 D. 534.

A sale of land by parol is not taken out of the statute by part performance unless such part performance be expressly stated in the bill, and be made under circumstances amounting to a fraud, against which a court of equity will relieve. *Meach v. Perry*, 6 D. 719.

A promise by a father to give a plantation and slaves to his son, if he would remove from another state to this to live, is a gratuity only, and not a contract of which a court of equity will enforce a specific performance, although the son has been thereby induced to break up at a loss, and been put to trouble and expense by the removal. And a part

performance of such promise, by putting the son in possession, and improvements made by him on the land, will not warrant the court in decreeing a conveyance by the devisees of the father after his death, where no conveyance, or promise of conveyance, is shown to have been made. *Forward v. Armistead*, 46 D. 246.

Specific performance of a parol agreement for sale of land, upon the ground of part performance, will not be decreed unless the facts alleged to be in part performance be clearly proved; and the contract itself as alleged in the bill should be established by clear and definite testimony. *Aday v. Echols*, 52 D. 225.

Part performance of a parol agreement to mutually exchange lands does not dispense with the requirements of the statute of frauds so as to entitle the party so partly performing to a specific performance. *Barnes v. Teague*, 62 D. 200.

Defendants orally agreed to take a lease of plaintiff's stores for five years, thus inducing him to break off negotiations for leasing to another party, and to incur expense in altering and adapting the stores to their own use. Defendants entered into possession and paid rent for two years, but neglected to execute the written lease in accordance with the agreement tendered them by plaintiff on taking possession, and at the end of two years refused to execute the lease, or longer to occupy or pay rent. Held, that they should be adjudged to execute the lease. *Seaman v. Aschermann*, 37 R. 849.

23. Necessity of performance on part of complainant. — A party seeking specific performance must show that he has not been guilty of laches or negligence, but has taken all proper steps towards a performance on his part. *Rogers v. Saunders*, 33 D. 635. *S. P.*, *Garretson v. Vanloon*, 54 D. 492; *Green v. Covillaud*, 70 D. 725.

Where the complainant seeking specific performance of a contract for the sale of land has failed to perform a precedent condition on his part, the court will not decree specific performance, if any injury has resulted to defendant for such non-performance; but the defendant having taken possession of the land, and paid part of the purchase-money, and executed the agreement in part, the court will consider him as having waived his objections to the complainant's default, and will decree a specific performance of the contract. *Ramsay v. Brailsford*, 2 D. 698.

If the party seeking the specific execution of a contract has been in default without excuse, chancery will not make compensation to the opposite party, and then decree a specific execution. *Moore v. Skidmore*, 12 D. 333.

A bill in equity will not lie upon one of dependent covenants in the absence of a

For Index to Notes in American Decisions and American Reports, see Volume I.

showing by plaintiff of a performance or of a valid excuse for the non-performance of the covenants incumbent upon himself. *Kimloch v. Hamlin*, 27 D. 441.

Performance of a condition precedent, such as the payment of money at a time designated, may be made essential to the existence of the right to specific performance. *Wells v. Smith*, 31 D. 274.

Specific performance will not be granted when the party applying has omitted to execute his part of the contract at the appointed time, though not notified to do so, without being able to assign any sufficient justification or excuse for his delay, and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay. *Kirby v. Harrison*, 59 D. 677.

A vendee, before bringing suit for specific performance, must have performed or offered to perform whatever the contract has made a condition precedent on his part. *Young v. Daniels*, 63 D. 477.

The vendee is not bound to follow the vendor to his residence without the state to make tender before bringing suit for specific performance, after he has applied within a reasonable time after the maturity of the notes at the place stipulated for their payment, and there demanded the deed. *Id.*

Equity will not enforce specific performance of a contract to convey lands, when the plaintiff shows no compliance or offer to comply on his part with the agreement, nor any excuse therefor, for the period of twenty-one or twenty-two months from the time he bound himself to perform. *Green v. Cowland*, 70 D. 725.

In an action by vendee to enforce specific performance of an agreement to convey real estate, the plaintiff need not aver tender of performance if he avers that the defendant had repudiated the contract, and expressly waived tender. *Martin v. Merritt*, 26 R. 45.

24. Sufficiency of performance on complainant's part. — Specific performance of a contract will be decreed, although the complainant has not wholly performed on his part, provided he has done so much that he cannot be placed *in statu quo*, and provided he is in no default. *Breckenridge v. Clinkenbeard*, 13 D. 261.

In an entire contract for the sale of five tracts of land, and a separate bond given for the conveyance of two, the purchaser cannot have specific performance without performing on his part, the entire contract. *Tierman v. Beam*, 15 D. 557.

Specific performance of a husband's contract to transfer the entire interest in lands, as well his own interest as his wife's right of dower, cannot be sought in so far as it relates to a transfer of his interest while at the same time an abatement is demanded from the contract price proportionate to the value of dower. In such cases, if perform-

ance is desired of the husband's contract with reference to his own right, the entire contract price must be tendered. *Clark v. Seirer*, 32 D. 745.

A party seeking to enforce a verbal contract for the conveyance of real estate should show full compliance with the substance of all provisions he has engaged to perform. *Hoen v. Simmons*, 52 D. 291.

It is sufficient part performance of an oral contract touching the title of lands to found a claim for specific performance thereof and avoid the bar of the statute of frauds, when one in prior possession of a portion of a tract of land remains in full possession of the whole tract under an oral agreement of partition awarding to him such full possession. *McMahan v. McMahan*, 53 D. 481.

25. Effect of tender, or readiness to perform. — Where a party to a contract, whose specific performance is sought, resists the performance, and insists that he is not bound by the contract, no tender of the purchase-money need be made before bringing suit. *Wright v. Young*, 70 D. 453.

Whether the performance of a contract should be specifically decreed depends upon the circumstances of the case. Accordingly, where the purchaser, in a contract for the sale of land, has with good faith shown a willingness and readiness, without injury to the vendor, to perform substantially the agreement, he will be entitled to the aid of a court of equity. *Hart v. Brand*, 10 D. 715.

26. Effect of complainant's inability to give good title. — The court will not decree a specific performance of an agreement, and compel the defendant to accept a title which the complainant cannot transfer free and clear of all encumbrances. *Buller v. O'Hear*, 1 D. 671; unless he has agreed to take the risk of the title, or to accept such as the vendor has. *Brown v. Haff*, 28 D. 425.

Equity will not compel a party to receive a conveyance of land in lieu of damages, if the complainant cannot show a clear title, and although there be no other objection. *Edwards v. Handley*, 3 D. 745. S. P., *Lewis v. Herndon*, 14 D. 68; *Jackson v. Murray*, 17 D. 53. A showing by the vendor of an uninterrupted possession of twenty years in himself and those under whom he claims is not sufficient. *Lewis v. Herndon*, 14 D. 68.

Equity will not compel a man to convey lands of greater value than those he had contracted, and was unable to convey by reason of his title thereto failing. *Webb v. Conn*, 13 D. 225.

If the vendor has been in adverse possession for the time specified in the statute of limitations, his title is not so impeached as to prevent his maintaining a suit for specific performance, by slight proof that the former owner was an alien, nor by the mere contingency that such owner may have died,

For Index to Notes in American Decisions and American Reports, see Volume I.

leaving heirs disabled from asserting their rights. *Seymour v. De Lancey*, 14 D. 552.

Equity will never compel a vendee to take a title not free from controversy. *Jackson v. Murray*, 17 D. 53.

Where one party agrees to give his note and a tract of land in consideration of the other party's surrendering certain notes in his possession, the former will not be decreed a specific performance, unless he can give a good title to the land, though the agreement calls for a "deed" merely, and does not stipulate for covenants of warranty. *Bowen v. Vickers*, 35 D. 516.

Specific performance of a contract of purchase will be decreed against a purchaser who has gone into possession and held it for many years, though the deed under which the vendor derails title has been lost. But in such case, as the *onus* of proving such title rested on the vendor, he must pay the costs. *Wade v. Greenwood*, 40 D. 759.

Equity may enforce the specific performance of a contract for the sale of lands, although the vendor may have had no title at the time of the sale, or even at the time of filing the bill, if he can make a good title at the time of the decree. *Mason v. Caldwell*, 48 D. 330; *Seymour v. Delancy*, 15 D. 270.

That the vendor's remedy at law is gone, by reason of there being a mortgage on the estate, so that he could not convey a good title at the day named in the contract, is no ground for refusing specific performance in equity. *Seymour v. Delancy*, 15 D. 270.

A bill for a specific performance will not be dismissed as of course because the title was not perfect at the commencement of the suit, although that may be a sufficient reason for giving costs to the defendant, if he has not made any unreasonable objection to the title. *Ref. Prot. Dutch Church v. Mott*, 32 D. 613.

Where a person covenants to convey title to certain land, a court of equity will not decline to decree a specific performance upon a mere showing that the covenantor is only a tenant in common of the land, and that "after reasonable exertion he has been unable to procure the title" of his co-tenants. *Love v. Camp*, 51 D. 419.

Where a covenantee knows that the covenantor does not own all the title which he is covenanting to convey, whether equity would decree a specific performance, *quære*. *Id.*

The vendee may waive full performance of an agreement for purchase of land, and take such title as the vendor can give. If, therefore, he agrees to waive a release of dower by the wife of the vendor, the latter cannot object to a performance on the ground that his wife refuses to sign the deed. *Corson v. Mulvaney*, 88 D. 485.

A husband contracted to sell land; the wife, without collusion with the husband,

refused to join in the deed. *Held*, that the vendee could not compel specific performance by the husband alone, and retain part of the purchase-money as indemnity against the wife's contingent claim of dower. *Burk's Appeal*, 15 R. 587.

27. When time is of the essence of the contract. — Time is not ordinarily of the essence of a contract to convey land, yet in every case it devolves upon the party seeking specific performance to account for his delay, and if there are circumstances showing culpable negligence on his part, or if the time permitted to intervene, together with other circumstances, raise the presumption of an abandonment of the contract, or if the property has greatly enhanced in value, and the purchaser has laid by apparently for the purpose of taking advantage of this circumstance, he is not entitled to specific performance of his contract. *Green v. Comillaud*, 70 D. 725.

Time is not generally deemed in equity to be of the essence of a contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract; and specific performance is therefore frequently decreed where the terms for the completion of the contract have not, in point of time, been strictly complied with. *Young v. Rathbone*, 84 D. 151.

Time is of the essence of a contract when the mere effluxion of time renders the thing sold of greater or less value, and also when it has been expressly agreed by the contract that time shall be essential. And in such cases, equity will not decree specific performance. *Rogers v. Saunders*, 33 D. 635.

Specific performance of a contract will not be decreed upon a bill filed prior to the time at which the contract is to be performed. *De Rivafnoli v. Corsetti*, 25 D. 532.

G. leased land to his son-in-law for a term of years at an annual rent. During the term, he promised in writing that if the lessee, by a specified time, would pay the arrears of rent, and all the rent to accrue, and certain other amounts due him, he would, in consideration of love and affection for his daughter, convey the land in fee for her separate use. The lessee made the payments, but not within the specified time. *Held*, that specific performance would not be decreed. *Keffer v. Grayson*, 44 R. 171.

28. What delay will defeat right to a decree. — Specific performance will not be decreed when the party applying has omitted to execute his part of the agreement by the time appointed, unless he can satisfactorily account for such omission, or the other party has expressly or impliedly assented to such delay. *Lewis v. Woods*, 34 D. 110; *Rogers v. Saunders*, 33 D. 635.

A material change in the value of the property, making a great change in the con-

For Index to Notes in American Decisions and American Reports, see Volume I.

dition of the parties, will prevent equity from giving relief against lapse of time. *Rogers v. Saunders*, 33 D. 635.

Where a party, by the terms of the sale, agrees to pay a certain amount in cash and give his promissory notes for the balance, and pays but a portion of the cash, and refuses for two years to pay the balance or to execute the notes, he is guilty of such negligence that he will not be decreed a specific performance. *Lewis v. Woods*, 34 D. 110.

Unexplained delay of the vendee for seven years, and a great rise in value of the lands forming the subject-matter of the contract, constitute an insuperable objection to the granting of a decree for the specific performance of a contract for the sale of lands. *Patterson v. Marts*, 34 D. 474.

A vendee will not be compelled, after eight years of default upon the part of his vendor, during which time the latter has been unable to comply with his covenants, and during which the land has depreciated greatly in value, to an execution of his contract of purchase. *Bryan v. Loftus*, 39 D. 242.

A party entitled to specific conveyance of property, personal or real, will not be permitted to hold back from an assertion of his rights, and speculate upon the chances of such changes as may decide whether it would be to his interest to have the conveyance made, but he is required to be vigilant and prompt in the assertion of those rights; and if changes have occurred during this lapse of time in the value of the property to be conveyed, or in the consideration to be paid, a court of equity will always refuse its aid, and leave the party to seek redress where the law had left him, by a suit for the breach of the covenant. *De Cordova v. Smith*, 58 D. 136; *Kirby v. Harrison*, 59 D. 677; *McAusland v. Pundt*, 93 D. 358.

Laches may be imputed to one seeking specific performance from the time when the one against whom relief is sought has indicated by his acts or expressions his intention to abandon the contract. *De Cordova v. Smith*, 58 D. 136.

The vendee forfeits the right to specific performance by refusing to pay at maturity, on demand and tender of a conveyance, a note given for the purchase-money of land. *Pearls v. Covillaud*, 65 D. 543.

An action for specific performance of a contract to convey is barred in four years after the maturity of a note given for the purchase-money, where the agreement was to convey on payment. *Id.*

Delay of more than three years to pay installments of an agreed price for land, after the same became due, according to the terms of a written agreement for the conveyance of the same, and after a refusal by the owner of the land to give any further time for making the payments, is such laches as will for-

feit all claim to the performance of the contract; and a bill in equity will not lie by the creditor of the person to whom the agreement was given to compel a sale of the land, and the application of the proceeds to the payment of his debt. *Fuller v. Howry*, 79 D. 782.

29. What will not. — The vendee being in possession, equity will, upon the vendor's application, decree a specific performance, although the time fixed in the contract for conveying has elapsed, if the vendor is not in fault, but the delay has been caused by the state of the title. *Craig v. Martin*, 19 D. 157.

Time is not of the essence of such a contract, and if a good title can be made in a reasonable time, it is sufficient. *Id.*

Specific performance of a contract for the sale of a tract of land, at the instance of the vendee, will not be defeated by the lapse of time, when it appears that the delay has been by the consent of both parties, and occasioned by the embarrassment of the vendor's title; or where it has been caused by the vendee being insane, or by the vendor failing to obtain the legal title, notwithstanding thirty years may have elapsed from the making of the contract. *Craig v. Leiper*, 24 D. 479.

The vendee does not forfeit his right to specific performance by laches in offer to pay purchase-money, when it appears that vendor was a non-resident of the state; that neither he nor any person for him was at the place of payment to demand payment when the notes for the purchase price became due; that he gave the vendee no notice that he should insist upon strict compliance with the contract, and had not returned the notes to the vendee; that within three months after the last note became due the vendee, at the place where the notes were to be paid, and to the person who had been the vendor's agent in the premises, offered to perform the contract on his part, and demanded the deed; and that within six months thereafter the vendee commenced suit to enforce specific performance, bringing the money into court. *Young v. Daniels*, 63 D. 477.

Laches is ground for denial of specific performance where twenty-three years have elapsed from the date of a contract for the purchase of real estate, during thirteen years of which no payments were made by the purchaser. But there is no laches where, in such a case, the vendor has preserved the vigor of the contract for his own benefit by the pendency of an action to enforce a lien for the purchase-money, and the vendee, answering to that action, offers to perform, and asks specific performance against the vendor; for the latter, by his own act, has thereby continuously recognized the obligation of the contract. *Bennett v. Welch*, 87 D. 354.

For Index to Notes in American Decisions and American Reports, see Volume I.

II. SUITS FOR SPECIFIC PERFORMANCE.

30. Jurisdictional questions. — 1. *Generally.* — To enforce the specific performance of agreements is an appropriate office of chancery. *Morgan v. Morgan*, 21 D. 638.

Equity will enforce a trust or contract, but cannot create a title where none exists. *Rush v. Vought*, 93 D. 769.

The reversal of a judgment at law against the complainant, who seeks in equity to have the contract upon which the judgment has been obtained specifically enforced, removes the barrier to granting the relief sought. *Grundy v. Edwards*, 23 D. 409.

The Texas court of equity has power and jurisdiction to decree specific performance and partition, and such decree vests the title to the land conveyed in the party named therein. The statute has deprived the court of none of its powers in this particular. *Grassmeyer v. Beeson*, 70 D. 309.

The common-law remedy by ejectment, used as a means to compel a specific performance, in Pennsylvania, is not taken away by the grant of equity powers to the court of common pleas. *Corson v. Mulcahy*, 83 D. 485.

2. *Contracts relating to land.* — A suit against a vendee for specific performance of a contract to purchase land is within the proper and acknowledged jurisdiction of a court of equity. *Brown v. Haff*, 28 D. 425.

Specific performance is granted to a greater extent in cases of contracts respecting real property than in cases respecting personal property; and while in the latter case the jurisdiction to grant it is limited to special circumstances, in cases of land contracts it is universally maintained. *Young v. Daniels*, 63 D. 477.

The orphans' courts of Pennsylvania have power to decree and enforce specific performance of a contract for sale of real estate, made by a decedent in his lifetime. This power is granted to them by the fifteenth, sixteenth, seventeenth, and eighteenth sections of the act of February 24, 1834, and is the same as that possessed by courts of chancery in like cases. *Chess's Appeal*, 45 D. 668.

A county court's jurisdiction to enforce specific performance of decedent's contract to convey land in a suit against his administrator, under the Texas statute, is special, and exists only where there is a bond or a contract in writing, disclosing all the terms of the agreement, in analogy to the memorandum required by the statute of frauds. *Peters v. Phillips*, 70 D. 319.

Decedent's bond to convey reciting a contract for conveyance in all its terms is sufficient to confer jurisdiction upon the county court, under the statute, for the specific enforcement of the contract, although the contract is not produced. *Ib.*

Husband and wife contracted in writing

to sell certain real estate belonging to the wife, and the wife's separate acknowledgment was taken to the agreement. *Held*, that a court of equity had jurisdiction to entertain a bill by the vendee for specific performance. *Dankel v. Hunter*, 100 D. 651.

3. *Contracts made or to be performed abroad.* — Chancery has jurisdiction to enforce the performance of contracts made in another country by foreigners actually domiciled or temporarily residing here at the time of service of process. *Mitchell v. Bunch*, 22 D. 669; *March v. E. R. R. Co.*, 77 D. 732.

Specific performance of a contract for sale of lands situated in another state will be decreed by chancery against a resident within the jurisdiction duly served. *Newton v. Bronson*, 67 D. 89; *Burnley v. Stevenson*, 15 R. 621. And its decree will be enforceable against the person of the party to compel a performance of the agreement. *Johnson v. Kimbro*, 75 D. 781.

Although the decree in such case, or the deed of a master executed in pursuance thereof, cannot operate to transfer the title to such lands, yet the decree is binding upon the consciences of the parties, and concludes them in respect to all matters and things properly adjudicated and determined by the court. *Burnley v. Stevenson*, 15 R. 621.

When the decree in such case finds and determines the equities of the parties in respect to such land, and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action or as a ground of defense in the courts of the state where the land is situated; and it is entitled, in the court where so pleaded, to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud. *Ib.*

The code provision that actions concerning land shall be tried in the county where the land is situated does not remove jurisdiction to decree specific performance of a contract for sale of lands without the state, since it does not apply to lands not situated in any county of the state. *Newton v. Bronson*, 67 D. 89. S. P., *Gardner v. Oyden*, 78 D. 192.

The courts of Massachusetts will not decree specific performance by a railroad corporation of another state, and a citizen of Massachusetts, in favor of a construction company of another state, of a covenant of payment contained in a contract for construction of a railroad in another state, nor restrain the citizen of Massachusetts from disposing of the stock and bonds of the railroad company in violation of the plaintiff's rights, although the railroad company has an office in Massachusetts for the transfer of stock, and has appeared by attorney. *Kansas Construction Co. v. Topeka etc. R. R. Co.*, 46 R. 439.

For Index to Notes in American Decisions and American Reports, see Volume I.

31. Who may sue. — The assignee of a note given for the purchase price of land, where the vendor retained the title as security, may, by a bill filed against the vendor and the vendee, compel the specific performance of the contract of purchase, and obtain satisfaction of the amount due him on such note by subjecting the land to sale for the payment thereof. *Hanna v. Wilson*, 46 D. 190.

After recovery by a vendee for a breach of a covenant to convey, against the administrators of a deceased vendor, it is too late for the latter to maintain a bill against such vendee and the heirs of the vendor for specific performance. *Moore v. Fitz Randolph*, 29 D. 208.

32. Who may be sued. — Where the specific execution of an agreement respecting lands will be decreed between the parties, it will be decreed between all parties claiming under them in privity of estate, or representation, or title, unless other controlling equities intervene. *Hays v. Hall*, 30 D. 530.

Specific performance will be decreed against an heir at law on a contract of sale made by his ancestor, though such contract did not purport to be obligatory on the heirs. *Moore v. Fitz Randolph*, 29 D. 208. Contra, *Givens v. Calder*, 2 D. 686.

33. Joinder of defendants. — A party seeking specific performance of a contract in which he has no privity must make all those through whom he claims the right of enforcing the contract parties to his suit. *Allison v. Shilling*, 86 D. 622.

Where one has made his title bond to another, who assigns it to another, who executes his own title bond to another, who makes his title bond to the plaintiff, the latter, in a suit against the first vendor for specific performance of his contract, must join all the others as parties. *Id.*

The assignor of a contract for sale of land is not a necessary party, in Indiana, to a suit by the assignee for specific performance thereof, as under the statute of this state the assignment of such an instrument carries with it the legal title, and not a mere equity. *Colerick v. Hooper*, 56 D. 505.

To a bill for a specific performance of a contract to convey land, the assignee in bankruptcy of the vendor, who has not received the whole of the purchase-money, and who has become bankrupt, must be made a party. *Svepson v. Rouse*, 6 R. 735.

34. Bill. — A bill for specific performance of an agreement to turn over choses in action as indemnity to the complainant should state with minuteness what books of account or evidences of debt were to be turned over, or if complainant could not obtain access to such choses in action, the bill should so state, and call upon the defendant to supply the deficiency. *Shockley v. Davis*, 63 D. 233.

Where a bill for specific performance of a contract sets out the contract, and by way of inducement, to support the allegation of the due execution of the contract, goes into particulars, and sets out circumstances which, if true, show ingratitude and baseness in defendant for refusing to execute the contract, the latter may answer, and set out circumstances tending to corroborate his averment that the contract is a forgery, or obtained by fraud; for, though abusive and disparaging, such averment is relevant, and therefore not scandalous. In such case, all circumstantial averments in the bill and answer should be stricken out, and the question as to the due execution of the contract left to a jury to determine. *Henry v. Henry*, 98 D. 87.

35. Petition. — A petition for specific performance of a contract for sale of land should aver that the petitioner has performed his part of the contract, or that he is willing and ready to perform it; but a failure to make such an averment is a defect in form only, which may be amended. *Chees's Appeal*, 45 D. 668.

A petition for specific performance of a contract of a testator is not in condition to be heard, where the record shows no appearance for the heirs or personal representatives, no answer to the petition, and no proof of the contract, or of the nature of it. *Id.*

36. Plea or answer. — In a suit for the specific performance of a contract for the sale of lands, the defendant may avail himself of the statute of frauds, either by plea or demurrer, except in certain cases, appearing on the face of the bill. *Meach v. Perry*, 6 D. 719.

To avail one's self of the statute of frauds as an objection to decreeing the specific performance of a parol contract for the sale of lands, the defendant must deny the sale or plead the statute; if he admit the sale and fail to rely on the statute, the plaintiff need adduce no proof of the sale. *Talbot v. Bowen*, 10 D. 747.

A defendant who admits a parol agreement for sale of lands in his answer, but insists that it is void by the statute of frauds, is entitled to the protection of such statute, and no decree can be made against him merely on the ground of such confession. *Barnes v. Teague*, 62 D. 200.

37. Matters of defense. — Facts showing an abandonment of a contract by the plaintiff furnish a decisive answer to his prayer for a specific performance thereof. *Patterson v. Martz*, 34 D. 474.

Specific performance will not be decreed when there is strong, un rebutted *prima facie* evidence of a mutual abandonment of the contract. *De Cordova v. Smith*, 58 D. 136.

A party, when resisting specific performance, may show by parol that plaintiff has surrendered all of his equities. The statute

For Index to Notes in American Decisions and American Reports, see Volume I.

of frauds has no application to the question. *Workman v. Guthrie*, 72 D. 654.

It is no defense to a bill to enforce a trust that the complainant is indebted to the estate of the *cestui qui trust*, as such indebtedness is to be adjusted by the court of probate. Nor is it a defense that a decree enforcing the trust would take the subject-matter thereof out of the jurisdiction of the probate court, as it always was in equity, and should not be distributed in the administration of the estate. *Cowles v. Whitman*, 25 D. 60.

Compensation for improvements by perception of profits is not a bar to the specific performance of a gift. *Young v. Glendenning*, 31 D. 492.

The fact that land contracted to be sold for a fair price has since become more valuable is not such a circumstance of hardship as would prevent a decree for the specific performance of the contract. *Young v. Wright*, 65 D. 303.

A party will not be permitted to set up his own fraud as a defense in a proceeding to enforce the specific performance of a contract. *Snow v. Flannery*, 77 D. 120.

38. Evidence. — Where one agrees in writing to permit another to search for iron ore on his land for a fixed time, the latter to then have the option to purchase the land at a fixed price, part to be paid upon the execution of the deed, and the balance to be secured by mortgage upon the property for two years, and the vendee, having elected to take the land, and given notice to the vendor, at the same time tendering the amount agreed to be paid down, brings ejectment to compel a specific performance, evidence that the contemplated use of the land would destroy its value within two years, and that the vendee's circumstances were such that he would be otherwise unable to pay the mortgage debt, is inadmissible when it is not shown that the vendee's circumstances had changed after the making of the contract. *Corson v. Mulvany*, 88 D. 485.

Where it was claimed that a mother entered into a verbal agreement with her brother, who undertook for her son, then a minor, to give her son certain land in consideration of his releasing his claim to the personal estate of his father, deceased, and the mother gave to the son possession of the land, which he used and improved as his own until his death, and the son executed a release after his coming of age, according to the contract, a specific performance of the agreement was denied, on the ground that it was not clearly and satisfactorily established. *Simmons v. Hill*, 1 D. 398.

Where the evidence adduced in support of a bill for the specific performance of an alleged agreement to convey an estate is adjudged by the court to show merely an intent on the part of a wealthy father, while in life, to give to his son that estate, which intent

the father, from forgetfulness or some other cause, never executed, the bill will be dismissed, with costs. *Taylor v. Staples*, 5 R. 556.

A father, possessed of great wealth, makes upon his account-book an entry to the credit of a son, in these words: "By further allowance, to pay for house, etc., five thousand dollars"; and long after the death both of father and son the legal representatives of the son, by suit in equity, seek to recover from the legal representatives of the father the said sum, with interest from the date of said entry (May 30, 1837). Held, that the entry is but the indication of an intention on the father's part, and not a promise founded upon a consideration cognizable by a court of equity; neither the fact that the father had trained up the son in idleness as the heir presumptive of inexhaustible wealth; nor the fact that this "allowance" was consistent with a "family arrangement" existing at the date of said entry; nor the fact that unless this claim of five thousand dollars and interest was allowed and paid, would this son receive of his father's accumulations so much as was received by his brothers and sisters respectively, — constituting a valuable consideration, upon which alone the court must act, unheeding a consideration merely "moral" or "meritorious." *Ib.*

39. The burden of proof. — To decree specific performance of a contract, the making of the agreement and its terms, the consideration upon which it was founded, and the time of its execution must be clearly established. *Hudson v. Layton*, 43 D. 161.

Specific performance will not be enforced where the time of the making of the agreement and its consideration are left in doubt and uncertainty. *Ib.*

Where a decree for specific execution of a contract for sale of lands is sought, the contract must be proved. *Rankin v. Simpson*, 57 D. 668.

A vendor can seldom ask the interposition of equity to specifically enforce a parol contract. He must show that he will be prejudiced by its non-performance, as that the vendee had been given and has retained possession. *Printup v. Mitchell*, 63 D. 258.

The terms of a parol contract for sale of land must be indubitably established, and must be free from all doubt or ambiguity, in order to justify a court of equity in enforcing its performance. *Blanchard v. McDougall*, 70 D. 458.

40. The judgment or decree; its form, and how entered. — In decreeing specific performance, a court of equity must have some certain and specific act which ought to be performed by the delinquent party to act upon, and it will decree that it be performed; but it cannot enter a general decree that in future the delinquent party

For Index to Notes in American Decisions and American Reports, see Volume I.

shall perform the acts required of him by his contract. Such a decree would be too general and indefinite. *Atlantic etc. R. R. Co. v. Speer*, 79 D. 305.

In a decree for specific performance, the same shall be final for a conveyance, and if not complied with, a decretal order appointing a commissioner to execute the decree should be entered. *Sproule v. Winant*, 18 D. 164.

In a suit for the specific performance of an agreement for the sale of a tract of land, which provided that payment should be made in installments, by the giving of bonds, the decree should not direct a sale of the entire tract of land, and the proceeds applied to the payment of the deferred installments as well as those then due; but the purchaser should be directed to execute the bonds as agreed, and a vendor's lien retained on the land for their payment. *Watts v. Kinney*, 23 D. 266.

A contract agreeing to pay a specific sum in gold coin, or upon failure thereof to pay such further sum as may be equal to the difference in value between gold coin and legal-tender notes, belongs to the class of contracts provided for in the so-called specific-contract act of California, and may be enforced according to its meaning; and the meaning of such contract is, that the maker will pay in gold coin, or if he does not do so, in legal-tender notes at their gold value, and a judgment may be rendered on such contract, payable in gold coin alone. *Lane v. Gluckauf*, 87 D. 121.

The California specific-contract act was not intended to legalize contracts which without it were illegal, but to provide a remedy for enforcing certain contracts, if held to be legal. *Id.*

41. What relief may be granted, generally.*—Courts of equity, in some cases, will decree specific execution, not according to the letter of the contract, if that will be unconscionable, but they will modify it according to the change of circumstances. *Wynn v. Garland*, 68 D. 190.

Where a contract is entire, equity will decree an entire performance or a total rescission; it cannot rescind as to a part and affirm as to the residue which has been performed. If the rights of third persons are involved, the parties must be left to their remedies at law. *Johnston v. Mitchell*, 10 D. 727.

One who has contracted to convey lands will not be compelled to convey a part to the grantee of his obligee, but such grantee is entitled to a decree compelling a conveyance of the whole to his grantor, as provided in the original contract. *Hancock v. Hancock*, 15 D. 92.

If it appear that complainant is entitled to a conveyance of land, but its quantity

* Partial performance, when may be compelled, see note, 12 D. 324.

and location are uncertain, a survey should be ordered. *Id.*

Affirmative relief to a defendant, not responsive to the prayer of the plaintiff's bill, may be decreed where the equities of the whole case disclosed by the pleadings and proofs require it. *Owings's Case*, 17 D. 311.

Specific performance of a parol agreement will be decreed against defendants who set it up and join in a prayer for its specific execution. *Squire v. Harder*, 19 D. 448.

A court denying specific performance may retain the bill and decree repayment of the consideration money paid on a parol agreement for the sale of land, but will deny costs to either party. *Pinnock v. Clough*, 42 D. 521.

A court of equity will decree specific performance of an agreement for exchange of lands, when, on the faith of such agreement, and in pursuance thereof, plaintiff purchased the land which he was to convey in exchange, if at the time for the exchange plaintiff is ready and willing to perform on his part, but defendant on his part fails to perform, in that he tenders a deed not signed by his wife, her refusal being induced by himself after she had consented to the agreement to convey, and he refuses, in lieu of her signature, to give an indemnity against any future claim for dower which she may have in such lands; and in granting such relief the court may order that the conveyances be so made between the parties that the plaintiff will hold an indemnity in the land which he conveys to defendant, so as to secure him against any future claim to be set up by defendant's wife. *Young v. Paul*, 64 D. 458.

42. How far relief is discretionary.—Specific performance of contracts is always addressed to the discretion of courts of equity, and they seldom, if ever, extend relief to one who has willfully violated his part of the contract. *Grundy v. Edwards*, 23 D. 409; *Young v. Daniels*, 63 D. 477; *Wynn v. Garland*, 68 D. 190. Or where to do so would be inequitable to the other party to the contract. *Bryan v. Loftus*, 39 D. 242; *Johnson v. Hubbell*, 66 D. 773.

Relief is not matter of right in either party to suit for specific performance, but it is granted or withheld, according to the circumstances of each case, when the rules or principles of equity will not furnish any exact measure of justice between the parties. *Young v. Daniels*, 63 D. 477; *Johnson v. Hubbell*, 66 D. 773.

Hence it requires much less strength of case on the part of the defendant to resist a bill to perform a contract than it does on the part of the plaintiff to maintain a bill to enforce a specific performance. *Trigg v. Read*, 42 D. 447.

While an application for specific performance is always addressed to the sound dis-

For Index to Notes in American Decisions and American Reports, see Volume I.

cretion of the court, yet where a contract respecting real estate is in writing, and is in its nature and circumstances unobjectionable, it is as much a matter of course for a court of equity to decree a specific performance of it as it is for a court of law to give damages for a breach of it. *Brewer v. Herbert*, 96 D. 582.

The discretion which the chancellor possesses in suits for specific performance of contracts is not arbitrary or capricious; it must be regulated on grounds which will make it judicial. *Seymour v. Delancy*, 15 D. 270.

43. What title or conveyance plaintiff will be compelled to accept.*—A specific performance of a contract for the conveyance of a good and sufficient title to real property will not be decreed, unless the grantor can place in the hands of the grantee all the muniments of title, sufficient to enable him to make out a title in ejectment. *Ross v. Grimbail*, 4 D. 711.

Equity will not compel one to accept a deed for part of a tract of land agreed to be conveyed, and to receive compensation for the residue. *McKeas v. Reel*, 12 D. 318. In such a case, the vendee may take the safe land and compensation for the residue, or may refuse to take any part, and go for compensation for the whole land. *Rankin v. Maxwell*, 12 D. 431.

A contract to give a quitclaim deed has reference to the title at the time the contract was entered into; not to one subsequently acquired. *Woodcock v. Bennet*, 13 D. 568.

Specific performance may be decreed, if it appears by the report of a master that a perfect title can be made to the purchaser at the time of making such report, unless the purchaser has been materially injured by the delay. *Ref. Prot. Dutch Church v. Mot*, 32 D. 613.

A party sued for specific performance of an agreement to lease lands can only be compelled to execute a lease containing the usual provisions, where nothing was said as to its terms, at the time when the agreement was made. *Baton v. Whitaker*, 44 D. 586.

Equity ought not to enforce specific performance of a contract for the purchase of lands, when the vendor's title is derived from such a judicial sale as has been pronounced unauthorized and illegal by the appellate court. *Young v. Rathbone*, 84 D. 151.

Equity will not compel a purchaser to accept a title depending upon an illegal and invalid sale while it remains open to review at the discretion of a court, although the judgment unreversed might be conclusive upon the party's rights. *Id.*

A vendee acting in good faith will not be compelled to accept a deed after the time fixed for delivery thereof has passed, and circumstances have materially changed, and the value of the property depreciated. *Id.*

The vendor is bound to convey title to land which he sells and covenants for in his obligation; and if from his negligence or default the title has been lost, or the property becomes encumbered by judgments, taxes, forfeiture, or otherwise, before the time for conveying the same, or before he offers to perform his contract, or before a rescission of the contract, he cannot insist upon performance by the other party until he relieves the title from such subsequent encumbrance. *Cooper v. Tyler*, 95 D. 442.

Equity will not compel a vendee to take an imperfect or defective title, but a pecuniary charge against which adequate security has been given does not constitute a defect in title; and equity will enforce the agreement to convey where a perfect title can be made at the time of the decree. *Brewer v. Herbert*, 96 D. 582.

Where a vendor contracted to sell a house and lot, the fact that at the date of the contract there was a judgment against the vendor from which he had entered an appeal, and given bond with ample security to pay the amount of the judgment, with costs, in case he should fail to prosecute his appeal with effect, was held not to constitute a defect or encumbrance upon the title which would prevent a specific execution of it. *Id.*

44. Recovery of interest.—Where a specific performance cannot be decreed, the court should decree the repayment of the purchase-money and interest, together with the value of the lasting improvements. *Johnston v. Glancy*, 23 D. 45.

45. When compensation in damages will be adjudged.—A bill for specific performance of a parol agreement, which has been denied because of failure to make out a proper case, will be retained by a court of equity for the purpose of granting compensation to one who, in faith of said agreement, has made valuable improvements, and whose remedy at law is incomplete. *Aday v. Echols*, 52 D. 225.

Where specific performance has been denied, and compensation allowed, the land may be charged with the amount ascertained to be due to the complainant, as against the vendor and his representatives, unless some circumstances render such a decree improper. *Id.*

Upon a bill for a specific performance of a contract for the conveyance of land, if the vendor's title is doubtful to a part, the court will not compel him to give land out of the same survey, to which his title is clear, in lieu of the land sold, but will give compensation in damages for that portion to which the title is doubtful; and the vendor having

* See also VENDOR AND PURCHASER, 7, 64.

For Index to Notes in American Decisions and American Reports, see Volume I.

acted in good faith, the measure of compensation is the price paid and interest. *Kelly v. Bradford*, 8 D. 656.

Equity will not ordinarily decree compensation in damages to a party who, when he files his bill for specific performance of a contract for the conveyance of land, knows that the contract cannot be specifically performed or decreed, but will, in such case, leave him to his action at law for a breach of the contract. *McQueen v. Chouteau*, 64 D. 178.

Equity will decree specific performance where the terms of an agreement have not been strictly complied with, or where such terms are incapable of being strictly complied with, if there has not been gross negligence in the party, and it is conscientious that the agreement should be performed, and if compensation may be made for the injury occasioned by the non-compliance with the strict terms; for the doctrine of such courts is not forfeiture, but compensation. *Wynn v. Garland*, 68 D. 190.

Equity has jurisdiction to grant compensation in all cases of bills for specific performance, though denying the relief sought by the bill, but should exercise it only under special circumstances and upon peculiar equities. *Rider v. Gray*, 69 D. 135.

If the wife of a vendor refuses to release her dower in land contracted to be sold by him, and the vendee is willing to take such title as the husband has to give, he may enforce the performance of the contract, and have an abatement of the purchase-money in compensation for the right of dower left outstanding. *Wright v. Young*, 70 D. 453.

An inchoate right of dower outstanding is a defect in title, and an encumbrance upon the estate, but its value is susceptible of accurate calculation. *Id.*

A court of equity may, in cases where the party is not entitled to specific performance, grant relief by decreeing the repayment of the money expended on the faith of the contract. *Green v. Drummond*, 1 R. 14.

46. Measure of damages in lieu of performance. — The measure of compensation upon denying a bill for specific performance is the amount paid on the contract, with interest, when there is no defense made on the merits. *Rider v. Gray*, 69 D. 135.

The measure of compensation, if the loss is not imputable to the vendor, is the value of the land at the date of sale, with interest from the time the purchase-money fell due. *Rankin v. Maxwell*, 12 D. 431.

SPEEDY TRIAL.

Right of accused to, see TRIAL, 122.

SPENDTHRIFTS.

For analogous titles, see GUARDIAN AND WARD; INFANTS; INSANE PERSONS.

1. The disability, and how established. — It is competent for a statute to

make an adjudication of a spendthrift's disability relate back to the time of the commencement of proceedings against him; history of legislation upon this subject given. *Chandler v. Simmons*, 93 D. 117.

2. Invalidity of contracts by. — Under section 10, chapter 109, General Statutes of Massachusetts, 1860, all contracts of a spendthrift, except for necessities, and all sales or transfers of property made by him pending proceedings against him, are void; and an adult's ratification by a sealed instrument of a conveyance of real estate made by him while a minor is a void contract, if executed after a copy of a complaint, under section 9, chapter 109, of said statutes, to place him under guardianship as a spendthrift, and of the order of notice thereon, has been filed in the registry of deeds, and after a guardian has been appointed by the probate court, and while an appeal is pending in this court, which afterwards affirms the decree of appointment. *Chandler v. Simmons*, 93 D. 117.

A spendthrift under guardianship cannot even make an acknowledgment that will take his debt out of the statute of limitations; but his guardian may bind the ward's estate by such an acknowledgment. *Id.*

3. Powers of the guardian. — A guardian of a spendthrift has authority, as such, to sell trees standing on his ward's land, and may receive the money, or take notes therefor, payable to himself. *Thompson v. Boardman*, 18 D. 684.

The ward cannot, after the guardianship ceases, discharge such notes; more especially if the ward is indebted to the guardian for advances made. *Id.*

If none of the timber had been taken during the guardianship, and after its termination the ward had refused to allow it to be taken, such facts might constitute a good defense to an action on the note. *Id.*

The guardian of an adult may avoid any conveyance of property executed by his ward while a minor which might be avoided by the ward himself if capable of exercising the right; or where, after he is of full age, he is unable to exercise his privilege by reason of mental or legal incapacity. *Chandler v. Simmons*, 93 D. 117.

A deed obtained by undue influence, though voidable only by the party wronged, may be avoided by a guardian afterwards appointed. *Id.*

SPIRITUOUS LIQUORS.

See INTOXICATING LIQUORS.

SPRINGS.

Protection of property in, see WATERCOURSES, 16.

STAGE PROPRIETORS.

As common carriers, see CARRIERS, 4, 61, 90.

For Index to Notes in American Decisions and American Reports, see VOLUME I.

STAKEHOLDERS.

Rights and liabilities of, see **WAGERS**, 6, 7.

STALE DEMANDS.

How regarded in equity, see **LIMITATIONS OF ACTIONS**, 58.

STAMPS.

Under internal revenue laws, see **REVENUE**, 8, 9.

STARE DECISIS.

Doctrine of, see **COURTS**, 11.

STATE COURTS.

Conflict of jurisdiction between federal courts and, see **HABEAS CORPUS**, 2.

Jurisdiction of, over offense of counterfeiting, see **COUNTERFEITING**, 1.

Of original jurisdiction, see **COURTS**, III.

Power of, to enforce liens upon vessels, see **SHIPPING**, 52.

Precedence between federal courts and, see **JURISDICTION**, 10.

Suits by or against national banks in, see **BANKS AND BANKING**, 73.

STATE LAWS.

Adoption of, in federal courts, see **COURTS**, 12.

Giving liens upon vessels, validity of, see **SHIPPING**, 51.

Relative to uses and trusts, see **TRUSTS**, 22.

STATE OF DEMAND.

Form and requisites of, see **PLEADING**, 12-20.

STATE PAPERS.

As evidence, see **EVIDENCE**, 222.

STATEMENT OF FACTS.

In confession of judgment, see **JUDGMENT**, 145.

On appeal, see **APPEAL**, 99.

On writ of error, see **ERROR**, 18.

STATES.

[Includes decisions relative to the several states as members of the confederation constituting the Union; their powers and sovereignty; comity between them; dealings between state and citizen; the state's priority; actions by or against a state, etc.]

Auditors of, see **OFFICERS**, 53.

Cannot surrender foreign fugitives, see **EXTRADITION**, 3.

Extradition between, see **EXTRADITION**, II.

Insolvency laws of, have no effect outside of, see **INSOLVENCY**, 4, 5.

In what, to indict for murder, see **HOMICIDE**, 16.

Judicial notice of laws of, see **EVIDENCE**, 14, 15.

Jurisdiction as affected by boundaries of, see **JURISDICTION**, 6.

Mandamus to officers of, see **MANDAMUS**, 12, 13.

Power of, to control law merchant, see **BILLS AND NOTES**, 237.

Powers of, in relation to regulations of commerce, see **COMMERCE**, 3.

Powers of, over navigable rivers, see **NAVIGATION**, 4.

Powers of, regarding patent rights, see **PATENTS**, 1.

Powers of, respecting the militia, see **MILITIA**, 1.

Powers of, to regulate fisheries, see **FISHERIES**, 6.

Powers remaining in, see **CONSTITUTIONS**, 7.

Relinquishment by, of right to tax, see **TAXES**, 20.

Secretary of, see **OFFICERS**, 57.

Set-off in actions against, see **SET-OFF**, 26.

State canals, see **CANALS**, 4.

Statutes of, as evidence, see **EVIDENCE**, 216.

Stealing in one, and carrying into another, see **LARCENY**, 16.

Suit pending in one state, when abates suit in another, see **ABATEMENT**, 3.

Title of, to public lands, see **PUBLIC LANDS**, 2.

Treasurers of, see **OFFICERS**, 59.

Validity of statutes of confederate, see **WAR**, 27.

What statutes are within police power of, see **STATUTES**, 28.

When entitled to writ of error, see **ERROR**, 35.

1. General nature of the confederation of states. — The union of states is perpetual and indissoluble, and no state has the right to secede therefrom. *Chancery v. Bailey*, 95 D. 350.

2. Admission into the Union. — The territorial courts of Wisconsin were in existence, and judgments could be rendered by them, after the adoption of the state constitution, and before its approval by Congress and admission of the territory as a state. *How v. Kane*, 54 D. 152.

The territorial officers, on the admission of Kansas as a state, became *ad interim* state officers. They could do no act prohibited by the constitution to regulate state officers of like functions, but were not obliged to follow the mode of procedure in the transaction of public business prescribed for the regular officers of the state government. *State v. Hitchcock*, 81 D. 503.

The territorial legislature, being in session when the act of admission was passed, had power to continue in the discharge of the duties of that department until superseded, according to the mode of procedure prescribed in the organic act, and the laws so passed were valid, provided they were not in conflict with the constitution of the United States or the state. *Id.*

Missouri was admitted into the Union, and

For Index to Notes in American Decisions and American Reports, see Volume I.

recognized as one of the states, on the same terms, and with the same powers, as the original states. Her admission was a direct and positive declaration that her constitution was republican in form, and not inconsistent with the constitution of the United States. She reserved the exclusive right to alter, amend, or abolish her constitution whenever her people might deem it necessary for their safety and happiness. *Blair v. Ridgely*, 97 D. 248.

3. Powers reserved to the states. — The commonwealth has succeeded to so much of the prerogative of the king as belonged to him as *parens patriæ*. *Com. v. Baldwin*, 26 D. 33.

The state may reserve the right to execute and serve process in any territory which she may cede to the United States. *State v. Dimick*, 37 D. 197.

A state has the same undeniable and unlimited jurisdiction over all persons and things within its limits as any foreign nation, unless such jurisdiction was withheld or limited by the federal constitution. *Chancery v. Bailey*, 95 D. 350.

The respective powers and duties of the national and of the state governments stated. *Com. v. Kimball*, 35 D. 326.

4. Sovereignty is that public authority which commands in civil society, and orders and directs what each citizen is to perform to obtain the end of its institution. *Chancery v. Bailey*, 95 D. 350.

Rights which are a part of state sovereignty, conferred for public good, cannot be lost by disseisin. *Treat v. Lord*, 66 D. 298.

5. Comity between states — Conflict of laws. — The penal laws of one state can have no operation in another state; they are strictly local. *Scoville v. Canfield*, 7 D. 467; *Dickson v. Dickson*, 24 D. 444.

No principle of comity among neighboring communities can be extended to give force and effect to the penal laws of one society in the territory of another, nor of one of the states of the American Union in another. *Dickson v. Dickson*, 24 D. 444.

Nothing in the law or comity of nations requires the courts of one state to give effect to the law of another state which is in derogation of the former's laws, and in violation of rights that have vested by force thereof. *McLean v. Hardin*, 69 D. 740. S. P., *Mahorner v. Hooe*, 48 D. 706; *Roche v. Washington*, 81 D. 376; *Donovan v. Pitcher*, 25 R. 634. And in the conflict of laws, when it must often be a matter of doubt which shall prevail, the court which decides will prefer the law of its own country to that of the stranger. *Smith v. McAtee*, 92 D. 641.

Comity is overruled by positive law, and it is only in the silence of any particular rule affirming, denying, or restraining the operation of foreign laws that courts of justice

presume a tacit adoption of them by their own government. *Id.*

Courts of a state have perfect jurisdiction over all personal property as well as real, within its limits, belonging to a married woman, and they have a right to protect both from the debts of the husband; if, therefore, the legislative enactments of one state in regard to the property of the wife conflict with the laws of another state in which the husband and wife are domiciled, it cannot be made a question in the courts of the former which shall prevail; but where there is no constitutional barrier, these courts are bound to observe and enforce the statutory provisions of their own state. *Id.*

A cause of action accruing in Iowa, under a statute rendering railway corporations liable to their employees for injuries by the negligence of their co-employees in the operation of such railway, may be enforced in Minnesota, although there is no corresponding statute there. *Herrick v. Minneapolis etc. Ry Co.*, 47 R. 771.

Defendant's dog, owned and kept in Massachusetts, strayed into an adjoining state, and bit plaintiff. In action of tort in Massachusetts for the injury, there was no evidence that the statute of such adjoining state made the injury actionable, nor was it proved that the defendant had knowledge that his dog was accustomed to bite mankind, and therefore liable at common law. *Held*, that the action would not lie, although the statute of Massachusetts gives an action for such injuries within the state. *Le Forest v. Tolman*, 19 R. 400.

An action was brought in New York, to render a stockholder of an Iowa corporation individually liable for a debt of the corporation on account of the failure to file the articles of incorporation in the office of the secretary of state, as required by the Iowa law in the case of all corporations except railroad companies. The statute provided this remedy after execution should be returned unsatisfied against the corporation. The Iowa supreme court in a similar action against another stockholder of the same corporation had held, by a divided court, after the commencement of this action, that the filing was not requisite because the corporation in question was a railroad company. No payment had been obtained against the corporation. *Held*, that this action could not be maintained. *Jessup v. Carnegie*, 36 R. 643.

6. Actions by or against states. — 1. *By a state.* — One state of this Union may sue in the courts of any other state thereof. *State v. Woram*, 40 D. 378; *Spencer v. Brockway*, 13 D. 615.

A state, as a political corporation, has a right, independent of any statutory provision, to institute a suit in any of her courts, whether it be required by her pecuniary in-

For Index to Notes in American Decisions and American Reports, see Volume I.

terests or the general public welfare. *People v. St. Louis*, 48 D. 339.

A suit the subject of which is local must be commenced by the state in the county of its locality, unless a special statute authorizes it to be commenced elsewhere. *Ib.*

The state is the real plaintiff where the treasurer sues and recovers judgment for its use. *Com. v. Baldwin*, 26 D. 33.

In a civil action brought by the people of the state against alleged conspirators, to recover money fraudulently obtained from a municipal corporation, — *held*, that the corporation, and not the state, was the proper party plaintiff. *People v. Ingersoll*, 17 R. 178.

The proper party to maintain a civil action for a tort or wrong to property is one who as trustee, special property man, bailee, or general owner has been pecuniarily damaged; and the state cannot, any more than a private individual, maintain a civil action for the recovery of money, except upon proof of title. *Ib.*

The relation of principal and agent does not exist between the state and municipal corporations in respect to the exercise of corporate functions; and money raised by municipal corporations for corporate purposes, but fraudulently obtained by wrongdoers, does not belong to the state, either in the capacity of trustee, principal, or owner, and cannot be sued for by the state without express legislative authority. *Ib.*

2. *Against the state.** — The sovereign cannot be sued unless by its own consent. *Hunsaker v. Borden*, 63 D. 130; *United States v. Murdock*, 89 D. 651; or unless there is an enactment of the legislature providing the manner and in what courts she may be sued. *Divine v. Harvie*, 18 D. 194. The remedy of a party upon a contract with the state is by an appeal to the legislature, who, it is fair to presume, will make provision for its full execution, and do ample justice to the party with whom it may have contracted. *Michigan State Bank v. Hastings*, 41 D. 549.

A state is not embraced by an act made to operate between individuals, unless such intention is apparent in the act; and an act subjecting the debts due a judgment debtor to his creditors does not embrace a debt due by the state. *Divine v. Harvie*, 18 D. 194.†

A state cannot be made a garnishee, nor can the auditor and treasurer be made parties to a suit, in place of the state, to obtain a warrant and money from the treasurer. *Ib.*

A creditor of the state cannot be compelled, by bill, under the act subjecting chases in action of a debtor to the satisfaction of his creditor's judgment, to assign his

warrants on the treasury, or otherwise transfer the demand to his creditor. *Ib.*

A demand on the state is not a chose in action within the statute mentioned. *Ib.*

Creditors of a state have nothing to rely upon except her good faith, and she has equally the power to postpone the time of payment or to refuse to pay at all. *Hunsaker v. Borden*, 63 D. 130.

One has no right to a remedy against the government or a subdivision thereof which cannot be taken away by the government. *Ib.*

A state can neither be sued nor be indicted; but such immunity does not pass to the vendees of her property or rights. *Delaware Division Canal Co. v. Com.*, 100 D. 570.

The constitution of Alabama provided that "suits may be brought against the state in such courts as may be by law provided." The legislature made provision accordingly, by a statute which was afterward repealed. *Held*, that the repeal was constitutional, and abated pending suits. *Ex parte Alabama*, 23 R. 567.

7. *Priority of the state.* — If the state take a particular security or mortgage, it is not thereby deprived of its general priority in cases to which it is entitled by law. *Lenoir v. Winn*, 6 D. 597.

The commonwealth is not bound by a statute limiting liens of judgments to a certain period, if not named. *Com. v. Baldwin*, 26 D. 33.

The state has no priority to the payment of its debts, by virtue of the act giving such priority to the lord proprietary of Maryland, that act being confined to the proprietary and his heirs, and not being in existence at the time of the Revolution. *State v. Bank of Maryland*, 26 D. 561.

By virtue of the common law, Maryland has priority in the payment of its debts, in the course of the distribution of the debtor's property, where an individual creditor has no antecedent lien. *Ib.*

The priority of the state is lost by the valid assignment of the debtor's (a banking corporation's) property in trust for the equal benefit of all its creditors; and the state can only come in with the other creditors. *Ib.*

8. *Dealings between state and citizen.* — A state is a corporation, and as such may be the payee of a note. *State v. Woram*, 40 D. 378.

Where a state, by an express act, ratifies an agreement made by its officers, except a condition subsequent contained therein, and takes possession of the property under such agreement, it is a ratification of the whole agreement, the exception being null and void, and is not a breach of that condition. *Michigan State Bank v. Hastings*, 41 D. 549.

A state has power to make a contract which shall bind it in future. *State v. Bank of Smyrna*, 73 D. 699.

* Actions against the sovereign, see note, 12 D. 517-519.

† Sovereign or state not bound by general words in statutes, see note, 15 D. 880-883.

For Index to Notes in American Decisions and American Reports, see Volume I.

A state undoubtedly has capacity to take by deed or devise, and a release to it by a grantee of land will be operative and effectual to divest the title of the grantee. *Dixie v. Miller*, 78 D. 571.

A state, when it enters into a contract with its citizens, can claim no exemption from the rules of law applicable to contracts between individuals. All acts which relate to the contract, and all declarations of agents which, in the case of a citizen, would affect the contract, must be held as in like manner affecting a contract made by the state. *Patton v. Gilmer*, 94 D. 665.

When the state breaks its contract, duly made by its authorized agents for the construction of a public work, it is liable for prospective profits. *Danolds v. State*, 42 R. 277.

With a view to raising a revenue, a state statute required the inspection of tobacco, and the storing of it in the state tobacco warehouses for that purpose. The plaintiff stored his tobacco in conformity with that law, and while so stored it was destroyed by fire. The plaintiff was enabled by special leave of the legislature to sue therefor. He brought action therefor, alleging that the loss occurred through the negligence of the state. *Held*, on demurrer, that there was no contract or obligation on the part of the state to keep the tobacco safe, and that the state was not liable for the loss as bailor, or in any other capacity. *Moore v. Maryland*, 28 R. 483.

9. State bonds. — Under an act of the legislature, bonds of the state were issued to raise money to be used in the purchase of lands to be sold to settlers thereon, and the interest on the purchase-money of the lands, when sold, to be applied by the state treasurer to the payment of the interest on the bonds issued under the act. *Held*, that the act constituted part of the contract with the holders of the bonds, and that the state had no right to divert the fund arising from the interest on the purchase-money of the land from the payment of the interest on such bonds. When the state borrows money on bonds issued by it for that purpose, and pledges a certain fund for the payment of the interest to accrue thereon, such pledge is a part of the contract with the holders of the bonds, and the state has no right, under the constitution of the United States, to impair the obligation of the contract by diverting the fund to other purposes. *State v. Cardoso*, 28 R. 275.

STATE'S EVIDENCE.

Rights of accomplice who testifies for the state, see ACCUSARIES, etc., 14.

STATIONS.

Duty of railroad company as to safety of, see RAILROAD COMPANIES, 70.

STATU QUO.

Putting adverse party in, on disaffirmance of contract, see INFANTS, 30.

Putting other party in, on rescission, see CONTRACTS, 144; SALES, 109.

STATUS.

Of illegitimate children, see PARENT AND CHILD, 19.

Of Indians, see INDIANS, 1.

Of infants, see INFANTS, 1.

Of slaves, see SLAVERY, 2.

Of the Confederate States, see WAR, 35.

STATUTE OF FRAUDS.

Effect of, on auction sales, see AUCTION, 6.

Effect of, on contracts for sale of land, see VENDOR AND PURCHASER, 1-12.

Effect of, on contracts sought to be enforced, see SPECIFIC PERFORMANCE, 17-22.

Effect of, on execution sales, see EXECUTION, 94.

Effect of, on marriage settlements, see MARRIAGE AND DIVORCE, 20.

Effect of, on transfers of crops, see CROPS, 3.

How pleaded, see PLEADING, 35.

Requirements of, generally, see CONTRACTS, III.

Requirements of, as to sales of chattels, see SALES, 15-24.

Requirements of, respecting guaranties, see GUARANTY, II.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES.

[Includes the enactment, constitutionality, interpretation, and operation of acts of the legislature; and also how they may be amended or revised, and rules relative to their repeal and revival. For statutes bearing upon particular subjects, see the titles of the subjects in question.]

Abolishing dower, see DOWER, 32.

Abolishing imprisonment for debt, see ARREST, 8.

Affecting trial by jury, see TRIAL, 118.

As means of evidence, see EVIDENCE, 214-222.

As to interstate extradition, see EXTRADITION, 7.

As to observance of Sunday, see SABBATH-BREAKING, 1.

As to removal of causes, see REMOVAL OF CAUSES.

As to weights and measures, see WEIGHTS AND MEASURES, 2.

Authorizing sales of decedent's land, see EXECUTORS AND ADMINISTRATORS, 48.

Authorizing sales of ward's lands, see GUARDIAN AND WARD, 20.

Authorizing searches for liquors, see INTOXICATING LIQUORS, 4.

Civil damage laws, see INTOXICATING LIQUORS, II.

For Index to Notes in American Decisions and American Reports, see Volume I.

Concerning licenses, constitutionality of, see **LICENSES**, 7.
 Concerning trade-marks, see **TRADE-MARKS**, 1.
 Constitutionality of excise laws, see **INTOXICATING LIQUORS**, 1.
 Constitutionality of poor-laws, see **POOR**, etc., 1.
 Containing grants, interpretation of, see **GRANTS**, 11.
 Contracts prohibited by, see **CONTRACTS**, 93.
 Creating liens, construction of, see **MECHANIC'S LIEN**, 1.
 Curing defects in married woman's acknowledgment of deed, see **ACKNOWLEDGMENT**, 17.
 Effect of foreign, giving liens, see **LIENS**, 13.
 Enforcing college discipline, see **COLLEGES**, 3.
 Exempting property from execution, see **EXECUTION**, 155.
 Exempting property from taxation, see **TAXES**, 20-29.
 Following words of, in indictment, see **INDICTMENT**, 18.
 For the protection of fish, see **FISHERIES**, 4.
 Giving action for negligently causing death, see **NEGLIGENCE**, 35.
 How to be pleaded, see **PLEADING**, 7.
 Imposing restrictions on marriage, see **MARRIAGE AND DIVORCE**, 2.
 Imposing taxes, constitutionality of, see **TAXES**, 3.
 In relation to military bounties, see **BOUNTIES**, 1.
 Insolvent laws, see **INSOLVENCY**, 1-5.
 Legal-tender acts, see **TENDER**, 22, 23.
 Limiting carrier's liability, see **CARRIERS**, 89.
 Limiting time within which acts must be done, see **TIME**, 2.
 Married women's acts, see **HUSBAND AND WIFE**, 41-53.
 Of Confederate States, validity of, see **WAR**, 27.
 Of 43 Elizabeth, see **CHARITIES**, 2.
 Of limitations, see **LIMITATIONS OF ACTIONS**, 1-4.
 Of limitations, effect of war on, see **WAR**, 34.
 Of the states, relative to uses and trusts, see **TRUSTS**, 21.
 Presumptions relative to, see **EVIDENCE**, 33, 34.
 Qualifying husband and wife as witnesses, see **WITNESSES**, 66.
 Regulating drainage, see **DRAINS**, 4.
 Regulating practice of medicine, see **PHYSICIANS AND SURGEONS**, 2.
 Relative to conveyances in fraud of creditors, see **FRAUDULENT CONVEYANCES**, 2.
 Relative to courts, constitutionality of, see **COURTS**, 1.
 Relative to descent, see **DESCENT**, 1, 2.
 Relative to dissolution of corporations, see **CORPORATIONS**, 167.
 Relative to eminent domain, see **EMINENT DOMAIN**, 3.
 Relative to ferry-boats, see **FERRIES**, 10.

Relative to going armed, see **CONCEALED WEAPONS**, 2.
 Relative to homesteads, constitutionality of, see **HOMESTEADS**, 1, 2.
 Relative to local improvements, see **MUNICIPAL CORPORATIONS**, 40.
 Relative to means profits, see **EJECTMENT**, 51.
 Relative to rape, construction of, see **RAPE**, 1.
 Relative to slaves, see **SLAVERY**, 3.
 Relative to trial by jury, see **TRIAL**, 2.
 Relative to trusts, requirements of, see **TRUSTS**, 17-23.
 Rendering parties and persons interested competent to testify, see **WITNESSES**, 35.
 Respecting railroads, see **RAILROAD COMPANIES**, 2, 3.
 Restricting right to vote, see **ELECTIONS**, 2.
 Taxing travel, validity of, see **TAXES**, 16.
 To suppress gaming, validity of, see **GAMING**, 1.
 What lapse of time bars actions under, see **LIMITATIONS OF ACTIONS**, 45.
 When judicially noticed, see **EVIDENCE**, 14-16.
 When void as regulations of commerce, see **COMMERCE**, 4-10.

- I. HOW ENACTED.
- II. CONSTITUTIONALITY; VALIDITY.
- III. INTERPRETATION AND EFFECT.
- IV. REPEAL, AND ITS EFFECT.

I. HOW ENACTED

1. General rules.*—A constitutional provision that no bill shall become law until read on three several days in each house of the general assembly does not contemplate that everything which is to become law by the adoption of such bill shall be thus read. *Dew v. Cunningham*, 65 D. 362.

A constitutional provision prescribing the style of laws will not invalidate a body of laws not themselves in such style, if the bill by which they were adopted pursued the prescribed style. *Id.*

If a law has been regularly promulgated according to the terms of the constitution, its invalidity will not be examined or passed upon by the judiciary on alleged irregularities or informalities committed by the general assembly in passing it, nor will parol evidence be received to show that the general assembly have not complied with the requirements of the constitution in passing it. *Louisiana State Lottery Co. v. Richoux*, 8 R. 602.

Every substantial part of a proposed enactment is a "bill," within the constitutional sense of the term, and must pass through all

* Power of courts to receive evidence to determine whether statutes were properly enacted, see note, 51 D. 616-623.

Sufficiency of such evidence, see notes, 51 D. 616-623; 55 D. 356-364.

Presumptions with respect to legality of enactment of statute, see note, 55 D. 357-364.

For Index to Notes in American Decisions and American Reports, see Volume I.

the constitutional stages of enactment before it becomes law. *State v. Platt*, 16 R. 647.

2. The necessary vote — Authentication. — A majority of all the members elected to either branch of the general assembly must concur in the final passage of a bill, under the constitution of Illinois, in order that it shall become a law. *Spangler v. Jacoby*, 58 D. 571.

The vote must be taken by ayes and noes and entered on the journal, on the final passage of a bill by either branch of the general assembly. *Id.*

In Illinois, a bill signed by the president of the senate and speaker of the house, and approved by the governor, would be conclusive of its validity and binding force as a law, except for the constitutional provision requiring that all bills, before they can become laws, shall be read three several times in each house, and shall be passed by a vote of a majority of all the members elect. *People ex rel. Barnes v. Starnes*, 85 D. 348.

The act of 1855 for compensating parties whose property may be destroyed by mobs and riots is not unconstitutional, under section 14, article 7, of the New York constitution, because it was not passed when three fifths of the members elected to each house were present. The article of the constitution relates to the state finances, while the act of 1855 does not impose a tax of any kind. *Darlington v. Mayor etc.*, 88 D. 248.

When a statute is authenticated by the signatures of the presiding officers of the two houses of the legislature, the courts will not search further to ascertain whether or not such facts existed as gave constitutional warrant to those officers to thus authenticate the act as having received legislative sanction in such manner as to give it the force of law. *Evans v. Browne*, 95 D. 710.

The New York constitution required certain laws to be passed by a two-thirds vote of the legislature. *Held*, 1. That such a law, not appearing on its face to have been passed by the required vote, was void; and 2. That the objection to the law need not be pleaded. *People ex rel. v. Comm'rs of Highways*, 13 R. 581.

The West Virginia constitution provides that "no bill shall be passed by either branch of the legislature without an affirmative vote of a majority of the members elected thereto." An act was passed by the affirmative vote of eleven senators, in a body which consisted, when full, of twenty-two members, one member having resigned after the opening of the session at which the act was passed. *Held*, that the court would not declare the act unconstitutional. *Osburn v. Staley*, 13 R. 640.

3. Approval. — The governor is an officer *de facto*, and his approval of acts of the legislature valid, where he holds over after expiration of his term, and after his succe-

sor has taken the oath of office, on the assumption of his re-election, in pursuance of the certificate of the state canvassers, and continues to so act as governor. *State v. Williams*, 68 D. 65.

An act is not invalid by reason of its having been approved on a day after the act of Congress admitting Kansas into the Union. *State v. Hitchcock*, 81 D. 503.

The constitution of Kansas does not require a record to be kept of the presentation of a bill to the governor for approval; but if it did, the fact that such directory provision as to a formal step was not complied with could not affect the validity of the law. *Id.*

Where the governor approves a bill, the constitution does not require that he should notify either house of the legislature of the fact, or that such notification, if made, should be entered on the journals. The date being no necessary part of the approval, it will be presumed that the bill was signed between the date of its passage and the final adjournment of that session of the legislature. *Id.*

When a bill has passed both branches of the legislature, and been signed by the proper officers, and sent to the governor for approval, it cannot be recalled except by the joint action of both. If the governor sends back the bill on the request of one house, any action it may take thereon is a nullity. *People v. Devlin*, 88 D. 377.

A bill passed by joint action of both houses, signed by their officers, and approved by the governor, and deposited in the office of the secretary of state, becomes a law, notwithstanding any action either house alone may take in regard thereto. *Id.*

4. Return without approval. — Under a section of the California constitution requiring all bills passed by the legislature to be presented to the governor for his approval, to be returned with his objections in case of non-approval, and providing, "that if any bill shall not be returned by the governor within ten days after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return," the governor sent to the legislature a bill not approved, with his objections, on the tenth day, and before the usual hour for adjournment. The legislature had, however, adjourned to the day following, and the messenger returned the bill to the governor, who retained it thereafter. *Held*, 1. That the governor had not returned the bill, within the meaning of the constitution; 2. That the legislature had not, by adjournment, prevented such return, the adjournment not being final; 3. That the court had jurisdiction to compel the governor, by *mandamus*, to cause the bill to be authenticated as a statute. *Harpenden v. Haight*, 2 R. 432.

For index to Notes in American Decisions and American Reports, see Volume I.

5. Entries in legislative journals.*—The journals of either branch of the legislature may be appealed to to show that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether. *Spangler v. Jacoby*, 58 D. 571; *Osburn v. Staley*, 13 R. 640; *Berry v. Baltimore etc. R. R. Co.*, 20 R. 69. And whenever it appears that the enrolled act differs from the bill as it passed, in a substantial matter, the judiciary department of the state may declare the whole act, or the part affected by the change, unconstitutional and void. *State v. Platt*, 16 R. 647.

When a bill is signed by both speakers and approved by the governor, the presumption is raised that it has been constitutionally adopted, but this presumption may be rebutted by the journals of the two houses. *People ex rel. Barnes v. Starnes*, 85 D. 348; *Spangler v. Jacoby*, 58 D. 571; *State v. McClelland*, 53 R. 814.

According to the adopted theory of legislation in Illinois, when a bill has become a law, there must be record evidence of every material requirement, from its introduction until it becomes a law, and this evidence is found upon the journals of the two houses. *People ex rel. Barnes v. Starnes*, 85 D. 348.

A bill purporting to be an appropriation act is not a law, though signed by the speakers of the two houses, and approved by the governor, where it does not appear from the journal of the house of representatives to have passed that body. *Id.*

A statute having the proper forms of authentication cannot be impeached or questioned upon mere parol evidence. *Berry v. Baltimore etc. R. R. Co.*, 20 R. 69.

The constitutionality of a statute cannot be attacked by introducing the journals of the legislature as evidence to contradict the statute roll. *Pacific R. R. Co. v. Governor*, 66 D. 673. But it seems that where the constitution requires a two-thirds vote for the passage of an act, courts may look into and beyond the record to see if it was passed as a majority bill or by the requisite two-thirds vote. *People v. Devlin*, 88 D. 377.

The legislative journals are not records; they are of no validity after an act has passed the legislature. *Pacific R. R. Co. v. Governor*, 66 D. 673.

The statute roll is the only absolute and conclusive proof of a statute; this record imports absolute verity, and cannot be contradicted. *Pacific R. R. Co. v. Governor*, 66 D. 673; *Sherman v. Story*, 89 D. 93; either by the legislative journals, or by the bill as originally introduced, or by the amendments attached to it, or by parol evidence. *Sherman v. Story*, 89 D. 93.

* Legislative journals as evidence, see notes, 61 D. 618-621; 85 D. 574, 575.

6. Publication, distribution, etc.—The objection that a statute was not published as required by the constitution is not maintainable when the constitution provides that a law shall not take effect until published and circulated, but gives no detailed directions, and the code provides that such acts shall take effect on the first day of July following the session, and the act in question was actually published in the volume of session laws before the first day of July following the session. The act took effect on that day by virtue of these general provisions. *Santo v. State*, 63 D. 487.

Part of an act may be made to take effect upon publication in newspapers, under a constitutional provision that if the legislature deem a law of immediate importance they may provide that it take effect by publication in newspapers. *Id.*

Publication of a statute is effected under the Indiana constitution, when the act is distributed, by the secretary of state, in a bound volume, in all the counties of the state. *State v. Bailey*, 79 D. 405.

Provisions as to the form of binding, color of materials, etc., of statutes, are directory only, and a failure of strict compliance with such provisions will not render the distribution of such statutes as are prepared and distributed any the less a publication of them. *Id.*

Eight and one half months is ample time to enable the secretary of state to publish and distribute specified laws, and courts will presume that he has done so, where he has been lawfully directed to do it. *Id.*

The correctness of publication or the existence of a statute cannot be tried as a question of fact, but must be determined as one of law by the court. *Sherman v. Story*, 89 D. 93.

Where an act of the legislature has been duly signed, certified, and published, evidence is inadmissible to show an error in the engrossing. *Mayor v. Harwood*, 3 R. 161.

7. Passing bill over governor's veto.—The legislature may provide a mode by statute for the authentication of laws returned to the legislature by the governor without his signature, and after reconsideration passed by both houses, when the constitution is silent as to the mode by which such laws shall be authenticated. *Pacific R. R. Co. v. Governor*, 66 D. 673.

8. The enacting clause.—A state constitution provided that statutes should be preceded by the formal enacting clause, "Be it enacted," etc. *Held*, that the provision was directory merely, and that the omission of such clause did not invalidate a statute. *Cope Girardeau v. Riley*, 14 R. 427. *Contra*, see *State v. Rogers*, 21 R. 738.

9. When a statute takes effect.—It was formerly the rule in England that acts of Parliament which were to take effect from

For Index to Notes in American Decisions and American Reports, see Volume I.

and after their passage should operate from the first day of the session. *Boston v. Cummins*, 60 D. 717.

A statute must be construed to speak from the first day of the session at which the act was passed; thus "next January" was held to mean the January following the beginning of the session, though the act was passed in that January. *Weeks v. Weeks*, 47 D. 358.

Public acts of the general assembly take effect from its rising, if not otherwise provided; and courts take judicial notice of the time when the session of the legislature terminates. *Perkins v. Perkins*, 18 D. 120.

A statute takes effect from its date, when no time is fixed, and there is no constitutional provision concerning it. And this rule is fixed beyond the power of judicial control. *Parkinson v. State*, 74 D. 522.

Where an act passed is but a regular exercise of legislative power, notice to the party to be affected by the same is unnecessary. *Wright v. Wright*, 56 D. 723.

A constitutional provision providing that every law shall be recorded, printed, published, and certified to the courts does not regulate the time when a law shall go into operation. *Parkinson v. State*, 74 D. 522.

The code of Iowa went into effect on July 1, 1851, and not at the date of its passage and approval; and the words "prior to the passage of this law," employed in section 1249, are in effect the same as if the word "heretofore" had been used, and either expression must relate to the time of taking effect, and not to the time of passage. *Charless v. Lamberson*, 63 D. 457.

In Maryland, an act not expressly providing when it shall take effect goes into operation only on the 1st of June next after the session of the legislature at which it was passed: See constitution of that state, section 31 of article 3. *Parkinson v. State*, 74 D. 522.

A statute takes effect at the time named therein, whether printed or not; and this, notwithstanding the requirement of the constitution that every law shall be printed in due time. *Id.*

The date of the certificate of the secretary of state appended to the published volumes of statutes will, in the absence of any suggestion which may lead to a more accurate inquiry, be taken to be the date of their publication and taking effect. *Attorney-General v. Foote*, 78 D. 689.

Whether a statute is in force at a given time is a question for the court to determine by judicial knowledge. *State ex rel. Brown v. Bailey*, 79 D. 405.

Where a statute provides that it shall take effect "from and after its passage," in computing the time when it takes effect the day of its passage is to be excluded. *Parkinson v. Brandenburg*, 59 R. 326.

II. CONSTITUTIONALITY; VALIDITY.

10. General principles. — 1. *Power of the courts to pass upon question of constitutionality.* — The judiciary has the power and it is its duty to determine whether a statute conflicts with the constitution, and in case of such conflict to declare the statute void. *Bailey v. Philadelphia etc. R. R. Co.*, 44 D. 593; *Hoke v. Henderson*, 25 D. 677; *Bailey v. Genry*, 13 D. 484; *Winter v. Jones*, 54 D. 379; *Pacific R. R. Co. v. Governor*, 66 D. 673; *Denham v. Holeman*, 71 D. 198; *Rison v. Farr*, 87 D. 52.

A statute in conflict with the constitution is not a legislative act, and cannot have the force of law. *Bailey v. Philadelphia etc. R. R. Co.*, 44 D. 593; *Boston v. Cummins*, 60 D. 717.

An act of the legislature must not infringe upon either the constitution of the United States or upon that of the state, and if it does so, it is absolutely void. *Rison v. Farr*, 87 D. 52.

In passing a legislative enactment, the law-making power but announces its will as defined by the constitution. The legal consequences resulting from the act are to be determined by the judiciary. *Wright v. Wright*, 56 D. 723.

Proceedings under an unconstitutional statute cannot be sustained, although they are so conducted as not to bear upon their face the objectionable features of the statute; or in other words, an unconstitutional law cannot be made operative by the magistrate adopting expedients and taking precautions not required by the statute. *Fisher v. McGirr*, 61 D. 381.

The courts must determine questions as to the power of the legislature under the constitution when such questions are properly presented, but cannot arrest the operation of a statute on the ground that it is unwise, unjust, or oppressive when no question of legislative power is involved. *Brodhead v. Milwaukee*, 88 D. 711. *S. P.*, *Armington v. Barnett*, 40 D. 705; *Taylor v. Newberne*, 64 D. 586; *Donahoe v. Richards*, 61 D. 256.

The courts cannot declare policy except as it is indicated by legislation or results from the spirit and object of the statutes. *Mathorner v. Hooe*, 48 D. 708.

A court cannot determine the reasonableness of a legislative act. *Moor v. Veasie*, 52 D. 655.

Courts have nothing to do with the wisdom, sound policy, or expediency of a law. *Winter v. Jones*, 54 D. 379.

The remedy for unjust or unwise legislation is not to be administered by the courts, but remains in the hands of the people. *People v. Mayor*, 55 D. 268.

2. *Their reluctance to declare statutes void.* — The power of courts to declare legislative acts unconstitutional is to be exercised with the most guarded circum-

For Index to Notes in American Decisions and American Reports, see Volume I.

spection and care. *Baughner v. Nelson*, 52 D. 694; *Santo v. State*, 63 D. 487; *Olmstead v. Camp*, 89 D. 221.

A statute should not be declared unconstitutional except in cases of plain and manifest violation of that instrument by the legislature. *Williamson v. Williamson*, 41 D. 636; *Tate v. Bell*, 26 D. 221; *State v. Reid*, 35 D. 44; *Lane v. Dorman*, 36 D. 543; *City of Louisville v. Hyatt*, 36 D. 594; *Bruce v. Schuyler*, 46 D. 447; *F. R. Steamboat Co. v. Foster*, 48 D. 248; *Lycoming v. Union*, 53 D. 575; *Sharpless v. Mayor etc. of Phila.*, 59 D. 759; *Mayor etc. of Baltimore v. State*, 74 D. 572; *Stewart v. Supervisors etc.*, 1 R. 238; *Hanson v. Vernon*, 1 R. 215; *Commonwealth v. Erie R'y Co.*, 1 R. 399.

Legislative acts are presumed to be constitutional, and their effect and operation can only be impeded by judicial powers, when they infringe some of the provisions of the constitution, or violate the vested rights of the people. Legislative acts are never pronounced unconstitutional or void in doubtful cases. *Davis v. Helbig*, 92 D. 646.

Fraud in obtaining an act of the legislature will not be presumed, but must be clearly proved before the court will pronounce the act void. *Derby T. Co. v. Parks*, 27 D. 700.

3. *Rules for determining question of constitutionality.*—The constitutionality of a legislative act cannot be called in question by the people; individuals alleging themselves to be injured thereby alone can raise the question. *People v. Rensselaer etc. R. R. Co.*, 30 D. 33.

A statute can be declared void only so far as it exceeds the legislative power, and only as to those whose rights are injuriously affected thereby, where it is assailed on those grounds. *Wellington's Case*, 26 D. 631.

Such act is voidable only, and not void. *Id.*

Strangers to the rights affected cannot take advantage of the grounds of avoidance of such a statute. *Id.*

A legislative enactment, which is palpably absurd, unnatural, unjust, or impracticable, is absolutely void, both here and in England. *Campbell's Case*, 20 D. 360.

Statutes calculated to operate against principles of common right, reason, and justice are null and void. *Flint River Steamboat Co. v. Roberts*, 48 D. 178. But compare *Flint River Steamboat Co. v. Foster*, 48 D. 248.

The constitution itself must be looked to in determining the validity of a legislative act. The general principles of justice, liberty, and right not contained or expressed in that instrument are not proper elements of a judicial decision upon it. *Sharpless v. Mayor etc. of Phila.*, 59 D. 759.

An act is valid if it be within the general grant of legislative power; that is, if it be in its character and essence a law, and if it be

not forbidden, expressly or impliedly, either by the state or federal constitution. *Id.*

Considerations of expediency and public policy are not regarded in deciding upon the constitutionality of a statute. *Mayor etc. of Baltimore v. State*, 74 D. 572; *Louisville etc. R. R. Co. v. Davidson County*, 62 D. 424; *Coffman v. Bank of Kentucky*, 90 D. 311.

A law is not unconstitutional because it may prohibit what a citizen may conscientiously think right or require what he may conscientiously think wrong. *Donahoe v. Richards*, 61 D. 256.

Conscientious belief of religious duty furnishes no legal defense to the doing or refusing to do what the state, within its constitutional authority, may require. *Id.*

The motives of the legislature in passing an act cannot be regarded by the judiciary upon the question of its constitutionality. *Mayor etc. of Baltimore v. State*, 74 D. 572.

The inhibitions of the constitution as to legislation are equally effective when they arise by implication as by expression, and this is the case when the legislative provision is repugnant to some provision of the constitution. *Page v. Allen*, 98 D. 272.

An act of the legislature may be unconstitutional in two ways: 1. Because it assumes or seeks to confer power not legislative in its nature; 2. Because it violates some specific provision of the national or state constitution. *Hanson v. Vernon*, 1 R. 215.

Where an act has been duly authenticated, and published as law by authority, the presumption is, that all the constitutional solemnities and prerequisites necessary to its valid enactment have been complied with; and this presumption exists until the contrary is clearly made to appear. But when it can be made clearly to appear that the particular bill, or section of a bill, although it may have all the forms of authentication, has never in fact received the legislative assent, the court is bound to look not only behind the printed statute-book, but beyond the forms of authentication of the bill as recorded in the office of the court of appeals, and if the evidence be clear and entirely satisfactory to the mind of the court, to decide accordingly. *Berry v. Baltimore etc. R. R. Co.*, 20 R. 69.

The court will not act upon the admission of parties that a statute has not been passed in the manner required by the constitution. Such fact must be shown either by the printed journals or the certificate of the secretary of state. *Happel v. Brethauer*, 22 R. 70.

11. *Powers of the legislature.*—The legislature has plenary power in respect to all subjects of civil government which it is not prohibited from exercising by the constitution of the United States and of the state. *Darlington v. Mayor etc.*, 88 D. 248. It does not follow, however, because there is

For Index to Notes in American Decisions and American Reports, see Volume I.

no restriction in the constitution prohibiting a particular act of the legislature, that such act is therefore constitutional. Some acts may be against the plain and obvious dictates of reason, and therefore void. *Bank of the State v. Cooper*, 24 D. 517.

An act submitted to the people for ratification, and approved, may be amended by the legislature without submitting the amendment to them. *Reapers' Bank v. Willard*, 76 D. 755.

The legislature may by act convey in trust, pledge, or mortgage, for the benefit of those who may aid in the construction of certain "internal improvements," a fund already existing and possessed by the state. It is not necessary to designate in the act all of the improvements to be aided by such fund; some may be mentioned, and others postponed until those first designated are put into successful operation. The trustees of the fund created by the act cannot be heard to impeach it. *Trustees v. Bailey*, 81 D. 194.

The requirement of the constitution that acts of the legislature be in articles and sections, in the same manner as a code is arranged, is directory in form, and looks more to convenience in adopting the law to codification than to its operative effect. *Hardesty v. Taft*, 87 D. 584.

The legislature has power to pass special acts for special purposes without infringing upon the operation of other general laws; and may except a particular class of cases from the provisions of a previously existing general law, without repealing such law. *Brodhead v. Milwaukee*, 88 D. 711.

In amending a law, the legislature may substitute any provision they please for any other provision, whether cognate or not, if the new section is not foreign to the subject indicated by the title of the law in which it is inserted. *Underwood v. McDuffee*, 93 D. 194.

The legislature of Ohio authorized the judges of the superior court to appoint trustees of a contemplated railway. *Held*, 1. That this was not an exercise of the appointing power, forbidden to the legislature by article 2, section 27, of the state constitution, such trustees not being public officers in the constitutional sense, and their appointment by the court being a legitimate function; 2. That the act was in violation of article 4, section 14, of the state constitution, prohibiting the judges from holding any other offices, such power of appointment being only an additional power or duty annexed to an existing office, and not a new office; and 3. The act was not in violation of article 2, section 20, of the state constitution, in not fixing the term of office and compensation of the trustees, such trustees not being "officers" in the sense of the constitution. *Walker v. Cincinnati*, 8 R. 24.

12. Retrospective laws. — 1. *General rule.* — The legislature, in passing retrospective laws, cannot disregard those fundamental principles of the social compact which underlie all legislation irrespective of constitutional restraints; and if the act in question is in clear violation of them, it is the duty of the judiciary to hold it abortive and void. The rule is, that although it is to be assumed that the legislature supposed they had authority to pass the particular retrospective act, and judged it to be reasonable and just, yet they may have erred; and if it is shown to the court, with entire clearness and certainty, to be so unreasonable and unjust in its operation upon antecedent legal rights that the action of the legislature cannot be vindicated by any reasonable intendment or allowable presumption, it is the duty of the court to declare it void. *Welch v. Wadsworth*, 79 D. 236.

The strength of a legal presumption existing in any one's favor cannot be weakened by subsequent legislative interference. *Davis v. Minor*, 28 D. 325.

2. *What laws are retrospective.* — Laws may be retrospective, if they affect an existing cause of action, or an existing right of defense, by taking away or abrogating the same, although no suit or legal proceeding then exists. *Clark v. Clark*, 34 D. 165.

An act repealing a statute of limitations is, with respect to actions pending which are barred by the statute, retrospective, unconstitutional, and void. *Woart v. Winnick*, 14 D. 384.

Where a statute, operating on facts existing at the time of its passage, attempts to impose upon one person a debt or duty to another, when no right and no obligation existed before its enactment, it is a retrospective law for the decision of a civil cause, and is therefore in violation of the constitution, and void. *Towle v. Eastern R. R. Co.*, 47 D. 153.

A statute amendatory of the charter of an insurance company, making the company's certificate of indebtedness conclusive evidence in all suits of the facts therein stated, is retrospective as to all causes of action originating prior to its passage, and is to that extent unconstitutional. *Hope Mut. Ins. Co. v. Flynn*, 90 D. 438.

A statute declaring adultery to be a cause of divorce, and giving power to the courts to grant divorces for adultery committed before as well as after its passage, is not a retrospective law within the meaning of the constitutional prohibition. *Jones v. Jones*, 5 D. 645.

A statute enacting that no words of limitation shall "hereafter" be necessary to devise a fee is not retrospective, but declaratory. *Peyton v. Smith*, 17 D. 758.

In proceedings by life-tenants the remainder was ordered to be, and was, sold. At that

For Index to Notes in American Decisions and American Reports, see Volume I.

time there was no authority for such a sale. Held, that the sale was void, and could not be made valid by subsequent legislation. *Maxwell v. Goetschins*, 29 R. 242.

The following are instances of retrospective acts: An act of the legislature directing a certain deposition to be read in the trial of a cause then pending. It is therefore void. *Dupuy v. Wickwire*, 6 D. 729.

An act abolishing the distinction between possession under a recorded deed and possession without such title on record, so far as it affects past transactions and vested rights. *Kennebec Purchase v. Laboree*, 11 D. 79.

A statute authorizing a probate court to renew a commission for the allowance of claims upon the estate of a deceased person, after the close of such commission and the expiration of the time limited by the general law for its renewal. *Bradford v. Brooks*, 16 D. 715.

A law reviving a right of action barred by the statute of limitations. *Davis v. Minor*, 28 D. 325.

3. *What retrospective operation is permissible.**—The legislature cannot, in general, establish a rule to operate retrospectively; but when the rule is unsettled, it belongs to the legislature to settle it, and such a rule necessarily operates both prospectively and retrospectively. *Peyton v. Smith*, 17 D. 758.

Retrospective laws which seek to take away or interfere with vested rights may be unjust and oppressive, but there are numerous cases in which they operate for the benefit of the community. *Boston v. Cummins*, 60 D. 717.

It has never been doubted that valid retroactive laws may be enacted. This is acknowledged by the civil and the common law. It is generally a matter of discretion with the legislature how far it may be expedient to enact such laws. *Id.*

The federal constitution does not prohibit a state from passing laws of a retrospective nature relating to civil matters, and which merely take away a right of action, or only divest rights vested by law in an individual, if they do not divest vested rights in property, nor impair the obligation of a contract. *Drehman v. Stifel*, 97 D. 268.

The provision of the constitution of Tennessee forbidding retrospective laws considered, and held to prohibit laws impairing existing rights, but not to extend to laws preserving rights from destruction. *Bell v. Perkins*, 14 D. 745.

An act of the legislature that removes an impediment and allows a contract to be enforced, although retrospective, is not unconstitutional. So held as to an act allowing a corporation to maintain a suit on a note, al-

though the corporation was at the time of taking the note dissolved by failure to pay a certain per cent of its dividends to the commonwealth, and in consequence thereof all notes taken by it at that time were null and void. *Bleakney v. Farmers' etc. Bank*, 17 D. 635.

Defects in the levy of executions on real estate may be cured by acts of the legislature, passed subsequent to the making of the levy. *Norton v. Pettibone*, 18 D. 116.

The Maryland bill of rights, article 15, though prohibiting passage of *ex post facto* laws, recognizes the right of the legislature to pass retrospective laws relating to civil cases and contracts. *Baughier v. Nelson*, 52 D. 694.

A retrospective act is constitutional if it neither take away a vested right of property, nor dissolve the obligation of a contract. *Aldrige v. Tusculumbia R. R. Co.*, 23 D. 307; *Rawls v. Kennedy*, 58 D. 289; *Railroad Co. v. Dickerson*, 66 D. 148.

The legislature may pass laws that act retrospectively where they operate upon the remedies afforded by law for the protection of rights of property, or for the enforcement of the obligation of contracts, not upon those rights and obligations themselves. *Oriental Bank v. Freeze*, 36 D. 701; *Sutherland v. De Leon*, 46 D. 100; *Wynne v. Wynne*, 58 D. 66; *Acheson v. Miller*, 59 D. 663; *Coffin v. Rich*, 71 D. 559; *Simpson v. City Savings Bank*, 22 R. 491.

The following acts, though retrospective, are not unconstitutional: An act rendering valid, to all intents and purposes, all marriages previously celebrated in the state by an ordained minister, qualified and empowered to celebrate them according to the forms and usages of any religious society. *Goheen v. Stonington*, 10 D. 121.

A retrospective act which relieves from mere informality in the certificate of a magistrate, but which creates no new title, and affects no right that did not equitably flow from the grantor's act. *Cheanut v. Shane*, 47 D. 387.

A statute which operates retrospectively, so as to give a mechanic a lien for work already done. *Bolton v. Johns*, 47 D. 404.

The Maryland act of 1845, chapter 52, declaring that any person thereafter seeking to avail himself of the statute of usury must plead it specially, and set out the sums, both principal and interest, due on the contract, reckoning interest at the rate of six per cent per annum. *Baughier v. Nelson*, 52 D. 694.

13. *Ex post facto* laws, generally.—The provisions in the state and federal constitutions against the passage of *ex post facto* laws were suggested by the abuses which the passage of bills of attainder, etc., in England occasioned. *Boston v. Cummins*, 60 D. 717.

The prohibition upon *ex post facto* laws applies only to such retrospective laws as

* Retrospective operation of, when permissible, see note, 10 D. 131-140.

Retrospective statutes curing defects in legal proceedings, see note, 37 R. 397-399.

For Index to Notes in American Decisions and American Reports, see Volume I.

relate to crimes and penalties. *Dash v. Van Kleeck*, 5 D. 291.

A law may be *ex post facto* and yet constitutional, provided it mollifies instead of aggravates the rigor of the criminal law. *Boston v. Cummins*, 60 D. 717.

The constitution of Missouri prohibits the passage of any *ex post facto* law, or law impairing the obligation of contracts, or retrospective in its operation. *Hope Mut. Ins. Co. v. Flynn*, 90 D. 438.

14. What laws are *ex post facto*.*—*Ex post facto* laws relate to penal and criminal proceedings which impose punishments and forfeitures, and not to civil proceedings which affect private rights retrospectively. *Grim v. Weissenberg School District*, 98 D. 237; *Baughner v. Nelson*, 52 D. 694; *Boston v. Cummins*, 60 D. 717; *Railroad Co. v. Dickerson*, 66 D. 148.

Any act which increases the degree of punishment attached by law to an offense at the time it was committed is *ex post facto*, and void. Therefore, to avoid giving such a retrospective effect to a statute which for the first time makes adultery a ground for divorce, the statute shall be construed as applying to cases of adultery only occurring after its passage. *Dickinson v. Dickinson*, 9 D. 608.

A statute imposed a penalty of fifty dollars for certain offenses. A subsequent statute amended the former so as to authorize a penalty of not exceeding one hundred dollars, and contained a proviso that the second act should not apply to proceedings pending under the first, except so far as to change the amount of the penalty. *Held*, 1. That the first act was repealed by the second; 2. That the proviso in the latter was unconstitutional as an *ex post facto* law; and therefore, 3. That prosecutions pending under the first act were defeated by the passage of the second. *Wilson v. Ohio & Miss. R. R. Co.*, 16 R. 565.

A statute enabled any person indicted for murder to avoid all risk of a capital sentence by pleading guilty. A subsequent statute took away that privilege. *Held*, *ex post facto* as to offenses committed while the former statute was in force. *Garvey v. People*, 45 R. 531.

15. What are not.—Where no contract exists between parties, an amendatory act is not an *ex post facto* law which gives either party three years in which to prosecute an appeal after an assessment of damages for a right of way is made. *Railroad Co. v. Dickerson*, 66 D. 148.

The legislature may pass laws altering, or even taking away, remedies for the recovery of debts, or for the recovery of compensation in damages for torts, without incurring a violation of the provisions of the constitution

* Validity of statutes creating presumptions of guilt, see notes, 36 R. 102, 103; 43 R. 24-25.

which forbid the passage of *ex post facto* laws. *Lord v. Chadbourne*, 68 D. 290.

The legislature may, by act, declare the negligent breach of a pre-existing contract to be a criminal offense, when such breach is in its nature prejudicial to the public good, and was before only the subject of a suit for damages by the party injured. Such law is constitutional. *Blann v. State*, 84 D. 788.

The constitution of Texas adopted in 1869 contained the following provision: "The statutes of limitation of civil suits were suspended by the so-called act of secession of the 28th of January, 1861, and shall be considered as suspended within this state until the acceptance of this constitution by the United States Congress." *Held*, that this provision is not to be regarded as an *ex post facto* law, nor as a law impairing the obligation of contracts, and that it is not in conflict with the constitution of the United States. *Bender v. Crawford*, 7 R. 270.

16. Special and local acts.—A special statute granting the right to appeal after the expiration of the time prescribed by law is void. *Stanford v. Barry*, 15 D. 691.

A statute giving an individual designated therein power to construct a dam at a place named, of such height as may be necessary for improving the navigation of Seneca River, and pointing out the manner in which the dam is to be constructed, and requiring it to be connected with a canal and lock of capacity sufficient to accommodate the largest-sized boats, is a public statute. *Calking v. Baldwin*, 21 D. 168.

A statute providing for the survey of lumber in a particular county, in a certain manner, by surveyors appointed in a prescribed way, and prohibiting, under penalty, the sale or purchase of lumber in that county not so surveyed, or the survey of it by persons not so appointed, is public, and therefore constitutional. *Pierce v. Kimball*, 23 D. 537.

Such statute is not in restraint of trade so as to render it unconstitutional. *Id.*

A town has no vested right in a moiety of penalties, prescribed by the Maine act of 1821, regulating the survey of lumber, until the recovery of judgment therefor, and the act of 1832, giving such moiety to the county, in Penobscot County, is not unconstitutional as impairing vested rights. *Id.*

Resolves granting personal privileges or exemptions to particular individuals are to be distinguished from local statutes of the character above mentioned, and are unconstitutional. *Id.*

A special act authorizing the sale of the property of minors, to provide funds for their education and maintenance, is not unconstitutional. *Cochran v. Van Surday*, 32 D. 570.

A special act may discharge existing trustees and vest their estate in new trustees to

For Index to Notes in American Decisions and American Reports, see Volume I.

be appointed by the court of chancery; may convert an equitable life estate into a legal estate, and may authorize the tenant of the life estate to sell and convey the estate in fee, with the assent of the chancellor, where the estate in remainder is vested in the minor children of the tenant for life. *Id.*

Section 17, article 2, of the Kansas constitution, providing that "in all cases where a general law can be made applicable, no special law shall be enacted," recognizes the necessity of some special legislation, and seeks only to limit, not prohibit it. It also leaves it to the discretion of the legislature to determine whether their purpose can or cannot be expediently accomplished by a general law, and no special law will be declared invalid merely because it would, in the opinion of the court, have been possible to frame a general law under which the same purpose could have been accomplished. *State v. Hitchcock*, 81 D. 503.

A statute professing, in general terms, to repeal all acts appointing commissions to regulate municipal affairs is general, and is not rendered local or special by the fact that there is but one commission to which it can apply. *Van Riper v. Parsons*, 29 R. 210.

A law altering the boundaries of wards, displacing officials, and changing the times of elections in the city of Newark, is a special and local law within the New Jersey constitutional prohibition of such legislation regulating the "internal affairs of towns and counties." *Pell v. Newark*, 29 R. 266.

17. Statutes of a partial or ununiform operation.—The Tennessee act of 1827, chapter 39, which directed the dismissal of a certain class of suits, growing out of the reservations of lands to the heads of Indian families, under the treaties of 1817 and 1819, with the Cherokees, upon certain facts being made to appear, is partial, and therefore unconstitutional. *Walby v. Kennedy*, 24 D. 511.

A special statute authorizing the executors of A to revive a judgment rendered in favor of B in the same manner as if they were the executors of B is partial, unconstitutional and void. *Tate v. Bell*, 26 D. 221.

A *scire facias* issued under such statute will be quashed on motion. *Id.*

An act imposing toll for passengers carried by mail stages on the Cumberland road, in Ohio, is constitutional. *State v. Neil*, 28 D. 623.

A statute is not unconstitutional on the ground that it is partial, when it gives a remedy to all owners of land lying on a designated creek, for injuries suffered from the unauthorized obstruction of such creek by the acts of a designated railroad company. Such statute manifestly operates in favor of all those who have suffered by such obstruction, and against all who have caused such suffering. *Bailey v. Philadelphia etc. R. R. Co.*, 44 D. 593.

A provision of a statute that "no black Republican, or indorser or approver of the helper book," shall be appointed to office by the board of police commissioners, created and appointed by the statute, is unconstitutional, if it is to be understood that the statute proscribes that class of persons on account of their political or religious opinions; but as the court cannot understand officially who are meant by the proviso, no judicial opinion can be expressed on the question. *Mayor etc. of Baltimore v. State*, 74 D. 572.

As to the effect of a clause in a statute which disqualifies from holding any office under the mayor and council of a city such persons as shall forcibly resist the provisions of the law, the judges are equally divided in opinion. *Id.*

A statute does not conflict with a constitutional provision that "all laws of a general nature shall have a uniform operation," when it provides that where a defendant is in actual military service, any action against him shall stand continued during the period of such service. *McCormick v. Rusch*, 83 D. 401.

18. Statutes in derogation of vested rights.—1. General rules.—A vested right is the power one has to do certain actions, or to possess certain things, according to the laws of the land. *Bailey v. Philadelphia etc. R. R. Co.*, 44 D. 593.

There can be no vested right in a particular remedy, but there is a vested right to some substantial and efficient remedy, and this right is protected as essential to the maintenance of the obligation of the contract. *Bruce v. Schuyler*, 46 D. 447.

The vested rights guarded against legislative interference are such as may be adhered to without violating any principle of sound morality. *Baughner v. Nelson*, 52 D. 694.

Substantial rights of parties cannot be changed or impaired by subsequent laws, but the remedial directions for enforcing those rights may be changed. *Coriell v. Ham*, 61 D. 134.

When a law is in its nature a contract, and when absolute rights have vested under it, a repeal of the law cannot divest those rights. *Trustees v. Bailey*, 81 D. 194.

The legislature cannot divest an individual of a vested right, although it may require the performance of an act in the future, and declare that its omission shall subject an individual to a penalty. *Conway v. Cable*, 87 D. 240.

That an act of the legislature divests vested rights is not a valid objection thereto, if it be within the legitimate scope of legislative power. *Grim v. Weissenberg School District*, 98 D. 237; *Baughner v. Nelson*, 52 D. 694.

The rights of a purchaser of land offered

* Rules as to statutes conflicting with vested rights, see note, 10 D. 184-186.

For Index to Notes in American Decisions and American Reports, see Volume I.

at public sale are vested, and cannot be affected by subsequent legislation reviving the provisions of a former act conferring rights on particular persons as preferred purchasers, and extending the time within which such rights may be exercised. *Thompson v. Schlater*, 33 D. 556.

Vested rights may be divested not only by a change or destruction of the title to property, but also by the destruction of the property itself. Such destruction may be said to take place when the property is rendered unfit for the object for which it was intended. *Cash v. Whitworth*, 71 D. 515.

Rights vested under the municipal law of a country are not affected by a change or abrogation of the law. *Williams v. Johnson*, 96 D. 613.

A vested right of action is property, and will be protected from arbitrary legislative interference. *Ib.*

2. *What laws conflict with vested rights.*—A statute divesting rights under pretense of regulating remedies is as objectionable as if attacking the rights directly. *Baughner v. Nelson*, 62 D. 694.

The right to a legacy cannot be impaired by a law passed after the legacy has vested by the testator's death. *Westervelt v. Gregg*, 62 D. 160.

The legislature cannot enact that a debtor's property shall not be taken to satisfy his debt, if it was so liable when the debt was incurred. *Penrose v. Erie Canal Co.*, 93 D. 778.

The Pennsylvania act of April 9, 1850, section 1, to regulate sequestrations in case of the Erie Canal Company, by making its property liable only in cases of mismanagement, misapplication of funds, or willful delay in discharging its legal liabilities, where it was prior to that act subject to execution for its debts, is unconstitutional, and does not affect rights of creditors existing when that act was passed. *Ib.*

When a statute of limitation has run on a debt, the debtor's right to the defense is vested, and any statute which afterward annuls or takes it away is unconstitutional. *Rockport v. Walden*, 20 R. 131.

Where a municipal corporation, under the express authority of an act of the legislature, is clothed with the exclusive right to collect wharfage rates from all vessels that shall make use of its wharves, the right is both constitutional and vested, and cannot be abrogated or impaired by any subsequent act of the legislature. *Ellerman v. McMains*, 31 R. 218.

Where a testator directs his executors to rent his lands and apply the rents to the support of one of his sons during his life, and further directs that none of said lands shall be sold during the life of said son, but that after his death the lands shall be sold and the proceeds be equally divided among the

other children of the testator, the legislature have no power to authorize the orphans' court to appoint a trustee to sell the lands during the lifetime of said son and apply the interest of the proceeds to his support during his life, where all the other parties in interest are of full age, under no disabilities, and object to such sale. An act which undertakes to confer such authority is unconstitutional. *Brvine's Appeal*, 55 D. 499.

By the constitution it was provided that the legislature should establish schools, and "all useful learning shall be duly encouraged in one or more universities." Accordingly, the legislature established a university, granting to it certain property escheated to the state; but an act was afterwards passed divesting such property. *Held*, such act was unconstitutional. *Trustees v. Foy*, 3 D. 672.

Where one of the duties appertaining to the office of sheriff was the collection of taxes, and during the plaintiff's term as such sheriff the legislature passed an act for the appointment of a tax collector, — *held*, that such act was unconstitutional. *King v. Hunter*, 6 R. 754.

A testator bequeathed the residuum of his estate to the Virginia Literary Fund, a corporation composed only of officers of the state. Subsequently to his death the legislature by enactment appropriated the fund to the Brooke Academy, an incorporated private educational institution. *Held*, unconstitutional. *Brooke Academy v. George*, 35 R. 760.

The following laws have been held void, as interfering with vested rights: A legislative act authorizing a person named to prosecute a particular suit, the plaintiff having died, without taking out letters of administration on the estate of the deceased. *Officer v. Young*, 26 D. 268.

A statute prohibiting a person from having or keeping a billiard-table without first paying a tax for the privilege of keeping it. *Stevens v. State*, 35 D. 72.

A statute providing for divesting out of the purchaser of land one third of the fee, and vesting the same in the widow of his deceased grantor. *Strong v. Clem*, 74 D. 200.

An act providing for the extinction of irredeemable ground-rents by compelling the rent-owner, at the option of the land-owner, to receive a gross sum and release the rents. *Palairer's Appeal*, 5 R. 450.

A statute forbidding any person to carry on the stabling business within a given distance of the grounds of a specified agricultural society, during the continuance of its fairs, and imposing a penalty for any breach of the law. *Com. v. Bacon*, 26 R. 189.

A statute forbidding the reservation of seats at public exhibitions, upon the sale of tickets of admission after the opening of

For Index to Notes in American Decisions and American Reports, see Volume I.

the doors. *District of Columbia v. Saville*, 29 R. 616.

A statute forbidding judges and state school officers to electioneer. *Louthan v. Com.*, 52 R. 628.

3. *What laws do not conflict with vested rights.*—A statute converting existing estates in joint tenancy into estates in common is constitutional, because not impairing vested rights, but rendering the tenure more beneficial. *Holbrook v. Finney*, 3 D. 243.

Where there is some public necessity, as in case of war, or invasion, an act suspending legal proceedings for a limited period is not unconstitutional; for a statute of this kind rather conduces to the due administration of justice, and is beneficial to parties litigant. *Johnson v. Duncan*, 6 D. 675.

An amendatory act operating retrospectively, creating a remedy where none existed before, is not objectionable as creating or divesting rights as then existing. *Whipple v. Farrar*, 64 D. 99.

An act validating a usurious loan of a savings and building association to a member thereof, though it injuriously affects an antecedent legal right of the borrower to insist upon the forfeiture by the lender of the whole interest, is not nevertheless, considering the nature of the right affected and the circumstances of the case, to be regarded as unjust, or as an infringement of a vested right. *Welch v. Wadsworth*, 79 D. 236.

The Kansas statute of 1864 concerning the burned records of Douglas County is not unconstitutional, it seems, as impairing vested rights, in providing that the plaintiff in any action pending in the district court of that county, or in which summons had been issued on the day when the records were destroyed, instead of setting out the pleadings therein, may commence a new suit upon the same cause of action, as in other civil cases, and the defendant shall not be allowed to plead the statute of limitations unless he could have pleaded it in the original action. *Searle v. Adams*, 89 D. 598.

Acts curing formal defects in the execution or acknowledgment of deeds, etc., debar those who might have relied on such defects of what would otherwise have been a legal vested right. But such acts have been frequently decided to be constitutional and valid. *Grim v. Weissenberg School District*, 98 D. 237.

An act provided that there should not be any private market kept within twelve squares of a public market in the city of New Orleans. *Held*, not unconstitutional, either as taking away the property of those keeping private markets at the time of the passage of the act within the prescribed limits, or as taking away the vested rights of those holding licenses to keep such markets. *New Orleans v. Stafford*, 21 R. 563.

A testator devised real estate to A for

life, and after her death to B and others, upon certain contingencies. Upon the petition of A, alleging that the property was producing a very small income, and was depreciating, the general assembly, against the remonstrance of B and the others, passed a resolution authorizing the sale of the land by specified trustees, and the investment of the proceeds for the benefit of all the parties interested, according to their respective rights. *Held*, a constitutional and valid act. *Linsley v. Hubbard*, 26 R. 431.

The defendant, owner of an ancient mill-dam, procured an act of the legislature authorizing him to raise it or erect a new one. The dam was always of such construction as to prevent the passage of fish. A subsequent statute imposed on dam-owners the duty of placing fishways in them. *Held*, 1. That the act was constitutional generally, and 2. In respect to the defendant in spite of the prior special act in his case. *Parker v. State*, 53 R. 643.

19. *Statutes delegating legislative power.*—The legislature cannot submit a law to the people in such manner as to make its final enactment depend on the popular vote, unless when specially authorized by the constitution. *Barto v. Himrod*, 59 D. 506; except where acts of incorporation are submitted to the acceptance of the corporations, whether private or municipal. *Santo v. State*, 63 D. 487.

The people have no power, in their primary and individual capacity, to make laws, that power being vested in the legislature. *Ib.*

An act complete in all its parts without the section that submits the act to a vote of the people is not wholly unconstitutional and void, but such section only, and a vote taken thereon is merely nugatory. *Ib.*

So a general law affecting private rights, which takes effect by its terms, and contains a clause authorizing the county courts to suspend it at pleasure, is unconstitutional and void. *State v. Field*, 59 D. 275.

An act provided that it should not be lawful for cattle to run at large in any county which, by a majority vote, should agree to restrain them. *Held*, unconstitutional, as a delegation of legislative power. *Lammert v. Lidwell*, 21 R. 411.

The taking effect of a statute affecting a particular county alone may constitutionally be made dependent upon the popular vote of that county. *Com. v. Weller*, 29 R. 407; *Boyd v. Bryant*, 37 R. 6; *Williams v. Cammack*, 61 D. 508.

Under a constitutional provision that the legislature shall provide a thorough and efficient system of free schools for the conferring a good common-school education, a statute authorizing the establishment and maintenance of township high schools, on a vote of the people, is valid. *Richards v. Raymond*, 34 R. 151.

For Index to Notes in American Decisions and American Reports, see Volume I.

20. Statutes assuming judicial power.—To exercise judicial power is not within the legitimate scope of legislative functions; and when vested rights are divested by acts of that character, they will be adjudged null and void. *Grim v. Welsenberg School District*, 98 D. 237.

The legislature has no authority to pass a law in which it exercises judicial powers, by determining the rights of parties. *State v. Tappan*, 9 R. 622.

An act is unconstitutional, as an assumption of judicial power, if it professes to decide between an existing conflict of right, or if it declare that an existing right of property shall cease. *Hoke v. Henderson*, 25 D. 677.

Such an act will not be redeemed because others, of the objects sought to be attained, are within the legitimate powers of the legislature. *Ib.*

A special act providing for the sale of a decedent's land, without notice to the heirs, and for the application of the proceeds to the claims of the administrator and another person against the estate, for moneys advanced and liabilities incurred by them on its account, and requiring the administrator to make deeds to the purchasers of the land, and to give bond to the heirs for the application of the proceeds as provided by the act, is unconstitutional, because it is an exercise of judicial power, and also because the heirs are thereby dispossessed of their freehold, not by the judgment of their peers, nor by the law of the land. *Lane v. Dorman*, 36 D. 543.

Acts of Congress confirming incomplete titles within the territory acquired from other nations, although laws in form, are in their essence judicial determinations. *Hunt v. Test*, 42 D. 659.

The following acts are void, as assumptions of judicial power: An act awarding a new trial in an action which has been decided in a court of law. *Merrill v. Sherburne*, 8 D. 52.

An act authorizing the opening of an existing judgment. *Ratcliffe v. Anderson*, 31 R. 716; *Dorsey v. Dorsey*, 11 R. 523.

A statute prescribing that no injunction shall issue against commissioners appointed by the statute. *Guy v. Hermance*, 63 D. 85.

An act validating a sheriff's sale, declared by the supreme court to be invalid. *Menges v. Dentler*, 75 D. 616.

The supreme court of Pennsylvania decided that under the laws, as to the opening of roads in Philadelphia, interest was to be allowed on an award from the date of the assessment. By the act of 1867, the legislature provided that the award should be enforced "in the same manner as provided by law in the opening of roads in the city of Philadelphia." By the act of 1869, the legislature declared that the true intent and

meaning of the act of 1867 were "that no interest shall be allowed on damages for ground taken, up to the time of their payment on the issue of any warrant for their payment by the city of Philadelphia." In a case arising under the act of 1867, — held, that the act of 1869, an expository act, was destitute of retroactive force, because it was an act of judicial power, and was in contravention of the constitution of the state, which declares that no man can be deprived of his property "unless by the judgment of his peers or the law of the land." *Haley v. Philadelphia*, 8 R. 153.

A statute attempting to validate a judgment void for want of jurisdiction and a sale made under it, — held, void, — 1. As an attempt by the legislature to exercise judicial powers; and 2. As in contravention of the constitutional provision that "no person can be deprived of his property without due process of law." *Pryor v. Downey*, 19 R. 656.

21. Rule as to statutes impairing the obligation of contracts. — 1. *The general rule.** — The legislature can constitutionally pass no act impairing the obligation of contracts, and when it attempts to do so, it is the solemn duty of the judicial department to declare such law null and void. *Trustees v. Bailey*, 81 D. 194.

A statute cannot alter the nature and legal effect of an existing contract, to the prejudice of either party, nor give to such contract a judicial construction binding on the parties or the courts. *King v. Dedham Bank*, 8 D. 112.

The legislature, though it may modify and repeal acts of former legislatures, cannot abridge succeeding legislative action, and has no power, by subsequent legislative action, to divest the rights of property derived from a contract made under authority of a former legislature. *State v. Barker*, 96 D. 175.

2. *Obligation of contract defined.* — The obligation of a contract is that which obliges a party to perform his contract, or to repair the injury done by his failure to perform it. *Bruce v. Schuyler*, 46 D. 447.

The obligation of a contract includes some known means acknowledged by the municipal law for its enforcement. *Ib.*

The obligation of a contract, as that expression is used in the constitution of the United States, means the right to performance which the law confers on one party, and the corresponding duty of performance to which it binds the other. *Larrabee v. Talbot*, 46 D. 637.

The remedy afforded by existing laws enters into and forms part of the obligation of contracts. *Von Baumbach v. Bade*, 76 D. 283.

The obligation of a contract has reference

* Obligation of contracts, statutes impairing, see note, 79 D. 495, 496.

For Index to Notes in American Decisions and American Reports, see Volume X.

to its performance rather than to the consequences of a breach. The rights of the parties with respect to the nature, construction, and effect of the contract are beyond the legislative power to change. *Coffman v. Bank of Kentucky*, 90 D. 311.

The obligation of a contract is the legal tie which imposes the necessity of doing or abstaining from an act, as distinguished from the imperfect obligation arising from gratitude, charity, or other moral duties, binding upon conscience, but having no legal remedy for their enforcement. *State v. Carew*, 91 D. 245.

3. *Interpreting the constitutional provision.*—The constitutional provision that "no law impairing the validity of contracts shall ever be made" extends to all rights arising under all contracts, whether written or parol, whether express or implied, whether arising from the stipulation of the parties or accruing by operation of law. *Lewis v. Brackenridge*, 12 D. 228.

This constitutional provision must be considered as rendering void any statute which is retrospective, and which destroys a vested right of action arising *ex contractu*. But the legislative power of limiting the time, and regulating the manner in which rights shall be legally demanded, does not interfere with the rights themselves, nor affect the construction given to that provision. *Id.*

Executed as well as executory contracts are within the protection of this provision of the constitution of the United States. *Pearce v. Patton*, 45 D. 61.

The provision extends to legislative grants, and to contracts made by individuals with a state. *Bruce v. Schuyler*, 46 D. 447; *Winter v. Jones*, 54 D. 379.

The extent of the change in a contract, by act of the legislature, is immaterial, in order to make said act unconstitutional, as impairing the obligation of contracts. *Winter v. Jones*, 54 D. 379.

Imposing conditions not expressed in the contract, or any slight deviation from its terms, is within the constitutional prohibition. *Id.*

Rights created by act of the legislature, being equivalent to a contract executed, cannot be impaired by a subsequent legislature. *Id.*

A judgment for the repayment of money paid by mistake is not upon a contract, and is not protected by the federal constitutional provision forbidding the enactment of laws impairing the obligation of contracts. *State v. City of New Orleans*, 58 R. 168.

29. *What statutes impair the obligation of contracts.*—1. *General principles.*—The obligation of a contract is impaired by any deviation from its terms, by postponing or accelerating the period of its performance, or imposing new conditions, or dispensing with the performance of condi-

tions, however minute or apparently immaterial. *Bailey v. Philadelphia etc. R. R. Co.*, 44 D. 593; *Robinson v. Magee*, 70 D. 638.

The law existing when a contract is made enters into and forms part of it; and this is applicable as well to the remedy as to the right, so that an impairment or taking away of the remedy is an impairment of the obligation of the contract. *Western Sav. Fund Soc. v. Philadelphia*, 72 D. 730; *Scobey v. Gibson*, 79 D. 490; *State v. Carew*, 91 D. 245.

The obligation of a contract is impaired if the end contemplated by it is substantially defeated. A dormant right that cannot be enforced is no right at all. *Robinson v. Magee*, 70 D. 638.

Right and remedy must stand or fall together; to deny the latter is to impair the former. *Id.*

A law impairs the obligation of a contract if it enlarges, abridges, or in any manner changes the intentions of the parties resulting from the stipulations in the contract. *State v. Carew*, 91 D. 245.

Obligation of contract is impaired if the means of enforcing it are withdrawn or materially diminished. It is immaterial whether this result is accomplished by acting upon the remedy or directly on the contract itself. *Id.*

One test of a contract that has been impaired is, that its value has, by legislation, been diminished. *Id.*

An act may be unconstitutional so far as it has a retrospective application to past contracts, and constitutional as applied to future contracts. *Barry v. Iseman*, 91 D. 262.

The following statutes have been held void as impairing the obligation of contracts: An act to "suspend executions for a limited time," commonly called the suspension act. *Jones v. Orittenden*, 6 D. 531.

A statute staying execution for two and one half years, unless the plaintiff will take payment in property at two thirds of its value, or in a particular kind of currency or money, or something else than money. *Baily v. Gentry*, 13 D. 484; *Townsend v. Townsend*, 14 D. 722.

"Stay laws" which prevent all proceedings in courts for the collection of debts, with few exceptions, for a long period. *Coffman v. Bank of Kentucky*, 90 D. 311. S. F., *Aycock v. Martin*, 92 D. 56; *Webster v. Rose*, 19 R. 583.

An act directing sales under decrees in chancery on longer credit than was allowed at the date of the contract. *January v. January*, 18 D. 211.

A statute divesting powers granted to a corporation by a previous statute, where such corporation is not in the strictest sense public, unless authority to resume such powers is reserved in the act granting them. *Trustees v. Bradbury*, 26 D. 515.

An act creating a new board of trustees

For Index to Notes in American Decisions and American Reports, see Volume I.

of an academy, being a private corporation, and clothing them with the powers exercised by an existing board under a previous act. *Montpelier Academy v. George*, 33 D. 585.

A statute requiring a sheriff to receive the notes of a bank in satisfaction of a judgment in favor of such bank. *Bank of Gallipolis v. Domigan*, 40 D. 475.

An act validating a void deed of a *feme covert*. *Pearce v. Patton*, 45 D. 61.

A statute extinguishing existing remedies, and leaving no redress for the violation of a contract. *Bruce v. Schuyler*, 46 D. 447.

A statute requiring the holder of a county warrant to present it to the auditor for registry before a day named, or be forever barred from enforcing payment. *Robinson v. Magee*, 70 D. 638.

A law tending to delay the collection of debts. *Scobey v. Gibson*, 79 D. 490.

An act providing for the redemption of real property sold upon execution, etc., so far as the same is intended to apply to sales on judgments rendered upon contracts existing at and before its passage. *Ib.*

A statute providing for the weighing of coal at mines, in so far as it declares null and void all contracts for mining coal in which the weighing as provided for in the statute is dispensed with. *Millett v. People*, 87 R. 869.

2. *Illustrations.* — A special act freeing the body of a debtor from imprisonment, and providing that "all such bonds as have been taken by the sheriff, on the admission of the debtor to the liberties of the prison, be discharged," is not construed to extend to the case of an escape committed before the passing of the act; and if it be so worded as to extend to such case, it is void as impairing the obligation of contracts. *Starr v. Robinson*, 6 D. 732.

Where lands were granted by the commonwealth to a town for the use of schools therein, and on the application of the town an act was afterwards passed incorporating certain persons as trustees, with power to sell the lands, invest the proceeds, and appropriate the income to the support of the schools, and to fill vacancies in their own number, etc., a subsequent statute divesting such trustees of the control of the fund, and vesting it in new trustees, to be chosen by the town, is unconstitutional and void. *Trustees v. Bradbury*, 26 D. 515.

An act provided for the sale of land, and the payment of a certain fee to take out a deed from the state. A subsequent act provided that unless the deed was paid for within a certain time the land would be forfeited to the state. *Held*, that the latter act was unconstitutional, as impairing the obligation of the above contract. *Winter v. Jones*, 54 D. 379.

An owner of bonds in an internal improvement fund, issued by virtue of the Florida act

of January 6, 1855, and known as the "Internal Improvement Act," may enjoin the trustees of such fund from applying it to any other purposes than those specified in the act, so as to endanger his claim by lessening his security; even though such application should be under the command of a subsequent act of the legislature. *Trustees v. Bailey*, 81 D. 194.

A statute violates the obligation of a contract, which provides for the compiling and printing of laws of the state under the supervision of the compiling commissioners, and for the letting of the printing contracts by them, in so far as it conflicts with the rights of one who has, by virtue of a former statute authorizing the legislature to contract with the lowest bidder for doing all state printing for the next year, contracted to do such printing. *State v. Barker*, 96 D. 175.

A statute providing "that while it remains in force, debts due on open accounts, and other demands not heretofore bearing interest by law, shall bear interest" at a certain rate, is unconstitutional, and void as to contracts already existing, as impairing their obligation. *Goggans v. Turnipseed*, 98 D. 397. *S. P.*, *Hubbard v. Callahan*, 19 R. 564.

Examples given of statutes which would impair the obligation of contracts, if enforced, and which, therefore, have been declared void. *Bailey v. Philadelphia etc. R. R. Co.*, 44 D. 593.

23. *What do not.* — The constitutional limitation on power to pass laws impairing obligation of contracts has reference to direct and not to merely consequential invasions of it. *Gray v. Monongahela N. Co.*, 37 D. 500.

The obligation of a contract is not impaired by a law which merely varies its consequences without changing the essence and character of the contract, or altering the nature of the obligation created by it. *Ib.*

The constitutional provision does not apply to contracts relating to public property. *State v. B. & O. R. R. Co.*, 38 D. 317; nor to the contract of marriage. *Rugh v. Ottenheimer*, 25 R. 513.

Incipient rights not perfected, given by statute, may be taken away by statute. *Bangor v. Goding*, 56 D. 688.

The constitutional provision that is restricted to laws affecting antecedent contracts does not apply to a law affecting future contracts. *Barry v. Iseman*, 91 D. 262.

An act of the legislature releasing a penalty accruing to a county, after verdict and before judgment, is constitutional, being neither an *ex post facto* law, nor a law impairing the obligation of contracts, and it may be pleaded *pais darrein continuance*. *Coles v. County of Madison*, 12 D. 161.

A statute taking away the preference given to judgments, in the payment of debts

For index to Notes in American Decisions and American Reports, see Volume I.

owing by a deceased insolvent's estate, by a prior statute, applies to judgments recovered after the passage of the first statute, and before the passage of the second, where the debtor dies after the second statute is enacted, and is not unconstitutional as impairing the obligation of contracts. *Deickman's Appeal*, 30 D. 271.

Where an act of the legislature incorporating a railroad company makes it the duty of the company to so locate and construct its road that it shall pass through certain named places, and imposes a forfeiture in case of a failure to so locate the act, is not a contract, but a case of penalty, subject as to its enforcement to the will and pleasure of the legislature. *State v. Baltimore etc. R. R. Co.*, 38 D. 317.

The execution law in force at the time of a contract enters into and becomes part of it, so far as it affects the obligation; but so far as it is merely remedial, it may be modified or changed at any time. *Coriell v. Ham*, 61 D. 134.

A statute providing for funding of a county debt does not impair the obligation of contracts, the obligation to pay being fully acknowledged, and the right of a person to secure the amount of his debt remaining unaffected. *Hunsaker v. Borden*, 63 D. 130.

A state law making a right of entry for non-payment of rent assignable (such as N. Y. Laws 1805, c. 98, sec. 3, continued in 1 Rev. Laws 1813, p. 364, sec. 3, and 1 R. S., p. 748, sec. 25) may be applied to reservations of rent in conveyances and leases made before passage of the law, without incurring the objection that it impairs the obligation of contracts, and therefore violates the federal constitution. Such a provision affects the remedy, not the contract. *Van Rensselaer v. Hays*, 75 D. 278.

A judgment for a tort is not a "contract" within the provision of the federal constitution. *McAfee v. Covington*, 51 R. 263.

The following statutes do not impair the obligation of contracts: An act authorizing the recovery of certain money in the hands of commissioners. *Smith v. Merchand*, 10 D. 465.

The Maine act of 1839, for relief of sureties on poor-debtors' bonds. *Oriental Bank v. Freeze*, 36 D. 701.

A statute releasing a penalty accruing to a county on account of the failure of a railroad company to comply with its act of incorporation. *State v. Baltimore etc. R. R. Co.*, 38 D. 317.

A statute authorizing judgment to be rendered without benefit of appraisement laws according to the terms of a note. *Hunt v. Standart*, 77 D. 79.

A state law that makes valid a void contract. *Weich v. Wadsworth*, 79 D. 236.

An act validating a contract void as usurious. *Id.*

A statute providing that where a defendant is in actual military service, any action against him shall stand continued during the period of such service. *McCormick v. Ruch*, 83 D. 401.

The South Carolina act of 1861, known as the "stay law," so far as it relates to future contracts made to be executed within the state. *Barry v. Iseman*, 91 D. 262.

24. Statutes impairing the obligation of corporate franchises.*—The legislature can pass no act impairing the rights or privileges of a corporation opposed to the original grant without its consent. *Pingry v. Washburn*, 15 D. 676.

Where an act incorporating part of a town into a new town provided that the latter should support its proportion of all the paupers then supported, in whole or in part, by the original town, a subsequent act, exonerating the new town from such liability in future, is unconstitutional and void, as impairing the obligation of contracts. *Bosdoinham v. Richmond*, 19 D. 197.

The charter of a railroad conferred upon the company the power to regulate its tolls for a certain length of time. During that time the legislature passed an act to regulate the same tolls. *Held*, unconstitutional. *Sloan v. Pacific R. R. Co.*, 21 R. 397.

A railroad company in which the state had a controlling interest, and which had a right under its charter to change the gauge of its road track at will, leased such road. *Held*, that a statute thereafter passed forbidding the lessees to change such gauge was unconstitutional as impairing the obligation of a contract. *State v. Richmond etc. R. R. Co.*, 21 R. 473.

25. Statutes embracing more than one subject.†—The constitutional provision that an act shall not embrace more than one subject is not violated by including under the title "An act for a homestead exemption," provisions for the exemption of personal property. *Tuttle v. Strout*, 82 D. 108.

Subjects subordinate to and having a necessary or natural connection with the primary or leading subject of a bill may be included in a bill without rendering the act double or multifarious in the sense of the constitutional prohibition. *Mills v. Charleton*, 9 R. 578.

A law embraces but one subject when it authorizes the construction of a railroad and provides that it shall have power to extend to and unite with other roads. *Belleville ex. R. R. Co. v. Gregory*, 58 D. 589.

The title, "An act to consolidate the Texas Monumental Committee and the Texas

* Foreign corporations, statutes imposing particular conditions and restrictions upon, see note, 22 R. 67-70.

† Statutes embracing more than one subject, see notes, 61 D. 337-346; 82 D. 110, 111.

For Index to Notes in American Decisions and American Reports, see Volume I.

Military Institute with Rutgersville College," embraces but one object within the meaning of the constitution. *Tadlock v. Eccles*, 73 D. 213.

A statute "to regulate the sale or disposal of opium, and to prohibit the keeping of places of resort for smoking or otherwise using that drug," is not unconstitutional as embracing more than one subject. *State v. Ah Sam*, 37 R. 454.

26. — or subjects not expressed in the title.*— 1. *Interpreting the constitutional provision.*— The constitutional provision inhibiting the passage of any law containing any matter different from what is expressed in its title does not require that the title should contain a synopsis of the law, but that the act should contain no matter variant from the title. *Martin v. Broach*, 50 D. 306.

The constitutional provision was passed for the purpose of preventing local and selfish provisions from being ingrafted upon acts of great public benefit and being adopted with them, and to prevent foreign matter from being incorporated into the law in the haste and excitement incident to the close of the sessions of the legislature. *Davis v. State*, 61 D. 331.

If an act contains minor matter not referred to in the title, such matter alone is void; but if the act be composed of a number of discordant and dissimilar provisions, so that no one could be pronounced as the principal one, the whole act is void. *Ib.*

An act is not in violation of this provision although it embrace several ideas or steps in the progress of its provisions toward the attainment of the main object expressed in the title. This object may be a broader or a narrower one, but if the several steps embraced in it are fairly conducive to that end or object, it is still a unit. *Santo v. State*, 63 D. 487.

Provisions of a general nature in a local statute not indicated in the title are valid notwithstanding the constitutional requirement, as in case of provisions relating to courts throughout the state contained in a statute entitled "An act to enlarge the jurisdiction of the courts" of a particular locality. *People v. McCune*, 69 D. 642.

The repeal of a statute on a given subject is properly connected with the subject-matter of a new statute upon the same subject; and this does not violate the constitutional requirement, although the repeal of the former statute is not mentioned in the title of the new enactment. *Gabbert v. Jeffersonville R. R. Co.*, 71 D. 358.

The constitutional provision only requires that the terms employed in the title of the act should be significant of the subject of its provisions. It does not mean that the word

"object" should be understood in the sense of "provision," for that would render the title of the act as long as the act itself. Nor does it intend that no act of legislation shall be constitutional which has reference to the accomplishment of more than one ultimate end. *Tadlock v. Eccles*, 73 D. 213.

An act providing a remedy for injuries inflicted by corporations as well as by natural persons does not for that reason embrace various and distinct subjects, and is not in conflict with this provision. *Chiles v. Drake*, 74 D. 406.

The title of an act need not contain all the details for carrying it into effect, but should merely be a brief and concise statement, sufficient to indicate the nature of it. *Parkinson v. State*, 74 D. 522.

An act will not be declared void because its objects are not set forth in its title, if the title discloses the objects of the act in terms so clear that no one can be misled thereby. *Louisiana State Lottery Co. v. Richoux*, 8 R. 602.

An expression of the general subject is sufficient. *Neuendorff v. Duryea*, 25 R. 235.

An act incorporating a railroad company is a private law within the meaning of the Illinois constitution providing that no private law shall be passed which embraces more than one subject, and that shall be expressed in its title. *Belleville etc. R. R. Co. v. Gregory*, 58 D. 589.

The legislature by simply declaring a private act to be a public law cannot evade the effect of the provision. *Ib.*

The following acts do not infringe the provision: An act which relates to a subject expressed in its title, and to others inseparably connected therewith. *Davis v. State*, 61 D. 331.

The Iowa statute of 1855 entitled an "Act for suppression of intemperance." *Santo v. State*, 63 D. 487.

An act the title of which is "to prohibit the 'sale' of intoxicating liquors," and the body of which makes it unlawful to "sell" or "give" the same away. *Parkinson v. State*, 74 D. 522.

An act entitled "An act to preserve the public peace and order on the first day of the week, commonly called Sunday," but by its terms limited to the city of New York. *Neuendorff v. Duryea*, 25 R. 235.

2. *Illustrations.*— Statutes whose titles, after enumerating certain objects for which they were passed, add, "And for other purposes therein mentioned," are not in conflict with the section of the constitution under consideration; but the objects not specified will be good under this general clause, if they do not contain matter variant from the title. *Martin v. Broach*, 50 D. 306.

The subject of a bill is expressed in its

* Constitutionality of statutes embracing subjects not expressed in title, see note, 69 D. 648-651.

* Instances of statutes embracing subjects not expressed in their title, see note, 25 R. 235-244.

For Index to Notes in American Decisions and American Reports, see Volume I.

title when the subject is to incorporate a railroad company, and the title is "An act to incorporate the Belleville and Illinoistown Railroad Company," although the name of the company does not give a full description of the road authorized to be constructed. *Belleville etc. R. R. Co. v. Gregory*, 58 D. 589.

A statute is not unconstitutional on the ground that it does not correspond with its title, when entitled "An act amendatory to and explanatory of the statute of limitations of 1805, so far as it regards idiots, lunatics, and infants," and providing concerning non-residents in addition to idiots, lunatics, and infants; for the title of the act is equivalent to "An act amendatory to the statute of 1805, and explanatory of that act, as far as it relates to idiots, lunatics, and infants." *Denham v. Holeman*, 71 D. 198.

The objects of the Illinois "act to incorporate Firemen's Benevolent Association, and for other purposes," approved June 21, 1852, are sufficiently expressed in its title. *Firemen's Benevolent Ass'n v. Lounsbury*, 74 D. 115.

The subject embraced in the title, "Act to prohibit sale of intoxicating liquors to minors," etc., is to prevent the procurement of liquor by the persons named in the act; and under the title, the body of the act may properly declare it unlawful "to sell, dispose of, barter, or give" such liquors to minors, as being a means to effect the chief design of the act as expressed in the title. *Parkinson v. State*, 74 D. 522.

The Minnesota act of 1863, chapter 10, is in conflict with the section of the constitution which provides that no law shall embrace more than one subject, which must be expressed in its title, and is void. *Winona etc. R. R. Co. v. Waldron*, 88 D. 100.

The legislature passed an act entitled "An act to authorize the city of Madison to reassess and collect certain taxes and assessments," and authorizing a special reassessment, for the payment of a patent pavement already laid in the city, and also the adoption and use of any patented pavement in the future, and the assessment and collection of taxes therefor. *Held*, that the act did not "embrace more than one subject," and that the subject was sufficiently "expressed in the title." *Mills v. Charleton*, 9 R. 578.

An act of a legislature entitled "An act to incorporate the San Antonio and Mexican Gulf Railroad," and which provides that certain towns may issue bonds to aid in the construction of the railroad, is in violation of the constitutional provision. *Giddings v. City of Antonio*, 26 R. 321.

27. Statutes regulating commerce.*

— A statute prohibiting the transportation from one state to another of prairie chickens

which have been lawfully killed is void as in contravention of the provision of the federal constitution granting to Congress the power to regulate commerce among the several states. *State v. Saunders*, 27 R. 98.

28. What statutes are within the police power of the state. — The legislature of a state may determine that articles injurious to the public health or morals shall not constitute property within its jurisdiction, where the enactment is to operate prospectively. And a declaration by the legislature that no person shall acquire any property in spirituous liquors intended to be used as a beverage would not violate any provision of the constitution. *Preston v. Drea*, 54 D. 639.

The legislature may regulate by law the sale of any article the use of which would be detrimental to the morals of the people. *State v. Gurney*, 58 D. 782.

The legislature may declare the possession of certain property to be unlawful, where such property would be dangerous, injurious, or noxious; and may by due process of law, by proceedings *in rem*, provide for the abatement of the nuisance and the punishment of the offender by the seizure and confiscation of the property, by the removal, sale, or destruction of the noxious articles. *Fisher v. McGirr*, 61 D. 381.

The New Hampshire act of July 3, 1863, which undertakes to charge the owner with amount of damage done by his dog, as determined by the selectmen of the town within which the damage happened, without an opportunity to be heard, is so far unconstitutional, because it is not a wholesome and reasonable law within the meaning of the constitution, is contrary to reason and natural justice, and is therefore not within the general scope of legislative power, and because it is in violation of the provision in the bill of rights which secures the right of trial by jury in all controversies concerning property, except in cases where it has been otherwise heretofore used and practiced. *East Kingston v. Towle*, 97 D. 575; 2 R. 174.

A statute making it a misdemeanor to manufacture cigars, in cities of more than five hundred thousand inhabitants, in any tenement-house occupied by more than three families, except on the first floor of houses on which there is a store for the sale of cigars and tobacco, is unconstitutional. *Matter of Jacobs*, 50 R. 636.

The following statutes have been sustained as proper exercises of the police power: A statute which makes it unlawful for a citizen to distill his grain into spirituous or intoxicating liquor, unless employed by the governor to do so, under such rules and regulations as he may prescribe. *Ingram v. State*, 84 D. 782.

A statute exempting from taxation one

* Statutes providing for inspection of illuminating oils, see note, 26 R. 517-520. See also COMMENT, 5-10.

For Index to Notes in American Decisions and American Reports, see Volume I.

dog to each family, and taxing all others at a fixed rate, under a penalty for non-payment. *Ex parte Cooper*, 30 R. 152.

A statute prohibiting the sale of opium. *State v. Ah Chew*, 40 R. 488.

A statute making it a penal offense to establish and maintain a place for vending provisions or refreshments, or furnish food or shelter for horses, within a mile of a camp-meeting without the permission of the authorities in charge of such meeting, with an exception in favor of any one thus carrying on his pre-established business, and a limitation of such prohibition to thirty days in any year. *Com. v. Bearse*, 42 R. 450; *Meyers v. Baker*, 60 R. 580.

A statute making it a misdemeanor to sell any pistols except such as are known as navy pistols. *Dabbs v. State*, 43 R. 275.

A statute declaring it unlawful, within certain counties, to transport or move after sunset and before sunrise of the succeeding day any cotton in the seed, but permitting the owner or producer to remove it from the field to the place of storage. *Davis v. State*, 44 R. 123.

A law requiring operators of butter and cheese factories on the co-operative plan to give bonds for faithful accounting for property received for manufacture. *Hawthorn v. People*, 50 R. 610.

29. Statutes unconstitutional in part. — An unconstitutional provision in a statute renders such statute void only so far as that provision is concerned. *University of Maryland v. Williams*, 31 D. 72. S. P., *Fisher v. McGirr*, 61 D. 381; *Brown v. Beatty*, 69 D. 389; if sufficient remains to effect its object without the aid of the invalid portion. *Santo v. State*, 63 D. 487. S. P., *East Kingston v. Towle*, 97 D. 575; *Berry v. Baltimore etc. R. R. Co.*, 20 R. 69.

A statute was passed in due form to re-portion the state into judicial districts, but before being signed by the governor was so changed as to reduce the number of judges in the second district to one, which was contrary to the constitution. *Held*, that the statute being complete and capable of execution as to the other districts, it was valid as to them. *In re Groff*, 59 R. 859.

30. Constitutionality of various statutes relating to remedies. — 1. *General rules.** — The legislature may enact laws varying the remedy for the collection of debts, and if the laws are general, and contain such provisions as the public good requires, they are constitutional, and all proceedings, as well for old as new debts, should conform to them. *Sommers v. Johnson*, 24 D. 604; *McMillan v. Sprague*, 35 D. 412; *Coffman v. Bank of Kentucky*, 40 D. 311.

Legislative authority over remedies may be exercised at pleasure over past or future

* Remedies, legislative control over, see note, 62 D. 112, 113.

contracts. *Baughner v. Nelson*, 52 D. 694; *Cook v. Gray*, 81 D. 185; if the parties are left a substantial remedy, according to the course of justice as it existed at the time the contracts were made. *Von Baumback v. Bade*, 76 D. 283. S. P., *Peurose v. Erie Canal Co.*, 93 D. 778; *Sequestration Cases*, 98 D. 494.

The legislature may create in favor of pending actions additional remedies for the enforcement of rights which are therein attempted to be enforced; thus it may declare that no action then pending shall abate because the firms who are respectively parties defendant and plaintiff have a common member. *Hepturn v. Curtis*, 32 D. 760.

Remedies may be altered or varied by the legislature as it pleases, provided that in so doing their nature and extent are not so changed as materially to impair the rights and interests of the creditors. *Von Baumback v. Bade*, 76 D. 283.

The legislature may pass retrospective laws affecting pending suits, giving new remedies, and modifying old ones, or removing impediments in the way of legal proceedings; provided that such laws do not violate the constitutional prohibitions. *Schenley v. Com.*, 78 D. 359.

For convenience, the state may vary the times of holding courts, shift jurisdiction from one to another, change forms of action, of pleadings, and of process, etc., and may incidentally delay somewhat the collection of given debts; but the legislature cannot, under guise of legislating upon the remedy intentionally, in effect impair the obligation of contracts. *Scobey v. Gibson*, 79 D. 490.

2. *What laws affect the remedy only.** — A statute is not void as conferring exclusive privileges upon particular persons, which gives a lien for services enforceable in a mode specially provided, to persons employed on steamboats and other water-craft. *F. R. Steamboat Co. v. Foster*, 48 D. 248.

The Missouri act of 1845 merely provides a mode for establishing a right which already existed, and is not unconstitutional. *Snyder v. Warford*, 49 D. 94.

The Maryland act of 1845 regulates remedies upon usurious contracts, and does not divest vested rights. *Baughner v. Nelson*, 52 D. 694.

The act of 1845 is merely remedial, obliging the borrower seeking relief as defendant against a usurious contract, to do the same as he is obliged to do when seeking relief as plaintiff. *Id.*

The following statutes have been sustained as affecting the remedy only: A statute requiring that makers and indorsers of negotiable paper shall be sued in a joint action. *McMillan v. Sprague*, 35 D. 412.

A law passed subsequently to the execu-

* What laws affect the remedy only, see note, 10 D. 136-140.

For Index to Notes in American Decisions and American Reports, see Volume I.

tion of a contract, making it unlawful to imprison a debtor. *Brown v. Dillahunty*, 43 D. 499.

A legislative act enforcing a moral obligation not legally enforceable. *Lycoming v. Union*, 53 D. 575.

The Pennsylvania act of March 27 providing that certain counties from which causes have been removed for trial to Union County, by virtue of the act of the 13th of April, 1843, reimburse Union County for the expenses of the said trials. *Id.*

A statute permitting municipal corporations to appeal without giving security as required in other cases. *Holmes v. City of Mattoon*, 53 R. 602.

3. *What alterations of remedies are unwaranted.* — The legislature may alter remedies; but the alteration must not, so far as prior contracts are concerned, appear on the face of the statute to be enacted to render the remedies less efficient or more dilatory than those in force when the contract was made. *Townsend v. Townsend*, 14 D. 722.

When the remedy is an essential part of the contract, it cannot be changed. To take away all legal remedies, or so to change and obstruct them as materially to impair the value and benefit of the contract, is within the prohibition of the constitution. *Coffman v. Bank of Kentucky*, 90 D. 311; *Sequestration Cases*, 98 D. 494.

A legislature has power, by a remedial statute, to legalize defective proceedings under a former statute, only in cases where it has present authority to authorize like proceedings. *Kimball v. Town of Rosendale*, 24 R. 421.

A statute providing that no person shall recover damages from a municipality for an injury from a defect in a highway, unless he resides in a country where similar injuries constitute a like cause of action, is unconstitutional. *Pearson v. City of Portland*, 31 R. 276.

4. *Illustrations.* — A contract of specialty was entered into, and judgment rendered, under a statute declaring that no writ of *ca. sa.* should in any case be issued upon a judgment recovered by a party not at the time a resident of the state, without an affidavit of fraud against defendant. Subsequently a statute was passed repealing the above requirement, and containing no saving clause as to pending suits. After this a writ of *ca. sa.* issued on the judgment without such affidavit of fraud. *Held*, that the repealing statute did not impair the obligation as to bail, but merely modified the remedy. *Coot v. Gray*, 81 D. 185.

A statute of Virginia which provided that "no corporation shall hereafter interpose the defense of usury in any action, nor shall any bond, etc., of such corporation be set aside, impaired, or adjudged invalid by reason of anything contained in the laws

prohibiting usury," — *held*, 1. To apply to contracts made before the passage of the act, even though in suit; and 2. Not to be in violation of the constitution of Virginia, or of that of the United States. *Town of Danville v. Pace*, 18 R. 663.

A statute made railroad companies liable "for all expenses of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision or other accident occurring to such cars, or otherwise." *Held*, unconstitutional so far as it attempts to make railroad companies liable in cases where they have violated no law, or been guilty of no negligence. *Ohio & M. R'y Co. v. Lackey*, 20 R. 258.

A town made an irregular assessment of taxes; a statute was thereupon passed to confirm the assessment. But before the passage of this statute a constitutional amendment had taken away from the legislature authority to enact special laws for the assessment and collection of taxes. *Held*, that the statute was void. *Kimball v. Town of Rosendale*, 24 R. 421.

31. *Statutes relating to punishment for crime.* — An act giving the recorder of an incorporated city jurisdiction of certain misdemeanors and civil causes within the city is constitutional. *State v. Helfrid*, 10 D. 591.

An act imposing a double penalty upon one who appeals, in case he is convicted by a jury in the appellate court, is unconstitutional. But the appellate court may, after conviction by the jury, impose the single penalty, where such penalty appears to be appropriate, and the law does not state by what tribunal it may be imposed. *State v. Gurney*, 58 D. 782.

An act requiring a charge to be made in like manner as is required in relation to other offenses, but giving no especial directions, is not unconstitutional on the ground that the charge is not required to be distinctly and fully made. *Sanso v. State*, 63 D. 487.

An act is not unconstitutional on the ground that it authorizes a criminal prosecution, and that it is not made necessary to inform the defendant, and that he has not the right to be confronted with witnesses, although it does not require an arrest, if it requires a notice to him as effectual in substance as when he is sued for any amount of indebtedness, and allows him to be confronted with witnesses. *Id.*

A statute providing that a person shall be subjected to an increased punishment upon conviction for a second offense is not in violation of a constitutional provision that no person shall be twice put in jeopardy for the same offense. *People v. Stanley*, 17 R. 401.

The legislature may lawfully authorize

* Constitutionality of statutes concerning industrial schools, see note, 35 R. 456-462.

For Index to Notes in American Decisions and American Reports, see Volume I.

cities to punish known thieves, etc., found in the municipality. *Morgan v. Nolte*, 41 R. 485.

A statute prescribing for the offense of living in adultery or fornication, when committed by a negro and a white person together, a different punishment from that prescribed when the offense is committed by two white persons or two negroes, is not unconstitutional. *Pace v. State*, 44 R. 513.

III. INTERPRETATION AND EFFECT.

32. General rules of construction. — Statutes must be construed according to their plain and obvious meaning. *Lippitt v. Huston*, 94 D. 115. And so as not to impair pre-existing rights of the public or of individuals. *Bruce v. Schuyler*, 46 D. 447.

Statutes should be so interpreted as to suppress the mischief they were intended to correct, and advance the remedy therefor. *Parkinson v. State*, 74 D. 522; and not so as to work a public mischief, unless required by clear, unequivocal words, especially if the statute be chiefly to subserve individual interests. *People v. Lambier*, 47 D. 273.

A statute is not to be construed to protect fraud, where any other construction is possible. *Rogers v. Brent*, 50 D. 422.

A statute empowering a court to give such relief as right and justice may appear to require does not authorize an arbitrary determination, but a decision according to the legal rights of the parties. *Ex parte Willsocks*, 17 D. 526.

Recitals of general and public facts in an act of Parliament cannot be denied. *Campbell's Case*, 20 D. 360.

A recital of a particular fact to the prejudice of an individual right is not conclusive, except in the case of bills of attainder. *Id.*

All statutes are, in legal contemplation, perpetual, unless limited by their terms, which means simply that they are of force until duly repealed or amended. *Wellington's Case*, 26 D. 631.

A case within the equity of a statute, though not within its letter, may be declared in a court of equity to be within the statute. *Davis v. Harkness*, 41 D. 184.

Courts have no dispensing power over statutes; where they contain no exceptions, the courts can make none; if they are too rigid in their terms, the remedy is with the legislature. *Bax v. Stanford*, 51 D. 142.

Courts have nothing to do with the policy, necessity, or expediency of a law. This is a matter for the consideration of the legislature. *Bepley v. State*, 58 D. 628.

Doubtful statutory provisions defining jurisdiction of courts should be interpreted so as to maintain the jurisdiction of the legal tribunals. *Abbott v. Gatch*, 71 D. 635.

The language of an exemption act should be construed in harmony with its humane

and remedial purpose. *Stewart v. Brown*, 93 D. 578.

33. Construction to be in favor of constitutionality. — A court of law when called upon to decide upon the validity of a statute will presume it to be constitutional until the contrary clearly appears. The legislature is presumed to be the judge, in the first instance, of its constitutional powers, and it is only when manifest assumption of authority or misapprehension of it appears that the judicial power should refuse to execute it. *Adams v. Howe*, 7 D. 216. S. P., *Bailey v. Philadelphia, W., & B. R. R. Co.*, 44 D. 593; *Sutherland v. De Leon*, 46 D. 100; *Baughner v. Nelson*, 52 D. 694; *Winter v. Jones*, 54 D. 379; *Wright v. Wright*, 56 D. 723; *Louisville etc. R. R. Co. v. Davidson Co.*, 62 D. 424; *Santo v. State*, 63 D. 487; *Reyburn v. Brackett*, 83 D. 457. Thus where such a statute would be valid if the consent of persons affected by its passage was previously obtained, that fact will be presumed, and conclusively so against a stranger. *Wellington's Case*, 26 D. 631.

An act of the legislature will be declared unconstitutional only in the case that its repugnance to the constitution be beyond reasonable doubt. *Hoke v. Henderson*, 25 D. 677. S. P., *Harrison v. State*, 85 D. 658; *Com. v. Erie Ry Co.*, 1 R. 399.

An act susceptible of two interpretations will be given that which will render it constitutional and valid. *Boisdere v. Citizens' Bank*, 29 D. 453; *Bloodgood v. Mohawk etc. R. R. Co.*, 31 D. 313; *Santo v. State*, 63 D. 487.

In construing statutes, courts should look to their true object, and not be guided by other objects or purposes which the legislature had mistakenly assumed or declared; and if in this view the statutes be within the power of the legislature, and consistent with the constitution, they should be upheld. *Sherman v. Buick*, 91 D. 577.

The word "be" will be construed as meaning "become" when this is necessary to save an act from the objection of being unconstitutional and void. *Boisdere v. Citizens' Bank*, 29 D. 453.

A statute enacting that the owners of land lying and being on a certain stream may recover as well for injuries heretofore sustained as for those which may be thereafter sustained in consequence of any act, work, or obstruction of the Philadelphia, Wilmington, and Baltimore Railroad Company must be construed as giving a remedy only for those injuries for which the company was liable under its charter, and not as imposing new liabilities. *Bailey v. Phila., W., & B. R. R. Co.*, 44 D. 593.

A statute authorizing certain acts to be done affords no protection for acts not done strictly in pursuance of the authority conferred. Hence if a company, by statute au-

For Index to Notes in American Decisions and American Reports, see Volume I.

authorized to erect across a navigable stream a bridge of specified dimensions or at a particular place, erects a bridge of different dimensions, or at another place, it will be answerable for any damages resulting from the variation in the dimensions or location of such bridge. *Id.*

34. Ordinary or well-known meaning of the words to be adopted.—The words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use. *Parkinson v. State*, 74 D. 522; *Cummings v. Coleman*, 62 D. 402; *Quigley v. Gorham*, 63 D. 139.

When the legislature has used a term, without defining it, which has a well-settled meaning in the common law, it must be supposed that they use it in the same sense. *Hillhouse v. Chester*, 3 D. 265; *Johnson v. Farwell*, 22 D. 203; *Carpenter v. State*, 34 D. 116; *State v. Baltimore & O. R. R. Co.*, 38 D. 317; *Buckner v. R. E. Bank*, 41 D. 105; *Ex parte Vincent*, 62 D. 714; *Harris v. Reynolds*, 73 D. 600.

The intention of the legislature is to be gathered from the words used, taken in their plain and obvious sense. *Keener v. State*, 63 D. 269.

Where the language of a statute is clear and plain, courts cannot consider consequences in construing it so as to give it a construction different from its natural and obvious meaning. *Coffin v. Rich*, 71 D. 559.

Construction of a statute is admissible only where there is an ambiguity. *Gains v. Gains*, 12 D. 375.

A word in a statute having two significations should ordinarily be construed as generally understood in the community, but not where it would contravene the manifest intention of the legislature. *Favers v. Glass*, 58 D. 272.

35. Interpretation of general words.—General words in a statute must receive a general construction, unless there be something in it to restrain them. *Jones v. Jones*, 36 D. 723.

36. Ascertaining and giving effect to legislative intent.—In construing a statute, the intention of the makers must be regarded, and what is within that intention is within the statute, though not within the letter, while what is within the letter of the statute but not within the intention of the makers is not within the statute. *Mayor etc. v. Root*, 63 D. 692. *S. P., People v. Ulica Ins. Co.*, 8 D. 243; *Orndoff v. Turman*, 21 D. 608; *Blakeney v. Blakeney*, 30 D. 574; and the intention may be collected from the cause or necessity of making the act or from foreign circumstances. *Car Spring Co. v. R. R. Co.*, 69 D. 181. Accordingly, where a statute recited that A, who was living, had only female heirs, and it appeared that A had two daughters, named B and C, and no

other children,—*held*, that by the words "female heirs" were meant the two daughters of A. *Beall v. Harwood*, 3 D. 532.

General rules of statutory construction must yield to the clear intention of the legislature sufficiently expressed. *Welch v. Wadsworth*, 79 D. 236.

Where a literal construction would produce results unjust and violative of the constitution, the general language of the statute must be restricted so as to accomplish the general intent and declared result of the statute without producing such results, or else it must be declared to be a plain violation of the provisions of the constitution, and therefore void. *Preston v. Drew*, 54 D. 639.

A universal rule in construing a statute is, that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto. *Tynan v. Walker*, 95 D. 152.

Laws must be executed according to the sense and meaning which they import at the time of passage. *Com. v. Erie etc. R. R. Co.*, 67 D. 471.

An express provision of law cannot be repealed or its construction controlled by the presumed or even well-known views of the members of the legislature. The law alone can speak the legislative will. *Belleville etc. R. R. Co. v. Gregory*, 58 D. 589.

It is safe to give effect to particular words of the enacting clause; for where the legislature, in the same sentence, uses different words, courts will presume that they were used to express different ideas. *Parkinson v. State*, 74 D. 522.

Laws to carry on the government are to receive a liberal construction to effectuate the objects designed, and if the legislative purpose can be arrived at in the absence of express language, that meaning is to be observed and obeyed. *Hardesty v. Taft*, 87 D. 584.

The legislature, in re-enacting a law without change or amendment, is deemed thereby to adopt the construction placed upon it by the courts. *Indiana etc. R. R. Co. v. Guard*, 87 D. 327.

The court must give to the language of a statute, which is deficient in precision and clearness, and faulty or imperfect in phraseology or structure, such an interpretation as may appear best adapted to effectuate the object contemplated in its enactment; and it is always to be presumed, in such case, that the legislature intended that the most reasonable and beneficial interpretation should be given to the language which they have used. *Pickering v. Day*, 95 D. 291.

Where the language of a statute is not

For Index to Notes in American Decisions and American Reports, see Volume I.

clear, and it is obvious that by a particular construction great public interests would be endangered or sacrificed, the court ought not to presume that such construction was intended by the makers of the law. *Id.*

Construing a statute according to its equity is to give effect to it according to the intention of the law-makers, as indicated by its terms and purposes. *Blakeney v. Blakeney*, 30 D. 574.

37. Rule that entire statute must be construed together. — The legislative intent governs in construing a statute, if it can be ascertained, and such intent is to be gathered from the whole statute. *Smith v. Randall*, 65 D. 476; *Belleville and Illinoisstown R. R. Co. v. Gregory*, 58 D. 589; *Parkinson v. State*, 74 D. 522.

Effect must be given to every part of a statute, if it can be done without manifestly violating the intention of the legislature. *Montesquieu v. Heil*, 23 D. 471; without rejecting any part as surplusage, or treating it as a repetition of a provision already made. *Gates v. Salmon*, 95 D. 139.

38. Construing two or more provisions together. — All sections of an act should be construed together, and each section should receive such a construction as will make it conform to common sense and justice. *Burnham v. Hays*, 58 D. 389; *Stout v. Keyes*, 43 D. 465; and if possible, so as to be consistent with all other sections. *Merrill v. Harris*, 57 D. 359.

Statutes which take effect simultaneously should be construed together in determining their effect. *Bishop v. Boyle*, 68 D. 615.

One portion of a law, to qualify, restrain, or suspend another portion, must appear to have been framed with that intention. *Belleville etc. R. R. Co. v. Gregory*, 58 D. 589.

A statute containing two inconsistent provisions must be construed so as to effect the legislative intention. *Lindley v. Cross*, 99 D. 610.

Express, plain, and clear words in a statute must control doubtful and ambiguous expressions in the same statute, particularly in the same clause or section. *Lisher v. Pierson*, 20 D. 612.

39. Interpretation of statutes in pari materia. — Acts in *pari materia* should be construed together as if they were one law. *McCartee v. Orphan Asy. Soc.*, 18 D. 516; *Montesquieu v. Heil*, 23 D. 471; *State v. Wilbor*, 38 D. 245; *State v. Baltimore & O. R. R. Co.*, 38 D. 317; *Dugan v. Gittings*, 43 D. 306; *Bruce v. Schuyler*, 46 D. 447; *Scarborough v. Watkins*, 50 D. 528; *Harrison v. State*, 85 D. 658.

Acts relating to the same subject-matter and passed on the same day should be so construed as to give them both effect. *Lorimer v. Lewis*, 39 D. 461. S. P., though not passed on the same day, *Neill v. Keese*, 51 D. 746.

40. When resort may be had to extrinsic facts. — The intent of the legislature ought not to be sought for outside of the statute, unless the words are doubtful and uncertain. *Salling v. McKinney*, 19 D. 722.

If the words are ambiguous, resort should be had to the probable consequences which would arise from the one or the other construction. *Hoke v. Henderson*, 25 D. 677.

But if the meaning of the language of the statute be plain, there can be no such resort. *Id.*

Considerations of policy are entitled to weight only in cases of doubtful interpretation, and where the intention of the legislature appears to be opposed to the literal import of the language of the act. *Coulter v. Robertson*, 57 D. 168.

41. What may be supplied by inference or implication. — Penalties in a statute for certain acts necessarily imply prohibition, and make the thing prohibited unlawful, although there is no express prohibition contained in the statute. *Harrison v. Berkley*, 47 D. 578; *Roby v. West*, 17 D. 423.

An attempt to contravene a public statute is illegal, whether it is expressly prohibited by such statute or not. *Rice v. Maxwell*, 53 D. 85.

Where the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words, or by necessary implication; and such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. *Hickok v. Hine*, 13 R. 255.

42. Referring to the title and preamble. — The title of an act may be referred to for the purpose of ascertaining the intent of the legislature, when not clearly manifest in the body of the act. *Blakeney v. Blakeney*, 30 D. 574.

The character of every statute is determined by its provisions, and not by its title, for the purpose of ascertaining whether it is general or local. *People v. McCann*, 69 D. 642.

The preamble to an act may be used to explain equivocal expressions, but never to control the obvious meaning of the statute, nor to supply matter not embraced in its spirit. *Bynum v. Clark*, 15 D. 633. S. P., *Hart v. Mayor of Albany*, 24 D. 165; *Sutherland v. De Leon*, 46 D. 100.

Effect must be given to the preamble in construing a statute, provided it does not contain expressions contradictory to or irreconcilable with the enacting clause. *Montesquieu v. Heil*, 23 D. 471.

43. Provisos and exceptions. — The office of a proviso is not to repeal, but to modify the enacting clause of a statute. *Salling v. McKinney*, 19 D. 722.

For Index to Notes in American Decisions and American Reports, see Volume I

A proviso in a statute is not to enlarge the operation of the enacting clause. *Id.*

The enactment of a general provision existing in the Spanish law into the code of Louisiana does not have the effect of repealing an exception which accompanied that general provision in the Spanish law. *Valcain v. Cloutier*, 22 D. 179.

The Georgia registry act of 1847, requiring the recording of marriage settlements, made no exception in favor of *femes covert*, and consequently the court can make none. It is undesirable that exceptions should be ingrafted upon any statute by the bench, as it increases the uncertainty of the law, and results in judicial legislation. *Boston v. Cummins*, 60 D. 717.

44. Effect given to punctuation. — The printer's punctuation of published statutes may be an uncertain guide to their interpretation. *State v. McNally*, 56 D. 650.

45. Effect of custom or usage on construction. — A construction of a statute long acted upon by the people at large will be adopted by the courts, if not in direct contradiction to its terms. *Maher v. State*, 26 D. 379.

46. Effect of contemporaneous legislation on construction. — Contemporaneous legislation is the best standard of the meaning of laws. *Harrison v. State*, 85 D. 658.

A long-established construction of a statute by the officers who execute it ought to have the force of a judicial determination. *Bruce v. Schuyler*, 46 D. 447; *Com. v. Posey*, 2 D. 560.

Contemporaneous construction of a statute is generally the best. *Bruce v. Schuyler*, 46 D. 447; and should never be departed from without most cogent reasons. *Chestnut v. Shane*, 47 D. 387; *Will of Warfield*, 83 D. 49.

47. Following prior English construction. — A statute adopted from a sister state or from England, which has received a settled and uniform construction by the courts of the country from which it has been taken, must be given a similar construction by the state adopting it. Such interpretation becomes part of the statute itself, in effect. *Munson v. Hallowell*, 84 D. 582; *Frankland v. Hallowell*, 84 D. 582; *Dowell v. Buchanan*, 23 D. 280; *Woolsey v. Cade*, 25 R. 711; *Myrick v. Hasey*, 46 D. 583; *Balance v. Rankin*, 54 D. 412; *Rigg v. Wilton*, 54 D. 419.

48. Construction of local acts. — Public statutes are usually general in their character and operation, and equally applicable in all parts of the state. *Pierce v. Kimball*, 23 D. 537.

Statutes which are local with respect to the violation of them are nevertheless public, if they are binding upon all persons

coming or being within the particular locality. *Id.*

Of this character are statutes regulating the taking of fish in particular localities, statutes establishing local tribunals, etc. *Id.*

49. — of statutes of sister states. — Foreign laws cannot *per se* operate extra-territorially. *Sneed v. Ewing*, 22 D. 41.

The construction of a statute of a state by the courts of that state must be followed in courts of other states. *Case v. Cushman*, 39 D. 47; *American Print Works v. Lawrence*, 57 D. 420.

50. — of retrospective statutes.*

— If a statute be not explicitly retrospective, the court will not by construction give it a retrospective operation. *Goshen v. Stonington*, 10 D. 121; *Perkins v. Perkins*, 18 D. 120; *Davis v. Minor*, 28 D. 325; *Garrett v. Wiggins*, 30 D. 653; *Oriental Bank v. Freeze*, 36 D. 701; *Oyon's Succession*, 41 D. 274; *Bruce v. Schuyler*, 46 D. 447; *Grimes v. Norris*, 65 D. 545; *Conway v. Cable*, 87 D. 240; *Richardson v. Cook*, 88 D. 622; *Williams v. Johnson*, 96 D. 613. But this rule does not apply where the legislature expressly declares its intention to make a statute retroactive. *Baughner v. Nelson*, 52 D. 694. But that intention is not to be assumed from the mere fact that general language is used which might include past transactions, as well as future. *Seamans v. Carter*, 82 D. 696. Nor does the rule apply to a repealing statute not affecting vested rights, merely operating on the remedy, and containing no saving clause as to pending suits. Such a statute will have a retroactive operation. *Cook v. Gray*, 81 D. 185.

It is a general rule, independently of the constitution, that statutes are to have a prospective operation only, and it is conclusively settled that a statute should not be construed to operate retrospectively, if a vested right be thereby destroyed. *Lewis v. Brackenridge*, 12 D. 228.

A statute is to be deemed retrospective or retroactive where it takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. *Hops Mut. Ins. Co. v. Flynn*, 90 D. 438.

A prospective, and not a retrospective, effect will be given to section 25, chapter 63, General Statutes of Vermont, providing that "no acknowledgment or promise shall be held to affect any defense made under the provisions of this chapter, unless such acknowledgment or promise shall be in writing, signed by the party affected thereby," and therefore the statute will not apply to an action pending when it took effect. *Richardson v. Cook*, 88 D. 622.

* Retrospective statutes, operation of, see note, 11 D. 98.

For Index to Notes in American Decisions and American Reports, see Volume I.

A statute limiting the time to five years to recover real estate sold by an administrator applies only to sales made subsequent to the passage of the statute, and has no retrospective operation. *Holyoke v. Haskins*, 16 D. 372.

An act legitimating children will not receive, in the absence of express provisions to the contrary, a retroactive effect so as to defeat the right of the commonwealth to taxes based on the illegitimacy, which right accrued prior to the passage of the act. *Com. v. Stump*, 91 D. 198.

A statute requiring, as a basis of recovery in an action, evidence of facts not previously necessary to be proved, will not be construed to apply to actions commenced before its passage, unless expressly so declared. *Bedford v. Shilling*, 8 D. 718.

Where a statute is passed enlarging the time for registration of bills of sale, for purposes of notice, it applies to existing bills of sale upon which the time previously allowed for registration has not run. *Read v. Staton*, 9 D. 740.

A retrospective act cannot affect a contract merged in a judgment at the time of its passage. *Welch v. Wadsworth*, 79 D. 236.

A retrospective act may affect a contract upon which suit has been brought and judgment by default rendered at the time of its passage, where the case is still pending on defendant's motion to be heard in damages, for the contract does not become merged in judgment until the extent of the defendant's liability under the contract is determined by final judgment. *Ib.*

A statute relating to the subject-matter of an order made previous to its passage will not affect the decision of the appellate court on appeal from the order. *State v. McGlynn*, 81 D. 118.

51. — of *ex post facto* laws. — At the time of the commission of the offense for which the prisoner was on trial, the statute provided that juries should be judges of the law in such cases. Before the trial this was repealed. *Held*, that the defendant was not entitled to the benefit of the repealed statute. *Marion v. State*, 57 R. 825.

52. — of statutes in derogation of common law. — Statutes in derogation of common law are to be strictly construed. *Hemingway v. Scales*, 97 D. 425; and it will not be inferred that the legislature intended to alter common-law principles further than is clearly expressed or the case absolutely requires. *Tinsman v. Belvidere etc. R. R. Co.*, 69 D. 565.

53. Interpretation of private acts. — Private acts of Parliament were passed in England only where there was no other mode of relief. *Campbell's Case*, 20 D. 360.

Such acts are construed as private conveyances, binding only parties and privies, and not affecting the rights of strangers. *Ib.*

A private act obtained by fraud may be relieved against in a court of law or equity. *Ib.*

Private statutes operate generally, in Maryland, as private conveyances merely, binding only on parties and privies, and are valid if they do not conflict with the constitution. *Ib.*

The validity of statutes annulling the marriage contract, and of other private statutes, in particular cases, considered. *Ib.*

A statute giving power to mortgage a decedent's realty for the payment of debts may bind his heirs and devisees, who applied for it, but not his creditors. *Ib.*

Where by a private act of the legislature the property of a person is directed to be sold or disposed of, and the money realized to be paid to certain creditors, it must be understood as saving the rights of third persons, and can only amount to a quitclaim of the right or interest of the state. *Jackson v. Catlin*, 3 D. 415.

Facts stated in a private statute are strong evidence against those who procured its passage. *May v. Frazer*, 14 D. 159.

Where a patent for a military lot was granted to David H. without words of description, and it was claimed by the heirs of Daniel H., a private statute confirming the title to the heirs of Daniel H., though inoperative to divest the title, was held valid as confirmatory of a void grant, it being shown by parol that Daniel H. was intended as the original patentee. *Jackson v. Stanley*, 6 D. 319.

54. Real and personal statutes. — A real statute is one which regulates property within the state where it is in force. *Saul v. His Creditors*, 16 D. 212.

The real statute of the situation prevails over the personal statute of the domicile. *Ib.*

A personal statute is one which follows and governs the party subject to it wherever he goes. *Ib.*

Definitions of real and personal statutes quoted and considered. *Ib.*

A statute governing the property rights of husband and wife is not a personal statute, but is a real statute. *Ib.*

55. Construction of remedial statutes, generally. — Remedial statutes should be liberally construed, to bring within the scope of their operation all cases that come within the mischief intended to be provided against. *Orndoff v. Turman*, 21 D. 608; *White v. Mary Ann*, 65 D. 523.

A statute is remedial which gives a right of action against stockholders of a corporation for corporate debts, and should be liberally construed. *Freeland v. McCullough*, 43 D. 685.

Where a statute gives a party a right to recover judgment in the nature of a penalty, for a sum larger than is justly due, the right to the amount that may be so recov-

For Index to Notes in American Decisions and American Reports, see Volume I.

ered does not become vested until after judgment. *Oriental Bank v. Freeze*, 36 D. 701.

The Pennsylvania act of March 20, 1818, "to improve the navigation of the river Lehigh," and the act of February 13, 1822, "to incorporate the Lehigh Coal and Navigation Company," construed, and held to afford a statutory remedy for those injuries which were remediable at common law, and for no others. *Lehigh B. Co. v. Lehigh C. & N. Co.*, 26 D. 111.

56. What words are mandatory and imperative.—A statute requires owners of tenement-houses to provide such fire-escapes as shall be directed and approved by certain commissioners. *Held*, that the duty is presently imperative, and the owners must procure such direction and approval, without waiting for the action of the commissioners. *Willy v. Mulledy*, 34 R. 536.

57. When new remedy is exclusive, and when cumulative merely.—The statutory remedy must be pursued where both the right and the remedy are given by statute; although if the right existed at common law, and a remedy is given by statute, the latter is regarded as cumulative, and either remedy might be pursued. *People v. Craycroft*, 56 D. 331; *Lang v. Scott*, 12 D. 257; *Dygeri v. Schenck*, 35 D. 575; *Lewey's I. R. R. Co. v. Bolton*, 77 D. 236.

Where a statute gives a remedy where there was none before, it ought to be followed. *App v. Dreisbach*, 21 D. 447.

If a statute provide a remedy for a matter before actionable at common law, the common-law remedy is not thereby divested. *Crittenden v. Wilson*, 15 D. 462; *Methodist Church v. Remington*, 26 D. 61; *Donnell v. Jones*, 48 D. 59. This rule does not apply to acts done by express authority of the statute for a public purpose; nor can either party resort to the common-law action in such a case, because the other has not proceeded to have the damages assessed in the mode prescribed in such statute. *Calking v. Baldwin*, 21 D. 168.

A statute giving a new remedy does not alter the nature of the wrong complained of; if a tort before such statute was enacted, it remains a tort afterwards. *Wilson v. Myers*, 15 D. 510.

Compensation for damages occasioned by an act authorized by statute must be sought in the mode prescribed by that statute, if it be a public statute; but if it be a private statute, compensation may be obtained through the remedy given by it, or by action according to the common law. *Calking v. Baldwin*, 21 D. 168.

If a statute confer special privileges, and provide a particular remedy for their invasion, those neglecting that remedy may be without redress for the invasion. *Bassett v. Carleton*, 54 D. 605.

A party injured is confined to his remedy under the statute in any case clearly within the provisions of the statute; for any other case, his remedy remains as at common law. *Troy v. Cheshire R. R. Co.*, 55 D. 177.

The Maryland act of 1821, chapter 77, provided for the appointment of an inspector of bark. The act of 1854, chapter 200, provided that any free white citizen could act as such inspector; but must first take out a license, and pay one hundred dollars therefor. *Held*, that whether the act of 1854 abolished the office as it previously existed or not, the inspector appointed by the governor must take out a license. *Davis v. State*, 61 D. 331.

A new remedy given by statute for failure of a bidder to comply with the terms of a probate sale is cumulative, and does not take away the common-law remedy, or remedy by suit to compel specific performance. *Dawson v. Miller*, 70 D. 380.

58. Rule that penal statutes must be construed strictly.—Penal statutes should be strictly construed. *Gates v. McDaniel*, 19 D. 49; *Warner v. Com.*, 44 D. 114; *Harrison v. State*, 85 D. 658. Thus a statute requiring the employment of an auctioneer to make sales at auction, and prohibiting other persons from doing so, applies only to the act of sale, and does not prohibit other persons from appointing the time and place of sale, advertising, giving notice to interested parties, and making adjournments. These acts are preliminary, and constitute no part of the contract or act of sale. *Hosmer v. Sargent*, 85 D. 683.

Penal statutes are to be expounded strictly against an offender and liberally in his favor; it is not sufficient that the offense is within the mischiefs intended by the legislature to be redressed, if not within the words used. Accordingly, it is not punishable, under the statute prohibiting the erection of wooden buildings within certain limits, and of wooden additions to buildings already erected, having in them a chimney, fire-place, or stove, to make a wooden addition to a building, with the fire-place entirely without the addition. *Daggett v. State*, 10 D. 100.

An act of Congress highly punitive in character must be strictly construed by the rules of the common law as well as by the modern rules of international law. *Galbraith v. McFarland*, 91 D. 281.

An act of Congress making it a penal offense to hinder, delay, or obstruct the mails must be strictly construed, when, under its provisions, it is sought to protect property used in the transportation of mails from the pursuit of creditors, in derogation of a right recognized by the laws of the state. *Lathrop v. Middleton*, 83 D. 112.

A statute imposed a penalty on any railroad company which should exclude any person or persons from any particular car

For Index to Notes in American Decisions and American Reports, see Volume I.

on account of race or color, and subjected the employees offending to fine and imprisonment. A man and his wife, colored persons, were excluded from a car by the same employee at the same time. *Held*, but a single offense, and that a recovery by the man and his wife in right of the wife barred a recovery in his own right. *Central R. R. Co. v. Green*, 27 R. 718.

59. Limits and exceptions to the rule. — Penal laws are not to be so construed as to defeat the obvious intention of the legislature, and though they are not to be extended, they should receive a rational construction. *Keller v. State*, 69 D. 226; *Parkinson v. State*, 74 D. 522.

The subject of a penal law may generally be perceived by ascertaining what mischief or evil the law was designed to remedy or prevent. *Parkinson v. State*, 74 D. 522.

60. Various interpretations of the word "may." — The word "may," or words "shall be lawful," used in a statute, are mandatory, wherever the act to be done under the statute is to be done by a public officer, and either concerns the public interest or affects the rights of third persons. *Ex parte Simonton*, 33 D. 320.

"May" will be construed to be synonymous with "shall," where the public or third persons have a claim *de jure* that the power should be exercised; but where this is not the case, "may" will not be construed as "shall." *Bansmer v. Mace*, 81 D. 344.

The word "may" is equivalent to "shall," in the statute providing that affidavits for use in any court within the state "may be taken" before justices of the peace. *People v. Brooks*, 43 D. 704.

61. Interpretations of various other particular words and phrases. — The word "act" is generally used to designate the entire bill with all the parts adopted by a single effort of the legislative will; but the word may be referred to a particular section in which it is used, when the context indicates that such was the legislative intent. *Satcher v. Satcher*, 91 D. 498.

In a criminal statute, the word "horses" may fairly be construed to include mares, as *somen generalisimum*. *State v. Dunnivant*, 5 D. 530.

"Purchaser," in a statute making a parol gift void as to creditors, purchasers, and mortgagees, without sufficient change of possession, means a purchaser for money or other valuable consideration. *Cummings v. Coleman*, 62 D. 402.

"Required," in a statute, is equivalent to "commanded." *Taylor v. Commissioners of Newberne*, 64 D. 566.

The word "shall" is merely directory where no right or benefit to any one depends upon

* "May," when construed as equivalent to "must," see note. 15 D. 467, 468.

the use of the word. *Wheeler v. City of Chicago*, 76 D. 736.

A statute declaring a thing "void" is often to be construed as making it merely voidable at the instance of a party. *Allen v. Huntington*, 16 D. 702.

62. How a revising statute should be construed. — Where a statute is repealed and re-enacted, with some changes, at the same time, both statutes may be considered together in giving a construction to the latter, but the act repealed has no force except so far as it is continued in force by saving clauses and exceptions. *Coffin v. Rich*, 71 D. 559.

63. Correcting errors and mistakes. — The failure to embody a provision in the Indiana statute of 1843, concerning the continuance of a term of the circuit court, when the completion of the trial of a case requires it, in the act of 1852, which was a substantial re-enactment of the former statute with respect to the courts of common pleas, is a *casus omisus*, and the provision is continued in force by the section of the act of 1852 continuing in force laws and usages relative to pleading and practice in criminal actions. *Wright v. State*, 61 D. 90.

64. Effect of repugnancy. — Where two grants of power are repugnant, the last-expressed will of the legislature must control. *Korah v. City of Ottawa*, 83 D. 255.

65. — or ambiguity. — A statute prohibited the sale of spirituous liquors within three miles of Mount Zion Church, in Gaston County. There were two churches of that name in that county. *Held*, inoperative. *State v. Partlow*, 49 R. 652.

IV. REPEAL, AND ITS EFFECT.

66. What amounts to a repeal or expiration, generally. — An important public statute of long standing will not be held to be repealed, except by express words, or by strong and necessary implication. *Wilson v. Spencer*, 10 D. 491.

Re-enacting into a code the general provisions of prior laws does not repeal the exceptions to which these general provisions were subject. *Miller v. Mercier*, 15 D. 156.

A provision in an act is repealed on re-enactment of the act in all its particulars with the exception that the provision is omitted. *Cantley v. Stanfield*, 60 D. 219.

Section 1 of article 1 of the Maryland code of public general laws, declaring that "no rights, property, or privileges held under a charter or grant from this state shall be in any manner impaired or affected by the adoption of this code," was a precautionary measure, not intended to keep in its original form and separate existence any public local law of the state, like the power or privilege granted to the town of Frederick by act of 1847, chapter 224, entitled "An act to open

For Index to Notes in American Decisions and American Reports, see Volume I.

and widen Carroll Creek, in Frederick City." *Mayor v. Groshon*, 96 D. 591.

The object of the Maryland code of 1860 was to arrange and simplify the whole body of statutory law of that state; and the legislature, in adopting it as a substitute for all the public general and public local statute law then existing, plainly intended an entire repeal of all such statutes of that character then on the statute-book as were not embraced in the codification. *Id.*

A statute cannot be repealed by mere disuser, but only expressly, or by a subsequent statute necessarily so repugnant that the two cannot stand together. *Homer v. Com.*, 51 R. 521.

67. Express repeal.—A constitutional provision that "no law shall be revived or amended by reference to its title only, but the act revived, or the section or sections amended, shall be inserted at length," does not apply to simple repealing acts. *Van Riper v. Parsons*, 29 R. 210.

Chapter 1 of the California act of 1850, concerning corporations, was not repealed by the act of 1851, although by a typographical error in the statutes of 1851, page 443, section 31, as printed, the whole of that act appears to have been repealed. The act as enrolled shows that only chapter 3 of the act of 1850 was repealed. *Brewster v. Hartley*, 99 D. 237.

68 Implied repeal.*—A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, will operate to repeal the former statute, although no express words to that effect are used. *Bartlet v. King*, 7 D. 99; *State v. Wilson*, 82 D. 163. And though a subsequent statute be not repugnant in its provisions to a former one, yet if it was clearly intended to prescribe the only rules which should govern, it repeals the prior statute. *Rogers v. Watrous*, 58 D. 100.

Repeal by implication is not favored, and is deemed to have taken place only when a subsequent statute cannot be reconciled with a prior one. *Bruce v. Schuyler*, 46 D. 447; *McCartee v. Orphan Asy. Soc.*, 18 D. 516; *Western Sav. Fund Soc. v. Philadelphia*, 72 D. 730; *State v. Wilson*, 82 D. 163.

Where two statutes are so inconsistent that they cannot stand together, the last repeals the first. *Rawls v. Kennedy*, 58 D. 289; *Edgar v. Greer*, 74 D. 316.

A later statute which does not, in terms, repeal an earlier one on the same subject is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject-matter. *Dugan v. Gittings*, 43 D. 306.

An act of the legislature of Maine, relating to the same subject as a statute of Massachusetts, continued in force by the act of sepa-

ration, but expressing different sentiments, establishing different principles, and containing provisions better suited to the people of Maine, is a virtual repeal of the act of Massachusetts. *Towle v. Marrett*, 14 D. 206.

Where the legislature passes an act postponing a term of court to a certain time, and before that time arrives passes another act providing that, after the date of its passage, the terms of said court shall be held at a time subsequent to that fixed by the prior act, the latter act conflicts with the former, and repeals it. *Ex parte Trapnall*, 42 D. 678.

The exactment of one law is as much a repeal of all inconsistent laws as if those inconsistent laws had been repealed by express words. This rule prevails even under article 3, section 17, Maryland constitution, which provides that "no law or section of law shall be revived, amended, or repealed by reference to its title or section only." *Davis v. State*, 61 D. 331.

The common law relative to nuisances is not repealed by an act imposing a penalty for occupying a building as a slaughter-house, without license, in the compact part of a town. *State v. Wilson*, 82 D. 163.

69. If both statutes can stand, there is no implied repeal.—Where there are two affirmative statutes on the same subject, if they do not conflict with each other, and can be so construed as to stand together, the later will not be considered as a virtual repeal of the former. *Warder v. Arell*, 1 D. 488; *McCartee v. Orphan Asy. Soc.*, 18 D. 516; *Wyman v. Campbell*, 31 D. 677; *Bruce v. Schuyler*, 46 D. 447; *Neill v. Keese*, 51 D. 746; *State v. Wilson*, 82 D. 163; *Carver v. Smith*, 46 R. 210.

An intention to repeal an existing law is not presumed. *Saul v. His Creditors*, 16 D. 212.

Subsequent statutes do not abrogate former ones by containing different provisions on the same subject; they must be contrary to produce such an effect. *Id.*

An act providing for the holding of special terms of courts for the trial of criminal causes is not repealed by a subsequent act authorizing such courts, when unable at the regular terms to dispose of all the business pending therein, to hold special terms to be devoted exclusively to the civil and chancery docket. Such acts are entirely consistent with each other, and may both operate together. *State v. Hughes*, 36 D. 411.

70. Effect of repeal.*—The repeal of a statute making an act illegal does not thereby render the act valid. *Roby v. West*, 17 D. 423.

Rights are not destroyed by the repeal of the law under which they were acquired. *Dixon v. Dixon*, 23 D. 478.

* See note on repeal of statutes by implication, 14 D. 206, 210.

* See note on the effect of repeals, 12 D. 480, 431.

For Index to Notes in American Decisions and American Reports, see Volume I.

The construction of a statute should be consistent with the dictates of justice and natural equity, even though this should require a deviation from its strict letter; and where an act repealed the former statute of limitations, and imposed new limitations as a rule of shorter duration, the repeal was held intended merely to be for the purpose of imposing new limitations, and not to deprive parties of defenses acquired under the old statute, by lapse of its period of limitations. *Davis v. Minor*, 28 D. 325.

Repeal of a statute giving a lien to laborers pending action destroys the right of action where there is no saving clause in the repealing statute; and this, notwithstanding that an attachment had been levied by virtue of the prior statute. *Bangor v. Goding*, 56 D. 688.

Repealing a statute from which a court derives its jurisdiction deprives it of the power to proceed in cases pending at the time of the repeal. *Hunt v. Jennings*, 33 D. 465; *Todd v. Landry*, 12 D. 479.

A statute repealing all divorce laws of the state ousts the court of jurisdiction in an action for divorce pending at the passage of the statute. *Grant v. Grant*, 32 R. 506.

The unconditional repeal of a penal statute abrogates all rights which may have arisen under it. *Gregory v. German Bank etc.*, 25 R. 760; *Welch v. Wadsworth*, 79 D. 236.

The statute making trustees of corporations individually liable for all debts of the company, in case they omit to publish an annual report, is penal; and the repeal of such a statute without any reservation destroys any unenforced rights which may have accrued to creditors of the company as against such trustees on account of such omission. *Gregory v. German Bank etc.*, 25 R. 760.

The repeal of a statute while a prosecution under it is pending puts an end to such prosecution, unless there is a saving clause in the repealing act. And this is the case, not only where the latter act expressly repeals the former, but also where its provisions are inconsistent with the former, although there be no annulling words or repealing clause therein. *Abbott v. Com.*, 34 D. 492.*

The general principle is, that if a statute creating an offense is repealed, no further proceeding can be taken under the repealed law to enforce the punishment after the repealing act takes effect. *Wall v. State*, 70 D. 302.

The repeal of a statute prohibiting a conviction on the uncorroborated testimony of an accomplice does not affect prosecutions under indictments pending prior to such repeal. To give this effect to the repealing statute would be to make it *ex post facto*

within the constitution. *Hart v. State*, 83 D. 752.

A statute prohibited the sale of intoxicating liquors within four miles of any incorporated institution of learning, except within incorporated towns. The defendant had a license to sell in a town in which there was such an institution. The charter of the town being repealed, — held, that the defendant was liable to prosecution under the statute. *Johnson v. State*, 31 R. 648.

The accused was convicted of a statutory offense. He appealed, and pending the appeal, the statute was repealed, without qualification or exception. Held, that the prosecution must be dismissed. *Sheppard v. State*, 28 R. 422.

71. Saving clauses, and their effect. — A saving clause respecting persons out of the state, contained in a statute in relation to wills, is not repealed by an act repealing a similar saving clause contained in an act respecting limitations of actions. *Schultz v. Schultz*, 60 D. 335.

Defendant was proceeded against for violation of a statute which had been repealed by a later statute, but which provided that nothing therein contained should affect "any penalty or forfeiture already incurred under the provisions of any law in force prior to the passage of this act." The offense alleged occurred before the latter statute took effect, but after its approval by the governor. Held, that the indictment was sustainable. *Com. v. Bennett*, 11 R. 304.

72. Revival. — Special words are not essential to revive a statute providing for the construction of a railroad, which has expired because the work has not been commenced within the time therein limited, but a statute passed after such expiration, extending the time, will be a sufficient revivor. *Crocker v. Crane*, 34 D. 228.

The repeal of a repealing statute revives the original statute. *Collins v. Smith*, 36 D. 228.

The expiration of a repealing statute by its own limitation revives the statute repealed and supplied. Therefore the Pennsylvania act of March 19, 1810, relating to unincorporated banks, was revived by the expiration of the repealing act of March 21, 1814. *Id.*

The repeal of a statute amending a former statute, by making the same to read as set forth at length in the later act, does not work a revival of the first act, but both fall together. *People v. Supervisors*, 23 R. 94.

STATUTORY OFFENSES.

Generally, see CRIMINAL LAW, III, and the titles of the various offenses.

How charged in indictment, see INDICTMENT, 17, 18.

* See note on the effect of the repeal of criminal statutes, 94 D. 217-220.

For Index to Notes in American Decisions and American Reports, see Volume L.

STAY.

Effect of appeal bond as a, see **APPEAL**, 83.
Of execution, see **EXECUTION**, 179-181.

STAYING PROCEEDINGS.

Against principal, effect of, see **SURETYSHIP**, 40.
In state courts, see **BANKRUPTCY**, 2.
On plea of infancy, see **INFANTS**, 57.

STEAMBOATS.

Owners of, as common carriers, see **CARRIERS**, 5.

STIPULATIONS.

In leases, see **LEASES**, 22-24.
Of attorney, when bind client, see **ATTORNEY AND CLIENT**, 23.
To pay attorney's fee, in note, see **BILLS AND NOTES**, 92.

STOCK.

Illegal dealings in, see **CONTRACTS**, 111.
In building association, see **BUILDING ASSOCIATIONS**, 2.
In corporations, generally, see **CORPORATIONS**, 11.
In corporations, when taxable, see **TAXES**, 13-15.
New stock in lieu of dividends, see **CORPORATIONS**, 45.
Stock-brokers, see **BROKERS**, 14-18.
Subscriptions for, see **CORPORATIONS**, 62-77;
RAILROAD COMPANIES, 5; **SUBSCRIPTIONS**.
What may be voted on, see **CORPORATIONS**, 139.
When limitation begins to run on subscriptions to, see **LIMITATIONS OF ACTIONS**, 22.

STOCKHOLDERS.

Competency of, as witnesses, see **WITNESSES**, 51.
Effect of dissolution on rights of, see **CORPORATIONS**, 180.
In foreign corporation, liability of, see **CORPORATIONS**, 189.
Individual liability of, see **MANUFACTURING COMPANIES**, 1.
Release of, from future assessments, see **MANUFACTURING COMPANIES**, 3.
Remedy of, against corporation, see **CORPORATIONS**, 54-60.
Rights and liabilities of, see **CORPORATIONS**, 111; **BANKS AND BANKING**, 11.

STOLEN GOODS.

Effect of proof of possession of, see **LARCENY**, 25.
Rights of purchaser of, see **SALES**, 31, 32.

STOP-OVER.

Right of railroad passenger to, see **RAILROAD COMPANIES**, 57.

STOPPAGE IN TRANSITU.

By seller of goods, see **SALES**, 64-68.

STORAGE.

Fees for, see **WAREHOUSEMEN**, 5, 6.
Of goods by carrier, see **CARRIERS**, 43, 44.

STRANDING OF VESSEL.

Right to abandon in cases of, see **INSURANCE**, 151.
When raises a case for general average, see **INSURANCE**, 169.

STRANGERS.

Are not estopped, nor can they create estoppel, see **ESTOPPEL**, 32.
Declarations of, as evidence, see **EVIDENCE**, 148.
Effect of judgment on rights of, see **JUDGMENT**, 54.
Not within rule excluding parol evidence to vary a writing, see **EVIDENCE**, 83.

STREET CONTRACTS.

Liability of city on, see **MUNICIPAL CORPORATIONS**, 61.

STREET-RAILROADS.

See **RAILROAD COMPANIES**, V.

STREETS.

Bounding lands on, see **BOUNDARIES**, 6, 7.
Description of lands bounded by, see **DEEDS**, 69.
In cities, regulation of, see **MUNICIPAL CORPORATIONS**, 31.
Laying railroad tracks in, see **RAILROAD COMPANIES**, 19.
Liability of cities for defects in, see **MUNICIPAL CORPORATIONS**, 64-78.
Measure of damages for injuries through defects in, see **DAMAGES**, 33.
Negligence of street contractors, see **NEGLIGENCE**, 9.
Obstructions in, as nuisances, see **NUISANCE**, 5.
Right of railroads to use, see **RAILROAD COMPANIES**, 115.
Telegraph poles in, see **TELEGRAPH ETC. COMPANIES**, 13.

STRICT FORECLOSURE.

When may be decreed, see **MORTGAGES**, 91.

STRICT PERFORMANCE.

Waiver of, see **CONTRACTS**, 132.

STRIKES.

Among servants, when excuses carrier of goods, see **CARRIERS**, 31.

STRIKING OUT.

Evidence, in criminal trial, see **TRIAL**, 172.
Indorsements, at the trial, see **BILLS AND NOTES**, 279.
Pleadings, see **PLEADING**, 176-184.

For Index to Notes in American Decisions and Am
SUBAGENTS.

See AGENCY, 35, 42, 43, 54.

SUBCONTRACTORS.

Rights of see MECHANIC'S LIEN, 11.

SUBLEASES.

Validity and effect of, see LEASES, 29.

SUBMISSION OF CAUSES.

1. How submitted, and when. — A submission to the supreme court of conflicting claims between plaintiffs is not to be approved, and in doubtful cases will not be allowed; but where no objection thereto is made by the other parties, and the law is clear, the court will determine such claims. *Sorrey v. Bright*, 28 D. 584.

An agreed case may be submitted to the court without plea, and even without declaration. The defect in or want of pleadings is cured by the agreement. *Sawyer v. Corse*, 94 D. 445.

2. How heard and decided. — A case stated must be decided on the facts agreed on, and inferences cannot be made from the facts which may or may not be true, though legal presumptions and necessary conclusions may be drawn. *Van Brunt v. Pike*, 45 D. 123.

The decision in a case submitted to the court after issue is made up is restricted to such issue. *Sawyer v. Corse*, 94 D. 445.

3. Defendant, when entitled to judgment. — In an agreed state of facts the principle is, if there be no special limitation in the statement, that the defendant is to have judgment if the facts would verify any plea which would be a bar to the action. *Moore v. Philbrick*, 52 D. 642; *Gardiner v. Nutting*, 17 D. 211; *Sawyer v. Corse*, 94 D. 445.

SUBORNATION.

See PERJURY, 10.

SUBPOENA.

Form and service of, see WITNESSES, 1.

SUBROGATION.

Among creditors, see DEBTOR AND CREDITOR, 19.

Among joint debtors, see JOINT LIABILITY, 12.

Of firm creditors, see PARTNERSHIP, 33.

Of insurer, on payment of loss, see INSURANCE, 35.

Of party paying judgment, see BILLS AND NOTES, 302.

Of surety to position of creditor, see SURETYSHIP, 13, 14.

SUBSCRIBING WITNESSES.

Effect of uncertainty in testimony of, see WILLS, 50.

Proof of deeds by, see ACKNOWLEDGMENT, 8; DEEDS, 45.

Proof of
 To deeds,
 To mortga
 When mu
 184.

[Includes
 tions to ca
 terest. Sub
 fully treat
 scription of
 or instrame
 of the speci

Actions on.
 As consider
 28.

By county,
 20, 22.

By towns,
 13.

For corpora
 77.

In aid of r
 see MU

Of memoran
 see Cor

Parol evide
 125.

To railroad
 NIES, 5.

To religious
 CITIES,

To stock, w
 see LIM

1. Valid
 of subscriber
 for the erect
 ing, and whe
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 17 D. 446.

emy v. Gilbe
 Parol evide
 terms of such
 17 D. 446.

Trustees of
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For Index to Notes in American Decisions and American Reports, see Volume I.

A subscription of money to induce a railway company to locate a bridge at a particular point constitutes a valid contract. *Cumberland Valley R. R. Co. v. Baab*, 36 D. 132.

A party making a subscription is bound thereby, if the terms are complied with and money and labor is expended on the faith of it. *Galt v. Swain*, 60 D. 311.

In an action against a subscriber to a paper stipulating that the subscribers would pay the sum annexed to their names to any person who should thereafter build a free bridge at a specified place, the same to be paid upon the completion of the bridge, — *held*, 1. That the instrument was a valid contract between the subscribers thereto and any one who should afterward build the bridge according to its terms, and that as relates to the payee, it was like a note payable to the bearer; 2. That parol evidence was inadmissible to show the work was to be let to the lowest bidder, there being no such provision in the paper. *Cooper v. McCrimmin*, 7 R. 258.

A note given for a subscription to build and endow a college, upon the faith of which the payee has incurred expense, is valid. *Philomath College v. Hartless*, 25 R. 510.

2. Acceptance or assent. — A subscription, to be binding, must be acceded to as any other promise or offer, and the party apprised within a reasonable time that his offer is accepted. *Galt v. Swain*, 60 D. 311.

3. Consideration. — When several agree to contribute to a common object which they wish to accomplish, the promise of each is a good consideration for the promises of the others. *Congregational Society v. Perry*, 25 D. 455.

A subscription requires consideration to support it, either of profit to the party promising or of loss to the other party. *Galt v. Swain*, 60 D. 311.

No action can be maintained upon a promise contained in a subscription paper, to pay money to "such persons as may be appointed trustees," for the erection of an academy, such promise being without consideration. *Farmington Academy v. Allen*, 7 D. 201.

But if upon the faith of such subscription, trustees are afterwards appointed and expenses incurred, of which the subscriber has knowledge, and to which he assents by paying part of the amount subscribed, the law will imply a promise to pay the remainder, and an action will lie therefor. *Id.*

It is a sufficient consideration for a promissory note that it was given to the trustees of a charitable institution, after a subscription for charitable purposes, payable to such trustees, the note reading for value received, and expressly referring to the subscription whose purposes were in process of execution. *Amherst Academy v. Cows*, 17 D. 387.

A contract by which subscribers promise to pay to the state treasurer the sums set opposite their names, towards building a state-house, is not void for want of consideration, nor can objection be made thereto on the ground of public policy or propriety. *State Treasurer v. Cross*, 31 D. 626.

Suit on such contract may be brought either in the name of the people of the state or in the name of the state treasurer. *Id.*

The erection of a church edifice is a sufficient consideration to authorize a recovery on a subscription made for the purpose of such erection. *McDonald v. Gray*, 79 D. 509.

4. Rights of subscribers — Revocation. — A subscription for building a church may be conditional, like any other promise or offer. If particular terms are prescribed, they must be complied with before the subscription is binding. *Galt v. Swain*, 60 D. 311.

Where a subscription of funds towards the erection of a bridge has been paid, and the contractor has failed to erect the bridge, the contributor can maintain an action for damages for breach of the contract. *Brimhall v. Van Campen*, 82 D. 118.

No one can change the purpose for which a subscription was made, without the subscriber's consent. *Id.*

A subscription was made on condition that a certain sum be subscribed by the citizens of B. One of the subscribers was domiciled in A, but boarded, did business, and spent nearly all his time in B. *Held*, that he was a citizen of B within the meaning of the subscription. *Union Hotel Co. v. Hersee*, 35 R. 536.

An engagement to subscribe for the benefit of an association is necessarily a mere proposal, and therefore revocable until the association is formed; until then there is no one to accept the proposal, and it is withdrawn by the death of a subscriber before its acceptance. *Phipps v. Jones*, 59 D. 708.

The association having been formed, and having contracted for a lot or building in the lifetime of a subscriber, and with his express or implied consent, upon the faith of a subscription made to it before its formation, may recover upon the subscription either from him or his representatives. *Id.*

A written offer to subscribe to capital stock of a railroad company, provided it shall build along a certain route, is revoked by death of party offering before delivery to and acceptance by company. *Wallace v. Townsend*, 54 R. 829.

5. Their liabilities. — A voluntary subscription to donate cash or property to the vestry of a church as trustees of the temporal affairs of the church for the erection of a church building, and delivered to one of said vestry, ripens into an enforceable contract as soon as the trustees are permitted to incur

For Index to Notes in American Decisions and American Reports, see Volume I.

legal liabilities and expense upon the faith of it. *Hopkins v. Upshur*, 70 D. 375.

6. Who may sue for—Right of action.—Where several persons agreed in writing to lend, for the establishment of a newspaper, the sums subscribed by them, the same to be paid to one of their number as agent, such agent may maintain an action against those subscribers who refuse to pay, to reimburse himself for money advanced upon the faith of the subscriptions. *Homes v. Dana*, 7 D. 55. But one of a number of subscribers to a common object cannot sue another of the number for the latter's proportion of moneys alleged to have been expended by the plaintiff, there appearing no agency for the expenditure of the money, authorized by the subscribers. *Basford v. Brown*, 38 D. 281.

A promise to pay to a building committee a certain amount of money to build a church, made by one of the committee, may be enforced by the other members of the committee, or their survivors, by an action at law against the promisor. *Chambers v. Calhoun*, 55 D. 583.

An action at law to enforce a promise to no particular person or set of persons by name may be resorted to as a substitute for a bill, and to prevent a failure of justice where the equity powers have not yet been extended to such a case, although in England such promise could be enforced only by bill in equity. *Id.*

Other members of the building committee appointed by an unincorporated religious association to superintend the erection of a church may maintain an action to enforce a promise by one of their number to pay a certain amount toward the expenses of the edifice, although they have finished the edifice and have been discharged; for though *functi officio*, they are still trustees for the recovery of this debt, and it is of no consequence that the congregation has appointed another committee to wait upon the promisor, for they could not transfer this chose in action to another committee so as to enable them to sue in their own names. *Id.*

A subscription for the purpose of erecting a church building may be assigned by the vestry in payment therefor; and the contractor who undertakes to build the church, and to whom the subscription has been assigned, may sustain an action therefor in his own name. *Hopkins v. Upshur*, 70 D. 375.

Equity has power to enforce a subscription for charitable purposes by virtue of its general jurisdiction, independent of a statute. *Id.*

An action may be maintained in his own name by one described as treasurer of an unincorporated association upon a subscription payable to him as such treasurer. The words describing him as treasurer should be

treated as surplusage. *McDonald v. Gray*, 79 D. 509.

Where a valid subscription of funds towards the erection of a bridge, according to certain plans, specifications, etc., and payable on demand, has been made, an action will lie for the recovery of the subscription before the erection of the bridge. *Brimhall v. Van Campen*, 82 D. 118.

7. Defenses.—Where a subscription of funds towards the erection of a bridge has not been paid, and the bridge has not been built as agreed upon, the failure to perform the contract may be pleaded in defense of an action for the sum subscribed, or in reply to it when offered as an offset. *Brimhall v. Van Campen*, 82 D. 118.

It is no defense that the sum subscribed exceeded the amount to be raised; but in that case the subscriptions of all should abate *pro rata*. *State Treasurer v. Cross*, 31 D. 628.

SUBSEQUENT CREDITORS.

Of fraudulent grantor, rights of, see FRAUDULENT CONVEYANCES, 20.

SUBSTITUTED SERVICE.

Of process, see PROCESS, 30.

SUBSTITUTION.

Of attorneys, see ATTORNEY AND CLIENT, 36.

Of copy of lost indictment, see INDICTMENT, 10.

Of creditor, to securities of rival creditor or surety, see SURETSHIP, 25.

Of debtors, see DEBTOR AND CREDITOR, 3.

Of parties, in actions under codes, see PARTIES, 13.

Of personal representative of deceased party to action, see ABATEMENT, 16.

Of trustees, see TRUSTS, 54.

SUCCESSION TAX.

On legacies, see LEGACIES, 41.

SUFFERANCE.

Tenancy at, see LANDLORD AND TENANT, 6.

SUICIDE.

Of insured, when avoids policy, see INSURANCE, 79.

SUITS.

See ACTIONS.

SUMMARY PROCEEDINGS.

To dispossess tenant, see LANDLORD AND TENANT, 50, 51.

SUMMONING JURORS.

Effect of irregularities in, see NEW TRIAL, 17.

SUMMONS.

In justices' courts, see JUSTICE OF THE PEACE, 13.

See PROCESS.

For Index to Notes in American Decisions and American Reports, see Volume I.

SUNDAY.

[Includes the validity of contracts, and acts, such as traveling, common labor, etc., made or done on Sunday, and of judicial proceedings taken on that day. The offense of Sabbath-breaking is separately treated; and the effect of the day upon the computation of time is under TIME.]

Bona fide purchase of note made on, see **BILLS AND NOTES**, 118.

Illegality of contracts made on, see also **CONTRACTS**, 95.

Liability of carrier to persons travelling on, see **CARRIERS**, 72.

Rule where last day of grace falls on, see **BILLS AND NOTES**, 167.

See also **SABBATH-BREAKING**.

1. Validity of contracts made on Sunday, generally.*—At common law, acts performed on Sunday were valid, unless expressly prohibited; and consequently, contracts made, work and labor done, and even business of one's ordinary calling were not considered by it illegal because performed on that day. *Amis v. Kyle*, 24 D. 463; *Kepner v. Keefer*, 31 D. 460; *Adams v. Hamell*, 43 D. 455.

A contract made on Sunday is void, when a statute forbids it to be made on that day, though it be otherwise lawful. *Woodman v. Hubbard*, 57 D. 310.

The intention of the statute prohibiting contracts on Sunday is to stop all business on that day, whatever its character, except works of necessity and charity; and that, too, whether done openly or privately. *Adams v. Hamell*, 43 D. 455.

A contract made on Sunday is void, and cannot be validated by subsequent ratification; but if the terms of a contract are agreed upon on Sunday, and the contract is subsequently executed, it is valid. *Butler v. Lee*, 46 D. 230. Compare *Love v. Wells*, 57 D. 375.

A contract executed on Sunday and delivered on a week day is valid, as it is of no binding validity until its delivery. *Harris v. Morse*, 77 D. 269.

The violation of the Sunday act is *contra bonos mores*, and will not be sustained by the courts. *Brimhall v. Van Campen*, 82 D. 118.

A contract for publication of an advertisement in a newspaper to be issued and sold on Sunday is void, under a statute which prohibits all servile labor or work of any kind on that day "excepting works of necessity and charity." *Smith v. Wilcox*, 82 D. 302. Contra, see *Sheffield v. Balmer*, 14 R. 430.

Contracts made on Sunday are not unlawful in Rhode Island, unless they are within one's "ordinary calling." *Hasard v. Day*, 92 D. 790.

A contract which could not be lawfully

* Validity of Sunday contracts, see notes, 12 D. 292-294; 33 R. 165-167.

made on Sunday cannot, if lawfully made, be rescinded on that day. *Benedict v. Batchelder*, 9 R. 130.

An action cannot be maintained to recover money loaned on the Lord's day. *Meador v. White*, 22 R. 551.

One who lets a horse and wagon on Sunday in violation of law, to be driven to a particular place, cannot maintain an action of trover against the hirer for driving them to another place and thereby injuring them. *Smith v. Rollins*, 23 R. 509. S. P., *Parker v. Latner*, 11 R. 210. Contra, *Hall v. Corcoran*, 9 R. 30. And see *Frost v. Plumb*, 16 R. 18.

One who hires a horse on Sunday for use in business or pleasure on that day is liable for an injury occurring to the horse in such use through his misconduct or negligence, although the contract of hiring is void. *Stewart v. Davis*, 25 R. 576.

A church subscription made on Sunday is void, and is not made valid by a subsequent oral acknowledgment and promise to pay it, without consideration. *Caillett v. Trustees M. E. Church*, 30 R. 197. Contra, see *Allen v. Duffie*, 38 R. 159; *Dale v. Knepp*, 42 R. 624.

A contract made on Sunday to telegraph the words, "Come up in morning; bring all," is void, and a breach of it will not warrant a recovery of the statutory penalty for failure to transmit. *Rogers v. Western U. Tel. Co.*, 41 R. 553.

No action lies for fraudulent representations inducing to a contract made on Sunday, although the representations were criminal. *Gunderson v. Richardson*, 41 R. 81.

A contract is not void because made on Sunday, within a statute prohibiting "labor" that "disturbs the peace and good order of society." *Richmond v. Moore*, 47 R. 445.

2. Negotiable instruments.—At common law, the giving of a bill on Sunday was not prohibited, and was therefore not void on that account. *Kepner v. Keefer*, 31 D. 460.

Under the statute a note or bill executed on Sunday is void. *Kepner v. Keefer*, 31 D. 460; *Adams v. Hamell*, 43 D. 455; *Brimhall v. Van Campen*, 82 D. 118.

A promissory note given on Sunday, in consideration for the purchase price of a horse, is void. *O'Donnell v. Sweeney*, 39 D. 336. And no subsequent acts of the parties can ratify it. *Allen v. Deming*, 40 D. 179.

A promissory note, written and signed but not delivered on Sunday, will not be void for what passed on Sunday. *Lovejoy v. Whipple*, 46 D. 157; *King v. Fleming*, 22 R. 131.

A promissory note executed on Sunday is void, even though the parties thereto have previously settled the terms of the contract, and meet on Sunday by appointment, merely

For Index to Notes in American Decisions and American Reports, see Volume I.

to execute the note. *Lovejoy v. Whipple*, 46 D. 157.

Where the consideration of a note executed on Sunday is a contract entered into on the day previous, the plaintiff, to be entitled to recover, must sue upon the contract, and not upon the note. *Kepner v. Keeser*, 31 D. 460.

A note executed upon Sunday is not *per se* any evidence that there was a contract made on the day previous, and without other evidence it is error to submit that fact to the determination of the jury. *Ib.*

Giving a promissory note is secular business, and within the purview of a statute prohibiting such business on Sunday. *Allen v. Deming*, 40 D. 179.

The indorsee of a promissory note void because made on Sunday can maintain no action upon it. Whether an action could be maintained if the indorsee had no knowledge of its invalidity, *quære*. *Ib.*

Where a note was made and delivered in the purchase of a mining privilege at Pike's Peak, in Kansas, on the sabbath day, and suit thereon is brought in the courts of Georgia, and there is no evidence of the *lex loci contractus* produced on the trial, the presumption of law is, that the law of the place where the note was made is the same as our own; especially will such presumption be made where a contrary presumption would be unjust to the Christian civilization of the age, and in violation of the Decalogue. *Hill v. Wilker*, 5 R. 540.

As the laws of Georgia forbid, under penalties, any violation of the Lord's day by the transaction of any business, trade, or calling, a note made upon the sabbath day, in pursuance of trade or business, will not be enforced by the courts of this state, under the laws of this state, as such contract is void. *Ib.*

A promissory note bearing the date of a secular day is valid in the hands of a *bona fide* holder for value although in fact made and delivered on the Lord's day, and therefore invalid as between the original parties. *Oranson v. Goss*, 9 R. 45; *Knaw v. Clifford*, 20 R. 28.

The fact that an indorsement of part payment made on a promissory note bore date upon a day of the month which was Sunday, joined with evidence that it was made at the time of the payment and in the presence of both parties and assented to by them, will warrant a jury in finding that the payment was made on that day. *Olapp v. Hale*, 17 R. 111.

The execution of a note by an accommodation surety on Sunday is void, although the note is dated on a week day, and is delivered by the principal to an innocent payee on a week day; and a request by the surety to forbear suit, and his notifying the payee of property of the principal to which he

might resort, do not amount to a ratification. *Parker v. Pitts*, 38 R. 155.

The note in suit was executed on Sunday to the plaintiff, who was traveling, and wished to pursue his journey on that day. He had been at the place of its execution for two days, and no reason was shown for its not having been executed before. *Held*, not a "case of necessity" which would render the contract valid. *Burns v. Moore*, 52 R. 332.

3. Sealed instruments. — A deed made on Sunday is void. *Love v. Wells*, 87 D. 375.

A deed takes effect from the time of its delivery, and though signed and acknowledged on Sunday, if delivered on another day it is a valid deed, whatever may be the effect upon the acknowledgment. *Ib.*

One whose deed is executed on Sunday, but which by procurement of grantor is dated upon the preceding day, cannot assert the invalidity of the deed against a subsequent *bona fide* purchaser. *Ib.*

A bond executed on Sunday, but dated and made to take effect on a week day, is valid in the hands of an innocent obligee. *Hall v. Parker*, 26 R. 540.

An official bond signed and delivered on Sunday by a surety to the principal, and delivered by the principal to the proper custodian on a secular day, binds the surety. *City of Evansville v. Morris*, 44 R. 763.

A mortgage executed on Sunday is not void either at common law or under a statutory prohibition of the exercise on that day of acts in the "ordinary calling" of the citizen. *Hellams v. Abercrombie*, 40 R. 684.

4. Sales and transfers of real property. — It is not within one's "ordinary calling," within the meaning of the Rhode Island statute prohibiting every one from doing "any labor or business or work of his ordinary calling" on Sunday, to purchase a dwelling-house for the personal occupation of himself and family, signing a contract therefor, and making and delivering a check in part payment. *Harvard v. Day*, 92 D. 790.

5. — of personal property. — A sale consummated on the sabbath is void, and an action of warranty in such sale will not lie. *Finley v. Quirk*, 86 D. 93.

An executed contract of sale, although made on Sunday, is not void, either between the parties thereto or third persons. *Moore v. Kendall*, 52 D. 145.

A tender of chattels on Sunday, in performance of a contract, is legal both at the common law and under a statute prohibiting labor in "one's ordinary calling"; and therefore where the day of performance falls on Sunday, a tender on the next day is too late. *Amis v. Kyle*, 24 D. 463.

An action for deceit practiced on an exchange of horses on Sunday, made in viola-

For Index to Notes in American Decisions and American Reports, see Volume E.

tion of law, cannot be maintained. *Robeson v. French*, 45 D. 236.

A demand made on Sunday for delivery of wheat under a contract is a nullity, and cannot be validated by any act of the party upon whom it was made. *Brackett v. Edgerton*, 100 D. 211.

It is not a bar to an action on an account stated that the indebtedness was for liquor sold on Sunday, contrary to law, provided the account was not stated on Sunday. *McChoir v. McCarty*, 11 R. 606.

If goods are sold and delivered to A and B on the Lord's day, the sale being induced by the false representations of A on a previous day, and subsequently, not on the Lord's day, the seller demands the price of A, and he promises to pay it, this amounts to a sale to him, and he is liable for the price. *Winchell v. Carey*, 15 R. 151.

Although a contract of sale on Sunday is void, yet the seller cannot recover the chattels sold nor damages for their value. Otherwise if he had been intoxicated by the purchaser for the purpose of defrauding him. *Block v. McMurtry*, 31 R. 357.

The purchaser of property delivered to him without payment, under a contract made on Sunday, may maintain replevin for it if the seller retakes it without his consent, without paying or offering to pay. *Kinney v. McDermot*, 39 R. 191.

Replevin lies for a horse sold and delivered on Sunday, although the contract was ratified on a week day. *Winfield v. Dodge*, 40 R. 476.

A and B made a trade on the Lord's day, whereby A sold B a set of jewelry, and B gave in exchange a coat. A few days after, B returned the jewelry and demanded the coat, and on refusal, brought action to recover its value. *Held*, that the transaction, being on the Lord's day, was illegal, and that the plaintiff could not recover. *Myers v. Meinrath*, 3 R. 368.

To an action on an account annexed for the purchase price of pigs, the answer set up a breach of warranty and that the contract was made on the Lord's day. The defendant's evidence tended to prove that the sale was completed on that day, and the pigs selected and marked, and that they were delivered on Monday, in pursuance of the contract. The plaintiff's evidence was, that he refused to sell them on Sunday, but did name his price. The pigs were delivered on Monday, but no price was then named, nor does it appear that anything was said about the terms of payment. The judge instructed the jury that, laying out of the case all that transpired on Sunday, if they were satisfied from the delivery and acceptance of the pigs on Monday that a sale was made on that day, then the plaintiff could recover their actual market value at the time of the sale, without reference to the price named on Sunday or

the warranty then given. *Held*, that the case was properly submitted to the jury under these instructions. *Bradley v. Rea*, 4 R. 524.

On Sunday two parties agreed on the terms of sale of a yoke of oxen, subject to the purchaser's inspection of the oxen and satisfaction with them. The next day the purchaser inspected the oxen, approved, and took them, and left a part of the price at the vendor's house. *Held*, a valid sale. *Moseley v. Vanhooker*, 40 R. 37.

6. Traveling on Sunday.* — 1. General rules. — A person injured while traveling on the Lord's day, by a defect in a highway, must, in an action for damages, prove that he was traveling from necessity or for purposes of charity. *Bosworth v. Swansey*, 43 D. 441. S. P., *Cratty v. City of Bangor*, 2 R. 56; *Johnson v. Town of Irasburgh*, 19 R. 111. Contra, see *Platt v. City of Cohoes*, 42 R. 286.

A person may travel on Sunday and maintain an action for damages caused by the insufficiency of the highway, provided that he wrought no disturbance to others by such traveling. *Dutton v. Wearre*, 43 D. 590.

Where a statute forbids traveling on Sunday, "except from necessity or charity," a necessity to render traveling lawful must actually exist; an honest belief that it is necessary is not sufficient. *Johnson v. Town of Irasburgh*, 19 R. 111.

One who travels from one town to another on the Lord's day, for the sole purpose of visiting a friend whom he knows to be sick, and thinks may be in need of assistance, and of rendering such assistance as on inquiry he might find to be necessary, is traveling from charity; and in an action against a railroad corporation for injuries sustained while a passenger on that day, on putting in evidence that he was traveling for the purpose above stated, he is entitled to go to the jury on the question whether he was traveling lawfully or not, although he offers no evidence of the ground of his belief that his friend was in need of assistance. *Doyle v. Lynn etc. R. R. Co.*, 19 R. 431.

One who works by night instead of by day, and who travels on the Lord's day for the purpose of seeing his master and inducing him to change his hours of labor from the night to the day time, in order that he may sleep better, is not traveling from necessity or charity, and cannot maintain an action against a town for an injury sustained by him while so traveling, by reason of a defect in a highway which the town is by law obliged to keep in repair. *Connolly v. Boston*, 19 R. 396.

One who travels on the Lord's day to ascertain whether a house which he has hired, and into which he intends to move the next

* Traveling on Sunday, see note, 12 D. 294.

For Index to Notes in American Decisions and American Reports, see Volume L.

day, has been cleaned, is not traveling from necessity or charity, and cannot maintain an action for injuries sustained at a railroad crossing, through the negligence of the servants of the railroad corporation. *Smith v. Boston & M. R. R. Co.*, 21 R. 538.

An action will not lie against a carrier for breach of its general duty in failing to carry passengers on Sunday. *Walsh v. Chicago etc. R'y Co.*, 24 R. 376.

One who is injured by a defect in a highway, on his return from a funeral, on Sunday, having diverged from his ordinary route to make a social call, is remediless. *Davis v. Somerville*, 35 R. 399.

One whose property is injured by the assault of a dog is not defeated in his action for damages against the owner by the fact that the plaintiff was unlawfully traveling on Sunday at the time. *White v. Lang*, 35 R. 402; *Schmid v. Humphrey*, 30 R. 414.

If the vessel of one while sailing for pleasure on Sunday is injured by a collision with another vessel, produced by the negligence of those in charge of the latter, he cannot recover against the owner; but he may recover if the act was wanton and malicious and within the scope of their employment. *Wallace v. Merrimack River etc. Exp. Co.*, 45 R. 301.

A conductor of a street-railway car performing his ordinary duties on Sunday is both "laboring" and "traveling," and can maintain no action for an injury by collision with a car of another company while so employed. *Day v. Highland Street R'y Co.*, 46 R. 447.

2. *Illustrations.* — Plaintiff was traveling from A. to L., a distance of eight miles, on Sunday, to visit his two boys, when he was injured by insufficiency in the highway. In an action against the town, — *held*, that a recovery would not be defeated by a statute prohibiting travel on Sunday, except for attendance at places of moral instruction and from necessity. *McClary v. Lowell*, 8 R. 366.

Plaintiff was injured on defendant's road while returning, on Sunday, from a Spiritualist camp-meeting. *Held*, that it was for the jury to say whether the meeting was of a religious character, and whether the plaintiff attended it for the purpose of divine worship and religious instruction, so as to bring him within the exception of the act prohibiting traveling on Sunday. *Feital v. Middlesex R. R. Co.*, 12 R. 720.

A person walked about a mile in a town on Sunday, for exercise. *Held*, not a traveler in such a sense as to bar her recovery against the town for injuries suffered during such walk from a defect in the highway. *O'Connell v. City of Lewiston*, 20 R. 673.

Where one walking on the Lord's day for exercise went into a beer-shop and drank a glass of beer, and on resuming his walk was injured solely by a defect in the highway, —

held, that he might recover. *Davidson v. City of Portland*, 31 R. 253.

A, carefully driving on Sunday on a highway in Massachusetts, was injured by the reckless driving of B. *Held*, that A could maintain an action therefor against B in Rhode Island, without showing that he was traveling for necessity or charity. *Baldwin v. Barney*, 34 R. 670.

A traveling insurance agent being solicited by letter from his sick sister, temporarily residing in another state, to meet her and carry her home, wrote her to make other arrangements if possible, and inform him by letter addressed to him at B. He expected to reach B. on a Saturday evening, but missing connections, failed to do so, and took a Sunday train on defendant's road a fortnight later, to reach B. and get the expected letter. Receiving personal injuries on that train by the defendant's alleged negligence, he brought this action. *Held*, not maintainable. *Bucher v. Fitchburg R. R. Co.*, 41 R. 216.

7. *Effect of the day on judicial proceedings, generally.* — Sunday is *dies non juridicus* by a canon of the church incorporated into the common law, and judicial acts cannot be done on that day, though other acts may be, unless prohibited by statute. *Story v. Elliot*, 18 D. 423.

Making an award is a judicial act, and if done on Sunday, is void. *Id.*

If an order made by a judge in vacation bears date on Sunday, it is for that reason void. *Coleman v. Henderson*, 12 D. 290.

A foreclosure sale on Sunday is not a judicial proceeding, and therefore is not void unless prohibited by statute. *Sayles v. Smith*, 27 D. 117.

Even though such a sale would be void, the notice of it would not necessarily be void, and the creditor may postpone the sale. *Id.*

A court of equity may lawfully issue an injunction on Sunday where necessary to prevent irreparable injury to property. *Langabier v. Fairbury etc. R. R. Co.*, 16 R. 550.

An undertaking of bail for murder, entered into on Sunday during vacation, is a case of necessity, and valid. *Hammons v. State*, 31 R. 13.

A criminal judgment of a justice of the peace rendered on Sunday is void. *Ex parte White*, 37 R. 466.

8. — on service of process, notices, etc. — Process in a civil suit can neither be executed nor issued on a Sunday. Accordingly, where a prisoner went beyond the liberties on a Sunday, and the plaintiff, before he returned, on the same day filled up a *capias* against the sheriff in an action for the escape, and delivered it to the coroner,

* What judicial acts may lawfully be done upon Sunday, see note, 12 D. 290, 291.

For Index to Notes in American Decisions and American Reports, see Volume L

—*held*, not to be such a commencement of a suit as would prevent his pleading a voluntary return before suit brought. *Van Vechten v. Paddock*, 7 D. 303.

That the original writ issued on Sunday is a good plea in abatement, see *Haynes v. Sledge*, 27 D. 606.

A replication to such plea may show facts making of the case an exception to the general rule avoiding such process, and it seems that the circumstances which by statute excuse the service of process on Sunday also authorize its issuance on that day. *Id.*

The levy of an execution on Sunday is void, and the subsequent sale of the property by virtue thereof is therefore also void. *Peirce v. Hill*, 33 D. 306.

The giving of notice of an award on Sunday is valid, for it is not an act of common labor, nor a judicial act, but is simply a ministerial act in connection with a judicial proceeding, and is not specially prohibited by any statute. *Kiper v. Coate*, 81 D. 351.

The publication of a sheriff's notice of sale in a Sunday newspaper is invalid. *Shaw v. Williams*, 44 R. 756.

9. Holding court on Sunday. — In a time of peace and order it is illegal to hold a court of criminal inquiry on Sunday, but bail may lawfully be taken on that day. *Weldon v. Colquitt*, 35 R. 128.

10. Reception of verdict on Sunday. — A verdict received and judgment rendered on Sunday are utterly void. *Davis v. Fish*, 48 D. 387.

A cause having been submitted to a jury late on Saturday night, and the jury having agreed on a verdict on the next day, Sunday, it is lawful for the court to receive it on that day, and adjourn the court until the next day. *Reid v. State*, 25 R. 627.

A judgment entered on Sunday is absolutely void, but it seems a verdict may be received and entered on that day. *Shearman v. State*, 28 R. 402.

11. Duty to abstain from labor on Sunday.* — The statute of 1741, chapter 14, section 2, of Tennessee, prohibits work and labor of one's ordinary calling from being performed on Sunday, but does not extend to all kinds of labor indiscriminately. *Amis v. Kyle*, 24 D. 463.

Penalties for carelessness and for Sabbath-breaking are totally distinct, and the laws out of which they arise are distinct in all their purposes and features. *Mohney v. Cook*, 67 D. 419.

The law relating to the Sabbath defines the duty of the citizen to the state, and to the state only. One offender against the law, to the injury of another, will not be allowed to set off against the plaintiff that he too is a public offender. *Id.*

That a person was on Sunday unlawfully

* Acts that are illegal when done on Sunday, see note, 3 R. 371, 372.

engaged in a worldly employment does not prevent him from recovering damages against one who obstructs a navigable stream. *Id.*

It is within a real estate broker's "ordinary calling," within the meaning of the Rhode Island statute prohibiting every one from doing "any labor or business or work of his ordinary calling" on Sunday, to carry out the special instructions of his principal in relation to the property which he is employed to sell, as it is to do whatever is embraced in the general authority arising out of his employment as a broker. *Hazard v. Day*, 92 D. 790.

When parties enter into a contract to be performed on Sunday by common labor, the contract, as to performance on Sunday, is illegal and void. *Pate v. Wright*, 95 D. 705.

Delivery of flour on board a steamboat on Sunday, in order to avoid liability of delay in getting it to market, occasioned by danger of the closing of navigation, is not a work of necessity. *Id.*

Plaintiff was driving his cattle to market on a Sunday, when they were injured by the breaking down of defendant's bridge. At the trial, the court granted a nonsuit, on the ground that when the injury occurred plaintiff was violating the statute prohibiting the doing of secular work on Sunday. *Held*, error. *Sutton v. Town of Wauwatosa*, 9 R. 534.

The plaintiff sustained personal damage from the negligence of the defendants while assisting them in their work on the Lord's day; in an action to recover for such damage, — *held*, that the plaintiff's illegal act in working upon the Lord's day was so inseparably connected with the cause of action as to prevent his maintaining the suit. *McGrath v. Merwin*, 17 R. 119.

The clearing out of a wheel-pit on the Lord's day, for the purpose of preventing the stoppage, on a week day, of mills which employed many hands, is not a work of necessity or charity. *Id.*

The plaintiff, gratuitously and as a matter of kindness, assisted the defendants in clearing out a wheel-pit on the Lord's day, for the purpose of preventing the stoppage, on a week day, of the defendants' mills. In an action for personal damage caused by the defendants' negligence, — *held*, that the fact that the plaintiff worked gratuitously and as a matter of kindness did not make his work a work of charity. *Id.*

Lending money to be repaid on demand is "business," within the meaning of the statute prohibiting "labor, business, or work, except only works of necessity or charity," on Sunday, and such an agreement is presumptively void, although the money is retained and used, without any offer to return it. *Treacert v. Decker*, 37 R. 808.

For Index to Notes in American Decisions and American Reports, see Volume I.

Procuring signatures of tax-payers to a petition to a board of supervisors to issue railroad aid bonds is "business," and if done on Sunday confers no authority to issue the bonds. *De Forth v. Wisconsin etc. R. R. Co.*, 33 R. 737.

SUPERCARGO.

Duties and liabilities of, see SHIPPING, 38.

SUPERIOR COURTS.

See COURTS, 18.

SUPERIOR OFFICER.

Command of, when a protection, see OFFICERS, 37.

SUPERSEDEAS.

To stay execution, see EXECUTION, 184.

When an appeal operates as, see APPEAL, 86.

SUPERVISORS.

Certiorari to boards of, see CERTIORARI, 6.
Powers, duties, and liabilities of, see COUNTIES, 5.

Powers of, respecting highways, see HIGHWAYS, 19.

SUPPLEMENTAL.

Charters, see CORPORATIONS, 27.

Pleadings, see PLEADING, IX.

SUPPLEMENTARY PROCEEDINGS.

Upon execution, see EXECUTION, VI.

SUPPLIES.

Lien upon vessel for, see SHIPPING, 47.

Power of master to contract for, see SHIPPING, 30.

SUPREME COURTS.

Of the several states, see COURTS, 17.

SURETIES.

Alteration of bill or note, when discharges, see BILLS AND NOTES, 79.

Conditional execution by one of several, see BONDS, 5.

For husband, wife as, see HUSBAND AND WIFE, 57.

Generally, see SURETYSHIP.

Indorser, when liable as, see BILLS AND NOTES, 110.

Liabilities of bail, see BAIL, 2-7, 19-27.

Of bank cashier, see BANKS AND BANKING, 51.

Of corporate officers, see CORPORATIONS, 147.

Of sheriff, liabilities of, see SHERIFFS, 36.

Of tax collectors, liabilities of, see TAXES, 42.

On administration bonds, liability of, see EXECUTORS, etc., 180, 181.

On appeal bonds, liability of, see APPEAL, 176, 177.

On attachment bonds, see ATTACHMENT, 127, 128.

On bill or note, see BILLS AND NOTES, 60-64.

On bonds of internal revenue officers, see REVENUE, 5.

On constable's bond, see CONSTABLES, 6.

On guardian's bonds, see GUARDIAN AND WARD, 43, 44.

On justice's bond, liability of, see JUSTICE OF THE PEACE, 2.

On official bonds, see OFFICERS, 46, 47.

SURETYSHIP.

[Includes the respective rights, duties, and liabilities of principal and surety, and the remedy of the creditor against the surety. Contracts of guaranty and indemnity merely are; not included.]

Competency of the parties as witnesses, see WITNESSES, 59.

Declarations of principal or surety, see EVIDENCE, 146.

When litigation begins to run on contracts of, see LIMITATIONS OF ACTIONS, 31.

I. GENERAL PRINCIPLES.

II. RIGHTS AND LIABILITIES OF THE PARTIES.

1. *Of the Surety.*
2. *Of Co-sureties.*
3. *Of the Creditor.*

III. WHAT WILL EXONERATE THE SURETY.

I. GENERAL PRINCIPLES.

1. Who are to be deemed sureties.*

— "Surety" is generally used in a limited sense, to designate one who enters into a contract with another, as principal, either jointly or jointly and severally, and at the same time, and who in all cases may be sued jointly with the principal without demand or notice. *Read v. Cutts*, 22 D. 184.

The party who receives the benefit from the contract, and makes the payments and all arrangements in reference to it, is the principal. *Smith v. Tunno*, 16 D. 617.

The parties to an instrument given as collateral security are not subject to the law of sureties. *New Orleans v. Ripley*, 25 D. 175.

Judgment on a forthcoming bond does not destroy the relation of principal and surety, existing between the parties to the bond. *Newell v. Hamer*, 35 D. 415.

The relation of principal and surety continues after judgment for the original debt, together with all the rights incident to that relation. *Bangs v. Strong*, 42 D. 64. S. P., *Owens v. Colbert*, 46 D. 427.

In a contract executed by two, the fact that one was principal and the other surety may be proved by any competent evidences, and it is not necessary that it should so appear by the contract. *Carpenter v. King*, 43 D. 405.

* Apparent principal, when may show himself to be a surety, see note, 17 D. 116-119.

For Index to Notes in American Decisions and American Reports, see Volume I.

In an action on a judgment, one of two defendants may, by evidence *alibanda*, show that he signed the obligation on which the judgment was rendered, as surety for the other judgment debtor. *Id.*

Whether an obligation assumed by a party is that of guarantor or surety is to be determined by the intent of the parties, as collected from the language of the instrument and the circumstances attending its execution. *Marberger v. Pott*, 55 D. 479.

One who acknowledges himself to be security for the amount of a note until satisfactorily paid by the maker assumes the liability of a surety, and his obligation is unqualified by the condition of a guaranty. *Id.*

The word "security" indicates an obligation to stand for the sum absolutely, unless discharged by the supine negligence of the obligor, after notice; while the word "guaranty" imports a conditional liability, if due steps are taken against the principal. *Id.*

Where a party does not appear on the instrument to have made himself liable as surety, he cannot, at law, avail himself of the equities between himself and the other parties to the instrument, unless he was accepted by the creditor as a surety, or known by him to be such, or has been discharged from the first contract by agreement of the creditor. *Yates v. Donaldson*, 61 D. 283; *Springer v. Toothaker*, 69 D. 66; *Goodman v. Litaker*, 37 R. 602.

The relation of parties as principal and surety may be shown, even as against the payee or obligee, for the purpose of letting in any act of the latter tending to affect the collateral relations of the makers or obligors, and even when the instrument is joint and several, and wholly silent as to which is the surety. *Dickerson v. Ripley County*, 63 D. 373.

A party contracting jointly with another is a principal debtor as between himself and the creditor, though he may be merely a surety for his co-debtor. *Dane v. Corduan*, 85 D. 53.

A, B, and C executed to the plaintiff, a bank, a joint and several bond, in the penalty of fifteen thousand dollars, with a condition reciting that A had become a member of a certain firm, rendering it probably necessary for him to use more funds in the business than he had at command, and which he proposed to borrow, and then proceeding thus: "Now, the foregoing bond is to be in force, and binding upon us, according to its terms, for the full amount of any loans and advances the said bank may make to said A, in connection with his said business, not to exceed in amount fifteen thousand dollars, for which sum, by the foregoing bond, we acknowledge ourselves his sureties, and in case of his failure to pay any such loans or advances as aforesaid, that the same shall and may be collected of us. Unless such loans and advances are made to

said A in his business aforesaid, upon the faith of this bond, the same is null and void," etc. The plaintiff alleged that on the faith of this bond, and for the purpose therein specified, it loaned A a sum of money on the checks of two other parties indorsed by A, and that these checks were protested for non-payment. *Held*, 1. That the bond was not an overture to guaranty by the sureties, but an actual undertaking; 2. That B and C were sureties, not guarantors, and, therefore, not entitled to notice of loans made on the credit of the bond, and of the default of the principal debtor. *McMillan v. Bull's Head Bank*, 2 R. 323.

2. Nature of their undertaking, generally. — The contract of suretyship is accessory to the obligation contracted by another, and it is of the essence of the contract that there be a subsisting valid obligation of a principal debtor. *Russell v. Faylor*, 59 D. 631.

Breach of an agreement to become a surety for the performance of a future contract may be recovered on. *Mann v. McDowell*, 45 D. 649.

Persons of ordinary intelligence are presumed to know the liabilities of a surety, and that they constitute a charge upon his property. *Hartley v. Frosh*, 55 D. 772.

The liability of sureties of a deputy is continuous with that of their principal; their undertaking is to make good the official defaults of their principal. *Wallace v. Holly*, 58 D. 518.

The surety is bound, though the principal is not, where the matter of defense in the hands of the principal is altogether of a personal character; such as infancy or coverture. In such a case the surety stands, in a certain sense, a principal promisor. *St. Albans Bank v. Dillon*, 73 D. 295.

Where a surety undertakes that the principal shall do a specific act, as that he will pay a judgment, the judgment against the principal is conclusive against the surety. No notice to the surety is required, as he stipulated without regard to it. *Pico v. Webster*, 73 D. 647.

The contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction. *Bradley v. Keesee*, 94 D. 246. Any concealment of or express or implied misrepresentation of material facts, or any undue advantage taken of the surety by the creditor, either by surprise or withholding proper information, will invalidate the contract, and the creditor is, in all subsequent transactions with the debtor, bound to equal good faith to the surety. If he does any act injurious to the surety, or inconsistent with his rights, the latter is discharged. *Johnson v. Ivey*, 94 D. 206.

The contract of a surety is in the nature of a collateral engagement to pay the debt

For Index to Notes in American Decisions and American Reports, see Volume I.

of another as distinguished from an original and direct agreement for the party's own act, and is in the nature of an accessory to a principal obligation. *Ib.*

The surety is bound with his principal as an original guarantor, and his obligation to pay is equally absolute, irrespective of any notice of the principal's default, while a guarantor is an individual contractor, to answer only for the consequences of the default of the principal, and is therefore entitled to notice of such default. *McMillan v. Bull's Head Bank*, 2 R. 323.

3. Validity of the contract of suretyship. — A parol promise made by one as surety or guarantor is not binding, unless it is made upon some new consideration, and any expectation of profit or hope of benefit from the sale of goods by the promisee to the person for whom he becomes surety or guarantor is not a sufficient consideration for such promise. *Doyle v. White*, 45 D. 110; *Taylor v. Drake*, 53 D. 680.

A surety on an obligation void for coverture is liable. *Hicks v. Randolph*, 27 R. 760.

A surety is not bound by any official bond conditioned to be, but not, signed by the principal. *Bunn v. Jetmore*, 35 R. 425.

Defendant signed a non-negotiable promissory note as surety, upon the express condition that a certain other person should sign as co-surety. The signature of the latter was not obtained. Held, that defendant was not liable to a holder in good faith and without notice. *Ayers v. Milroy*, 14 R. 465.

4. And how construed. — The undertaking of a surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms. *Blair v. Perpetual Ins. Co.*, 47 D. 129; *Strawbridge v. Baltimore etc. R. R. Co.*, 74 D. 541; *Pickering v. Day*, 95 D. 291; and incidents and intentions not necessarily deducible from the language employed are never indulged. *Lepcomb v. Postell*, 77 D. 651.

II. RIGHTS AND LIABILITIES OF THE PARTIES.

1. Of the Surety.

5. Liability to third persons, generally. — Sureties on a joint bond of two persons as administrators are not liable to one of the administrators for property of the estate converted by the other. *Slaughter v. Froman*, 17 D. 33.

A surety for the fidelity of one as agent for a corporation is only liable for such acts as the corporation, by its charter, might lawfully require its agent to perform. *Blair v. Perpetual Ins. Co.*, 47 D. 129.

Sureties are bound by a judgment against the principal, although they had no notice of suit, where, by the express terms of their

agreement, or by reasonable implication from the very nature and intent of their obligation, they have stipulated to pay the damages and costs which may be recovered against their principal, or otherwise to abide the decree or judgment of a court against him. *Chamberlain v. Godfrey*, 84 D. 690.

A surety on the bond of a re-elected county treasurer is liable only for default during the term for which the bond was given. *Van Sickle v. County of Buffalo*, 42 R. 753.

The bond of a bank messenger bound him to "account for and pay over all moneys that may come into or pass through his hands as such messenger, and that he shall in all things conduct himself honestly and faithfully as such messenger." The bank intrusted him with the keys of the vault and the combination of the safe. He stole moneys of the bank from the safe and vault by means of the keys and his knowledge of the combination. Held, that the sureties on the bond were liable therefor. *German-Amer. Bank v. Auth*, 30 R. 374.

6. What may be set up in defense. — Sureties may plead anything which their principal might plead in his denial of liability on the bond. *Wallace v. Holly*, 58 D. 518.

A surety has the same defenses at law, when sued alone, as he would have in equity. *Baker v. Briggs*, 19 D. 311; *Springer v. Toothaker*, 69 D. 66.

Where a surety on a bond pays the creditor the amount of a judgment recovered against the debtor, the bail of the principal may plead such payment in bar to an action against him by the creditor. *Creager v. Brengle*, 9 D. 516.

A surety on an office bond will not be liable if the names put upon the bond before his own are forgeries. *Seely v. People*, 81 D. 224.

A surety on the bond of a re-elected county treasurer is not estopped from contesting the correctness of the principal's voluntary official reports as to the amount of money in his hands at the commencement of the term. *Van Sickle v. County of Buffalo*, 42 R. 753.

It is no defense to a surety for a corporation that the obligation of the latter is beyond its powers; his liability remains notwithstanding, if default is made by his principal. *Gist v. Drakely*, 41 D. 426.

A surety, in an action against him alone on a bond for faithful performance, cannot offset or recoup a claim of the principal against the plaintiff for services in the business in which the bond was given. *Baltimore & O. R. R. Co. v. Bitner*, 36 R. 820.

7. Right of surety to equitable relief. — A surety, when the debt becomes due, may come into a court of equity to compel the creditor to sue for and collect the debt of the principal. *King v. Baldwin*, 8 D. 415.

* Cases in which surety is or may be, bound, although principal is not, see note, 73 D. 297-299.

For Index to Notes in American Decisions and American Reports, see Volume I.

A surety may, in equity, compel his principal to discharge the debt. *Pride v. Boyce*, 33 D. 78. Persons who agree to save harmless the maker of a promissory note are principals with respect to the maker, and within the application of the above rule. *Bishop v. Day*, 37 D. 582.

A surety on a joint and several bond may, in equity, compel the personal representative of his principal to discharge the debt in advance of simple contract debts, and on an equality with the specialty debts of the estate; but if he himself pays the bond, his claim against the estate will be merely that of a simple contract creditor. *Pride v. Boyce*, 33 D. 78.

Equity will infer that a bond was made joint by mistake if it is given for a pre-existing liability of one of the parties, the other party being merely a surety, and will treat it as if joint and several, in favor of the surety. *Ib.*

Where a defendant at law, being surety for his co-defendant, set up in his defense that the plaintiff, though urged by the surety to prosecute and collect the money from the principal debtor, had refused to do so, and delayed until the principal became insolvent, which defense was overruled, the surety may, notwithstanding, seek relief in equity on the same ground as that set up by him at law. *King v. Baldwin*, 8 D. 415.

A surety for whose indemnity a trust deed has been given is entitled to the aid of equity to prevent the payment of the proceeds of the sale of the trust property under execution until his liability as surety is ascertained, and is discharged out of such proceeds. *Marshall v. Colvert*, 27 D. 589.

Money paid by a surety upon a judgment at law against him may be recovered in equity, when, by reason of the neglect of the creditor in releasing an execution against the principal debtor, the liability of the surety is, in effect, extinguished. *Cooper v. Wilcox*, 32 D. 695.

Chancery will entertain a suit by a surety to reach credits of the principal, and apply them to the payment of a judgment obtained against them jointly, where the principal is insolvent, although the surety has not paid the judgment. *McConnell v. Scott*, 45 D. 583.

A surety of a purchaser cannot obtain relief against his obligation on the ground of fraud in the sale, unless it appear that his principal and the vendor have combined to defraud him. *Brown v. Wright*, 18 D. 190.

8. Right to indemnity. — Upon a bond of indemnity, the obligee is not obliged to wait until he is compelled to discharge the debt; he may bring an action the moment the first breach happens in failing to perform the condition of the bond. *Ramsay v. Gervais*, 1 D. 635.

Indemnity taken by one surety cannot be reached by his co-sureties to his prejudice,

unless it was taken for their benefit, or in fraud of their rights. *Moore v. Moore*, 15 D. 523.*

Rent of property conveyed as security to indemnify the grantee against liability as surety for the grantor constitutes a part of the security, and cannot be recovered by the grantor until the liability is discharged. *Sellick v. Munson*, 16 D. 689.

The surety's lien on such rent is not extinguished, but rather confirmed, by an agreement that moneys in his hands due the plaintiff are to be applied on the debts for which he is surety. *Ib.*

The undertaking of a principal to pay his surety the amount of the demand for which he stands liable, whenever he is called upon for payment by the creditor, or whenever he should have reason to doubt his principal's ability to ultimately save him harmless, is valid, and may be enforced upon either of these contingencies arising, though at the time the surety has paid the creditor no part of the debt. *Fletcher v. Edison*, 30 D. 470.

Where one for whom another is surety procures a third person to sign a promise of indemnity to such surety, and there is no new consideration for such promise, and it is not made in pursuance of any contract entered into at the time of the original contract, the promise to indemnify is void for want of consideration. *Rizz v. Adams*, 31 D. 619.

A promise to remain surety for another for an indefinite time is not sufficient consideration for a promise to indemnify such surety. *Ib.*

A mortgage given to indemnify one surety, after an adjustment of the loss between them, cannot be construed to be a mortgage given to indemnify two. *Hall v. Cushman*, 43 D. 562.

Where a mortgage is given to indemnify one surety, he has no cause of action or anything to assign until he has been damnified, when he may recover to that extent. *Ib.*

A party has an adequate remedy at law, where he has been induced to become a surety on an administration bond by the parol promise of the defendant to indemnify him against loss; and in such a case equity will not entertain jurisdiction to relieve him from the loss he may have sustained. *Jones v. Shorter*, 44 D. 649.

One of several sureties of a trustee on his bond to secure the beneficiaries cannot maintain a bill to compel him to substitute solvent sureties for those who have become insolvent, or give counter-security, on pain of removal. *Ridgeway v. Potter*, 55 R. 875.

9. Right to be reimbursed by principal, generally. — A surety having satisfied a judgment which his principal was legally bound to pay is entitled to recover

* Right of surety to indemnity held by co-surety, see note, 43 D. 563-565.

For Index to Notes in American Decisions and American Reports, see Volume I.

Judgment against him. *Pike v. McDonald*, 64 D. 597.

A surety may maintain an action against his principal for money paid, where the surety has paid a debt on default of his principal; and this on the ground that defendant's assent is implied in all cases where the plaintiff is under a legal obligation to pay the money through the default of another. *Snider v. Greathouse*, 63 D. 54.

A surety cannot maintain *indebitatus assumpsit* against his principal before payment; but a bill of exchange or a negotiable note given and received in satisfaction will support the count for money paid. *Miller v. Howry*, 24 D. 320; *Neale v. Newland*, 38 D. 42.

Where a surety holds a counter-bond in the amount of the sum secured, given in consideration of his liability, he may sue thereon before payment. *Miller v. Howry*, 24 D. 320.

Sureties of a guardian are entitled, in equity, to be relieved from their suretyship, or secured against loss, before payment of their principal's debt. *Howell v. Cobb*, 68 D. 591.

Under the Tennessee code, a surety has a right of action against the principal before the debt is due, but no final decree shall be made until the debt is due; or if the principal will secure or indemnify the surety, the attachment may be discharged. *Id.*

10. Scope and extent of the right. — A surety is entitled to recover from his principal for money paid by the surety on behalf of the principal on a usurious contract made by the principal, and although the latter might have avoided such contract. *Ford v. Keith*, 2 D. 4; *Jackson v. Jackson*, 31 R. 688.

A surety who has been obliged to pay his principal's debt is entitled to an immediate action against him for his indemnity, without giving him any previous notice of such payment. *Ward v. Henry*, 13 D. 119.

A general count in *indebitatus assumpsit* for money paid, laid out, and expended is proper in all cases where a surety has been obliged to pay the principal's debt. *Id.*

As between a surety who has paid a judgment against his principal, and a subsequent judgment creditor of the principal, the former has preference. *Fleming v. Beaver*, 19 D. 629.

The surety of a purchaser of land at a sale on a specified credit under a decree in chancery, the title being retained until the purchase-money should be paid, may charge the land for the payment of the sum for which he is liable, in the hands of an assignee of the purchaser who took it in good faith, without notice; nor is the title of the assignee benefited by the fact that he had afterwards bought in the same land at a sale under execution against his assignor, paying

a valuable consideration therefor. *Poll v. Gallant*, 34 D. 410.

Actual payment need not be made by a surety, to enable him to sustain an action. *Id.*

Where a surety has paid money for his principal, the chancellor has original jurisdiction to decree the repayment thereof; and where there is no personal estate, he may, without any judgment at law, set aside a fraudulent conveyance, and subject real property to such repayment. *Partlow v. Lane*, 39 D. 473. S. P., *Godbold v. Lambert*, 70 D. 192.

Where a mere surety for another is compelled to pay a debt, which the latter in equity and justice ought to have paid, he is entitled to relief against him who was in fact the principal debtor, whether he became such surety by actual contract or by operation of law. *Hunt v. Amidon*, 40 D. 283.

Where a surety on a bond discharges the obligation of himself and principal by giving his own negotiable note, which the obligee accepts in full satisfaction, he may maintain an action against his principal for the amount of such note before he pays it; but where he has discharged the obligation by giving a bond or other non-negotiable security, he can recover only the amount actually paid by him since giving the security. *Bouthorse v. Robinson*, 58 D. 117.

A surety who has paid the debt of his principal may, in equity, enjoin an execution on a judgment against him in favor of said principal, to the extent of the amount so paid as surety, although the money was not paid until after the commencement of the action in which the judgment was rendered, and consequently would not have been good as a set-off at law, if it appears that the principal has removed from the state, leaving no property. *Brittain v. Quiet*, 62 D. 202.

Several heirs of a deceased surety can maintain a joint action against the principal debtor for money paid by them in satisfaction of a joint judgment rendered against such heirs. *Snider v. Greathouse*, 63 D. 54.

A surety secured by a collateral mortgage may foreclose it before paying the debt of the principal, and for the whole amount of his liability, although the creditor has obtained judgment for less. *Hellams v. Abercrombie*, 40 R. 684.

11. Its limits and exceptions. — A surety cannot have a right of action on a general promise of indemnity until he has been compelled to pay the debt for which he is bound. *Brentnal v. Helms*, 1 D. 44.

Where a surety on a note takes up the same, his right of action accrues when the note is paid. *Conn v. Coburn*, 26 D. 746.

A surety on an appeal bond who has been compelled to pay the judgment can recover interest on the amount of the original judgment, but not on the damages and costs of appeal. *McClung v. Beirne*, 34 D. 739.

For Index to Notes in American Decisions and American Reports, see Volume I.

A surety paying the debt with his own non-negotiable note cannot recover against the principal in an action for money paid, where he has not paid his note. *Pitzer v. Harmon*, 44 D. 738.

If a surety discharges a joint judgment against himself and principal, the judgment is satisfied and its legal efficacy destroyed. *Lyon v. Bolling*, 44 D. 444.

12. Right to retain funds of principal.—A surety may retain funds in his hands belonging to the principal debtor, upon the latter's insolvency; and an assignee of the principal debtor has, in such case, no better right to such funds than his assignor would have. *Williams v. Helme*, 18 D. 580.

A surety receiving from his principal as security property to which the latter subsequently releases to the former all right and interest for a grossly inadequate consideration is entitled to deduct from the value of the property all sums expended under the original contract, and other *bona fide* payments, on behalf of the principal, but must account to the latter's creditors for the residue. *Ripley v. Sererance*, 17 D. 397.

Where the principal engaged to pay an annuity, the surety was permitted to compute the value of such annuity in ready money, and retain that sum out of the property placed in his hands. *Id.*

If the parties all concerned agree, the plaintiff may relieve the surety, summoned as trustee, from his future liability in respect to such annuity. *Id.*

A surety in whose hands are funds of his principal, created for his indemnity, is responsible to the latter for the same, if they are not needed to effectuate his discharge from liability. *Fletcher v. Wilson*, 30 D. 470.

A surety on an official bond of a committee of a lunatic may maintain *assumpsit* for money had and received against one by whom it is collected under an agreement between the three parties, that the defendant was to collect the money due the lunatic, and retain it subject to the order of the surety until he should be released from his suretyship, although the action is begun before judgment in a suit against the surety on his bond is obtained. *Keller v. Rhoads*, 30 D. 539.

13. Right to be subrogated to position of creditor, generally.—A surety, on paying the debt of the principal, is entitled to be put in the place of the creditor, and avail himself of all or any of the collateral securities, means, or remedies which the creditor has for enforcing payment against his principal. *Bank of Montpelier v. Dixon*, 24 D. 640; *Loundes v. Chisolm*, 16 D. 667; *Eddy v. Traver*, 31 D. 261; *Cullum v. Emanuel*, 34 D. 757; *Pratt v. Thornton*, 48 D. 492; *Edgerly v. Emerson*, 55 D. 207; *Mitchell v. De Witt*, 78 D. 561.

A surety paying a judgment against his principal is substituted by operation of law to the rights of the creditor. *Fleming v. Beaver*, 19 D. 629; *McClung v. Beirne*, 34 D. 739.

Sureties have the right in equity to be subrogated to the lien that the judgment creditor has on the debtor's land, upon the payment by them of the debt for which they are security, though such payment be voluntary, and they are preferred to a creditor who acquires a lien upon the land by a foreign attachment, sued out in chancery after the entry of such judgment, although no *elevis* or execution was issued thereon. *Watts v. Kinney*, 23 D. 266.

Subrogation as a matter of course, without any agreement to that effect, arises only in cases where the one advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights. *Sandford v. McLean*, 23 D. 773.

In other cases the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished. *Id.*

Sureties who have paid the debt for which they were security may reach in equity any fund set apart by the principal debtor for the payment of such debt, no matter who the trustee or *custui que trust* is. *Rodes v. Crockett*, 24 D. 489.

If a debtor mortgage his land to a creditor on condition that the mortgagee pay out of the land another debt for which certain sureties of the mortgagor are liable, such sureties may in equity set up that condition by parol, and enforce it upon the property in the hands of the mortgagee. *Id.*

A surety compelled to pay a note is subrogated to the rights of the payee, under a mortgage given by the principal to secure the payment of the note. *Jones v. Tincher*, 77 D. 92.

Equity recognizes the right of a surety to pay off a note or obligation of the principal debtor, and be subrogated to the rights of the creditor. *Rucker v. Robinson*, 90 D. 412.

Where one of several co-sureties pays a joint judgment against them, intending to save his right to be subrogated to the right of the judgment creditor, he can afterwards sustain an action to be subrogated, notwithstanding the legal extinguishment of the judgment; and the intention to save such right will be presumed from the payment until the contrary is shown. *Neilson v. Fry*, 91 D. 110.

The surety of a deceased debtor to the state, having paid the debt to the state, is entitled to be subrogated to the state's prior claim in the distribution of the debtor's assets. *Orem v. Wrightson*, 34 R. 286.

The general agent of an insurance com-

For Index to Notes in American Decisions and American Reports, see Volume I.

pany appointed a local agent, and took from him a bond in the name of the company, with sureties, conditioned that the local agent should pay over all moneys received by him. The local agent having made default in paying over certain moneys received for premiums, the general agent paid the same in accordance with his contract with the company. In an action upon the bond, in the name of the company, for the use of the general agent, — *held*, 1. That the payment by the general agent did not discharge the bond so as to prevent subrogation; 2. That notice to the sureties of defalcation of the principal was not necessary in order to charge the sureties. *Hough v. Aetna Life Ins. Co.*, 11 R. 18.

14. Scope of the right to subrogation. — By the payment of the debt, a surety has a right to be put in the place of the creditor, and to whatever means and remedy the creditor possesses, to enforce payment from the principal debtor. Accordingly, if a creditor takes a mortgage from the principal debtor, the surety is entitled to it as an indemnity, and the creditor must do nothing by which it may be impaired as a security. *Hayes v. Ward*, 8 D. 554.

A surety who pays the judgment debt of his principal may in equity compel the creditor to assign the judgment, with all the liens given by the principal to secure it. *Creager v. Brengle*, 9 D. 516.

Although equity will compel an assignment of the judgment against the debtor which a surety has satisfied, yet it will not authorize the surety to proceed against the bail of the principal, unless such bail is absolutely fixed at the time of the assignment. *Ib.*

A surety has a right to be subrogated to all the securities which the obligee has. *Smith v. Tunno*, 16 D. 617.

A surety who has paid the debt may compel his co-surety to make contribution; or he may by substitution take the place of the creditor and acquire all his rights against the principal debtor. He can acquire no rights that the creditor did not have, and cannot compel a contribution by the representatives of his co-surety against whom the creditor had no remedy. *Waters v. Riley*, 18 D. 302.

A surety paying the debt is entitled to be subrogated to the creditor's right to enforce a judgment previously recovered on a note given by a third person after several judgments against the principal and surety, as collateral security to obtain a stay of execution against the principal. *Pott v. Nathans*, 37 D. 456.

A surety discharging a bond or judgment, which is the only security the creditor has taken, has nothing to which he can be subrogated. *Uwell v. Mack*, 40 D. 648.

A surety, paying any part of a bond for purchase-money, when the vendor also re-

served a lien upon the land, is subrogated to the vendor's rights under the lien. *Ib.*

A surety is entitled to the appropriation of a collateral security, held by the creditor for the same debt, to the payment thereof, or to have it retained for his benefit and to be subrogated to the creditor's right thereto if he pays the debt. *New Hampshire Savings Bank v. Colcord*, 41 D. 685.

Where a surety on an injunction bond was sued, and judgment obtained against him (the injunction being of a judgment and being afterwards dissolved), — *held*, that the surety is entitled to the benefit of the creditor's judgment lien upon the property of the judgment debtor. *Rodgers v. McCluer*, 47 D. 715.

A surety paying the debt may stipulate for an assignment of all the collateral securities of the creditor against the principal, and such assignment will be protected in courts of law as well as in equity. *Edgerly v. Emerson*, 55 D. 207.

Payment of the debt by the co-debtor who is a surety does not discharge the debt, but the debt will be held undischarged so far as is necessary to preserve and give effect to the collateral securities against the principal, assigned by the creditor to the surety, either voluntarily or by a decree of a court of equity. *Ib.*

The lien of an attachment is preserved for the benefit of a surety who pays the debt and takes an assignment of the creditor's securities, in the same manner and to the like extent whether the payment be before or after judgment. *Ib.*

If, after judgment against principal and surety, a third person gives his note for the debt to obtain a stay of execution for the principal, and the surety is afterwards obliged to pay the debt, he is entitled to have an assignment of the judgment on the note of the third person to indemnify him for such payment. So *held*, where the original principal in a debt prosecuted a writ of error, and the original surety or indorser of the note afterwards paid the debt, and asked to have the judgment against the original defendants and sureties on the *superedeas* bond assigned to him. *Mitchell v. De Witt*, 78 D. 561.

A surety who pays a judgment, and is thereby subrogated to the rights of the creditor against the principal debtor, may issue execution on the judgment in the name of the creditor for the amount which he has paid as surety. *Connely v. Boury*, 79 D. 568.

The right to recover costs as well as principal and interest of debt, against a first indorser as surety, is transferred to a second indorser by the effect of the legal subrogation, which results from his payment of the debt to the judgment creditor. *Ib.*

A surety on a note secured by trust deed,

For Index to Notes in American Decisions and American Reports, see Volume I.

by paying off the debt thus secured, becomes substituted to the rights of the creditor under the trust deed, and may enforce the lien for reimbursement, but not in such manner as to affect the right to redeem of one who purchases the land at execution sale. *James v. Jacques*, 82 D. 613.

A second indorser having given an injunction bond in an action on the note, his surety in that bond, who has been compelled to pay the note, may recover it from the first indorser. *Chrisman v. Harman*, 26 R. 387.

15. Rules of pleading in actions against sureties.—A demand must be alleged and proved in an action against a surety on a bond filed by a plaintiff on commencing an action, conditioned that such plaintiff will pay, "on demand," all costs awarded to the defendant, because the demand is parcel of the contract, though no demand need be averred in suing a party on his agreement to pay his own debt on demand. *Nelson v. Bostwick*, 40 D. 310.

Breaches must be assigned in a declaration on a bond other than for the payment of money at a particular time or in specified installments, under 2 N. Y. R. S. 378, sec. 5. Hence such an assignment is necessary in an action against a surety on a bond filed by the plaintiff in an action conditioned for the payment by such plaintiff, on demand, of all costs awarded to the defendant, and the omission of such assignment is fatal, even after verdict, and nominal damages cannot be allowed. *Id.*

An administrator of a deceased officer cannot be joined with the sureties on such officer's bond, in an action brought thereon. *Wayello County v. Bigham*, 74 D. 370.

16. — of evidence.*—Judgment against the principal *prima facie* establishes the liability of the sureties who were not parties to the action; but the sureties may impeach the judgment for fraud, collusion, or mistake. *Charles v. Hoskins*, 83 D. 378. S. P., *Lévescomb v. Postell*, 77 D. 651.

Parol evidence is admissible, on the part of a surety on a note, to show that the payee, to induce him to become such security, represented that he had in his hands funds belonging to the principal in the note, which should be applied as a credit thereon; and if the proof establish such facts, the security is entitled to the benefit of such assurance. *Matheson v. Jones*, 76 D. 647.

Where a financial officer is his own successor, his entries of balances in his hands at the expiration of his first term, made in pursuance of legal requirements, are conclusive on himself and his sureties on his bond for the new term. *Chicago v. Gage*, 35 R. 182.

* Judgment against principal, effect of, as evidence against surety, see notes, 83 D. 280-290; 83 R. 802-804.

17. Limits to their liability.—The defendant became surety for the faithful performance of a book-keeper's duties in the department of docks in the city of New York. The book-keeper was required also to assist the treasurer in receiving and depositing the department funds, and he embezzled the same by means of false entries or omissions to make entries. It was conceded that the additional duties did not hinder his faithful performance of the duties of book-keeper. *Held*, that the question of damages was for the jury. *Mayor etc. v. Kelly*, 50 R. 699.

2. Of Co-sureties.

18. In general.—A surety is entitled to share the benefit of any security which his co-surety has taken from the principal, for his own indemnity against loss, before being damnified. *Brown v. Ray*, 45 D. 361; *McMahon v. Fawcett*, 14 D. 796.

A promise of indemnity is void for want of consideration, where one of the sureties on an administration bond, after the execution of the bond, promises his co-surety to indemnify him for any loss he may sustain on the bond. *Jones v. Shorter*, 44 D. 649.

Where a surety takes security to indemnify him generally against loss on several demands upon which he is surety with different co-sureties, it should be apportioned among all the demands. *Brown v. Ray*, 45 D. 361.

A person being a creditor and a surety, who takes a security for his own indemnity generally, is entitled to apply it first to his own debt, and his co-sureties are only entitled to share the benefit of any surplus then remaining. *Id.*

The right of a surety to the benefit of security taken by his co-surety attaches when it was taken, and is not divested by a subsequent purchase of demands against the principal, unless it was part of the agreement at the time when the security was taken that such co-surety should purchase such demands, the security being taken for them also. *Id.*

A surety, before he has paid the debt of his principal, or more than his aliquot portion of it, is entitled to an injunction restraining a co-surety from a fraudulent disposition of his property, the principal being insolvent. *Bowen v. Hoskins*, 7 R. 728.

19. When the right to contribution exists.—Sureties have a right to claim contribution from each other in proportion to the amount paid by each upon the common debt; and this right is the result, not of any implied contract between the parties, but of an acknowledged principle of natural justice, which requires that those who voluntarily assume a common burden should bear it in equal proportions. *White v. Banks*, 56 D. 283; *Moore v. Moore*, 15 D. 523; *Russell v. Faylor*, 59 D. 631.

For Index to Notes to American Decisions and American Reports, see Volume I.

Contribution between sureties will be decreed whether they be on the same or different bonds, although they knew nothing of the obligations of each other; but they must be sureties for one and the same debt or obligation. *Harrison v. Lane*, 27 D. 607. S. P., *Bosley v. Taylor*, 30 D. 677.

Co-sureties on a bond have a right to call on each other to contribute to pay the debt of their principal who is insolvent, and to have the benefit of a judgment obtained by the creditor against them all, although satisfaction had been entered up on such judgment, in order to allow them to stand as judgment creditors against one of the co-sureties, deceased, whose estate was insolvent, but which, nevertheless, could pay his proportion, if this debt be considered a judgment debt. *Burrows v. Carney*, 1 D. 677.

Where three persons give a note for their joint debt, each is to be regarded a principal with respect to one third and as surety with respect to two thirds of the debt. And if one is insolvent and another pays the whole debt, he may recover a moiety thereof from the third. *Henderson v. McDuffee*, 20 D. 557.

All the solvent sureties must bear the burden equally, where some of the sureties have become insolvent. *Bosley v. Taylor*, 30 D. 677.

Non-residency of a surety is equivalent to his actual insolvency, so far as the application of the doctrine of contribution is concerned. *Ib.*

A surety whose liability is collateral merely, may justly submit to suit in order to ascertain the extent of his liability, and is entitled to contribution for the costs of such suit. *Ib.*

The execution and forfeiture of a forthcoming bond by a surety against whom judgment had been obtained on a bond cannot operate so as to destroy the right of the surety for the original principal, to call for contribution, he having paid the debt. *Preston v. Preston*, 47 D. 717.

A co-surety may recover contribution against another for money paid after defendant's discharge in bankruptcy, though the obligation on which they were co-sureties was payable before petition in bankruptcy was filed. *Dole v. Warren*, 52 D. 640.

Judgment against one co-surety entitles him to contribution, though the other co-surety's name was stricken out by the plaintiff in the suit on the bond to which the co-sureties had signed their names. *Ib.*

A surety's right to contribution from his co-surety is an equity arising with the relation created, and is fully consummated when the surety pays the debt. *Wayland v. Tucker*, 50 D. 78.

The sureties' right of contribution for costs and expenses in defending suit exists against a co-surety when the defense was made under

such circumstances as to be regarded hopeful and prudent. *Fletcher v. Jackson*, 56 D. 98.

Sureties or indorsers against whom judgment has been rendered, and who have obtained title to property under a judgment rendered against them in an action of trespass brought by one upon whose goods they levied by mistake as upon the property of the principal, and who have sold this property and applied it to the satisfaction of the judgment against them, may enforce contribution from co-sureties in a proportionate amount of the sum applied to the satisfaction of the judgment against them. *Ackerson v. Miller*, 59 D. 663.

A surety discharged from the principal obligation is not released from liability for contribution to his co-sureties if they are not discharged. *Clapp v. Rice*, 77 D. 387.

The estate of a deceased co-surety is liable to contribute in a suit by a co-surety. *Johnson v. Harvey*, 38 R. 515.

One surety, paying the whole obligation after judgment, may compel contribution from his co-surety for the costs, although the latter was not served with process. *Van Winkle v. Johnson*, 50 R. 495.

The parties were sureties on an official bond, upon which judgment had been recovered and paid by the plaintiff. In an action against the co-sureties for contribution, the latter alleged, in defense, that they had never been served with process, nor appeared in the action upon the bond; that the plaintiff had appeared for them without authority, and suffered judgment to be entered, to defraud them; that he had, without their knowledge, entered into a special contract with the relators in that action to pay the judgment out of funds then in his hands, belonging to the principal in the bond, and, in consideration of such agreement, received an extension of one year's time on said judgment; that but for such extension of time the judgment could have been made out of the property of the principal. *Held*, that these facts did not constitute a defense to the action. *Bagott v. Mulles*, 2 R. 351.

The defendants further alleged that they signed the bond out of which the liability arose at the request of the plaintiff. *Held*, that they were, nevertheless, liable to contribution. *Ib.*

The estate of a deceased surety of a principal debtor was discharged from liability to the creditor, through his negligence, by operation of the statute of limitations. A co-surety afterward paid the debt. *Held*, that the estate was liable to contribute to such co-surety, notwithstanding it was released from direct liability to the creditor. *Camp v. Bostwick*, 5 R. 669.

Plaintiff and defendant were sureties upon a promissory note which the maker failed to pay at maturity. Action thereon having been

For Index to Notes in American Decisions and American Reports, see Volume I.

brought, plaintiff paid the note before judgment, and brought this action for contribution. *Held*, that he was entitled to recover, although there existed a good defense to the note, he being ignorant of the fact and having acted in good faith and without negligence. *Hickborn v. Fletcher*, 22 R. 562.

The parties to the action were co-sureties on a note, all the parties to which lived in Vermont. After the statute of limitations had run against the note, the plaintiff in good faith went to New Hampshire, where the statute was no defense, and judgment was recovered against him on the note, and he was compelled to pay it. *Held*, that the defendant must contribute. *Aldrich v. Aldrich*, 48 R. 791.

20. When it does not.—If indemnity be taken by a surety to secure him from loss, and as a condition precedent to his becoming a surety, his co-sureties are not entitled to the benefit of the indemnity until after he for whose benefit it was given is fully repaid. *Moore v. Moore*, 15 D. 523.

Sureties on a joint bond, while living, are both liable to the creditor of their principal, and one may recover against the other a just proportion of what he is made to pay; but if one dies, the remedy as to him is gone, and the duty and the remedy survive against the survivor. If the survivor pay the debt, his only remedy is against the principal. *Waters v. Riley*, 18 D. 302.

A surety on one bond is not entitled to contribution from a surety on another, if the latter bond was not to be pursued, unless the principal could not obtain payment from the sureties on the former. *Harrison v. Lane*, 27 D. 607.

A surety engaging to pay only if the creditor cannot get payment from other sureties is not liable to contribution at the suit of the latter. *Id.*

Sureties are supposed to assume the same risk, and to stand, in relation to their principal, in the same situation, obtaining no benefit from the transaction, but each equally subjecting himself to responsibility. *McPherson v. Talbot*, 32 D. 191.

Where a surety, without his co-surety's knowledge, by a previous arrangement with the principal, receives one half of the sum borrowed, he is not entitled to contribution from such co-surety. *Id.*

One surety is not entitled in equity to contribution from another, if, by ordinary diligence, he can obtain indemnity or reimbursement from their principal. *Morrison v. Poynts*, 32 D. 92; *McCormack v. Obannon*, 5 D. 509.

Assumpsit by one surety against another does not lie where recovery can be had from the principal debtor, or out of property which such principal had placed in the hands of plaintiff for his indemnity. *Morrison v. Poynts*, 32 D. 92.

A surety's collateral obligation of contribution is released by his co-sureties executing to the principal a general release of all liability for any sums they should pay; and it does not make any difference that the release was only intended to remove the principal's interest, in order that he might testify in the suit against the co-sureties. *Fletcher v. Jackson*, 56 D. 98.

If an offer of security is made by the principal upon condition that the sureties execute a release, the refusal by one to accept the terms offered would not prevent the other from acceding to the proposition; and in such case, although the surety refusing would have a right to demand that the proceeds of the securities received should be fairly devoted to the reduction of the common debt, such proceeds could in no other way inure to his benefit; and the payment, so far as the right of contribution is concerned, would be considered as made by the paying surety out of his own funds, and if it amounted to his proportion of the debt, it would discharge him from contribution. *White v. Banks*, 56 D. 283.

Refusal by a surety to accept a fraudulent deed of assignment by the principal for the benefit of his creditors deprives him of his right of contribution against a co-surety who has accepted the deed, when the deed has been executed, as to the assenting creditors, and the co-surety has received under it an amount exceeding his contributive share, and has applied it on the debt. *Id.*

Contribution against a co-surety cannot be claimed by a surety who voluntarily pays money on a void note. *Russell v. Failor*, 59 D. 631.

One surety who has obtained security from his principal debtor by a mortgage must be regarded as a trustee for the other, as the mortgage inures to the benefit of all the sureties, and he is bound to the exercise of the duties which attach to that relation. If such surety gives up such security without the consent of his co-surety, he cannot obtain contribution from him. *Taylor v. Morrison*, 62 D. 747.

A surety who pays the debt after it is barred by the statute of limitations cannot compel his co-surety to contribute. *Cocke v. Hoffman*, 40 R. 23; *Cochran v. Walker*, 56 R. 891.

21. Proceedings to obtain contribution.—1. *Right of action, generally.*—A surety who pays the debt may maintain an action in a court of law for contribution. *Henderson v. McDuffee*, 20 D. 557.

Assumpsit by one surety against the other for contribution can be sustained as soon as the former has paid the debt for which they are sureties; it need not be shown that the principal debtor is insolvent, nor that payment from him cannot be obtained. *Roberts v. Adams*, 31 D. 694.

For Index to Notes in American Decisions and American Reports, see Volume I.

A surety could not maintain an action against a co-surety at law formerly in North Carolina; the remedy was in equity. *Powell v. Matthis*, 40 D. 427.

The liability of a surety at common law was his aliquot proportion of the money, ascertained by the number of sureties; the death or insolvency of one of the sureties did not enlarge the other's liabilities. *Ib.*

The rule of the common law of England was adopted by the act of 1807: R. S., c. 113, sec. 2. *Ib.*

A surety, before payment, may maintain a bill in equity against his co-sureties and their principal to compel the latter to pay, if able, or to require the sureties to contribute, when the principal is unable to make payment. *Morrison v. Poyntz*, 32 D. 92.

Where one surety holds a note against his co-surety, and the latter has paid a debt for which both were sureties, the promisor may set up his equity of contribution from his co-surety as an offset against the note. *Wayland v. Tucker*, 50 D. 76.

Failure to set up the equity of contribution as an offset will not preclude a recovery of the claim in a distinct action, nor will it preclude him from applying to chancery for relief. *Ib.*

2. *Necessity of demand or notice.*—Notice of payments for principal is requisite before bringing suit for contribution. *Sherrod v. Woodward*, 25 D. 714.

A surety is liable to his co-surety who has paid the whole debt, for a moiety thereof, without demand, the principal being insolvent. *Cage v. Foster*, 26 D. 265.

Application to a co-surety for payment or contribution is not indispensable to a recovery against him for his share of the moneys actually paid by his fellow-surety to discharge the debt of their principal. *Morrison v. Poyntz*, 32 D. 92.

The Ohio code limits to six years the right to maintain an action against a co-surety demanding subrogation and a judgment for contribution; and the costs in such action cannot be recovered of the co-surety without notice to him of the payment. *Neilson v. Fry*, 91 D. 110.

3. *Parties.*—In a suit by a surety against his co-surety for contribution, their common principal, or if he is dead, his personal representative must be made a party defendant. *Rainey v. Yarborough*, 38 D. 681; *Aiken v. Peay*, 53 D. 684.

The surety cannot call upon his co-surety for contribution without showing that he cannot obtain satisfaction from their common principal. *Rainey v. Yarborough*, 38 D. 681.

A surety cannot maintain a joint action against his co-sureties, at law, to recover their share of the liability, but each must be sued separately for his own liability. *Powell v. Matthis*, 40 D. 427.

In a suit in equity by a surety for contri-

bution, all the co-sureties must be joined; but if some of them are without the jurisdiction of the court, the plaintiff, by stating that fact in his bill, may proceed against those within its jurisdiction. *Jones v. Blanton*, 51 D. 415.

A co-surety has to make contribution without regard to the share of another co-surety who is without the jurisdiction of the court and therefore not made a defendant. *Ib.*

Sureties jointly paying a judgment against them may sue jointly in equity the heirs of a deceased co-surety for contribution; and a decree may be made against the defendants severally for so much as each is liable. *Fletcher v. Jackson*, 56 D. 98.

Sureties may join in an action to recover from a co-surety the amount paid for his benefit, when each being liable for the full amount, they joined in making the payment by a contribution agreed on among themselves for that purpose. *Clapp v. Rice*, 77 D. 387.

4. *Evidence.*—The record of a recovery against sureties on a bond is competent evidence against co-sureties, in a suit for contribution, of the amount of recovery, but not of the default of the principal; and the fact that the case was referred in the county court, and that judgment was entered by consent in the supreme court, will not affect the judgment as evidence, the necessity of these steps being sufficiently explained. *Fletcher v. Jackson*, 56 D. 98.

In an action by an apparent principal against an apparent surety on a sealed note for contribution, evidence is competent to show that both were principals. *Williams v. Glenn*, 53 R. 416.

22. *Computing the amount to be contributed.**—If one of several sureties pays the debt, he is entitled to demand contribution from his co-surety for whatever he has paid more than his aliquot part. *Aiken v. Peay*, 53 D. 684.

Where one of three sureties is insolvent, and another pays the whole debt, he may recover one half thereof from the third surety. *Henderson v. McDuffee*, 20 D. 557.

Interest is allowed to a surety who has paid, from the time of the payment up to the final decree. *Bosley v. Taylor*, 30 D. 577.

A surety of an insolvent debtor is entitled to contribution from his co-sureties, and, if all are solvent, each is liable for his share of the sum advanced by one to relieve them of the common burden. *Preston v. Preston*, 47 D. 717.

Sureties who are severally and not jointly bound in two thousand dollars each upon an official bond taken in the penal sum of twenty thousand dollars from ten sureties may be held liable in the full sum of two thousand

* Whether entitled to dividend for whole debt against estate of insolvent co-surety, see note, 45 R. 295-297.

For Index to Notes in American Decisions and American Reports, see Volume I.

dollars, if an unsatisfied defalcation of the principal exceeds that sum, although such defalcation is less than twenty thousand dollars. *Bank of Brighton v. Smith*, 90 D. 144.

The holder of a note, by arrangement with a solvent surety on it, proved it against the insolvent estate of another surety, and assigned the note and the claim against the estate to the solvent surety, who paid him in full. *Held*, a payment of the note, and that the proof was properly expunged, and that the surety could prove only one half against the insolvent estate, although he would receive not more than half of what he had paid if allowed to prove in full. *New Bedford Inst. etc. v. Hathaway*, 45 R. 289.

3. Of the Creditor.

23. When creditor is in a position to sue surety. — Where there is a surety for a debt secured by mortgage, the creditor has an election, of which he cannot be deprived, whether he shall proceed in equity upon his mortgage or at law against the debtor or surety. *Culham v. Emanuel*, 34 D. 757; *Allen v. Woodard*, 28 R. 250.

The payee of a note is entitled to judgment against both principal and surety, and has the right, the principal being insolvent, to subject the property of the surety to the discharge of the judgment, without first proceeding to foreclose a mortgage, given by the principal to secure the note, and executed and received concurrently therewith. *Jones v. Tincher*, 77 D. 92.

When a principal debtor delivers to his surety money to pay the debt to the creditor, he may redemand it before payment, and the creditor gets no lien on it, and can maintain no action for it against the surety. *Spalding v. Henshaw*, 44 R. 463.

24. Exhausting remedy against principal. — A surety cannot require a creditor to exhaust his remedies against the principal before resorting to the surety, except under special circumstances. *Abercrombie v. Knox*, 37 D. 721.

A surety cannot have the benefit of discussion, if he has bound himself as principal debtor by the contract. *Aston v. Morgan*, 5 D. 733.

The right of a surety continues after a judgment, and he can require the creditor to make an effort to obtain satisfaction from the principal debtor. *Commercial Bank v. Western Reserve Bank*, 38 D. 739.

A surety of a principal to refund advances cannot compel a factor to assert his lien upon the goods or money of the principal before proceeding against him personally. *Martin v. Pope*, 41 D. 66.

The creditor is under an equitable obligation to obtain payment of the principal debtor, and not from the surety, unless the principal is unable to pay; and the fact that courts of law now assume jurisdiction in

such cases does not affect the jurisdiction originally and intrinsically belonging to courts of equity. *Hempstead v. Watkins*, 42 D. 696.

A surety cannot issue execution against the principal without the consent of the execution creditor, when he has not paid the debt, and the creditor has a right to call it in and discharge the levy if it had been made, without prejudicing himself. *Forbes v. Smith*, 49 D. 432.

25. Right to be substituted to benefit of securities held by rival creditor or surety. — A surety receiving money or claims to be applied to the payment of his principal's debt holds as trustee of the creditor, and must account to him. *Green v. Dodge*, 25 D. 736.

The creditor is entitled to the benefit of all collateral obligations for payment of the debt which a surety thereon has received for his indemnity. *Klapsworth v. Dressler*, 78 D. 69; *King v. Harman*, 26 D. 485.

Property mortgaged to a surety to secure him for indorsing the mortgagor's note, whether such property be real or personal, may be subjected to the payment of such note by a bill filed by the creditor, where the debtor is insolvent. *New London Bank v. Lee*, 27 D. 713.

A creditor need not levy execution so as to obtain a lien upon property mortgaged to a surety for the same debt for his indemnity, as he has an equitable lien on the property so mortgaged. *Id.*

An infant's guardian executed a mortgage as security to a surety on his bond. *Held*, that the infant was entitled to the benefit of it as security for what was due from the guardian. *Morrill v. Morrill*, 38 R. 659.

III. WHAT WILL EXONERATE THE SURETY.

26. In general. — 1. *Surety released.* — As a general rule, the obligation of a surety becomes extinct by the extinction of the obligation of the principal. An exception to this rule exists whenever the extinction of the principal's obligation arises from causes which originate in the law, and not in the voluntary act of the creditor. *Johnson v. Planters' Bank*, 43 D. 480.

The liability of a surety is presumed to have been extinguished after the lapse of more than ten years from the time when the obligation was incurred by him, and a deed of trust executed for his indemnity; and in the absence of proof of any payment made by him, such deed cannot be upheld as effective against the rights of the grantor's creditors. *Waller v. Todd*, 28 D. 94.

One of several joint obligees may make such an arrangement with the principal debtor, without the consent of the co-obligees, as will release the surety. *Chapman v. Pottor*, 20 D. 203.

One joint obligee may release the debt. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

Co-obligees, like partners, are in general bound by the acts of one another. *Ib.*

A release of goods of the principal debtor by order of the owner of the judgment is a release *pro tanto* of the sureties. *Bank v. Fordyce*, 49 D. 561.

A surety is released from payment of a judgment against him and his principal, though in the hands of assignees without notice, where, after an execution has issued upon the judgment and become a lien upon sufficient personal property of the principal to pay the debt, the judgment creditor, under color of a fraudulent assignment from the principal, removes the property out of the county, sells it, and appropriates the proceeds to his own use, in order that the judgment may be collected out of the property of the surety, and then assigns the judgment. *Robeson v. Roberts*, 83 D. 308.

Where the maker of a note with sureties makes a tender in United States treasury notes in payment thereof to the payee, and such tender is refused, the sureties are discharged. This is so in any event, and more especially when the insolvency of the maker is known to the payee. *Johnson v. Ivey*, 94 D. 206.

A creditor having received a portion of his claim under his debtor's general assignment cannot afterward assert a claim for that portion against a surety for the debt. *Bank v. Alexander*, 39 R. 702.

2. *Surety not released.* — Revoking a levy on the goods of one of two sureties does not release the other; for as between themselves they are both principals, and the creditor may pursue either. *Whitehill v. Wilson*, 24 D. 328.

A surety cannot be discharged on the ground of fraudulent representations made to his principal except when that principal would be. *Bryant v. Crosby*, 58 D. 767.

A surety is not released by any act or conduct of the payee which does not place the surety in a worse position than he would otherwise have been. *Driakell v. Mateer*, 80 D. 105.

A surety is not released by the creditor's declaring to him that the debt is paid, if such surety does not in consequence change his situation or otherwise suffer loss. *Ib.*

Part payment of the amount due will not discharge the surety, even where it is agreed that such part payment shall have that effect. Where a party is bound to pay a certain sum, there is no consideration in contemplation of law for a promise that a less sum shall be received in satisfaction. *Obern-dorf v. Union Bank*, 1 R. 31.

Where the principal in a note payable to a bank has funds on deposit in the bank after the maturity of the note, and before suit, exceeding the sum due thereon, the surety is not discharged by the omission of the bank

to apply the same to its payment. *Voss v. German-Amer. Bank*, 25 R. 415.

One who, at the request of the principal, and without the knowledge of the obligee, signs a bond for the principal's faithful conduct as an insurance agent, is not released by the principal's previous neglect in the same employment to make payments promptly, which were subsequently made good; nor by the obligee's continuing him in his employment after such default; and if the surety allows his name to remain without protest after learning of such default, he is liable in future. *Home Ins. Co. v. Hol-way*, 39 R. 179. S. P., *Watertown Fire Ins. Co. v. Simmons*, 41 R. 196.

Sureties on the bond of a book-keeper of a bank are liable for his defalcations or overdrafts, although the cashier consented and the directors were negligent in discovering them. *Chew v. Ellingwood*, 56 R. 429.

A leased premises to C, and B became surety for the rent. A distrained for non-payment of rent, but C replevied and repossessed himself of the goods. *Held*, that the pendency of the replevin suit was not a bar to an action by A against B as surety. *King v. Blackmore*, 13 R. 684.

If the surety is told by the creditor that the debt is paid, and thereby loses an opportunity of securing himself, he is discharged, although the debt was not paid, and the creditor acted under a mistake. *Baker v. Briggs*, 19 D. 311; *Carpenter v. King*, 43 D. 405.

Any settled agreement or active interference by the obligee, whereby the surety may be injured or subjected to increased risk, or deprived of or suspended in the assertion of his equitable right to force the obligee to sue the principal, or of his right to pay the debt and occupy the attitude in equity of the obligee, will release the surety in equity. *Sneed v. White*, 20 D. 175.

27. *Impairing the surety's remedy.* — 1. *In general.* — If the obligee undertakes to discharge the principal, or in any considerable degree to lessen his responsibility without the knowledge of the surety, the latter is released; but the mere acceptance of a common appearance in a suit by the obligee against the principal, in consequence of which the latter executed an assignment to secure part of the debt, will not affect the surety's obligation. *Commissioners v. Ross*, 5 D. 383. S. P., *Stratbridge v. Baltimore etc. R. R. Co.*, 74 D. 541; *Craig v. Cox*, 5 D. 609.

Positive and willful interference by a creditor, embarrassing the recovery of the claim against the principal, will release the surety. *Bank of Manchester v. Bartlett*, 37 D. 594.

2. *Laches of creditor.* — Where a creditor does an act injurious to the surety, or omits to do an act when required by the surety,

For Index to Notes in American Decisions and American Reports, see Volume I.

which he is bound to do as to the surety, and the omission is injurious to the surety, the latter is discharged, and may set up such conduct of the creditor as a defense to a suit at law. *King v. Baldwin*, 8 D. 415.

The mere omission by the holder of a promissory note to present it to the assignee (for benefit of creditors) of the principal will not discharge the surety. *Dye v. Dye*, 8 R. 40.

The sureties upon a bond given by an employee to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal known to the employer, and a continuance of the employment after such default in the absence of evidence of fraud and dishonesty on the part of the employee. *Atlantic & Pac. Tel. Co. v. Barnes*, 21 R. 621.

Seemly that the rule is otherwise where the default is of a nature indicating want of integrity in the employee, and this is known to the employer. *Id.*

The agent of a corporation, being under bond to account and pay over daily, cannot be trusted with more money at his surety's risk after dishonesty of the agent is discovered by the corporation. But he may be so trusted, so long as the circumstances, fairly interpreted, point, not to moral turpitude, but to a want of diligence or punctuality, rather than to a want of integrity. *Charlotte etc. R. R. Co. v. Gow*, 27 R. 403.

A surety on the bond of the treasurer of a secret society, conditioned for the faithful application of the trust moneys, cannot evade liability for a misappropriation, by the mere fact that the treasurer had misappropriated the trust funds in the preceding year, to the knowledge of the officers and members of the society, but not of the surety, and had been re-elected without any communication of such defalcation to the surety. *Roper v. Sangamon Lodge*, 33 R. 60.

A life insurance company holding the note of a deceased policy-holder, for money loaned, and knowing that his estate was insolvent, and that the note was signed by a surety, paid the money due on the policy to his personal representative, to whom it was payable by the terms of the policy, although the latter offered to deduct the amount due on the note, or to receive the note in part payment. Held, that the surety was thereby discharged. *White v. Life Ass'n*, 35 R. 45.

A surety became bound on the bond of a loan officer whose accounts the supervisors were ordered to examine annually, and if a deficiency occurred, they were empowered by law to remove the officer, and elect another. Deficiencies occurred in 1791, and continued for several successive years. No

notice of these deficiencies was taken by the supervisors at their annual meeting until 1798, when suits were ordered against the officers on their bonds, but they were not prosecuted, and indulgence given until 1803, when suits were again begun. Had the suits been prosecuted with due diligence in 1798, the principal then being solvent, the amount of the deficiency might have been collected. The surety was held to be discharged by the laches of the supervisors. *People v. Jansen*, 5 D. 275.

3. *Parting with security.*—The surety is discharged if the creditor, having the means of satisfaction actually or potentially in his hands, refuses to retain it. The same rule applies when the surety apprises the creditor of the means of recovering the debt, and the latter declines to pursue it. *Lichtenthaler v. Thompson*, 15 D. 581.

A surety is discharged by the creditor's surrender of collateral security held for the same debt, either *pro tanto* or entirely according to the value of the security, if surrendered without his consent, but not otherwise; nor is such discharge obviated by the creditor's taking additional sureties in lieu of the security so surrendered. *New Hampshire Savings Bank v. Colcord*, 41 D. 685. *S. P., Baker v. Briggs*, 19 D. 311; *Cullum v. Emanuel*, 34 D. 757; *Springer v. Toothaker*, 69 D. 66.

A creditor who has disabled himself from surrendering to the surety the means of reimbursement which he once possessed is not to be injured thereby, if he acted without a knowledge of the rights of other persons, and with good faith and just intentions. *Cullum v. Emanuel*, 34 D. 757.

Sureties on a replevin bond are discharged by the discharge of one of two defendants by the voluntary act of the plaintiff, where the undertaking of the sureties was in the joint behalf of both defendants. *Harris v. Taylor*, 67 D. 576.

A surety is released by the creditor's surrendering attached property of the principal to the amount of the property so surrendered, where it is done without his consent and after the creditor's lien has become absolute by the recovery of judgment. *Springer v. Toothaker*, 69 D. 66.

A surety is not discharged by act of the creditor in parting with security of the principal debtor, where he does so for the purpose of securing other property of greater value, which would be otherwise unavailable. *Young v. Cleveland*, 82 D. 155.

A surety is discharged where, by the wrongful act of the creditor, goods of the principal, upon which an execution not levied has become a lien, are taken away and sold, so that they are placed beyond the reach of any subsequent execution. *Robeson v. Roberts*, 83 D. 308.

A surety is entitled to have levied upon

For Index to Notes in American Decisions and American Reports, see Volume L.

and sold real estate of his principal, upon which a judgment against himself and his principal is a lien, before his own is levied upon. *Ib.*

Where a judgment creditor released from the operation of his judgment certain land which the debtor formerly owned, but which he had conveyed away previous to its rendition, but in which it was thought that such debtor might have some contingent interest, for the purpose of relieving the premises from a possible cloud, this does not discharge the surety of said debtor, where it is shown that in fact the debtor had no interest whatever in the land released, and that in consequence the judgment never was a lien upon it. *Blydenburgh v. Bingham*, 98 D. 49.

To release a surety by surrender of security for payment by principal, the security released must have an actual value, rather than a supposititious or imaginary one. *Ib.*

The contract of a surety is *strictissima juris*, and the creditor must not deal with the debtor, or the security which he holds upon the debtor's property, to the prejudice of the surety, unless he intends to release him. *Ib.*

4. *Fraud or concealment.* — A surety on notes given for the purchase-money is not discharged by a subsequent conveyance of the land in pursuance of the contract, nor by failure, through fraud of the principal, to record a mortgage given at the time of the conveyance, whereby intermediate claims acquired precedence. *Coombs v. Parker*, 49 D. 459.

Fraudulent concealment of facts from the principal will not discharge the surety necessarily; the concealment which entirely discharges a surety is one of facts known to the other party and not known to him, and known to be of a character to materially increase the risk beyond that assumed in the usual course of business of that kind, he having a suitable opportunity to make them known to the surety. *Bryant v. Crosby*, 58 D. 767.

Where the payee of a note intrusts it to the principal for a fraudulent purpose, and consents that he shall induce the sureties to believe that the debt has been paid, and they are thus led to forego an advantage which they would otherwise have had, they will be released from the contract in equity, and also at law, if sued alone. But if such payee gives the note to the principal for some honest purpose, and the latter, without his knowledge or consent, represents to the sureties that the debt is paid, and even if he should tear off the names of the sureties, or destroy the note, this will not release the sureties, if the payee at the earliest opportunity corrects their misapprehension. *Wilson v. Green*, 60 D. 279.

28. *Altering the terms of the contract.* — If the obligee releases any of his

securities, or enters into a new contract with the principal, by which the terms of the original contract are varied, without the knowledge or consent of the surety, he will be discharged from his liability. *Smith v. Tunno*, 16 D. 617; *Mayhew v. Boyd*, 59 D. 101.

A novation between the principal and creditor, whereby time is given, to the prejudice of the surety, discharges him; but the new contract should be made clearly to appear, and that it was so prejudicial to the surety in its tendency that the obligee ought to be compelled to rely upon it, and not be allowed to resort again to the surety. *Brown v. Wright*, 18 D. 190; *Sneed v. White*, 20 D. 175.

Sureties on a bond for a writ of error are discharged by the principal's agreeing with the adverse party, without their consent, that the judgment may be affirmed, and that he will deliver indorsed bills for the amount, payable in installments, and that no execution shall be levied, except on non-payment of the bills. *Comegys v. Cox*, 18 D. 45.

The release of sureties who have signed as joint obligors is not effected, at law, by anything short of what amounts to a release or discharge of all the parties to the bond. Thus where a bond for the payment of money was without interest, a separate agreement by the principal, subsequently entered into under seal, that the amount of the bond should bear interest, does not avoid the liability of the sureties. *Tremper v. Hemphill*, 31 D. 673.

There is no consideration in contemplation of law for a promise by a creditor that a sum less than the debt shall be received in satisfaction, and such a promise will not release a surety. *Oberndorf v. Union Bank*, 1 R. 31.

Sureties on the bond of a railroad ticket and freight agent are not discharged by the company's changing the station from second to first class, thereby increasing the freight, but leaving unchanged the agent's duties; viz., to receive all sums payable at his station, both for freight and passengers. *Strawbridge v. Baltimore etc. R. R. Co.*, 74 D. 541.

B was appointed ticket agent of defendant at Memphis, and gave a bond, with sureties, for faithful performance of his duty. There were two ticket-offices, but the bond did not specify to which he was appointed. Subsequently the offices were consolidated, and the duties of both were imposed on him, and his salary was increased, without the knowledge of his sureties. *Held*, that his sureties were discharged. *Mumford v. Memphis etc. R. R. Co.*, 31 R. 616.

A bond was executed for the faithful performance of duty by an "assistant clerk" in a bank. He was employed as a messenger. Afterward he was promoted to the next higher clerkship, and still later to the posi-

For Index to Notes in American Decisions and American Reports, see Volume I.

tion of book-keeper. In the last position he was stationed near the money-drawer, and from time to time abstracted money from it, and made false entries to conceal his crime. The last promotion was without the knowledge of his sureties on the bond. *Held*, that they were not liable for the embezzlement. *Manufacturers' Nat. Bank v. Dickerson*, 32 R. 237.

A city superintendent of water-works gave a bond for the proper discharge of his duties and the payment of moneys coming to his hands. At that time there was no law or ordinance specifying his duties or requiring any bond. Subsequently an ordinance was passed defining his duties, one of which was to collect water rents. *Held*, that his sureties were not liable for his default in paying over such rents collected by him. *City of Lafayette v. James*, 47 R. 140.

29. — or departure from it. — Where a surety bound himself to make good a deficiency arising from a sale of goods consigned to the correspondent of the creditor who had entire control of the consignment, a sale by the consignee at another place than that agreed on releases the surety. *Ludlow v. Simond*, 2 D. 291.

A surety is released by the creditor's agreement to take land from the principal debtor for the whole or a part of the debt without such surety's consent. *Bangs v. Strong*, 42 D. 64.

An agreement by a creditor to accept a certain percentage within a specified time, in full of his claim, but containing no stipulation for delay or extension, and never complied with, does not discharge a surety for the debt. *Miller v. Haick*, 39 R. 346.

30. Taking a new or further security. — Taking collateral security, though of a higher nature, from the principal debtor, or a stranger, does not preclude the principal debtor from suing on the first contract, and consequently does not discharge the sureties upon it. *Burke v. Oruger*, 58 D. 102.

Where a creditor received the note of a third person from the principal debtor, and gave a receipt that it was received "in security for all notes signed by" the debtor, in an action against the surety, parol evidence was admitted to show that the note was received in payment, with the intent to discharge the debtor and his surety. *Baker v. Briggs*, 19 D. 311.

Defendant indorsed a note for the accommodation of the maker, who also gave the payee a mortgage as further security pursuant to an agreement between all the parties. The payee failed to have the mortgage recorded, and afterward canceled it and took another. *Held*, that defendant was discharged, and this even though the original mortgage would have been worthless if re-

* Release of surety by accepting non-negotiable note of principal, see note, 38 R. 85, 86.

corded, by reason of prior liens. *Atlanta Nat. Bank v. Douglass*, 21 R. 234.

31. Giving further time to principal, when a discharge. — Where the creditor has disabled himself to pursue the principal, the surety is *ipso facto* discharged. *United States v. Simpson*, 24 D. 331; *Johnson v. Planters' Bank*, 43 D. 480; *Rucker v. Robinson*, 90 D. 412.

A surety is discharged by a valid agreement for delay for any length of time, however short, entered into by the creditor with the principal debtor, without the surety's assent. *Bangs v. Strong*, 42 D. 64; *Grafton Bank v. Woodward*, 20 D. 566; *Bank of Montpelier v. Dixon*, 24 D. 640; *Steele v. Boyd*, 29 D. 218; *King v. State Bank*, 47 D. 739; *Lime Rock Bank v. Mallett*, 56 D. 673; *Yates v. Donaldson*, 61 D. 283; *Dickerson v. Ripley County*, 63 D. 373; *Place v. McIlwain*, 97 D. 777; but it must appear that such credit was given either expressly or impliedly against his consent or inclination, or that he was prejudiced thereby. *Butler v. Hamilton*, 2 D. 692.

The fact that a creditor has received money collected by her brother on a note does not warrant a presumption of her recognition of his authority to bind her by an indulgence granted to the debtor, where no direct authority is proved. *Canton v. Dunlap*, 23 D. 194.

A surety is released by the creditor's accepting interest in advance beyond the day of payment from the principal debtor without the surety's assent, there being no evidence of any reservation of a right to sue, such acceptance of interest being evidence of a contract to delay. *New Hampshire Savings Bank v. Colcord*, 41 D. 685.

The holder of a promissory note extending the time of payment to the maker by contract, upon sufficient consideration, discharges an apparent maker that he knows to be a surety, and whose consent to the extension has not been given. *Lime Rock Bank v. Mallett*, 56 D. 673.

An agreement between the indorsee and principal maker of a note to extend the time of payment for a definite period, in consideration of usurious interest paid in advance, discharges a surety on the note who was known to the indorsee as to be when he took the note. *Stillwell v. Aaron*, 33 R. 517; *Hamilton v. Prouty*, 36 R. 866.

Taking a note, draft, or check of the principal debtor, payable at a future day, suspends the creditor's right of action until their maturity, and consequently would operate as a discharge of the surety. *Place v. McIlwain*, 97 D. 777.

A statutory extension of the time of a collector of taxes to pay over his collection operates to discharge the sureties on his bond previously given. *State v. Roberts*, 30 R. 788.

The payment of usurious interest for time

For Index to Notes in American Decisions and American Reports, see Volume I.

already elapsed constitutes a valid consideration for the extension of the time of payment of an obligation to pay money, although under the law the debtor or his sureties may recoup the amount so paid; and such a payment discharges the innocent surety. *Lemmon v. Whitman*, 39 R. 150.

A wife joined her husband in a note, and mortgaged her separate property as security. The husband subsequently was discharged in bankruptcy. After that, the creditor, knowing all the facts, agreed to extend the time of payment for a definite period and to reduce the rate of interest, and the husband in consideration thereof promised to pay the debt. This agreement was indorsed on the note. The wife did not know of it. *Held*, that she was released. *Post v. Losey*, 60 R. 677.

32. — when not a discharge. — A surety on a promissory note is not discharged by the holder giving time to the principal debtor, or even by his discontinuing a suit commenced against the debtor without the privity and consent of the surety, it not appearing that the surety had suffered any injury by the delay, or that the holder had made any agreement with the debtor which prevented the holder from suing him. *Fulton v. Matthews*, 8 D. 261; *Rucker v. Robinson*, 90 D. 412; *Berry v. Pullen*, 31 R. 243.

Sureties cannot be prejudiced by an arrangement between the creditor and principal debtor, whereby time is given to the latter, unless they had knowledge thereof and acquiesced therein. *Everett v. United States*, 30 D. 584.

When it appears that the time of payment has been extended by a creditor at the instance of the principal debtor, and no evidence is offered to show that the sureties of the latter had any knowledge of such extension, an instruction that from the acts of the creditor the jury may infer a knowledge of such extension by the sureties is erroneous. *Id.*

A surety fully indemnified by the principal debtor is not released by an extension of time given the latter. *Chilton v. Robbins*, 37 D. 741.

The participation of a surety in payments of interest in advance furnishes evidence of his assent to the agreement for delay implied from such payment. *New Hampshire Savings Bank v. Colcord*, 41 D. 685.

Extension of time of payment of a promissory note, to which one of two sureties assents, and the other does not, does not release the surety assenting. *Wolf v. Fink*, 44 D. 141.

A covenant by the holder of a bond with the principal obligor for a definite extension of time does not release the surety at law, but his remedy is in equity. *Devers v. Ross*, 60 D. 331.

A surety is not discharged, where, for a

valuable consideration, the holder of a note gives an extended time for payment to the principal debtor, but reserves to himself the right to sue whenever required by the surety. *Rucker v. Robinson*, 90 D. 412.

The payee and holder of a promissory note agreed with the principal maker, without the consent of the surety, to extend the time of payment "until after harvest." *Held*, not to discharge the surety because too indefinite. *Findley v. Hill*, 34 R. 578.

An extension of the time of payment, granted by the payee of a note to one of two joint makers, without the knowledge or consent of the other, who is in fact a surety, but not known as such to the payee, does not release the non-consenting joint maker. *Mullendore v. Werts*, 39 R. 155.

A surety on a tax collector's bond is not released by subsequent extension of the collector's time by the legislature. *State v. Swinney*, 45 R. 405.

33. Forbearance to sue. — Forbearance, without any binding promise to grant it, will not release the surety. *Sneed v. White*, 20 D. 175; *Smith v. Tunno*, 16 D. 617; *United States v. Simpson*, 24 D. 331. Therefore neglect to sue or to attempt to collect the debt at the time it falls due does not discharge the sureties, although the principal had ample means at the time, and subsequently became insolvent. *King v. State Bank*, 47 D. 739. To escape liability, the surety must do some act, such as giving notice to the holder of the instrument to proceed against the principal, to warn him and put him on his guard. *Marberger v. Pott*, 55 D. 479.

The indulgence granted to a principal which is to discharge a surety from his engagement must be of that kind whereby the nature of the contract is changed, or whereby the creditor without the consent of the surety, and by his own act, puts it out of his power to enforce the payment of the debt by the principal. It does not mean a mere forbearance to sue the principal, which a court of equity on application of the surety might direct him to do, on pain of foregoing his claim upon the surety. *Buchanan v. Bordley*, 1 D. 387.

Forbearance to sue the principal will discharge the surety, although it be for a limited time only. *Dickerson v. Ripley Co.*, 63 D. 373.

34. Effect of mere indulgence. — Mere indulgence to the debtor does not discharge the surety unless there is an agreement upon a sufficient consideration, and binding upon the creditor, to give time to the principal debtor. *Burke v. Cruger*, 58 D. 102. *S. P.*, *Martin v. Pope*, 41 D. 66; *Brinager v. Phillips*, 36 D. 575; *Oberndorf v. Union Bank*, 1 R. 31.

* See note on the release of the surety by indulgence of the principal, 80 D. 267, 268.

For Index to Notes in American Decisions and American Reports, see Volume I.

Forbearance or passive indulgence, by the obligee, will not release a surety. *Sneed v. White*, 20 D. 175; *Newell v. Harner*, 35 D. 415; as the surety ought to have warned the creditor to proceed. In such case actual detriment is not the criterion or material ingredient. *United States v. Simpson*, 24 D. 831.

An indorser is not discharged by an agreement for indulgence by the creditor to the principal debtor founded upon a usurious consideration paid in advance, and reserving his rights and remedies against the indorser. *First Nat. Bank v. Lineberger*, 35 R. 582.

The act of the creditor entitling the principal to indulgence after the debt has matured will release, in equity, the non-assenting surety. *Sneed v. White*, 20 D. 175.

The surety's assent to the indulgence given cannot be inferred from his silence or neutrality. *Id.*

35. — or more delay to prosecute.

— A surety is not discharged by delay or negligence in proceeding against the principal, unless there be a binding contract for such delay. *Caston v. Dunlap*, 23 D. 194; *Hunt v. Bridgham*, 13 D. 458; *Police Jury v. Haw*, 20 D. 294; *Cooper v. Wilcox*, 32 D. 695; *Carter v. Jones*, 49 D. 425; *Wright v. Yell*, 58 D. 336; *Cook v. Southwick*, 60 D. 181.

Delay or neglect to sue the principal, although urgently requested thereto by the surety, is not a discharge of the surety. *Bank of Montpelier v. Dixon*, 24 D. 640.

A surety on certain bonds is not released merely on the creditor not urging his demand. There must be an express extension of credit to the principal. If one of the bonds has been prosecuted to judgment and an execution returned *nulla bona*, there is therefore less necessity to sue on the others. *Butler v. Hamilton*, 2 D. 692.

An omission on the part of the accounting officers of the commonwealth for a year and upwards to compel the prothonotary of the common pleas to settle his account of fees does not discharge the sureties in the official bond of the prothonotary, although the officers are authorized to compel an account at the end of each year, and to enforce payment by execution. *Com. v. Wolbert*, 6 D. 452.

Where a joint and several note, made by T. as principal and the defendant as surety, payable to a bank, on demand, as collateral security for a check given by the principal for a loan of money, remained in the bank six months before it was entered on the bank's books, the loan being intended to be temporary, and the surety was not called on for payment, nor was notice given to him of the non-payment of the note until the further lapse of six months, when the principal had become insolvent, these circumstances were held not to release the surety in an action

upon the note. *Commercial Bank v. French*, 32 D. 280.

A surety is not discharged by the creditor's failure to present a claim to the administrator of the deceased principal within the time prescribed by law. The sureties may, in such a case, compel the presentment of the claim in due time, and thus preserve their recourse against the estate. *Johnson v. Planters' Bank*, 43 D. 480; *Minter v. Branch Bank*, 58 D. 315; *Ashby v. Johnston*, 79 D. 102.

The surety of a vendee on a continuing contract of purchase is not discharged by mere forbearance, or neglect of the vendor to enforce payment at the times stated in the contract. *McKechnis v. Ward*, 17 R. 281.

W. became surety on the bond of B. for the performance of an agreement between B. and plaintiffs, whereby "the agency for the sale of their ale" at S. was let to B., he agreeing to pay on the first of each month for the amount of ale delivered, and "not to purchase" ale of any but plaintiffs. The agreement might be terminated on three months' notice by either party. In an action for breach of the bond, — held, that B. was not the agent of plaintiffs under a fair construction of the agreement; and that W. was not discharged as surety, although plaintiffs neglected or forbore to enforce full payment at the times stated in the agreement, and did not give notice to W. that B.'s account was in arrears. *Id.*

A surety is not discharged by an executed usurious agreement for delay, between the principal debtor and the creditor, although made without the surety's knowledge or assent. *Howell v. Sevier*, 27 R. 771.

36. Staying proceedings against principal. — On an execution against a principal and surety, the release of property of the principal seized will discharge the surety. *Dixon v. Ewing*, 17 D. 590; *Baird v. Rice*, 1 D. 497; *Sneed v. White*, 20 D. 175; *Curran v. Colbert*, 46 D. 427.

Dismissal of a suit and release of an attachment sued out by the payee against the principal on a promissory note is not a discharge of the surety. *Bank of Montpelier v. Dixon*, 24 D. 640; *Baker v. Marshall*, 42 D. 528. Contra, see *Bank of Missouri v. Matson*, 72 D. 208.

Where, on a judgment against the principal in a bond and his two sureties, an execution is levied on property of the principal sufficient to satisfy the judgment, but the property is released by the execution of a delivery bond by the principal and one of the sureties, together with other parties, the other surety refusing to join therein and desiring the sheriff to proceed, the latter is discharged, and is not liable for contribution to his co-surety, who, after forfeiture and judgment on the delivery bond, pays

For Index to Notes in American Decisions and American Reports, see Volume I.

the whole amount of the judgment. *Brown v. McDonald*, 29 D. 112.

Forbearance to enforce an execution neither suspends nor extinguishes a surety's liability, nor deprives him, as a binding novation or levy might have done, of any right to pay the debt, nor requires the creditor to proceed against the principal. *Blandford v. Barger*, 33 D. 519.

But where the debt could have been satisfied out of the property of the debtor, had it not been for the interference of the creditor, then the surety is entitled to relief to the extent of his loss, on the ground that in prosecuting the execution the creditor was his quasi trustee, and had violated the trust, to his prejudice. *Ib.*

Holding up an execution on a forthcoming bond does not discharge the surety, where it is a voluntary act upon the part of the creditor, for which the consideration has been given; though during the time that the writ is so held the principal debtor becomes insolvent. *Newell v. Hamer*, 35 D. 415.

A surety is not discharged by an agreement to suspend execution where no positively defined period was agreed upon for the suspension, and the direction to the sheriff was "not to execute the execution until ordered to do so," as in such a case, the time being indefinite, the stay could have been arrested at any time that the surety requested it to be done. *McGee v. Metcalf*, 51 D. 122.

A surety of an execution debtor is not released by a mere countermand by the creditor of an execution after it goes into the hands of the sheriff, but before it is levied. *Humphrey v. Hitt*, 52 D. 133. Compare *Robeson v. Roberts*, 83 D. 308.

A surety is not discharged by the creditor's discontinuing proceedings against the principal, where there is no abandonment of any absolute lien or security. *Springer v. Toothaker*, 69 D. 66.

A surety is discharged when the creditor relinquishes any hold which he has actually acquired on the property of the principal, and which might have been made effectual for the payment of the debt. *Robeson v. Roberts*, 83 D. 308.

Sureties on an undertaking on appeal are released by the creditor's private agreement to stay execution in consideration of a confession of judgment. *Kendall v. Grice*, 47 R. 243.

A receiver was imprisoned for not paying over money in obedience to an order of the court. He was released with the assent of the party to whom he was ordered to pay the money. *Held*, that this did not discharge the surety, although he was able to pay when in prison, and afterward became insolvent. *Hawkins v. Mims*, 38 R. 30.

Co-sureties should be parties, as well as the principal, to a bill by a surety on a

replevin bond to be released by reason of a stay of execution granted by the creditor. *Sneed v. White*, 20 D. 175.

37. Discharge of surety by notice to creditor to proceed against principal. — Where a surety apprehends a danger from the delay of the creditor, he may compel the latter to sue the principal debtor; especially on indemnifying the creditor for the consequence of risk, delay, or expense. *Hayes v. Ward*, 8 D. 554.

If the holder of a security payable on demand is requested by the surety to proceed without delay to collect the money from the principal, who is then solvent, but neglects so to do, and the principal afterwards becomes insolvent and absconds, the surety will be exonerated. *Pain v. Packard*, 7 D. 369; provided the request be proved clearly and beyond a doubt, and be positive and accompanied by a declaration that unless it be complied with, the surety will be considered discharged; and though such request should be in writing, yet if made verbally it will not be void. *Cope v. Smith*, 11 D. 582. *S. P.*, *Bruce v. Edwards*, 18 D. 33; *Greeham v. Kreider*, 45 D. 639; *Jackson v. Huey*, 43 R. 301.

After the principal's death, the creditor is not bound, unless requested by the surety, to resort to his estate, notwithstanding a statute requiring creditors to exhibit their accounts to executors and administrators within twelve months after public notice. *Cope v. Smith*, 11 D. 582.

Sureties on official bonds cannot set up as a defense that before the breach for which the suit was brought against them on the bond, they gave notice of the officer's unfitness for the office, and requested his removal. *Crane v. Newell*, 13 D. 461.

A request made by the widow of a surety five months after the latter's death, to the obligee of a bond, to sue the principal, will not discharge the administrator of such surety. *Gardner v. Ferree*, 16 D. 513.

The surety, or after his death, his personal representative alone, can request the obligee to sue the principal; and the obligee may treat the request of the widow as that of a mere stranger. *Ib.*

The obligee is bound to do no more than permit the surety to manage the legal responsibilities of the parties, so as to cast the burden where it ought to be borne; and if, when requested to sue, he offers the bond to be sued on, the surety who refuses such offer will not be discharged. *Ib.*

Where the creditor fails, after request by the surety, to do any act which his duty enjoins him to do, his omission, if injurious to the surety, will, in equity, discharge the latter. *Hempstead v. Watkins*, 42 D. 698.

The statute of Arkansas providing that a surety shall be exonerated from liability unless the creditor brings suit against the

For Index to Notes in American Decisions and American Reports, see Volume I.

principal debtor within thirty days after service of notice upon him is but declaratory, and an extension of an existing and originally equitable remedy, so qualifying such remedy that the surety is not bound to show the injury resulting from the subsequent insolvency of the principal in order to entitle himself to a discharge from his suretyship. *Id.*

Where a surety on a bond gives the holder thereof notice, under the Arkansas statute, to sue the principal debtor, and he fails to bring a valid suit thereon within thirty days thereafter, such surety may plead his exoneration either at law or in equity. *Id.*

If the surety notifies the holder of promissory notes, to whom they have been pledged as collateral security, that he signed said notes as surety, and requires him to bring suit against his principal, it seems that this would be a substantial compliance with the statute. The holder may waive notice in writing. If the notice does not comply with the requirements of the statute, it would be good at common law, when connected with proof showing failure to sue, and damage to the surety resulting therefrom. *Pickens v. Farborough*, 62 D. 728.

The Mississippi statute requires notice from sureties to the holder of a note to sue the principal, or all the parties, to be in writing. A verbal notice will not discharge the sureties from liability. *Bridges v. Winters*, 97 D. 443.

If a surety on a bill give notice to the creditor to sue, and after suit brought, the creditor discontinues and gives further time to the principal, without the consent of the surety, and subsequently the principal fail, the surety will still be bound. *Manning v. Shotwell*, 8 D. 622.

Notice by a surety to the creditor that he would no longer consider himself bound, and requesting the creditor to get payment from the debtor, will not absolve the surety, upon the creditor's failure to sue the principal debtor. *Grecanwall v. Kreider*, 45 D. 639.

Notice by a surety to the cashier of a bank, requesting him to put the note on which he was surety "in a train of collection," will not release him from liability upon the bank's failure to comply therewith. *Bates v. State Bank*, 46 D. 293.

Notice by a surety on a note not due, that he will not remain responsible if the holder does not sue the principal debtor as soon as the note falls due, or get other security, will not discharge the surety. *Hellen v. Crawford*, 84 D. 421. S. F., *Hunt v. Purdy*, 37 R. 587.

A surety is not discharged from his liability by failure of creditor to sue the principal debtor when requested so to do by the surety. *Dane v. Corduan*, 85 D. 53; *Caston v. Dunlap*, 23 D. 194.

If a creditor fails to sue his principal debtor when solvent, at the request of the surety, and he afterward becomes insolvent, still the surety is not discharged. *Findley v. Hill*, 34 R. 578; *Pintard v. Davis*, 47 D. 172; *Smith v. Freyler*, 47 R. 358.

The creditor is entitled to select his own attorney, and a tender of the services of an attorney is not equivalent to furnishing money to pay the expense of procuring one, under a decree obtained at the suit of a surety, and requiring the creditor to sue the principal, on the surety tendering the creditor a sufficient amount to pay reasonable costs and expenses in the action. *Dane v. Corduan*, 85 D. 53.

A decree in equity obtained at the suit of a surety, and requiring the creditor to sue the principal debtor, is not a bar to an action against the surety, though the creditor fails to sue the principal debtor, unless the surety specifically performs the conditions imposed by the decree; and where the decree prescribes the condition that the surety tender to the creditor a sufficient amount to pay reasonable costs and expenses in the suit against the principal, a payment to the clerk and sheriff of a sufficient amount to pay their fees in the contemplated suit is not a compliance with the condition. *Id.*

A surety may pay the debt and prosecute his principal, and one who for value transfers a debt or security, and thereupon becomes guarantor or indorser, may thus protect himself against the consequences of delay in enforcing the principal obligation; but he cannot, by notice, impose upon the creditor or holder the duty of active diligence at the risk of discharging the surety by omitting it. *Wells v. Mann*, 6 R. 93.

One of several sureties for a debt notified the creditor, upon the maturity of the debt, to sue the principal debtors within thirty days, which he failed to do, whereby, by statute, the surety was discharged. *Held*, that his co-sureties who had given no notice remained liable. *Wilson v. Tebbetts*, 21 R. 165.

38. Death of surety, and liability of his estate.—One who obligates himself that another will faithfully perform the duties of an office is liable upon the default in the performance of those duties, although such default takes place after the death of such surety. *Greene v. Young*, 22 D. 218; *Susong v. Vaiden*, 30 R. 50.

An undertaking given upon appeal in an action read thus: "We" (naming sureties) "do hereby, pursuant to the statute in such case made and provided, undertake," etc. *Held*, 1. That the obligation was joint, and not several; 2. That upon the death of one of the sureties his estate was discharged from liability thereon, both in law and in equity; and 3. That the liability of the parties was not affected by the fact that the undertaking

For Index to Notes in American Decisions and American Reports, see VOLUME I.

was given in pursuance of a statute. *Wood v. Fisk*, 20 R. 528.

The obligors in a bond, one of whom was a surety only, bound themselves, their "heirs, executors, and administrators." The surety died, and after his death a breach occurred. *Held*, that his estate was liable. *Royal Ins. Co. v. Davies*, 20 R. 581.

The estate of a deceased surety on a bond given by an insurance agent for faithful conduct and accounting is liable for moneys coming into the agent's hands after the surety's death, but not for moneys coming to his hands on his retention in the agency after he had made default to the knowledge of the obligee. *Rapp v. Phoenix Ins. Co.*, 55 R. 427.

39. New promise. — A new promise by a surety, after discharge, in consideration of forbearance for a definite term, to be holden for a longer period, is binding, and waives the discharge, though he had no knowledge of the matters discharging him, if there has been no fraudulent concealment, and if the principal was still liable when the new promise was made. *New Hampshire Savings Bank v. Colcord*, 41 D. 685.

A new promise by a surety, after discharge, with knowledge of the facts discharging him, is binding, without any new consideration; otherwise, if he has no such knowledge. *Id.*

SURGEONS.

As experts, see WITNESSES, 134.

Generally, see PHYSICIANS AND SURGEONS.

SURPLUSAGE.

In indictments, see HOMICIDE, 26; INDICTMENT, 41.

In pleadings, see PLEADING, 10.

SURPLUS MONEYS.

In foreclosure, disposal of, see MORTGAGES, 107.

On execution, disposal of, see EXECUTION, 119.

SURPRISE.

When ground for new trial, see NEW TRIAL, 41-43.

SURRENDER.

Covenant for, in lease, see LEASES, 17.

Of corporate franchise, see CORPORATIONS, 171.

Of deed, effect of, see DEEDS, 41.

Of fugitives from justice, see EXTRADITION, 2, 3, 15, 16.

Of lease, see LEASES, 32, 33.

Of principal, by bail, see BAIL, 3, 22.

SURROGATES.

Appeals from decisions of, see APPEAL, 136.

Powers of, see WILLS, 44.

SURVEYS.

As evidence of boundary, see BOUNDARIES, 14.

Courses and distances must yield to landmarks and monuments, see BOUNDARIES, 5.

Of insured vessels, see INSURANCE, 115.

Of public lands, see PUBLIC LANDS, 6-9.

Parol evidence to explain, see EVIDENCE, 128.

Surveyor's certificates, as evidence, see EVIDENCE, 225.

Use of, as evidence, see EVIDENCE, 241.

1. What constitutes a survey, generally, and how made. — Astronomical observations may be employed to find the true location of a line, and are likely to be more accurate than a survey made by commencing at the initial point and running by the compass. *Taylor v. Shafford*, 15 D. 512.

The allowance to be made for the variation of the compass, and whether any allowance should be made to determine the location of a survey, are questions of fact for the determination of the jury. *Harlan v. Brown*, 41 D. 436.

Lines actually marked on the ground constitute the survey, in all cases, whether an adjoining survey be called for or not. *Hall v. Tanner*, 45 D. 686.

An allotment by plan may indicate with certainty the location of each and every lot, although no lot lines may in fact have been run out; if the lots can be made certain, that will be sufficient. *Wells v. Jackson Iron Mfg. Co.*, 90 D. 575.

In New Hampshire the courses in a deed are presumed to have been run according to the magnetic meridian, unless there is something in the instrument to indicate a different method. And the word "due" prefixed to the courses will not justify the inference that a different method is intended. *Id.**

2. Surveys of land bounded on water. — To run the lines of water lots from the upland to low-water mark, under the Maine colonial ordinance of 1641, draw a base line between the two corners of each lot where they strike the shore, and from these corners extend parallel lines perpendicular to the base line to low-water mark, and if the shore line is straight, the lines thus extended will be the boundaries of each lot. *Emerson v. Taylor*, 23 D. 531.

Where the shore line is curved, either regularly or irregularly, so that the lines of adjoining lots thus extended diverge from or interfere with each other, the triangular parcels thrown out or included thereby must be equally divided between the adjoining proprietors. *Id.*

A survey of land bounded on a stream, the quantity of land and length of line on the stream being given, the meanderings of the stream are to be followed until, reduced to a straight line, the same will be of the re-

* When presumed to have been made by magnetic instead of true meridian, see note, 90 D. 592.

For Index to Notes in American Decisions and American Reports, see Volume I.

quired length. From the ends of this line other lines are to be projected at right angles with it, far enough so that a line drawn between the two, parallel with the straight line, will leave the required quantity between it and the stream. *Hicks v. Coleman*, 85 D. 103.

The quantity being given, without specifying the length of line on the stream, the required quantity of land is to be located by making the first line follow the meanderings of the stream from the starting-point named in the deed until, reduced to a straight line, it shall be of sufficient length to form one side of a square large enough to contain the required quantity; and this square is to be formed by projecting straight lines at right angles from the ends of the first straight line to such a distance that a line drawn from one to the other, parallel with such first line, will include the required quantity between it and the stream. *Ib.*

Where a line opposite a river is, by the express terms of the deed, to run "parallel with river," it means parallel with the river in all its meanderings, and not parallel with its general course. *Ib.*

If the government survey of a fractional lot contains a mistake, so that either a quarter-section line or the meandered line of a stream, both of which are called for by the survey as constituting the boundary lines between two fractions, must be abandoned, the quarter-section line should be adhered to as the more certain call. *Martin v. Carlin*, 88 D. 696.

3. Ascertaining corners—Closing line.—Where all the corners of a survey are made, but the closing line is left open, the course must be so varied as to strike the corners. *Brown v. Hobson*, 13 D. 187.

A line marked part of the distance must be followed in the same direction for the whole distance, unless there is some marked corner to divert it. *Thornberry v. Churchill*, 16 D. 125.

When marked corner trees cannot be found, the point where the lines intersect is treated as the corner. *Ib.*

The order of the corners in a certificate of survey is of no importance in determining a question of boundary. *Ib.*

To bring a plat with the rule of closed survey, the line of division must be marked on the ground. *Neuman v. Foster*, 34 D. 98.

4. When set aside.—The refusal of the court to set aside, at plaintiff's instance, a survey of a tract of land, made in pursuance of a final decree in favor of the defendant, ordering it to be made with the usual front on the river, on the ground that it gives too large a front on the river, is not erroneous, where it does not appear, by any statement of facts or otherwise by the record, that a less front could have been given so as to include the defendant's improve-

ments, and have due respect to the surveys of the proprietors of the adjacent lands. *Smith v. De la Garza*, 65 D. 147.

SURVIVING PARTNERS.

Rights and liabilities of, see PARTNERSHIP, 86-92.

SURVIVORSHIP.

Among devisees, see DEVISE, 13.

Among joint tenants, see CO-TENANCY, 61.

Among legatees, see LEGACIES, 12.

Effect of, as regards community property, see HUSBAND AND WIFE, 84.

Effect of, on title to lands held by husband and wife, see HUSBAND AND WIFE, 61.

Of wife, her rights as survivor, see HUSBAND AND WIFE, 27.

Presumptions relative to, see EVIDENCE, 37.

SUSPENSION.

Of attorney, from practice, see ATTORNEY AND CLIENT, 9.

Of member of corporate body, see CORPORATIONS, 50.

Of sentence in criminal cases, see TRIAL, 213.

Of statute of limitations, see LIMITATIONS OF ACTIONS, 62-65.

Of statute of limitations in time of war, see LIMITATIONS OF ACTIONS, 79; WAR, 34.

SWITCHES.

Duty of railroad company relative to, see RAILROAD COMPANIES, 29.

SYMBOLIC DELIVERY.

Of goods sold, see SALES, 43.

TACKING.

Of mortgages, see MORTGAGES, 59.

Of one adverse possession upon another, see ADVERSE POSSESSION, 13.

TALESMEN.

How summoned, qualifications, etc., see TRIAL, 23.

TAXATION.

Distinguished from eminent domain, see EMINENT DOMAIN, 2.

Exemption of counties from, see COUNTIES, 14.

Of costs, see COSTS, 17-19.

Of national bank shares, see BANKS AND BANKING, 63.

Under internal revenue laws, see REVENUE, 6.

TAX DEEDS.

When cloud on title, see CLOUD ON TITLE, &

TAX LISTS.

See TAXES, 36.

For Index to Notes in American Decisions and American Reports, see Volume I.

TAX SALE.

Purchase at, by tenant in common, see CO-TENANCY, 16.

TAX TITLES.

See TAXES, IV.

TAXES.

[Includes the power to tax; who are taxable, and where; what property may be taxed; enforcement and sale of land for non-payment of taxes; and remedies for unlawful taxation.]

Assessments for local improvements of property exempt from, see MUNICIPAL CORPORATIONS, 52.

Compelling levy and collection of, see MANDAMUS, 15.

Effect of payment of, to prove adverse holding, see ADVERSE POSSESSION, 16.

Enjoining collection and disbursement of, see INJUNCTION, 23.

For school purposes, see SCHOOLS, 4-8.

Municipal, see MUNICIPAL CORPORATIONS, 28.

On legacies, see LEGACIES, 41.

Review of assessment of, see CERTIORARI, 7.

Rights of mortgagor and mortgagee respecting, see MORTGAGES, 40.

Road taxes, see HIGHWAYS, 26.

Stipulation to pay, in lease, see LEASES, 22.

I. THE POWER TO IMPOSE TAXES.

II. WHO MAY BE TAXED, AND FOR WHAT PROPERTY; EXEMPTIONS.

III. ASSESSMENT AND COLLECTION.

IV. SALE OF LAND FOR NON-PAYMENT; TAX TITLES.

V. REMEDIES FOR ILLEGAL TAXATION.

I. THE POWER TO IMPOSE TAXES.

1. Scope and extent of the power.*

—The power of taxation and of apportioning the same is vested exclusively in the legislature, unless limited or restrained by some constitutional provision. *People v. Mayor*, 55 D. 266; *Anderson v. Kerns D. Co.*, 77 D. 63.

The power of the legislature with reference to taxation is limited only by their own discretion. For the abuse of it, members are accountable to nobody but their constituents. *Sharpless v. Philadelphia*, 59 D. 759. *S. P.*, *Williams v. Cammack*, 61 D. 508.

The taxing power is an incident of sovereignty, the exercise of which belongs exclusively to every state, and attaches alike upon everything that comes within its jurisdiction. *People v. Coleman*, 60 D. 581; *McKeen v. County of Northampton*, 88 D. 515.

The right of taxation is an inseparable incident of sovereignty, delegated in the general grant of legislative authority, and, the provision against poll-taxes excepted, is subject to no express limitations or restrictions,

when used by the legislature as a means to accomplish a lawful purpose. *Hill v. Higdon*, 67 D. 289.

The taxing power in this country is not altogether arbitrary. Equality, as far as practicable, and security of property against irresponsible power, must govern the legislature in the exercise of the taxing power. *City of Lexington v. McQuillan*, 35 D. 159.

The power of eminent domain and that of taxation explained and distinguished. *People v. Mayor*, 55 D. 266.

The power of apportionment of taxation is unlimited, unless restrained as a part of the power of taxation, since the two powers are identical and inseparable. *Id.*

Constitutional limitation or restraint on the power of apportionment of taxation does not exist in New York, and taxes may be apportioned according to the benefit each tax-payer is supposed to receive from the object on which the tax is expended. *Id.*

Constitutional prohibitions that no person shall be deprived of his property without due process of law and that private property shall not be taken for public use without just compensation do not apply to taxation. *Id.*

Property may be taxed in one state, although taxed in another, especially when it is within the limits of the former, and without the limits of the latter. *Minturn v. Hays*, 56 D. 366.

Taxation is a legislative right and duty, which must be exercised by the legislature, or under the authority of laws passed by them. *Sharpless v. Mayor etc.*, 59 D. 759.

The imposition of a tax upon all lands within a certain county, for the purpose of establishing a work of improvement for the general good and benefit of all persons interested in such lands, is not a taking of private property for a public use, but is a legitimate exercise of the power of taxation by the legislature. *Williams v. Cammack*, 61 D. 508.

The power to sell lands upon failure to pay a tax levied thereon is a mere incident to the power of taxation. *Id.*

The legislature has power to impose a tax on a local district for the construction of local public improvements. *Id.*

The power to tax for a lawful purpose necessarily includes power to determine the extent and upon what property the tax should be levied. *Hill v. Higdon*, 67 D. 289; *State v. Bank of Smyrna*, 73 D. 699.

Taxation may be limited by the legislature. *State v. Bank of Smyrna*, 73 D. 699.

A tax, in California, is a personal debt or obligation in the nature thereof, due from the property holder, and is not a mere charge upon the property created by and depending upon the regularity of the proceedings given by statute. *People v. Seymour*, 76 D. 521.

* Definition of taxation, see note, 1 R. 222.

For Index to Notes in American Decisions and American Reports, see Volume L.

The power of the legislature to tax is neither restricted as to mode nor limited as to time; and therefore, though payment of a tax can only be enforced according to law, yet, if from accident, or oversight, or remission, on the part of the tax-payer, the time for payment has passed, or the mere mode of charging him has not been followed by the officers, the legislature may still compel him to pay. *Id.*

Rights of eminent domain and taxation may be exercised for the construction of works of public use and benefit, where no constitutional restriction forbids it. *Anderson v. Kerns D. Co.*, 77 D. 63.

The objects for which money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute. *Brodhead v. Milwaukee*, 88 D. 711.

The court will not be justified in declaring a tax void, and arresting proceedings for its collection, unless the absence of all possible public interest in the purposes for which the funds are raised is so clear and palpable as to be immediately perceptible to every mind. *Id.*

Claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax. *Id.*

The right or power of taxation, originally inherent in the states, is not abridged by the grant of similar power to the government of the Union; and it may be concurrently exercised by the two governments. *Southern Exp. Co. v. Hood*, 94 D. 141.

A tax duly assessed is not a debt within the clause of the constitution prohibiting the passage of a law impairing the obligations of a contract. *City of Augusta v. North*, 2 R. 55.

For a discussion of the taxing power of the legislature, see *Hanson v. Vernon*, 1 R. 215; *Stewart v. Polk Co.*, 1 R. 238; *People v. Salem*, 4 R. 400; *Whiting v. Sheboygan R. R. Co.*, 3 R. 30.

2. Its limits and exceptions. — The power of taxation is a necessary accompaniment of the power of legislation, and is limited only by the extent of that power. *Battle v. Mobile*, 44 D. 433.

Taxation means a certain mode of raising revenue for public purpose in which the community that pays it has an interest. The right of the state to lay taxes has no greater extent than this. *Sharpless v. Mayor etc.*, 59 D. 759.

The power of taxation is limited only by discretion of legislature, when exercised by the government itself, and when exercised by subordinate bodies is limited by the objects for which the legislature has seen fit to authorize it to be exercised, and by such restrictions as the legislature has seen fit to prescribe, unless, indeed, it is further limited by some constitutional provision. *Nichols v. Bridgeport*, 60 D. 636.

Local taxation must be permitted only to defray expenses in cases of public use and benefit. *Anderson v. Kerns D. Co.*, 77 D. 63.

The legislature cannot validate an invalid tax sale by a subsequent law. *Conway v. Cable*, 87 D. 240.

The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. *Brodhead v. Milwaukee*, 88 D. 711.

An act of the legislature authorizing contributions to be levied for a mere private purpose, or even for a public purpose in which the people from whom they are to be exacted have no interest, is not a law, but a judicial sentence, and not within the legitimate scope of legislative authority. But within this limit, the power of the legislature to impose taxes, or to authorize their imposition by subordinate municipal authorities, is discretionary. *Grim v. Weissenberg School District*, 98 D. 237.

A *de facto* government, which is able to maintain its supremacy by its armies, may exercise the taxing power; and those who are subject to its control are bound to obedience. But if it assesses a tax, and is overthrown before it is collected, the rightful sovereign, whose power is established, will not enforce such assessment against the subjects of the government *de jure*. *O'Byrne v. Mayor*, 5 R. 532.

Under a railroad charter binding the company to pay a certain fixed rate annually in lieu of all other taxes, and reserving the power to the state to repeal or modify the charter, the state may not at will increase the annual rate. *State v. Board of Assessors*, 57 R. 516.

3. Constitutionality of statutes imposing taxes. — An act of the legislature would not be law when it authorizes contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest. The act would be but a sentence commanding the periodical payment of a certain sum by one portion or class of people. The power to make such order is not legislative, but judicial, and was not given to the legislature by the general grant of legislative authority. *Sharpless v. Mayor etc.*, 59 D. 759.

A tax law is not unconstitutional on the ground that the act authorizes contributions to be levied for a public purpose in which those from whom they are exacted have no interest, unless it is apparent at first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied. And this is more especially true if it be a local tax, and if the authorities have themselves laid the tax in pursuance of an act of the legislature. *Id.*

An act levying a tax on consigned goods in

For Index to Notes in American Decisions and American Reports, see Volume I.

the hands of the consignee is not in violation of the clause of the constitution of the United States which guarantees to citizens of one state the same privileges and immunities to which they are entitled in their own states. *People v. Coleman*, 60 D. 391.

The revenue act of 1853 is not in derogation of the constitution of California, or of the constitution of the United States. *Id.*

A state law providing that all goods, wares, etc., brought into California from any other state, or from a foreign country, to be sold in the state, owned by any person not domiciled in the state, shall be declared consigned goods, and that every person selling such goods shall be taxed a certain rate on the value of the goods so sold, the tax to be paid by the seller, and to be a lien on the goods in the hands of the owner, does not violate those provisions in the constitution of the United States which confer upon Congress the power to regulate commerce, and prohibit any state from levying any impost or duties on imports or exports. *Id.*

An act authorizing a levy, for levee purposes, of a uniform tax of not exceeding ten cents per acre on all lands in a certain county lying within ten miles of the Mississippi River, and a uniform tax of not exceeding five cents per acre on all lands in said county lying ten miles from said river, prescribes a rule of taxation for all the taxable lands in the county, as well for those lying beyond the range of ten miles from the river as for those lying within ten miles of it. *Williams v. Cammack*, 61 D. 508.

An act which exempts from taxation for levee purposes lands lying between the river and the levee does not confer exclusive privileges upon the owners of such lands, and does not violate the constitutional provisions "that all freemen are equal in rights," and "that no man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community but in consideration of public services." These provisions declare that honors, emoluments, and privileges of a personal and political character are alike free and open to all the citizens of the state; but they have no reference to the private relations of the citizens, nor to the action of the legislature in passing laws regulating the domestic policy and business affairs of the people, or any portion of them. *Id.*

A statute making an assessment *prima facie* proof of delinquency of property for taxes, and of the amount thereof, and all that the forms of law in regard thereto have been complied with, merely affects the remedy, and is therefore constitutional. *People v. Seymour*, 76 D. 521.

A statute providing for enforcing the collection of taxes assessed in a former year is not unconstitutional because the delinquent tax list for such year was not properly pub-

lished, as the liability for the tax preceded the publication of the delinquent list, and the suit would be based upon such liability. *Id.*

A tax levied in Sacramento County for wagon-road from eastern boundary line of said county through El Dorado County to Carson Valley, under the California act of 1858, and the tax levied for the agricultural hall under the act of 1859, are constitutional. *Id.*

The legislature may impose a tax on a local district to pay for a public improvement already made; and such action interferes with no contract, and divests no vested rights. *Schenley v. Com.*, 78 D. 359.

In so far as it imposes tax upon bills of lading for the transportation of gold or silver from any point in this state to any point without the state, the act of the California legislature of April, 1858, amending the act of April, 1857, "to provide for the support of the government of this state from a tax to be levied and collected from foreign and inland bills and other matters," is in conflict with that clause of the constitution of the United States which declares that "no state shall, without the consent of the Congress, lay imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," and hence the provisions of the act must be restricted to the enforcement of the tax against instruments other than such bills of lading. *Brumagim v. Tillinghast*, 79 D. 176.

A state tax on the gross receipts of an express company doing business from points within the state to points without, in other states, is not unconstitutional, as tending to regulate commerce between the several states, or as laying any imposts or duties on imports or exports. *Southern Express Co. v. Hood*, 84 D. 141.

A tax imposed by a school district to raise money to pay bounties is for a public purpose and to subserve an end eminently advantageous to the community upon which it was levied. The legislature has, therefore, power to authorize such a tax, and can consequently cure any irregularity or want of authority in levying it by a retroactive law, even though thereby a right of action which had vested in an individual should be divested. *Grim v. Weissenberg School Dist.*, 98 D. 237.

The Nevada stamp act requiring revenue stamps upon bills of exchange drawn in that state and payable in another state is a valid exercise of the taxing power, and is not in conflict with the United States constitution. *Ex parte Martin*, 8 R. 707.

By a convention ordinance of Missouri, it was provided that an annual tax of ten and fifteen per cent of the gross earnings of the North Missouri Railroad Company should be paid to the state in lieu of other taxation.

TAXES, I.

For Index to Notes in American Decisions and American Reports, see Volume I.

and applied in payment of the debt due from the state, on the bonds issued to the company by the state. *Held*, not unconstitutional, either as in violation of articles 5 and 7 of the amendments to the United States constitution (for these articles are only restrictive of federal power), or as impairing the obligation of contracts. Such an ordinance is a valid exercise of the taxing power. *North Missouri R. R. Co. v. Maguire*, 8 R. 141.

A statute of Pennsylvania provided that in addition to taxes already collectible, the owners of ore-beds in L. township should pay to the supervisors of the roads one and a half cents for each ton of ore mined and carried away by teams over the roads. In default of payment, the amount should be collected as debts were collected by law. *Held*, that the statute was constitutional, and that the owner of an ore-bed was bound to pay the tax, although he had leased it. *Weber v. Reinhard*, 13 R. 747.

A statute imposing a tax upon each suit at law, to be paid by the unsuccessful party, is not in contravention of a constitutional provision that "all courts shall be open, and every man shall have right and justice administered without sale, denial, or delay." *Harrison v. Willis*, 19 R. 604.

The constitution authorized the legislature to tax certain specified business classes, among which litigants were not included. *Held*, that its power to tax was not limited to the classes named, and that a statute imposing a tax upon one commencing a suit at law was constitutional. *State v. County Comm'rs*, 19 R. 641.

A state tax upon "the entire amount of premiums received by insurance companies," although it covers premiums drawn from sources outside the state, is not in conflict with the federal constitution. *Ins. Co. of No. Amer. v. Com.*, 30 R. 352.

A tax on gifts, legacies, and collateral inheritances is constitutional. *Matter of McPherson*, 58 R. 502.

4. Delegation of the taxing power.*

—A state has an undoubted power to tax persons and property within its limits, and it may delegate such power to a civil corporation, so far as it may be necessary for the good government of the corporation. *Harrison v. Mayor*, 41 D. 633.

A statute authorizing a levee company to levy a tax per acre upon the land-owners within a certain district, for the purpose of reclaiming the lands within such district from inundation, by leveeing, ditching, and embanking, is constitutional, and not in conflict with the constitutional provision which requires all property subject to taxation to be taxed in proportion to its value. *Egyptian Levee Co. v. Hardin*, 72 D. 276.

The legislature may delegate the power of

levying a tax for special purposes to police commissioners appointed by the legislature instead of to the city authorities. *Mayor etc. of Baltimore v. State*, 74 D. 572.

When the legislature provides for a tax by any agency whatever, it is, in contemplation of the constitution, the act of the people, and binding on all alike. *Ib.*

A statute authorized towns in which manufacturing establishments should be located to exempt the same from taxation for a term of years. *Held*, that the statute was unconstitutional, because,—1. It in effect authorized unequal taxation; and 2. The legislature could not delegate to a municipal corporation its power of determining upon what property taxes shall or shall not be imposed. *Brewer Brick Co. v. Inhabit. of Brewer*, 16 R. 395.

The remission of a tax by a vote of a town is in substance and effect the same as a gift, and a statute authorizing it is void. *Ib.*

5. Equality and uniformity of taxation.—Taxation, although not universal, must be general and uniform. *City of Lexington v. McQuillan*, 35 D. 159.

To exact from one citizen or from one county the entire revenue would be equivalent to taking private property for public use. *Ib.*

Persons in the same class, and property of the same kind, must generally be subjected to the same burden, in Kentucky, to constitute taxation. *Ib.*

An ordinance passed by a city, under authority of the legislature, taxing insurance companies, is not invalid because it exempts a particular company from the payment of the tax, where such ordinance recites a sufficient consideration for the granting of such exemption. *Com. v. Milton*, 54 D. 522.

A revenue law intended by the legislature to affect all persons and property alike, as near as possible, does not violate a constitutional provision that "laws of a general nature shall be uniform in their operation." In the very nature of things, it is impossible to devise a tax law that shall operate with perfect equality upon all. *People v. Coleman*, 60 D. 581.

A constitutional provision that "taxation shall be equal and uniform throughout the state" does not operate as a limitation upon the taxing power of the legislature, and apply to every species of taxation, but applies only to direct taxation upon property as such. It was intended to prevent the legislature from fixing an arbitrary standard as to kind or quality. *Ib.*

Although the Virginia constitution provides that taxes shall be equal and uniform, it is within the constitutional power of the legislature to impose a tax upon the transmission of estates by devise or descent, and prescribe the rate of the same. *Eyre v. Jacob*, 73 D. 367.

* Delegation of powers of taxation by legislature, see note, 74 D. 560-565.

For Index to Notes in American Decisions and American Reports, see Volume I.

Neither legislature nor courts can disregard provisions of the constitution on the subject of taxation because they may think them to be unjust and unequal, or even arbitrary and oppressive. *People v. Worthington*, 74 D. 86.

Local taxation for objects in themselves local is not prohibited by constitutional provisions that the rate of taxation shall be uniform and equal, and that local laws authorizing taxation are prohibited. They require a general uniform levy for state purposes, but they do not forbid local taxation under general laws. *Anderson v. Kerns D. Co.*, 77 D. 63.

Discrimination in taxation may be made between foreign corporations and domestic corporations of the same character. *Ducat v. Chicago*, 95 D. 529.

A tax imposed upon a corporation is not a tax upon persons or property of corporators or stockholders. It is the artificial being, the mere legal entity, which is taxed, and the tax is paid out of its funds. And as a foreign corporation has no status as a citizen of the state creating it, the objection that a tax imposed upon it is not uniform cannot be maintained. *Id.*

A tax was imposed upon the gross receipts of all railroad companies in lieu of all other taxes. *Held*, not a direct tax upon the property of such companies within the meaning of the constitution, which required all direct taxes on property to be equal and uniform. *State v. Philadelphia etc. R. R. Co.*, 24 R. 511.

The constitutional provision that taxes shall be equal and uniform does not prevent the legislature, or any municipal corporation authorized thereto by the legislature, from dividing the objects of taxation into different classes, and imposing different taxes on each class, but merely requires that the tax on each member of the same class shall be the same. *New Orleans v. Kaufman*, 29 R. 328.

The law imposing a smaller license tax on proprietors of bars or drinking-saloons kept on steamboats owned and registered in Louisiana, than on the owners of bars kept on land, does not violate the clause of the constitution prescribing equality and uniformity of taxation. *State v. Rolle*, 31 R. 234.

A statute exempting from taxation property to the amount of five hundred dollars of widows and maids or any female minor whose father is dead, and whose exempt property does not exceed one thousand dollars, is unconstitutional, because unequal, and not for "charitable purposes." *State v. City of Indianapolis*, 35 R. 223.

A statute taxing some railroad companies upon gross receipts and others upon capital stock is unconstitutional for inequality. *Worth v. Wilmington etc. R. R. Co.*, 45 R. 679.

A law imposing a tax on owners of sleeping-cars for running them over the railway of another, but exempting the act of running the same kind of cars over the road of the owners of the cars, is unconstitutional. *Pullman Palace Car Co. v. State*, 53 R. 758.

For the valuation and assessment of a tax upon certain classes of corporations a special board may be constituted by the state. *State v. Board of Assessors*, 57 R. 516.

A tax on the property of railroad and canal companies alone is unconstitutional. *Id.*

II. WHO MAY BE TAXED, AND FOR WHAT PROPERTY; EXEMPTIONS.

6. Non-residents.* — Personal property of a ward cannot be taxed in the district in which his guardian has his domicile, where the ward lives with his mother in another district, the father being dead and the mother having since remarried. *School Directors v. James*, 37 D. 525.

Personal estate of a citizen of another state, when employed in this state is as much the subject of taxation as property of the same kind belonging to our own citizens; and the fact that it is also elsewhere held subject to taxation is not a circumstance which interferes with the exercise of the power in the state where it is. *Battle v. Mobile*, 44 D. 438.

Non-residents are not exempted from taxation because section 8 of the California revenue act of 1851 provides that "every person shall be listed in the county where he resides." *Minturn v. Hays*, 56 D. 368.

A change of domicile, so far as it respects the question of taxation, cannot be effected by intention alone, and without actual removal. *Stoddert v. Ward*, 100 D. 83.

A person is liable to taxation as a citizen of a certain county so long as he continues in fact to reside in such county; and the levy of the year being completed while he so continues to reside in the county, and before he removes therefrom, he is chargeable with the taxes assessed for that year. *Id.*

The question of change of domicile, in respect to taxation, is a question of fact; and if a tax-payer has actually changed his domicile, he cannot afterward be lawfully assessed in the place from which he has removed, although his removal was for the purpose of avoiding or lessening the taxation of his property. *Thayer v. Boston*, 26 R. 650.

Under a statute providing for taxation of all personal property within the state, owned by non-residents, a tax cannot be imposed on choses in action owned by a non-resident, and left with an attorney in the state for collection, nor on municipal bonds so owned and temporarily on deposit in a bank in the state for safe-keeping. *Herron v. Keenan*, 26 R. 87.

* Taxing property of non-residents, see note, 56 D. 584.

For Index to Notes in American Decisions and American Reports, see Volume I.

For purposes of taxation, a residence, once acquired, will not be presumed to be changed from the mere fact that, leaving his family, a man has gone elsewhere and entered into business. *Nugent v. Bates*, 33 R. 117.

Mortgages of non-residents may be taxed where recorded without regard to the time of the execution of the contract. *Mumford v. Sewall*, 50 R. 462.

Notes and mortgages belonging to a non-resident, but placed in the hands of an agent in this state for collection and reloading in this state, are taxable here. *Finch v. County of York*, 56 R. 741.

A statute provided that persons residing outside of a city or town, and electing to be transferred to such city or town for educational purposes, or who should send their children to a school in such city or town, should be liable to taxation on their property in such city or town as if they resided therein. *Held*, constitutional as to persons so sending their children to school, without making such election to be transferred. *Kent v. Town of Kentland*, 30 R. 182.

One domiciled in Boston, Massachusetts, went to Europe in 1876 with his family for an indefinite term of absence, and remained abroad until 1879. On leaving he had determined never to return to reside in Boston, and before May 1, 1877, he had decided to take up his residence, on his return, in Waterford, Connecticut, and on his return he went there to reside. *Held*, that his "domicile," for the purposes of taxation, was in Boston on the 1st of May, 1877. *Borland v. Boston*, 42 R. 424.

7. Corporations, generally.—A franchise, as property, is liable to taxation, according to its value, for the support of government, whether paid for by a bonus or not. *Mayor etc. of Baltimore v. B. & O. R. R. Co.*, 48 D. 531.

A burden or bonus imposed by charters upon the corporation, or by the acts of assembly renewing the charters, is not a tax, but a price or condition arbitrarily or discretionally fixed by the legislature as the consideration of its grant. *Id.*

A banking corporation's property is liable to taxation, like the property of individuals, unless it is otherwise agreed upon in their charter; and such property consists in their franchise, or right to do banking business, within the limits of their charter; their capital invested in such business; their surplus earnings, set apart undivided; and such other property, real and personal, as they may be authorized to have. *State v. Bank of Smyrna*, 73 D. 699.

The tax law of Kentucky applies to persons only, and not to political bodies exercising in different degrees the sovereignty of the state. *City of Louisville v. Com.*, 85 D. 624.

The gross receipts of an express company

upon which it is taxed does not include such sums as it collects for forwarding goods over connecting lines, as agents for such lines; nor such sums as the company are compelled to pay to the railroad and steamship companies over which it does business. *Southern Exp. Co. v. Hood*, 94 D. 141.

A telegraph line is taxable as real estate, although it has paid a privilege tax. *Western U. Tel. Co. v. State*, 40 R. 99.

The legislature may authorize the taxation of a toll-bridge against the corporation, and of the shares of the stock of the corporation against the stockholders. *Cook v. City of Burlington*, 44 R. 679.

8. Foreign corporations.*—A state cannot tax a foreign corporation upon a different principle or in a different manner from what she can tax one of her own domestic corporations. *Erie Ry. Co. v. State*, 86 D. 228.

The act of taxing property is an acknowledgment of the legal status of a person or company upon whom the tax is levied. A state under a tax law cannot require a foreign corporation to pay any sum it may please, and then defend the act upon the plea that the company taxed has no rights but such as of grace may be conferred upon it. *Id.*

A state may impose upon corporations of other states a tax for the privilege of carrying on their business within it, although no equivalent burden is imposed upon its domestic corporations. *Com. v. Milton*, 54 D. 522; *Phoenix Ins. Co. v. Com.*, 96 D. 331.

For purposes of taxation, a bridge over the Potomac River, and other property lying within the state of Maryland, belonging to a bridge corporation which does business in Virginia, is assessable in the county in which it is situated under a Maryland law, which provides that the property of a corporation having no place of business in the state shall be assessed for taxation in the county where such property is situated. *O'Neal v. Virginia Bridge Co.*, 79 D. 669.

The Massachusetts legislature may, under statutes of that state, constitutionally tax foreign corporation having an office or place of business within that commonwealth. *Attorney-General v. Bay State M. Co.*, 96 D. 717.

Stock in a foreign corporation may be taxed to the resident owner. *Worth v. Ashe County*, 33 R. 692; *McKeen v. County of Northampton*, 88 D. 515; although the capital of such corporation is taxed where it is located. *Bradley v. Bauder*, 38 R. 547.

9. Railroad companies.†—The rolling stock of a railroad company is personal property, and, as such, liable to be seized

* See note on the taxation of foreign corporations by states, 96 D. 833-845.

† Taxation of railroad property, see note, 56 D. 625, 626.

For Index to Notes in American Decisions and American Reports, see Volume I.

and sold for the collection of a tax against the company. *Randall v. Ethell*, 11 R. 747; *Sangamon etc. R. R. Co. v. Morgan Co.*, 56 D. 497; *Hoyle v. Plattsburgh etc. R. R. Co.*, 13 R. 595.

The rolling stock of railroad is so connected with the purposes and uses of the track and superstructure that it is within the power of the legislature to treat it as real property, for the purposes of taxation. *Louisville etc. R. R. Co. v. State*, 87 D. 358.

A county in which a railroad company has no residence cannot tax the proportion of the company's personal property which the length of track in that county bears to the whole length of the track within the state. *Sangamon etc. R. R. Co. v. Morgan Co.*, 56 D. 497.

A county authorized to tax property within its limits may tax the portion of a railroad track within its limits. *Id.*

Valuation for county taxation of a portion of a railroad within the county must be of that portion of road within the county, irrespective of the value of the whole road, and not of an undivided part of the value of the whole road. *Id.*

Rules for assessment and valuation of a railroad for city purposes are the same as those for county purposes. *Id.*

A railroad, from one end to the other, is an entirety, and as a whole only may be subject to taxation or coercive sale; it, with its appurtenances, is considered by the law as one entire thing, and in such consolidated character it must be taxed for state revenue, and is not subject to local taxation by the counties through which it runs. *Applegate v. Ernst*, 96 D. 272.

A railroad cannot be taxed to raise funds to pay the amount of a county's subscription to aid in building the road. *Id.*

A railroad company carrying on also an independent express business on its own account is subject to taxation as an express company. *Memphis etc. R. R. Co. v. State*, 42 R. 673.

Sleeping-cars hired and run by a railway company in Colorado, from a company in Illinois having no office or place of business in Colorado, are taxable in the latter state. *Carskile v. Pullman Palace Car Co.*, 54 R. 553.

10. What property is taxable, generally.—Taxes are laid for the support of government, and all property made liable to contribute to this end ought to be embraced in assessments for that purpose. *O'Neal v. Virginia Bridge Co.*, 79 D. 369.

No property is exempt from execution in case of defaults for taxes. *Scales v. Alvis*, 46 D. 269.

Credits are property within the meaning of a provision of the Illinois constitution au-

thorizing the legislature to provide for levying a tax upon every person in proportion to the value of his property. *People v. Worthington*, 74 D. 86.

The people of a state, in framing their constitution, have an absolute right to tax, or to exempt from taxation, rights or credits, or any other interest or property. The exercise of such right is not restrained by any provision of the federal constitution; nor is there any compact between the federal and state governments forbidding it. *Id.*

The constitution of Illinois has conferred upon the legislature authority to tax all credits according to their real value. And the legislature, in imposing such tax, have simply carried out the intention of the constitution in letter and in spirit. *Id.*

A resident of Iowa had deposited for safe-keeping in Illinois promissory notes that had never been brought by him into Iowa. *Held*, that they were subject to taxation in Iowa. *Hunter v. Supervisors etc.*, 11 R. 132. *Contra*, *Wilcox v. Ellis*, 19 R. 107.

A state legislature has power to tax persons residing in the state for money lent by them to persons residing out of the state and secured upon real property out of the state. *Kirtland v. Hotchkiss*, 19 R. 548.

A state constitution provided that "all property shall be taxed in proportion to its value." *Held*, that debts due were not property, and were not, therefore, taxable. *People v. Hibernia Bank*, 21 R. 704.

The notes, bills, etc., representing money loaned at interest by a corporation are its "property," and are liable to taxation within the constitution. *New Orleans v. Mechanics' etc. Ins. Co.*, 31 R. 232.

11. What real property, or interest thereon, is taxable.—The jurisdiction of a county to levy a tax on real estate does not extend beyond its own limits, for real estate necessarily has a fixed and unchangeable locality. *Sangamon etc. R. R. Co. v. Morgan Co.*, 56 D. 497.

A tax is a charge attaching to land under all circumstances, regardless of encumbrances, or the rights of any one whomsoever. *Ferguson v. Eiter*, 76 D. 361.

A tract of land, though uninhabited, may be properly taxed. *Wells v. Jackson I. M. Co.*, 90 D. 575.

A sale of lands by an assignee in bankruptcy does not divest the lien of the state for taxes. *Stokes v. State*, 12 R. 588.

12. What personal property is taxable, generally.—A person is legally taxable for personal property in the town of which he is an inhabitant when the tax is assessed; but the election to pay such taxes in one town instead of another is not conclusive of such person's habitancy, but only a circumstance to be considered with others,

* See monographic note on the place at which property may be taxed, 56 D. 523-537.

* See note on the taxation of credits, 74 D. 92-94.

TAXES, II.

For Index to Notes in American Decisions and American Reports, see Volume I.

in order to determine where he is liable. *Lyman v. Fiske*, 28 D. 293.

Personal property may be taxed where it is permanently located, although in general personal property follows the residence of the owner and is there taxable. *Mills v. Thornton*, 79 D. 377; *Sangamon etc. R. R. Co. v. Morgan Co.*, 56 D. 497.

Personal property temporarily absent from the owner's residence and to be immediately returned is taxable at the owner's residence. *Sangamon etc. R. R. Co. v. Morgan Co.*, 56 D. 497.

The situs of personal property does not follow the domicile of its owner for purposes of taxation. *New Albany v. Meekin*, 56 D. 522.

Chattels purchased in one state by a citizen of another, and remaining in the former to receive a finishing process of manufacture, are taxable in the state where purchased. *Standard Oil Co. v. Combs*, 49 R. 156.

A billiard-table erected and used merely for the purpose of amusement is liable to the tax on "billiard-tables," in the same way as if used for the purpose of gaming. *Sears v. West*, 3 D. 694.

Pipes of a gas company laid in the streets of a city are part of the "establishment" of the company, and are subject to taxation, under a statute providing that certain enumerated "and other manufacturing establishments" shall be taxable; for the apparatus for delivery is merely an extension and continuation of the apparatus for the manufacture of gas, and both belong to the "establishment"; but this, of course, does not include pipes owned by the city or by private persons, into which the company delivers gas for consumption. *Memphis G. L. Co. v. State*, 98 D. 452.

A law taxing dogs and appropriating the proceeds to payment of damage done by dogs to sheep is a constitutional exercise of police power. *Van Horn v. People*, 41 R. 159; *Holt v. Roe*, 48 R. 459.

Deposits in savings bank are not taxable to the bank and also to the depositors. *Berry v. Windham*, 47 R. 202.

13. Stocks and shares in banks.* — The personal property of a bank subject to taxation is so much of the capital stock paid in or secured as will remain after deducting therefrom the actual cost of all the real estate of the company. *Bank of Utica v. Utica*, 27 D. 72.

The mere fact that some corporations or some personal property are subject to a less rate of taxation than banks will not vitiate the law imposing taxes upon bank shares, unless it clearly appears to be the legislative intent to effect discrimination against them. *McMahon v. Palmer*, 55 R. 796.

The provisions of the act authorizing proceedings to punish for misconduct in refusing

* Bonds, shares, and other choses in action, where taxable, see note, 56 D. 527-531.

or neglecting to pay a tax upon personal property are not unconstitutional. 76.

A bank, shortly before the legal day for assessment of taxes, and with the intent to escape such tax, converted its capital stock into United States bonds not taxable. Soon after the day of assessment the bank sold the bonds and reconverted its capital stock. *Held*, that the capital stock was taxable by the state. *Holly Springs etc. Ins. Co. v. Supervisors*, 24 R. 668.

By the Massachusetts statute of June, 1868, chapter 349, entitled "An act concerning the taxing of bank shares," it was provided that the shares in national banks owned by non-residents of the commonwealth shall be assessed to the owners thereof in the cities or towns where the banks are located; that the rate of taxation shall be the same as on other moneyed capital; that the value of such shares shall be omitted from the valuation upon which the rate is to be based, and that the act shall "apply to taxes assessed and collected for the present year in the same manner and to the same effect as if it had been in force on the first day of May." *Held*, that the act was not unconstitutional, either as being in violation of the act of Congress of 1864, chapter 106, section 47, and 1868, chapter 7, or as levying a tax in a disproportional manner, or as being retrospective in its operation. *Providence Inst. v. Boston*, 3 R. 407.

The Bank of Smyrna was incorporated under the legislative condition that the company should pay the state semi-annually at the rate of one half of one per cent per annum on the stock actually paid in, during the continuance of the charter. This provision, however, was repealed at the ensuing session of the legislature, and before the bank was organized. This repealing supplement or act provided that "in lieu of other taxes" the bank should pay a tax semi-annually at the rate of one fourth of one per cent on the whole of the capital stock actually paid in, during the continuance of the charter. By a subsequent act, a tax of one fourth of one per cent was imposed on seventy-five per cent of the surplus or contingent fund of the state banks generally. The words "in lieu of other taxes," contained in the supplemental act to the charter, were held not to exempt the bank from the payment of the last-mentioned tax imposed on its surplus, or contingent fund, by the general act of the legislature. It was also held that these words would not warrant the inference that the state thereby agreed not to impose any tax thereafter on this or any other property of the bank. The general act imposing the tax on the surplus or contingent fund of the state banks generally, so far as it related to the Smyrna bank, was also held constitutional, and the bank bound to pay it. *State v. Bank of Smyrna*, 73 D. 699.

For Index to Notes in American Decisions and American Reports, see Volume I.

14. — national banks. — Shares of stock in a national bank are liable for the same tax that shares of stock in a bank authorized by state laws are compelled to pay; and the officers of the national bank may be compelled to pay such tax for the respective share-holders. *Com. v. First Nat. Bank*, 96 D. 285.

Congress has constitutional power to establish a national bank in any state, and to provide that the shares of its capital stock shall be exempt from taxation by other states. *Flint v. Board of Aldermen*, 96 D. 713.

By the United States statute of 1864, chapter 106, section 41, Congress prohibited state taxation upon shares of national bank stock by any other state than the one where such bank was located. Thus shares of capital stock in a national bank located in New York City, and owned by a resident of Boston, Massachusetts, could not be assessed to the latter in Massachusetts. *Id.*

The owner of stock in a national bank is taxable in the city or town where he resides, and not where the bank is located. *Clapp v. City of Burlington*, 1 R. 355. [Otherwise under a subsequent act.]

A statute empowering the authorities of a town to impose the same taxes, for municipal purposes, upon non-residents pursuing their ordinary avocations within the corporate limits as upon the inhabitants, with a proviso that non-residents so taxed shall have the right to vote at municipal elections, is not abrogated by a change in the state constitution which deprives the non-resident taxpayer of his vote, and authorizes a tax upon the shares in a national bank located in the town, and held by one who conducts his ordinary business therein, but whose residence is in the county, outside the corporate limits. *Moore v. Mayor etc.* 30 R. 75.

In the assessment of shares of national banks in a city, when the owner does not reside in the ward where the bank is located and has no real estate therein, the assessment may be made upon a special list, although the owner lives and is assessed for personal property in another ward. *McMahon v. Palmer*, 55 R. 796.

15. — other corporations. — Shares of stock in a foreign manufacturing corporation are personalty, and if owned by citizens of Massachusetts, are taxable there for their full value, without deducting the value of machinery and real estate belonging to the corporation, which is in the place of its corporate existence, and there taxed. *Dwight v. Mayor*, 90 D. 149.

The owner of shares of stock in a foreign corporation is liable to taxation thereon in the state where he resides, although he has paid a tax thereon in the state where the corporation is located. *Dyer v. Osborne*, 23 R. 460.

The stocks and bonds of an interstate

railway are liable to taxation by any state in which it is situate in proportion to the length of the road in such state. *Pittsburg etc. R. R. Co. v. Com.*, 5 R. 344.

Stockholders in a moneyed corporation are liable to taxation on their shares, although the capital stock has also paid a tax. *Memphis v. Ensley*, 32 R. 532.

Stock of a corporation may be taxed to the owner, independently of taxation upon the corporate franchises and property. *Belo v. Foreyth County*, 33 R. 688.

Stock of the New Orleans Cotton Exchange is taxable as property. *Schreiber v. Board of Assessors*, 55 R. 525.

16. Validity of statutes taxing travel and means of transportation. — Property employed in foreign or domestic commerce may be taxed. *Battle v. Mobile*, 44 D. 438.

A transfer-boat, registered at Cairo, Illinois, plying between that place and Fillmore, Kentucky, on the opposite shore of the Ohio River, and owned half by a railway corporation of Illinois and half by a railway corporation of another state, and used for the transfer of cars of both companies, laid up at Cairo when not in use, both companies having a business office and the boat-hands residing there, is properly taxed there to both corporations. *Irvin v. New Orleans etc. R. R. Co.*, 24 R. 208.

Steamers used by a railroad company in transporting freight-cars across water intervening between the termini of the tracks are not taxable as a part of the "roadway" or "road-bed." *San Francisco v. Central Pac. R. R. Co.*, 49 R. 98.

17. — taxing vessels — Tonnage taxes. — Steamboats employed within the state may be taxed under a general ordinance levying a tax on all personal estate, although regularly enrolled and licensed under the laws of the United States. *Battle v. Mobile*, 44 D. 438.

Steamboats may be taxed where the owner resides, though they are navigated beyond the boundary of the state; and a statute requiring them to be so taxed does not conflict with the constitution of the United States nor the ordinance of 1787. *Perry v. Torrence*, 32 D. 725.

The share of a part owner of a steamboat occasionally touching at a city in which he resides, but not enrolled or usually lying there, is not taxable there under a charter providing for the taxation of property within that city. *New Albany v. Meekin*, 56 D. 522.

A state tax on the tonnage transported by railroads, — held, not in violation of the federal constitution. *Com. v. Erie R'y Co.*, 1 R. 399; reversed, 15 Wall. 282.

18. — taxing trades, professions, and employments.* — The power to tax

* License taxes, validity of state statutes concerning, see note, 59 R. 267-282.

For Index to Notes in American Decisions and American Reports, see Volume I.

trades, professions, and occupations is entirely within the control and rests in the sound discretion of the legislature. *People v. Coleman*, 60 D. 581.

Indirect taxation by way of licenses upon particular pursuits or tariffs is not prohibited by a constitutional provision requiring the general levy of direct taxes for state purposes to be upon a uniform assessment. *Anderson v. Kerns D. Co.*, 77 D. 63.

A trader is one who sells goods substantially in the form in which they are bought, and who has not converted them into another form of property by his skill and labor; therefore one who carries on the business of buying timber and converting it into lumber for sale is a manufacturer, and not liable to indictment for failure to pay a tax and obtain a license as a "trader." *State v. Chadborn*, 30 R. 94.

The legislature has the power to levy a license or occupational tax upon lawyers. *Young v. Thomas*, 35 R. 93; *Simmons v. State*, 49 D. 131.

A license tax upon merchants, graduated by the average amount of their stock, is not unconstitutional. *City of Newton v. Atchison*, 47 R. 486.

A commission merchant who is also an agent for steamships and other vessels is taxable for both occupations. *Wilder v. Mayor etc.*, 48 R. 598.

A company printing and publishing a newspaper is not a "manufacturer," but one doing the business of job-printing, engraving, electrotyping, etc., is a "manufacturer." *Evening Journal Ass'n v. Board of Assessors*, 52 R. 107, note.

A state statute imposing a license tax on drummers, and allowing drummers paying a dealer's tax an equal rebate on their purchase tax, is not unconstitutional. *State v. Long*, 59 R. 263. And see *Ex parte Asher*, 59 R. 276.

A statute provided for the assessment of a specified tax on liquor dealers, the money thereby raised to be devoted to the use of the towns, villages, and cities in which the business was carried on. *Held*, 1. Not a "state tax," and therefore not within the constitutional provision directing the application of "specific state taxes"; 2. That the fact that the same tax was levied on all dealers without regard to the amount of business did not render it unjust or unequal; 3. That the parties taxed could not object because the municipality had no voice in the levy, nor because the sheriff, and not the tax collector, was made the collector; and 4. That the tax was not equivalent to a license so as to come within the constitutional prohibition of licensing the sale of liquors. *Youngblood v. Sexton*, 20 R. 654.

19. What is not subject to state taxation. — The right to keep any species of property cannot by the legislature be

converted into and taxed as a privilege. *Stevens v. State*, 35 D. 72.

The right to use a billiard-table is a common right possessed by every citizen, and cannot be taxed as a privilege. *Id.*

The power to tax privileges conferred by the constitution means such privileges as cannot be exercised by any citizen without the aid of some statutory provision granting such privilege or right to one or more individuals, as, for instance, the right of keeping a ferry or public road and collecting tolls thereon, the right of banking, etc.; but a right not created by or dependent upon statute, as, for instance, the right to acquire and use property, is not a privilege subject to taxation. *Id.*

The draining of marshes and ponds for the promotion of public health is a public object for which taxes may be assessed. But the draining of farms to render them more valuable to the owners is not a work of public utility, and a corporation organized for such purpose could not collect a tax to pay for the work. *Anderson v. Kerns D. Co.*, 77 D. 63.

20. Relinquishment by state of right to tax. — A state may make a valid contract to exempt property from taxation. *State v. Bank of Smyrna*, 73 D. 699.

The power of taxation operates upon all persons and property belonging to the body politic. Its relinquishment ought never to be presumed. *Battle v. Mobile*, 44 D. 438. S. P., *State v. Bank of Smyrna*, 73 D. 699; *Mayor etc. of Baltimore v. State*, 74 D. 572; *Erie R'y Co. v. Com.*, 5 R. 351. And such surrender is never made, unless it be the result of express terms or necessary inference. *Mayor etc. of Baltimore v. B. & O. R. R. Co.*, 48 D. 531.

The legislature does not, by implication, divest itself of the power of taxing a corporation, by the exaction of a bonus as the condition of a grant of corporate powers. *Id.* Thus where a railroad was constructed under a law requiring it to pay for the franchise a fixed annual sum, and to submit to taxation on its stock, — *held*, that this did not preclude the state from levying a further and general tax upon the corporation. *Erie R'y Co. v. Com.*, 5 R. 351.

21. Power of legislature to pass exemption laws. — The legislature has no power to exempt from taxation any species of property, however owned, under section 13 of article 11 of the California constitution, which declares that "all property in this state shall be taxed in proportion to its value." *Minturn v. Hays*, 56 D. 366; *People v. Eddy*, 13 R. 143.

The legislature cannot grant to a corporation or individual exemption from taxation forever; it has no authority to convey away

* Power of legislature to grant perpetual immunity from taxation, see note, 73 D. 662-664.

For Index to Notes in American Decisions and American Reports, see Volume I.

upon any consideration the taxing power over any property so as to bind the action of future legislatures. *Mott v. Pennsylvania R. R. Co.*, 72 D. 664.

Tax-payers, state creditors, and canal commissioners have such beneficial interest as entitles them to be heard in opposition to the validity of an act of the legislature which seeks to grant away forever the taxing power over certain property, or to improperly sell or dispose of the state's system of railroads and canals. *Ib.*

Exemption of property from taxation is a question of policy, and not of power. *State v. Bank of Smyrna*, 73 D. 699.

The legislature has power to bind the state by contract with a corporation created by its charter not to tax for a given time the franchise or property of such corporation further than is agreed upon in the charter. *Ib.*

22. — and to repeal or alter them. — A statute exempting property from the payment of rates is not a contract, and may be repealed and the property taxed. *Lord v. Litchfield*, 4 R. 41; *East Saginaw Mfg. Co. v. East Saginaw*, 2 R. 82.

An act declaring that all estates granted for any religious, educational, or charitable uses shall forever remain to such uses, and shall also be exempt from the payment of rates, is not a contract between the state and the grantor or grantees; and a subsequent act taxing such of those estates as have been leased or conveyed in such a manner as to yield no longer an annual income for such use is valid. *Lord v. Litchfield*, 4 R. 41.

The legislature passed an act exempting from taxation all property used for the purpose of manufacturing salt, and offering a bounty of ten cents a bushel for salt manufactured in the state. Two years later the said act was amended by limiting the exemption from taxation to five years. The five years having elapsed, the complainant, a corporation for the manufacture of salt, organized after the passage of the original act, filed a bill to restrain the collection of a tax upon their property, on the ground that the exemption from taxation was in the nature of a contract between the state and the parties acting under it, and therefore protected by the United States constitution. *Held*, that the act was not in the nature of a contract, and could be amended or repealed at any time. *East Saginaw Mfg. Co. v. East Saginaw*, 2 R. 82.

23. How such laws are construed. — A statute exempting the property of a railroad company and its shares from taxation exempts the company from all taxation. *Worth v. Wilmington etc. R. R. Co.*, 45 R. 679.

The express exceptions specified in the tax law of Kentucky do not imply that no property not excepted shall be exempt, or that

municipal property, used for public purposes of local government, was intended to be subject to taxation. Property owned and used by city of Louisville, in its social or commercial capacity, as a private corporation, and for its own profit, such as vacant lots, market-houses, fire-engines, etc., is subject to taxation, but property dedicated to charity is not. *City of Louisville v. Com.*, 85 D. 624.

Provisions of Kentucky statute law defining property subject to and exempt from taxation, where embodied. See *Ib.*

24. What property is exempt, generally. — A statute exempting from taxation lands, tenements, and other estates, extends to money at interest. *Attwater v. Woodbridge*, 16 D. 46.

Internal revenue stamps are exempt from state and local taxation. *Palfrey v. Boston*, 3 R. 364.

Land of a county used for county purposes is exempt from all taxation, whether imposed for public purposes or for local improvements of a public nature. *Worcester v. Worcester*, 17 R. 159.

Property the title to which is held by the United States, for whatever purpose, is exempt from state taxation while so held. *People v. United States*, 34 R. 155.

25. What is not. — Gasometers and gas mains and pipes of a gas company are not part of its "machinery actually used in the manufacture" of gas. *Consolidated Gas Co. v. Mayor etc.*, 50 R. 237.

Fruit trees are not "growing crops" exempted by the constitution from taxation. *Cottle v. Spitzer*, 52 R. 305.

Vessels employed to convey timber to saw-mills are not exempt from taxation as "property employed in the manufacture of articles of wood." *Martin v. New Orleans*, 58 R. 194.

26. Exemptions in favor of corporations, generally. — The exemption of stock of a corporation from taxation protects the specific articles of property of the company, as the shares of stock embrace every species of property owned by the company. *Mayor etc. v. B. & O. R. R. Co.*, 48 D. 531.

Exemption of the stock of a corporation from taxation, when there are no words used by the legislature qualifying or limiting the extent of the immunity conferred, covers county and city as well as state taxes. *Ib.*

The corporation's right of exemption from taxation is not lost by the stockholders assenting to the fifteenth section of the Maryland act of 1835, chapter 395. *Ib.*

Property of a corporation is exempt from taxation only in so far as it is necessary and not merely convenient for the company to acquire and hold for the purposes for which it was incorporated, under a charter which, after making provision for the payment of certain duties, enacts "that no other tax or

TAXES, II.

For Index to Notes in American Decisions and American Reports, see Volume I.

impost shall be levied or assessed upon the said company." *State v. Commissioners*, 57 D. 409.

The franchise of a corporation may be exempted from taxation by charter; but this affords no such immunity beyond what is expressly stipulated in the charter. The franchise is one property and the capital stock another. *State v. Bank of Smyrna*, 73 D. 699.

The exemption of property of a corporation from taxation can last only during the continuance of the charter granting this immunity. And unless this exemption is expressed when the charter is renewed and extended, the power to tax will revive. *Id.*

A charter providing that the franchise or property of a corporation shall not be taxed for a given time, or further than agreed upon in the charter, is a contract between the state and the corporators, which is inviolable under the constitution of the United States; and an agreement to limit or restrain the power of the state to impose further taxes on the franchise of a corporation during the continuance of its charter may enter into such a contract and have binding force. *Id.*

A bonus is a price paid for a franchise, or power to do banking business, and may be measured by a tax on the capital stock, or by a specific sum stipulated; but unless otherwise stipulated and agreed upon in the charter, the payment of a price for a franchise no more exempts from taxation other property of the corporation, such as the surplus accumulation of earnings derived from that business while in its hands undivided, than it does the dividends in the hands of the stockholders, or the banking-house, or any other real property which it holds. *Id.*

A corporation is exempt from all other taxes, where, by the laws under which it is incorporated, it is required to pay a certain annual specific tax on its paid-in capital, to be "in lieu of all other taxes upon all the property of said company." *Le Roy v. East Saginaw City R'y*, 100 D. 162.

Under a statute exempting from taxation a lot of ground for the use of a private banking institution, the bank is not entitled to exemption of such parts of the banking-house as are leased to others. *De Soto Bank v. Memphis*, 32 R. 530.

A grain-elevator erected by a railroad company on its lands and used by it in transshipping grain is exempt from taxation as for railroad and transshipping purposes. *State v. Mayo, et al.*, 60 R. 648. But see *Matter of Swigert*, 59 R. 789.

27. — **Charitable and educational institutions.** — Lands granted to the trustees of Davidson Academy, in Tennessee, are exempt from taxation for ninety-nine years, under the language of the act, not-

withstanding into whose hands they may come. *State v. Hicks*, 30 D. 423.

A statutory exemption from taxation of school-houses and seminaries of learning extends to such as are founded by a particular religious sect for instruction according to its doctrines. *Ward v. Manchester*, 22 R. 504.

A building used partly as a dormitory and boarding-house for students of an academy, and partly as a public house, is not exempt from taxation as land "for the use of the academy." *Philips Exeter Acad. v. Exeter*, 42 R. 589.

A charitable corporation which is, by its charter, "exempted from taxation of every kind," is not exempted from special assessments against its property for improvements in a street on which it abuts. *Sheehan v. Good Samaritan Hospital*, 11 R. 412; *Broadway Bapt. Church v. McAtee*, 8 R. 480; *Boston Seamen's Friend Soc. v. Boston*, 17 R. 153.

The constitution of a state provided that "such property as the general assembly may deem necessary for schools, religious and charitable purposes, may be exempt from taxation." *Held*, that only such property could be exempted as was actually used for the purposes named in the constitution; and that there could be no exemption of lands held for profit merely, although such profit was devoted to educational, religious, or charitable purposes. *Northwestern University v. People*, 22 R. 187.

Under a statute exempting all public libraries, grounds, and buildings of literary, scientific, benevolent, agricultural, and religious institutions and societies, devoted solely to the public objects of these institutions, not exceeding 640 acres in extent, and not leased or otherwise used with a view to pecuniary profit, — *held*, that the dwellings of professors on the grounds of literary institutions, and of clergymen, owned by religious societies, exclusively so used, and producing no income, are appropriate to the objects of those institutions and societies, and exempt from taxation. *Griswold College v. State*, 26 R. 138.

Such a statute is not in conflict with the constitutional provision that "the general assembly shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof, nor shall any person be compelled to attend any place of worship, pay taxes, tithes, or other rates, for building or repairing places of worship, or the maintenance of any minister or ministry." *Id.*

A seminary originally owning eight acres of land, on which its buildings were located, afterward acquired about seventy-five acres, embraced in the same inclosure, and used for walks, lawns, garden, orchard, pasturage, and wood, all for the exclusive use of the institution. *Held*, that all the land was

For Index to Notes in American Decisions and American Reports, see Volume I.

exempt from taxation, as not "used with a view to profit." *Monticello Seminary v. People*, 46 R. 702.

28. — religious societies. — A statute exempting from taxation the property which should be thereafter given for the support of the ministry of the Gospel is in the nature of a contract which the state cannot rescind or impair. *Atwater v. Woodbridge*, 16 D. 46.

The residence of a priest or clergyman is not exempt from taxation as a "building for religious worship" because it contains one room set apart as a religious chapel. *St. Joseph's Church v. Assessors of Taxes*, 34 R. 597.

A statute exempted from taxation churches and other public buildings for religious worship, with the appurtenant lots of ground used therewith for that purpose. *Held*, that this did not embrace a parsonage or rectory. *First Presb. Church v. New Orleans*, 31 R. 224.

Under a statute exempting from taxation "churches, meeting-houses, or other regular places of stated worship, in actual use and occupation for the purpose aforesaid," the land on which a church is in process of erection is not exempt. *Mullen v. Commissioners*, 27 R. 650.

Vacant lots bought by the authorities of a church and held in private ownership, in anticipation of the increase of the city, and with the intention of possibly erecting thereon a church, school, or hospital when needed, are not exempt from taxation as a "place of public worship" or a "charitable institution," or "property used for colleges or other school purposes." *Enaut v. Tax Collectors*, 51 R. 14.

29. Cemetery company. — The charter of a cemetery company provided that all property held and actually used by the corporation for burial purposes, or for the general uses of lot-holders, or subservient to burial uses, and which had been platted and recorded as cemetery grounds, should be exempt from taxation. The company had ground in actual use for cemetery purposes. It had also other lands, separated therefrom by a public highway, which were platted and recorded as cemetery lands, but never used for burial. The company had erected on the latter stables and houses, occupied and used by horses and men in the employ of the company, and removed mold and sand therefrom for the improvement of the burial-grounds, and used them for pasturage for horses. *Held*, that such use of the property did not render it exempt from taxation. *People v. Cemetery Co.*, 29 R. 32.

III. ASSESSMENT AND COLLECTION.

30. In general. — Taxes legally assessed upon an estate create a lien thereon, and lay the foundation for a title paramount to that derived by deed or mortgage. *Williams v. Hilton*, 58 D. 729.

The Wisconsin statute providing that any tax or assessment which has been set aside, by reason of irregularities or defects, may be reassessed, etc., has no application to a case where the tax or assessment was not authorized by law. *Dean v. Charlton*, 99 D. 205.

The time for making a return of taxable property in Indiana stated. *Louisville etc. R. R. Co. v. State*, 87 D. 358.

31. Powers and duties of assessors. — Assessors and collectors of taxes are independent public officers, not agents, of the towns in which they are respectively elected. *Lorillard v. Monroe*, 62 D. 120.

Assessments for taxes ought not to be vacated, and property released from taxation, because public officers have not strictly followed the statutes, which are merely directory. A substantial compliance with the statutory directions is sufficient. *O'Neal v. Virginia Bridge Co.*, 79 D. 669.

32. Their liabilities. — Assessors are liable for taking property to pay a tax illegally assessed. *Ingles v. Bosworth*, 16 D. 419.

A tax assessed by the selectmen of a town for an object not within their corporate powers is illegal and void, and the selectmen are liable for property sold to satisfy such tax. *Drew v. Davis*, 33 D. 213.

Where a tax for legitimate purposes is blended with an illegal tax, by the vote creating both, the whole proceeding is void, and the matter stands as though no vote had been taken imposing a tax for any purpose. *Id.*

Selectmen, in the assessment and collection of taxes, do not act as a court. Their acts are not regarded as judgments. They are liable to an action by a party aggrieved, for any wrongful exercise of their authority. *Henry v. Sargeant*, 40 D. 146.

Selectmen who assess the tax and issue a warrant for its collection are responsible, if such tax is illegal by reason of informality in the listing. *Id.*

Assessors are not servants or agents of the town or parish so as to be civilly liable to such town or parish for neglect of duty. *First Parish v. Fiske*, 54 D. 755.

Parish assessors are not liable to the parish for neglect to assess the full tax voted by the parish, where they act in the bona fide belief that they are performing their duty; so especially where the tax, if assessed, would have been illegal. Nor for neglect to qualify by taking the oath required by law. *Id.*

Malice need not be proved, although alleged in the declaration, in an action on the case against a town assessor for altering the assessment list after it has been perfected and lodged with the town clerk, by reason of which alteration the plaintiff is compelled to pay an increased tax in order to save his property from sale under the tax

For Index to Notes in American Decisions and American Reports, see Volume I.

warrant. And it is error for the court to charge the jury, in such case, that the allegation of malice is a material part of the declaration, which it is necessary to prove. *Bristol Mfg. Co. v. Gridley*, 71 D. 56.

An unlawful alteration of an assessment list by an assessor after it has passed out of his power is a direct violation of the rights of the owner of the property assessed, for which he may sustain an action, irrespective of the motive with which it was done. *Ib.*

Plaintiff's property was seized and sold to pay an assessment which was illegal because of want of jurisdiction of the assessors. *Held*, that plaintiff had two remedies, either against the assessors in tort, or against the town in *assumpsit*, for the proceeds of the property; but having elected the latter remedy and recovered judgment against the town, which was satisfied, he could not proceed against the assessors. *Ware v. Percival*, 14 R. 565.

33. Time, place, and manner of laying the assessment. — Taxes in Vermont must be assessed upon the lists in being and completed at the time the taxes are authorized. *Henry v. Sargeant*, 40 D. 148.

The acts of an assessor in making assessments for taxes are invalid, unless the provisions of the statute are strictly followed, and all its conditions fully complied with by him. *Moss v. Shear*, 85 D. 94.

An invalid assessment constitutes no charge upon the land, and no legal obligation is thereby imposed upon any one to pay the taxes. *Ib.*

The legislature has power to prescribe the form of proceedings in the assessment and collection of taxes, and, in matters of form, may declare what steps shall or shall not be essential to the validity of a tax sale or tax deed. *Smith v. Smith*, 88 D. 707.

A valid assignment in the name of a county may be written over the name and official title of the clerk of the county board of supervisors, where certificates of sale of land for taxes have been issued to the county as purchaser, where the purchaser has been authorized by law to assign the same by writing his name in blank on the back thereof, and where such clerk, having authority to sell and assign the certificates, has assigned the same by writing his name and official title in blank on the back thereof. *State v. Winn*, 88 D. 689.

34. Validity of assessment. — An assessment of a tax is valid, and is not vitiated as to those that are liable, although certain persons are assessed who are not liable to be taxed. *Inglee v. Bosworth*, 16 D. 419.

The assessment of "part of a lot," or of "one acre of a lot," without any location, is too vague to authorize or support a sale. *Mannis v. Long*, 15 D. 547.

The owner of real estate who does not

return his property nor pay his tax, as required by statute, cannot dispute the legality of an assessment in the name of another, made upon the return of the owner's agent. *Kingman v. Glover*, 45 D. 756.

If the law relating to the levy of a tax is not strictly pursued by the officers, the tax will be void, and cannot be enforced by a sale of the property upon which it is levied and assessed. *Mayor etc. v. Porter*, 79 D. 686. Thus a tax assessed by assessors not sworn as required by law is illegal. *First Parish v. Fiske*, 54 D. 755. But a tax ought not to be rendered invalid by mere non-compliance with some direction of a statute, notwithstanding which the tax may have been entirely just and equal, or by any objection which does not go to the very groundwork of the tax. *Mills v. Gleason*, 78 D. 721.

The legislature has power to provide means for enforcement and collection of taxes, and as a means of fixing the amount of the tax it may require an assessment; and in the event of an informal or incorrect assessment, may as well prescribe a mode for the correction thereof as to prescribe the form thereof in the first instance. *People v. Seymour*, 76 D. 521.*

The intentional omission of taxable property by the assessor, materially affecting the equality of taxation, and increasing the burden of the party complaining, will avoid the tax; but the unintentional omission of such property by the officer attempting in good faith to carry out the requisitions of the law will not. *Smith v. Smith*, 88 D. 707.

35. The valuation. — Property may be taxed, but the taxation must not be disproportionate to its value. *Stevens v. State*, 35 D. 72.

The provision of the Missouri constitution requiring taxation to be proportioned to value of the property on which it is laid is only applicable to taxation in its usual, ordinary, and received sense, for state, county, city, and town purposes, and is not intended to apply to local assessments where the money raised is to be expended on the property taxed. *Egyptian Levee Co. v. Hardin*, 72 D. 276.

Property should be assessed, for purposes of taxation, at its present value, and not at its prospective value. *State v. Ill. Cent. R. R. Co.*, 79 D. 396.

Railroad property should be assessed according to its value for the purposes for which it is constructed, and not for any other purposes to which it might be applied. *Ib.*

In ascertaining the present value of railroad property, an important element is the amount of net profits, if the property is devoted to the use for which it was designed,

* Power of the legislature to supply defects in assessments of taxes, see extended note, 76 D. 527-537.

For Index to Notes in American Decisions and American Reports, see Volume I.

and is in a condition to produce its maximum income; but in connection with this, there should be considered what prudent men would give for the property, as a permanent investment, with a view to present and future income. *Ib.*

The Indiana constitution does not require a uniform method of valuation of property for taxation, but only "such regulations as shall secure a just valuation"; and in determining how this end shall be secured, the legislature must exercise a discretion, and unless the method adopted be clearly inadequate to secure the result, the courts cannot interfere. *Louisville etc. R. R. Co. v. State*, 87 D. 358.

A statute providing that appraisers, in estimating the value of a railroad for purposes of taxation, shall take into consideration the location of the road for business, the competition of other roads, its earnings, etc., is constitutional. *Ib.*

An assessment of a joint tax on two parcels of land of different owners, based upon a joint valuation thereof, is invalid. *Jennings v. Collins*, 96 D. 687.

Such an assessment creates no lien; but an apportionment, made as a formal reassessment of a separate parcel, upon a separate valuation thereof, and entered on the assessor's list and recommitted to the collector, does create a lien from that time upon such parcel. *Ib.*

Where one makes affidavit that his indebtedness exceeds his taxable personal property, and it appears that part of such indebtedness is a demand note for twenty-five thousand dollars, the proceeds of which were used to purchase government bonds which were pledged as collateral thereto, and it does not appear that the note is not a just debt, the assessors must allow a deduction therefor, although the transaction may have been a device to escape taxation. *People v. Ryan*, 42 R. 238.

36. Tax lists, assessment rolls, etc.

— Failure to perfect the list according to the convention of listers invalidates any tax assessed thereon. *Henry v. Sargeant*, 40 D. 146.

Under the California revenue act of 1854, the assessor is required to list the land in the name of the owner, when known, whether the land be vacant or occupied. If the land be listed to the owner, nothing more need be stated by the assessor. *Moss v. Shear*, 85 D. 94.

Under that act, the assessor must, when the owner is unknown and the land is unoccupied, list it as the land of a person unknown. If the land is unoccupied and the owner unknown, both of these facts must appear in the assessor's list, in order to make an assessment to an unknown owner valid. And if the land be listed as the land of a person unknown, the assessor must state that the land

is so listed because the owner is unknown and the land is unoccupied. *Ib.*

The assessor must, when the owner is unknown, list the land, if occupied, in the name of the occupant. If the land is occupied and the owner unknown, both of these facts must appear, in the list, in order to make an assessment to the occupant valid. Where the land is occupied, ignorance of the true owner is a condition precedent to the validity of an assessment against an occupant; and if the land be listed in the name of an occupant who is not the owner, it must be stated by the assessor to have been so listed because the owner was unknown to him. *Ib.*

Where a single sum is assessed upon an unincorporated place, the treasurer's warrant is a list within the meaning of the statute, and the certificate of the deputy secretary upon the copy of it returned by the collector is competent evidence of the time of filing and return. *Wells v. Jackson I. M. Co.*, 90 D. 575.

The assessment roll need not be signed, the signature of the assessor to his certificate attached thereto is sufficient. *Lacey v. Davis*, 66 D. 524.

An assessor's certificate to a township assessment roll is fatally defective when it states that the assessors have estimated the real estate at a sum which, for the purpose of assessing, they believed to be the true value thereof, instead of at what they believed to be the true cash value thereof, as required by law; and a sale for taxes levied on the basis of such assessment roll conveys no title to the purchaser. *Clark v. Crane*, 71 D. 776.

What the law requires to be done for the protection of the tax-payer in the assessment and collection of taxes is mandatory, and cannot be regarded as merely directory. *Ib.*

The intentional omission of taxable property of a city from an assessment roll invalidates taxes levied thereon, notwithstanding such omission is made by the assessor for the sole purpose of giving effect to an ordinance passed by the common council of the city in good faith, under the honest belief that it had authority to exempt such property from taxation, for the purpose of advancing the interests of the city. *Hersey v. Supervisors*, 82 D. 713.

Unintentional omissions of taxable property from the assessment roll, arising from accident, mistakes of fact, erroneous computations, or errors of judgment, do not necessarily vitiate a tax levied thereon. *Ib.*

37. Equalization of assessments. — Where the law requires the board of supervisors, in a proper case, to equalize assessments, and no record of such equalization exists, the presumption is that no cause existed requiring it. *Lacey v. Davis*, 66 D. 524.

An assessment was made and entered on the assessor's books against the "Potomac Bridge Company," when the true corporate

For Index to Notes in American Decisions and American Reports, see Volume I.

name was "The Virginia and Maryland Bridge Company at Shepherdstown," and the company knew of the assessment, and did not appear before the board of commissioners, which had authority to determine complaints, etc., of persons aggrieved by the valuation of the assessor, to have such error corrected, or for any purpose. *Held*, that equity could not interfere in behalf of such corporation to relieve it from the payment of the tax assessed. *O'Neal v. Virginia Bridge Co.*, 79 D. 669.

38. Proceedings to enforce collection, generally.—A statute authorizing suit to be brought for unpaid taxes of former years, and prohibiting the defendants from setting up in defense any informality in the levy or assessment of the tax, and making duly certified copies of the delinquent tax list, or the original or duplicate assessment rolls, evidence of the delinquency of the property assessed, of the amount of taxes due and unpaid, and that all the forms of law in relation to the levy and assessment have been complied with, is constitutional. *People v. Seymour*, 76 D. 521.

A complaint averring the indebtedness of defendant for taxes, amount thereof, kind of tax, description of property assessed, and value thereof, that the assessment was to defendant, and that he has refused to pay the same, is sufficient, under the California act of 1860, to put upon defendant the burden of showing that he is not liable. *Id.*

A judgment for taxes is fatally defective unless the amount is specified in dollars and cents, and the use of numerals, without words, marks, or characters to indicate for what they were intended, is not sufficient to support a sale thereunder. *Eppinger v. Kirby*, 76 D. 709; *Lawrence v. Fast*, 71 D. 274.

A precept on a judgment for taxes is not fatally defective, it seems, or at least it may be amended so as to conform to the judgment, where, instead of specifying the amount in dollars and cents, numerals are used, without words, marks, or characters to indicate for what they were intended. *Eppinger v. Kirby*, 76 D. 709.

A judgment for taxes will not support a sale and deed, where the amount of the judgment varies from the amount for which the land was sold, and which is recited in the deed. *Id.*

The record-book of judgments for taxes is a separate and independent record, under the Illinois statute, and the record of a judgment therein must be complete in itself, without reference to the general records of the court. *Lawrence v. Fast*, 71 D. 274.

Taxes were assessed on land May 1st; the tax bill was issued to the collector October 1st. *Held*, that the taxes were an encumbrance on the land from May 1, 1870. *Cochran v. Guild*, 8 R. 296.

A statute authorized "the county judge of the Jefferson County court" to appoint a collector of taxes. *Held*, that the appointment might be by parol, and need not be evidenced by any record or other writing. *Hoke v. Field*, 19 R. 58.

A collector of taxes is under no obligation to give a receipt for taxes paid to him, unless the statute expressly requires it; and a custom to do so will not bind him. *Stiles v. Hitchcock*, 19 R. 121.

39. Additions for delinquency.—The addition of ten per cent to all taxes becoming delinquent, being done by virtue of a statute authorizing such addition, cannot be objected to as excessive. *Lacey v. Davis*, 66 D. 524.

A statute is not unconstitutional because it compels a property owner who is delinquent in the payment of taxes, if sued, to pay costs, and a percentage by way of attorney's fees, in addition to the tax assessed. *People v. Seymour*, 76 D. 521.

40. Issuing the warrant.—A tax-warrant issued by *de facto* trustees of a school district, and regular on its face, is a sufficient protection to the collector, and in trespass against him for a seizure thereunder, evidence showing that the requirements of the statute, as to notice, etc., in the proceedings for the organization of the district were not complied with, is inadmissible. *Reynolds v. Moore*, 24 D. 116.

A warrant signed by two school trustees for the collection of a tax is good, and the presence of the third trustee at the previous proceedings will be presumed until the contrary appears. *McCoy v. Curtis*, 24 D. 113.

A misrecital in the warrant for collecting a tax of the date of a statute under which the tax was levied renders void a tax sale made thereunder. *Brown v. Wright*, 42 D. 481.

The abbreviation "est." in a tax-warrant, will be construed to mean estate. *Kingman v. Glover*, 45 D. 758.

A tax-warrant, delivered to the collector before an execution delivered to the sheriff, but not levied until after levy under the execution, has priority over it. *Evans v. Walsh*, 32 R. 201.

41. Liabilities of collectors.—A tax collector is not liable for any irregularities antecedent to the commitment of the assessment to him for collection, his warrant being his protection against all illegality but his own. *Ford v. Clough*, 23 D. 513. And this, even though the assessors had not in fact any jurisdiction over the person they assumed to tax. *Nowell v. Tripp*, 14 R. 572.

The protection that the law affords to ministerial officers acting in obedience to process fair and regular on its face, and issued from a court of competent jurisdiction, is extended to collectors of taxes. *Sprague v. Birchard*, 60 D. 393.

Such collectors, sued for acts done by vir

For Index to Notes in American Decisions and American Reports, see Volume I.

tue of warrants issued to them, need not prove the authority for making the assessment, nor show the regularity and legality of the proceedings antecedent to the issuing of the warrant. *Id.*

A tax-warrant, regular on its face, although the tax is void, protects the officer in replevin, but not the purchaser of the property seized and sold. *Power v. Kindschi*, 46 R. 652.

Such warrant, regular on its face, will not afford the collector protection in an action of replevin for property levied upon and taken by him to satisfy unauthorized taxes, although it would protect him from personal responsibility as a trespasser or wrong-doer. *Le Roy v. East Saginaw City R'y*, 100 D. 162.

Since the adoption of the Louisiana code in 1825, no mortgage exists in that state, on behalf of the state or a parish, on the property of its collecting officers for taxes collected and unaccounted for. *Police Jury v. Haw*, 20 D. 294.

A purchase by a tax collector at his own sale is not absolutely void, but voidable, at the option of the owner of the property. *Pierce v. Benjamin*, 25 D. 396.

The owner's right to maintain trover for goods so sold is doubtful, where he has not previously elected to annul the sale by a demand of the property or otherwise. *Id.*

A tax collector who has collected money without objection from tax-payers must account to the town therefor. *Inhabitants of Orono v. Wedgewood*, 69 D. 81.

A tax collector is liable for a false return of *nulla bona*, whereby the owner of a mortgage of lands is compelled to redeem from a tax sale. *Rayneford v. Phelps*, 38 R. 189.

In an action of trespass against a tax collector for arrest and false imprisonment, the defendant justified under a warrant from the assessors of the town. *Held*, a good defense, although the plaintiff was not liable to taxation by the assessors. *Nowell v. Tripp*, 14 R. 572.

A tax collector whose statutory duty was, after selling a distress, to deduct the tax and expense of sale, and restore the balance to the former owner, applied a portion of the proceeds in payment of a tax already paid, and of illegal charges, before returning the balance. *Held*, an abuse of authority which rendered him a trespasser *ab initio*. *Carter v. Allen*, 8 R. 420.

42. — and their sureties. — A parish loses no rights against the sureties of its collecting officers by a failure to enjoin an execution issued by the state against such officer for failure to account for taxes collected. *Police Jury v. Haw*, 20 D. 294.

In an action against a tax collector and his sureties on his official bond, for not paying over moneys received for taxes, it is no defense that the meeting at which he was

chosen was not legal; or that the bills of assessment were defective and irregular, or that there was any neglect or omission of duty on the part of the assessors or other officers of the town concerning the assessment. *Ford v. Clough*, 23 D. 613.

The collector and his sureties are estopped by a recital in his bond that he was "duly chosen" at a particular meeting, to deny the legality of the meeting, in an action against them on such bond. *Id.*

Sureties on the official bond of a tax collector are not liable for breaches of duty committed by the same individual as sheriff. *Moss v. State*, 47 D. 116.

Sureties on a tax collector's bond are liable for moneys their principal ought to account for; but they should not suffer from a mistake of the treasurer in passing a credit to the wrong account. *Inhabitants of Orono v. Wedgewood*, 69 D. 81.

Appropriations by selectmen of the town of moneys collected for taxes for subsequent years, to make up a deficiency of a prior year of the same collector, are unauthorized, and inequitable as respects the sureties on the collector's bonds for the subsequent years, and the sureties on the bond for the first year remain liable for the deficiency. *Inhabitants etc. v. Stanley*, 74 D. 501.

A surety who signs a town collector's bond on condition that it shall be signed by all whose names have been accepted by the town as sureties, otherwise the bond should not be delivered, will not be liable on such bond, if all do not sign it, unless he subsequently waives the condition. But if without such condition he signs the bond to indemnify the town, and the bond is left to be delivered and used for that purpose, and is so delivered, he will be bound, notwithstanding he may have expected when he signed it that all whose names were accepted by the town would become sureties. *Inhabitants etc. v. Shaver*, 79 D. 592.

A party executing an instrument creating liability is ordinarily presumed to know its contents, if no fraud is practiced upon him. *Id.*

If a surety signs the bond of a collector after erasure of one of the names accepted as sureties by the town, it is immaterial whether he knew of such erasure or not, if he did not annex to his signing the condition that the bond was not to be delivered until all those accepted by the town should sign. *Id.*

Neglect of town officers to enforce the collection of taxes, and their payment over by the collector, or to take the tax bills from him, does not release the sureties on his official bond. *Id.*

Where a collector for two successive years proves to be a defaulter at the end of the second year, he had the right at the time he made payments to the town to have appro-

For Index to Notes in American Decisions and American Reports, see Volume I.

prated them to either year; if he then failed to have them appropriated, the town might have had them appropriated as they desired; but if neither party made any appropriation, the law will appropriate such payments to the oldest debts, although by so doing the whole deficit be made to fall on the second year. *Id.*

Where a collector for two successive years, and the sureties on his bond for the second year of his term of office, are sued for an alleged default of such collector, it rests upon the defendants to show what part of the deficit belonged to each year. *Id.*

A county collector, owing two thousand seven hundred dollars of taxes not paid over, concealed about four thousand five hundred dollars on his person, and set out on horseback, unarmed, from his residence, to go to the county seat to pay it over. On the way he was attacked by a highway robber, and some three thousand three hundred dollars was taken from him. *Held*, that he was negligent in carrying more than the amount required, and that it was for the jury to say whether he was not negligent in going unarmed; and that, being negligent, his sureties would be liable. *State v. Houston*, 56 R. 59.

IV. SALE OF LAND FOR NON-PAYMENT; TAX TITLES.

43. Necessity of a sale. — The right to sell property for taxes is founded on the non-payment of the tax. If it be paid before the sale, the lien of the state is discharged, and the right to sell no longer exists. *Wallace v. Brown*, 76 D. 421.

44. Notice to owners or occupants. — The notice of tax sale required by statute is essential to the validity of the sale. *Bidwell v. Webb*, 88 D. 56.

The notice must give a particular and certain description of land to be sold, so that the owner may know that it is his land, and bidders may ascertain its locality with a view to the regulation of their bids. *Id.*

A notice of tax sale headed as follows: "Auditor's Office, Ramsey County, Minnesota, St. Paul, December 8, 1882," and containing no further description of the premises than as "Roberts and Randall's Addition, lot 11, block 20, lot 12, block 20," and nowhere describing the addition or lots as being in any particular city or county, is insufficient. *Id.*

Where the notice of a tax sale is insufficient, the officer has no authority to sell, the sale is void, and the purchaser acquires no title and takes nothing by his deed. *Id.*

A description in a notice of a collector's sale is insufficient if it merely states the owner's name, the assessed value, and that it is situated on the east side of South Street, without designating the dimensions of the lot or the particular part of the street on which it is located. *Alexander v. Walter*, 50 D. 688.

The mortgagee, being the legal owner of the land mortgaged, is the person to whom notice must be given by the sheriff of a levy and sale of such land for unpaid taxes. *Whitehurst v. Gaskill*, 12 R. 655.

45. Advertising the sale. — Where an advertisement of land sold for taxes did not contain the description, and was not published for the length of time required by law, the title is invalid. *Lyon v. Hunt*, 46 D. 216.

Two insufficient advertisements of a tax sale cannot be coupled together so as to make one complete legal advertisement, even though a verbal consent thereto is given by the delinquent. *Scales v. Alvis*, 46 D. 269.

Where a statute requires that the advertisement shall be published in a newspaper "three weeks successively," and after the first insertion the date of publication is so changed that the advertisement appears on Tuesday instead of Saturday of the respective weeks, — *held*, that three such insertions were a sufficient compliance with the statute. *Cass v. Bellows*, 64 D. 347.

The advertisement of sale of land for taxes need not be posted in unincorporated place which is not inhabited. *Wells v. Jackson I. M. Co.*, 90 D. 575.

46. What lands may be sold. — Land cannot be sold for taxes, under the Alabama statute, where the delinquent owner has goods and chattels within the county. *Scales v. Alvis*, 46 D. 269.

The sheriff cannot sell an undivided part of certain property for the payment of taxes, but he must sell a certain portion thereof, and if the same is insufficient, another portion, until sufficient has been sold to pay the same. *Macdonough v. Elam*, 20 D. 284.

A sale of land as unseated land, for non-payment of taxes, for a number of years, is valid, if the statutory requisites are complied with, where it appears that the land had been vacant and unoccupied during the whole time up to and including the time of sale, except during one year, for which taxes were assessed, when a mere intruder raised a crop on part of it, and then wholly abandoned it. *Dikeman v. Parriah*, 47 D. 455.

A change of county boundaries after land has been assessed for taxes does not affect the lien of the tax on the land; and the collector of the old county has power to sell the land to enforce the lien, where the land falls into another county by reason of such change. *Moss v. Shear*, 85 D. 94.

47. Selling whole tract or parcels. — A sale by the sheriff of an entire tract of land for taxes on the whole, when a tax is due for a part only, is void. *Jones v. Gibson*, 7 D. 690.

Tax sales of certain specified quantities of land, supposed to embrace the whole tract, will not support a conveyance of the entire

For Index to Notes in American Decisions and American Reports, see Volume I.

tract which subsequently turns out to be of greater extent. *Blight v. Banks*, 17 D. 136.

48. Conduct and validity of the sale.*—A tax sale is not valid unless all substantial requirements of the statute are shown to have been strictly complied with. *Brown v. Wright*, 42 D. 481; *Terry v. Bleight*, 16 D. 101; *Scales v. Alvis*, 46 D. 269; *Dikeman v. Parrish*, 47 D. 455; *De Witt v. Hays*, 56 D. 352. Therefore, when such sale is made within the court-house, under a statute requiring that it shall take place "before the court-house door," it is void, and passes no title. *Rubey v. Huntsman*, 82 D. 143.

A tax sale of land on which no taxes were due conveys no title. *Blight v. Banks*, 17 D. 136.

A sale under a *f. fa.* and a forced sale for taxes do not differ, except as to the mode and period of advertising, and the form of the deed. *Macdonough v. Elam*, 20 D. 284.

To validate a tax sale, the land must be properly entered on the tax duplicate. *Perrins v. Doble*, 36 D. 97.

A tax duplicate describing the land as being in "range 3, township 13, section 1, lots 8 and 9 N. part, one hundred acres," without specifying the quantity of land in each lot, is not sufficient under the act of February 3, 1835, and a tax sale under it is void. *Ib.*

A sale, for taxes, of land of non-residents must appear from the record to have been made to the highest bidder. *Bean v. Thompson*, 49 D. 154.

The purchaser under a collector's sale must show affirmatively and positively the regularity of the proceedings out of which the sale grows, and the existence of all the prerequisites upon which it depends. *Alexander v. Walter*, 50 D. 688; *Polk v. Rose*, 89 D. 773.

A sale of land for taxes, after service of injunction upon the commissioners who levied the tax, enjoining them "from collecting or proceeding to collect" the tax on such land, is irregular, and will be set aside. *Williams v. Cammack*, 61 D. 508.

A sale of land for taxes, part of which were illegal, is void in an action of ejectment, where the validity of the sale depends upon the validity of the tax and subsequent proceedings. In personal actions against the collector it is different. If the illegal part can be separated, it alone is rejected. *Lacey v. Davis*, 66 D. 524.

A tax sale, to be valid, need not extend to the interest of both tenants in common. One having paid his share of the tax, the interest of the other may be sold for the balance. *Payne v. Danley*, 68 D. 187.

Under the Arkansas theory of tax sales, they are void or valid, and there is no inter-

mediate ground. *Wallace v. Brown*, 76 D. 421.

A tax sale is valid if substantially made in conformity with statutory provisions. *Ib.*

A tax sale is void if the statute is not followed in any matter material to the sale. Thus if the sale is made on the wrong day; or if the land is not advertised; or if it is misdescribed in the advertisement; or if no demand is made of the resident tax-payer for the taxes charged upon the land before sale, etc. *Ib.*

A tax sale is void where lands have been sold for an illegal excess of five per cent more than the amount of taxes and charges for which they were liable to be sold. *Kimball v. Ballard*, 88 D. 706.

The power of a tax collector to make sale of real estate for payment of taxes, so as to convey a valid title to the purchaser, is a specially delegated one, and must be strictly pursued. *Polk v. Rose*, 89 D. 773.

A series of acts preliminary in their character are required by law to precede the execution of the power of a tax collector to make such sale, each of which is separate, independent, and essential; and if any one of them be wanting, the whole proceeding is defective for want of sufficient authority to support it. *Ib.*

A clerk at an auction sale for taxes is not an officer making or controlling the sale, and may become a purchaser thereof. *Wells v. Jackson I. M. Co.*, 90 D. 575.

Charging land on a tax list in the name of a person other than the true owner invalidates the tax sale, unless the land be otherwise correctly described, and the taxes be due and unpaid at the time of the sale. *Greve v. Coffin*, 100 D. 229.

49. Form and sufficiency of the deed.—A grant of power includes the usual ordinary and necessary means for the exercise of the power. *Bruce v. Schuyler*, 46 D. 447.

Power given an officer to sell lands for delinquent taxes includes, by implication, the power to make a conveyance in pursuance of the sale. *Ib.*

A sale for taxes made by a public officer is a contract, the obligation of which the legislature cannot impair, by repealing that portion of the statute which provides that the officer making the sale shall execute a conveyance in pursuance thereof. *Ib.*

Custom is the best interpreter of the law. A comptroller's deed will not be adjudged void when in the form sanctioned by long years of usage, during which many recoveries have been had in the courts. *Bank of Ulrica v. Mercereau*, 49 D. 189.

A comptroller's deed for taxes need not be technically in the name of the people of the state, nor need it state the year in which the tax was assessed. *Ib.*

A tax deed is not void because it fails to

* See note on the effect of combinations at tax sales, 15 D. 576, 577.

For Index to Notes in American Decisions and American Reports, see Volume I.

show that everything has been done by the assessor, county court, clerk, and collector that the law requires. Such a rule would violate the statutory regulations concerning the effect of tax deeds, and the principles of interpretation to be applied to them. *Pleasant v. Scott*, 76 D. 403.

A tax deed shows no actual violation of law simply because it appears therefrom that the sale was made on the first day, and not upon the first Monday, of November. *Ib.*

A tax deed need not contain recitals of the various acts, required under the California revenue act of 1854, showing a compliance on the part of the revenue officers with the several conditions of the statute. These acts are only required to be recited, in the certificate of purchase. Their omission from the deed only affects the question of proof. If inserted in the deed, they are *prima facie* evidence; but if not inserted, they may be proved *aliunde*. *Moss v. Shear*, 85 D. 94.

The statute requires only a deed of conveyance in fee-simple to the purchaser; and any deed is sufficient if, according to the rules of the common law, it will transfer the title of the former owner, and vest the estate in the purchaser, provided it recites the power under which it was made, and is accompanied by proof that the law was strictly complied with. *Ib.*

A deed of land sold for taxes, described as "ten acres and one half of lot number 70, in the second division of lots in said Danbury," is void for uncertainty. *Beas v. Thompson*, 49 D. 154.

A tax deed is properly excluded for uncertainty in description, where the property is therein described as "a lot on Dupont Street, 137 feet and 6 inches from the northwest corner of Washington Street, with the improvements thereon, — 12 x 100." *Keane v. Cannovan*, 82 D. 738.

The description of property in the deed must must be certain in itself, and not such as to require evidence *aliunde* to render it certain. *Ib.*

A register's deed upon sale of land for taxes may be properly rejected as evidence for uncertainty of description; notwithstanding the statute makes it *prima facie* evidence of title in the purchaser. *Alexander v. Hickox*, 86 D. 118.

An error of the sheriff in neglecting to affix a seal to a deed of land sold for taxes will not be corrected by a court of chancery, tax titles being purely technical as distinguished from meritorious titles, and depending for validity upon strict compliance with the statute. *Alles v. Hinckler*, 85 D. 406.

The omission of the words "as the fact is," in a tax deed, where their insertion is required by statute, is a fatal defect; and the deed will not give the vendee a title on

which he can recover in an action of ejectment, or transfer to him the constructive possession of vacant lands. These words are in the nature of a certificate on the part of the officer who executes the deed that he has examined the records and finds the facts to be as stated in the deed. *State v. Winn*, 88 D. 689.

A county treasurer having given an imperfect tax deed which does not pass title may afterward of his own motion give a second and corrected deed. *McCready v. Sexton*, 4 R. 214.

50. Its validity and effect as evidence. — 1. *Validity*. — The validity of a tax deed is governed by the law in effect at the time of the sale, though this has been altered before the execution of the deed, where, in the statute working the change, no words are to be found extending its operations to prior sales. *Garrett v. Wiggins*, 30 D. 653.

A treasurer's deed defining the quantity, but not the location, of part of a tract of land sold for taxes, is valid, and the grantee may locate such part for himself. *Coxe v. Blanden*, 26 D. 83.

A subsequent conveyance of the residue to the same grantee, in such a case, supercedes the necessity of an election as to the part first conveyed. *Ib.*

The antiquity of a tax deed, if no possession has been taken under it, affords no presumption in favor of it. *Brown v. Wright*, 42 D. 481.

The deed of an assessor and collector of taxes for land sold for non-payment of taxes is a "deed" within the Texas statute, and may be relied on to support the statute of limitations. *Wofford v. McKinna*, 76 D. 53.

A sale of land by the comptroller for taxes which have in fact been paid to the collector is of no validity, and the deed executed pursuant to such a sale conveys no title to the purchaser. *Jackson v. Morse*, 9 D. 225.

A comptroller's deed is void if the lands intended to be conveyed cannot be located from the description given. *Bank of Utica v. Mercereau*, 49 D. 189.

A tax deed will be held void where the description is so uncertain and incomplete as to require the aid of extrinsic evidence to determine the boundaries therein mentioned. *Wofford v. McKinna*, 76 D. 53.

Where land in a tax deed is described "to commence at the beginning corner, and taken in a square, if it will admit of it, out of said three fourths of a league granted to W. A." the description is uncertain and the deed void. *Ib.*

A deed void on its face for uncertainty cannot be relied on to support the plea of the statute of limitations under the Texas statute. *Ib.*

The failure to recite in a tax deed one of the requisites to a valid levy of the tax, where all the other essential requisites are

For Index to Notes in American Decisions and American Reports, see Volume I.

set out, is evidence by implication that the requirement not recited was not complied with. *Long v. Burnett*, 81 D. 420.

2. *Effect as evidence.*—A sheriff's deed of land sold for taxes is sufficient evidence of title in ejectment against a mere intruder on unseated lands, who shows no better right, where title has been proved out of the commonwealth; much more where the purchaser is shown to have taken and retained possession under his deed. *Dikeman v. Parrish*, 47 D. 455.

A party claiming title under a collector's sale for taxes must show affirmatively a compliance with every substantial requirement of the law. A tax collector's deed is not even *prima facie* evidence in favor of the purchaser's title, but must be sustained by proof of extraneous facts. *Lyon v. Hunt*, 46 D. 216.

The law, by making tax deeds *prima facie* evidence of regularity of all proceedings up to their date, shifted the burden of proof from the holder of the title to the adverse party. To invalidate the deed, or to throw the burden upon the former, the latter must show irregularities of such a nature as to require explanation or counter-proof; they must be of matters which are peremptory, and not directory. It is not sufficient to cast a general doubt over the title, but it is necessary to point out some specific defect, or raise a reasonable presumption against the sufficiency of some specific act, or of the non-performance of some necessary duty. *Lacey v. Davis*, 66 D. 524. S. P., *Long v. Burnett*, 81 D. 420.

A tax deed, though void on its face, is sufficient to show color of title in the grantee who in good faith took possession thereunder of the premises conveyed, and claimed to hold them as against the real owner, and is therefore admissible in evidence for that purpose. *Edgerton v. Bird*, 70 D. 473.

A tax deed should be received as evidence of title where the only objection to its regularity is, that the person to whom the land was assessed became the purchaser. But this will not preclude the objecting party from afterwards showing that the purchaser occupied such a position as required him to pay the taxes. *Pleasant v. Scott*, 76 D. 403.

A tax deed, irrespective of its irregularity or goodness, may be read in evidence by defendant, where it is coupled with proof of possession that would be sufficient under any statute of limitations to bar an action for the lands. *Id.*

A tax deed is not admissible as evidence of title without proof that all the requirements of the law authorizing its execution have been complied with. *Keane v. Cannon*, 82 D. 738.

The statute making a tax deed *prima facie* evidence of transfer of title of the delinquent can apply only to deeds executed

upon a sale for taxes levied subsequent to its enactment. *Id.*

The Indiana statute prescribing the degree of credibility to be attached to an auditor's deed of land sold for taxes, and its recitals, does not preclude the introduction of evidence to show non-compliance with positive statutory requirements in reference to the steps necessary to vest in him the power to sell. *Wilson v. Lemon*, 85 D. 471.

A statute declaring a tax deed conclusive evidence that all of the essential requirements of the law regulating the exercise of the taxing power were complied with is unconstitutional. *McCready v. Sexton*, 4 R. 214.

51. *Effect of recitals in tax deed.*—A recital in a tax deed of compliance with statutory requirements is not even *prima facie* evidence of such compliance. *Brown v. Wright*, 42 D. 481; *Jackson v. Shepard*, 17 D. 502; unless made so by statute, but the burden is on the party claiming under such deed to prove by other evidence full compliance with the requirements of the statute. *Working v. Webster*, 71 D. 543.

Such recitals are not evidence against the owner of property. The facts must be established by proof *alimunde*. *Polk v. Rose*, 89 D. 773.

Under a statute which required a sale of land for taxes to be made on the first Monday in the month, and to be continued from day to day until the amount has been realized, a deed which recites that the sale took place on the 11th of the month is not invalid, nor does such recital throw the burden of proof upon the defendant. The law may have been complied with, and it is for the plaintiff to show that it was not. *Lacey v. Davis*, 66 D. 524.

52. *Rights of the purchaser.*—1. *Who may purchase.**—A partnership to purchase at tax sales is against the policy of the law, is a fraud on the owner, and the purchaser cannot obtain an available title. *Dudley v. Little*, 15 D. 575.

A tenant in possession, who is under obligation to pay the taxes, cannot acquire title to the premises by a purchase at a tax sale made in his own name, or in the name of another person for his benefit; and it seems that a title so acquired would remain void in the hands of a *bona fide* purchaser without notice. *Blake v. Howe*, 15 D. 681.

A person who holds a defective title to property may perfect the same by purchase at tax sale, if he stands in no relation of trust to, and is implicated in no fraud against, the owner. *Coxe v. Gibson*, 67 D. 454.

The fact that lands are assessed to and sold in the name of a particular person does not preclude his purchase of them at a tax sale, and acquiring title thereto, if the taxes

*See note on who may purchase at tax sale 14 D. 484-494.

For Index to Notes in American Decisions and American Reports, see Volume I.

were illegally assessed to him, and he is under no legal obligation to pay them. *Pleasant v. Scott*, 76 D. 403.

Neither a tenant in common nor a mortgagee can acquire a tax title and set it up as against his co-tenant or mortgagor, as a general rule; but a purchaser of land at a tax sale, under the California statute providing for the collection of delinquent taxes in Sacramento, is entitled to a writ of assistance to obtain possession of the premises, notwithstanding the existence of such relation. *Mills v. Tukey*, 83 D. 74.

One who is under no legal or moral obligation to pay taxes is not precluded from purchasing at the tax sale, although in possession at the time the assessment was made, or when the land was sold. *Moss v. Shear*, 85 D. 94.

One who enters upon and occupies land as a mere intruder is under no obligation to pay the taxes, and may acquire title to the land under a tax deed adverse to the former owner or his grantees. *Link v. Doerfer*, 24 R. 417.

2. *Rights and liabilities of purchaser.*—The owner of land incurs no forfeiture by permitting his land to be sold for taxes in a manner not according to law. The purchaser at a tax sale is bound to see that all of the essential requirements of the law have been performed before he can acquire title. *Conway v. Cable*, 87 D. 240; *Jackson v. Shepard*, 17 D. 502; *Garrett v. Wiggins*, 30 D. 653.

The record made by the officer of the quantity of land sold by him for taxes prevails over the certificate given to the purchaser. *Blight v. Banta*, 17 D. 136.

The quantity certified by the officer to have been sold by him is *prima facie* correct. *Ib.*

A sheriff's deed to land, made several years after a sale on tax execution, relates back to the date thereof, so as to protect a purchaser who has taken possession before the execution of the deed, but after the sale. *Kingman v. Glover*, 45 D. 756.

A mistake of a treasurer who told complainant's agent that no taxes had been assessed against his land, by which he allowed the same to be sold for delinquent taxes, cannot operate to invalidate a decree vesting the title in the purchaser, unless some collusion or fraudulent combination between the treasurer and the purchaser can be shown. *McGowan v. Carr*, 71 D. 421.

The objection that property was assessed in a wrong name comes too late after a decree has been entered establishing title thereto in a purchaser at a sale thereof for delinquent taxes. *Ib.*

Every purchaser at tax sale takes his deed subject to a condition that the tax has not been paid; and if his title is defeated, he must look to the government for that relief which such a case may require. *Wallace v. Brown*, 76 D. 421.

Claims of estates or interests in real property adverse to the occupant are the only matters within the purview of the Minnesota statute allowing an action to be brought by the party in possession of real estate, or by his tenant, against any person claiming an adverse estate or interest therein, and a lien acquired through a tax sale is not a proper subject for adjudication in an action brought under such statute. It must be enforced in a separate action. *Bidwell v. Webb*, 88 D. 56.

Defendant, in an action by a tax-title claimant, must make the deposit required by chapter 22, Wisconsin Laws of 1859, in certain cases, or show conditions of the act in which a deposit is not required, or that the taxes are unjust and void in equity. *Smith v. Smith*, 98 D. 707.

In an action by a tax-title claimant, it is not sufficient that defendant's answer alleges such deposit; but it must be proved, and there must be a finding of the fact, to sustain a judgment for the defendant. *Ib.*

3. *Compelling execution of deed.*—Where a tax deed, fatally defective in form, has been issued to the owner of a valid certificate of a sale of lands for taxes, he may, though he has never been in actual possession of the land, compel the clerk of the county board of supervisors, by *mandamus*, to execute to him a proper deed. *State v. Winn*, 88 D. 689.

Such clerk cannot refuse to execute a proper deed on the ground that the certificates of sale of said land, which were issued to the county, had no other proof of assignment than an indorsement of the name and official title of the person who was clerk at the time of such alleged assignment, where such officer was authorized by the supervisors to assign such certificates. *Ib.*

Such clerk cannot refuse to execute a proper deed on the ground that such certificate is defective in omitting the words "according to the facts," or that, after being assigned in blank, it was transferred to a town or city which had no power to purchase or sell such certificates, and was received by the plaintiff from such town or city. It is doubtful whether these objections would be good if taken by one who had a right to insist upon them; but the clerk cannot raise them, especially after he has received and canceled the certificate. *Ib.*

Such clerk, upon presentation to him of the holder's certificate of purchase of lands sold for taxes, shall execute in the name of his county, as clerk, a deed. If the certificate has been assigned, the assignment is to be presented with it. His duty is simply to receive the certificate and assignment, and make the deed to the holder. He is not to inquire through whose hands the certificate has passed. But the only assignments which he is required to take any notice of are such as are on the back of or attached to the certificate. *Ib.*

For Index to Notes in American Decisions and American Reports, see Volume I.

A quitclaim deed from a purchaser of land sold at tax sale is not such assignment of the certificate of purchase as to authorize the clerk of the board of supervisors, under the Wisconsin statute, to issue a deed from the county to the grantee in such quitclaim deed. *Ib.*

53. What title passes. — A party who claims title to land listed for taxation in his name cannot enlarge his interest therein by permitting it to be sold for taxes and purchasing it himself, either directly or indirectly. *Pleasants v. Scott*, 76 D. 403; *Moss v. Shear*, 85 D. 94.

A purchase at tax sale by a part owner who is liable for the tax does not strengthen his title. *Choteau v. Jones*, 50 D. 460. S. P., *Willard v. Strong*, 39 D. 240.

Successive purchases of the same property, at different sales thereof, for delinquent taxes, do not operate to strengthen the title first acquired. *Lacey v. Davis*, 66 D. 524.

A purchaser with the record before him that the collector was "sworn into office" takes title subject to the same rights as regards the record as had existed with respect to former owners. *Cass v. Bellows*, 64 D. 347.

One in possession of property as a trespasser, or under color of title, by suffering the same to be sold for taxes and becoming a purchaser at such sale, acquires no additional title. Every act of his which is in obedience to a law imposing such burden upon the land must be regarded as done by him by reason of his own claim of title, and in protection thereof; and he cannot thereby acquire a new or superior title, as every such act is deemed to be subordinate to his own title. That such taxes were a lien upon the land at the time of his entry thereon makes no difference, nor does it matter in whose name the property was assessed. *Lacey v. Davis*, 66 D. 524.

A claimant under a tax title whose title has been established by decree entered upon default of the former owner must prove that all the requisites of the law have been complied with; and unless the steps which the law requires to be taken have been regularly pursued, the court has no jurisdiction, under the law, to divest a party of his property, and vest it in the state or another person. *McGahan v. Carr*, 71 D. 421.

Payment of taxes by the grantee in a tax deed for a portion of the time he was in possession under such deed is not of itself, disconnected with other circumstances, evidence that the owner has abandoned the property. *Keane v. Cannon*, 82 D. 738.

The presumption in favor of a tax deed from lapse of time since its execution, and the possession of the grantee under it, can be indulged only in favor of acts between the assessment and the execution of the tax deed; but no presumption can be indulged in favor of the assessment itself, which is the

foundation of all subsequent proceedings. It is only the intermediate proceedings, if any, that can be presumed in such cases. *Ib.*

A tax deed is conclusive against an intruder without color of title. *Wheeler v. Winn*, 91 D. 186.

A party claiming under a tax deed must show that the land had not been redeemed when such deed was made, before it can be received as *prima facie* evidence of title, under the Minnesota statute. *Greve v. Coffin*, 100 D. 229.

54. What will defeat a tax title. — The operation of a tax deed may be defeated by showing that the taxes were paid before the sale, or that no proper notice to redeem was given to the occupant of the premises. *Bank of Utica v. Mercereau*, 49 D. 189. S. P., *Wallace v. Brown*, 76 D. 421.

A suit for recovery of lands sold for taxes, except in cases where the taxes have been paid or the lands redeemed according to law, must by the Wisconsin statute be commenced within three years from the time of recording the tax deed of sale, and cannot be commenced thereafter. *Edgerton v. Bird*, 70 D. 473.

Lapse of time will not afford presumptive evidence of regularity of a tax sale, if the purchaser and those claiming under him have had no possession under the deed. But an ancient deed and its recitals, together with subsequent, long-continued, and uninterrupted possession, are evidence from which compliance with a statute in regard to tax sales may be presumed, and the question thereon is one for the jury, upon all the evidence in the case. *Worthing v. Webster*, 71 D. 543.

A city being owner of land assessed and sold for taxes as the land of another, by its officers, without authority, is not estopped to deny regularity and validity of the proceedings by which the purchaser claims title. *St. Louis v. Gorman*, 77 D. 536.

The owner can maintain suit to cancel a tax deed to his premises, where they have been sold for an illegal excess above the amount of taxes for which they were liable, by tendering the amount for which they should have been sold, with interest at seven per cent. *Kimball v. Ballard*, 88 D. 705.

The fact that a party sets up a claim under a conveyance from a certain person does not prevent him from also setting up a tax title, if he has acquired such, nor from relying upon mere possession. *Wells v. Jackson I. M. Co.*, 90 D. 575.

55. Confirmation. — Proceedings for confirmation of a tax title are in the nature of a bill of peace, and are governed by the ordinary rules of chancery practice. All evidence resting in parol must be presented in the form of written depositions, unless dispensed with. *Payne v. Danley*, 68 D. 187.

Though a sale of land after owner's pay-

For Index to Notes in American Decisions and American Reports, see Volume I.

ment of taxes thereon is void, yet after decree of confirmation, where the court is shown to have jurisdiction, the owner will not be permitted, in a collateral proceeding, to prove the payment. Any other construction would take from the judgment that conclusiveness which the law expressly says shall be given to it. As the non-payment is the essential fact upon which the power to sell rests, the decree necessarily includes within it the finding of that fact. *Wallace v. Brown*, 76 D. 421.

Errors and irregularities in a tax sale are cured where the purchaser obtains a decree under a statute confirming the sale, if there was no fraud in procuring the decree. *Id.*

56. Redemption from tax sales, generally.—A purchaser at tax sale acquires the legal title to the land, subject to redemption by the owner, or some one having an opposing interest therein; but persons having no right or interest in the land cannot divest such purchaser of his interest by redemption, nor can the owner avail himself of a redemption made by a third person having no interest in the land, so as to divest the title of the purchaser at the tax sale. *Byington v. Bookwalter*, 74 D. 279.

In proceedings for the foreclosure of the equity of redemption under a tax deed, if a party claiming title to the land is on his own motion admitted a party defendant, such admission to defend does not determine his title; and when he properly sets up his claim to the land in his answer, the plaintiff may take issue thereon. *Id.*

A certificate of redemption of a county treasurer is not conclusive evidence of the amount to be paid for redemption in a proceeding to foreclose the equity of redemption under a tax deed; and further evidence is admissible to show the payment of subsequent taxes by plaintiff, that there were still unpaid costs in the action, and the like. *Id.*

Redemption of land is not invalidated by failure of the county treasurer to enter a memorandum of the redemption in the list of tax sales. The party redeeming cannot be held responsible for the omission of the officer. *Id.*

In order to avoid costs in an action by minors to redeem from a tax sale, tender of the amount due the defendant for taxes paid, and that the tender has been kept good, should be shown. *Curl v. Watson*, 95 D. 763.

In a proceeding to redeem from tax sales, it was found that one of the sales was invalid, while the others were valid. *Held*, that the plaintiff should pay the amount of legal taxes paid by the defendant, with interest thereon at six per cent, under the invalid sale, and the statute penalty and interest upon the valid sales, and also the subsequent taxes paid by the defendant. *Id.*

The owner of any interest in real estate subject to redemption from tax sale may redeem the whole property, and the purchaser may require him to redeem the whole, if any. *Id.*

57. Time to redeem.—A purchaser at tax sale to whom the owner tenders the amount of his bid, with twenty-five per cent interest, for an assignment of the certificate of sale, and who orally agrees to make such assignment to the owner within a few days and receive the money, but in fact obtains a deed from the auditor-general after the owner, relying upon this promise, has allowed the time for redemption to expire, and refuses, upon tender of the amount of his bid, with interest and charges, to convey to the owner, is guilty of a fraud upon the owner, cannot avail himself of the statute of frauds as a defense, and will be compelled by equity to convey to the owner. *Loring v. McKee*, 87 D. 738.

58. Who entitled to redemption money.—A purchaser at a tax sale acquires an equitable interest in the lands sold; and if they are conveyed by him before the time for redemption expires, his grantee acquires such equitable interest, and a right to the redemption money, if the lands are redeemed, as completely between the parties as by an assignment of the certificate of purchase. *Scott v. Kelsey*, 95 D. 415.

But if the purchaser should convey such premises to one person, and assign the certificate to another, both being innocent purchasers, the holder of the certificate might, with some reason, insist on a superior right to the redemption money. *Id.*

Where K., a purchaser at a tax sale, conveyed the lands to C., a married woman, who, without her husband joining in the deed, conveyed them to S., and the premises were redeemed, the redemption money being paid to K.,—*held*, that S. took nothing by such conveyance, and that a suit to recover the redemption money from K. should have been brought by C. and her husband. *Id.*

V. REMEDIES FOR ILLEGAL TAXATION.

59. In general.—After a party has been, by decree, divested of his title to land sold for delinquent taxes of one year, he cannot have such decree set aside because he has paid the taxes for other and succeeding years. *McGahan v. Carr*, 71 D. 421.

A property owner must seek relief against the improper exercise of the power of taxation in the manner pointed out by statute. If he fails to do so, he must present a very strong case to get relief in equity, if indeed he can be relieved at all. *O'Neal v. Virginia Bridge Co.*, 79 D. 669.

One seeking relief against certain illegal taxes levied on his property must pay the

For Index to Notes in American Decisions and American Reports, see Volume I.

legal taxes levied thereon before he is entitled to relief against the illegal taxes. *Hershey v. Board of Supervisors*, 82 D. 713.

The owners of taxable property can maintain a suit to annul illegal acts of municipal officers when such acts will increase the municipal taxes, and the state is not a necessary party. *Newmeyer v. Missouri etc. R. R. Co.*, 14 R. 394.

A bill was filed by tax-payers of a county on behalf of themselves and all other tax-payers, to set aside an order of the county court making a subscription on behalf of the county to the capital stock of a railroad, and to have the same declared null and void on the ground that it was illegal. *Held*, that there was no defect of parties. *Id.*

60. Abatement or deduction. — The tax imposed by the Massachusetts statute of 1865, chapter 283, on corporations chartered by the commonwealth, or organized under its general laws for purposes of business or profit, and having a capital stock divided into shares, was a tax on their franchises, and not on their property; and it is no reason for the abatement of any portion of such a tax, that, in computing the market value of the capital stock of a corporation as the true value of its corporate franchise, the tax commissioner omitted to make any deduction for a portion of its property invested in United States bonds, which are exempt from taxation by any state. *Manufacturers' I. Co. v. Loud*, 96 D. 715.

61. Action to recover back. — 1. Generally. — Where personal property is taken by a collector in satisfaction of an illegal tax, and sold, and the avails paid to the town, the owner may recover back the money in an action of *assumpsit* against the town. *Bailey v. Town of Goshen*, 87 D. 191.

A party cannot recover city taxes paid by him for ten consecutive years through an alleged mistake of law, especially where he helped to impose the tax, and otherwise ratified it, and was under an honorary obligation to his fellow-citizens, who therefore paid their portions of it, to contribute his share of the self-imposed burden. *Hubbard v. City of Hickman*, 96 D. 297.

The payment of a municipal tax to one having formal authority to collect it is involuntary, and if the tax is illegal the amount paid may be recovered back. *Tuttle v. Everett*, 24 R. 622.

2. Voluntary payments. — Money voluntarily paid on an unconstitutional assessment of taxes cannot be recovered from the sheriff, especially after he has paid it into the treasury. *Dickins v. Jones*, 27 D. 488.

Taxes collected under a state statute which is afterward declared unconstitutional cannot be recovered back, if no protest or ob-

jection is made against the payment of such taxes. *Taylor v. Board of Health*, 72 D. 724.

Payment of taxes extinguishes them, and a voluntary second payment, by another, amounts to a gratuity to the taxing power. *Morrison v. Kelly*, 74 D. 169.

Where an assessment has been set aside by a court, one who has paid it, though voluntarily, may recover it back. *Mayor ad. Riker*, 20 R. 386.

An illegal tax voluntarily paid by mistake of both law and fact may be recovered. *City of Louisville v. Anderson*, 42 R. 220.

3. Compulsory payments. — Payment of taxes is not compulsory because made under a threat, express or implied, that unless paid, legal remedies to compel payment would be resorted to. *Taylor v. Board of Health*, 72 D. 724.

An illegal tax paid under duress may be recovered of the county treasurer receiving it, if he had notice of the facts while the money was yet in his hands. *Greenabaum v. King*, 96 D. 172.

A payment of a tax was made under duress where the circumstances were, that after plaintiff had commenced proceedings against the county treasurer to enjoin the collection of an illegal tax, his clerk, in the absence of plaintiff, paid the same, upon the false representation made to him by the treasurer, that the supreme court had decided that the tax was legal, and the notification that unless paid, a seizure would be made of plaintiff's stock of goods therefor. *Id.*

Demand is not a prerequisite to the maintenance of a suit to recover back the amount of an illegal tax paid under duress. *Id.*

4. Payments under protest. — A party who pays an illegal tax under protest and notice of suit, upon being threatened with a distress, may maintain an action to recover it back. *Grim v. Weissenberg School Dist.*, 98 D. 237.

The pendency in the supreme court of an application for a perpetual injunction to restrain the collection of a county tax is sufficient notice to the county treasurer not to pay over or appropriate money collected for such tax, and which has been paid to him only after protest, and to prevent seizure. *Greenabaum v. King*, 96 D. 172.

Assumpsit will not lie against a town for money paid, under protest, by a resident owner for taxes on real estate, where the only objection is, that "the assessments were not legally made." It seems that the proper course for the tax-payer is to refuse to pay the taxes, and, when the land is sold by the collector, to defend his title. *Rogers v. Inhabs. of Greenbush*, 4 R. 292.

A tax was assessed on land under a statute

* Action for money had and received, to recover money paid as taxes, see note, 23 R. 519-521.

* Recovery of illegal tax paid under compulsion, see note, 45 D. 164-166.

For Index to Notes in American Decisions and American Reports, see Volume X.

afterward decided to be unconstitutional. Prior to such decision the owner paid the tax, under protest, to prevent a threatened sale. *Held*, that the payment was voluntary, and that the money could not be recovered back. *Detroit v. Martin*, 22 R. 512; *Benson v. Monroe*, 54 D. 716.

A sale of land for taxes laid under an unconstitutional law does not constitute a cloud upon the title; and, therefore, payment of such taxes to prevent a sale is voluntary, though made under protest, and cannot be recovered back. *Detroit v. Martin*, 22 R. 512.

To recover taxes paid to a municipal corporation, it must appear that the tax was wholly unauthorized; that the amount was actually received by the corporation; and that it was paid under compulsion, to prevent the immediate seizure and sale of plaintiff's goods, or arrest of his person. Voluntary payment accompanied by protest will not suffice. *First Nat. Bank v. Mayor etc.*, 45 R. 478.

62. Action for damages. — A collector selling property for taxes, after the expiration of the time prescribed by statute therefor, becomes a trespasser *ab initio*, though the original taking was rightful. *Pierce v. Benjamin*, 25 D. 396.

The owner may sue in trover without a demand and refusal, in such a case, the taking constituting a conversion. *Id.*

The owner does not waive his right of action against a tax collector for an illegal seizure and sale of his property by paying the balance of the tax, and taking a receipt for the whole. *Id.*

The rule of damages in an action against selectmen for property sold to satisfy an unlawful tax is the value of the property. *Drew v. Davis*, 33 D. 213; less the amount applied to the owner's tax. *Pierce v. Benjamin*, 25 D. 396.

63. Injunction.* — 1. *When lies.* — Proceeding by injunction is a proper mode by which to test the legality of a levy made by an officer under the supposed authority of a law the constitutionality of which is denied. *Byre v. Jacob*, 73 D. 367.

An injunction to stay a tax sale of city lots assessed by the city council of Cincinnati will lie. *Burnet v. Cincinnati*, 17 D. 582.

Equity may, by injunction, stay the collection of a tax, when the law has conferred no power to levy the tax, or where a person or officer not authorized by law to exercise such a power levies a tax, or when the proper persons make the levy for purposes on the face of the levy not authorized, or for fraudulent purposes. *Ottawa v. Walker*, 74 D. 121.

* See notes on injunction against collection of taxes, 69 D. 198-206; 23 R. 622, 628; 49 R. 287-289; 66 R. 110-112.

A bill to enjoin collection of taxes on personal property in a certain district must affirmatively show that the property was not taxable there. *Mills v. Thornton*, 79 D. 377.

The interest of a tax-payer is sufficient, where money is to be raised by taxation or expended from the treasury, to entitle him to proceed in equity to test the validity of the law which proposes the assessment or expenditure. *Page v. Allen*, 98 D. 272.

A court of equity has jurisdiction to enjoin a sheriff from making a sale of personal property for the payment of taxes on which he has levied, where the bill alleges that said taxes have been fully paid and discharged. *Lewis v. Spencer*, 23 R. 619.

Upon proof that the taxes have been paid off and discharged, the injunction will be perpetuated. *Id.*

An injunction will issue to restrain the collection of a real tax, when the property proceeded against is not that on which the tax is laid, and the party whose property is proceeded against is not the one who owes the tax. *Seeley v. Westport*, 36 R. 70.

At the suit of one or more dog-owners, on behalf of themselves and all other dog-owners in the county, an injunction may issue to restrain the collection of a dog-tax on the sole ground of illegality, in order to prevent a multiplicity of suits. *Williams v. County Court*, 53 R. 94.

2. *When does not lie.* — An injunction against collecting a tax assessed in the ordinary way, and unaccompanied by any circumstances of peculiar injury, will not lie, although the act authorizing the tax be unconstitutional. *McCoy v. Chillicothe*, 17 D. 607.

Equity cannot take cognizance of cases involving simply the question of taxation; the issue is strictly one at common law. *Minturn v. Hays*, 56 D. 366.

Where the illegality appears on the warrant for the collection of taxes, an adequate remedy at law lies by an action of trespass, should the payment of the tax be attempted to be enforced by a sale of the property. *Bank of Utica v. Utica*, 27 D. 72.

A perfect remedy exists at law, and equity has no power to interfere, if a tax upon a franchise has been illegally interposed, or a valid objection appears upon the face of the proceedings. *De Witt v. Hays*, 56 D. 352.

A cloud on title is not cast, nor irreparable injury wrought, by the sale of a wharf for taxes, where the plaintiffs do not pretend to a title in the soil, but only to an interest in the franchise. *Id.*

Equity will not enjoin the collection of a general tax or of a sidewalk tax of a city, on the mere ground that the tax was illegally assessed against the complainant, and that his real estate has been levied upon,

For Index to Notes in American Decisions and American Reports, see Volume L.

and is about to be sold for its payment, where no special equities are shown, and the law affords an adequate and more appropriate remedy. *Greene v. Mumford*, 73 D. 79.

Equity will not restrain the collection of a tax levied by officers *de jure* or *de facto*, where irregularities are charged, much less where no irregularities are charged. The remedy is at law. *Metc v. Anderson*, 76 D. 704.

A sale of personal property, rolling stock of a railroad company, for the purpose of collecting a tax claimed to be illegal, will not be enjoined. The sale of the property is a trespass, for which the company would have a remedy at law. *Chicago etc. Ry Co. v. Ft. Howard*, 91 D. 458.

Rolling stock of a railroad which a statute provides to be real estate is personal property for the purpose of sale to collect delinquent taxes. It is realty only for purposes contemplated by the statute. *Id.*

Tax assessments ought not to be vacated, and property liable to taxation released altogether, because the public officers have not strictly followed the provisions of the law, which are merely directory. And equity cannot interfere for such cause to relieve a party from the payment of taxes assessed upon his property by the proper authority. *Stoddert v. Ward*, 100 D. 83.

A tax-payer cannot as such maintain a suit to restrain the collection of a tax, or the application of the proceeds to the purposes for which it was raised. *Kilbourne v. St. John*, 17 R. 291.

Equity has no jurisdiction to restrain the collection of a personal tax, even if it be illegal; nor will it assume jurisdiction to prevent a multiplicity of suits when the parties have, severally, remedies at law. *Youngblood v. Sexton*, 20 R. 654.

An action does not lie in the name of the state at the relation of the attorney-general for an injunction to restrain the collection of a tax levied to pay void bonds issued by a public (school district) corporation. *State v. McLaughlin*, 22 R. 264.

Equity will not enjoin the collection of an illegal tax, in the absence of special circumstances, as, for example, to prevent multiplicity of suits, or irreparable injury, or cloud upon title. *Douglas v. Harrisville*, 27 R. 548.

TEACHERS.

Compensation of, see SCHOOLS, 14.

TECHNICAL WORDS.

Construction of, see WILLS, 75.

Use of, in indictments, see INDICTMENT, 21.

When explainable by parol, see EVIDENCE, 92.

TELEGRAPH AND TELEPHONE COMPANIES.

[Includes the duties and liabilities of telegraph companies to the public, and to those employing them; also, the decisions relating to telephone companies.]

1. The liability distinguished from that of common carriers.*—A telegraph company is not a common carrier, but a bailee, performing, through its agents, a work for its employer, according to certain rules and regulations, which, under the law, it has a right to make for its government. *Birney v. Printing Tel. Co.*, 81 D. 607.

A telegraph company is not liable as a common carrier, but only for want of proper care and attention. *Leonard v. New York etc. Tel. Co.*, 1 R. 446. Contra, *Parks v. Alta California Tel. Co.*, 73 D. 589.

2. Liability for delay, or failure to transmit. — A telegraph company is responsible for any loss or injury which results from its failure or neglect to transmit a message received by it for transmission. *Birney v. Printing Tel. Co.*, 81 D. 607.

A telegraph company receiving a message in its office is bound to transmit it with impartiality and good faith in the order of time in which it is received; and a failure to do so makes the company liable to the person whose dispatch is neglected or postponed. But private dispatches must give way to the transmission of intelligence of general and public interest, and to communications for and from officers of justice. *Western Union Tel. Co. v. Ward*, 85 D. 462.

A party is entitled to recover of a telegraph company a penalty of one hundred dollars, under the Indiana statute, where he took a message to the company's office, and after being informed by the agent that it could be transmitted immediately, paid the charges demanded, but the message was not sent until the following morning, when it was too late to be of any service, unless the company shows that, after receiving the message, the same could not be sent by reason of some derangement of the wires, or that it was postponed in consequence of the transmission of intelligence of general and public interest, or of communications for or from officers of justice. *Id.*

A telegraph company is guilty of gross negligence, and is therefore liable to the sender of the message for such damage as he sustained in consequence thereof, where a prepaid message, sent from one place to another over the company's line, did not get beyond an intermediate point, and no reason was given by the company for its failure to transmit the message to its destination. *United States Tel. Co. v. Wenger*, 93 D. 751.

A telegraph company is not liable for loss

* See monographic note on the general duties and liabilities of telegraph companies, 81 D. 613-618. See also note, 45 R. 486-500.

For index to Notes in American Decisions and American Reports, see Volume I.

consequent upon a failure to send a message which is in cipher, or which on its face does not indicate that any such loss might result, unless the purport of the message is communicated to the company's agent at the time it is offered to be sent, so that proper precautions to avoid the risk could be taken. So held where one broker telegraphed to another, "Sell fifty (50) gold," which meant, as between them, "sell fifty thousand dollars gold," and the message was not explained at the time it was offered to be sent, and the brokers, by the decline of gold, as a consequence of the non-delivery of the message, suffered loss. *United States Tel. Co. v. Gildersleeve*, 96 D. 519.

A statute denouncing a penalty against telegraph companies for failure to transmit messages does not apply to messages delivered out of the state, for transmission to the state. *Carnahan v. Western Union Tel. Co.*, 46 R. 175.

A statute imposing a penalty on a telegraph company for failure to transmit a message is not unconstitutional, even as to a message addressed to another state, and the sender may recover the penalty. *Western Union Tel. Co. v. Pendleton*, 48 R. 692.

Conditions upon a telegraph message that the company will not be liable for mistakes and delays in transmission or delivery will not exempt the company for a mistake or delay occasioned through its negligence. *Menville v. Western Union Tel. Co.*, 18 R. 8.

The plaintiff delivered to the defendant, a railway company operating a telegraph, a message on Sunday, announcing the death of his wife and child to his father, and requesting him to come to him. The defendant negligently failed to deliver the message until the next day, too late for the funeral. Held, that the plaintiff was entitled to recover, and that exemplary damages were proper. *Gulf etc. Ry Co. v. Levy*, 46 R. 278.

3. — for failure to deliver. — The burden of proof is on plaintiff, in an action for a breach of a contract to deliver a message by telegraph, to show affirmatively that there has been negligence or want of faith in the sending or delivery of the message. *United States Tel. Co. v. Gildersleeve*, 96 D. 519.

If the telegraph company is in default, but their default is made mischievous to a plaintiff only by the operation of some other intervening cause, such as the dishonesty of a third person, the rule, *Causa proxima non remota spectatur*, applies, and the company cannot be made responsible for the loss occasioned by the act of such third person. *First Nat. Bank of Barnesville v. Tel. Co.*, 27 R. 485.

A telegraph company is liable for injury to the feelings of a son by willful neglect to deliver to him a message announcing the death of his mother, whereby he was pre-

vented from attending her funeral. *So Relle v. Western Union Tel. Co.*, 40 R. 805. But reversed, 46 R. 278.

4. — for mistakes in messages. — A telegraph company must send the very message prescribed. They must follow the copy; and for a failure to do so, they are liable in damages, in an action on the case, to the party to whom the message is sent. *New York etc. Tel. Co. v. Dryburg*, 78 D. 338.

Malice is not the gist of an action against a telegraph company for damages for a failure to send a telegram as it was written. *Id.*

A message as delivered by plaintiff to a telegraph company read: "If we have any Old Southern sell same before board. Buy five Hudson at board"; but the message as transmitted read: "If we have any Old Southern sell same before board. Buy five hundred at board." Plaintiff's agent, who received the message, bought five hundred Old Southern; but plaintiff, hearing of this, immediately directed the sale thereof, and the purchase of five hundred shares Hudson River, according to the intention of the original message as delivered. In the mean time Hudson River had risen, making a difference to plaintiff of \$1,375. In an action against the company for damages, — held, that plaintiff could recover, and that the measure of damages was the rise in the price of the stock. *Rittenhouse v. Independent Line of Tel.*, 4 R. 673.

It is gross negligence in a telegraph company to employ an operator who is ignorant of the existence of a county town which is one of the stations on its line. *Western Union Tel. Co. v. Buchanan*, 9 R. 744.

Plaintiff delivered to defendants, a telegraph company, in Maine, a message to be sent during the night to plaintiff's agent in Chicago, directing him to "ship ten thousand bushels" of corn. Defendants received and transmitted the message, but through an error in transmission, it read, as delivered to the agent: "Ship one thousand bushels." The agent bought and shipped one thousand bushels; but some days after, on learning of the mistake in the message, he purchased the other nine thousand bushels, paying ten cents more per bushel therefor, the price having advanced. The message, as delivered to defendants, was written on a blank in which it was provided that the defendants would receive messages to be sent during the night "at one half the usual rates, on condition that the company shall not be liable for errors or delays in the transmission or delivery, from whatever cause occurring." In an action to recover the additional price paid for the nine thousand bushels, — held, 1. That the condition exempting the company from liability was against public policy, and therefore void, even though assented to

* Liability for mistakes in transmitting message, see note, 9 R. 149-156.

For Index to Notes in American Decisions and American Reports, see Volume E.

by the sender of the message; 2. That the plaintiff made out a *prima facie* case by proof of the undertaking, error, and damages, and that thereupon the burden of proof was on the defendants to show that the error was caused by some agency for which they were not liable. *Bartlett v. Western Union Tel. Co.*, 16 R. 437.

A mistake in the transmission of a telegram is *prima facie* evidence of negligence on the part of the company, and the burden of proof rests upon it to show itself free from fault. *Rittenhouse v. Independent Line of Tel.*, 4 R. 673; *Bartlett v. Western Union Tel. Co.*, 16 R. 437; *Turner v. Hawkeye Tel. Co.*, 20 R. 605; *Western Union Tel. Co. v. Tyler*, 24 R. 279.

B. sent a message by defendant's telegraph to plaintiff, asking for five hundred dollars. By negligence of defendant's servant the message was changed to five thousand dollars, which sum plaintiff sent, and B. absconded with it. *Held*, that defendant was not liable for the loss, its negligence not being the proximate cause thereof. *Lowery v. Western Union Tel. Co.*, 19 R. 154.

An impostor, at Cincinnati, sent a dispatch in the name of B. over defendant's telegraph line to C., at Selma, Alabama, requesting C. to send a telegraphic money-order to B., at Cincinnati; C. complied, and defendant paid the money to the impostor at Cincinnati. *Held*, that defendant was not liable for the mistake, in the absence of any suspicious circumstances. *Western Union Tel. Co. v. Meyer*, 32 R. 1.

A telegraph company may not stipulate for immunity for liability for its own negligence. *Telegraph Co. v. Griswold*, 41 R. 500.

Where a telegraph company has inaccurately transmitted a message, the burden is on it to show its freedom from fault. *Ib.*

Proof of due care by a telegraph company, or of the absence of negligence and carelessness on its part, is a good defense to an action against it for damages for negligence in receiving and transmitting a dispatch. *Pinckney v. Telegraph Co.*, 45 R. 499, note.

A telegraph company is not liable for a mistake of its clerk in endeavoring, at the request of the sender, to correct a mistake in the written message. *Western Union Tel. Co. v. Foster*, 53 R. 754.

5. Cipher dispatches. — When a message was written in cipher, and the company ignorant of its contents, — *held*, that it was liable only for the amount received for transmission. *Candee v. Western Union Tel. Co.*, 17 R. 452.

Under a statute rendering telegraph companies liable in damages for failure to transmit dispatches, a company altogether failing to transmit a cipher dispatch which it undertakes to deliver, is liable in damages as if the message had been intelligible. *Western Union Tel. Co. v. Reynolds*, 46 R. 715.

For non-delivery of a cipher dispatch, the meaning of which is not known or explained to the company, a telegraph company is liable in the same damages as if its purport had been apparent, and where such dispatch directs the sale of goods owned by the sender, the measure of damages is the difference in the market price between the time when they would have been sold if the dispatch had been delivered, and the actual sale. *Daughtery v. American Union Tel. Co.*, 51 R. 435.

For failure to deliver or for delay in delivery of a cipher dispatch, a telegraph company is liable only in nominal damages. *Daniel v. Western Union Tel. Co.*, 48 R. 305.

A telegraph company is liable in damages for unreasonable delay in the delivery of a cipher dispatch, and the recovery is not limited to nominal damages. *Western Union Tel. Co. v. Fatman*, 54 R. 877.

6. Negligence in other respects. — A telegraph operator of T. received a message dated at E. and addressed to bankers at P., which read as follows: "Keystone bank will pay the check of T. F. McCarthy to the amount of twenty thousand dollars (\$20,000). J. J. Town, cashier of Keystone bank." The person presenting the message was known to the operator by the name of McCarthy, but no authority from the cashier was shown. The message was transmitted, and proved to be fraudulent. *Held*, that the operator was guilty of gross negligence, for which the telegraph company was liable. *Elwood v. Western Union Tel. Co.*, 6 R. 140.

7. Regulation as to repeating messages. — 1. *Generally.* — A condition in a telegraph blank upon which a message is written, exempting the company from liability for unrepeatable messages, is not a contract binding in law. *Tyler v. Western Union Tel. Co.*, 14 R. 38.

A condition in a telegraph blank exempting the company from liability for errors in unrepeatable messages exempts them only for errors arising from causes beyond their control; and an error being proved, the onus is on the company of proving that it arose from such causes. *Western Union Tel. Co. v. Tyler*, 24 R. 279.

It is not unreasonable for telegraph companies to require the repetition of a message, or otherwise the company will not be liable for any error in its transmission. *Wana v. Western Union Tel. Co.*, 90 D. 395; *Womack v. Western Union Tel. Co.*, 44 R. 614; being liable only for willful misconduct or gross negligence. *Hart v. Western Union Tel. Co.*, 56 R. 119; *Breece v. United States Tel. Co.*, 8 R. 526. And a person who, having notice of such regulation brought home to his knowledge, sends a message without having it repeated, is to be regarded as having sent

* Conditions exempting company from liability for error, see note, 24 R. 283, 284.

For Index to Notes in American Decisions and American Reports, see Volume L.

it at his own risk. *Camp v. Western Union Tel. Co.*, 71 D. 461. And where the condition as to repeating exists, and is known to the party, or where he is bound to take notice of it, and a mistake occurs in an un-repeated message, the mere proof of such mistake, without some other evidence of carelessness on the part of the company, will not make it liable. *Sweetland v. Illinois etc. Tel. Co.*, 1 R. 285; *Becker v. Western Union Tel. Co.*, 38 R. 356. And in such case the receiver cannot recover more than the stipulated rate of damages where he had reason to suspect an inaccuracy, and neglected to demand repetition, relying on the receiving operator's assurance of correctness. *Western Union Tel. Co. v. Neill*, 44 R. 589.

The sender of a telegram is chargeable with notice of the printed conditions on the blank form on which it is written. *Womack v. Western Union Tel. Co.*, 44 R. 614.

One who sends messages by telegraph is supposed to know that the company's engagements are controlled by those rules and regulations which it has a right to make, and in law, he ingrafts them in his contract, and is bound by them. *Birney v. Printing Tel. Co.*, 81 D. 607. Whether or not the particular message be expressly declared to be subject to the terms and conditions prescribed by such rules and regulations, unless it is otherwise provided by special contract. *United States Tel. Co. v. Gildersleeve*, 96 D. 519.

A telegraph company which has adopted a rule that it will not be liable beyond a certain sum on any un-repeated message is still bound to use ordinary diligence in the delivery of such a message, but it is not bound to exercise any extraordinary degree of care or caution. *Id.*

Telegraph companies may specially limit their liabilities, but will not be protected from the consequences of gross negligence. *Wann v. Western Union Tel. Co.*, 90 D. 395; *United States Tel. Co. v. Gildersleeve*, 96 D. 519.

The exemption from liability for a non-transmission and a non-delivery of an un-repeated message does not apply to a case where no effort was made by the company, or its agents, to put the message on its transit. *Birney v. Printing Tel. Co.*, 81 D. 607.

A printed heading upon a telegraph blank limiting the liability of the telegraph company for mistakes in the transmission of un-repeated messages to the amount received for sending the message constitutes, when underwritten with a signed dispatch, a contract between the company and the dispatch sender, although it has never been read by him; and, unless, perhaps, in case of willful default or of gross negligence on the company's part, limits its liability to the specified amount, even though the mistake is of a

kind not to be prevented by the repetition of the message. *Grinnell v. Western Union Tel. Co.*, 18 R. 485; *Redpath v. Western Union Tel. Co.*, 17 R. 69; *Aiken v. Western Union Tel. Co.*, 58 R. 210.

The mere fact that the message as delivered at its destination differs from that delivered for transmission in a single letter, is not sufficient to warrant a larger recovery than that provided for in the limitation. *Womack v. Western Union Tel. Co.*, 44 R. 614.

2. *Illustrations.* — In an action against a telegraph company by the sender of an un-repeated dispatch, to recover the statutory penalty for failure to transmit it, — *held*, that a regulation of the company limiting its liability in such cases to the amount paid for transmission, and of which plaintiff had no notice, was no defense. *Western Union Tel. Co. v. Buchanan*, 9 R. 744.

A telegraph company cannot, by a notice printed on a blank on which a message is written that it will not be liable unless the message is repeated, relieve itself from liability for a negligent failure to deliver a message not repeated, after it was received at the office to which it was addressed. *Western Union Tel. Co. v. Graham*, 9 R. 136.

A telegraph company received the following message for transmission: "Cover two hundred September and one hundred August," and transmitted it, "Cover two hundred September and two hundred August." The expressions were common and well understood in the cotton trade. *Held*, that the company was liable for the full amount of damage suffered, although the message was not repeated according to its regulation, and although in such cases its regulation undertook to limit its liability. *Western Union Tel. Co. v. Blanchard*, 45 R. 486.

The following telegram was written upon a blank stipulating that the company should not be liable for mistakes or delays in the transmission or delivery of any un-repeated message, by negligence of its servants or otherwise, beyond the amount received for sending the same: "Send bay horse to-day. Mock loads to-night." The message was not repeated, and was delayed in transmission by the defendant's negligence, and the sender lost the sale of the horse in consequence. Mock was a well-known horse dealer, in the habit of shipping horses at that place. *Held*, 1. That the stipulation did not prevent a recovery for a want of ordinary care and diligence; 2. Actual damages were recoverable. *Thompson v. Western Union Tel. Co.*, 54 R. 644.

8. *Other conditions limiting liability.* — A telegraph company cannot by

* See monographic note on the power of telegraph companies to impose conditions as to the sending of messages, 71 D. 463-474. See also note, 11 R. 168, 169.

For Index to Notes in American Decisions and American Reports, see Volume L.

tending his funeral, compensation for injury to the feelings may be recovered, where the company was notified of the emergency. *Stuart v. Western Union Tel. Co.*, 59 R. 623.

2. *Illustrations.* — Plaintiff's agent in Chicago telegraphed to his agent in Oswego for five thousand sacks of salt. By the carelessness of the operator the telegram was made to read "casks"; and five thousand casks were sent, for which there was no market in C., and which were sold at a loss. In an action against the telegraph company for damages arising from the mistake, — *held*, that the measure of damage was the difference between the market value at O. and at C., together with the cost of transportation from O. to C. *Leonard v. New York etc. Tel. Co.*, 1 R. 446.

The failure of the plaintiff's agent at Oswego to attempt to withdraw the shipment, on learning the mistake, after the goods had been shipped, and, as he supposed, had actually gone, but in fact, as afterward appeared, before they had gone, was not such legal negligence as would prevent the plaintiff's recovering. *Id.*

Plaintiff, having received an offer of a cargo of corn at ninety cents a bushel, delivered to defendant, a telegraph company, for transmission, a message in reply to the offer, written on a "night-message blank," in these words: "Ship cargo named at ninety, if you can secure freight at ten; wire us the result," and paid forty-eight cents, the rate for night messages, and which was less than the day rates. The blank contained the following printed condition: "It is agreed between the sender of the following message and this company that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message, beyond the amount received by said company for sending the same." The message was sent, but was not delivered, by reason whereof the plaintiff failed to obtain the corn at the terms offered, and the price of corn and freight having advanced, plaintiff was compelled to purchase at higher terms. *Held*, that assuming that the corn would have been forwarded at the terms named but for the non-delivery of the message, the measure of damages was the difference between the price stated and that which the plaintiff would have been obliged to pay at the same place in order by due diligence, after notice of the failure of the telegram, to purchase the like quantity and quality of corn, together with the additional freight. *True v. International Tel. Co.*, 11 R. 156.

A condition in a blank message that the company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of a message, beyond the amount received for sending the same, — *held*, unreasonable, and not binding in case of non-delivery. *Id.*

A message, conditioned against liability for error or delay if unreported, directed the sale of one hundred shares of stock. The "100" was changed to "1,000" in transmission, and the latter number was sent. *Held*, that the measure of damage was the amount paid by plaintiff by reason of an advance in price of stock to replace the excess of nine hundred shares sold in obedience to the erroneous message. *Tyler v. Western Union Tel. Co.*, 14 R. 38.

A message sent by plaintiff, but not delivered by defendant, directed plaintiff's agent to buy a certain quantity of wheat, to be delivered at any time in June at seller's option. The price of wheat fluctuated during the month of June, but was at the close of the month less than on the day when the message should have been delivered. *Held*, that the court could not presume that the plaintiff would have sold at the right time to make a profit, had the wheat been bought, and that he was, therefore, only entitled to nominal damages. *Hubbard v. Western Union Tel. Co.*, 14 R. 775.

Plaintiff was directed by his correspondent to "ship your hogs at once." The message containing the directions was delayed by defendant's negligence four days. *Held*, that the measure of damage was the difference at the place of delivery between the market value of the hogs on the day when they would have been delivered had the message been promptly delivered, and the market value on the day the plaintiff was able to deliver them after the actual receipt of the message. *Manville v. Western Union Tel. Co.*, 18 R. 8.

Defendant, a telegraph company, agreed to furnish plaintiff, a grain dealer at S., with daily reports of the grain market at C., a point beyond defendant's line. By reason of an error in the report, plaintiff was induced to purchase a quantity of grain to fill a contract for future delivery. *Held*, that the measure of damages was the difference between the actual purchase price and the price as represented in the report. *Turner v. Hawkeye Tel. Co.*, 20 R. 605.

The defendant telegraph company received from a banking-house acting as agent for plaintiff a message to another banking-house, directing the latter to protect the plaintiff's note. The sender paid the price of repeating. The message never was delivered. *Held*, 1. That the defendant was liable to the plaintiff; 2. That the damages should not be measured by the limitation provided in case of repeated messages, in the blank form on which the message was written, but would embrace all actual damages, including injury to credit; 3. But not exemplary damages, in the absence of proof of express or implied authority or adoption by the company. *Western Union Tel. Co. v. Brown*, 44 R. 610.

TELEGRAPH AND TELEPHONE COMPANIES — TENANTS IN COMMON. 3195

For Index to Notes in American Decisions and American Reports, see Volume I.

The plaintiff sued a telegraph company for delay in delivering to him a message announcing the death of his son's wife and child, whereby he was prevented from attending the funeral. *Held*, that there could be no recovery for his mental suffering. *Gulf etc. Ry Co. v. Levy*, 46 R. 278.

Plaintiff's agent telegraphed him the price at which he could buy apples, but owing to mistakes in the address and signature, the plaintiff paid no attention to it. The price of apples advanced, and the plaintiff was obliged to pay more than the price named in the telegram. In an action for damages, there being no evidence of any difference between the cost of a car-load at the price named, and the value thereof in the same market at the same time, — *held*, that only the amount paid for the telegram could be recovered. *Pennington v. Western Union Tel. Co.*, 56 R. 367.

13. Poles in streets.* — A telegraph company having a right to place its line in a public street is bound only to reasonable care, can be made responsible for an injury occurring from the breaking of one of its poles only by proof of culpable negligence in the construction or maintenance of the line, and is not bound so to construct or maintain the line as to guard against storms of unusual severity, the occurrence of which could not reasonably be expected. *Ward v. Atlantic & Pac. Tel. Co.*, 27 R. 10.

Legislative authority to telegraph companies to erect poles in public streets is subject to the liability to make compensation to the adjacent land-owners for the use. *Board of Trade Tel. Co. v. Barnett*, 47 R. 453.

Telegraph poles and wires in a public street are not necessarily a nuisance which will be prohibited at the suit of one in front of whose lot they are erected. *McCormick v. District of Columbia*, 54 R. 284.

Under a statute authorizing telegraph companies to erect their lines in any streets in a city designated for that purpose by such city, a common council cannot revoke such a designation of the streets, when the company has conformed to the condition upon which the designation was made, and has expended money in placing poles upon the designated streets. *Hudson Telephone Co. v. Jersey City*, 60 R. 619.

14. Decisions relative to telephone companies.† — The defendant, a Connecticut telephone company, had purchased from a Massachusetts telephone company, owning the patent, the right to use its magnetic

telephone system for a certain period, on the condition that it should not permit telegraph companies to use the system unless they had purchased the right from the Massachusetts company. A statute of Connecticut provides that every telephone company shall impartially permit persons and corporations to transmit speech through its wires by its instruments. The plaintiff, a telegraph company in Connecticut, not having purchased the right, sued to compel the defendant to permit it to use the system. *Held*, not maintainable. *American etc. Tel. Co. v. Connecticut Telephone Co.*, 44 R. 237.

A telephone company may not arbitrarily refuse its facilities to any person desiring them and offering compliance with its regulations, and *mandamus* will issue to compel the company to do its duty. *State v. Nebraska Telephone Co.*, 52 R. 404.

A telephone company being bound by statute to receive dispatches from and for all telegraph companies may not justify a discrimination in favor of a particular telegraph company by the fact that its contract with the company controlling the telephone patents requires it to do so. *Chesapeake etc. Telephone Co. v. Baltimore & O. Tel. Co.*, 59 R. 167.

A telephone company is liable for an injury to a traveler caused by the fall of wires on a street, although the fall was occasioned by ice produced by water thrown upon them by the fire department. *Nichols v. City of Minneapolis*, 53 R. 56.

The state may limit the price which telephone companies may charge for their patented facilities. *Hackett v. State*, 55 R. 201.

Under a license from city authorities for the erection of a telephone line, there is no right to enter private property and cut off the limbs of trees, although they project over the sidewalk. *Memphis Bell Telephone Co. v. Hunt*, 57 R. 237.

TELEGRAMS.

Admissibility and effect of as evidence, see EVIDENCE, 239.

Contracts by, see CONTRACTS, 13.

TELEPHONE COMPANIES.

See TELEGRAPH ETC. COMPANIES, 14.

TELLERS.

Of banks, see BANKS AND BANKING, 52.

TENANCY.

Different kinds of, see LANDLORD AND TENANT, 3-5.

In coparcenary, see CO-TENANCY, 62, 63.

Of land, by husband and wife, see HUSBAND AND WIFE, 59-62.

TENANTS IN COMMON.

Generally, see CO-TENANCY, I.

Partition between, see PARTITION.

Waste as between, see WASTE, 2.

* Poles in public streets, and proceedings to abate the same, see notes, 61 R. 240-293; 57 R. 409-412.

† Right to erect telephone poles in the streets of a city, see note to 57 R. 409-412.

Duty of, to serve public without discrimination, see note, 59 R. 173-175.

Mandamus to prevent discrimination by telephone companies, see notes, 28 R. 587-589; 44 R. 241-242.

For Index to Notes in American Decisions and American Reports, see Volume I.

TENDER.

[Includes the necessity of a tender; the time, place, and validity of tender; rules of pleading and evidence in respect to tender; and decisions relative to the legal-tender acts of Congress.]

Necessity of, before suit, see **CONTRACTS**, 160; **TROVER**, 10.
Of deed, duty of vendor to make, see **VENDOR AND PURCHASER**, 19.
Of mortgage debt, effect of, see **MORTGAGES**, 133.
Of performance, see **CONTRACTS**, 123.
Of performance, effect of, see **SPECIFIC PERFORMANCE**, 25.
Of stock, before suit for subscription, see **CORPORATIONS**, 213.
Plea of, see **PLEADING**, 38.
When bank notes are good tender, see **BANKS AND BANKING**, 34.
When necessary before bringing ejectment, see **EJECTMENT**, 22.

1. When necessary.—A tender of a conveyance is unnecessary where the other party has declared his unwillingness to accept it. *Lynch v. Postlethwaite*, 12 D. 495.

The averment of actual tender and payment of money into court is not necessary in the case of an executory agreement, where the acts of the parties are to be concurrent, as where one is to make a deed and the other to pay the purchase-money; an offer to pay and demand of performance is sufficient, if performance be refused, and the money may be brought into court at the trial. *Henry v. Raiman*, 64 D. 703.

2. Who may make or receive a tender.*—Tender of money due the beneficiary should be made to the trustee. *Chahoon v. Hollenback*, 16 D. 587.

A party has no right to make tender on his own behalf of amount due on mortgage, where he has no interest in the mortgaged premises, or in making the tender. *Mahler v. Neubaur*, 91 D. 571.

A creditor has the right to be informed on whose behalf a tender is made, when made by a stranger, or one not a party in interest, or he will not be required to accept it, or reject it at his peril. *Id.*

3. In what currency tender may be made, generally.—A tender in bank notes is valid if no objection is made on that account at the time, but the only objection to receiving the notes is placed upon the ground that a larger sum is due. *Ball v. Stanley*, 26 D. 263.

A written agreement to pay a sum of money on or before a day certain, with a provision that it may be paid in Arkansas currency, is not discharged by a tender of the amount due thereon, in Arkansas currency, after maturity. *Hoys v. Tuttle*, 46 D. 309.

*To whom and by whom must be made, see note, 77 D. 477, 478.

4. — in cases of contracts expressly made payable in gold coin.—A contract to pay a sum of money in gold coin of United States "of the present standard weight and fineness, notwithstanding any law which now may or hereafter shall make anything else a tender in payment of debts," is not payable in legal-tender notes. *Dutton v. Pailaret*, 91 D. 135; *McGoon v. Shirk*, 5 R. 122; *Myers v. Kauffman*, 95 D. 367; *McGoon v. Shirk*, 5 R. 122; *Killough v. Alford*, 5 R. 249.

5. Depreciated or uncurrent money.—Where a party objects to a tender on the ground that it is not made in lawful money, although the jury may be satisfied that his real motive is to get rid of the contract, they are not at liberty to disregard his objection. *Decamp v. Feay*, 9 D. 372.

6. What is a valid tender.*—An offer of money in bags is a legal tender. It is sufficient that the party offered to pay the requisite amount. *Behaly v. Hatch*, 12 D. 570.

An objection made at the time of a tender precludes all others, and if that be not well grounded, the tender will be held good. *Moynahan v. Moore*, 77 D. 468.

7. What is not.—It is not a legal tender to say, "Here I am ready"; the tenderer must have the money ready also. *North v. Mallett*, 2 D. 622.

The offer of a certain sum in satisfaction of an unliquidated claim does not operate as a legal tender if refused. *McDaniels v. Bank of Rutland*, 70 D. 406.

A declaration of willingness to pay for the value of the labor when the article shall be delivered is not equivalent to an actual tender by a plaintiff in an action of replevin. *McIntyre v. Carver*, 37 D. 519.

To constitute a valid tender, he who makes it must be ready to pay and must actually offer to pay. It is not sufficient that a person is present from whom the money might be borrowed, unless he actually consents to loan it for the purpose of the tender. *Sargent v. Graham*, 22 D. 469.

8. Proper time to make tender.†—A tender of money or property must be made at a convenient time before sunset. *Williams v. Johnson*, 12 D. 275.

A tender of principal and interest, when only the latter was due, is good, unless the creditor shows a willingness to accept the amount due. *Saunders v. Frost*, 16 D. 394.

A creditor cannot be required to accept a part of a debt which has not become due. *Id.*

*General requisites of tender, see note, 77 D. 470-472.

Duty of debtor to seek creditor for purpose of making tender, see note, 8 D. 520, 521.

† Illustrations of sufficient and insufficient tender, see note, 77 D. 473-476.

‡ Time and place of tender, see note, 77 D. 478-480.

For Index to Notes in American Decisions and American Reports, see Volume L.

A tender must precede suit where the plaintiff relies on an equitable title under a contract for a conveyance. *Chakoon v. Holtenback*, 16 D. 587.

The tender of the amount due on a mortgage of chattels by one who has converted the same, claiming under the mortgagor, is ineffectual after an action commenced for the conversion, unless the costs are also tendered. *Farr v. Smith*, 24 D. 162.

The Vermont statute allowing a tender in all actions until three days before the term of court does not apply to actions of trover, or to other actions, where no tender could be made without the aid of a statute. *Hart v. Skinner*, 42 D. 500.

After a writ had been sued out to recover a debt, and delivered to an officer for service, the debtor tendered the amount of the debt, with interest, but without costs. *Held*, that the tender was good, as the suit was not commenced, except for the purpose of preventing the running of the statute of limitations, until the writ was served. *Randall v. Bacon*, 24 R. 100.

9. The necessary amount. — An offer of part of the amount due does not avail as a tender, nor, if refused, does it operate as payment *pro tanto*. *Fridge v. State*, 20 D. 463.

10. Keeping the tender good.* — The benefit of a tender is lost by a subsequent demand and refusal. *Ross v. Brown*, 1 D. 22.

The tender of securities in satisfaction of a debt must be kept good by bringing and offering the securities in court. Their destruction annuls the tender. *Brooklyn Bank v. De Grauw*, 35 D. 569.

Where a tender merely defeats a particular remedy, but does not discharge a debt, it is not necessary to show continued readiness to pay or to bring the money into court. *Kortright v. Cady*, 78 D. 145.

To save costs, defendant must keep his tender good by actually producing the money and depositing it in court. And it is too late where the amount tendered before suit is not deposited in court until after the trial has begun, and after the accrual of costs not embraced in the amount tendered. *Warrington v. Pollard*, 95 D. 727.

At common law, the tender of a mortgage debt on the day it falls due, and at the appointed place, discharges the mortgage. *Orain v. McGoon*, 29 R. 37. But a tender after default of the amount due upon a chattel mortgage must be kept good, to be availing. *Tompkins v. Batie*, 38 R. 361.

11. Payment into court.† — Money paid into court is not to be deducted from the amount found due, and a verdict re-

turned only for the balance, but the verdict should be for the whole amount due, if it exceeds the amount paid in; otherwise the verdict should be for the defendant. *Dakin v. Dunning*, 42 D. 33.

Money paid into court must be indorsed on an execution, and the balance only collected, where the verdict is for the plaintiff for a larger sum. *Id.*

Defendant may pay into court the amount he admits to be due, with costs to that time, and if plaintiff deny that it is sufficient to satisfy his demands, and go to trial, and the jury find more is due him than defendant offers, the latter must pay costs; but if they find the amount sufficient to satisfy plaintiff's just demands, he must pay all costs incurred since the offer was made. *Murray v. Windley*, 47 D. 324.

Where money paid into court by way of a tender is withdrawn under an order of the court, such withdrawal cannot affect the validity of the tender. *Wright v. Young*, 70 D. 453.

12. Conditional tender.* — A tender with a condition annexed is invalid. *Holton v. Brown*, 46 D. 148; *Brooklyn Bank v. De Grauw*, 35 D. 569; *Draper v. Hitt*, 5 R. 292. And the money or other thing to be tendered must be actually produced, unless the creditor dispenses with it, either by an express declaration, or other equivalent acts. *Brown v. Gilmore*, 22 D. 223.

Plaintiff held a mortgage to secure a note, but had lost the note. Defendant, the mortgagor, tendered payment, but demanded the note as a condition, and refused to take a receipt and discharge of the mortgage, which plaintiff offered. *Held*, such tender was no bar to an action of ejectment brought on the mortgage. *Holton v. Brown*, 46 D. 148.

A party is not entitled to an abatement of interest on his debt secured by trust deed on the ground of a prior tender, if at the time of such tender he required as a concurring stipulation an impossible condition. *Ross v. Dudley*, 67 D. 231.

A tender sufficient in amount to discharge a mechanic's lien for repair of personal property is not vitiated by a condition that the property shall be delivered up, where the only objection made to the tender was, that the amount was insufficient. *Mognahan v. Moore*, 77 D. 468.

Tender made to procure possession of property can hardly be called conditional because it is accompanied with a demand for the property. *Id.*

A tender of the amount due upon a promissory note secured by a mortgage on real estate, made upon the condition that such mortgage shall be released or canceled, is insufficient. *Storey v. Krenwon*, 23 R. 668.

* Must be unconditional and unqualified, see note, 77 D. 476, 477.

* Keeping the tender good, see note, 77 D. 481, 482.

† Bringing money into court, see note, 77 D. 482, 483.

For Index to Notes in American Decisions and American Reports, see Volume I.

13. Tender of chattels.* — 1. Generally. — A tender of property is not good unless the articles are specifically pointed out, so that their identity can be ascertained. *Bates v. Bates*, 12 D. 572.

A tender of chattels in pursuance of a contract for their delivery, though it discharges the original obligation, and if not accepted, converts the obligor into the bailee of the obligee, does not justify the obligor in abandoning or destroying the property. He must take care of it at the expense and risk of the obligee. *Sheldon v. Skinner*, 21 D. 161.

Where property has been tendered as of a certain value, having been appraised by but one of two appraisers agreed upon by the parties, the tender is not good; both appraisers must act, or the amount in money be tendered. *Lamb v. Lathrop*, 27 D. 174.

Property of a greater value than the debt cannot be tendered, with a demand for the difference; it should be tendered at the amount to be paid, or money should be tendered. *Ib.*

A tender of a specific article must be of such article, in every material respect, as the contract under which it is made requires. *Sharp v. Jones*, 81 D. 359.

2. Time and place of tender. — The time and place at which a delivery or tender of specific chattels may be made must be determined from the nature of the contract. *Sheldon v. Skinner*, 21 D. 161; *Roberts v. Beatty*, 21 D. 410.

The place where cumbersome chattels may be delivered in pursuance of a contract must be ascertained by notifying the obligee, and requesting him to name the place where he will receive them. Delivery must be made at the place designated, unless it is an unreasonable one. *Sheldon v. Skinner*, 21 D. 161.

The place where articles are to be delivered, though not named in the contract, may often be determined from the nature of the transaction, and the situation and business relations of one or of both of the parties. *Ib.*

If no place be fixed, the debtor must seek the creditor, if within the state, and tender performance of the contract. *Roberts v. Beatty*, 21 D. 410.

Portable property, in such a case, must be taken and delivered to the creditor, or at his residence. *Ib.*

Where a contract is payable at a certain time and place, in specific articles, and the debtor is at the place appointed at a seasonable hour before sunset on the day fixed, prepared to make delivery, and the creditor neglects to attend to receive the articles, a tender after sunset will be good. *Avery v. Stewart*, 7 D. 240.

The delivery of portable articles, when the place is not designated in the contract there-

* See note on tender of specific articles, 12 D. 700, 701.

for, must be made at the residence of the obligee. *La Farge v. Rickert*, 21 D. 209. And if the property be ponderous, the debtor must request the creditor, a reasonable time beforehand, to appoint a time and place of delivery. *Roberts v. Beatty*, 21 D. 410; and then deliver them at the place by him designated, if he appoint a reasonable place, and one within the probable contemplation of the parties. The articles tendered must be separated from other articles, so that the promisee can know which to take. *Barns v. Graham*, 15 D. 394.

There can be no tender after the contract is broken, and uncertain damages have accrued. *Roberts v. Beatty*, 21 D. 410.

Tender of specific articles must be made on the day stipulated. *Ib.*

14. Tender of choses in action. — A chose in action against a creditor is not a good tender in payment of a judgment or execution. *Thorp v. Wegfarth*, 93 D. 789.

15. Tender of performance. — A tender of performance, if no place is fixed, may be made to the person. *Bates v. Bates*, 12 D. 572.

Tender by an executor of a deed executed by the testator, in his lifetime, in accordance with a direction in the will, is good. *Rearick v. Swinchart*, 51 D. 540.

A vendor to exempt himself from costs by tender in an action by his vendee for a specific performance, and for damages on account of a diminution in the amount conveyed, must tender the amount owing the vendee on account of the diminution, and also a conveyance of the land. *Walling v. Kinnard*, 60 D. 216.

A demand is liquidated so that tender exempts defendant from costs, where he conveys a tract as containing a certain number of acres at a certain price per acre and the tract falls short of that amount. *Ib.*

The tender of a quitclaim deed, without a release of the dower of the wife of the grantor, is not a sufficient compliance with a contract by which the bargainor agrees to convey the entire estate in the land by a good and sufficient conveyance. *Wright v. Young*, 70 D. 453.

16. Effect of tender, generally. — A tender of specific articles at the time and place appointed by the contract discharges the contract, and vests the property in the creditor, whether he attends to receive it or not. *Barney v. Bliss*, 12 D. 696; *Mitchell v. Merrill*, 18 D. 128. And if the tender is refused, the party tendering becomes the bailee of the party refusing. *Spaw v. Baitwell*, 46 D. 346.

A tender properly made is a satisfaction of the demand; the debt is paid, and the articles tendered become the property of the creditor, and afterwards are kept at his risk and expense. *Lamb v. Lathrop*, 27 D. 174.

The relation of debtor and creditor no

For Index to Notes in American Decisions and American Reports, see Volume L.

longer exists between the parties, but that of trustee and *cestui que trust*, or bailor and bailee. *Ib.*

A tender after suit brought to recover specific property upon which a lien for services is claimed does not entitle plaintiff to his costs, though the tender be of the full amount claimed by defendant, exclusive of costs, and though the sum offered is thereupon accepted. *McIntyre v. Carver*, 37 D. 519.

Tender in the bills or notes of a bank is not treated as a tender of specific articles, and does not discharge the debt. A party pleading such tender must, therefore, plead it with a proferet *in curia*. *Spann v. Ball-sell*, 46 D. 346.

Money tendered in payment of a debt does not, unless accepted, discharge the debtor, or vest title to the same in the creditor. *Stowell v. Read*, 41 D. 714.

A tender in payment of a debt prevents the recovery of costs in an action to enforce the demand. *Ib.*

A tender admits the liability or indebtedness to the amount of the sum tendered. *Frink v. Coe*, 61 D. 141.

A tender of a thing claimed in suit, when made in the course of judicial proceedings and in an unqualified and unrestricted manner, carries with it the presumption which the law attaches to a judicial confession; but when such tender is made, not of the thing claimed, but of something else, with a special reservation of all legal rights, and with the special defense that the thing claimed is not due, and when such tender is not accepted as made, it does not have that conclusive effect. *Davis v. Milaudon*, 87 D. 517.

17. Effect of tender in foreign jurisdiction. — Though one country will not execute the penal laws of another, yet if a person be discharged from a debt by a tender and refusal made in a foreign country by virtue of its laws, he may defend himself elsewhere by relying upon such tender and refusal and the laws under which he was discharged. *Warder v. Arell*, 1 D. 488.

18. Waiver of strict tender. — The positive declaration of one to whom money is to be paid within a certain time, that he will not receive it, will excuse the tender of the money, provided the declaration is made before the expiration of the time. *Dorsey v. Barboe*, 12 D. 296.

A party waives his objection that a tender is made after a breach of a contract to deliver goods, where he refuses to accept the goods solely on the ground that they are not merchantable. *Gould v. Banks*, 24 D. 91.

19. Avoiding or preventing tender. — A suit commenced by a creditor who keeps out of the way to prevent a tender of the amount due him will be stayed upon payment of the amount due, without costs, although a technical right of action existed

at the commencement of the suit. *Noyes v. Clark*, 82 D. 620.

20. Rules of pleading respecting tender. — Tender and refusal in covenant need not be pleaded with an averment of being still ready. Where the time and place are fixed, and the covenantor can discharge the covenant without any concurrent act on the part of the obligee, the plea should be tender, etc., and not "ready to pay." *Mitchell v. Gregory*, 4 D. 655.

A plea of tender should show that the tender was made at the uttermost convenient hour of the day. So on a covenant to deliver whisky at obligor's distillery upon a given day, a plea "that he was ready on the day, but neither plaintiff nor any one on his behalf attended with the vessels to receive it," is bad for want of a statement of the time of the day at which the obligor attended. *Jouett v. Wagon*, 5 D. 602.

A plea of tender of specific articles must state an actual tender; and a plea stating that the debtor had the property ready at the time and place to deliver to the creditor, and there remained throughout the day, but that the creditor did not attend to receive it, and that it is still ready for the creditor if he will receive it, is insufficient. *Barney v. Bliss*, 12 D. 696.

To a declaration upon a note payable in good current bank notes, such as will be received in deposit in two banks named, and such as will pass at par at the time of payment, a plea of tender of such bank notes as would be received in the two banks named, which fails to aver that the notes were of par value, is bad on demurrer. *McNairy v. Bell*, 24 D. 454.

Plea of tender must show an unqualified offer to pay the whole amount, and such plea admits the amount due and a readiness at all times to pay it. *Cary v. Bancroft*, 25 D. 393.

A tender of a note due the defendant from the assignor of the plaintiff, and the balance in money, does not support a plea of tender. *Ib.*

A plea of tender of personalty need not aver that the defendant is still ready to deliver, nor that the tender was made in satisfaction of the debt. *Lamb v. Lathrop*, 27 D. 174.

In an action on a bond payable in notes of a certain bank, a plea of tender which does not aver that the defendants were always ready to pay the said notes from the time of tender, and does not aver that the tender was made on the day of the maturity of the bond, is demurrable. *Lanier v. Trigg*, 45 D. 293.

Plea of tender is not good unless the party bring the money or other thing tendered into court, and thus give his adversary an opportunity to accept it. An exception exists where the thing tendered cannot, owing

TENDER—TESTIMONY.

For Index to Notes in American Decisions and American Reports, see Volume I.

to its weight or bulk, be conveniently brought into court. *Spain v. Baltzell*, 46 D. 346.

Plea of tender and refusal after commencement of the action is no bar, even though the money is brought into court under that plea; but such a plea of refusal, aptly pleaded and in due time, will bar the action and throw upon the plaintiffs the costs of the suit. *Murray v. Windley*, 47 D. 324.

Tender in open court of thing demanded, or its equivalent, is an admission that the thing itself is due, and is inconsistent with an averment that the thing is not due; and a plea of payment or plea of tender is inconsistent with a general denial. *Davis v. Mil-laudon*, 87 D. 517.

21. Rules of evidence. — Evidence that goods tendered were unmerchantable is admissible in rebuttal of proof of a tender in an action for the non-delivery of such goods. *Gould v. Banks*, 24 D. 90.

22. Constitutionality of legal-tender acts. — The act of Congress declaring United States treasury notes a legal tender in the payment of debts is valid and binding. *Johnson v. Levy*, 94 D. 206.

23. Their interpretation and effect. — The acts of Congress called "legal-tender acts" do not merely confer a privilege on debtors for their benefit, but are measures of public policy, and the right under them to pay in any lawful money cannot be waived even by express consent. *Galliano v. Pierre*, 89 D. 643.

Legal damages for a failure to pay a stipulated amount in gold cannot possibly exceed that amount in any lawful currency, under the legal-tender act. *Id.*

The defendant accepted, payable in Boston, a bill of exchange for one hundred pounds, drawn in London. *Held*, that he was liable to pay only at the rate of \$4.84 per pound in treasury notes. *Cary v. Courtenay*, 4 R. 559.

In 1870 the legislature of Vermont authorized the state treasurer to pay, in gold coin, bonds issued before the passage of the "legal-tender" act of Congress, and due in 1871. Subsequently, the supreme court of the United States decided that the legal-tender act applied to debts contracted before as well as after its passage; and the state treasurer refused to pay the bonds in gold coin. *Held*, that the payment of the bonds in gold could not be enforced. *Kellogg v. Page*, 8 R. 383.

The bonds of the state were expressed on their face to be payable in gold and silver coin. The legislature passed a resolution to pay them in legal-tender notes. *Held*, that the court had no power to compel the state officers to make payment in coin. *State v. Hays*, 11 R. 402.

A mortgage was executed before the passage of the legal-tender act. After the decision of the United States supreme court (*Hepburn v. Griswold*, 8 Wall. 606) declaring the act void as to contracts made prior to its

passage, the grantee of the mortgage tendered payment of the mortgage debt in legal-tender notes, which the mortgagee refused. Subsequently the United States supreme court reversed its decision. (*Knox v. Lee*, 12 Wall. 457.) *Held*, that the tender did not discharge the lien of the mortgagee, it being insufficient according to the law as then declared. *Harris v. Jex*, 14 R. 285.

TENURE OF OFFICE.

By justice, see JUSTICE OF THE PEACE, I.
Generally, see OFFICERS, 1-18.

TERM.

Of imprisonment, when begins and ends, see IMPRISONMENT, 3.
Under contract of hiring, see LANDLORD AND TENANT, 51.

TERM OF OFFICE.

Of judge, see JUDGES, 3.
Of president of corporation, see CORPORATIONS, 157.

TERMINATION.

Of attorney's authority, see ATTORNEY AND CLIENT, 25.
Of authority of guardian *ad litem*, see INFANTS, 51.
Of bailment, see BAILMENT, 16.
Of carrier's liability, see CARRIERS, 38.
Of easement of party-wall, see PARTY-WALLS, 7.
Of guardian's authority, see GUARDIAN AND WARD, 7.
Of homestead estate, see HOMESTEAD, II.
Of liability for baggage, see CARRIERS, 82.
Of office, see OFFICERS, 15-18.
Of right to alimony, see MARRIAGE AND DIVORCE, 95.
Of risk in fire insurance, see INSURANCE, 82.
Of risk in marine insurance, see INSURANCE, 134.
Of tenancy, by death, see LANDLORD AND TENANT, 8.
Of term of imprisonment, see IMPRISONMENT, 3.

TESTAMENTARY CAPACITY.

Generally, see WILLS, I.
Of married women, see HUSBAND AND WIFE, 24.

TESTAMENTARY GUARDIAN.

See GUARDIAN AND WARD, 3.

TESTE.

Of execution, see EXECUTION, 2.

TESTIMONY.

Of jurors, to impeach or sustain verdict, see NEW TRIAL, 51, 52, 82.
On probate of will, effect of uncertainty in, see WILLS, 50.

For Index to Notes in American Decisions and American Reports, see VOLUME I.

THEFT.

Liability of carrier for loss of goods by, see EXPRESS COMPANIES, 9.
Purchase of chattel from thief, see SALES, 31.
See also LARCENY.

"THEN AND THERE."

Use of the phrase in indictments, see INDICTMENT, 24.

THREATS.

By accused, on trial for murder, see HOMICIDE, 30.
By deceased, see HOMICIDE, 55.
By person assaulted, see ASSAULT, 23.
Duress by, see DURESS, 3.

TICKETS.

For passage on railroads, effect of, see RAILROAD COMPANIES, 55-57.
In lotteries, indictment for selling, see LOTTERIES, 7.
In lotteries, rights of holders of, see LOTTERIES, 4.
Limitations of liability in, see CARRIERS, 95.
Of passengers, see CARRIERS, 74.

TIMBER.

License to cut, see LICENSE, 5.
Right to, as affected by mortgage, see MORTGAGES, 37.

TIME.

Allegation of, in indictment, see HOMICIDE, 19.
Giving further, to principal, when discharges surety, see SURETSHIP, 31-37.
Lapse of, effect of, in equity, see LIMITATIONS OF ACTIONS, 57.
Lapse of, when bars action, see LIMITATIONS OF ACTIONS, III.
Of birth or death, proof of, by hearsay, see EVIDENCE, 68.
Of commission of offense, stating, in indictment, see INDICTMENT, 23.
Of death, stating, in indictment for murder, see HOMICIDE, 22.
Of delivery by carrier, see CARRIERS, 47.
Of delivery of goods sold, see SALES, 34.
Of deposit of notice in mail, see BILLS AND NOTES, 201.
Of entry of judgment, see JUDGMENT, 11.
Of imprisonment, designating, in sentence, see TRIAL, 215.
Of laying assessment of taxes, see TAXES, 33.
Of making execution levy, see EXECUTION, 47.
Of objecting for defect of parties, see PARTIES, 14.
Of payment, filling in, when left blank, see BILLS AND NOTES, 20.
Of payment of legacy, see LEGACIES, 27.
Of performance of contract, see CONTRACTS, 121.
Of service of process, see PROCESS, 14, 25.

Of taking deposition by commission, see DEPOSITIONS, 13.
Time policies of marine insurance, see INSURANCE, 97.
To challenge jurors, see TRIAL, 29, 151.
To demand payment of bill or note, see BILLS AND NOTES, 161-169.
To demand payment of check, see CHECKS, 14.
To elect between dower and will, see DOWER, 35.
To enforce individual liability of stockholder, see CORPORATIONS, 84.
To except, see APPEAL, 78.
To file mechanic's lien, see MECHANIC'S LIEN, 18.
To give notice of assignment to debtor, see ASSIGNMENT, 34.
To give notice of dishonor, see BILLS AND NOTES, 186-190.
To interpose plea in equity, see PLEADING, 71.
To issue *A. fa.*, see EXECUTION, 14.
To make payment, see PAYMENT, 6.
To make tender, see TENDER, 8.
To move for injunction, see INJUNCTION, 39.
To move for new trial, see NEW TRIAL, 47.
To move to dissolve injunction, see INJUNCTION, 51.
To move to vacate judgment, see JUDGMENT, 125.
To notify opposite party to produce best evidence, see EVIDENCE, 55.
To object to the jurisdiction, see JURISDICTION, 13.
To offer to abandon to underwriters, see INSURANCE, 153.
To pass sentence on convicted felon, see TRIAL, 213.
To perform contract, extension of, see CONTRACTS, 137.
To plead, see PLEADING, 165.
To plead in abatement, see ABATEMENT, 12.
To plead, in actions at law, see PLEADING, 22.
To plead statute of limitations, see LIMITATIONS OF ACTIONS, 16.
To present bill of exceptions, see APPEAL, 96.
To present claim for loss, to carrier, see EXPRESS COMPANIES, 16.
To present claims against decedent's estate, see EXECUTORS, etc., 91.
To probate will, see WILLS, 40.
To redeem from execution sale, see EXECUTION, 148.
To redeem from mortgage, see MORTGAGES, 124.
To redeem from tax sale, see TAXES, 57.
To sue for dower, see DOWER, 45.
To sue on insurance policy, see INSURANCE, 183, 184.
To take an appeal, see APPEAL, 77.
To take objections, see TRIAL, 53, 54.
What allowed counsel for argument, see TRIAL, 173.

For Index to Notes in American Decisions and American Reports, see Volume I.

When a statute takes effect, see STATUTES, 9.
 When a treaty takes effect, see TREATIES, 1.
 When bill or note is payable, see BILLS AND NOTES, 10.
 When equitable conversion takes effect, see WILLS, 91.
 When of the essence of a contract, see CONTRACTS, 76; SPECIFIC PERFORMANCE, 27.
 When right to sue arises on bill or note, see BILLS AND NOTES, 256, 257.
 Within which to sue for seduction, see SEDUCTION, 2.

1. Rules for computing time, generally.*—From the day of the date, and from the date, signifying the same thing, and may either include or exclude the day, according to the intent. *Houser v. Reynolds*, 1 D. 551; *Smith v. Cassidy*, 48 D. 420; unless a different intention is manifested by the instrument or statute under which the question arises. *Bemis v. Leonard*, 19 R. 470. This rule applies to every instrument or contract, and also to the construction of statutes and all proceedings under them. *Weeks v. Hall*, 50 D. 249. So where mortgaged premises have been sold at foreclosure sale on a certain day, the redemptioner has until the last moment of the same day of the succeeding year in which to redeem. *Teucher v. Hiett*, 92 D. 440.

Whenever a forfeiture would be incurred by including "the day of the date," or "an act done," it will be excluded in the computation; and whether such day is to be included or excluded is to be determined according to the intention of the parties, so as to effectuate their deeds, and not to destroy them. *Williamson v. Farrow*, 21 D. 492.

In the computation of time from a certain day, it is a general principle that the time will be so computed as to save the right intended to be favored by the law, or to be secured by the parties to a contract, by including or excluding the first day. *Jones v. Planters' Bank*, 42 D. 471.

A month referred to without designation of year will be understood to be of the current year, unless from the connection it is apparent that another year is intended. A writ, therefore, made in February, returnable at the court to be held on the fourth Tuesday of April will be understood as returnable on the fourth Tuesday of April next. *Kelly v. Gilman*, 61 D. 645.

2. Statutory limitations of time within which acts must be done.—If, in a statute, time is to be computed from the doing of an act, the day on which it is done is excluded from the computation. *Ex parte Dean*, 14 D. 521; *McCulloch v. Hopper*, 54 R. 146; *Owen v. Slatter*, 62 D. 745.

Under a statute requiring the copy of the writ and of the return of the attachment to

*Time within which act is to be done, how computed, see notes, 7 D. 260, 261; 46 R. 410-416.

be deposited in the town clerk's office "any time within three days thereafter," the day of the attachment is to be excluded. *Bemis v. Leonard*, 19 R. 470.

The statute of 21 Henry III. concerning leap-year makes no provision as to how the 28th and 29th of February shall be counted in computing a number of days less than a year; the 29th of February is an independent day in such computations; and so service of a summons on the 25th of February for a term commencing March 6th is a valid ten days' notice. *Helphenstine v. Vincennes Nat. Bank*, 32 R. 86.

In computing time under the statute of distributions, it is the practice of American courts to include one day and exclude the other, except when the statute requires so many entire days to intervene, in which case both are excluded. *Owen v. Slatter*, 62 D. 745.

In computing the time allowed to do an act, intervening Sundays are included; but if the day of performance falls on Sunday, it is not counted, and the party is entitled to perform the act on the Monday following. *Salter v. Burt*, 33 D. 530; *Cressey v. Paris*, 46 R. 406.

Where the last day for the performance of an act by statute falls on Sunday, it may be done on the next day. *Edmundson v. Wrapp*, 49 R. 590.

3. Rule that fractions of a day are not regarded.*—Fictions of law are resorted to only for the purpose of attaining justice, and will never be allowed to prevail over the real facts, where such allowance will work a wrong. *Murfree v. Carmack*, 26 D. 232.

In the computation of time, the law does not know the fractions of a day. *Fears v. Merrill*, 50 D. 226; unless for the purpose of giving effect to a right which would otherwise be defeated. *Williamson v. Farrow*, 21 D. 492; *Craig v. Godfrey*, 54 D. 299. So where two persons claim the same tract of land from a common source, by different conveyances, executed on the same day, the time of day such conveyances were executed may be proved, for the purpose of showing who has the better right. *Murfree v. Carmack*, 26 D. 232. S. F., *Knowlton v. Culver*, 52 D. 156; *Motts v. Bright*, 32 D. 683.

Where in ejectment a plaintiff claims title under a judgment dated a certain day, and defendant by deed from the judgment debtor executed on the same day, and there is no proof that the lien of the judgment attached prior to the execution of the deed, the defendant must prevail. *Murfree v. Carmack*, 26 D. 232.

4. When "month" means a lunar month, and when a calendar month.—In cases of bills of exchange and promissory

*Fractions of a day, when will be considered, see note, 36 D. 224-226.

For Index to Notes in American Decisions and American Reports, see Volume 1.

notes, time is calculated by calendar and not by lunar months. *Leffingwell v. White*, 1 D. 87.

In statutes and judicial proceedings the word "month" means a calendar month; and it should be so construed in contracts, unless it appears that the parties intended a lunar month. *Williamson v. Farrow*, 21 D. 492.

The word "month" and the words "thirty days" are synonymous terms in the general railroad law of Indiana. *Heaston v. Cincinnati etc. R. R. Co.*, 79 D. 430.

5. Meaning of the word "day."—Under a statute authorizing the filing of a certain paper in the clerk's office within a specified number of days, the paper need not be filed within the hours appointed by law for keeping the office open, but may be filed after the expiration of those hours at any time up to midnight of the last day. *Zimmerman v. Cowan*, 47 R. 476.

TIME POLICIES.

Warranty of seaworthiness in, see **INSURANCE**, 110.

TITLE.

Acquirement of, by adverse possession, see **ADVERSE POSSESSION**.

Acquisition of, by general government, see **PUBLIC LANDS**, 1.

Action by vendee for defects in, see **VENDOR AND PURCHASER**, 68.

Compelling purchaser to take, see **PARTITION**, 29.

Conclusiveness of judgment as to, see **JUDGMENT**, 70.

Declarations relative to, see **EVIDENCE**, 151-155.

Discontinuance on plea of, see **JUSTICE OF THE PEACE**, 10.

Disputed, effect on jurisdiction, see **PARTITION**, 7.

Effect of bill of lading to pass, see **BILLS OF LADING**, 3, 4, 16.

Effect of inability to give, on right to performance, see **SPECIFIC PERFORMANCE**, 26.

Effect of judgment to transfer, see **TROVER**, 22.

Effect of raising question of, see **FORCEFUL ENTRY**, 12.

How proved, see **EVIDENCE**, 259.

In third person, when a defense, see **EJECTMENT**, 14; **TRESPASS**, 19.

Necessity of sheriff's deed to complete, see **EXECUTION**, 128.

Of assignee for creditors, see **ASSIGNMENTS**, etc., 38.

Of assignee in bankruptcy, see **BANKRUPTCY**, 14, 15.

Of assignee of mortgage, see **MORTGAGES**, 64.

Of buyer of chattels, see **SALES**, 26.

Of claimant to property levied on, trial of, see **EXECUTION**, 191.

Of complainant seeking removal of cloud, see **CLOUD ON TITLE**, 11.

Of landlord, tenant estopped to deny, see **LANDLORD AND TENANT**, 10-12.

Of personal representative, see **EXECUTORS AND ADMINISTRATORS**, 40, 41.

Of plaintiff as legal holder, averments as to, see **BILLS AND NOTES**, 270, 274; evidence to prove, see **BILLS AND NOTES**, 277, 278; to disprove, see **BILLS AND NOTES**, 292.

Of purchaser at foreclosure sale, see **MORTGAGES**, 103.

Of purchaser from thief, see **BONDS**, 25.

Of receivers, see **RECEIVERS**, 9.

Of the states, to public lands, see **PUBLIC LANDS**, 2.

Of vendor, when purchaser may dispute, see **VENDOR AND PURCHASER**, 24.

Passing, by indorsement, see **BILLS AND NOTES**, 93-111.

Presumptions as to, see **EVIDENCE**, 36.

Proceedings to acquire, for railroad, see **RAILROAD COMPANIES**, 22.

Proof of, by hearsay, see **EVIDENCE**, 67.

Purchase from one not having, see **SALES**, 30, 31.

Purchase of hostile, by vendor, see **VENDOR AND PURCHASER**, 26.

Reference to, in construing statutes, see **STATUTES**, 42.

Remedies of purchaser for defects in, see **VENDOR AND PURCHASER**, 27.

Slander of, see **SLANDER**, IV.

Statutes embracing subjects not expressed in, see **STATUTES**, 26.

To bed of a stream, or flats, see **RIPARIAN RIGHTS**, 3-5.

To burial plots, see **CEMETERIES**, 3.

To goods, as between principal and factor, see **FACTORS**, 6.

To goods sold, when passes, see **SALES**, 53-62.

To insured property, effect of change of, see **INSURANCE**, 59, 60.

To land, effect of war on transfers of, see **WAR**, 32.

To land set apart for a highway, see **HIGHWAYS**, 7.

To mining lands, see **MINES AND MINING**, 1.

To mortgaged premises, see **MORTGAGES**, 24.

To office, *mandamus* to determine, see **MANDAMUS**, 16.

To office, proceedings to try, see **OFFICERS**, 13; **QUO WARRANTO**, 5.

To office, when determined by injunction, see **INJUNCTION**, 32.

To personal chattels, see **PERSONAL PROPERTY**, 2.

To real property, see **REAL PROPERTY**, 2-7.

To stream, by adverse possession, see **WATERCOURSES**, 5.

To subject-matter mortgaged, see **CHATTEL MORTGAGES**, 17.

To support action for trespass on land, see **TRESPASS**, 14, 15.

To support trespass *de bonis*, see **TRESPASS**, 30.

To vessels, see **SHIPPING**, 1.

For Index to Notes in American Decisions and American Reports, see VOLUME I.

Trespass to try, see **TRESPASS**, 45-47.
 Trial of question of, see **REPLEVIN**, 23.
 Warranty of, see **SALES**, 70.
 What adverse possession will give, see **LIMITATIONS OF ACTIONS**, 50, 51.
 What may be acquired for right of way, see **RAILROAD COMPANIES**, 17.
 What necessary in demandant, see **RIGHT (WRIT OF)**, 1.
 What necessary to maintain replevin, see **REPLEVIN**, 10.
 What necessary to support trover, see **TROVER**, 4.
 What passes, at execution sale, see **EXECUTION**, 106.
 What passes, at judicial sale, see **JUDICIAL SALE**, 11.
 What passes, at sale of land for payment of debts, see **EXECUTORS**, etc., 120.
 What passes, at tax sale, see **TAXES**, 53, 54.
 What passes, by assignment, see **ASSIGNMENT**, 22.
 What passes, by legacy, see **LEGACIES**, 5.
 What purchaser will be compelled to accept, see **SPECIFIC PERFORMANCE**, 43; **VENDOR AND PURCHASER**, 66.
 What will pass, by grant, see **GRANTS**, 6.
 What will support ejectment, see **EJECTMENT**, 4-8.
 When covenants pass, by estoppel, see **ESTOPPEL**, 31.

TOLLS.

On canals, see **CANALS**, 3.
 On ferries, see **FERRIES**, 6.
 On street-railroads, see **RAILROAD COMPANIES**, 118.
 Right of railroad company to, see **RAILROAD COMPANIES**, 52.
 Right to erect toll-gates, see **TURNPIKE COMPANIES**, 5.
 Toll-bridges, see **BRIDGES**, 11.

TOOLS.

Exemption of, from attachment or levy, see **ATTACHMENT**, 41; **EXECUTION**, 158, 159.

TORNADOES.

Insurance against, see **INSURANCE**, 82.

TORTS.

Complaints in actions for, see **PLEADING**, 97.
 Of child, liability of parent for, see **PARENT AND CHILD**, 12.
 Waiving, and suing in *assumpsit*, see **ASSUMPSIT**, 17, 18.
 When claims arising out of, constitute a counterclaim, see **SET-OFF**, 37.

TOTAL LOSS.

Abandonment of vessel for, see **INSURANCE**, 152.
 Adjustment of, in marine insurance, see **INSURANCE**, 163.
 What is, in marine insurance, see **INSURANCE**, 144-146.

TOWAGE.

Contracts for, see **SHIPPING**, 23.

TOWNS.

[Includes the organization of towns; the corporate powers of towns and town officers; town meetings; township taxes and bonds; and matters relative to township roads and highways.]

Competency of inhabitants of, as witnesses, see **WITNESSES**, 43.
 Effect of changes in, on settlements of paupers, see **POOR**, etc., 7.
 Liability of, for defects in highways, see **HIGHWAYS**, 33-35.
 Liability of, for highway obstructions, see **HIGHWAYS**, 39.
 Recovery over by, against one who obstructs highway, see **HIGHWAYS**, 40.
 Rights and liabilities of, in respect to paupers, see **POOR**, etc., 2, 3.
 See **MUNICIPAL CORPORATIONS**.

1. What is a town. — The power to elect representatives without classification is, under constitution of New Hampshire, confined to towns; viz., those places having one hundred and fifty ratable polls, or places with town privileges, which are really towns. No others have such power. *Bow v. Allentown*, 69 D. 489.

A legislative annexation of other territory to a town will make it part of the town in future, even if it was not a town before. *Id.*

Towns only are authorized to draw jurors, and fact that a place was required by the courts to return jurors, and that jurors were drawn and returned to the courts, is evidence that the place was reputed to be a town and assumed to act as such. *Id.*

Evidence tending to prove the existence of a town by a prescriptive right is also evidence proper to be weighed in the attempt to establish its existence by reputation. *Id.*

Places exercising town privileges are towns by implication. *Id.*

Powers of unincorporated places under constitution and laws of New Hampshire pointed out, and the gradual approximation of the condition and powers of such places to those of towns shown. *Id.*

2. Powers of legislature respecting towns. — The legislature has power to restrain, modify, enlarge, or change public corporations which exist for public purposes alone, like counties, cities, and towns, provided, however, that property owed by such corporations shall be secured for the use of those having an interest in it, or for whose benefit it was acquired. *North Yarmouth v. Skilling*, 71 D. 530.

An act of the legislature authorizing a town to raise by tax a sum of money for the use and benefit of a private educational institution is unconstitutional and void. *Curtis v. Whipple*, 1 R. 187.

The fact that an educational institution is

For Index to Notes in American Decisions and American Reports, see Volume I.

incorporated does not render it public, so far as relates to the power of taxation for its aid. *Ib.*

The legislature cannot constitutionally authorize a town to loan its credit to persons who will, in consideration thereof, maintain a manufacturing enterprise in the town for their own private emolument. *Allen v. Inhab. of Jay*, 11 R. 185.

3. Incorporation and organization.* — An act of incorporation cannot be proved by evidence that a place has been classed for the choice of a representative; because unincorporated places are usually classed for that purpose. *Bow v. Allentown*, 69 D. 489.

The incorporation of a town may be proved by representation, legislative grants necessarily implying a town corporation, or by claim and user of the corporate powers of a town with the knowledge and assent of the legislature, and without objection or interruption for a period long enough to furnish evidence of a prescriptive right, where no charter or act of incorporation of the place as a town can be found. *Ib.*

A new charter does not extinguish old privileges; and an act of incorporation does not raise any conclusive presumption that the town thus incorporated was not a corporate town before the act was passed. It is evidence to be weighed by the jury. *Ib.*

4. Divisions of towns. — On the division of a town by the legislature, and incorporation into a new town of part of its territory, with the inhabitants thereon, the old town will retain all the property and be responsible for the existing liabilities, unless there is some legislative provision to the contrary. *North Yarmouth v. Skillings*, 71 D. 530.

The legislature, on division of a town, has the constitutional authority to provide that the property owned by the original town shall be appropriated or held for the use and enjoyment of the inhabitants of both towns, and to impose upon each town the payment of a share of the corporate debts. *Ib.*

Where a town holds property in trust for the use of all the inhabitants, the legislature, on division of a town, may provide that the original town shall still hold such property in trust for inhabitants of the old town, and of the new town created by such division. *Ib.*

Whether the legislature by dividing a town and failing to provide in regard to trust property could deprive part of the inhabitants of their accustomed use of it, *quære*. *Ib.*

If a portion of the tract known as "Sargent's Purchase" had been annexed by the legislature to the town of Jackson, what remained would constitute "Sargent's Purchase," and be liable for the proportion of

*To what extent towns are corporations, see note, 62 D. 123-125.

taxes assigned to that location. *Wells v. Jackson I. M. Co.*, 90 D. 575.

When a town is divided and a new town created out of a part of the territory, the latter is not bound to contribute toward the payment of debts contracted before the division, in the absence of any statute to that effect. *Town of Depere v. Town of Bellevue*, 11 R. 602.

5. Altering boundaries. — The record of an adjudication of the court of sessions, establishing the boundary line between two towns, cannot be given in evidence as to the original line between the townships, in an action between private land-owners. *Lawrence v. Haynes*, 20 D. 554.

The perambulations of the line made by selectmen of the two towns may be given in evidence in such an action. *Ib.*

A town is a civil division composed of contiguous territory; and under constitutional powers to county boards to change town boundaries, a town cannot be made to consist of two tracts not contiguous. *Chicago etc. Ry. Co. v. Town of Oconto*, 36 R. 840.

6. Powers of towns, generally. — A town may, by vote, release a debt as well as contract one. *Ford v. Clough*, 23 D. 513.

Powers of unincorporated places under the constitution and laws of New Hampshire pointed out, and the gradual approximation of the condition and powers of such places to those of towns shown. *Bow v. Allentown*, 69 D. 489.

The trustees of a town have implied power to employ counsel to defend the marshal against an action of false imprisonment brought by one arrested by him for violation of a town ordinance. *Cullen v. Town of Carthage*, 53 R. 504.

7. Township taxes. — Towns are not responsible for errors or wrongful acts of assessors and collectors of taxes in assessing and collecting excessive or unauthorized taxes. *Lorillard v. Town of Monroe*, 62 D. 120.

A town cannot raise by taxation or by pledge of its credit, or pay from its treasury money for the expenses of a committee directed by a vote of the town to petition the legislature for the annexation of the town to another town. *Minot v. Inhab. of West Roxbury*, 17 R. 52.

8. By-laws and ordinances. — A town cannot by its by-laws confer authority upon its officers to make sales of impounded animals, except for penalties incurred and the costs of the proceedings, under the Illinois act of 1861, empowering the electors of towns at their annual town meetings to restrain or prohibit the running at large of certain animals, and to authorize the detaining, impounding, and sale of the same for penalties incurred and the cost of the proceedings. *Poppen v. Holmes*, 92 D. 186.

To ascertain whether a penalty has been

For Index to Notes in American Decisions and American Reports, see Volume I.

incurred is a proceeding purely judicial in its character, and the power cannot be exercised by the pound-master by virtue of his office, under the Illinois act of 1861 empowering the electors of towns at their annual town meetings to restrain or prohibit the running at large of certain animals, and to authorize the distraining, impounding, and sale of the same for penalties incurred and the cost of the proceedings. *Id.*

A town cannot by its by-laws authorize a pound-master to sell property without a judicial ascertainment that some law has been violated. *Id.*

A town having passed an ordinance requiring a certain license fee, the legality of which was questioned, its trustees orally agreed, at a regular meeting, with a person required to take such a license, that if he would pay the fee they would record an agreement to refund it if the ordinance should be adjudged illegal. He accordingly paid the fee, and the agreement was subsequently recorded. The ordinance was afterward adjudged invalid. *Held*, that he could recover the fee. *Columbia City v. Anthes*, 43 R. 90.

9. Township officers. — Township officers are not personally liable for acts done honestly, in the exercise of the discretion which the law gives them, even though that discretion be exercised so mistakenly as to work an injury to private property or private individuals; but they are liable if they act maliciously or wantonly, and if the work which they perform is done rather to injure an individual than to discharge a public duty. *Yealy v. Fink*, 82 D. 556.

A town may, out of moneys raised for town purposes, indemnify its officers for reasonable expenses incurred by them in or through the *bona fide* discharge of their duties. *State v. Council*, 20 R. 404.

The trustees of a town possess only such powers as are specifically conferred by the act of incorporation, or are necessary to carry into effect the powers expressly granted; and if they transcend the authority so conferred, their acts are not binding upon the town or third persons. *Petersburg v. Mappin*, 56 D. 501.

The authority of town selectmen is no more a personal trust than that of an administrator, a conservator, or a guardian, — all of whom may submit matters within their charge to arbitration. *Hine v. Stephens*, 89 D. 217.

The trustees of town may sue and be sued, and take all steps necessary to assert and secure the rights of the corporation. *Petersburg v. Mappin*, 56 D. 501; *Hine v. Stephens*, 89 D. 217.

The court in this case was inclined to hold that the selectmen of a town have power, without special authority from it, to submit to arbitration a claim against the

town for damages. *Hine v. Stephens*, 89 D. 217.

The power of trustees of a town to prosecute and defend suits on behalf of the corporation includes the power to compromise the same; and a settlement of an existing controversy, if made in good faith, binds the corporation, though if collusive it is not obligatory. *Petersburg v. Mappin*, 56 D. 501.

A mere error in judgment will not vitiate a settlement of the controversy by trustees of a town in behalf of the corporation, if made in good faith. *Id.*

The selectmen of a town, in the performance of a duty imposed upon them by statute, employed a person as nurse in a small-pox hospital established by the town, and suffered him to depart without being properly disinfected, whereby plaintiff caught the disease. *Held*, that the town was not liable. *Brown v. Finkelhaven*, 20 R. 709.

An order for goods, signed by township trustees, with the addition of their official description, but purporting in the body to be their personal contract, the contract not being such as the town could legally make, binds the signers individually. *Revolving Scraper Co. v. Tuttle*, 47 R. 816.

Where a county physician refuses to treat a person in urgent need of medical attendance, a township trustee has authority to employ another; and his declarations concerning payment are competent. *Washburn v. Shelby County*, 54 R. 332.

The neglect of a town clerk to index a record furnishes no cause of action, under a statute making the town liable for damages accruing to any person from the neglect of the town clerk, unless it is the cause of the alleged injury, which must not result from the plaintiff's want of diligence; therefore it gives no right of action to one who never examined the records, and was therefore not misled by the omission. *Lyman v. Edgerton*, 70 D. 415.

The false representations of a town clerk as to records in his office will not give right of action against town, under a statute making the town liable for the neglect of the town clerk; but to hold the town liable for a defect in the records, the plaintiff must either examine the records, or prove a refusal of the clerk to permit him to do so upon request. *Id.*

An excuse for making a request is not provable under an allegation of refusal of the town clerk to show the records upon request. *Id.*

The request to a town clerk to show records is not proved by testimony that the plaintiff asked the clerk if there was any claim upon the property, and that he made the inquiry to avoid an examination of the records. *Id.*

The statements of a town clerk respect-

For Index to Notes in American Decisions and American Reports, see Volume 2.

ing records in his office are not official acts; and if false, the town is not liable for the injury accruing therefrom, under a statute making the town liable for the neglect or default of the town clerk. *Ib.*

The neglect of a town clerk, whether fraudulent or not, to disclose existence of encumbrance upon premises to purchaser is not an official neglect for which the town is liable by statute. *Ib.*

A town treasurer and collector is not excused from failure to pay over money collected by him by its loss, through theft, without his fault. *Hancock v. Hazard*, 59 D. 171.

The surety of a township treasurer is not bound by a settlement of the treasurer's accounts with the town by the treasurer's deputy without the treasurer's knowledge, the treasurer being charged by the town clerk in the account upon which the settlement was based, with moneys which his predecessor never paid over. *Rice v. Sidney*, 38 R. 227.

A committee of a town, executing a contract in their individual names, therein describing themselves as a committee of the town of W., and stipulating that "said committee are to pay," etc., are personally answerable on the contract. *Simonds v. Heard*, 34 D. 41.

Where the committee of a town contracted with one to clear land belonging to the town, for a municipal purpose, and the contractor, in doing the work, was guilty of negligence, injuring the plaintiff, — held, that the members of the committee were not individually liable; but, *quære*, Would the town be liable? *Wright v. Holbrook*, 13 R. 12.

10. Town meetings, how called. — The manner of warning a town meeting is not prescribed by any statute. *Ford v. Clough*, 23 D. 513.

A meeting will be presumed to have been legally called if the inhabitants assemble at the time and place appointed, and proceed to act under the warrant. *Ib.*

That a constable's return on a warrant for a town meeting is dated on the day of the meeting is no objection to the legality of such meeting. *Ib.*

A warrant calling two town meetings on the same day at the same place is not illegal, if the objects of the meetings respectively, and the qualifications of voters thereat, are distinctly specified. *Ib.*

A public notice of the time and place of meeting must be given; and a meeting cannot be adjourned by the few townsmen present to a distant part of the town on the same evening, of which time and place of adjournment other townsmen subsequently arriving receive no notice. *Chamberlain v. Dover*, 29 D. 517.

Where no return has been made on a

warrant calling a town meeting, the court may, upon satisfactory evidence, permit the selectmen who ought to have made the return to supply the omission, and the town clerk for that year to amend his record accordingly. *Bean v. Thompson*, 49 D. 154.

11. — how conducted, validity, etc. — An action on the case will not lie against the moderator of a town meeting for rejecting the vote of a qualified elector, without proof of malice or improper motives. *Wheeler v. Patterson*, 8 D. 41.

A town meeting may vote money for parochial purposes, notwithstanding the parish act of 1821; and may raise money to build a bridge, under an article in the warrant calling the meeting, authorizing it "to see what measures the town will take to build" such bridge. *Ford v. Clough*, 23 D. 513.

A town clerk may, while he remains in office, amend the records of town meetings, to conform to the truth. *Chamberlain v. Dover*, 29 D. 517.

The acts of the majority present at town meetings bind not only the minority, but all who are absent. *Ib.*

A town meeting must be held at the place appointed. A meeting to be held at a school-house must be held within its walls. *Ib.*

A meeting fairly organized possesses the incidental power of adjournment to a future time; but an adjourned meeting must be from a regular meeting valid as to time and place. *Ib.*

Where the record shows that the meeting was not at the place appointed, testimony is admissible to show that an irregular meeting was held at another place, and what was there done. *Ib.*

The reconsideration at a regular meeting of acts done at a previous irregular meeting cannot be construed as a ratification of such acts. *Ib.*

12. Liability on township bonds. — Town bonds issued pursuant to a law not yet in force for want of publication are without authority of law and void. *Town of Rochester v. Alfred Bank*, 30 D. 746.

Town supervisors cannot, of themselves, give validity to void bonds, where the assent of the people of the town is required to enable them to issue such bonds. *Ib.*

A statute authorized towns to issue bonds to raise money "for the purpose of providing the destitute citizens of such townships with provisions and with grain for seed and feed," — the object being to relieve farmers whose crops had been destroyed. Held, unconstitutional, as not being for a public purpose. *State v. Osaueke Township*, 19 R. 99.

13. — on subscriptions to railroads. — The trustees of a town are not entitled to the affirmative relief of rescission of a contract of subscription to stock of a railroad company, and of the cancellation of the

For Index to Notes in American Decisions and American Reports, see Volume I.

bonds issued by them in payment for the stock, on the ground that the subscription was made and the bonds issued under a misapprehension or misconstruction of, and not in accordance with, the statute authorizing these acts, where the bonds have been delivered to the company, and assigned by them, and the interest accruing thereon has been paid for several years without objection, and there is no charge of fraud against the defendants; though the illegality of the bonds might be available and effectual as a defense against any holder. *Goshen v. Shoemaker*, 80 D. 386.

A mandatory statute requiring a town to become a stockholder in a railroad, by exchanging its bonds for stock upon terms prescribed by the statute, and without its consent, is unconstitutional. *People v. Batchelor*, 13 R. 480.

An act of the legislature authorizing towns to appropriate money as a donation, to aid in the construction of a railroad, is constitutional. *Chicago etc. R. R. Co. v. Smith*, 14 R. 99.

Under an act of the legislature the town of H. was authorized to loan its credits to a railway. A vote was directed to be taken, and other acts done, which the selectmen were to certify to the town treasurer, who was to issue the bonds. *Held*, that the issue by the treasurer, of the bonds signed by the selectmen, was conclusive on the question of their validity in the hands of an innocent purchaser for value without notice. *Deming v. Houlton*, 18 R. 253.

14. Duties and liabilities in respect to construction of roads and bridges. — The committee of a town appointed to rebuild a bridge has authority to enter into all contracts necessary to accomplish that purpose, including the borrowing of money. *Simonds v. Heard*, 34 D. 41.

The duty of making and repairing highways is imposed upon towns, and the town acquires a qualified interest in a highway constructed by it, distinct from the right of way, of passing and repassing, and of making and repairing the road, acquired by the public. *Troy v. Cheshire R. R. Co.*, 55 D. 177.

Township supervisors are not personally liable for building a causeway instead of a bridge, in laying out a road across a stream, thereby injuring a mill-owner below, unless they acted with a malicious design to do the mill-owner injury, or with such a reckless and wanton disregard of his interests as would be equivalent to malicious intent. *Yeaty v. Fink*, 82 D. 556.

A jury may properly inquire whether an injury was committed by a joint act of the supervisors of adjoining townships, in erecting a causeway across a stream. The erection of the causeway was one act, though parts of it were built at different times and by different defendants. *Id.*

The want of malicious intent in building a causeway instead of a bridge may be shown by a township supervisor in an action against him for an injury caused thereby, by evidence that before the work was commenced he had received a message from a supervisor of an adjoining township that the latter would not join in building a bridge, because the people of his township were opposed to it. *Id.*

In an action by contractors for services performed in changing the route of a public road by direction of the supervisors, it appeared that the supervisors had no authority to change the route, but that the contractors had no knowledge of this want of authority. *Held*, that the town was liable. It seems that the town has a remedy over against the supervisors. *Cook v. Deerfield Township*, 3 R. 605.

15. — and in repairing them. — A town is bound to repair highways within its bounds at the expense of the inhabitants. *Bancroft v. Lynnfield*, 29 D. 623.

A town may indemnify a surveyor or other officer against liability incurred in the *bona fide* though mistaken discharge of the duty of the town to repair highways. *Id.*

A town having appointed a committee to defend an action brought against a surveyor for digging a ditch to improve a highway, or for the purpose of having the bounds of the highway legally determined, is liable for the expenses and services of the committee in discharging that duty. *Id.*

Towns are not liable for damages caused by the non-repair of bridges and highways, being, like counties, *quasi* corporations, whose corporate powers and functions are conferred without their solicitation, for the benefit, not of themselves, but of the public at large. *Commissioners v. Martin*, 69 D. 333.

Towns cannot be indirectly subjected to liability for damages for non-repair of bridges and highways, by a suit, under the Michigan Revised Statutes, chapter 119, against the commissioners of highways; this chapter does not authorize any action to be brought against township officers, by their name of office, except for acts done, or upon contracts made by them while acting within the scope of their official duty and authority. *Id.*

16. Liability for injuries caused by obstructions and defects in roads. — A town is not required to keep the entire surface between the fences of a highway free from snow-drifts, nor to clear the drifts from the track usually traveled in the summer; but it is sufficient if there is a reasonably safe and convenient path anywhere within the limits. *Seeley v. Litchfield*, 44 R. 213.

The custom of the inhabitants of Connecticut towns to join and break paths through the snow in highways is ancient, general, and

For Index to Notes in American Decisions and American Reports, see Volume I.

reasonable, and excuses the selectmen from action in ordinary cases. *Ib.*

17. Action over, by town. — For an injury to the streets, the president and trustees of an incorporated town have not such a possession as will enable them to maintain an action of trespass *quare clausum fregit*. *Conner v. New Albany*, 12 D. 207.

A person guilty of negligence, whereby a street is left in a dangerous condition, and the town subjected to an action and judgment for injuries suffered, cannot avoid a recovery by the town on the ground that its officers and agents were also negligent in not replacing the barriers which such person had negligently failed to replace. *Lowell v. Boston & L. R. R. Co.*, 34 D. 33.

A town may maintain an action against a person injuring a highway by destroying a bridge which the town erected, and which it is bound to maintain, and recover all such damages as are sustained by the wrongful act. *Troy v. Cheshire R. R. Co.*, 55 D. 177.

TOWNSHIP TAXES.

See TOWNS, 7.

TRADE.

Course of, when judicially noticed, see EVIDENCE, 19.

Obnoxious to health or comfort, see NUISANCE, 7, 8.

Persons skilled in particular, as experts, see WITNESSES, 137.

Taxation of, see TAXES, 18.

Warranty against unlawful, in marine policy, see INSURANCE, 113.

What are fixtures of, see FIXTURES, 13.

TRADITION.

When admissible as evidence, see EVIDENCE, 64.

TRADE-MARKS.

[Includes the validity and protection accorded to trade-marks; what constitutes infringement; the remedy by injunction; and the measure of damages in trade-mark cases.]

1. Construction of statutes. — Right of property in a trade-mark is recognized by common law, and does not in any manner depend for its inceptive existence or support upon statutory law, although its exercise may be limited or controlled by statute. *Derringer v. Plate*, 87 D. 170.

Right of property in a trade-mark is not limited in its enjoyment, by territorial bounds, but may be asserted and maintained wherever the common law affords remedies for wrongs, subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property. *Ib.*

The California act of 1863 concerning trade-marks does not take away the common-law remedy for the protection thereof

from those who do not register their trade-mark according to the provisions of the act. *Ib.*

By the term "peculiar name, letters, marks, devices, figures, or other trade-mark or name," as used in the statute, is meant, not the proper and established names by which the "articles" are known in the market, nor something indicating their actual kind, character, or quality, but something new, of the manufacturer's own invention, which is peculiar to him, and not common to him and others, and which is intrinsically foreign to the "articles" themselves, and only serving to designate them because it has been fancifully put to that use, in disregard of all natural relations. *Falkenburg v. Lucy*, 95 D. 78.

The statute does not vest in the manufacturer or vendor, as the case may be, any exclusive property in the thing manufactured or sold, nor in the name or the words which most aptly describe it, and if it did, it would be so far void for want of power in the legislature to enact it. *Ib.*

If the statute goes beyond the common law, and embraces within its protection matter which relates to kind, character, or quality of the thing manufactured or sold, it is not perceived why it does not trench upon the law of copyrights and patents, and is therefore void. *Ib.*

It is suggested that the matter used in the statute relative to designation of kind and quality was inadvertently incorporated under a mistaken notion of the functions of a trade-mark, and in that respect the statute can have no intelligible operation. *Ib.*

The Missouri statute was not designed to weaken or abridge any existing rights, or any future right, to a trade-mark which might be acquired, or to legalize, in any form or measure, piracy in trade-marks. *Filley v. Fassett*, 100 D. 275.

The Missouri statute requiring the registration of trade-marks has no application to articles made in another state. *Ib.*

2. What may be appropriated as a trade-mark. — 1. *Generally.* — A trade-mark adopted by a merchant or manufacturer for his goods is not entitled to protection as his exclusive property, unless it in some manner designates the true origin or ownership of the goods. *Boardman v. Meriden B. Co.*, 95 D. 270.

The words which compose a trade-mark need not each be new. If the combination thereof be new, and be descriptive of the origin of the goods and their ownership by the manufacturer who devises the mark, it will be unlawful for any other person to

* See monographic note on what may be adopted as, 47 D. 287-295.

Letters of the alphabet, when may be, see note, 34 R. 593-596.

Instances of valid trade-marks, see note, 39 R. 290.

For Index to Notes in American Decisions and American Reports, see Volume I.

flesh the combination or any important part thereof. *Wolfe v. Barnett*, 13 R. 111.

"Pride" is a good trade-mark for cigars, and its use by others than the original user will be restrained, although accompanied by distinctive labels. *Hier v. Abrahams*, 37 R. 589.

"Insurance Oil" is a valid trade-mark for an illuminating non-explosive oil. *Insurance Oil Tank Co. v. Scott*, 39 R. 286.

A trade-mark may be acquired in the words "Boker's Stomach Bitters," and it will not be defeated by the plaintiff's unwarranted use of the word "imported" in connection with it, unless such use is intended to deceive the public, nor by the plaintiff's mere neglect to prosecute others who have infringed it. *Funke v. Dreyfus*, 44 R. 413.

"Sliced animals," "sliced birds," and "sliced objects" are a valid trade-mark, when used to designate dissected puzzle-pictures for children. *Selchow v. Baker*, 45 R. 169.

2. *Figures or numbers.**—Figures indicating numbers may be protected as trade-marks, especially when they are associated with name of manufacturer upon labels of certain form, color, and arrangement, and in connection with such labels are used by him to indicate his own manufacture; for by virtue of such connection they form an important part of the trade-mark. *Boardman v. Meriden B. Co.*, 95 D. 270.

Where a manufacturer of britannia spoons, for the purpose of distinguishing them from all other britannia spoons in the market, and for the purpose of designating different classes of his own spoons, adopts several different labels of particular size, form, and color, with his own name thereon, together with some term descriptive of the spoons, and in connection therewith certain figures arbitrarily chosen, the different classes of spoons being indicated by fixed numbers; and these labels constitute the only trade-mark under which he introduces his spoons into market; and under these labels and numbers the spoons have become generally and favorably known, and a large demand has grown up for them; and they are generally bought and sold by the numbers on the labels,—the labels thus arranged and used constitute legal trade-marks, and are entitled to protection. *Id.*

Plaintiff had, for many years, manufactured and sold a steel pen, put up in boxes, with "303" and "Joseph Gillott, extra fine," upon the pens and boxes. Defendant began the manufacture and sale of a steel pen, put up in boxes, with "303," and "Esterbrook & Co., extra fine," upon the pens and boxes. Held, that plaintiff had acquired the right to the exclusive use of the figures "303" as a trade-mark, and that an action would lie restraining defendants from using such figures

* Numbers, when may be used as a trade-mark, see note, 37 R. 265, 266.

in such manner. *Gillott v. Esterbrook*, 8 R. 553.

The figures "523," on hosiery, in combination with a wreath and an eagle, and used to denote the grade and the origin of the manufacture, are a valid trade-mark. *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 37 R. 362.

3. *Names.**—A trade-mark may consist of any contrivance, design, name, symbol, or other thing which is adapted to accomplish the object proposed by it, namely, to point out the true source and origin of the article to which the mark is applied, or to point out and designate the dealer's place of business, distinguishing it from the business locality of other dealers. *Filley v. Fassett*, 100 D. 275. And the courts will protect him in the exclusive use of such mark, when original with him, so far as it serves to indicate the origin and ownership of the goods to which it is attached, to the exclusion of such symbols, figures, and combination of words which may be interblended with it, and merely indicating the name, kind, or quality. *Falkenberg v. Lucy*, 95 D. 76.

A name established for a hotel is a trade-mark in which the proprietor has a valuable interest that a court of equity will protect against infringement. *Woodward v. Lamar*, 82 D. 751.

A tenant, by giving a particular name to a building as a sign of business done by him at that place, does not thereby make the name a fixture to the building, nor transfer it to the landlord upon the expiration of his lease. *Id.*

The name of a manufacturer, used by him as a trade-mark, may have added to and connected with it some peculiar device as auxiliary to the name in declaring the true origin and ownership of his goods; and a wrongful violation of such a trade-mark may be effected, even though the name of the imitator be substituted for that of the original manufacturer, by such an imitation of the device as indicates a design to deceive, and is calculated to deceive, the public as to the true origin and ownership of the goods. *Boardman v. Meriden B. Co.*, 95 D. 270.

The owner of a mineral spring has the right to the exclusive use of such trade-mark or name as indicates the origin or ownership of the waters. *Dunbar v. Glenn*, 24 R. 395. The word "Congress," in the phrases "Congress Water" and "Congress Spring Water," is a legitimate trade-mark. *Congress etc. Spring Co. v. High Rock etc. Spring Co.*, 6 R. 82. *S. P.*, *Dunbar v. Glenn*, 24 R. 395.

The plaintiff corporation took its name from the names of its principal stockholders. Some of these stockholders afterward started a rival corporation, and used their names, with the addition of one other, as its

* Use of defendant's true name, when will be sustained, see note, 38 R. 21-22.

For Index to Notes in American Decisions and American Reports, see Volume I.

name. *Held*, that the plaintiff was entitled to protection in the use of said stockholders' names, and that defendants would be enjoined from using them. *Holmes v. Holmes*, 9 R. 324.

Plaintiffs and their predecessors had for many years been engaged in manufacturing water-lime cement from quarries near Akron, Erie County, which was labeled and sold as "Akron Cement," to which they had given a reputation in the market, and the defendants, knowing of such use by the plaintiffs of the word "Akron" as a trade-mark, and for the purpose of availing themselves of the reputation the plaintiffs cement had acquired, applied the word "Akron" to designate a similar cement made by them at a quarry near Syracuse. *Held*, that the plaintiffs were entitled, as against the defendants, to protection in the exclusive use of the word "Akron," by injunction to restrain the use of it by the defendants. *Newman v. Alvord*, 10 R. 588.

Three brothers named Rogers had acquired a reputation in the manufacture of plated spoons and forks. Petitioners purchased from them the right to manufacture and sell plated spoons and forks stamped with the name "Rogers," and thereupon adopted and used as their trade-mark the words and figure, "1847, Rogers Bros., A 1." The said brothers were also employed by the petitioners in the manufacture of their goods. The goods so manufactured and stamped with the said trade-mark acquired a good reputation in the market. Subsequently, three brothers of another family named Rogers, not previously engaged in the business, made an engagement with the respondent to manufacture for them, and also on his own account, plated spoons and forks. These were stamped "C. Rogers Bros., A 1," and "C. Rogers & Bros., A 1." It was found that these stamps resembled the petitioners' trade-mark to that degree that they were calculated to deceive, and did deceive, "unwary purchasers"; that large quantities of respondents' goods had been sold by him upon the reputation of petitioners' goods, and that the respondent supposed that the resemblance of his stamp to the petitioners' would enable him more readily to sell his goods. *Held*, that the petitioners had a right to protection in the use of the stamp, "1847, Rogers Bros., A 1," as a trade-mark; and 2. That the respondent was violating that trade-mark by using a stamp so nearly resembling the petitioners', and that therefore respondent would be restrained from using his said stamp, and also from using the name "Rogers Bros." *Held*, also, that the use of the name "Rogers" would not be restrained. *Meriden Britannia Co. v. Parker*, 12 R. 401.

A manufacturer has the right in good faith to use his own name as a trade-mark upon

his goods, although it is the same as that of another manufacturer of like goods who uses the same as a trade-mark. *Rogers v. Rogers*, 55 R. 78.

3. What may not be. — A disputed trade-mark cannot be appropriated by filing in the recorder's office a written claim thereto, although the original claimant had never filed such document for registration. *Filley v. Fassett*, 100 D. 275.

The Missouri statute will not warrant the appropriation of an existing trade-mark by one party, when the ownership and title to it is in another. *Ib.*

The plaintiff gave to his place of business the name of the "Antiquarian Book Store," by which name it became widely known. The defendant, having a rival store, adopted substantially the same name. *Held*, that the name could not be appropriated as a trade-mark. *Choyndi v. Cohen*, 2 R. 476.

The term "Moline," in "Moline plow," is generic, Moline being the name of the place where the plow is manufactured, and is not susceptible of exclusive use as a trade-mark. *Candee v. Deere*, 5 R. 125.

The combination of letters and figures, "A No. 1," "A X No. 1," "No. 1," "X No. 1," "No. 3," and "B No. 1," respectively, used originally for the purpose of designating the quality of manufactured articles, are not susceptible of exclusive use as a trade-mark. *Ib.*

Any word or phrase used in circulars, price-lists, or advertisements, to designate a manufactured article, but not placed upon the article, does not constitute a trade-mark. *Ib.*

Wolfe had for a long time made and sold gin labeled "Wolfe's Aromatic Schiedam Schnappa." Cassin began the manufacture of gin, which he bottled in imitation of Wolfe's, and labeled "Van Wolf's" or "Von Wolf's Aromatic Schiedam Schnappa." *Held*, that Cassin would be restrained from using any colorable imitation of Wolfe's name, or bottles or labels, but that the words "Aromatic Schiedam Schnappa" were not entitled to protection as a trade-mark. *Burke v. Cassin*, 13 R. 204.

Plaintiff adopted the name "Glendon" as a trade-mark on its iron; afterward the name was applied to the town wherein plaintiff's furnaces were. Defendants subsequently commenced in the same town to manufacture the same kind of iron, which they stamped with the name "Glendon." *Held*, that defendants could lawfully use such name. *Glendon Iron Co. v. Uhler*, 15 R. 599.

The words "gold medal," in the name of a manufactured article, cannot be protected as a trade-mark, whether or not a gold medal has been in fact awarded in a competitive exhibition. *Taylor v. Gillies*, 17 R. 333.

The coupling together, in a new combina-

For Index to Notes in American Decisions and American Reports, see Volume I.

tion, of words which before had been used apart, and had entered into the common or scientific vocabulary, does not give a right to the exclusive use of such combination, where it is indicative, not of origin, maker, use, and ownership alone, but also of quality and other characteristics. *Cassell v. Davis*, 17 R. 233.

A medicine was prepared consisting of iron, phosphorus, and elixir of calisaya bark, which was named "Ferro-Phosphorated Elixir of Calisaya Bark." *Held*, that the name could not be protected as a trade-mark. *Id.*

The family name of a manufacturer cannot be made a trade-mark, so as to exclude other manufacturers of the same name from its use in the manufacture and sale of similar articles, unless unfair means are adopted to mislead purchasers into the belief that the article is of the other manufacture. *Marshall v. Pinkham*, 38 R. 756.

"Snowflake" is not a valid trade-mark for bread or crackers. *Larrabee v. Lewis*, 44 R. 735.

"Royal" is not a valid trade-mark for a particular grade of goods. *Royal Baking Powder Co. v. Sherrell*, 45 R. 229.

"Samaritan" is not a valid trade-mark on medicines. *Desmond's Appeal*, 49 R. 118.

A business sign with a row of beer-barrels painted on it, with the letters "P. B." on the heads, the words "Depot of the Celebrated" above, and the words "Philadelphia Beer" below, cannot be protected as a trade-mark *per se*. *Eggers v. Hink*, 49 R. 96.

Where a patented medicine becomes known to the public by a distinctive name, and by its shape, appearance, and ornamentation, any one after the expiration of the patent can make and sell it and use the name, and no one can deprive him of that right by incorporating the name into a trade-mark. *Brill v. Singer Mfg. Co.*, 52 R. 74.

A tenant has no right to apply to a building, without the owner's consent, a particular name descriptive of the building alone, as distinguished from a trade-mark, and afterward transfer it to another and distinct locality. *Armstrong v. Kleinhans*, 56 R. 894.

"Health-preserving" is not a valid trade-mark for corsets. Courts will not interfere to protect a trade-mark where ordinary attention on the part of purchasers will enable them to discriminate. *Ball v. Siegel*, 56 R. 766.

4. Proceedings to obtain protection.

A trade-mark must point out the source and origin of the goods, and not be merely descriptive of the style, quality, or character of them. *Filley v. Fassett*, 100 D. 275.

5. What protection is accorded. — The exclusive right to a trade-mark is recognized by law as a species of property. *Bradley v. Norton*, 87 D. 200; which the courts will protect. *Filley v. Fassett*, 100 D. 275.

The leading principle of the law of trade-marks is, that the manufacturer or merchant

who has produced or brought into market an article of use or consumption that has found favor with the public, and who, by affixing to it some name, device, or symbol which serves to distinguish it as his, and to distinguish it from all others, has furnished his individual guaranty of its value, shall receive the reward of his skill, and shall not be deprived thereof by infringement or imitation. *Wolfe v. Barnett*, 13 R. 111. S. P., *Partridge v. Menck*, 47 D. 231.

The entire label will not be protected as a trade-mark, where it contains the name of the article manufactured, a statement of the mode of its use, and a laudation of its qualities; only so much of the label will be protected as indicates that the complainants are the manufacturers or vendors of such article. *Falkenburg v. Lucy*, 95 D. 76.

Plaintiff, claiming to be the owner of a cosmetic known and designated as "Laird's Bloom of Youth, or Liquid Pearl," brought suit to restrain the defendant from using the same name on another compound, and from counterfeiting plaintiff's bottles and labels. It appeared that plaintiff had announced his cosmetic as "free from all mineral and poisonous substances," but the evidence tended to prove otherwise. *Held*, that the plaintiff was engaged in a fraud upon the public, and was not entitled to protection. *Laird v. Wilder*, 15 R. 707.

In an action to restrain the infringement of a trade-mark, the complaint alleged that the plaintiffs manufactured brandy which they sold in "quart and pint bottles" with their trade-mark thereon. It appeared that the bottles were of the size ordinarily used in the trade, and there was nothing on them to indicate the quantity; that the brandy was imported and entered at the custom-house at the true quantity; it did not appear that the bottles were used in the trade as measures of quantity; that purchasers did not understand their capacity; that the plaintiffs ever represented that they contained quarts or pints, or that they ever deceived any one as to their capacity. The court found that defendants wrongfully imitated plaintiff's trade-mark, but the plaintiffs did not use quart or pint bottles as alleged in their complaint, but bottles falsely and deceitfully represented to contain those quantities, and that the trade-mark was designed and used to protect this fraud, and dismissed the complaint; this defense was not set up in the answer nor litigated at the trial. *Held*, that the finding of fact and the conclusion derived therefrom were erroneous. *Hennessy v. Wheeler*, 25 R. 188.

6. What amounts to an infringement. — The imitation of a trade-mark, to

* What constitutes infringement, see notes, 47 D. 295-299; 83 R. 835-839.

Infringement of trade name, where referring to one's self as being formerly connected with firm or business, see note, 35 R. 546-550.

For index to Notes in American Decisions and American Reports, see Volume I.

constitute an infringement, need not be a precise copy; but if there is a substantial similarity, so that the community would be likely to be deceived, it is sufficient. *Bradley v. Norton*, 87 D. 200. It may be limited or partial, nor is it requisite that the whole should be pirated, nor is it necessary to show that any one has in fact been deceived, or that the party complained of made the article; nor is it necessary to show intentional fraud. *Filley v. Fassett*, 100 D. 275. But to entitle a party to relief for an alleged infringement of a trade-mark, the resemblance of the simulated to the genuine trade-mark must be so close as to amount to a false representation as to the manufacture or proprietorship of the articles. *Popham v. Cole*, 23 R. 22.

Whether a partial imitation of a trade-mark by one was designed, calculated, and effectual to carry out a fraud upon another is a question upon the evidence for the jury. *Barroes v. Knight*, 78 D. 452.

It is unlawful to put up imitation goods under the name of the real manufacturer, and the excuse that such act was authorized by a person of the same name as that manufacturer is absurd. *Wolfe v. Barnett*, 13 R. 111.

A designed imitation of a trade-mark, whereby one is enabled to fraudulently pass off his goods in the market as those manufactured by another, to the latter's injury, renders the former liable for any injury sustained. Such imitation may consist in the appropriation of the words "Roger Williams" from a trade-mark known as "Roger Williams Long Cloth." *Barroes v. Knight*, 78 D. 452.

Where the imitation of a name of a hotel is calculated to deceive the public into the belief that it is the same name as the original, its use will be restrained by injunction, as where the name of the plaintiff's hotel is the "What Cheer House," and the defendant opens a hotel under the name of the "Original What Cheer House," the word "original" being painted on the sign in smaller letters than the residue of the title. *Woodward v. Lazar*, 82 D. 751.

Where another manufacturer makes spoons similar to those of complainant, though differing somewhat in style, and prepares labels resembling his, and adopts the same numbers for spoons of a similar kind; the labels being so nearly alike that a purchaser not reading the name upon them might be deceived; and where such labels are adopted with those particular numbers for the purpose of aiding the introduction of his spoons into the market, — it is a violation of the trade-mark of the first manufacturer, although the second manufacturer puts his own name on the labels in the place of that of the first. And the use of the same figures with a cipher prefixed does not vary

the case. *Boardman v. Meriden B. Co.*, 95 D. 270.

When plaintiff's article is not conspicuously known by the device which surrounds the name, the whole of which constitutes the trade-mark, but by the name itself, the adoption of such name for an article manufactured by another is an infringement of the former's right, for if the name as used was calculated to mislead, the intention to deceive is inferred. *Filley v. Fassett*, 100 D. 275.

The complainant had for some twenty years published an almanac entitled "J. Gruber's Hagerstown Town and County Almanack," which had been established and long published by his ancestor. The defendant, in 1879, issued an almanac with the same emblems, devices, marks, representations, and general exterior appearance, and entitled "T. G. Robertson's Hagerstown Almanac." Held, that the defendant's publication should be enjoined. *Robertson v. Berry*, 33 R. 328.

The plaintiff had for several years made wagons at Eldora, and painted on them in one general style the words "Shaver Wagon, Eldora." The defendant, his brother, had been his employee, and later his partner, in that business. The firm was dissolved, and the plaintiff acquired its property and continued the business. Two years after, the defendant set up the same business in the same town, and painted the same words on his wagons, in the plaintiff's general style, but with slight changes in form, and adding his own initials. The resemblance was calculated to deceive the public. Held, that the defendant should be restrained. *Shaver v. Shaver*, 37 R. 194.

Three parties had carried on business at Kalamazoo under the name of Kalamazoo Wagon Company. Two of them sold out their entire interest, including the good-will, to the plaintiff, and afterward set up a like business, almost next door, under the name of Kalamazoo Buggy Company, issuing circulars and cards in that name, resembling those of the plaintiff. Held, that such use of that name should be restrained, but that the defendants should not be prohibited from receiving mail matter addressed in their said name. *Myers v. Kalamazoo Buggy Co.*, 52 R. 811.

A trade-mark on the label on matches is not infringed by a label put on the matches of another maker, where the only point of resemblance is that on each label there is a representation of a bee-hive, and that the letters on both are printed on a black ground, and the appearance of the bee-hives is so dissimilar as not to be readily mistaken the one for the other. *Partridge v. Menck*, 47 D. 281.

The use of a trade-mark consisting of the words "Candee, Swan, & Co.," in a semi-cir-

For Index to Notes in American Decisions and American Reports, see Volume I.

ular form above the words "Moline, Ill.," is no infringement upon a trade-mark consisting of the words "John Deere," in a semi-circular form above the words "Moline, Ill." *Candee v. Deere*, 5 R. 125.

Plaintiff put upon packages of lard the figure of a fat hog, with his name and the words "prime leaf lard." Defendant put upon packages of lard a globe with a small, lean boar on top, above which was his name, and beneath it the words "prime leaf lard." Plaintiff claimed that the use of the figure of the boar was an infringement of his trade-mark. The two marks were so unlike in general appearance as not to be calculated to deceive any one. *Held*, that plaintiff was not entitled to relief. *Popham v. Cole*, 23 R. 22.

The sign "Great IXL Auction Co." is not an infringement of the sign, recorded as a trade-mark, "IXL General Merchandise Auction Store." *Lichtenstein v. Mellis*, 34 R. 592.

The plaintiff sold soap in packages in tinfoil and blue paper labeled on one side, in gilt letters, "Sapolio for cleaning and polishing, manufactured by Enoch Morgan's Sons & Co., 440 West Street, New York," and on the other, "Enoch Morgan's Sapolio," with a well-drawn picture of a human face opposite a pan and reflected in it. The defendants also sold soap, in packages of a different shape from the plaintiff's, in tinfoil and blue paper, labeled on one side, in gilt letters, "Troxell's Pride of the Kitchen Soap," and on the other, "Pride of the Kitchen Soap," with a picture of a small monkey looking at himself in a mirror or pan held in his paw. *Held*, no infringement. *Morgan's Sons' Co. v. Troxell*, 42 R. 294.

7. Jurisdiction of equity to restrain infringement.—An infringement of trade-mark may be enjoined by the court of chancery. *Partridge v. Menck*, 47 D. 281; for the purpose of promoting honesty and fair dealing, and because no one has the right to sell his own goods as the goods of another. *Palmer v. Harris*, 100 D. 557.

8. Who may sue.—One who has the sole interest in a trade-mark may maintain suit for injunction against the infringement thereof without joining as a party one who is a silent partner with him in the business of manufacturing the article. *Bradley v. Norton*, 87 D. 200.

The owner of a trade-mark need not be original inventor or proprietor of the article upon which it is placed, in order to be entitled to the protection of a court of chancery. *Partridge v. Menck*, 47 D. 281.

It seems that where an employee originates and names a medical article, but acquiesces in the appropriation of the article and its name by his employers, and its sale to the public by them under the name given the

article, the property in the trade-mark, if a valid one, is in the employers. *Caswell v. Davis*, 17 R. 233.

The mere sale of a trade-mark, apart from the article to which it is affixed, confers no right of ownership; but where a trade-mark is used to designate the place and person by whom certain goods are manufactured, the right to such trade-mark passes to the purchaser upon the sale and transfer of the business and manufactory at which the goods are made. *Wuthaus v. Braun*, 22 R. 44.

9. Right of assignee to sue.—The trade-mark, "A. N. Hoxie's Mineral Soap," is assignable, and if the assignee uses it to denote soap made according to A. N. Hoxie's formula, he may have an injunction to restrain infringement. *Hoxie v. Chaney*, 59 R. 149.

A sale of the owner's business and its goodwill carries a trade-mark, but does not imply that the vendor will not re-engage in the like business at another place, but he may be restrained from representing himself as successor to the business sold, or as having a right to use the trade-mark. *Id.*

10. Discretionary power of the court to grant or refuse injunction.—An injunction against the piracy of a trade-mark, in case of doubt, should not be granted until the cause is heard on pleadings and proofs, or the complainant has established his right at law. *Partridge v. Menck*, 47 D. 281.

The simulation of a trade-mark, such as probably to deceive customers of the owner, should be enjoined at once. *Id.*

11. When an injunction will be granted.*—An injunction will be granted against the use of the name, mark, or label of the complainant, where such use is designed to induce the belief that an article manufactured by defendant is one manufactured by complainant. It is wholly immaterial whether the spurious article is or is not equal to the genuine. *Taylor v. Carpenter*, 42 D. 114.

An injunction will be granted, without regard to lapse of time, to restrain continued use of another's name, in the designation, in whole or in part, of an existing partnership, without having obtained the written consent of the person if he be living, or of his legal representatives if he be dead, as required by the Massachusetts general statutes, chapter 56, sections 1-4. *Bowman v. Floyd*, 80 D. 55.

A receipt will not be construed as a written consent to continued use of another's name, when it is given merely in settlement of the claims of executors of a deceased partner against surviving partners, but in which the

* Injunctions against infringement, see note, 23 R. 27-30.

Enjoining one from using his own name, see note, 12 R. 410-414.

For Index to Notes in American Decisions and American Reports, see Volume I.

later are mentioned by the partnership name, under which they continued to carry on business. *Id.*

Injunction is the sole adequate remedy against an infringement of a trade-mark, where it appears that the party infringing intends to continue the wrong. *Bradley v. Norton*, 87 D. 200.

An injunction against an infringement of a trade-mark may be granted though the party defendant is in fact only the agent of the manufacturer of the spurious article, where the latter has conducted the business through such agent, and held him out to the public as the proprietor. *Id.*

Brewer, the proprietor of a medicine called "Brewer's Lung Restorer," sold the exclusive right to manufacture and sell it, with his trade-mark, to the plaintiff, and agreed not to use or permit the use of his name on any preparation which could be recommended and sold for the same purpose. Subsequently, he made and offered for sale a preparation professing to be a cure for all diseases of the lungs and throat, and called "Brewer's Sarsaparilla Syrup." *Held*, that he should be enjoined from the use of his name thereon. *Brewer v. Lamar*, 47 R. 766.

The plaintiffs, partners under the name of "D. F. Tayler & Co.," had long manufactured and sold hair-pins, known and readily sold as "Tayler's Hair-pins," put up in pink and yellow packages, with a peculiar device well known to the trade. The defendants also manufactured and sold hair-pins, and had procured from L. B. Taylor the right to mark their packages "L. B. Taylor & Co.," to which they added "Cheshire Conn.," using a device, labels, and wrappers so nearly resembling the plaintiffs' in size and color as to be likely to deceive careless and unwary purchasers. The defendants acted in good faith, and with no design to infringe the plaintiffs' rights. *Held*, that the defendants should be enjoined. *Williams v. Brooks*, 47 R. 642.

The complainant made and sold "Morse's Compound Syrup of Yellow Dock Root," in bottles in paper wrappers. The defendant subsequently set up the sale in bottles, without wrappers, of "Dr. Morse's Celebrated Syrup," those words being blown in the glass, with labels inscribed "Dr. Morse's Improved Yellow Dock and Sarsaparilla Compound." The bottles were exactly similar in size and shape, but the labels were different. The complainant made his preparation under one trade name and sold it under another, and advertised it as "sold only in quart bottles," whereas the bottles, although known in the trade as quart bottles, held substantially less. *Held*, that complainant was entitled to an injunction and account of profits. *Alexander v. Morse*, 51 R. 369.

The plaintiff manufactured and sold choco-

late under the description of "German Sweet Chocolate," having obtained authority to use it from Samuel German, the original proprietor. The defendant, with intent to get plaintiff's customers, manufactured and sold chocolate under the description of "Sweet German Chocolate." *Held*, that the defendant should be restrained therefrom. *Pierce v. Guitard*, 58 R. 1.

12. When refused.*—An injunction will not be granted to restrain the use of a trade-mark which consists in part of the name of a former partner of some of the defendants, and which was adopted and used by the partnership, without objection, in the lifetime of such partner, and used by the defendants since his death. The right to the use of such trade-mark is secured to the defendants by the Massachusetts statutes. *Bowman v. Floyd*, 80 D. 55.

The use of a trade-mark will not be restrained, unless it so closely resembles that of the complainant as to raise the probability of mistake on the part of the public, or of design and purpose on the part of the defendant to mislead and deceive. *McCartney v. Garnhart*, 100 D. 397.

A party is not entitled to an injunction to secure the profits arising from the fraudulent use of a trade-mark bearing on its face a falsehood as to the place where the goods are manufactured, and where, in order to have the benefit of the reputation which such goods have acquired in the market, he is guilty of the same fraud which he complains of in defendant. *Palmer v. Harris*, 100 D. 557.

For equity to refuse to enjoin the counterfeiting of a fraudulent trade-mark, it is not necessary that any person has been actually deceived or defrauded; it is enough that it is a misrepresentation calculated to have that effect on the unwary and unsuspicious. *Id.*

A. C. & Co., being the successors, by purchase, of Stillman & Co., woolen manufacturers, continued to use "Stillman & Co." as a trade-mark on their ticket for goods. Latimer, Stillman, & Co., the lessees of a mill formerly used by Stillman & Co., known both as the "Stillman Mill" and as the "Seventh Day Mill," used "Stillman Mills" as a trade-mark. On a petition for an injunction, brought by A. C. & Co. against Latimer, Stillman, & Co., to prevent their so using the word "Stillman," it appearing that no deception could be charged on either complainants or respondents, and that no person of the old firm of Stillman & Co. was a member of the firm of A. C. & Co.,—*held*, that the injunction could not be granted. *Held*, further, that a manufacturer has the right to label his goods with his own name or that of his mill, if no fraudulent purpose

*That a false representation in a trade-mark debars party from protection in equity, see note, 25 R. 191-192.

For Index to Notes in American Decisions and American Reports, see Volume I.
is intended. *Cornmichael v. Latimer*, 23 R. 481.

Quere, if a trade-mark whose reputation depends on the excellence of the manufacture, or the skill and honesty of the manufacturer, can be legally assigned. *Ib.*

13. Rules of evidence.—The acts of respondent are sufficient evidence of his intention to continue the infringement of a trade-mark, without averring and proving threats. *Bradley v. Norton*, 87 D. 200.

14. Matters of defense.—That goods made or sold under a pirated trade-mark are equal in quality or value to the original is no defense to an injunction against such piracy. *Partridge v. Menck*, 47 D. 281.

The fact that a party in another state manufactured articles and put them upon the market to compete with plaintiff, using his trade-mark, is no defense for a third party whom plaintiff seeks to enjoin from using his trademark, unless plaintiff assented to or acquiesced in such infringement on his right. In other words, the depredations of others upon plaintiff's rights is no excuse to defendant for similar acts on his part. *Filley v. Fassett*, 100 D. 275.

The fact that a trade-mark label is copyrighted, but the date of entry is not given as required by the act of Congress, is of no importance in a suit in a state court for damages for imitation of a trade-mark. *Wolfe v. Barnett*, 13 R. 111.

Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do any act calculated to mislead. *Meneely v. Meneely*, 20 R. 489.

If there is any right of trade-mark in the words "East Indian," in connection with "Remedy," on bottles of medicine, the false adoption of those words to indicate that the medicine is used in the East Indies will defeat an action for infringement. *Connell v. Reed*, 35 R. 397.

The plaintiffs manufactured and sold a cordial, under the name of "Angostura Bitters," claiming that name as a trade-mark, with labels stating that it was prepared by Dr. S., formerly at Angostura, but now at Port of Spain, and that the bottles bore the plaintiff's signature. In fact Dr. S. died before this suit, never lived at Port of Spain, and the bottles bore only the signature of the inventor. The plaintiff sought to enjoin the defendants from manufacturing and selling a cordial under the name of "Angostura Aromatic Bitters." *Held*, that in consequence of these misrepresentations he could not maintain this suit. *Siegert v. Abbott*, 48 R. 101.

15. When damages are recoverable for infringement.—Damages may be awarded against a person who uses the trade-mark or name of another. *Taylor v. Carpenter*, 42 D. 114.

In an action to recover for the violation of a trade-mark, the damages awarded was the whole profit realized by defendant from sales of the spurious articles under the simulated trade-mark. *Held*, on appeal by defendant, that the damages were not excessive. *Graham v. Plate*, 6 R. 639.

16. Protection of trade names.—Carriage proprietors authorized to use a hotel name as a badge on their carriages and the caps of their drivers, under an agreement with the hotel-owner, whereby they have the privilege of carrying passengers to and from the house, have the exclusive right to the use of such name to indicate that they have the patronage of the house in transporting passengers, and may, without proof of special damage, maintain an action against one who uses the same badge for the purpose of falsely holding himself out as having such patronage, in order to divert custom from the plaintiffs. *Marsh v. Billings*, 54 D. 723.

Damages for diverting plaintiffs' custom in such a case are not to be confined to the loss of such passengers as the plaintiffs can prove have actually been diverted from their carriages, but the jury are to allow such damages as upon the whole evidence they are satisfied that the plaintiffs have suffered in loss of business by such injurious act. *Ib.*

Where one has established a business at a particular place, from which he has or may derive profit, and has attached to such business a name indicating to the public where it is carried on,—e. g., "No. 10 South Water Street,"—he thereby acquires property in the name, which will be protected from invasion by a court of equity on principles analogous to those applicable in case of the invasion of a trade-mark. *Glen & H. Mfg. Co. v. Hall*, 19 R. 278.

TRADE NAMES.

Protection of, see TRADE-MARKS, 16.

TRANSCRIPTS.

From public records, as evidence, see EVIDENCE, 226.

Of justices' judgments, see JUDICIAL OF THE PEACE, 25.

Of record of criminal case, see APPEAL, 148.

On appeal, see APPEAL, 100.

Sufficiency of, on error, see ERROR, 15.

TRANSFERS.

Of bank stock, see BANKS AND BANKING, 5, 62.

Of corporate stock, see CORPORATIONS, 36-41.

For Index to Notes in American Decisions and American Reports, see VOLUME I.

- Of debt or note secured by mortgage, see MORTGAGES, 62.
- Of easements, see EASEMENTS, 6, 7.
- Of goods stored by warehouseman, see WAREHOUSEMEN, 9.
- Of interest of witness, see WITNESSES, 39.
- Of land, effect of law of place on, see REAL PROPERTY, 5.
- Of leases, see LEASES, IV.
- Of mill property, see MILLS, 6.
- Of negotiable paper, see BILLS AND NOTES, IV.
- Of non-negotiable instruments, see BILLS AND NOTES, 305.
- Of private way, see PRIVATE WAYS, 5.
- Of property insured against fire, see INSURANCE, 59.
- Of property of religious societies, see RELIGIOUS SOCIETIES, 7.
- Of property, on Sunday, see SUNDAY, 4, 5.
- Of slave property, see SLAVERY, 4.
- Of sovereignty, by conquest, see WAR, 5.
- Of thing pledged, by pledgee, see PLEDGE, 9.
- Of title to chattels, see PERSONAL PROPERTY, 5.
- Of title to land, effect of war on, see WAR, 32.
- Of vendor's lien, see VENDOR AND PURCHASER, 50.

TRANSSHIPMENT.

- Of goods, when covered by marine policy, see INSURANCE, 123.

TRAVEL.

- Traveling on Sunday, see SUNDAY, 6.
- Validity of statutes taxing, see TAXES, 16.

TRAVERSE.

- Of inquisition of lunacy, see INSANE PERSONS, 16.
- Of return on mandamus, see MANDAMUS, 29.

TREASURER.

- Of city, see MUNICIPAL CORPORATIONS, 53.
- Of corporation, see CORPORATIONS, 163.
- Of county, see COUNTIES, 9.
- Of the state, see OFFICERS, 59.

TREATIES.

- As to extradition, see EXTRADITION, 1.
- Judicial notice of, see EVIDENCE, 13.
- Privileges of Indians under, see INDIANS, 3.
- Respecting rights of aliens, see ALIENS, 15.

1. When take effect. — Treaties, as to the government making them, take effect not merely from the day of ratification, but from the date of their execution, unless they contain stipulations to the contrary. But where they affect individual rights, the ratification of the treaty must be deemed its date. *Yeaker v. Yeaker*, 81 D. 530.

2. Supremacy. — A treaty is the su-

* Effect of treaties as laws, and power to annul by hostile legislation, see note, 81 D. 535-545.

preme law of the land, and is obligatory on all departments of the government, and on parties litigating in the courts. *Howell v. Fountain*, 48 D. 415.

A treaty is paramount to state law, and the latter must yield to the extent of its conflict with the treaty, but it is void only so far as it contravenes the constitution, laws, or treaties of the federal government. *Yeaker v. Yeaker*, 81 D. 530.

TREBLE DAMAGES.

When allowed, see DAMAGES, 44.

TRESPASS.

[Includes what amounts to and the liability for trespass, whether upon land, to personal property, or to the person. Also, rules of procedure in actions for trespass, including trespass to try title, or for meane profits.]

Between tenants in common, see CO-TENANCY, 45-47.

By animals, see ANIMALS, 16-18.

By cattle, effect of defect in fence on right to sue for, see FENCES, 4.

By officers of corporation, see CORPORATIONS, 134.

Measure of damages in, see DAMAGES, 40.

Remedy by injunction, see INJUNCTION, 35.

I. WHAT CONSTITUTES A TRESPASS.

II. ACTIONS FOR TRESPASS.

1. For Trespass upon Land.
2. For Trespass upon Personal Property.
3. For Trespass upon the Person.
4. Other Actions for Trespass.
5. The Crime, and Prosecution.

I. WHAT CONSTITUTES A TRESPASS.

1. Generally. — One who enters a dwelling-house without permission of the occupant, and remains there after being requested to leave, is guilty of a trespass; and if he had permission to enter, and remained after a request to leave, he would then be liable as a trespasser *ab initio*. *Adams v. Freeman*, 7 D. 327.

Where an injury is the immediate consequence of an act, whether it was intentional or unintentional, the doer of the act is liable in trespass. *Guille v. Swan*, 10 D. 234; *Norris v. Litchfield*, 69 D. 546.

Any interference, however slight, which unlawfully disturbs another in the enjoyment of his property, is a trespass. *Rand v. Sargent*, 39 D. 625.

Trespass only will generally lie for an injury directly inflicted by a forcible act of the defendant. *Waterman v. Hall*, 42 D. 434.

Trespass or case will lie for an injury not effected by the direct and immediate forcible act of the defendant, though flowing from that act without the intervention of any other voluntary or responsible agency, as where the plaintiff's beast is chased by the

For Index to Notes in American Decisions and American Reports, see Volume I.

defendant with sticks and stones and is driven upon a fence, whereby it is injured. *Id.*

Trespass or wrong done by accident, without design, or against the actor's will, is not a fault, in the sense of that word as used in connection with actions for negligence. It is a misfortune, and not a fault. *Norris v. Litchfield*, 69 D. 546.

An injury is immediate, and therefore a trespass, only when it is directly occasioned by, and is not merely a consequence resulting from, the act complained of. *Holly v. Boston Gaslight Co.*, 69 D. 233.

Trespass cannot be maintained for an act done under authority of a constitutional statute. *Brown v. Beatty*, 69 D. 389.

An act may be a private injury as well as a public offense. *Hedges v. Price*, 94 D. 507.

2. Joint trespassers.*—If several persons co-operate in the performance of an act which occasions an injury, they are liable as trespassers, either jointly or severally, and one may be held responsible for all the damages if it appear that they acted in concert, or that the acts of the others were the natural result of the act performed by the one sued. *Guille v. Swan*, 10 D. 234.

In trespass all are liable who participate in the wrongful act, either by aiding in, or advising, or assenting to it. *Ross v. Fuller*, 36 D. 342. *S. P.*, *Brittain v. McKay*, 35 D. 738; *State v. Smith*, 57 R. 802; and it is no defense for any one co-trespasser to say that the injury was greater than he intended, and that the particular act done was not contemplated or intended by him. *Kirkwood v. Miller*, 73 D. 134.

Agreeing to a trespass committed for one's use makes him guilty of trespass, and liable as a trespasser. *Harper v. Baker*, 16 D. 112; *Caldwell v. Sacra*, 12 D. 285; *Alfred v. Bray*, 97 D. 288.

The right to contribution does not exist between joint trespassers. *Cumpton v. Lambert*, 51 D. 442. But this rule applies only to cases where the persons have engaged together in doing, wantonly or knowingly, a wrong. Contribution lies where one of several persons who join in performing an act which to them appears to be right and lawful, but which proves to be a tort, has paid the amount of the damage. *Acheson v. Miller*, 59 D. 663.

In actions against several defendants for their joint trespass, damages may be severed and apportioned, according to the degree and nature of the offense committed by each. *Smith v. Singleton*, 39 D. 122.

The liability is that of joint trespassers, where several different creditors acting separately, without concert, and even without knowledge that they are employing a common agent, cause their debtor to be arrested

* See monographic note on the liability of and who are co-trespassers, 73 P. 137-149.

on their several writs, by the same officer, who serves the writs simultaneously, and by virtue thereof the debtor is committed to jail, where he is confined upon all of such writs at the same time; and full satisfaction by the debtor, obtained from any one of such persons, is a bar to an action by him against the others. *Stone v. Dickinson*, 81 D. 727.

A person procuring an illegal act to be done by another is a co-trespasser with the person employed to perpetrate the wrong, and is equally responsible with him to the person injured, although not actually present when the trespass is committed; and the acts and declarations of the agent in performing such unlawful service are competent evidence against the principal. *Raisler v. Springer*, 82 D. 736.

To ascertain the liability of a party in a trespass committed by more than one, it is only necessary to show that he participated in the wrong done. The amount of property taken by him, if he took any, is immaterial, and it need not be shown what degree of efficiency he exhibited in giving aid and countenance to the perpetrators of the trespass. It is enough if he was found acting in concert with them. *Alfred v. Bray*, 97 D. 283.

Any person present at the commission of a trespass, who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and liable as a principal. *McManus v. Lee*, 97 D. 386.

Proof that a person was present at the commission of a trespass, without disproving or opposing it, is evidence from which it is competent for a jury to infer that he assented thereto, and aided and abetted the same. *Id.*

A mere pretense of a person at the commission of a trespass having no unlawful intent, and doing nothing to countenance or approve those who are actors, does not render such person liable as a participator therein, though he did not make active efforts to prevent the commission of the unlawful acts. *Id.*

In trespass against two or more acting independently, and producing a result injurious to the plaintiff, one cannot be held for the acts of the others. *Blaisdell v. Stephens*, 33 R. 523.

3. Trespass by officers.—When process is a protection.—In trespass, the defendant may show as a justification that he acted under the command of an officer in the execution of process, although the process may not be regular and valid; but if he acted officiously, he must show a valid process. *Reed v. Rice*, 19 D. 122.

An officer having made a lawful levy can only be rendered a trespasser *ab initio* by a subsequent act of trespass, not by an omission

For Index to Notes in American Decisions and American Reports, see Volume I.

or neglect of duty. *Waterbury v. Lockwood*, 4 D. 215.

An officer is not a trespasser who peaceably enters the house of the owner or keeper of an unlicensed dog, and kills it, in pursuance of a warrant from the proper authorities, which directs him to kill all dogs not "licensed and collared" as required by statute, and which statute provides that such dogs may be killed "whenever and wherever found." *Blair v. Forehand*, 97 D. 82.

The theater of the plaintiff was assessed by the assessors under an act of Congress, but erroneously as a dwelling-house; a tax collector executed a warrant of distress under such assessment. *Held*, that an action of trespass did not lie against him as a ministerial officer for executing such warrant. *Henderson v. Brown*, 2 D. 164.

4. — when it is not. — Abuse of authority in removing a trespasser's goods renders one a trespasser himself *ab initio*. *Whitney v. Swift*, 53 D. 228; *Barrett v. Lightfoot*, 15 D. 110. Whether the goods were removed in an improper manner is a question for the jury. *Whitney v. Swift*, 53 D. 228.

Service of void process is a trespass for which the magistrate issuing it, and the officer serving it, are answerable. *Barker v. Stetson*, 66 D. 457.

5. What constitutes a trespass on land, generally.* — An entry under a contract for the purchase of land, and a trespass committed thereon, and refusal to complete the purchase, make the vendee a trespasser *ab initio*. *Wendell v. Johnson*, 29 D. 648.

Abuse of legal authority or license, by one who at first acted with propriety under it, makes him a trespasser *ab initio*. *Dickson v. Parker*, 34 D. 78. *Contra*, *Wendell v. Johnson*, 29 D. 648.

A recovery of mesne profits is no bar to an action of trespass *quare clausum fregit*; therefore, the removal of fence rails is a trespass, and for which damages may be recovered in an action of trespass *quare clausum fregit*, notwithstanding a recovery in an action for mesne profits, unless such removal was necessary for the use and occupation of the land. *Gill v. Cole*, 2 D. 527.

Trespass lies whether the injury is willful or not, if the injurious act is the immediate result of the force originally applied by the defendant, and the plaintiff is injured thereby; thus where defendant cut trees on his own land and one accidentally fell on the land of the plaintiff, the latter may maintain an action of trespass. *Newson v. Anderson*, 37 D. 406.

Horses and cattle, having been declared free commoners under a township act, do not possess a legal right to trespass upon the

vested private rights of either a citizen or a corporation. *Williams v. Mich. Cent. R. R. Co.*, 55 D. 59.

Where one wrongfully cuts timber on the lands of another, and sells it to an innocent purchaser, the entry upon the lands and removal of the timber by such purchaser is a trespass. *Hazelton v. Week*, 35 R. 796.

Defendant's wife, under the direction of the highway surveyor, cut the grass growing in the highway over the land of plaintiff, that her children might go and come from school without getting their clothes wet. She carried the grass away, when cut, and fed it to her husband's horse. *Held*, that although she had a right to cut the grass, yet, by carrying it away, she became a trespasser *ab initio*. *Cole v. Drew*, 8 R. 363.

6. What estate or interest is the subject of trespass. — A person has no right to go into or upon the premises of another after the owner has forbidden him to do so; nor has he a right, after having entered by leave, to stay upon being requested by the owner to depart; and this though such premises be a business office or mercantile house, workshop, factory, or other place of business. No doubt the very fact that a professional man or a merchant or other person opens an office to transact business with and for the public is a tacit invitation to all persons having business with him, and a permission to others, to enter, unless forbidden; but this does not divest the owner of his control over it, or the right to prevent whom he pleases from entering, and to require any and all persons to depart after they have once entered. *Woodman v. Howell*, 92 D. 221.

A person who is in the office of another by the latter's courtesy cannot authorize others to use, occupy, or even enter the office; and if he does so, the proprietor has the right, either in person or through a servant, to require them to leave. *Id.*

7. What entries upon land do not amount to trespass, generally. — Persons who, in a populous town, erect buildings and fences on the line of a street, with doors and gates so constructed as when open to swing over it, or who, in constructing such buildings, place within the limits of the street building materials, and the earth dug from the cellar, if removed within a reasonable time, or spread earth on the street to improve it as a way, or allow horses and carriages to stand on such street, are not liable in trespass for such acts to the owner of the soil of the street. *Van O'Linda v. Lotthrop*, 32 D. 281.

A traveler going from the highway upon adjoining land from necessity, because the highway is made temporarily impassable by snowdrifts, is not guilty of trespass if he does no unnecessary damage. *Campbell v. Race*, 54 D. 723.

* Trespass by one co-tenant against another, see note, 29 D. 433-435.

Trespass in forcibly entering upon one's own property, see note, 51 R. 362-363.

For Index to Notes in American Decisions and American Reports, see Volume I.

The owner of part of a reversion or remainder of land, between whom and another a suit is pending involving a question of waste or improvements, may go upon the premises in a peaceable manner, with witnesses, to examine the same. *Council v. State*, 56 D. 512.

One purchasing at a wreck commissioner's sale is not guilty of trespass in hauling the goods over the plaintiff's land, although forbidden to do so, where the goods could not be taken off in any other way without great inconvenience. *Hetfield v. Baum*, 57 D. 563.

An entry into a man's house after a warning not to enter does not necessarily constitute a forcible trespass. *Carroll v. State*, 58 D. 282.

A husband is not liable as a trespasser for removing a grave-stone placed there by his wife's mother, from the grave of his wife, whom he has buried in a public burying-ground, where he does not injure the stone, and holds it in possession ready to be delivered to the owner on demand, and causes the removal for the purpose of substituting another stone. *Dwrell v. Hayward*, 69 D. 284.

A party entering upon land in good faith, under the belief that he has a title thereto, is not a naked trespasser, though the title be in fact in another; and he is entitled to all legal protection to his improvements and property placed upon the premises, given by the statute to parties in possession under color of title. *Mississippi etc. R. R. Co. v. Devaney*, 2 R. 608.

One entering upon the sea-beach of another and removing, for the purpose of restoring to its owner, a boat cast ashore by a storm and in danger of being carried off by the sea, is not a trespasser. *Proctor v. Adams*, 18 R. 500.

The owner of land may expel, with reasonable force, a wrongful occupant, without being liable to any civil action, although he may be liable for breach of the peace or for forcible entry. *Souter v. Codman*, 51 R. 384.

When the owner of land, having the right to immediate possession, enters thereon quietly and peaceably, or without force and violence, he is not liable in trespass to an occupant. *Fort Dearborn Lodge v. Klein*, 56 R. 133.

8. Entry under license from owner. — One who exceeds an authority in fact is liable only for the excess; but if one abuses an authority in law, by committing acts which are in themselves trespasses, not authorized by the authority, he is a trespasser *ab initio*. *Jewell v. Mahood*, 84 D. 90.

Trespass *quare clausum fregit* may properly be brought against a party having a license to enter on another's land, who, in taking down a gate erected thereon to enable him to enter, neglects to restore it to its place,

in consequence of which his swine trespass upon the plaintiff's land. And defendant, under this form of action, may be held liable for the damages thus occasioned. *Kiescher v. Monn*, 78 D. 379.

9. Entry under judicial authority. — Authority to commit a trespass cannot be implied. *McCoy v. McKowen*, 59 D. 264.

Neither a justice of the peace nor a plaintiff in a judgment becomes a trespasser by enforcing a judgment of the former which remains unrecinded and unpaid; although such judgment may be erroneous, if the justice had jurisdiction of the case in which it was rendered. *Deal v. Harrie*, 63 D. 686.

10. What constitutes trespass to personal property. — The using of an estray by the taker-up, except in a matter of necessity and for the benefit of the owner, is wrongful, and renders him liable in trespass. *Barrett v. Lightfoot*, 15 D. 110.

Actual forcible dispossession is unnecessary to maintain trespass *de bonis asportatis* or trover, any unlawful interference or exercise of dominion with respect to the property by which the owner is damaged being sufficient. *Phillips v. Hall*, 24 D. 103.

There is a tortious taking whenever there is an unlawful meddling with the property; or an exercise or claim of dominion over it, without any pretense of authority or right. This, without a manual seizing of the property, is sufficient, and an action of trespass or replevin will lie. *Haythorn v. Rushforth*, 38 D. 540.

Appropriation of another's property to one's own use is not allowed even for a temporary purpose. *McCoy v. Danley*, 57 D. 680.

Wrongful intent is not necessary to constitute trespass; it is sufficient if the act is done without a justifiable cause or purpose, though it be done accidentally or by mistake. *Dexter v. Cole*, 70 D. 465; *Kirkwood v. Miller*, 73 D. 134.

11. What acts relative to the chattels of another do not amount to trespass. — One who receives possession of property known to him to have been wrongfully taken from another does not thereby become a party to the wrong, and cannot be held liable as a trespasser by relation. *Harper v. Baker*, 16 D. 112.

Private property may be destroyed by an individual in the exercise of the common-law right of necessity, to prevent the spreading of a conflagration, although his own property is not in imminent danger. *American Print Works v. Lawrence*, 57 D. 420.

II. ACTIONS FOR TRESPASS.

1. For Trespass upon Land.

12. Venue. — Trespass *quare clausum fregit* must be brought in the county where the land lies, and it must appear on the record that the trespass was committed in the county. *Champion v. Doughty*, 35 D. 522.

For Index to Notes in American Decisions and American Reports, see Volume I.

13. Who may sue. — Trespass *quare clausum fregit* lies for an occupant of government land against any person wrongfully dispossessing him. *Duncan v. Potts*, 24 D. 766.

An occupant of public lands is a tenant at will of the government. *Id.*

14. The title or possession necessary in order to maintain an action for trespass on land. — 1. *Necessity of possession.* — To maintain trespass, plaintiff must have possession. *Forster v. Fletcher*, 18 D. 208.

Trespass *quare clausum fregit* can be maintained only by a person in actual possession of the *locus in quo* at the time of the injury; a mere legal or constructive possession will not sustain such action. *McClain v. Todd*, 22 D. 37; *Truss v. Old*, 18 D. 748; *Wilson v. Bibb*, 25 D. 118; *Bakersfield Cong. Soc. v. Baker*, 40 D. 668; *McColman v. Wilkes*, 51 D. 637.

The gist of the action of trespass is the injury done to the plaintiff's possession, and therefore, in order to maintain it, possession is necessary. This possession may be either actual or constructive; the mere right of entry on the lands is not sufficient, if they be in the actual possession and occupancy of a disseisor. *Gent v. Lynch*, 87 D. 558; *Chandler v. Walker*, 53 D. 202.

One who has illegally acquired possession may maintain trespass against any person who unlawfully disturbs his possession. *Evertson v. Sutton*, 21 D. 217.

Trespass for cutting down and carrying away trees cannot be maintained, unless the plaintiff was in the actual possession of them. *McClain v. Todd*, 22 D. 37.

Defendant being in possession, although tortiously, will prevent a recovery in such an action. *Wilson v. Bibb*, 25 D. 118.

A religious society entitled to the use of a meeting-house for all religious purposes, but who are not the owners of the fee therein, this being in a separate society composed of the pew-holders in the meeting-house, cannot maintain an action of trespass *quare clausum fregit* for a breaking and entering into the meeting-house whereby the exercise of their right was interrupted. *Bakersfield Cong. Soc. v. Baker*, 40 D. 668.

The owner of a building may be in possession thereof, although he has leased the rooms as such to divers individuals, and he may maintain an action of trespass for its destruction. *Curtiss v. Hoyt*, 48 D. 149.

Constructive possession is such as the law annexes to the title, and will without entry maintain trespass *quare clausum fregit* against a casual trespasser; but it is always displaced by actual possession. *McColman v. Wilkes*, 51 D. 637.

To maintain trespass *quare clausum fregit* against a mere wrong-doer, it is unnecessary that the land shall be inclosed, where possession is known, marked, and uninterrupted. *Chandler v. Walker*, 53 D. 202.

Where defendant has entered upon an outlying uninclosed lot of plaintiff's, and has cut and sold wood off it from time to time, these were mere successive acts of trespass, and the title being in plaintiff, the constructive possession is in her, and she may maintain trespass against defendant. *Gent v. Lynch*, 87 D. 558.

An entry by the holder of a mortgage upon one of several detached lots of wild and unoccupied land in the same county, in the name of all, gives him constructive legal possession of all, so that he may maintain trespass against any person afterwards entering without right upon any of the other lots, if the lots are covered by the same mortgage, upon the same condition. *Green v. Pettingill*, 93 D. 444.

Under a paper title apparently good, actual possession of part of the land described is sufficient to maintain trespass for entry upon any part of it. *Parker v. Wallis*, 45 R. 703.

2. *When title alone is sufficient.* — One having title may maintain trespass for cutting timber, without actual possession, no one being in the actual possession. *Gillespie v. Deu*, 18 D. 42; *Van Rensselaer v. Radcliff*, 25 D. 582.

Trespass *quare clausum fregit* may be maintained by a plaintiff who has any title to the *locus in quo*, that continued down to the time of the alleged trespass; and a husband seized in right of his wife has, during her lifetime, a title sufficient to maintain such action. *Adams v. Cuddy*, 25 D. 330.

A disseisor may maintain trespass *quare clausum* against the disseisor. *Stevens v. Hollister*, 46 D. 154.

Where plaintiff has possession of a part of a tract of land, claims the whole of it, and has a deed for the whole, he may recover for every successive trespass upon the land, although the trespasser has actually occupied some portion of the land for a great number of years. *Id.*

3. *When possession alone is sufficient.* — If a person having a possessory title merely forcibly enters and turns out one who has only a naked possession, the latter cannot maintain trespass against the former. *Hyatt v. Wood*, 4 D. 258.

If a person having a legal right of entry makes a forcible entry, though he subjects himself to indictment for a breach of the peace, he is not liable in an action of trespass at the suit of the person who has no right, and so turned out of possession. *Id.*

Possession alone is sufficient to maintain the action against all the world, except the rightful owner. *Wilson v. Bibb*, 25 D. 118.

A party in possession of land may maintain trespass against a stranger for cutting trees thereon, though he has conveyed to a third person who has never entered into possession. *Hayward v. Sedgley*, 31 D. 64.

For Index to Notes in American Decisions and American Reports, see Volume L.

Possession is sufficient evidence of title to land to maintain trespass against one who cannot show a better title or some legal right of entry. *Heath v. Williams*, 43 D. 265; *Leonard v. Crossland*, 60 D. 213; *Fuhr v. Dean*, 69 D. 484.

Trespass *quare clausum fregit* may be maintained against a wrong-doer by one in actual possession without, or constructive possession with, title. *Chandler v. Walker*, 53 D. 202.

Possession is sufficient to maintain trespass against mere wrong-doer for cutting timber from the unfenced portion of a lot, when occupied for several years up to a spotted line, as a part of a farm, and as a wood and timber lot attached thereto, other portions of the lot being cleared, cultivated, and fenced. *Id.*

15. — as between landlord and tenant. — A landlord cannot maintain trespass *quare clausum fregit* after having parted with his entire possession to his lessee. *Torrence v. Irwin*, 1 D. 340. Case is the proper remedy for an injury done to the reversionary interest of the landlord while the property was in the possession of his tenant. *Cannon v. Hatcher*, 26 D. 177.

Where the owner of land agreed with another to cultivate the land on shares, they may jointly maintain an action of trespass against a third person who cuts and carries off the crop. *Foot v. Colvin*, 3 D. 473.

Where a tenant holds over the term, and the landlord enters by force and turns him out, he cannot maintain trespass against the landlord. *Hyatt v. Wood*, 4 D. 258.

A tenant entitled to the waygoing crop, who enters and warns a third person against cutting it, may maintain trespass *quare clausum fregit* against the wrong-doer, notwithstanding he had, previously to the trespass, given up to his landlord possession of the farm, in a part of which the crop was growing. *Stultz v. Dickey*, 6 D. 411.

16. Parties defendant. — The liability of trespassers is joint and several; the plaintiff may proceed against all or any one at his election, and judgment without satisfaction against one is no bar to action against the others. *Blann v. Crocheron*, 54 D. 203. If the damages have been in part satisfied by payment or compromise with some of the defendants, the plaintiff may still proceed against those who remain on the record. Evidence of a sum received by the plaintiff from one of the defendants, on account of the alleged trespass, is, therefore, admissible in mitigation of damages. *Bloss v. Plymale*, 100 D. 752.

Trespass *quare clausum fregit* cannot be sustained against a corporation aggregate. *Foot v. Cincinnati*, 34 D. 420.

Trespass may be maintained on account of damage committed by cattle agisted, either against the owner or the agister, although but

one satisfaction can be obtained. The rule of the common law in this respect has not been changed by the revised statutes, chapter 113, section 4. *Sheridan v. Bean*, 41 D. 507.

The owner of land cannot maintain trespass *quare clausum fregit* against one who was in possession at the time he acquired title. *McColman v. Wilkes*, 51 D. 637.

Tenants in possession may be sued jointly in an action for trespass committed by animals kept by them in common upon the premises, although the several animals are owned by them separately and individually. *Jack v. Hudnall*, 18 R. 298.

17. Declaration. — A declaration in trespass should aver the county in which the trespass was committed; and where, subsequent to the trespass, but before the bringing of the action, a new county was formed, including the land trespassed upon, an allegation that the trespass was committed in the new county is fatal error. *Champion v. Doughty*, 35 D. 523.

The averment of possession in trespass *quare clausum* is sufficiently contained in the charge that "defendant broke and entered into the close of plaintiff." *Finch v. Alston*, 23 D. 299.

18. What may be set up in defense, generally. — To justify, as for a distress damage-tenant, the defendant must show actual possession of the land trespassed upon. *Orser v. Storme*, 18 D. 543.

A purchaser of land under a decree in chancery may enter peaceably and take possession, and may then distrain cattle doing damage on the premises. *Id.*

A trespasser will not be permitted to make the person trespassed against his debtor for improvements made without the consent and against the will of the latter; neither will the trespasser be allowed to set them off against damages to which he has subjected himself by reason of his trespass. *Beverly v. Burke*, 54 D. 351.

Trespass *quare clausum* will not lie against one who, having a right by deed to enter certain premises for a particular purpose, and having entered for that purpose, after entry exceeds his authority, and commits acts for which he was not authorized to enter. *Jewell v. Mahood*, 84 D. 90.

The action of trespass is several as to each defendant, and each has a right to make his own defense, and to have it tried, without being compelled to rely upon a defective defense made by a co-defendant. *Johnson v. Jones*, 92 D. 159.

Duress constitutes a good defense in trespass; but it seems that if the plaintiff gives evidence tending to show that the defendant might have avoided committing the trespass by any reasonable means, it is then incumbent on the defendant to show that he

For Index to Notes in American Decisions and American Reports, see Volume I.

had no reasonable means of escaping from the force or fear after it was applied to him, and before the trespass was committed. *Cunningham v. Pitzer*, 94 D. 526.

In an action of trespass *quare clausum* and for assault, defendant pleaded that the locus was part of plaintiff's house, which had been used by him while postmaster, as a post-office; that one G. having succeeded him in that office, had license for him to enter and remove the public property of the United States; that defendant, as assistant-postmaster and servant to G., and by his direction, attempted to enter for that purpose, but was resisted and assaulted by plaintiff, whereupon, etc. (justifying the trespass). *Held*, that the justification was good, and would have been so without the averment of license. *Sterling v. Warden*, 12 K. 80.

19. — title in other than plaintiff.

— It is no defense to trespass *quare clausum* that the title to the premises on which the trespass is charged is in one other than the plaintiff, unless the defendant justify under authority from such other person. *Finch v. Alston*, 23 D. 299; *McColman v. Wilkes*, 51 D. 637.

Action of trespass *quare clausum fregit* is founded upon the actual possession of the plaintiff; but if defendants have title, the damage done to the close is no injury to the possessor, who has no right. *Wilsons v. Bibb*, 25 D. 118.

A party in possession, though without title, may maintain trespass against a wrongdoer; and defendant's showing the title to be in a third person will not avail him; he must show that the right is in himself. *McColman v. Wilkes*, 51 D. 637.

The rule that a mere trespasser cannot show title in a third party is generally true, but not universally so. It is true when plaintiff relies on prior possession for his title. *Bird v. Liebros*, 70 D. 617.

20. The plea or answer. — *Liberum tenementum* is a sufficient plea in justification in an action of trespass *quare clausum fregit*. *Crockett v. Lashbrook*, 17 D. 98; *Tribble v. Frame*, 23 D. 439.

The plea of *liberum tenementum* asserts title to the locus in quo in defendants. *Wilsons v. Bibb*, 25 D. 118.

In trespass *quare clausum fregit* under such a plea, and issue thereon, evidence of paramount title in either party is admissible. *Ib.*

Records, papers, etc., bearing upon the question of possession are admissible under a plea of *liberum tenementum*. *Ib.*

A plea that the entry was by license of the real owner is good to trespass for breaking a close and carrying off the grain. *Rasor v. Qualls*, 30 D. 658.

The general issue in trespass will allow proof that the breaking the close complained of was by license of the real owner. *Ib.*

The plea of *liberum tenementum* in trespass

quare clausum asserts a freehold in the defendant and a right to immediate possession, but it admits possession in the plaintiff and a color of right thereto. *Hunter v. Hatton*, 45 D. 117.

The general issue in trespass puts in issue both the fact of trespass and title of plaintiff. It follows that any title, whether freehold or possessory, in the defendant, is admissible in evidence; and for this purpose a certificate of the register of the land-office that the defendants had located the land upon which the alleged trespass occurred is competent evidence. *Floyd v. Ricks*, 58 D. 374.

The answer of defendant need not set forth the lease under which he justifies in an action for breaking and entering a close. *Dillon v. Brown*, 71 D. 700.

Defendant in trespass, who has pleaded the general issue, may at his option claim benefit of judgment on demurrer in favor of a co-defendant who has pleaded specially, if such special plea shows that the plaintiff cannot maintain his action against either, or he may insist on a trial of the issue made by his own plea. *Johnson v. Jones*, 92 D. 159.

If such defendant seeks to avail himself of such judgment, and the court permits it, the plaintiff can except, and preserve against them in the record the same question raised by his demurrer to the special plea; but if the defendant insists upon a trial of the issue made by his own plea, a verdict and judgment may be had according to the evidence. *Ib.*

21. Subsequent pleadings. — A traverse of a plea of *liberum tenementum* in trespass *quare clausum* admits the defendant's right to possession if he is entitled to the freehold, and puts in issue only the question of freehold. Hence, evidence of a mere possessory right in the plaintiff is inadmissible, but evidence of a freehold is admissible. *Hunter v. Hatton*, 45 D. 117.

Plaintiff in trespass *quare clausum* need not make a new assignment where the defendant pleads the general issue of not guilty to the whole trespass alleged, with or without a brief statement, under the provisions of the statute; but he may give evidence of any act of trespass covered by his declaration. *Palmer v. Dougherty*, 54 D. 636.

22. What evidence is admissible and sufficient. — Evidence in an action for trespass on timber-lands, under the statute, is regulated by the rules of the common law, and is not confined to the parties to the action; such latter evidence is merely cumulative. *Batschelder v. Kelly*, 34 D. 174.

In Missouri, under a count for trespass framed under the act approved February 25, 1835, which affixes a penalty for every trespass therein described, evidence of the number of trespasses committed is admissible in order that the jury may ascertain the damages. *Cooper v. Maupin*, 35 D. 456.

For Index to Notes in American Decisions and American Reports, see Volume I.

Under the general issue in trespass *quare clausum*, evidence of title as well as of possession in the plaintiff is unquestionably admissible. *Hunter v. Hatton*, 45 D. 117.

A valid lease may be given in evidence as a full legal defense in an action for breaking and entering a close. *Dillon v. Brown*, 71 D. 700.

Under the general issue, everything directly connected with the acts complained of may be proved to show or to rebut malice. *Perkins v. Towle*, 80 D. 149.

Acts of trespass prior to the earliest day laid in the complaint may be proved under the New York statute, though trespasses laid under a *continuando* have already been proved. *Dubois v. Beaver*, 82 D. 326.

An action of trespass was brought against several defendants. As to one of them, Jarrell, the case was dismissed by the plaintiff without trial and before plea. He also dismissed the case as to three other defendants before trial. The defendants pleaded "not guilty," and also accord and satisfaction to Jarrell, who was alleged in the plea to be a joint trespasser, and on the trial they offered in evidence the summons and declaration. *Held*, that it was not error to permit the declaration and orders of dismissal to go in evidence, for they were parts of the record; but that the plea of "not guilty" estopped the remaining defendants from using the allegations of the declaration to prove that the released defendant, Jarrell, was a joint trespasser. *Bloss v. Plymale*, 100 D. 752.

23. What is inadmissible or insufficient. — No evidence can be offered, under the general issue, in trespass *quare clausum* to show that an act *prima facie* a trespass was authorized by the plaintiff. *Finch v. Alston*, 23 D. 299.

Parol evidence is inadmissible under a traverse of a plea of *liberum tenementum* in trespass *quare clausum*, against a husband by a purchaser at a trustee sale of the *locus in quo* as the property of the wife, then an infant, to show that the husband, after the wife's majority, received the purchase-money, permitted the purchaser to take possession, and renounced all claim to the land, as this is no evidence of a freehold. *Hunter v. Hatton*, 45 D. 117.

Evidence of the commission of a trespass upon a tract of land other than that described in the writ is inadmissible. *Longfellow v. Quimby*, 48 D. 525.

In trespass *quare clausum*, defendant's parol admission of plaintiff's title is not admissible to prove his title, where the plaintiff relies upon his title, and not his possession, to sustain the action, but introduces no record evidence of it, and offers the defendant's parol admission to supply its place. *Bivins v. McEivroy*, 52 D. 258.

In trespass, matters not directly connected

with acts complained of cannot be shown. Thus in trespass for tearing down plaintiff's house, it is inadmissible to show, for the purpose of rebutting the presumption of malice, that the house was occupied by lewd women; that visitors entered over defendant's land, left the bars down, and disturbed a religious meeting, etc. *Perkins v. Towle*, 80 D. 149.

In an action for damages for maliciously burning a barn, evidence of the defendant's good character is not admissible under the general denial. *Gebhart v. Burkett*, 26 R. 61; *Barton v. Thompson*, 41 R. 119.

24. Burden of proof. — A presumption of guilt arises in an action of trespass if it is proved that two houses, the removal whereof was the cause of action, were, after such removal, in the possession of the defendant. *Finch v. Alston*, 23 D. 299.

Trespass *quare domum fregit* cannot be maintained without showing an unlawful entry into the house. *Harris v. Gillingham*, 23 D. 701.

The burden of proof as to title to land in trespass, by a plaintiff in possession against a defendant out of possession, is on the latter, where both claim the title. *Heath v. Williams*, 43 D. 265.

Plaintiff in trespass need not prove his possession is rightful; it is deemed to be so until the contrary appears; it devolves on the defendants to show that the plaintiff's was a wrongful possession. *Linard v. Crossland*, 60 D. 213.

If a *prima facie* case of trespass is made out against defendant, the burden of proving justification is on him, for the court will not presume its existence. *Woodbridge v. Conner*, 77 D. 283.

25. Instructions. — The court cannot find, as a legal conclusion, that a trespass was wanton, from the fact that it was committed without a license from the real owners. *Longfellow v. Quimby*, 48 D. 525.

The court has no right to assume that parties to an action are trespassers, as that is a question of fact for the jury. *Beverly v. Burke*, 54 D. 351.

The law presumes damage from trespass, and therefore it is error, in an action for a trespass, for the court to charge the jury that if they believe no injury or damage was done by the defendants to the plaintiffs, they should find for the defendants. *Attwood v. Fricot*, 76 D. 567.

26. The damages recoverable. — Damages in trespass are limited to the injury actually received, and cannot include the trouble the owner has been put to in looking after the trespassers. *Longfellow v. Quimby*, 48 D. 525.

The measure of damages in an action of trespass for breaking plaintiff's close and taking away his goods and chattels is the value of the goods, together with the inci-

For Index to Notes in American Decisions and American Reports, see Volume I.

dental damages. *Woolley v. Carter*, 11 D. 520.

A party intending to commit a trespass on public lands, and by mistake committing trespass upon lands of a private individual, is liable for such trespass in penal damages. *Perkins v. Hackleman*, 59 D. 243.

A party supposing himself to be cutting timber on his own land, but by mistake cutting on another's land, is liable for the actual damage done. *Ib.*

Where the gist of the action is disturbance of plaintiff's possession, whatever was done after the breaking and entry is but aggravation of damages. *Adams v. Blodgett*, 90 D. 569.

Plaintiff in trespass may elect any day prior to the date of his writ as the time when the defendant forcibly entered upon his land and converted property thereon to his own use, and the defendant may be compelled to pay the highest market value for the property taken at the place of the conversion, with interest thereon from the time of the taking to the day of the trial. *Ib.*

The jury may determine the damages by making a fair average of sales of the same kind of property made near the time and place of the conversion, and both before and after the taking. *Ib.*

In trespass for wrongfully attaching and seizing goods, damages cannot be mitigated by proof of an offer to return the property in the same condition on the next day. *Carpenter v. Dresser*, 39 R. 337.

If one having a right, by license, to enter upon another's land for a lawful purpose, exceed his license or abuse his authority, he is liable for consequential damages arising from his wrongful act in an action of trespass *quare clausum fregit*. *Kissecker v. Monn*, 78 D. 379.

The rule of damages in trespass for the destruction of a building is the value of the property destroyed, if the defendants acted *bona fide* under claim of right, doing no unnecessary or wanton injury; but if the defendant acted wantonly and maliciously, the jury may, in the exercise of a sound discretion, allow something more. *Curtiss v. Hoyt*, 48 D. 149.

Exemplary damages may be recovered in trespass *quare clausum*, if the facts would warrant such a recovery in any other form of action. *Perkins v. Towle*, 80 D. 149.

Single damages are recoverable for a trespass which proves to be casual or involuntary, though the complaint was in form for treble damages, under a statute allowing such damages for willful trespass. *Dubois v. Beaver*, 82 D. 327.

Where the defendant went up in a balloon, and descending in the plaintiff's garden, became entangled, and called for help, whereupon a crowd broke into the garden and injured the fences and plants, — *held*, that the

injury was the natural and ordinary consequence of the act of the defendant, and that he was liable therefor. *Guille v. Swan*, 10 D. 234.

27. Judgment, and how enforced. — There can be but one final judgment in an action of trespass *quare clausum* against several defendants; and if some of them should make default, and an interlocutory judgment be rendered against them, it is erroneous to render judgment against those who appear and contest the action, without embracing the defaulting defendants. *Bivins v. McElroy*, 52 D. 258.

If separate judgments have been recovered against several joint trespassers, there can be but one satisfaction of the damages, but the costs can be collected on all the judgments. *Ayer v. Ashmead*, 83 D. 154; *Lord v. Tiffany*, 50 R. 689; *Livingston v. Bishop*, 3 D. 330; *Fleming v. McDonald*, 19 R. 711.

2. For Trespass upon Personal Property.

28. When trespass is the proper remedy. — Trespass *vi et armis* lies if the injury be immediate and direct, but if it be consequential, the action will be trespass on the case. *Jordan v. Wyatt*, 47 D. 720.

Trespass on the case lies for a violent and immediate injury, unless willful, if occasioned by the carelessness or negligence of the defendant. *Ib.*

Where an act not willful, but the result of negligence, is the immediate and direct cause of an injury, trespass *vi et armis* will lie. Accordingly, where a belligerent cruiser chased a neutral, supposing her to be an enemy, and through negligence ran her down in the night, and sank her, trespass *vi et armis* will lie for the damages sustained. *Percival v. Hickey*, 9 D. 210.

Trespass *vi et armis* is the proper form of action for a direct, immediate, and intentional injury to one's fishery; and the fact that the defendant was in the cabin at the time his vessel tore the plaintiff's net does not alter the case, he being still the master of the vessel. *Post v. Munn*, 7 D. 570.

Trespass, and not case, is the proper remedy where an infant, having hired a horse, uses him with such violence and cruelty that he dies. *Campbell v. Stakes*, 19 D. 561.

If case is brought for such an injury, it affirms the hiring, and the plea of infancy is a good defense. *Ib.*

Trespass will not lie for the bare neglect by an infant or adult to use a hired animal with ordinary care, to protect him from injury, and return him as agreed upon. *Ib.*

A willful and positive act by an infant, in such a case, amounting to an election to disaffirm the contract, entitles the owner to immediate possession. *Ib.*

For a willful and intentional injury by an infant, to a horse hired by him, trespass will lie. *Ib.*

For Index to Notes in American Decisions and American Reports, see Volume I.

Want of jurisdiction to render a judgment may be shown collaterally; it avoids the judgment, and in the case of inferior courts, renders all persons concerned in enforcing it trespassers. *Putnam v. Man*, 20 D. 686.

Where the court has jurisdiction, and the proceedings are regular on their face, trespass will not lie. *Id.*

Trover and trespass are concurrent remedies for most illegal or tortious takings. *Phillips v. Hall*, 24 D. 108.

Trespass lies for levying on the goods of a stranger and taking a receiptor, though the goods are not removed, and the receiptor permits the owner to keep possession and dispose of them as his own. *Id.*

Trespass does not lie for goods delivered by the owner to the defendant, and afterwards sold by the latter to a stranger without authority. *Bradley v. Davis*, 30 D. 729.

Abuse of a license given by the owner of goods does not constitute the licensee a trespasser *ab initio*. *Id.*

Trespass is the proper remedy where there is no right to distrain and the seizure is illegal. *Dickson v. Parker*, 34 D. 78.

A tree standing directly upon the line between adjoining owners is the common property of both parties, and trespass will lie if one cuts and destroys it without the consent of the other. *Griſſis v. Bixby*, 37 D. 225.

Trespass is an appropriate remedy where one's property, or the property of a person of whom he has become administrator, has been tortiously taken. *Osborn v. Bell*, 49 D. 275.

Trespass or trover will lie for a dog. *State v. McDuffie*, 69 D. 516.

Plaintiff cannot carve two suits out of one cause of action. Therefore where the plaintiff's team was stopped by the defendant, and a horse taken therefrom, — *held*, that the plaintiff could not bring trover for the horse taken, and trespass for stopping the team and delaying his journey, because it was all one act. *Hue v. Long*, 18 D. 719.

Plaintiff had wood on defendant's land. Defendant set fire to some rubbish on another part of the land. The fire escaped him and unintentionally burned plaintiff's wood. *Held*, trespass *vi et armis* would lie against defendant for the injury. *Jordan v. Wyatt*, 47 D. 720.

Plaintiff's cow escaped into defendant's land, through a defect of a fence which the latter was bound to repair, and was there bitten by a dog. *Held*, that trespass would not lie, but *semble* that case would. *Cate v. Cate*, 9 R. 179.

Defendant had by contract the right to float logs through plaintiff's dam, and was bound by the same contract to repair and pay all damages done by him. *Held*, that he was also liable to trespass on the case for damages negligently done by him. *Dean v. McLean*, 21 R. 130.

29. Who may sue. — A mortgagee of personalty may maintain trespass against one who takes it from the possession of the mortgagor, although at the time the debt is not due. *Woodruff v. Halsey*, 19 D. 329.

Where a party willfully sets fire to and burns wheat brought to a machine to be thrashed, the owner of the machine may, in an action of trespass, recover from him the value of the wheat destroyed. *Ripsey v. Miller*, 62 D. 177.

30. Necessary title or possession in plaintiff. — Actual or constructive possession is necessary to maintain trespass for taking chattels. *Orser v. Storms*, 18 D. 543.

Constructive possession is, when one has such a right as to be entitled to reduce goods to actual possession at any time. *Id.* Accordingly, where cows and sheep were delivered to a person who promised to redeliver within one year, with the natural increase, and to pay for such as should be lost or destroyed and not redelivered, it was held to be a hiring of the chattels for a year for a valuable consideration, and that the owner could not maintain trespass against a person who took them from the hirer. *Putnam v. Wyley*, 5 D. 346.

The right to reduce a chattel into actual possession is sufficient to maintain trespass for taking it. *Buck v. Aikin*, 19 D. 535; *Haythorn v. Rushforth*, 38 D. 540.

The owner of a chattel may maintain trespass for it, if at the time of the injury he have the right of present possession, though the actual possession be in another. *Carson v. Noblet*, 6 D. 554; *Edwards v. Edwards*, 34 D. 711.

One who has bought the timber on a lot belonging to another, and enters and cuts a portion, has sufficient possession to maintain trespass against a stranger who should cut and carry away some of the timber. *Goodrich v. Hathaway*, 18 D. 701.

An appeal lies in such a case, although the damages claimed do not exceed ten dollars. *Id.*

The owner of cattle loaned to another for an indefinite time, who retains the right of property therein, may maintain trespass for taking them or their increase from the borrower's possession, though that possession may have been continued for many years. *Orser v. Storms*, 18 D. 543.

Possession of a part of a tract of land, without title, cannot be extended by construction to the part not in actual possession of the party so as to enable him to reclaim timber cut thereon. *Buck v. Aikin*, 19 D. 535.

The purchaser of a lot cannot reclaim trees cut and removed therefrom before his purchase. *Id.*

A mortgagee of a building on a third per-

* See monographic note on the possession necessary to enable plaintiff to maintain trespass *de bonis*, 18 D. 545-550.

For Index to Notes in American Decisions and American Reports, see Volume I.

son's land may maintain trespass against a stranger who tears it down and carries the materials away, it being unoccupied and not in the actual possession of the mortgagee at the time. *Woodruff v. Halsey*, 19 D. 329.

Trespass *de bonis asportatis* may be maintained by the owner of the land for the removal of wood cut and severed from the freehold, although such owner was not in actual possession. *McClain v. Todd*, 22 D. 37.

Heirs cannot maintain trespass for an injury done in the lifetime of their ancestor, by carrying away cord-wood from his land. *Id.*

A bailor who loans his horses has a constructive possession which will support an action of trespass *de bonis asportatis*. *Root v. Chandler*, 25 D. 546.

The possessor of property may maintain trespass against a mere wrong-doer without showing the extent of his right. *Potter v. Washburn*, 37 D. 615; *Barron v. Cobleigh*, 35 D. 505.

A wrongful conversion of property gives title thereto against all persons except the true owner. *Wincher v. Shrewsbury*, 35 D. 108.

Timber cut on public lands and made into rails belongs, except as against the government, to the person cutting it, and he may maintain an action against any one taking the rails, although the person taking has acquired the title from the government. *Id.*

The possession of plaintiff is generally sufficient to enable him to maintain trespass *de bonis asportatis*; but where a paramount right is shown to be in a third person, and the defendant connects himself properly with such third person, the rule is otherwise. *Hutchinson v. Lord*, 60 D. 381.

Proof of possession and claim of ownership of land is sufficient evidence of title to maintain the statutory action of trespass, to recover the specific value of trees alleged to have been cut upon the land; and in such case, in order to defeat the action, it is incumbent on the defendant to show title, either in himself or in some third person. *Ware v. Collins*, 72 D. 122.

31. Who may be sued. — Trespass lies against one who carries away the materials of a building, although he did not assist in the pulling down. *Woodruff v. Halsey*, 19 D. 329.

Trespass by him who has a special property in goods will lie against him who has a general property. The principle applied to an action by a bailee for the manufacture of skins into morocco against the assignee of the bailor. *Burdiet v. Murray*, 21 D. 583.

Trespass *de bonis* will lie against one who directs an officer to detain property and indemnifies him for such taking. *Root v. Chandler*, 25 D. 546.

Trespass lies against a *bona fide* mortgagee of bailee of a chattel, by the bailor without demand, where the bailee mortgages the same for his own debt without authority and the mortgagee takes possession without notice of the owner's title. *Stanley v. Gaylord*, 48 D. 643.

Those committing trespass by command of another are liable to an action therefor. *Woodbridge v. Conner*, 77 D. 263.

For a joint injury done by dogs owned by separate owners, an action of trespass against such owners will not lie. *Adams v. Hall*, 19 D. 690.

The indorser of a non-negotiable note is not liable as a trespasser for the seizure of property under a void attachment issued in a proceeding brought thereon in his name as nominal plaintiff. *Ross v. Fuller*, 36 D. 342.

An officer is not liable in trespass for using a pitchfork of a debtor in attachment for the purpose of removing certain hay and grain attached by him, where, after the removal, he leaves the fork where he found it, and does it no injury. The maxim *De minimis non curat lex* is peculiarly applicable in such a case. *Paul v. Slason*, 54 D. 75.

The doctrine that an officer becomes a trespasser *ab initio* when he abuses the authority given him by law has never been extended to any case, except where there has been a clear, substantial violation of the plaintiff's rights, and of such a character as to show a wanton disregard of duty on his part. *Id.*

An officer is not liable as trespasser *ab initio* for using personal property attached by him, unless it has been injured by him, or been used by him for his own benefit, or for the benefit of some person other than the debtor. *Id.*

A person who does no more than to prefer complaint to a magistrate is not liable in trespass for acts done under the magistrate's process issuing thereon, though the latter have no jurisdiction. *Barker v. Stetson*, 66 D. 457.

In trespass for a wrongful seizure of plaintiff's goods made by an officer under a warrant issued against the goods of another at the suit of defendant, — *held*, 1. That the defendant was not liable for the wrongful acts of the officer, without proof that he had authorized such acts; and 2. That the fact that defendant's attorney had directed such wrongful acts would not render the defendant liable in the absence of proof of special authority in the attorney. *Weish v. Cochran*, 20 R. 519.

32. Rules of pleading. — A declaration in trespass not alleging property in the plaintiff in the thing taken is bad on demurrer. *Hite v. Long*, 18 D. 719.

In trespass *de bonis*, an averment of the value of the articles carried away is not a material averment. The omission of it is a

For Index to Notes in American Decisions and American Reports, see Volume I.

defect of form only; it is cured by pleading in chief and by the verdict, and is no ground of exception to the admission of evidence to prove the value. *Baker v. Baker*, 48 D. 725.

A count for willfully killing a horse may be joined with one for trespass in entering upon plaintiff's land and setting fire to his buildings; and where no declaration is filed, such additional count will be considered as made. *Rippey v. Miller*, 62 D. 177.

A complaint in trespass *de bonis* need not, in terms, allege "wrongful taking," where the facts set up show a wrongful taking. Such an allegation is not one of fact, but a conclusion of law, arising from the facts stated. *Buck v. Colbath*, 82 D. 91.

To plead property in a stranger is not competent for a defendant in trespass *de bonis*. *Squire v. Hollenbeck*, 20 D. 506.

In trespass *de bonis*, evidence of justification is inadmissible under the general issue. *Root v. Chandler*, 25 D. 546.

The general issue will not admit evidence in trespass for taking goods, to show that the taking was by the defendant, in his capacity of sheriff. *Davis v. Hooper*, 24 D. 751.

In trespass *de bonis*, a plea that the goods belonged to a third person, and that the defendant took them by virtue of an attachment against him, gives no color for the action, and is obnoxious to the objection of amounting to the general issue; but if the plea admits that the property was taken from the possession of the plaintiff, it gives color, and will be held good. *Van Etten v. Hurs*, 41 D. 748.

33. — of evidence. — The wrong-doer is responsible for the consequences which immediately flow from his wrongful or negligent acts; but in trespass for taking corn plaintiff cannot prove, for the purpose of enhancing damages, that, in consequence of the trespass, he was compelled to work as a day-laborer to obtain the means to purchase other corn. *Sims v. Glasener*, 48 D. 120.

To constitute a trespass, wrongful intent need not be proved. *Stanley v. Gaylord*, 43 D. 643.

Trespass *de bonis asportatis* may be sustained by proof of any unlawful interference with or exercise of acts of ownership over property, to the exclusion of the owner. It is not necessary to prove actual forcible dispossession of the property, in order to maintain the action. *Dexter v. Cole*, 70 D. 465.

34. Matters of defense. — A judgment for the defendant in an action of trover or detinue for a chattel is a bar to an action of trespass for the same chattel; for the trespass is waived by bringing trover or detinue. *Hue v. Long*, 18 D. 719.

The owner of a horse which another's servant has harnessed in his team, and is

driving violently away, may stop the team, using no more force than necessary, and retake his horse; and a plea setting forth these facts in an action of trespass by the owner of the team for stopping the same is good, where the plaintiff does not claim property in the horse. *Id.*

In trespass *de bonis* the defendant may give in mitigation of damages that the goods did not belong to the plaintiff, and that they have come to the use of the owner. *Squire v. Hollenbeck*, 20 D. 506.

The owner of land is not liable in trespass for cutting and carrying away the grain or grass of one in wrongful possession. *Barnes v. Dean*, 30 D. 346.

Defendant may show that plaintiff is not the owner or was not in possession of the property upon which the trespass is claimed to have been committed, so as to exclude his right to maintain an action in relation to it; or for the same purpose defendant may show that the owner, against whose property defendant held a writ of attachment, had deposited it with plaintiff, as his servant. *Pomroy v. Parmlee*, 74 D. 328.

Where a trespass has been committed and goods carried away, the injured party is not obliged to accept an offer of compromise, or receive the goods upon restoration proposed, but he may stand upon his legal rights. *Woolley v. Carter*, 11 D. 620.

Property in a stranger is no defense in trespass *de bonis*, though it is otherwise in trover. *Buck v. Aldin*, 19 D. 535.

Trespassers cannot relieve themselves from responsibility by pleading, in defense, the authority of third persons. *Tourne v. Lee*, 20 D. 260.

That a trespass was committed under a mistake is no justification. *Hobart v. Hagget*, 28 D. 159.

The intent with which an act is done is no test of a person's liability in trespass. *Id.*

That plaintiff kept a bawdy-house is no defense in trespass for entering a dwelling-house, and taking and carrying away the goods of the occupant. *Love v. Moynahan*, 63 D. 306.

35. Instructions to the jury. — Defendant pleaded, in an action of trespass *de bonis*, that he took the property under a writ of attachment out of a federal court, and as United States marshal; and that he took it as the property of another party, defendants in the writ. Such taking being admitted by the pleadings, it is erroneous to charge the jury that the right of property in the goods cannot be tried in the state court, and that there must be a verdict for defendant. *Buck v. Colbath*, 82 D. 91.

36. Damages recoverable. — In trespass for taking a chattel the plaintiff may recover both the value of the property and damages for the violence used. *Hue v. Long*, 18 D. 719.

For Index to Notes in American Decisions and American Reports, see Volume I.

The owner of property sold under illegal process, purchasing the same at such sale, either personally or by his agent, can recover only the amount of his bid and interest thereon in trespass for the unlawful taking. *Baker v. Freeman*, 24 D. 117.

The measure of damages in trespass or trover by a termor against his reversioner is the actual loss sustained by the termor. *Harker v. Dement*, 52 D. 670.

The measure of damages in trespass *de bonis*, or trover by a termor against a stranger is the full value of the property. *Ib.*

When an invasion of right is established, the law gives nominal damages, although no actual damage be shown. But damages will not be given for a trespass to personal property when no unlawful intent or disturbance of a right of possession is shown, and when not only all probable but all possible damage is expressly disproved. *Paul v. Slason*, 64 D. 75.

In trespass, plaintiff is entitled to damages for all injury done, and the value of goods taken is not the measure of damages. In such case, it is proper that every circumstance going to show aggravation, as well as the actual injury done, should be taken into consideration. *Alfred v. Bray*, 97 D. 283.

In trespass *vi et armis*, the damages are not to be limited to the value of the property destroyed, and the interest thereon, and vindictive damages for the force, but the jury may give special damages for circumstances of aggravation attending the act. *Churchill v. Watson*, 5 D. 130.

An offer of compromise may be given in evidence in mitigation of the damages. *Woolley v. Carter*, 11 D. 520.

The jury cannot deduct from the amount given in trespass money in the plaintiff's hands belonging to defendant. *Hobart v. Haggel*, 28 D. 159.

37. Judgment, and how enforced. — A judgment for the plaintiff, in trespass for carrying away goods, vests the property in the goods in the defendant. And a verdict cannot be rendered assessing damages for the taking, and ordering the goods to be returned to the plaintiff. *Woolley v. Carter*, 11 D. 520.

Damages for a separate trespass of one of two defendants cannot be included in a joint judgment against both. *Symonds v. Hall*, 59 D. 53.

3. For Trespass upon the Person.

38. When trespass is the proper form of action. — The wrongs for which trespass on the case lies may be either unlawful acts, or lawful acts done under circumstances which render them wrongful, any acts done or omitted contrary to the general obligation of the law, or the particular rights and duties of the parties. *Harrison v. Berkley*, 47 D. 578.

Trespass *vi et armis* will lie for an unintentional injury caused by the glancing of a

pistol-ball shot at a mark. *Welch v. Durand*, 4 R. 55.

The plaintiff, a blind girl, taught music in the defendant's family one day every week, and passed the night in his house, lodging in a room assigned her by the defendant and his wife. One night at midnight the defendant came stealthily into her room, sat upon her bed, leaned over her, and solicited her to sexual intercourse, which she refused. *Held*, a trespass and an assault; that exemplary damages were proper; and that the question whether these acts would have injured a person of ordinary nerve and courage was immaterial. *Newell v. Whitcher*, 38 R. 703.

39. Parties. — Where a physician takes an unprofessional, unmarried man with him to attend a case of confinement, and no real necessity exists for the latter's assistance or presence, both are liable in damages to the woman, although she supposed at the time that the intruder was a medical man, and therefore submitted without objection to his presence. *De May v. Roberts*, 41 R. 154.

B seized A by the arm, swung him around, and let him go, thereby throwing him violently against C, who instantly pushed him away and against a hook which injured him. *Held*, that A could maintain an action of trespass *vi et armis* against B. *Ricker v. Freeman*, 9 R. 267.

Three persons at midnight demanded admittance to a restaurant which was closed for the night, but had a light burning within. One of them went around to a side door, entered, and told the keeper that one of the others wanted to come in. The others being at the front door, one said to the other, "fire a salute." The one addressed fired a pistol, and the ball went through the door, and severely wounded the keeper. There was an ordinance prohibiting the discharge of fire-arms in the street. *Held*, that the person firing and the one advising the firing were responsible. *Daingerfield v. Thompson*, 36 R. 783.

40. Pleading. — *Molliter manus imposit* in a plea is no justification of a beating and wounding. *French v. Martin*, 57 D. 294.

41. Defenses, generally. — Trespass will not lie where the injury is the result of an involuntary act, and no blame attaches to the defendant. *Vincent v. Stinehour*, 29 D. 145.

The plea of *son assault demeene* is not sustained where it appears that the defendant's assault was disproportionate to the assault made on him. *Scribner v. Beach*, 47 D. 265.

A wounding, claimed to be in defense of one's property, is not justified unless it is shown that the party wounded had first forcibly attempted to take the property. *Ib.*

In an action for excessive personal injuries inflicted by defendant in resisting the

For Index to Notes in American Decisions and American Reports, see Volume I.

attempt of the plaintiff to dig ore from the defendant's mine, it is competent to prove that angry feelings had arisen between the parties in regard to their respective right to the possession of the ore bank previous to the beating, in order to show that the plaintiff would naturally expect and come prepared to meet a vigorous resistance, if he was determined to proceed to assert his right to the possession by force, and this might serve to palliate or excuse the conduct of the defendant. *Riddle v. Brown*, 56 D. 202.

Where the trespass was committed in an affray, the defendant may show, in mitigation of damages, that the plaintiff, during several years before the affray, had frequently tried to provoke a quarrel with him; had on various occasions threatened to take his life; that some of these threats were made to defendant himself; and that all of them had been brought to his knowledge before the affray. *Fairbanks v. Witter*, 86 D. 765.

The proprietor of a place of business may use sufficient force to remove from the premises a person who, having no right to remain, refuses to depart after being requested to do so; and he does not incur liability for trespass in so doing; but if in asserting his rights the proprietor uses more force than is necessary to eject the intruder, or inflicts unnecessary injury, he then becomes a trespasser and liable as such. *Woodman v. Howell*, 92 D. 221.

The public have only an easement in a highway to pass and repass along the same, and when one stops in the road and uses loud and obscene language, he becomes a trespasser, and the owner of the land has the right to abate the nuisance which he is creating; and in case the trespasser is armed with a pistol and acting in a belligerent manner, the principle of *molliter manus* does not apply. *State v. Davis*, 30 R. 86.

The defendant, armed and sitting in the road, saw the plaintiff coming toward him with a gun on his shoulder, and thereupon concealed himself and shot the plaintiff, although the latter made no hostile demonstrations and the defendant could easily have got away. The defendant knew that the plaintiff twenty days before had threatened to take his life, but there had been no attempt to carry out such threats. *Held*, 1. That the threats did not justify the defendant's action; 2. That evidence of the violent and dangerous character of the plaintiff, and of the peaceable character of the defendant, was incompetent. *Cummins v. Crawford*, 30 R. 558.

42. Process as a defense. — Where the defendant has sufficient real property to satisfy a judgment recovered against him, trespass will lie against the judgment creditor who sues out a writ of *capias ad satisfaciendum*, under which the debtor is imprisoned,

although such writ will be a justification to the officer executing it. *Allison v. Rheam*, 8 D. 644.

A plea defending an alleged trespass on the ground of an application for issuance of a *ca. sa.* is bad, when it omits to allege the due issuance of the *ca. sa.*, and the arrest and imprisonment of plaintiff by virtue thereof. *McDonald v. Willie*, 54 D. 423.

43. Instructions. — Whether a beating administered in repelling a trespass upon defendants was excessive and beyond what was necessary for the defense and maintenance of their possession is a matter purely for the jury to determine under all the facts and circumstances of the case. *Riddle v. Brown*, 56 D. 202.

44. Amount of recovery. — It is the right and duty of the jury, in assessing damages in trespass for an assault, to consider what effect the finding of trivial damages would have to encourage a disregard of the laws and disturbances of the public peace, and it is not error for the court to so instruct them. *Beach v. Hancock*, 59 D. 373.

An action of trespass *vi et armis* will lie for an unintentional injury caused by the glancing of a pistol-ball shot at a mark, and if gross negligence and culpable carelessness is proved, additional damages, as expenses of the litigation, will be allowed. *Welch v. Durand*, 4 R. 55.

4. Other Actions of Trespass.

45. When trespass to try title will lie. — Trespass to try title may be maintained, notwithstanding the pendency of chancery proceedings to sell the land for the purchase-money. *Chapman v. Glassell*, 48 D. 41.

The plaintiff must have a legal title at the commencement of an action to try title. *Bank of South Carolina v. S. C. M. Co.*, 49 D. 640.

A sheriff's deed, dated after the commencement of the action, will not support trespass to try title to land purchased by plaintiff at judicial sale prior to the proceeding. *Id.*

To collaterally attack title, such errors as would be good upon appeal or writ of error would not be sufficient. *Con v. Davis*, 52 D. 199.

The law affords the same protection to an equitable as to a legal title, in an action of trespass to try title. *Easterling v. Blythe*, 56 D. 45.

A statute directing that trespass to try title shall be tried "conformably to the principles of trial by ejectment" was not intended to introduce all the incidents and consequences attached to that form of action at the common law; its object was simply to furnish a mode of procedure to ascertain in whom the right of property resides. *Id.*

Trespass to try title may be sustained by

For Index to Notes in American Decisions and American Reports, see Volume I.

the cutting of a fallen tree the roots of which still remain in the soil. *Spigener v. Cooner*, 84 D. 755.

46. Pleading and evidence. — In trespass to try title, a recovery will be defeated by showing a title in a third person fully matured under the statute of limitations. *Fayouez v. Prather*, 9 D. 691.

A paper title need not be shown as against a mere possessor without title, where the claimant and those from whom he derives title have a prior possession and have made valuable improvements. *Cox v. Davis*, 52 D. 199.

Defendant is not estopped to show a better title than common origin, from which both trace title, and under which the defendant obtained possession, in trespass to try title, but it is not sufficient merely to raise a doubt as to which is the paramount title. *Martin v. Ranlett*, 57 D. 770.

Proof, in trespass to try title, of a claim of title from a common source by both parties is sufficient to enable the plaintiff to avoid a nonsuit, as where it is shown that both claim under execution sales against the same party. *Ib.*

Defendant supplying proof of common origin of title claimed by both parties, if the plaintiff fails to do so, will prevent a nonsuit in the appellate court although a nonsuit was erroneously refused in the first instance in the court below. *Ib.*

Special matters of defense may be specially pleaded in trespass to try title. *Hunt v. Turner*, 60 D. 167.

Defendant has a right to fortify his title and cure defects therein by any releases or conveyances which he can obtain at any time before trial of an action of trespass to try title. *Walker v. Winerson*, 73 D. 207.

Defendant in trespass to try title, if he can have in that action equitable right, as against plaintiff, to avoid a sheriff's deed for irregularities in the sale, cannot have this relief under plea of not guilty, but must plead specially, bringing in all necessary parties. *Ayres v. Duprey*, 86 D. 657.

A plea of not guilty in trespass to try title admits only such defenses as are applicable to that action. *Ib.*

47. Damages — Improvements. — In trespass to try title, damages may be recovered for the retention of the premises. *Avent v. Read*, 27 D. 663.

In trespass for title, the defendant may not be allowed for improvements made after suit, although with the intention of removal, and after sequestration and replevy. *Henderson v. Owenby*, 42 R. 691.

48. Trespass to recover possession may be maintained on a contract between the owner of the fee and the plaintiff, by which the plaintiff was to take possession, make certain improvement within a given time, and then receive title in fee. Nor can

a stranger resist a recovery on the ground that the plaintiff has not performed the conditions of the contract. *White v. Saint Guirons*, 12 D. 56.

A right of entry and possession are alone sufficient to sustain trespass. It is not necessary to prove actual possession or ouster, and the plaintiff may recover, though the defendant be in possession of less than is declared for. *Ib.*

Damages for meane profits may be recovered in trespass, as well as the possession. *Ib.*

5. The Criminal Prosecution.

49. What constitutes a criminal trespass. — A party who is on a public or private highway, and is violent in his manner and threatening in his language to the party over whose land the highway passes, is guilty of forcible trespass. *State v. Buckner*, 98 D. 83.

One who pursues with dogs and kills a hog trespassing on his premises, and injuring a growing crop, is guilty of criminal trespass. *Thompson v. State*, 42 R. 101.

A mere trespass on private property, without disturbance of the peace, is not an indictable offense. *State v. Wheeler*, 23 D. 212.

Entry by the owner of land, and erection of a building, against the objection of a tenant at sufferance in possession, does not constitute an indictable trespass at common law. *State v. Ross*, 69 D. 751.

Indictable trespass is that committed *manu forti*, in a manner amounting to a breach of the peace, or which would necessarily lead to a breach of the peace, if the party in possession were not overawed by the force displayed, and induced to surrender possession because resistance would be useless. *Ib.*

Whether one having a right of entry may use force if necessary to exert his right is an unsettled question, according to common law; but the authorities may be reconciled on this distinction. One having a right of entry may use force, provided it does not amount to a breach of the peace; but one not having such right is guilty of indictable trespass if he enter with a strong hand, under circumstances calculated to excite terror, although the force used does not amount to a breach of the peace. *Ib.*

50. Indictment. — An indictment in forcible trespass, which charges that defendant entered the premises with a strong hand, the prosecutor being then and there present, is sufficient. *State v. Buckner*, 98 D. 83.

The words "willfully, maliciously," etc., used in an indictment to describe the manner in which an act was done, cannot have the effect of making such act a public offense. *State v. Wheeler*, 23 D. 212.

For Index to Notes in American Decisions and American Reports, see Volume I.

TRESPASSERS.

Duty of land-owner as towards, see REAL PROPERTY, 9.

Liability of carrier towards, see CARRIERS, 70.

Release of one of several, see RELEASE, 6.

TRIAL.

[Includes rules for the determination of issues of fact and of law, by jury or by court, in both civil and criminal cases; not including principles peculiarly applicable to particular causes or forms of action or proceedings individually treated in the digest.]

By jury, of suit for divorce, see MARRIAGE AND DIVORCE, 73.

Effect of absence of accused during, see NEW TRIAL, 61.

Effect of failure to object at, see NEW TRIAL, 15.

New trial for errors at, see NEW TRIAL, 5-15.

Of claims against decedent's estate, see EXECUTORS, etc., 96.

Of competency of dying declarations, see HOMICIDE, 44.

Of feigned issues, see EQUITY, 51.

Of issue of sanity, see INSANE PERSONS, 16, 37.

Of right of property, see ATTACHMENT, 117; EXECUTION, 190.

Of title to office, see QUO WARRANTO, 5.

Surprise at, when ground for new trial, see NEW TRIAL, 41-43.

See also HEARING.

I. MODE OF TRIAL; WHETHER BY JURY OR BY COURT.

II. PLACE OF TRIAL, AND HOW CHANGED.

III. BRINGING ON THE TRIAL; POSTPONEMENT.

IV. IMPANELING THE JURY; CHALLENGES.

V. CONDUCTING THE TRIAL.

1. In General.
2. Putting in the Evidence.
3. Objections and Exceptions.
4. Nonsuit; Dismissal.

VI. INSTRUCTIONS TO THE JURY.

1. Questions of Law and Fact.
2. What Instructions are Proper.
3. What Instructions are Improper.
4. The Prayer for Instructions.
5. Further Instructions; Directing a Verdict.

VII. THE VERDICT OR FINDING.

VIII. TRIAL IN CRIMINAL CASES.

1. Right of Trial by Jury.
2. Bringing on the Trial.
3. The Place of Trial, and how Changed.
4. Continuance and Postponement.
5. Impaneling the Jury; Challenges; Opinions.
6. Trial and Decision of Challenges.
7. Conduct of the Trial, Generally.
8. Counsel's Address to the Jury.
9. Instructions to the Jury.

10. Retirement and Deliberation of the Jury.

11. The Verdict.

12. Arrest of Judgment.

13. The Sentence, and how Enforced.

I. MODE OF TRIAL; WHETHER BY JURY OR BY COURT.

1. Right of trial by jury.*—An amendment to the United States constitution concerning jury trial does not apply to suits in state courts. *Lee v. Tillotson*, 35 D. 624; *Joseph v. Bidwell*, 26 R. 102.

Constitutional provisions preserving right of trial by jury apply more particularly to criminal cases. *Flint River Steamboat Co. v. Foster*, 48 D. 248.

A provision that a trial by jury "as heretofore used shall remain inviolate," in the Georgia constitution, applies to that right as it existed in 1798, and does not require a jury trial in all cases. *Id.*

All issues of fact must be tried by a jury, if a party desires to have them so tried; and the court should grant him the privilege of such a trial, although the statute which gives him the remedy he is pursuing may be silent on the subject. *Scott v. Nichols*, 61 D. 503.

2. Constitutionality of statutes restricting the right.—A statute providing that upon the affirmation of a judgment in the court of appeals, judgment shall be given by that court against a surety on a supersedeas bond, is unconstitutional, in that it deprives the surety of a right of trial by jury in a case where it existed before the adoption of the constitution. *Gullion v. Bowhore*, 2 D. 708.

A trial by jury in common-law causes is a constitutional right, and a law that any such causes shall be tried "agreeably to the course of a court of chancery" is obnoxious to this right, and void. *North Penn. Coal Co. v. Snowden*, 82 D. 530; *Bank of the State v. Cooper*, 24 D. 517.

A statute which authorizes the rendition of a judgment without a jury contravenes the provision of the constitution of Florida that "the right of trial by jury shall forever remain inviolate," and is therefore void. *Flint River Steamboat Co. v. Roberts*, 48 D. 178.

The statute of January 4, 1847, authorizing a court to render judgment without a jury, but upon the affidavit of the plaintiff alone, and without notice to the defendant, is unconstitutional, null, and void. *Id.*

The act authorizing a judgment without the intervention of a jury is not necessarily unconstitutional, especially if it ultimately guarantees that right, as in the Georgia steamboat lien law of 1841. *Id.*

* How far legislature may regulate right of trial by jury, see note, 58 D. 791-793.

Power of legislature to dispense with trial by jury, see note, 45 D. 125-124.

For Index to Notes in American Decisions and American Reports, see Volume I.

A statute hampering the right of trial by jury with restrictions which do not amount to a denial of that right, directly or indirectly, is not unconstitutional, as in the case of a statute requiring defendants in certain classes of cases to pay what they admit to be due, and to give security, etc., before obtaining a jury trial. *Id.*

A statute providing that in civil actions no party shall be entitled to a trial by jury, unless he files within a prescribed time a notice that he desires such trial, is constitutional. *Foster v. Morse*, 42 R. 438.

A statute requiring the party demanding a jury to pay the jury fee, and tax the same in his costs, if he prevail, is constitutional. *Randall v. Kehler*, 11 R. 169.

3. Waiver of trial by jury.—A jury trial may be waived, being a mere constitutional privilege. *Flint River Steamboat Co. v. Foster*, 43 D. 248.

An agreement that a pending action shall abide result in another case, entered on the docket, binds the parties to it; and the defendant, by entering into such an agreement, waives his right to a trial by jury to determine the damages. *Cummings v. Smith*, 79 D. 629.

4. When trial by the court without a jury is proper.—Where a jury has been waived, the judge is substituted to the same attributes that would have been vested in a jury. *Callahan v. Patterson*, 51 D. 712.

A jury is unnecessary in actions founded on bills obligatory. *Baughner v. Nelson*, 52 D. 694; or in a case of *quo warranto*. *State v. Lupton*, 27 R. 253; or in proceedings under a public drainage act. *Anderson v. Caldwell*, 46 R. 613.

5. Separate trials.—Defendants who submit to be tried jointly without objection thereby waive their right to separate trials. *Sere v. Armitage*, 13 D. 311.

Separate trials may be allowed, in the discretion of the court, when there are several defendants in ejectment and the testimony of one is material for his co-defendant. *Young v. Adams*, 58 D. 654.

II. PLACE OF TRIAL, AND HOW CHANGED.

6. Grounds for change of venue, generally.—In an action for a libel, the court will not, upon the common affidavit, change the venue from the county in which the libel was circulated to that in which it was printed and first published. *Clinton v. Croswell*, 2 D. 235.

7. —disqualification of judge.—When an application for a change of venue is made on the ground that the judge is interested, and the only proof is, that he was interested in the property in dispute a year before suit was brought, and the motion is overruled, the ruling will be sustained on ap-

peal, under the presumption that the judge acted on his own knowledge that at the time suit was instituted he had no interest. *Table Mountain G. & S. M. Co. v. Waller's etc. Co.*, 97 D. 526.

8. Who may move.—Change of venue can be applied for only by a party to the record, under the Illinois statute, and it is not error to deny an application for a change of venue in an action of ejectment made by a third person claiming to be a trustee of the real owner, of whom the defendant on the record is only a tenant. *Crowell v. Maughs*, 43 D. 62.

The court may, in the exercise of sound legal discretion, grant or refuse a change of venue, upon the application and affidavit made by a person not a party to the record. *Shattuck v. Myers*, 74 D. 236.

Corporations are entitled to a change of venue equally with individuals. *Commercial Ins. Co. v. Mehlman*, 95 D. 543.

Any recognized officer of a corporation may make the requisite affidavit upon an application by the corporation for a change of venue, he being regarded as a party to the record *pro hac vice*. *Id.*

9. The motion papers.—An application for a change of venue must generally be supported by the affidavit of the party in person; and the affidavit of his attorney is not sufficient basis for the change. But this rule is not applicable in suits by or against corporations. *Shattuck v. Myers*, 74 D. 236.

An affidavit for a change of venue stating merely the belief of affiant that the judge is disqualified to try the cause on the ground of interest, but without stating any of the facts upon which such belief is founded, or any person from whom he may have learned any facts as to the matter, is too vague and uncertain. *Table Mountain G. & S. M. Co. v. Waller's etc. Co.*, 97 D. 526.

10. Hearing and determining the motion.—In civil actions, an application for a change of venue should be granted when properly presented, the granting or withholding thereof not being within the discretion of the court. *Shattuck v. Myers*, 74 D. 236.

11. What will effect the change.—On a change of venue, the statute, not in express terms, but by necessary implication, requires the clerk to transmit the transcript over his official certificate and seal. *Stringer v. Jacobs*, 50 D. 221.

An order for a change of venue divests the court in which the suit is instituted of its jurisdiction over the cause, and in contemplation of law operates to transfer the same to the court to which the change is taken; the latter court, though vested with the jurisdiction, cannot exercise it so as to adjudicate upon the rights of the parties litigant, until such a transcript of the record

* See note on change of venue, 74 D. 241-245.

For Index to Notes in American Decisions and American Reports, see Volume I.

and proceedings is filed as is required by the statute. *Ib.*

On a change of venue, the statute requires a full transcript of the record and proceedings in the cause, with all the original papers filed therein and composing a part of the record; it is not absolutely essential that a copy of the entire record and proceedings, or that every original paper filed in the cause, should be transmitted, but if enough is transmitted to enable the court to determine what is in controversy, and to bring its dormant power into active exercise, numerous irregularities may be waived without impairing the validity of the judgment. *Ib.*

The transcript on a change of venue is insufficient where the clerk transmitted only a copy of the petition, notice, and order for the change of venue, and totally failed to send up any part of the record and proceedings in the cause. *Ib.*

12. Consequences of the change. — Where a change of venue has been improperly ordered, the court to which the transfer was made may direct it to be retransferred to the court where it belongs. *Rogers v. Watrous*, 58 D. 100.

III. BRINGING ON THE TRIAL; POSTPONEMENT.

13. Non-attendance of witnesses. — A continuance for conscience' sake will not be granted because a Jew has scruples in regard to appearing in court as a witness on Saturday. *Simon v. Gratz*, 23 D. 33.

A motion to suspend a trial to enable defendant to subpoena a witness whom he failed to serve properly is addressed to the discretion of the judge, and his decision thereon is not one to which an exception can be properly taken. If such an exception be taken, the judge should strike it out before he affixes his seal. *Rapelye v. Prince*, 40 D. 267.

A continuance will not be granted for the absence of a material witness where a party has omitted to employ the means provided by law, when practicable, to enforce his attendance. *Hensley v. Lytle*, 55 D. 741.

A failure to subpoena a witness is fatal to an application for continuance, in general, for his absence. *Ib.*

Due diligence to obtain the testimony of a witness, to warrant a continuance for his absence, is not shown by an affidavit admitting that he had not been subpoenaed, but stating that he lived so near that he could be called at any time, and was willing and determined to attend the trial, but had left the state with the intention of returning in time for the trial, and had been unavoidably detained abroad. *Ib.*

14. Alteration or amendment of pleading. — Where two replications are filed to the same plea, and upon the plaintiff refusing to elect upon which he will rely,

the court orders one of them rejected, the defendant is not entitled to a continuance on the ground that plaintiff has made a substantial amendment to his pleadings. *Whitler v. Hicks*, 33 D. 454.

An amendment of a declaration, made during the trial, which does not affect the merits or prejudice the defendant, is no ground for a continuance. *McKinney v. Harter*, 43 D. 96.

An application for a continuance on the ground of an amendment to the complaint substituting new plaintiffs must be supported by affidavit showing how the defendant is prejudiced by the amendment. *Hubler v. Pullen*, 68 D. 620.

15. Continuance to permit execution and return of commission to take testimony. — A refusal to continue for an answer to interrogatories is not error, where they have been filed with a pleading and so framed as to elicit evidence to sustain certain paragraphs of such pleading, if a demurrer to those paragraphs has been sustained, and responsive answers to the questions cannot be properly admitted as evidence under other issues raised by the pleading. If, however, the paragraphs demurred to be sufficient, the demurrer ought to be overruled as to them, and the cause continued, if necessary, to obtain an answer to the interrogatories. *Swift v. Ellsworth*, 71 D. 316.

A continuance of a cause for a failure to obtain a deposition of an absent witness will no be justified on a mere showing that letters were written and inquiries made concerning his whereabouts, without success, in time to have the deposition at the trial. *Stevenson v. Sherwood*, 74 D. 140.

16. The motion, generally. — How far granting it is discretionary. — Applications for continuances are addressed to the sound legal discretion of the court, and if not expressly provided for, will be granted or refused, as the ends of justice may require. *Wilkowski v. Halle*, 95 D. 374; and a second affidavit for a continuance, after the first has been overruled, is not good if it fails to show any reasonable excuse for the failure to embrace all the reasons for the continuance in the first application. *Shattuck v. Myers*, 74 D. 236.

17. Requisites of moving affidavits. — The continuance of a cause will not be granted unless the party seeking it makes oath that due diligence has been used. *Thompson v. Miss. Marine and F. Ins. Co.*, 22 D. 129.

18. Hearing the motion. — A miscontinuance is cured by the statute of jeofails. *Miller v. Plumb*, 16 D. 456.

19. Granting the motion on terms. — A court may, as terms for granting a continuance, require the applicant to consent to the reading of an informal deposition. *Hamilton v. Cooper*, 12 D. 588.

For Index to Notes in American Decisions and American Reports, see Volume I.

20. Avoiding continuance by admissions.—The admission that an absent witness, if present, would swear to the facts expected to be proved by them, is not sufficient to defeat a motion for a continuance on the ground of the absence of witnesses; the admission must be of the facts themselves. *Smith v. Creason*, 30 D. 688.

IV. IMPANELING THE JURY; CHALLENGES.

21. Qualifications of jurors.*—Where a juror was a freeholder when his name was put into the town jury-box, but was not a freeholder at the time of the trial, it was held that this was not a cause for setting aside the verdict, but exception should have been taken by challenge. *Orcutt v. Carpenter*, 4 D. 722.

A juror may be excluded on the ground that he does not adequately understand English, at the discretion of the trial judge. *Sutton v. Fox*, 42 R. 744.

The objection that a juror was not of proper age comes too late after verdict. *Johns v. Hodges*, 45 R. 722.

22. Hearing excuses.—The charter of the defendant city provided that in an action to which the city is a party no person shall be deemed an incompetent juror by reason of his being an inhabitant of the city. In impaneling a jury in this action, the plaintiff, against the defendant's objection, excused twelve jurors drawn, on the ground that they were inhabitants and tax-payers of the city, and they were set aside. A jury was obtained, and judgment went against the city. Held, that the ruling was a fatal error. *Hildreth v. City of Troy*, 54 R. 686.

23. Talesmen.—On a *tales de circumstantibus*, only those actually present in court can be taken. *Simon v. Graetz*, 23 D. 33.

24. Challenge to the array.—A challenge to the array of the panel will not be allowed for the reason that the clerk who issued the warrants to the constables to summon the jury is a party to the action. *Hart v. Tallmadge*, 2 D. 105.

If the sheriff who returns the jury is a brother of one of the litigants, this is a good cause of challenge to the array. *Munshower v. Patton*, 13 D. 678.

25. Challenge for cause, generally.†—Rejecting of one as a juror who has been subpoenaed to impeach the character of an important witness in the cause is not error. *Chess v. Chess*, 21 D. 350.

It is a good cause of challenge to a juror that the same facts which warrant a verdict in favor of the plaintiff will support an action under the trustee statute in favor of the juror and against the defendant, on a

judgment previously recovered against the plaintiff and assigned to the juror. *Davis v. Allen*, 22 D. 386.

Where jurors who have tried one case are brought to try another in which the issues and evidence are the same, the law presumes them to be under a disqualifying bias, and an objection to their competency should be sustained. *Garthwaite v. Tatum*, 76 D. 402.

26. — for opinion of juror.*—Impaneling a juror on a former trial, if no verdict or other expression of opinion is given, is not a sufficient ground for challenge. *Atkinson v. Allen*, 36 D. 361.

A juror having formed a decided opinion, which is positive, and not hypothetical, upon the merits of the case, either from personal knowledge, from statements of witnesses, or of parties, or from rumor, which opinion will probably prevent him from giving an impartial verdict, is subject to challenge for cause. *Smith v. Barnes*, 36 D. 515.

A light, transient, or hypothetical opinion formed by a juror, which may be changed, and which does not show a conviction of the mind and a fixed conclusion upon the case, is not a good ground of challenge; and a full examination may be allowed if necessary to ascertain the state of the juror's mind. *Ib.*

An opinion formed by a juror from a rumor as to which party in the case ought to succeed, where he states on his examination that he still retains that opinion if what he has heard is true, but is not asked as to whether or not he believes it to be true, is not a good ground of challenge. *Ib.*

A person who has expressed an opinion that one undergoing imprisonment for a criminal offense has been sufficiently punished, and who has signed a petition for his pardon, is not a competent juror upon the trial of a civil action against the prisoner founded upon the same charge. *Asbury Life Ins. Co. v. Warren*, 22 R. 590.

27. Challenge to the favor.—It is a good cause of challenge to the favor that a juror has, before the trial, taken the depositions of the principal witnesses of one of the parties as a magistrate. *Rollins v. Ames*, 9 D. 79.

But where the objection is made after verdict, a new trial will not be granted for this cause, unless the party and his counsel make affidavit that they did not know of this ground of challenge at the trial. *Ib.*

A juror who would be incompetent by relationship to a party is equally incompetent if he sustains the same relationship to counsel whose fees depend upon the recovery. *Melson v. Dickson*, 36 R. 128.

* See monographic note on opinions of jurors as ground for challenge, 36 D. 521-524.

See note on opinions formed from rumor and newspaper accounts, 36 D. 529, 530.

See note on hypothetical opinions of jurors, 36 D. 524-525.

* Competency of jurors, see note, 53 D. 101.
† English language, inability to understand, as ground for challenge to juror, see note, 35 R. 728-731.

For Index to Notes in American Decisions and American Reports, see Volume I.

28. Peremptory challenges. — Where when it came plaintiff's turn to exercise his right of peremptory challenge he answers that he has none to make, and the defendant then challenges a juror, and another is called to fill his place, plaintiff may then peremptorily challenge a juror who was on the panel at the time of his waiver; and his neglect to challenge only counts one upon the number of challenges allowed him. *Fountain v. West*, 92 D. 406.

29. Time to interpose challenges. — It is too late after verdict in a civil case to object to the jury on the ground that they have not been regularly summoned on the venire, or as talesman from the by-standers, or because the *venire facias* had not been regularly drawn from the box. *Shotwell v. Hamblin*, 55 D. 83.

30. Waiver for challenges. — Where, at the trial of an action against an insurance company, it appeared that the sheriff, who had returned a talesman to serve on the jury, was a stockholder in such company, and this was known to plaintiff's counsel soon after the trial began, but no objection was made until some time after, this was held to amount to a waiver of any exception to the competency of such juror. *Orrok v. Com. Ins. Co.*, 32 D. 271.

Where a bank is plaintiff, the fact that a juror is the father of a director thereof is a legal ground of principal challenge, but objection to him may be waived by the opposing party, and is waived by his not making, at the proper time, even the ordinary inquiries respecting the qualifications of the juror. *Quinebaug Bank v. Leavens*, 50 D. 272.

31. The proper number of jurors. — That a jury consisted of thirteen persons, in *assumpsit*, is no ground of error. *Tilman v. Ailles*, 43 D. 520.

32. Struck juries. — The court is not required to be active in assigning a struck jury, and is not bound to grant one on demand of the parties, unless such demand be made before the organization of the jury is commenced. *McArthur v. Currie's Adm'r*, 70 D. 529.

V. CONDUCTING THE TRIAL.

1. In General.

33. Qualifications and powers of the judge. — The rules of court may, in a proper case, be suspended by the judge presiding at a trial, in the exercise of his discretion. *Eastman v. Amoskeag Mfg. Co.*, 82 D. 201.

In all motions arising during the progress of a trial, the court may act on personal knowledge in regard to things which in their nature are better known by it than they could be by others. *Table Mountain G. & S. M. Co. v. Waller's etc. Co.*, 97 D. 526.

34. What questions are before the court. — Questions in no wise connected

with the issue at trial cannot be tried. *Sidenesparke v. Sidenesparke*, 83 D. 527.

35. Election between counts. — The refusal of a judge to require the plaintiff to elect on which of two counts in slander, for the same cause of action, he will proceed on the trial, is not a ground of exception. *Sheffill v. Van Deusen*, 77 D. 377.

36. Motion to amend. — Under an act allowing an amendment "on" the trial, plaintiff may amend his declaration during the argument. *Franklin Fire Ins. Co. v. Findlay*, 37 D. 430.

A motion to amend after defendant's motion for nonsuit does not come too late. A motion to amend is always in time when it immediately follows the objection to the sufficiency of the complaint or answer. *Valencia v. Couch*, 91 D. 589.

37. The right to open and close, generally. — The affirmative rests on the plaintiff, in contemplation of the law. *Benham v. Rowe*, 56 D. 342. And the party holding the affirmative has the right to open and close the argument to the jury. The strict rule on this subject is for the party holding the affirmative to open his case, stating and maintaining his several points by reference to such evidence as tends to sustain them, together with the points of law and a reference to the authorities; then for the other side to answer, and illustrate and establish his defense, combating the positions assumed by his adversary, and assuming others of his own; and afterward for the party holding the affirmative simply to reply to what has been said on the other side, confining himself strictly in his reply to what has been urged by his opponent. But this rule is not always observed in practice, and a departure from it can hardly be assigned for error. Matters of this kind are generally under the control of the judge, and rest mainly in his sound discretion, and unless it is clear that he has abused that discretion, the fact that he may have made a mistake affords no ground for reversing the judgment. *Marshall v. Am. Exp. Co.*, 73 D. 381.

In an action for libel, the plaintiff holds the affirmative, although defendant, in his answer, admits signing the alleged libelous publication, but denies all malice, amount of damage, and intentional publication. *Fountain v. West*, 92 D. 406.

Where plaintiff files an admission and avoidance of facts pleaded by defendant, or where the state of the pleadings and admissions is such that he is not entitled to recover without the introduction of evidence, the burden of proof is deemed to be upon the plaintiff, and he will be entitled to open and close the trial. *Viele v. Germania Ins. Co.*, 96 D. 83.

38. When defendant may open and close. — The defendant is entitled to the

For Index to Notes in American Decisions and American Reports, see Volume L.

opening and closing before the jury on a trial of a writ of right upon the mise joined on the mere right. *Overton v. Davison*, 42 D. 544.

Where the answer of defendant, in an action upon a policy of fire insurance, admits the loss, and sets up matter in avoidance of plaintiff's right to recover, the burden of proof is upon defendant, with the consequent right of opening and closing at the trial. *Viele v. Germania Ins. Co.*, 96 D. 83.

39. The counsel's address to the jury, generally. — Counsel should not be permitted to read law to the jury in civil cases. It is the duty of the court to instruct the jury as to what the law applicable to the case is, and the duty of the jury to receive the law as it is given, and apply it to the facts of the case. *Tuller v. Tulbot*, 76 D. 695; *Phoenix Ins. Co. v. Allen*, 83 D. 756.

In argument to the jury counsel cannot read and comment on matter not in evidence, irrelevant and prejudicial. *Union Cent. Life Ins. Co. v. Cheever*, 38 R. 573.

The plaintiff's counsel may not comment to the jury upon the discrepancy between the original and the amended answer, and argue therefrom that the defense is fictitious. *Taft v. Fiske*, 54 R. 459.

40. Abuses of the right of argument. — Irrelevant evidence read to the jury on the promise of counsel that he will follow it up so as to make it relevant, must not, when not so followed up, be argued upon by counsel, nor given to the jury for consideration. *Stewart v. Huntingdon Bank*, 14 D. 628.

An argument of counsel may be arrested by the court where there is no evidence to support the argument. *Doster v. Brown*, 71 D. 153.

Where counsel having the last argument persist, against objection, in arguing to the jury upon facts pertinent to the issue, but not in evidence, or in appealing to prejudices foreign to the case in evidence, a new trial may be granted therefor. *Brown v. Swineford*, 28 R. 582.

Upon the trial of an action at *nisi prius*, the judge suffered counsel in opening the case to read, against objection, papers not admissible in evidence, and which were not afterward offered in evidence. *Held*, 1. That this was such an abuse of discretion as to require the granting of a new trial; 2. That the error was not cured by a subsequent instruction to the jury to disregard such papers. *Scripps v. Reilly*, 24 R. 575.

It is not within the privilege of counsel in argument to a jury to use language calculated to humiliate and degrade the opposite party in the eyes of the jury and by-standers, particularly when he has not been impeached; and where, on the trial, a witness for plaintiff had been impeached by the testimony of defendant, and plaintiff's counsel said, in addressing the jury, "that no man who lived

in defendant's neighborhood could have anything but a bad character; that defendant polluted everything near him or that he touched; that he was like the upas trees, shedding pestilence and corruption all around," — *held*, that the defendant was entitled to a new trial. *Coble v. Coble*, 28 R. 338.

On the trial of an action against B., the president of a corporation, for supplies furnished the company, his attorney offered evidence that the secretary of the company had embezzled its funds and appropriated its property. This was excluded. In argument to the jury he treated the matter as proved, and commented on it. *Held*, error for which a new trial must be granted. *Cleveland Paper Co. v. Banks*, 48 R. 334.

2. Putting in the Evidence.

41. General rules as to admissibility of evidence. — To sustain an objection to evidence merely on the ground of irrelevancy, it should appear to be so beyond all doubt, for if its competency be doubtful, it should be admitted, leaving its weight to be determined by the jury. *Shannon v. Kinney*, 10 D. 705.

Defendant's evidence may entitle plaintiff to judgment when his own does not. *Jackson v. Town*, 15 D. 405.

If, at the taking of a deposition, the adverse party interrogates a witness touching his interest in the suit, this is an election of the mode of proof, and none other can be resorted to at the trial. *King v. Upton*, 16 D. 268.

Where, in *assumpsit* by J., a subcontractor, against W., a contractor for carrying the United States mail, to recover J.'s proportion of the compensation received for the services rendered, a letter of the postmaster-general is read in evidence by the defendant, without objection, to prove defaults committed by the plaintiff in the execution of that part of the contract which was underlet to him, a certificate of the postmaster-general, showing the times and places of the defaults in the contract is inadmissible on plaintiff's behalf against defendant's objection. *Wilkinson v. Jett*, 30 D. 493.

The court cannot reject proof of a fact as immaterial, if the question as to whether it is immaterial or not depends upon proof of another fact. The proper course in such a case is to submit the proof of both facts to the jury. *Day v. Sharp*, 34 D. 509.

The improper admission of a record copy of an instrument, the original of which is in the possession of the party offering it, is cured by the subsequent production of the original. *Hart v. Gregg*, 36 D. 166.

Evidence not read in the hearing of the jury is not evidence properly before them. The opposite party has the right to insist that such portions of books and papers as are

For Index to Notes in American Decisions and American Reports, see Volume I.

relied on must be read to the jury. *Duke v. C. N. Co.*, 44 D. 472.

Rules of evidence where several actions are tried together are the same as if they were tried separately, all competent evidence in each action being admissible, though not competent in all the actions. *Kimball v. Thompson*, 50 D. 799.

It is not error to admit evidence which may be made competent by the introduction of subsequent testimony. *Hamilton v. Summers*, 54 D. 509.

Evidence admissible against one only of two parties sued cannot be excluded by the other, but if he desires it limited, he must ask an instruction to be given to the jury relieving him from its effects. *Goodman v. Walker*, 68 D. 134.

Error in introducing secondary evidence is corrected and overcome by the subsequent introduction of primary evidence to the same point. *Lockridge v. Baldwin*, 70 D. 385.

Plaintiff may avail himself of proof supplied by defendant, to establish a given fact essential to his case, but which he omitted to prove before closing his evidence. *Deahler v. Beers*, 83 D. 274.

The trial court may exercise reasonable discretion in applying or relaxing rules for introduction of testimony, according to circumstances apparent only to the court itself, and a strict uniformity, at all times, is not to be expected. *Runyan v. Price*, 86 D. 459.

Defendant who has not been called upon to state whether he expected to prove all the facts essential to his defense should not be prevented from testifying because his offer does not embrace every fact necessary to establish it. *Tyler v. Green*, 87 D. 130.

The fact that illegal testimony has been permitted to go to the jury without objection is not a ground for allowing other testimony, inadmissible under the rules of evidence, to be given when objection thereto is made. *Higgins v. Carlton*, 92 D. 666; *Wilkinson v. Jett*, 30 D. 493.

Testimony ruled out by the court for one purpose, but admitted for another, can only be considered by the jury for the purpose for which it was received. *Macdougall v. Maguire*, 95 D. 98.

The admission of improper evidence, clearly calculated to arouse the sympathy of the jury and influence the verdict, is not cured by striking it out. *Gulf etc. Ry Co. v. Levy*, 46 R. 269.

42. Offers of proof, and how made.—Evidence offered at an improper time, though not incompetent in itself, may be rejected, and it will not be error. *Irish v. Smith*, 11 D. 648.

Where the court does not clearly see that a fact is entirely foreign to the issue, and cannot be connected with it by evidence of other facts, it is the practice to ad-

mit proof of it upon the assurance of the counsel offering it that it will turn out to be pertinent and material. *Davis v. Calvert*, 25 D. 282.

A statement by counsel of what they expect to prove, in reply to a statement on the other side, is not a sufficient foundation for the introduction of adverse evidence otherwise inadmissible. *Id.*

An offer of evidence should specify the purpose for which it is offered. *Carabaden v. Poorman*, 36 D. 145.

A party offering evidence apparently unconnected with the issue, if it is opposed, should show its connection with other facts, either in evidence or intended to be given; otherwise the court may lawfully reject it. *Orenshaw v. Davenport*, 41 D. 56.

Testimony inadmissible for the purpose for which it is offered must be rejected by the court, whether it be inadmissible for the reason assigned or not. *Budd v. Brooke*, 43 D. 321.

Illegal testimony should be rejected when offered, and not admitted, subject to subsequent exclusion, when the court charges the jury. *McCurry v. Hooper*, 48 D. 280.

The court is not bound to separate legal from illegal evidence when both are offered together and as a whole; and if the party offering it does not separate the legal from the illegal testimony, the whole may be rejected. *West v. Kelly*, 54 D. 192.

43. Admissibility of evidence under particular pleadings.—A party is bound by the effect of evidence which, without opposition, he permits to be adduced, contrary to or beyond the allegations contained in the pleadings. *Hennen v. Gilman*, 96 D. 396.

44. Rule that where part of a transaction, conversation, or document has been introduced by one side, the other is entitled to the whole of it.*—When part of a conversation or declaration is introduced in evidence by one party, the other has a right to call for the whole of it. *Nelson v. Iverson*, 60 D. 442; *Harrison v. Laverty*, 13 D. 283; *Gordon v. Preston*, 26 D. 75; provided it relates to the subject-matter of the suit. *Williams v. Keyser*, 89 D. 243. Thus where the plaintiff, to show that his property had been applied to the defendant's use in payment of a note made by the defendant and indorsed by the plaintiff, proved that the defendant pointed out the property to the sheriff, and declared that it was plaintiff's, it was held that the defendant was entitled to prove his statement in the same conversation that the note was the plaintiff's debt, and he was to pay it. *Rouse v. Whited*, 82 D. 337. But he is not entitled to prove other conversations with

* Conversation, admission of part, when entire balance to be admitted, see note, 82 D. 343-344.

For Index to Notes in American Decisions and American Reports, see Volume L.

the same parties, about the same time, qualifying or explaining the conversation which is in testimony against him. *Hatch v. Potter*, 43 D. 88.

Where the defendant offered an answer in chancery in evidence, and read a part of it and of the exhibits, consenting that the plaintiff might read the whole, the latter may, at any stage of his argument, refer to and read any and all of the answer and exhibits. *Bumpass v. Webb*, 18 D. 34.

A paper offered in evidence by one party, for a single purpose, may be offered in its entirety by the adverse party, without proof of its genuineness. *Young v. State Bank*, 39 D. 322.

Plaintiff unnecessarily introduced in evidence certain affidavits used to procure a judgment, together with such judgment, for the purpose of showing his discharge in insolvency. The affidavits showed the judgment to be void. *Held*, that he was bound by his evidence; that he could not claim the benefit of such part as was favorable to his case, and ignore such as was prejudicial. *Ullman v. Leon*, 83 D. 783.

A defendant has no right to use other parts of an answer as evidence for himself, from the fact that a portion of the answer is read as evidence by the plaintiff; although he may have the right to read portions affecting the sense, or explaining the portions read. *Gunn v. Todd*, 64 D. 231.

45. The order of proof. — Rules of the court respecting the closing of proofs and the publication of testimony stated. *Murray v. Hay*, 43 D. 773.

A rule adopted by a trial court, requiring all the evidence to be offered in a case before any question of law is raised, excepting objections to testimony, is a proper rule, and no one will be heard to complain that he has been injured because of the court's adherence thereto. *Gist v. Drakely*, 41 D. 426.

Any relaxation of a rule that all evidence in support of the affirmative of an issue must be given in the first instance is but an appeal to the sound discretion of the court in which the issue is tried, and is not reviewable on error. *Graham v. Davis*, 62 D. 285.

The party on whom rests the burden of proving any fact must first proceed with evidence for that purpose, and if no testimony is given tending to disprove the fact thus sought to be established, no further testimony will be received upon that point. *Pingry v. Washburn*, 15 D. 676.

Where a case involving questions both of law and of equity is tried without a jury, the more regular and orderly practice is to first dispose of the equitable branch of the case. *Martin v. Zellerbach*, 99 D. 365.

Where an instrument under seal purports to have been executed by an attorney, and the authority of the attorney is disputed, before the instrument goes to the jury the

letter of attorney must be produced to the court, who are to judge of its competency. But in simple contracts, where the agent's authority may be proved by parol, the fact of signing and the power to sign are both questions for the jury, and the order in which they shall be proved is immaterial. *Emerson v. Providence Hat Mfg. Co.*, 7 D. 66.

46. Personal examination. — In an action for personal injuries, the court may, at the trial, compel the plaintiff to submit to a surgical examination. *White v. Milwaukee City Ry Co.*, 50 R. 154; or in its discretion may refuse to compel the plaintiff to submit to a surgical examination. *Shepard v. Missouri Pac. Ry Co.*, 55 R. 390.

In an action of damages for permanent injury to the eyes, the plaintiff having testified, and no medical expert having testified, the court may order the plaintiff to submit to an examination by a competent expert. *Atchison etc. Ry Co. v. Thul*, 44 R. 659.

On the trial of an action of damages for a personal injury, the court may refuse to order the plaintiff to submit to a physical examination by the defendant's medical witnesses, in private, it not appearing to be necessary, and the plaintiff having already submitted to an examination by such witnesses in the presence of the jury. *Sioux City etc. R. R. Co. v. Finlayson*, 49 R. 724.

On the trial of an action for personal injuries, the uncontradicted proof showing that since receiving them the plaintiff walked lame, the court commits no error in refusing to compel him to walk across the court-room in presence of the jury. *Hatfield v. St. Paul & D. R. R. Co.*, 53 R. 14.

Where a plaintiff in an action for personal injuries alleges that they are permanent, the defendant is entitled, as a matter of right, to have a surgical examination. But where the evidence of experts is already abundant, the court may refuse the examination, subject to review in case of abuse. *Sibley v. Smith*, 55 R. 584.

47. View by jury.* — A statutory requirement that no one shall speak to the jury on the subject of trial should be carefully observed on the inspection by the jury of the property in dispute. And where, in violation of this requirement, a witness for the prevailing party was present and made a remark bearing on the case, which part of the jurors heard, and the verdict seemed to be founded upon a theory suggested by the remark, the judgment was reversed. *Erwin v. Bulla*, 92 D. 341.

48. Evidence in rebuttal. — Evidence, to be rebutting, must apply directly to the matter in controversy, should disprove the particular facts attempted to be shown by

* Inspection by court or jury of property as place in dispute, see note, 92 D. 342-344.

For Index to Notes in American Decisions and Ameri

the other side, and must not introduce new matter. *Foye v. Leighton*, 53 D. 231.

Evidence of plaintiff's intemperate habits is admissible to rebut the evidence that plaintiff is a skillful workman. *Cummings v. Nichols*, 38 D. 501.

Where parol evidence of possession by a grantee, under his deed from a grantor whose deed was not proved to be legally executed, has been admitted to prove possession under the former deed, sufficient to admit it in evidence, it is error to exclude defendant's evidence to rebut and disprove said parol evidence. *Shanks v. Lancaster*, 50 D. 108.

Evidence to show that plaintiff's testate held a note as agent, and not as owner, may be rebutted by evidence of the state of the accounts and money transactions between such party and his indorser. *Burke v. Allen*, 61 D. 642.

Evidence in rebuttal is admissible, on defendant's part, to the effect that on a former hearing of the case, a witness for the plaintiff, to prove the genuineness of a paper, testified that she saw the defendant sign it, where the witness on the present hearing testifies in what room he signed it, and that "he stood by the secretary, and stooped over to sign it," without expressly stating that he was seen to sign it, because if there is an essential contradiction the defendant is entitled to the benefit of it, and if there is none, the plaintiff is not injured. *Travis v. Brown*, 52 D. 540.

49. — in reply. — Plaintiff's evidence in reply may be received or not, in the discretion of the presiding judge. *Ashworth v. Kirtledge*, 59 D. 178; *Onstadi v. Ream*, 95 D. 695.

A party upon whom the affirmative of the issue devolves is bound to give all his evidence in support of the issue in the first instance; and he can only give such evidence in reply as tends to answer the new matter introduced by his adversary. *Graham v. Davis*, 62 D. 285.

50. Opening cause after parties have rested. — A refusal to admit irrelevant testimony after a party has closed his case is not erroneous. *Greer v. Caldwell*, 58 D. 553.

It is discretionary with the court to allow plaintiff to introduce evidence after motion for nonsuit. *May v. Hanson*, 63 D. 135.

Where the answer, in an action for the wrongful diversion of water, sets up more than five years' continuous adverse possession in the defendant, and the plaintiff before resting introduces evidence tending to show his possession during the five years, and the defendant then introduces evidence to sustain the answer, the plaintiff may, if he does not wish to rely upon the proof already offered by him upon the same points, produce evidence tending to show that the

defendant's case had not been or adverse. S but is a part and is admitted the court, and He has no right upon his original same facts the opening. *Ud* 145.

Plaintiff's witness is limited by him as to what he has introduced the discretion between the parties as to what watercourse for continued use is, in substance happens more in dispute testified to in evidence.

Where plaintiff against a married woman discloses her conduct to introduce evidence to the plea of mitigation, in the case it after the argument counsel has closed 92 D. 400.

51. Compel and papers. — witness in his evidence if the in its terms or matter. *Eagle Bank*, 1

Documents, have been seen introduced, where they were left in the giving rise to were at the time.

52. Withdrawing party who has court has admitted opposite party instructions are cause has been have the same variation of the judgment its withdrawal.

3. Object

53. The principle. — A failure ruling admitting reserving object evidence is closed directs the jury precludes the party should have been *McKnight v. Du*

An exception regarded as waived offered as evidence

For Index to Notes in American Decisions and American Reports, see Volume I.

the other side, and must not introduce new matter. *Foye v. Leighton*, 53 D. 231.

Evidence of plaintiff's intemperate habits is admissible to rebut the evidence that plaintiff is a skillful workman. *Cummings v. Nichols*, 38 D. 501.

Where parol evidence of possession by a grantee, under his deed from a grantor whose deed was not proved to be legally executed, has been admitted to prove possession under the former deed, sufficient to admit it in evidence, it is error to exclude defendant's evidence to rebut and disprove said parol evidence. *Shanks v. Lancaster*, 50 D. 106.

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Where the answer, in an action for the wrongful diversion of water, sets up more than five years' continuous adverse possession in the defendant, and the plaintiff before resting introduces evidence tending to show his possession during the five years, and the defendant then introduces evidence to sustain the answer, the plaintiff may, if he does not wish to rely upon the proof already offered by him upon the same points, produce evidence tending to show that the

defendant's enjoyment of his asserted right had not been continuous or uninterrupted or adverse. Such evidence is not in rebuttal, but is a part of the plaintiff's original case, and is admissible only in the discretion of the court, and for the furtherance of justice. He has no right, for such a purpose, to enter upon his original case and again prove the same facts that were proved by him in his opening. *Union Water Co. v. Crary*, 85 D. 145.

Plaintiff's witnesses cannot be re-examined by him after he has closed and defendant has introduced his evidence, except in the discretion of the court, where the issue between the parties is a contest between them as to which had the better right to a watercourse founded on prior possession and continued user, and the object of the offer is, in substance, to prove the same facts, perhaps more in detail, that those witnesses had testified to in chief for the plaintiff. *Id.*

Where plaintiff, in an action on a contract against a married woman which fails to disclose her coverture, inadvertently omits to introduce evidence constituting his reply to the plea of coverture, he may be permitted, in the court's discretion, to introduce it after the argument of one of defendant's counsel has closed. *McCormick v. Holbrook*, 92 D. 400.

51. Compelling production of books and papers. — A contract referred to by a witness in his deposition need not be produced if the interrogatories do not call for its terms or mention the contract. *Hooker v. Eagle Bank*, 86 D. 351.

Documents, testified in a deposition to have been seen by a witness, need not be produced, where the evidence shows that they were left in the hands of the adverse party, giving rise to the presumption that they were at the time in his custody. *Id.*

52. Withdrawal of evidence. — A party who has offered testimony which the court has admitted against objection by the opposite party may afterwards, and before instructions are asked for, and before the cause has been argued by counsel, ask to have the same withdrawn from the consideration of the jury, and the court may allow its withdrawal. *Boone v. Purnell*, 92 D. 713.

3. Objections and Exceptions.

53. The proper time to object, generally. — A failure to object at the time to a ruling admitting testimony provisionally, and reserving objection to its competency till the evidence is closed, if the judge ultimately directs the jury to disregard the testimony, precludes the party from objecting that it should have been excluded when offered. *McKnight v. Dunlop*, 55 D. 370.

An exception comes too late, or must be regarded as waived, when taken to a paper offered as evidence because it purports to be

For Index to Notes in American Decisions and American Reports, see Volume L.

a copy, and not the original, such paper having been received as evidence without any call being made for the original, or any objection made that the paper was but a copy. *Iaeye v. Bossieux*, 76 D. 189.

It is competent to urge for the first time on the argument that the record of a judgment has not been established; if an objection goes merely to a defect in an exemplification of a record, it should, perhaps, be made while the evidence is being developed. *Lyon v. Bolling*, 48 D. 122.

54. — to object to evidence. — An objection to evidence as incompetent is waived unless made when the evidence is offered. *Wait v. Maxwell*, 16 D. 391; *Parks v. Foster*, 71 D. 221.

55. General and specific objections. — A general objection to admissibility of evidence, without specifically pointing out the causes or defects for which objection is made, should be disregarded and the evidence received. *McCartney v. Shepard*, 64 D. 250; *Smoot v. Kelava*, 58 D. 310; *Donnell v. Jones*, 48 D. 59; *Martin v. Hardesty*, 62 D. 773; *Smith v. Causey*, 65 D. 372; *Morrison v. Whiteside*, 79 D. 661; *Folk v. Wilson*, 83 D. 599. But evidence offered as a whole may be rejected as a whole, on objection thereto, if part of such evidence is illegal. *Barlow v. Lambert*, 65 D. 374.

An objection to evidence must be confined to that which is inadmissible, where testimony is taken under a commission, and a part is admissible and a part is not. *Pettigrew v. Barnum*, 69 D. 212.

The rule that objections to evidence must be specific applies only to such objections as can be obviated by other evidence, or by the act of the party or the court. *Clauser v. Stone*, 81 D. 299.

If evidence is admissible for any purpose in the inquiry before the jury, it would be error to exclude it as irrelevant and inadmissible under the general exception. *Wilms v. White*, 90 D. 113.

General objections to evidence will be held good in some cases, as, for instance, if it is attempted to prove a written contract by parol, or the wife of a party should be offered in her husband's behalf, or if a party should offer himself as a witness. These objections only raise the question of competency; but when the technical sufficiency of the particular kind of evidence is relied on, the objection must be specific. *Rindskoff v. Malone*, 74 D. 367.

56. The requisite definiteness and certainty in objections. — The rule of practice with regard to objection to evidence is, that when it is not illegal upon its face, the ground of the objection must be stated, to enable the court to judge its legality. *Cunningham v. Cochran*, 52 D. 230; *Briggs v. McCabe*, 89 D. 503; *George v. Thomas*, 67 D. 612; *Beets v. Bull*, 27 D. 150; or the objec-

tion will not be considered by the court on appeal. *Rindskoff v. Malone*, 74 D. 367.

But evidence objected to, without stating the precise ground of objection, if it is illegal upon its face, may be refused, notwithstanding such failure to state the cause. *Cunningham v. Cochran*, 52 D. 230.

An objection to the proof of the service of a notice required by law in an action for a penalty for unlawfully marrying the plaintiff's minor child, that the copy served was not a true copy because it omitted the word "one" in the expression "twenty-one years," is too refined. *Carekadden v. Poorman*, 36 D. 145.

General, vague, and indefinite motions will not be entertained by the court; such as "exclude the latter part of the answer of John D. Winthrop to the fourth interrogatory," or "exclude so much of the answer to the fifth interrogatory as was matter of opinion." *Donnell v. Jones*, 48 D. 59.

57. Waiver of objections. — If one party proffers a paper to be read to the jury, and it is accordingly done, he cannot afterwards take exception because it was so read. *White v. Fox*, 4 D. 643.

A plaintiff may waive the absence of original papers and proof of their execution, and thus he will be presumed to have done by an omission to object to their introduction or motion to exclude them. *Thomason v. Odum*, 68 D. 159.

The failure to object to the introduction of a written instrument in evidence is an admission that the instrument is evidence, but is not an admission that it is sufficient evidence to sustain a judgment. *Lowie v. Bliss*, 76 D. 742.

The question of a reasonable use of a river as a highway by defendant having been, by the consent of both parties, submitted to the jury in an action for damages accruing from an obstruction of the river by a boom, whereby plaintiff's logs were detained, this was a waiver by the parties of their right to except to the instructions of the court upon the subject. *Davis v. Winslow*, 81 D. 573.

If one party offers himself as a witness, and the other objects because the objector is the representative of a deceased person, and the court decides to take the evidence with leave to the other party to move to strike it out, the motion to strike out must be made when the direct examination is closed. By cross-examining the witness generally, the other party waives the motion to strike out. *King v. Haney*, 13 R. 217.

58. When exceptions may be taken, and how. — A party has a right to require the opinion of the court upon any point of law pertinent to the issue, and a refusal to give it will be error to which an exception may be taken. *Fletcher v. Howard*, 16 D. 686.

An exception to instructions must be

For Index to Notes in American Decisions and American Reports, see Volume I.

taken before the jury leave the bar. *City Council v. Gilmer*, 70 D. 562.

A demurrer to a paragraph of an answer must be regarded as having been sustained, but without exception taken, where an issue of law, upon such demurrer, is submitted to the court at the same time with the issues of fact for trial, under a general denial, and the finding of the court upon all the issues is for the plaintiff. *Harrison v. Martinsville etc. R. R. Co.*, 79 D. 447.

A question involving the determination of facts in dispute is properly left to the jury, and no exception will lie to the refusal of a judge to rule upon it as a matter of law. *Pettingill v. Porter*, 85 D. 671.

59. Demurrer to evidence, and its effect, generally. — A demurrer to evidence is an unusual and antiquated practice, calculated to suppress truth and justice, and is allowed or denied by the court in the exercise of a sound discretion. *State v. Soper*, 83 D. 665.

A demurrer to evidence is no longer in use in New York, and a refusal to permit one is not reversible error. *Colegrove v. N. Y. etc. R. R. Co.*, 75 D. 418.

60. — as an admission of truth of evidence demurred to. — A demurrer to evidence admits the facts which that evidence, if admitted, would tend to prove, together with such inferences as may be reasonably drawn from such facts. *Doe v. Rue*, 29 D. 368; *MacKinley v. McGregor*, 31 D. 522. And no testimony can be considered which impugns the truth of such facts. *Davis v. Steiner*, 53 D. 547. But only such inferences can be drawn by the court as the jury might fairly and reasonably have inferred from such evidence if they had been allowed to pass upon it. *Union Steamship Co. v. Nottinghams*, 91 D. 378.

61. Joinder in demurrer to evidence. — On a demurrer to evidence, the court, in its discretion, may compel the party to join in demurrer, or to abandon his evidence. *Brandon v. Huntsville Bank*, 18 D. 48.

Upon a demurrer to evidence, final judgment must be entered for the plaintiff or defendant, accordingly as the demurrer is overruled or sustained. *Obaugh v. Finn*, 37 D. 773. And the jury should be discharged either at once or after a conditional verdict has been taken for plaintiff. It will be error to retain the jury, and to submit to them, after the demurrer has been overruled, the assessment of damages. *Id.*

4. Nonsuit; Dismissal.

62. Power of court to order nonsuit. — A nonsuit without plaintiff's consent cannot be granted. *Boos v. Davis*, 33 D. 457; *Cahill v. Kalamazoo M. I. Co.*, 43 D. 457.

A plaintiff has a right to have every question of fact in his case tried by a jury; and to nonsuit him on the trial, against his con-

sent, would be an infringement of that right. *Boos v. Davis*, 33 D. 457.

Courts do not possess the power to nonsuit in Mississippi; but they instruct the jury to find as in case of a nonsuit. *Beving v. Glidwell*, 34 D. 96.

A compulsory nonsuit may be directed by the court. *Mateer v. Brown*, 52 D. 303; *Ellis v. Ohio etc. Co.*, 64 D. 610.

A compulsory nonsuit will not be granted where a party has failed to make out his case, but the court, on motion of the defendant, will instruct the jury to find for the defendant. *Martin v. Webb*, 39 D. 363.

The trial court may refuse to pass upon the sufficiency of plaintiff's evidence to maintain his action until the evidence is closed upon both sides, as this is a matter within its discretion. *Smith v. First Nat. Bank*, 97 D. 59; *Manning v. Albee*, 92 D. 736.

Upon a motion for a nonsuit, where the evidence is conflicting, the court should assume that view which is most favorable to the plaintiff. *Sheridan v. Brooklyn etc. R. R. Co.*, 93 D. 490.

The testimony of plaintiff's witness drawn out on cross-examination may be considered by the court in ordering a nonsuit, as well as that given on examination in chief. *Eastman v. Howard*, 50 D. 611.

The court is not bound to award a nonsuit where, after verdict for plaintiff, it would grant a new trial because the verdict was contrary to the evidence. *Tison v. Yawn*, 60 D. 708.

A motion to amend after nonsuit granted, but before it is entered, should be granted. *Phillips v. Brigham*, 71 D. 227.

63. Upon what grounds ordered, generally. — Evidence from which arises a fair and legitimate inference of facts sufficient to justify a verdict for the plaintiff must be submitted to the jury; but if there be no such evidence, a judgment of nonsuit may be properly entered. *Baker v. Lewis*, 75 D. 598.

A nonsuit should be ordered if, admitting all facts proved and all reasonable deductions from them, the plaintiff, on all the proof, ought not to recover. *Tison v. Yawn*, 60 D. 708; *Dain v. Cossing*, 39 D. 585.

A nonsuit may be granted where there is no proof to support the issue. *Tison v. Yawn*, 60 D. 708; or if the court would set aside a verdict, if so found, as contrary to the evidence. *Mateer v. Brown*, 52 D. 303; *Deyo v. New York Central R. R. Co.*, 88 D. 418.

It is proper to direct a nonsuit whenever there is a total failure of evidence, or only light or trivial presumption to support an action; for it would be nugatory to submit such a case to a jury; but where there is testimony of a doubtful nature, or which depends on a

* Granting compulsory nonsuits, see note, 24 D. 620-624.

For Index to Notes in American Decisions and American Reports, see Volume I.

long train of circumstances, or on facts contradictory in themselves, or which admit of different interpretations, the plaintiff has a right to have his case submitted to the jury. *Brown v. Frost*, 1 D. 633.

To leave to the jury the finding of a fact without color of proof is error. *Whitehill v. Wilson*, 24 D. 328.

A variance between *allegata* and *probata* in action of account by tenants in common against their co-tenants is a ground of nonsuit. *McPherson v. McPherson*, 53 D. 416.

In personal actions a nonsuit will be entered as to all plaintiffs, where one of the several co-plaintiffs shows to the court that the action was brought without his knowledge, consent, or authority, and by petition duly presented, requests to be nonsuited. And an offer of indemnity by the other co-plaintiffs to the petitioning plaintiff, not made till after the presentation of such petition, will not ordinarily prevent a nonsuit. *Brown v. Wentworth*, 88 D. 223.

64. — and when refused. — Plaintiff will not be compelled to become nonsuited on the trial for the insufficiency of his evidence. *French v. Smith*, 24 D. 616; *Bank of Pittsburgh v. Whitehead*, 38 D. 186; *Van Rensselaer v. Jewett*, 51 D. 275; *Tison v. Yarns*, 60 D. 708; *Fickett v. Swift*, 66 D. 214; *Page v. Parker*, 80 D. 172; *Phillips v. Brigham*, 71 D. 227.

An amendable variance between the declaration and the proof is no ground of nonsuit. *Boorman v. Jenkins*, 27 D. 158.

An instruction to find as in case of a nonsuit is in the nature of a demurrer to evidence, which admits the evidence, concedes its truth, and is predicated upon it. *Bishops v. McNary*, 36 D. 592.

The incompetency of a witness from interest is not ground of instruction to find as in case of nonsuit, but the objection should be taken by a distinct motion to exclude the evidence. *Id.*

A motion for nonsuit, on the ground that plaintiff had shown no property in himself, should be overruled where there is testimony of several witnesses to the acknowledgments of the donor, that she had given the property to plaintiff, that it belonged to him, and that the donor had parted with the possession and dominion of the property. *Maxwell v. Harrison*, 52 D. 385.

A motion for a nonsuit involves not only admission of truth of evidence adduced by the plaintiff, but the existence of all the facts which the evidence, in any degree, tends to prove. It concedes to the plaintiff everything that the jury could possibly find in his favor, and leaves nothing but the question whether, as a matter of law, each fact indispensable to his right of action has been supported by some evidence. If it has, no matter how slight it may have been, the motion must be denied; because it is

the right of the party to have the weight and sufficiency of his evidence passed upon by a jury. *Ellis v. Ohio L. I. & T. Co.*, 64 D. 610.

65. Voluntary nonsuit. — Where the plaintiff failed to make out his case against an accommodation indorser, having had a fair opportunity to do so, on account of the insufficiency of the protest, the court will not give judgment as in case of a nonsuit, on the supposition that the notary, not having been called as a witness before, might testify to something to help out his protest, but will give judgment for the defendant. *Dupré v. Richard*, 43 D. 214.

A party cannot dismiss his case or be nonsuited after the publication of the verdict. A verdict is considered as published at the instant in which it is handed to the plaintiff's counsel or other person directed by the court to receive it. *Merchants' Bank v. Rawls*, 50 D. 394.

A plaintiff, when surprised by the rejection of his evidence, may take a nonsuit, and then move to set it aside and reinstate the case; and if the evidence was erroneously rejected, and the court refuses to reinstate, its judgment will be revised on appeal or writ of error. *Easterling v. Elythe*, 56 D. 45.

A nonsuit with a bill of exceptions may be taken, on motion, before the trial is begun, in consequence of a suppression of plaintiff's deposition. *Douglas v. Montgomery etc. R. R. Co.*, 79 D. 76.

66. Effect of nonsuit. — A nonsuit does not bar a subsequent suit for the same cause, except in some particular case. It differs in this respect from a *retrazit*. *Dana v. Gull*, 20 D. 255.

The consequence of a nonsuit is generally to subject the plaintiff to the payment of costs. *Id.*

67. Setting aside nonsuit. — Nonsuits, when entered, may be set aside, sometimes with, sometimes without, payment of costs. *Dana v. Gull*, 20 D. 255.

68. Review of judgment of nonsuit. — The question as to the *quantum* of damages cannot be raised by motion for nonsuit so as to bring it up on error, if the plaintiff is entitled at least to nominal damages. *Little v. Hoyt*, 40 D. 360.

To nonsuit a plaintiff on the evidence of defendant is irregular, and the supreme court will seldom grant a nonsuit where the motion was not made on the circuit. *Jones v. Weatherabee*, 51 D. 653.

A motion for a nonsuit on one ground is an implied waiver of others; and a different position cannot be assumed on appeal from that taken in the court below. *Mateer v. Brown*, 52 D. 303.

In determining the propriety of a nonsuit, the court will assume the truth of facts which plaintiff's testimony legitimately conduced to prove, though their correctness

For Index to Notes in American Decisions and American Reports, see Volume L.

be controverted by defendant's witnesses. *Ernst v. Hudson R. R. Co.*, 90 D. 761.

69. Review of judgment of dismissal. — An issue of fact raised by the pleadings cannot be adjudicated on a motion to dismiss the cause. *Conger v. Dean*, 66 D. 93.

VI. INSTRUCTIONS TO THE JURY.

1. Questions of Law and Fact.

70. Questions of law for the court.

—1. *In general*.^{*}—Fraud is a question of law, especially when there is no dispute about facts. *Sturtevant v. Ballard*, 6 D. 281; but the credibility of testimony tending to show fraud should be left to the jury. *Weaver v. Lepsley*, 94 D. 671. So held in the case of fraud in a sale, as against creditors. *Chenery v. Palmer*, 65 D. 493.

The jury are not the judges of the law; it is the province of the judge to expound and explain the law, and the province of the jury to determine the facts. *McCorry v. King*, 39 D. 165.

Where there is no dispute as to facts, the question is purely one of law, and the court should decide it. *Roth v. Buffalo & S. L. R. R. Co.*, 90 D. 736.

Where the facts are undisputed that go to prove a promise sufficient to take a debt out of the statute of limitations, whether it amounts to a sufficient acknowledgment or not, is a question of law for the court to determine. *Martin v. Broach*, 50 D. 306.

In doubtful cases of a sale, the question of a delivery and acceptance is for the jury under proper instructions. But where the facts are clear and undisputed, that question, and what will amount to a waiver of the vendor's lien, is for the court. *Southwestern Freight etc. Co. v. Standard*, 100 D. 255.

Due diligence is a question of law, where there is no dispute about the facts. *Tate v. Sullivan*, 96 D. 597. So where a bank took the usual and customary mode to detect the frauds or mistakes of its clerks, this will be sufficient evidence of diligence, and it is erroneous to leave the question of diligence to the jury. *Manhattan Co. v. Lydig*, 4 D. 239.

Facts must be sufficient to constitute due diligence where they are submitted to the jury to be ascertained by their verdict. *Tate v. Sullivan*, 96 D. 597.

The determination of what is a reasonable time depends upon the situation of the parties, and the subject-matter of the contract, and where a promise was in consideration that assignments of certain bonds be procured, an assignment procured after the lapse of one or two years was held within reasonable time, the situation of the party proposing having been unaffected by the de-

^{*} Reasonable time, what is, when a question of law, see note, 17 D. 644-646.

lay, and it appearing that the assignments were of a nature not to be obtained without considerable delay. *Morse v. Bellows*, 28 D. 372.

The following have been held to be questions of law for the court to decide: The term when a judgment was entered. *Adams v. Betts*, 26 D. 79.

What is a reasonable time. *Gilmore v. Wilbur*, 22 D. 410; *Morse v. Bellows*, 28 D. 372.

The reasonableness of a custom. *Bodfish v. Fox*, 39 D. 611.

Ownership. *Maxwell v. Harrison*, 52 D. 385.

What is a waiver. *Spring Garden etc. Ins. Co. v. Evans*, 66 D. 308.

The construction of an order granting letters of administration. *Sims v. Boynton*, 70 D. 540.

Whether letters have been lost or destroyed, and if so, whether such destruction was for a dishonest purpose. *Tobin v. Shaw*, 71 D. 547.

The abandonment of a contract, and what acts will constitute it. *Dula v. Coules*, 75 D. 463.

2. *Instruments in writing*.^{*}—The construction of foreign statutes, like other written compacts, belongs to the court, municipal law being a matter of compact; and written and unwritten foreign laws stand on the same footing in this respect. *Sidwell v. Evans*, 21 D. 387.

A written contract must be construed by court, and not by the jury. *Randall v. Thornton*, 69 D. 56. So held as to the construction of patents, conveyances, and other written muniments of title. *Thornberry v. Churchill*, 16 D. 125.

Whether a note introduced in evidence was a note for \$42.25 or for \$42.75, is to be determined by the court upon an inspection. *Drew v. Towle*, 64 D. 309.

The fact and scope of an agency created and proved by a writing are questions of law, and are properly decided by the court. *Savings Fund Soc. v. Savings Bank*, 78 D. 390.

The construction of a deed is for court. *Carson v. Ray*, 78 D. 267. So where the facts are admitted, it is a question of law what lands are conveyed by a deed. *Stevens v. Hollister*, 46 D. 154.

Whether a deed after majority constitutes a disaffirmance of a prior deed executed by the grantor while an infant is a question of law for the court. *Peterson v. Laik*, 69 D. 441.

The construction of a will or other written paper is, as a general rule, a question for the court, and not for the jury. *Warner v. Miltenberger*, 83 D. 573. And whether a paper offered in evidence is testamentary in

^{*} Writing, construction of, when a question for court and when for jury, see note, 69 D. 454-456.

For Index to Notes in American Decisions and American Reports, see Volume I.

its character, or whether it is to take effect absolutely, or only on condition, is to be determined by proper instructions of the court to the jury. *Mages v. McNiel*, 90 D. 354.

71. Questions of fact for the jury.—*I. Generally.*—The credibility of evidence, whether oral or written, is a matter for the jury to decide. *Turner v. Child*, 17 D. 555.

Where evidence is conflicting in least degree, the court should leave it entirely to the consideration of the jury. *Buffington v. Cook*, 73 D. 481; *Parson v. Donnell*, 19 D. 218; *Flemming v. Marine Ins. Co.*, 33 D. 33; *Gray v. Allen*, 45 D. 523. But the jury must receive the law from the court, and act according to its instructions, whether correct or incorrect. *Flemming v. Marine Ins. Co.*, 33 D. 33; *Shelton v. Hamilton*, 57 D. 149; *Roth v. Buffalo etc. R. R. Co.*, 90 D. 736; *Nichols v. Sixth Ave. R. R. Co.*, 97 D. 780.

Findings of fact must be left to the jury, except where the cause is tried upon admissions at the bar; and while the jury may discredit testimony, they cannot find contrary to the admissions of the parties. *Inloes v. American Bk. Bank*, 69 D. 190; *Birney v. Printing Tel. Co.*, 81 D. 607.

Collisions upon navigable waters are governed by the same principles of common law as apply in cases of collision of carriages upon highways. In neither case can the exercise of due care and skill be questioned as matter of law. *Sawyer v. Eastern Steamboat Co.*, 74 D. 463.

The following have been held to be questions of fact for the jury to decide: Whether, upon all the facts of the case, a water right and tilt-hammer pass as appurtenances under a sheriff's sale. *Hall v. Benner*, 21 D. 394.

Whether the defendant had notice of the assignment of the cause of action before he paid the debt sued for to the nominal plaintiff. *Marr v. Hanna*, 23 D. 449.

Whether a boundary has been so run and marked as to preclude further inquiry. *Newman v. Foster*, 34 D. 98.

The existence of a custom or usage. *Farnsworth v. Chase*, 51 D. 206; *Allegre v. Maryland Ins. Co.*, 20 D. 424.

Whether words were spoken by one as agent or in his own behalf. *Whitney v. Swett*, 53 D. 228.

What is a delivery. *Atwell v. Miller*, 61 D. 294.

Whether apparatus called a range is a stove or not, within the meaning of the statute exempting certain property from execution. *Montague v. Richardson*, 63 D. 173.

Whether a passenger injured while standing on the platform of a car was there wrongfully, and if so, whether he can recover notwithstanding, where the injury happened from a derailment, and the evidence shows negligence on the part of the carrier. *Zemp v. Wilmington etc. R. R. Co.*, 64 D. 763.

Whether a person has acted in excess of his authority, in cases where the justification of the act which is alleged to be wrongful and injurious is based on the exercise of authority, whether that authority be incident to the official character and duty of the party exercising it, or arise from the misconduct of the opposite party and the necessities of the case. *Hilliard v. Gould*, 66 D. 765.

What is reasonable care and unnecessary damage. *Dwinel v. Veazie*, 69 D. 94.

Whether the assignee of a bond has used due diligence to recover against the obligor. *Mackie v. Davis*, 1 D. 482.

Whether a highway is or is not in a suitable state of repair for the travel passing thereon, under the particular circumstances of each case. *Hubbard v. City of Concord*, 69 D. 520.

Whether curb-stones are customary for sidewalks. *Schenley v. Com.*, 78 D. 359.

Whether on the facts, the essential parts of an estoppel are proved, in the absence of proof of the effect of the admission on the party setting up the estoppel. *Brown v. Bowen*, 86 D. 406.

Whether a failure of the servants of a railroad company, in charge of a train which is stopped by an obstruction upon the track, to notify passengers to leave the cars, where a possible collision might be anticipated, is a neglect of duty. *Eaton v. Boston etc. R. R. Co.*, 87 D. 730.

2. Fraud.—Whether there be fraud or not is a proper question for the determination of the jury under all the circumstances of the case. *Hamilton v. Greenwood*, 1 D. 607; *Briscoe v. Bronaugh*, 46 D. 106; *McMichael v. McDermott*, 55 D. 560; *Jennings v. Gage*, 56 D. 476; *Billings v. Billings*, 56 D. 319; *Kuykendall v. McDonald*, 57 D. 212; *Burch v. Smith*, 65 D. 154; *Linn v. Wright*, 70 D. 282; *Drinkard v. Ingram*, 73 D. 250.

So held as to fraud in an agreement for the sale of land. *Miles v. Stevens*, 45 D. 621; as well as to fraud in a sale of goods. *Bidault v. Wales*, 59 D. 327.

It is for the jury to determine whether a judgment and execution sale, in a particular case, constituted a mere contrivance to delay and defraud creditors; and such fraud is not to be presumed, but must be proved, though the proof may be circumstantial. *Floyd v. Goodwin*, 29 D. 130.

Whether representations amount to a fraud or to a warranty. *Anderson v. Burnett*, 35 D. 425; or are merely the expression of an opinion,—are questions for the jury. *Sinar v. Canaday*, 13 R. 523.

Meaning, extent, and truth of representations may be properly left to the jury, where there is evidence that a party, on transferring the note of a third person, represented it to be "as good as cash, and that the maker was perfectly responsible," and also that it was understood that the note was not

For Index to Notes in American Decisions and American Reports, see Volume I.

to be presented at once. *Abell v. Munson*, 100 D. 165.

3. *Construction of contracts, generally.*—Where the testimony may admit of different and distinct constructions, it is the province of the jury to adopt that construction which is most satisfactory to their minds. *Coke v. Hunt*, 41 D. 589.

Under a statute providing that in all contracts for or relating to labor ten hours of actual labor shall be taken to be a day's work, unless otherwise agreed by the parties, the plaintiff worked for the defendant from November to April, each day from sunrise to sunset, under an agreement for \$2.50 a day, without any agreement as to how many hours should constitute a day's work. The plaintiff brought suit to recover \$2.50 for each actual day's work. The defendant claimed that he was entitled to \$2.50 for each ten hours' work only. *Held*, that it was for the jury to determine whether or not the work done by the plaintiff in a day was, by the understanding and implied agreement of the parties, to be taken as a day's work. *Brooks v. Cotton*, 2 R. 172.

In an action by the lessee of a dwelling-house against the lessor, for letting the house, knowing that it was infected with the small-pox, without disclosing that fact, the lessee having taken the disease from the infected house, the question whether vaccination would, under all the circumstances of the case, have been a proper precaution for the lessee to have taken is for the jury. *Minor v. Sharon*, 17 R. 122.

The following are questions of fact for the jury: The construction of an oral agreement. *McFarland v. Neuman*, 34 D. 497.

A waiver of the original conditions of an agreement. *Savage Mfg. Co. v. Armstrong*, 35 D. 227.

The rescission of a contract. *Blood v. Enos*, 36 D. 363.

Whether a contract was made for an illegal purpose. *Bellows v. Russell*, 51 D. 238.

The sufficiency of proof to establish a valid contract between parties. *Atwell v. Miller*, 61 D. 294.

Whether a contract is joint or several, where it depends, not only on the construction of several written instruments, but also upon oral evidence. *Bradford v. South Carolina R. R. Co.*, 62 D. 411.

4. *Contracts in writing.*—The construction of a written document may become a question for the jury, when the doubt as to its meaning arises from extrinsic facts not appearing upon the instrument, and the intention of the parties has to be sought for by a recurrence to the state of facts as they existed when the instrument was made, and which the parties are presumed to have reference to. Such an ambiguity is a latent one, and may be explained by parol. *Warner v. Miltenberger*, 83 D. 573.

The question as to the existence and nature of a prior parol contract, and as to whether a subsequent written instrument contains it all, should be submitted to the jury, where the plaintiff alleges that there was a prior parol contract concerning the same subject-matter, and that the written agreement subsequently signed does not embrace all the terms of such previous parol contract. *Cobb v. Wallace*, 98 D. 435.

The following are held to be questions of fact for the jury: An objection to a deed upon the ground of the grantor's insanity; and it is not for the court to decide whether or not the grantor was insane. *Doe v. Reagan*, 33 D. 486.

Whether a deed has been delivered or not. *Hannah v. Swarner*, 34 D. 442.

Whether a note or a receipt in full is evidence of a contract which extinguishes the original cause of action. *Steamboat Charlotte v. Hammond*, 43 D. 536.

The ownership of a bill of exchange; and if the jury have passed upon it, it is not the business of the appellate court to disturb their finding. *Merchants' Bank v. Central Bank*, 44 D. 665.

The question as to who are parties to a written contract, if it does not appear from the contract itself. *Miller v. Ford*, 55 D. 687.

The question of usury, where, although there was no direct evidence of a usurious agreement at the time when the loan was made, it was shown that twenty-two days thereafter a sum in excess of the legal rate was paid and received for the use of the money. *Callin v. Gunter*, 62 D. 113.

The fact and scope of agency not created by writing, but implied from the conduct of the principal, and proved by witnesses. *Savings Fund Soc. v. Savings Bank*, 78 D. 390.

The construction of a written instrument, if its meaning is to be judged by extrinsic evidence. *Ganson v. Madigan*, 82 D. 659.

Whether certain characters were intended to represent one word or another. *Fenderson v. Owen*, 92 D. 551.

72. *Mixed questions of law and fact.*

—1. *In general.*—Whether a party has used due diligence to charge the indorser of a note is a question of fact for the jury; but what constitutes sufficient notice of dishonor is a question of law. *Thompson v. Bank of S. C.*, 30 D. 354.

Fraud is a mixed question of law and fact, to be determined by the jury. If the jury find a transaction fraudulent, without any evidence to support it, its finding will be reversed on appeal. *Dodd v. McCraw*, 46 D. 301.

What acts or declarations amount to a waiver is a question of law to be determined by the court, but whether or not such acts or declarations were done or made is a question of fact for the jury. *Minor v. Edwards*, 49 D. 121.

For Index to Notes in American Decisions and American Reports, see Volume I.

Where the facts are disputed that go to prove a new promise sufficient to take a debt out of the statute of limitations, whether a sufficient acknowledgment or promise has been made is a mixed question of law and fact to be passed upon by the jury. *Martin v. Broach*, 50 D. 306.

The question of reasonable time is ordinarily a mixed one of fact and law. *Roth v. Buffalo etc. R. R. Co.*, 90 D. 736.

2. *Instruments in writing.*—Written instruments must be construed by the court, except when they cannot be understood without reference to facts *dehors* the writing, in which case the jury, who are to inquire into the facts, should judge of the whole. *Watson v. Blaine*, 14 D. 669.

What land a deed covers, or what estate it conveys, is a question of law to be decided by the court. What are the termini of the lines are points of construction, but where they are a question of fact; hence it is error to instruct the jury that where there is an irreconcilable difference between a natural boundary and a marked line, it is a matter of evidence, and not of construction. *Hurley v. Morgan*, 28 D. 579; *Doe v. Paine*, 15 D. 507.

The construction of written evidence is for the court, and of parol evidence for the jury. But the admixture of parol and written evidence is wholly for the jury to construe. *Sidwell v. Evans*, 21 D. 387.

The court determines the legality of evidence tending to prove the execution of an instrument, and submits it to the jury for them to weigh and decide upon its sufficiency. *Beaman v. Russell*, 49 D. 775.

The construction of commercial correspondence is sometimes not a mere question of law, but more a question of fact; and when this is the case, it may properly be left to the jury. *Pagin v. Connolly*, 69 D. 450.

The *factum* of a foreign law is for the jury to find upon evidence; but it is the duty of the court to construe such law, especially if it be in writing, and to direct the jury as to its force and effect. *Cecil Bank v. Barry*, 83 D. 553.

2. What Instructions are Proper.

73. Powers and duty of the court in respect to instructions.*—Where no testimony is offered of a fact, or the proof is so vague and indefinite that the fact to be proved cannot be deduced by any rational inference, the court should instruct the jury that it is not competent for them to find such fact. *Riggin v. Patapco Ins. Co.*, 16 D. 302; *Satterwhite v. Hicks*, 57 D. 577; *Alexander v. Harrison*, 90 D. 431; when, looking to the whole evidence adduced, and considering its quality and general tenor, and after deducing all reasonable inferences therefrom, it is satisfied that it is not legally

* General duty of the court in giving instructions, see note, 99 D. 118-120.

sufficient to constitute the foundation for a verdict, and that a verdict founded upon it could not in justice and judicial propriety be allowed to stand. *Sprigg v. Moale*, 92 D. 698.

Instructions should inform the jury of what the evidence must satisfy them; and what they are to find from testimony upon a certain point, in order to find, generally, for either party. *Booster v. Rogers*, 52 D. 680.

A judge is not bound to give an opinion on facts, or to say what the law is on the whole evidence; he may advise, but if he directs the jury to find in a particular way, it is error. *Sidwell v. Evans*, 21 D. 387.

Where a witness testifies that the defendant promised the plaintiffs that if they "would wait a while," and "not push his brother," he would pay, the judge is not bound to give the legal construction of the words, the construction of words spoken being exclusively for the jury. *Id.*

The judge is not bound to present the case in every aspect of which it is susceptible on the evidence. *Id.*

Instructions should be positive and specific, and should leave nothing to inference. *Snyder v. Laframboise*, 12 D. 187.

Decision of all questions of fact should be left to the jury, and the court should, when so requested, correct any misstatement of law by counsel in argument before the jury. *Kisten v. Hildebrand*, 48 D. 416. But the judge need not instruct the jury on the history or object of a law. It is sufficient that he states the law itself. *Lincoln v. Wright*, 62 D. 316.

The court in answering a point must so present the qualifying facts that they may have their due weight with the jury. *Killion v. Power*, 91 D. 127.

The court are not bound to charge the jury whether any facts have been given in evidence raising a legal presumption of fraud sufficient to invalidate a will; but can only instruct them as to the law upon certain facts, if they should find them well proved. *Irish v. Smith*, 11 D. 648.

The failure to leave the *bona fides* of a transfer of personal property to the jury, where there was no evidence of *mala fides*, is not error. *Horton v. Smith*, 42 D. 628.

The court should instruct jury as to conclusions of law arising from the face of an instrument. *Hutchinson v. Lord*, 60 D. 381.

Evidence admitted under the assurance that it will be followed up by proof of other material facts intimately connected with it should be disregarded by the jury if the assurance is not fulfilled, and it is the duty of the court to so instruct them upon subsequent application of counsel. *Atwell v. Miller*, 61 D. 294.

An instruction should include all facts in controversy, material to the right of the plaintiff, or the defense of the defendant, where the court instructs the jury upon

For Index to Notes in American Decisions and American Reports, see Volume L.

what state of facts they must find a verdict for a party. *Gallagher v. Williamson*, 83 D. 114.

74. What instructions are proper, generally.—The court may instruct the jury as to the legal modes of ascertaining the boundaries of land. *Seidensparger v. Spear*, 35 D. 234.

An instruction that personalty is liable before realty in payment of a legacy given by a will of personalty only does not tend to mislead the jury, and forms no ground for complaint. *Guhrte v. Owen*, 36 D. 311.

Where a person assigns his property to five assignees in trust for creditors, and the assignees appoint two of their number to carry on the trust business, which two authorize the assignor to act as their agent, and he gives a note signed by himself "for the assignees," in an action against the two assignees on the note, what was meant by those words, and whether the defendants were the only acting assignees, is properly left with the jury. *Paige v. Stone*, 43 D. 420.

Instructions are not erroneous merely because they do not embrace every aspect in which the law applicable to the case might have been presented to the jury. *Linn v. Wright*, 70 D. 282.

A head-note to a reported decision is not law, except so far as it is warranted by the judgment of the court upon the facts of the case; and it is not error for the court so to remark in the hearing of the jury while counsel is reading the head-note of a case. *Denham v. Holman*, 71 D. 198.

An instruction based upon incompetent evidence unobjected to is not erroneous, as when it is based upon a record to which a party to the suit was not a party. *Parke v. Foster*, 71 D. 221.

It is not error if the court adds to its instruction to a jury, "much is left, and much must always be left, to your sound discretion," if otherwise the instructions are without error. It is better, however, not to add such words. *Pennsylvania R. R. Co. v. Ogier*, 78 D. 322.

The court may call the jury's attention to the fact that defendant did not testify in the case, and may instruct them that they may consider that fact and give to it such weight as they think it deserves, in an action against the indorser of a promissory note, on the trial of which is adduced proof of demand and notice to the defendant, where the allegation of due notice is controverted by him. *Union Bank v. Stone*, 79 D. 631.

Where the count in a declaration claims consequential damages for injuries to private property from grading a road by a turnpike corporation, and the recovery of such damages is dependent upon facts to be found by the jury, an instruction that if the corporation did acts unnecessary and improper to the grading of the road, then the corpora-

tion would be liable, is proper. *Douglass v. Boonsborough Turnp. Co.*, 85 D. 647.

An instruction in an action against a railroad company for injuries received in jumping from a car, that the defendant would be liable if the injuries resulted from the want of proper skill and care on the part of the conductor, is not erroneous, taken in connection with another instruction, that if the plaintiff was guilty of negligence in jumping from the car, whereby she was injured, then she could not recover, even if the defendant was also guilty of negligence. *Evansville etc. R. R. Co. v. Duncan*, 92 D. 322.

75. Instructions in respect to damages.—An instruction that the plaintiff has a right to recover if the jury believe the evidence, without saying anything as to the amount of the recovery, is not erroneous if there is uncontradicted evidence establishing the plaintiff's right to any part of his demand. *Pleasants v. Pendleton*, 18 D. 726.

In an action on a bond, where the defendant agreed for a valuable consideration that if he should, after a specified time, practice medicine, etc., within certain limits, the plaintiff should recover of him one thousand dollars as liquidated damages, an instruction that if the jury should find the issues for the plaintiff they must assess the damages at one thousand dollars is unobjectionable. *Miller v. Elliott*, 50 D. 475.

An instruction that malice or gross neglect of plaintiff's rights has not been sufficiently established to allow the jury to find exemplary damages is proper, if such is the state of the evidence. *Seiden v. Cashman*, 81 D. 93.

Where the jury gives more than nominal damages, all instructions given in reference to nominal damages become immaterial, because no state of facts arose to which such instructions could apply. And the same is true in relation to instructions sought upon the assumption that no actual damage was done. *Eastman v. Amoskeag Mfg. Co.*, 82 D. 201.

To leave the measure of damages entirely to the discretion of the jury is error on the part of the trial court. *Pennsylvania R. R. Co. v. Books*, 98 D. 229.

76.—in respect to question of negligence.—A jury having agreed upon a verdict, reduced it to writing, sealed it, and separated. When produced in court, the next morning, it was for the plaintiff, for six thousand dollars, and was entered upon the minutes of the court. On the polling of the jury, they failed to agree, and were directed by the court to retire to their room. The jury having retired, returned for instructions as to whether they could increase their verdict. Being instructed that they might decide upon any verdict to which they all agreed, they brought in a verdict for the plaintiff for seven thousand dollars.

For Index to Notes in American Decisions and American Reports, see Volume I.

Held, no error. Until the polling of the jury takes place, and the assent of the jurors, either express or tacit, is given to the verdict, and the jury is dismissed, and has become no more a jury in the case, the verdict is, within certain limits, in the power of the jury, and to a certain extent within the direction of the court. *Warner v. New York Cent. R. R. Co.*, 11 R. 724.

77. Comments upon the evidence. — The court may properly instruct the jury on the legal effect of a certain instrument, without violating the rule that an instruction shall not be given on the weight of evidence. *Austin v. Richardson*, 2 D. 543.

Where there is no conflict of testimony, a statement of its legal effect by the court is not considered as taking the facts from the jury. *Johnston v. Gray*, 16 D. 577.

An instruction that there is no evidence of a fact sought to be proved is proper, where the evidence is so loose and inconclusive that the jury cannot make a legitimate and reasonable inference, and find such fact to be established, without indulging in conjecture and speculation. *Spring Garden etc. Ins. Co. v. Evans*, 66 D. 308.

The rule that a judge should not charge on the weight of evidence applies only where there is doubt, and the jury are required to weigh the evidence. *Winslow v. Stokes*, 67 D. 242.

78. Assuming existence of facts. — An instruction which assumes the existence of a fact is not erroneous when that fact is clearly established by the evidence, where there is no testimony to disprove it, and where it was not contested at the trial in the court below. *Heirn v. McCaughan*, 66 D. 588.

An instruction assuming the existence of a fact admitted at a trial is not erroneous, where the admission is made for the benefit of a party, and is of a fact without the existence of which he could not, in any event, recover. *Inloes v. American Ex. Bank*, 69 D. 190.

An instruction assuming that there is no evidence tending to establish a proposition is not ground for reversal, if such is the case. *Sharp v. Parks*, 95 D. 565.

79. Expressions of opinion. — The court's opinion upon the facts may be submitted to the jury, if they are at the same time informed that they are to judge of the facts. *Gordon v. Little*, 11 D. 632.

A judge's expression of opinion on a matter of fact will not be intended to have misled the jury. *Robinson v. Justice*, 21 D. 407.

A jury is the proper tribunal to determine questions of fact; but the judge is not thereby precluded from expressing to the jury his opinion on the weight and effect of evidence. *Kirkwood v. Gordon*, 62 D. 418.

An opinion of the court, based on evi-

dence as he remembered it, and not upon the verdict alone, is unobjectionable, if the verdict alone is sufficient to sustain it. *Bruggerman v. Hoerr*, 82 D. 97.

An expression of opinion on the state of facts by a judge is not matter of legal exception. *Phillips v. Kingfield*, 36 D. 760; *Matthews v. Allen*, 77 D. 430; if he also told the jury that they were the sole judges of the credibility of the witnesses. *Porter v. Seiler*, 62 D. 341.

A judge's intimation of an opinion on the facts that the presumption is that a deed was delivered as an escrow is no ground for reversal, where the fact as to whether it was so delivered is correctly left to the jury. *Jackson v. Rowland*, 22 D. 557.

80. Rule that instructions be written. — It is the duty of a judge in all cases to give the jury a knowledge of the definitions and principles of law applicable to the case; and under the statute of Louisiana, in all appealable cases, the judge may be required by counsel to charge the jury in writing, they having the power to disregard his instructions. *Tresca v. Maddox*, 66 D. 198.

The court should charge jury in writing, when requested to do so, and without any verbal additions or explanations. *Campbell v. Miller*, 95 D. 390. And if the court then instruct orally, it is error; but exception must be taken, or the error is waived. *Heaton v. Cincinnati etc. R. R. Co.*, 79 D. 430.

If instructions are not modified or changed by any oral charge, but go to the jury as they were written, there is no violation of the provision of the code requiring all instructions to be in writing, although the court repeated orally a part of one of the charges, and in reading another charge remarked orally that he had not intended to read so far as he had, and then reread the charge as he intended to give it. *Pate v. Wright*, 95 D. 705.

81. Interpreting instructions. — An instruction must be understood in reference to the issue and evidence in the case. The words employed must be taken in their ordinary and popular acceptance. *Mitchell v. Zimmerman*, 61 D. 717.

The universal rule of construction is, that the general language of the court is to be understood as limited by the conditions to which it is addressed. *Barroilhet v. Hathaway*, 89 D. 193.

82. Withdrawal of instructions. — The court may withdraw an instruction given to the jury before they retire. *Donnell v. Jones*, 62 D. 194.

3. What Instructions are Improper.

83. In general — Limiting the issue. — An instruction is not necessarily correct because given in the same words used by the court of last resort in a case wherein they

For Index to Notes in American Decisions and American Reports, see Volume I.

acted both as judge and jury. *Booster v. Rogers*, 52 D. 680.

An instruction is erroneous when its effect is to take a case from the jury, as where the instruction is simply that there is no evidence to a certain point, this point only impliedly affecting the point in controversy, and there being other evidence from which a verdict might have been rendered for the defeated party. *Tibeau v. Tibeau*, 59 D. 329.

An instruction to the jury outlining facts upon which plaintiff would be entitled to recover, which hypothesis of facts takes from the jury the finding of other facts by which his right to recover might be impaired or defeated, is erroneous. *Adams v. Capron*, 83 D. 566.

Instructions should not be so framed, nor given and refused, as to exclude from the jury the consideration of the points which are fairly raised by the evidence. *Sawyer v. Hannibal etc. R. R. Co.*, 90 D. 382; *Alexander v. Harrison*, 90 D. 431.

Instructions removing from the consideration of the jury the sanity of an alleged testator, where there is testimony upon this point, are erroneous. *Booster v. Rogers*, 52 D. 680.

It is error to instruct that the finding of one issue in favor of plaintiff will entitle him to recover, when, in order to gain the suit, all of the issues must be found in his favor. *Galbreath v. Davidson*, 99 D. 233.

84. Instructions assuming facts, or unsupported by evidence. — Want of evidence upon which to base an instruction, though good law, will render it erroneous if given. *Druggins v. Watson*, 60 D. 560; *O'Fallon v. Boisemau*, 26 D. 678; *Heirn v. McCaughan*, 66 D. 588; *Gulther v. Myrick*, 66 D. 316; *Phoenix Ins. Co. v. Lawrence*, 81 D. 521; *Stouffer v. Latschaw*, 27 D. 297.

It is the province of the jury to find facts from the evidence, and it is error for the court in its charge to assume as proven a fact which is in issue. *Caldwell v. Center*, 89 D. 131; *Tyner v. Stoops*, 71 D. 341; *Crozier v. Kirker*, 51 D. 724; *Warren v. Jacksonville*, 58 D. 610; *McKenzie v. Branch Bank*, 65 D. 369.

So an instruction assuming a fact to be doubtful when there is no conflict of evidence respecting it, or assuming an hypothesis at variance with the fact, should not be given. *Winta v. Morrison*, 67 D. 658.

It is error for the court to annex to a charge properly asked, a material qualification not required nor authorized by the evidence given at the trial. *Walker v. Stetson*, 84 D. 382.

An instruction assuming that property was damaged in the manner complained of is defective, notwithstanding the proof established the fact beyond a reasonable doubt. *Baltimore & S. R. R. Co. v. Woodruff*, 59 D. 72.

A charge which assumes that a rule of law is established from certain facts, when such result does not necessarily follow, is erroneous. *Clark & Co. v. Goddard*, 84 D. 777.

85. Abstract propositions and remarks calculated to mislead the jury. — An instruction authorizing the jury to find one of three alternate and distinct propositions of fact, without saying which, is erroneous. *Whiteford v. Burckmyer*, 39 D. 640.

An instruction not perspicuously worded, whose precise import is not clear, is objectionable for that reason. *Thompson v. Thompson*, 68 D. 638.

An ambiguous instruction which may mislead the jury, and conflicting instructions, are irregular, and should not be given. *Southern R. R. Co. v. Kendrick*, 90 D. 332.

Instructions amounting to mere abstract propositions of law are erroneous. They should be made applicable to the case in hand. *New Orleans etc. Co. v. Statham*, 97 D. 478.

It is erroneous for courts to give instructions containing only a portion of material facts connected with any particular transaction, and to omit others of equal importance, which, if included in the instruction, might lead the mind of the jury to a different conclusion. *Id.*

An instruction must be applicable to the testimony, and where there is testimony tending to bring the case fairly within an exception to a general rule, an instruction will be misleading which states the general rule as applicable to the testimony without stating it to be merely a general rule, and subject to exceptions, and without adverting to such testimony. *White v. Thomas*, 80 D. 347.

86. Comments upon the evidence or credibility of witnesses. — The jury should attempt to reconcile all contradictions and discrepancies in testimony of witnesses, and it is error for the court to instruct them that such attempt should not be made. *Moore v. Kendall*, 52 D. 145.

An instruction should not state the testimony of a particular witness, as what that testimony was is a matter to be determined by the jury. *Southern R. R. Co. v. Kendrick*, 90 D. 332.

The court has no right to instruct the jury that the testimony proves a certain fact, although it may greatly preponderate in favor of that fact. *Trovillo v. Telford*, 31 D. 484. Such an instruction amounts but to a comment upon the testimony, and is an encroachment upon the province of the triers of fact. *Wilson v. Huston*, 53 D. 138.

A general charge on the evidence in favor of a party is an invasion of the province of the jury, where an inference of fact is necessary to be drawn before such party is

For Index to Notes in American Decisions and American Reports, see Volume I.

entitled to recover. *White v. Hass*, 70 D. 548.

An instruction declaring that upon the evidence a plaintiff cannot recover is justified only where there is a total failure of evidence to uphold a verdict, but where there is any evidence tending to prove the issue, it must be submitted to the jury. *Claffin v. Rosenberg*, 97 D. 336; *Houghtaling v. Ball*, 59 D. 331.

For the judge to charge the jury that a book of farriery, referred to by counsel, in addressing them, is entitled to as much weight as the testimony of an expert witness in the science, who had been examined in the case, is a clear violation of the act of 1796, which prohibits the judge from expressing any opinion as to the credibility or weight of the testimony. *Melvin v. Easley*, 62 D. 171.

The weight of evidence is not subject of legal direction or of error. *Brittain v. Doylestown Bank*, 39 D. 110.

Jurors should test the truth and weight of evidence, when heard, by their general knowledge derived from experience, observation, and reflection; and an instruction to them to apply special circumstances and facts connected with the case in forming their verdict is erroneous. *Ottawa Gas Light Co. v. Graham*, 81 D. 263.

An instruction that "other things being equal in regard to witnesses, the testimony of those examined in open court is entitled to greater weight than the testimony of witnesses embodied in depositions," is erroneous. *Müller v. Eglin*, 31 R. 121.

87. Expressions of opinion.—The court in charging the jury has no right to express or intimate his opinion as to what has or has not been proved during the trial. *Beverly v. Burke*, 54 D. 351.

The sufficiency of the evidence ought to be left wholly to the consideration of the jury; so where the court instructed the jury that "from the whole testimony before them, the demand of the plaintiffs was not barred by the act of limitations,"—*held*, that the instruction was erroneous. *Fisher v. Duncan*, 3 D. 605.

An instruction evincing an opinion that a contested fact has been proved is erroneous, because it is calculated to bias the jury. *Whiteford v. Burckmyer*, 39 D. 640.

It is error for the court in its charge to the jury to intimate doubts as to the competency of legal testimony which has been submitted to them, it being calculated to paralyze its influence in their estimation. *Potts v. House*, 50 D. 329.

If a judge feels it to be his duty to intimate his opinion to the jury, that a certain fact is or is not sufficiently proved, he should always instruct them, at the same time, to consider the evidence and to decide as they shall find the truth to be. *Id.*

88. Instances of erroneous instructions.—It is error to instruct a jury that they are at liberty to find conditional damages, sufficient in amount to enforce specific execution of a contract, and that the court will take care that no improper use is made of the verdict. *Decamp v. Peay*, 9 D. 372.

Parol evidence is inadmissible to vary a record, and a charge is erroneous the effect of which is to shift from the court to the jury the duty of determining what parol evidence is inconsistent with the record. *Thomason v. Odum*, 68 D. 159.

Where a question at issue is the delivery of personal property, it is error for the court to charge that he knew of nothing in the case that went to show that the delivery was not valid under the circumstances, so far as it was within the province of the court to determine the question, though the statute provides that the court must instruct the jury as to all matters of law which it thinks necessary for their information in giving their verdict; and if it presents the facts, must also inform the jury that they are the exclusive judges of all questions of fact. *Caldwell v. Kennison*, 77 D. 499.

It is error to instruct the jury that there was no evidence to take the case out of the statute of limitations if there is proof tending to show that a party was defendant's agent, attended to his books, and settled his accounts; that such agent had, within three years, made entries in plaintiff's books verifying the accounts sued upon. *Morrison v. Whiteside*, 79 D. 661.

Instructions were held erroneous in an action against a wharf superintendent for wrongfully ordering the captain of a vessel discharging at plaintiff's wharf to remove therefrom, whereby the plaintiff was injured and deprived of his wharfage, where the jury were charged that it was not enough for the defendant simply to have believed that he had no authority to make the order complained of and to have made the same in good faith, but that he was bound to act with reasonable caution. The defendant was entitled to an instruction that there could be no recovery unless he had acted with a malicious and fraudulent design to injure the plaintiff. *Gregory v. Brooks*, 95 D. 278.

4. The Prayer for Instructions.

89. Necessity of a prayer, or request.*—In the absence of a prayer for a specific instruction, the silence of the judge is not error. *Holliday v. Rheem*, 57 D. 628; *Brittain v. Doylestown Bank*, 39 D. 110; *Jacobs v. Bangor*, 33 D. 652; *Herbert v. Huie*, 34 D. 755; *Churchman v. Smith*, 36 D. 211; *Mearns v. Commissioners*, 49 D. 412; *Deal v. Bogue*, 57

* Instructions to jury, mode of obtaining and of reviewing errors in giving or refusing, see note, 99 D. 113-123.

For Index to Notes in American Decisions and American Reports, see Volume I.

D. 702; *Moses v. Boston & M. R. R.*, 64 D. 381; *Kauffman v. Griesemer*, 67 D. 437; *Lim v. Wright*, 70 D. 282; *Wright v. Boynton*, 72 D. 319; *Reeves v. Del. etc. R. R. Co.*, 72 D. 713; *Weamer v. Stuart*, 72 D. 627; *Borngeesser v. Harrison*, 78 D. 757; *Philadelphia etc. R. R. Co. v. Hagan*, 86 D. 541; *Siegel v. Robinson*, 93 D. 775; *Moore v. Fitchburg R. R. Corp.*, 64 D. 83; if such omission does not mislead the jury in investigating the main question in the case. *Mullen v. Wilson*, 84 D. 461. But this rule does not apply where the charge given by the court upon the questions involved is itself erroneous. *Chambliss v. Tarbox*, 84 D. 614. And where a charge on the requisites prescribed by statute for the execution of wills omitted some of the requisites, and the omissions, when considered in connection with the evidence, appeared to have the effect of authorizing the jury to conclude that they were unnecessary, the omissions are error, although the adverse party did not ask the court to supply the omissions in its charge. *Tynan v. Paschal*, 84 D. 619.

That proper instructions were given will be assumed; and where a party desires definite instructions, he should make a request therefor. *Sidensparker v. Sidensparker*, 83 D. 527.

Charges tending to mislead should be corrected by asking additional and explanatory instructions. *Kenan v. Holloway*, 50 D. 162.

90. Form and sufficiency of the prayer.—1. *In general.**—A prayer for an instruction, not referring to the pleadings, that if the jury believe certain evidence, the plaintiff is or is not entitled to recover, authorizes the court, under the Maryland act of 1825, merely to pass upon the sufficiency of the facts as a cause of action, assuming the pleadings to be correct, and not upon the sufficiency of the pleadings or their agreement with the facts, and on appeal from the granting or refusal of such instruction the court will not pass upon the pleadings. If an opinion is required upon the sufficiency of the facts under the pleadings, the prayer must be so framed. *Stockton v. Frey*, 45 D. 138.

A prayer that there is no evidence of a waiver concedes the truth of opposing party's evidence, and all legitimate inferences which may be drawn from it. *Spring Garden etc. Ins. Co. v. Evans*, 66 D. 308.

The rejection or granting of a prayer depends for its correctness upon evidence to which it alone refers, and not upon the state of the pleadings, where the prayer neither points nor refers to the pleadings. *Bitney v. Printing Telegraph Co.*, 81 D. 607.

2. Defective prayers which should be denied.—A prayer for an instruction based on a hypothetical statement of part of the facts proved, and assuming the existence of other

material and indispensable facts, also proved, but not stated, will not be granted unless justified by a consideration of all the facts assumed as well as stated. *Bosley v. Chesapeake Ins. Co.*, 22 D. 337.

A prayer for an instruction involving a complicated statement which it would be difficult for the jury to understand should be denied. *Whiteford v. Burckmyer*, 39 D. 640; *Fell's Point Sav. Inst. v. Weedon*, 81 D. 603.

If a charge asked embraces several different propositions, part of which are good and a part bad, the court may refuse the whole. *Inglebright v. Hammond*, 53 D. 430.

A court of common pleas may make rules regulating a request for instructions on points; and where requested instructions have not been furnished to opposite counsel, according to rule, it is not error to refuse them. *Haines v. Stauffer*, 53 D. 493.

Plaintiff's prayer for an instruction, based upon his own evidence, cannot be given, when the proof of the defendant, if believed by the jury, would establish any proposition inconsistent with the theory of such prayer. Plaintiff must assume or admit the truth of all the defendant's proof on the subject. *McTavish v. Carroll*, 61 D. 353.

Where limitations and *non assumpsit* are both pleaded, a prayer for instructions which overlooks the evidence offered under the plea of limitations and directs the jury to find for the plaintiff, notwithstanding they may find the debt barred by the statute, is fatally defective in not limiting the finding of the jury to the plea of *non assumpsit*. *Hurst v. Hill*, 63 D. 705.

The refusal of an instruction in the alternative is right, when one of the alternatives is erroneous, although the other may be correct. *Berry v. Griffin*, 69 D. 123.

A prayer that plaintiff is not entitled to recover upon the pleadings and evidence in a cause is too general in its terms, since the Maryland act of 1825, chapter 117. *Fell's Point Sav. Inst. v. Weedon*, 81 D. 603.

A prayer is objectionable in assuming a fact and leaving to the jury a question of law, where it is to the effect that if the jury find "that the fund deposited" was still in bank, and that "proper" letters of administration have been taken out and granted to the plaintiff, the plaintiff was entitled to recover. 76.

An instruction predicated upon a statement of facts that does not enumerate all the other facts material to the right of recovery, of which evidence was offered, is defective. *Adams v. Capron*, 83 D. 566.

Inconsistent instructions should not be given. And where one of two inconsistent instructions correctly presents the case to the jury, but does not appear to have been submitted in such terms as would impose any limitations upon the inconsistent and oppos-

* Prayer for instructions must be in writing, see note, 99 D. 120-123.

For Index to Notes in American Decisions and American Reports, see Volume I.

ing theory of the other, the error is not cured. *Ib.*

A charge is erroneous when the jury is instructed that if the creditor received a note "in settlement for or in payment of the account sued on," the debtor was entitled to a credit for the amount of the note, although the maker and first indorser became applicants for the benefit of the insolvent laws and were finally discharged. *Berry v. Griffin*, 69 D. 123.

A written request to charge the jury must be applicable to facts and to law, or the court need not notice it; and the court may give the charge with verbal modifications, but the whole taken together must be correct. *Campbell v. Miller*, 95 D. 389; *Fulton v. Maccracken*, 81 D. 620; *Whiteford v. Burckmyer*, 39 D. 640.

3. *What prayers are proper.* — A party may ask an instruction on the testimony of a single witness, though there is other testimony on the same point. *Whiteford v. Burckmyer*, 39 D. 640.

A party may ask an instruction as to the applicability and effect of evidence when testimony is taken under a commission, and the parts that are admissible are so inseparably blended with those that are not that distinct objections cannot be made. *Pettigrew v. Barnum*, 69 D. 212.

It is no objection to a charge asked for by a party that he asks for less than he is entitled to upon the facts submitted to the jury. *Trieber v. Knabe*, 71 D. 607.

A prayer is not erroneous, as assuming the existence of a partnership, where the jury are left to find that the note sued upon was "discounted for the use and benefit of the defendants, under the firm name of Fulton and Linn, and that they received the proceeds of said note." *Fulton v. Maccracken*, 81 D. 620.

If counsel, in a case tried by the court without a jury, desires to present points of law, as applicable to the facts established, or sought to be established, upon which the court might be called to charge a jury, were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points, or counsel contends as follows. *Touchard v. Crow*, 81 D. 108.

A prayer may raise a question of law out of the facts enumerated in it, and demand an opinion upon it, not as conclusive of the plaintiff's right to recover, but as ancillary to that right. *Parkhurst v. Northern Central R. R. Co.*, 81 D. 648.

A prayer should not be rejected because an apparently independent proposition contained in it is erroneous, when it is limited by another more definite and substantial proposition, with which it is so connected as to form one entire proposition. *Ib.*

91. *What prayers should be granted.** — A party is entitled to an instruction containing even a hypothetical statement of law whenever there is any competent and relevant testimony, however slight, upon the point. *Farish v. Reigl*, 62 D. 666; *Bradford v. Marbury*, 46 D. 264; *Plummer v. Gheen*, 14 D. 572; *Clealand v. Walker*, 46 D. 238; *Cook v. Wood*, 76 D. 677.

Where there is no tendency of proof to a conclusion from conflicting evidence, it is certainly a right of the parties to have from the court a declaration of the legal effect of the evidence. *Rhodes v. Otis*, 73 D. 439.

A general charge on the point raised is sufficient to substantially comply with the request to charge upon it. *Lycoming Ins. Co. v. Schreffler*, 82 D. 501.

A party may require the court's opinion on a question of law arising upon any hypothesis as to the facts in testimony in the cause. *Whiteford v. Burckmyer*, 39 D. 640.

A party liable to be prejudiced has the privilege of asking an explanatory charge. *Taylor v. Kelly*, 68 D. 150.

The direction of the court upon the effect of testimony in a cause may always be asked by a party, without reserving objections as to its admissibility or effect at the time of its introduction. *Inloes v. Amer. Exch. Bank*, 69 D. 190.

An instruction may be had upon any given statement of facts, only when it is subordinate to or in aid of a theory which embraces all the facts material to establish or defeat the right in controversy. *Adams v. Capron*, 83 D. 566.

Under the evidence showing a constructive delivery, either party has the right to ask instructions of the court as to the legal effect of any particular circumstance which may be offered to the jury, and from which the delivery is to be deduced. *Atwell v. Miller*, 61 D. 294.

A party defending against an obligation on account of misrepresentations, etc., is entitled to specific instructions to the jury directing their attention to the particular fact in which the alleged misrepresentations, etc., consist. *Mutual Fire Ins. Co. v. Deale*, 79 D. 673.

The court is precluded from instructing the jury as in case of a nonsuit, where the plaintiff omits to prove a material fact; but the defendant may in such case move the court to instruct the jury that if the given fact was not proved they should find in his favor. *Deahler v. Beers*, 83 D. 274.

92. *What may be properly refused.*† — Abstract instructions should not be given.

Porter v. Robinson, 13 D. 153; *Irish v. Smith*, 11 D. 648; *Hathorn v. Stinson*, 25 D. 228;

* What prayers should be granted, see note, 98 D. 126, 127.

† What prayers may be refused, see note, 99 D. 127-128.

For Index to Notes in American Decisions and American Reports, see Volume I.

Oresinger v. Welch, 45 D. 565; *Zachary v. Pace*, 47 D. 744; *Stevenson v. McReary*, 51 D. 102; *Pennington v. Yell*, 52 D. 282; *Cole v. Sprowl*, 56 D. 696; *Benham v. Rowe*, 56 D. 342; *Cowles v. Bacon*, 56 D. 371; *Jellison v. Goodwin*, 69 D. 62; *Hunt v. Crane*, 69 D. 381; *Crommelin v. Thiess*, 70 D. 499; *Gunn v. Howell*, 73 D. 484.

Instructions substantially embraced in the general charge, or one which is abstract and not warranted by the evidence, should be refused. *McCown v. Schrimpf*, 73 D. 221; *Doty v. Strong*, 40 D. 773.

The court need not charge upon a point not arising upon the evidence. *Harvey v. Thomas*, 36 D. 141; *Newman v. Foster*, 34 D. 98; *Towle v. Leavitt*, 55 D. 195; *Marshall v. Haney*, 59 D. 92; *Johnson v. Jennings*, 60 D. 323; *Pembecot R. R. Co. v. White*, 66 D. 257; *Treat v. Lord*, 66 D. 298; *Andre v. Bodman*, 71 D. 628; *Chicago etc. R. R. Co. v. George*, 71 D. 239; *Abbott v. Gatch*, 71 D. 635; *Hosley v. Brooks*, 71 D. 252; *Cooke v. England*, 92 D. 618.

Instructions should not assume facts as proved, but should be hypothetical. *Floyd v. Ricks*, 58 D. 374. And instructions based on rejected testimony may properly be refused. *Pleasant v. Scott*, 76 D. 403.

The court need not give instructions irrelevant to the evidence offered. *Hanse v. N. O. Ins. Co.*, 29 D. 456; *Stout v. McAdams*, 33 D. 441; *Pomroy v. Parmlee*, 74 D. 328; *Winston v. Taylor*, 75 D. 112; *Brown v. Illius*, 71 D. 49. And their relevancy must be affirmatively shown by the party complaining. *Conger v. Dean*, 68 D. 93.

Instructions on mere hypothetical points of law, however correct, need not be given. *New Brunswick etc. Transp. Co. v. Tiers*, 64 D. 394; *Melledge v. Boston Iron Co.*, 51 D. 59; *McIntyre v. Kline*, 64 D. 163; *Andre v. Bodman*, 71 D. 628.

The court need not give an instruction which has been once given. *Raver v. Webster*, 66 D. 96; *Pettigrew v. Barnum*, 69 D. 212; *Haly v. Markel*, 92 D. 182; *Price v. Alexander*, 52 D. 526; *Holbrook v. Utica etc. R. R. Co.*, 64 D. 502.

The court is not obliged to give an opinion upon the weight of the testimony. *Vincent v. Stinehour*, 29 D. 145.

A request to charge that one of several matters constitutes a good defense, where each would not do so, may be disregarded by the judge. *Bowman v. Teall*, 35 D. 562.

The denial of a motion for an instruction containing several propositions is not error if any of the propositions are untenable. For the court is not bound to divide a question involving several members, some of which are competent and some not, and to admit those which are competent. *Whiteford v. Burckmyer*, 39 D. 640.

An instruction that there is no evidence to prove a particular fact should be refused

if there is any evidence whatever tending to prove that fact. *Id.*

Where part of an instruction asked for is good and part bad, the court may reject the whole, according to its merits, as presented in its entirety. *Budd v. Brooke*, 43 D. 321; *Birney v. Printing Tel. Co.*, 81 D. 607.

The refusal of a prayer for instructions may be right, although it was made on a wrong construction of the evidence, provided the instruction was one that ought not to be given. *Budd v. Brooke*, 43 D. 321.

An instruction that may mislead the jury by stating only a part of the evidence, and that if the jury believe the evidence so stated, the plaintiff must recover, but omitting material facts, should be refused. *Stockton v. Frey*, 45 D. 138.

The court is not bound to give an opinion on a legal question arising on part of the evidence as stated in a prayer for instructions. *Melledge v. Boston Iron Co.*, 51 D. 59.

Instructions on a point assumed by counsel should not be given, without some evidence from which it might be fairly inferred. *Haines v. Stauffer*, 53 D. 493.

Where evidence is conflicting, on a question of fact material to the defense, the plaintiff is not entitled to a charge asserting his right to a recovery on the whole evidence. *Woolfork v. Sullivan*, 58 D. 305.

Refusal to give instructions is not error, where they would have accomplished nothing, if given, for the party asking them, or where their refusal does not injure him. *Gunn v. Todd*, 64 D. 231.

The court is not bound to charge the jury as to the legal effect of the entire evidence, unless, after concession of all points upon which there was a conflict of evidence, the party asking the charge is entitled thereto. *Rhodes v. Otis*, 73 D. 439.

The court may properly decline to call especial attention of the jury to a particular part of the evidence, by instructions as to the weight to which it is entitled, or the purposes for which it may be considered by them. *Castro v. Illius*, 73 D. 277.

An instruction whose object is to declare facts enumerated therein to be competent evidence in a case is properly refused, since the court, by admitting the evidence, has already declared it competent. *Williams v. Christian Female College*, 77 D. 569.

The court is not bound to give an instruction, where the effect of it would, perhaps, be to cause the jury to attach too great importance to evidence too meager to sustain a verdict upon the principle involved in the instruction. *Blankenship v. Douglas*, 82 D. 608.

The refusal of the court to grant a prayer which submits a question of law to the jury is not ground for a reversal. *Cecil Bank v. Barry*, 83 D. 553.

A requested instruction is properly refused

For Index to Notes in American Decisions and American Reports, see Volume I.

when it calls upon the court to take from the jury the determination of facts, or when the case does not show the facts to which the requested instruction relates. *Brackets v. Persons Unknown*, 87 D. 548.

It is not error to refuse to give numerous propositions in gross as a charge to the jury where some of them are plainly erroneous; and under an exception to such refusal, the question as to whether the remaining propositions were correct is one which the appellate court will not consider. *Mages v. Badger*, 90 D. 691.

An instruction is properly refused which does not include all of the facts material to be considered in determining the issue presented by it, if the effect of giving it would be to exclude from the consideration of the jury the material facts not referred to in it. *Cornelius v. Burford*, 91 D. 309.

Where counsel in his argument takes a certain position with regard to the effect which certain evidence should have, and the court charges in accordance therewith, counsel cannot after such charge ask the court for a charge giving to such evidence a different effect. *Wilnot v. Howard*, 94 D. 338.

A prayer offered by one party, and granted upon the concession of the other, should be withdrawn by the court, if it thereafter be found not to express the law applicable to the case. *Northern C. R. R. Co. v. State*, 96 D. 545.

An instruction is practically refused which is not marked by the court as either given or refused. *Vastine v. Wilding*, 100 D. 347.

A party is not entitled to an instruction on a patent not located on the plats in the cause nor introduced in evidence. *Casey v. Inloes*, 39 D. 658.

A defect in a declaration is not subject of instruction to a jury. *Brittain v. Doylestown Bank*, 39 D. 110.

An instruction based upon a different state of facts from that proved is properly refused, as where an instruction was asked in an insurance case that a sale of damaged goods at auction by the assured, without the insurer's consent, did not furnish a proper measure of damages, when the proof was that the insurer consented to the sale. *Henderson v. W. M. F. I. Co.*, 43 D. 176.

An instruction to the effect that an actual delivery is necessary to make valid sale, in all cases where it depends upon delivery alone, will be refused. *Atwell v. Miller*, 61 D. 294.

An instruction placing a construction on a contract at variance with its plain meaning must be refused. *Benson v. Atwood*, 71 D. 611.

An instruction that a man claiming to own land is bound to know the state of his own title is not in all cases correct, and is properly refused. *Davis v. Davis*, 85 D. 157.

A judge may refuse to charge upon the

effect of a given state of facts when the facts are themselves in dispute. It was therefore not error to refuse to charge the jury that there was no evidence that the accident which was the basis of the action was caused by the sole negligence or want of care of the defendants and their servants, and that the verdict must therefore be in their favor. *Philadelphia etc. R. R. Co. v. Hagan*, 86 D. 541.

An instruction is properly refused which takes from the jury the power of determining whether a railroad company was acting in the capacity of a common carrier, or of a warehouseman, when the loss occurred, if the evidence upon this point is conflicting. *North Missouri R. R. Co. v. Akers*, 96 D. 183.

93. Modifying prayer.* — A party has no right to modify his opponent's prayer for instruction, based upon a certain hypothesis as to the facts, so as to include other facts, against the will of the party moving for the instruction, and it is error to permit any such modification. *Whiteford v. Burckmyer*, 39 D. 640.

The court may qualify instructions asked, so as to make them conformable to law. *Walker v. McDowell*, 43 D. 476.

Thus in an action against two for a tort, where instructions are asked, assuming the relation of principal and agent between the defendants, to the effect that the agency must be proved, and that the assumed principal is not liable unless the agent was acting within the scope of his authority when he committed the tort complained of, and did not transcend his authority, nor unless such agent acted with the principal's assent or under his directions, which must be proved, and cannot be presumed from the agency, the court may give such instructions with the modification that they are correct so far as the alleged principal is sought to be made liable for the agent's acts. *Johnson v. Barber*, 50 D. 416.

A charge should be given in the terms in which it is asked, where it is conformable to law and authorized by the evidence adduced. *Clealand v. Walker*, 46 D. 238.

The court is not bound to give a requested instruction in the precise words of the request. It is sufficient if it be substantially given in any form, so that the jury may not misunderstand the law of the case. *Treat v. Lord*, 66 D. 293; *Tainter v. Lombard*, 87 D. 552.

A party has the privilege of raising any question of law arising out of the facts of the case, and to demand the opinion of the court distinctly upon it; and the opposite party has the equal privilege of asking an opinion on additional facts not embraced in the hypothesis assumed by the adversary in his prayer, but not the privilege of control-

* Modifying the prayer, see note, 99 D. 123, 124.

For Index to Notes in American Decisions and American Reports, see Volume I.

ling or modifying that hypothesis. *Birney v. Printing Tel. Co.*, 81 D. 607.

A party is entitled to a full, fair, and explicit answer to his prayer for instruction, if pertinent; but where the evidence so requires, the court should make such qualification as will adapt the instruction to the facts, and enable the jury to make the necessary discrimination and decide the cause correctly. *Hays v. Paul*, 88 D. 569.

The court is not bound to give in a charge a general proposition, although it be the law, unless it be applicable to the facts of the case. If such a charge is requested, the court may refuse it entirely, or may modify it and make it applicable. *Southern Eap. Co. v. Newby*, 91 D. 783.

The court may reject all the prayers asked, and instruct the jury in its own words, or it may grant the prayers with such explanations or qualifications as may be necessary to a proper understanding of the case. *Higgins v. Carlton*, 92 D. 666.

Where an instruction asked contains two independent branches, one of which states the law correctly, while the other does not, that branch which states the law correctly should be severed from the other and given to the jury. *Peshine v. Shepperson*, 94 D. 468.

Where the refusal of an improper instruction is calculated to mislead the jury, the court should explain the refusal, or give such an instruction as will make the matter clear to the jury. *Id.*

Where an instruction asked is equivocal, being correct upon one construction of it, the court, instead of refusing it, should amend it so as to insure its being understood by the jury in the proper sense, and give it to the jury as so amended. *Ward v. Churn*, 98 D. 749; *Rosenbaum v. Weeden*, 98 D. 737.

The court may generally refuse an instruction asked which does not correctly state the law, and is not bound to modify it, or give any other instruction in its place. *Rosenbaum v. Weeden*, 98 D. 737.

Misleading instructions to the jury should be explained or modified, or be refused. *Snyder v. Brosse*, 99 D. 551.

5. Further Instructions: Directing Verdict.

94. Further instructions after retirement. — On the application of the jury, it is proper for the judge to instruct them, in an action for tort, what amount of damages will carry costs. *Elliott v. Brown*, 20 D. 644.

Charging the jury in the absence of counsel is error, even though the instructions do not vary, in the estimation of the judge, from those previously given in the presence of the parties. *Davis v. Fish*, 48 D. 387.

It is settled practice in New Hampshire, that upon receiving a written request from the jury, the court may send them written

instructions in the absence of counsel; such request and instructions must be filed with the verdict by the court, so that they may be seen by counsel. *Leighton v. Sargent*, 64 D. 323.

It is not error to instruct a jury in the absence of a party and his counsel, where the jury, after retiring, come into court while it is still in session and ask further instructions, and the absent party and his counsel are first loudly called for at the door. *Preston v. Bowers*, 82 D. 430.

Where, after a jury had retired to consider their verdict, they again came into open court, and, at their request, there received additional instructions in the absence of the defendant and his counsel, — held, 1. That such instruction was not a privy instruction or communication to the jury; 2. That the giving of notice to absent counsel or suitors, before proceeding in causes in which they are interested, is a matter of grace or favor on the part of the court, and not a legal obligation or duty. *Chapman v. Chicago etc. R'y Co.*, 7 R. 81.

A jury came into court and reported that they could not agree, and "stood eleven to one, and divided on two hundred dollars." The judge told them it would be better for one or both sides to yield, and that a disagreement over so small a matter would be unfortunate. Held, error. *Goodsell v. Seeley*, 41 R. 183.

95. Directing a verdict. — A verdict may be directed independent of the consent of the parties, whenever the party on whom the burden of proof lies wholly fails to sustain it by evidence. *People v. Cook*, 59 D. 451.

Where there is no evidence to warrant the jury in finding a material fact, the judge is not at liberty to leave it to them to determine whether or not such fact is proved; but he should direct them to find that it is not proved. *Story v. Brennan*, 69 D. 629.

The court does not always invade the province of the jury by directing a verdict. It has a right to pronounce its judgment on the legal effect of admitted facts; and on such facts it is not only the province, but the imperative duty, of the court to determine. *Todd v. Old Colony etc. R. R. Co.*, 83 D. 679.

A party is not entitled to have the jury instructed to render a verdict in his favor, upon a hypothetical statement of the facts of a case, if the statement omits material facts upon which testimony has been offered, and where the finding of the omitted facts against the party would change the result of the case. *Cleveland etc. R. R. Co. v. Crawford*, 15 R. 633.

VII. THE VERDICT, OR FINDING.

96. Custody and conduct of the jury.

— A jurymen should not converse with any

For Index to Notes in American Decisions and American Reports, see Volume I.

person other than a fellow-juror, upon the merits of the cause under consideration. *Dana v. Roberts*, 1 D. 38.

97. Taking out papers, etc. — Sending out with the jury, in an action for malicious prosecution, the defendant's affidavit before the magistrate, in instituting the prosecution complained of, is not error. *Selbert v. Price*, 40 D. 525.

Depositions sent to a jury, which contain improper matter, will vitiate the verdict, unless the same are wholly immaterial or were sent through mistake. *Kittredge v. Elliott*, 41 D. 717.

The jury are not required to take all the papers of the case with them into the consulting-room. *Phillips v. Runnels*, 43 D. 109.

Sending out of papers with jury is in discretion of the court, as a general rule, with some exceptions. *Little Schuylkill N. etc. Co. v. Richards*, 98 D. 209.

It is error for the jury, after retiring for consultation, to send for and have read to them a decision in the state reports. *Reed v. Roberts*, 71 D. 210.

Permitting the jury to take to the jury-room pleadings in a case is not error. *Brail v. Moran*, 83 D. 772.

Pleadings in a cause are for the consideration of the parties and the court, and not for the jury. It is, therefore, not good practice to allow the jury to take the declaration to their room when they retire to consider their verdict. *Good v. Martin*, 91 D. 703.

A deed offered in evidence to prove the plaintiff's title is competent for the consideration of the jury, and may be taken to their room with such other documentary evidence as is ordinarily committed to the custody of a jury, notwithstanding the deed contains conditions and reservations not binding upon the defendant; the jury being instructed that the deed is only competent to prove the plaintiff's title to the premises, and is not to be considered at all upon any other point. *Moore v. Davis*, 6 R. 460.

It is not error for the judge to allow the jury to take to their room written instructions asked by one of the parties and refused. *Langworthy v. Connelly*, 45 R. 117.

98. Mode of arriving at verdict. — A juror having knowledge of facts not in evidence has no right to consider them in making up a verdict. Before he can do so, he should be sworn and testify to the facts, precisely as any other witness. *Ottawa Gas Light Co. v. Graham*, 81 D. 263.

99. — or of assessing damages. — If the jury, in the decision of a cause, determine the amount of damage by a resort to chance, it is a good cause for an arrest of judgment. *Warner v. Robinson*, 1 D. 38.

The amount of a verdict is improperly made up where each juror names a certain

sum, and the aggregate of the sums specified is divided by the number of the jury. *Sawyer v. Hannibal etc. R. R. Co.*, 90 D. 382; *Elledge v. Todd*, 34 D. 616; *Wilson v. Berryman*, 63 D. 78.

The verdict of a jury is not vitiated where one juror, without any knowledge of the others, took the different amounts suggested by his fellow-jurors, and having ascertained the result of one twelfth of the aggregate sum, proposed that the verdict should be for that amount, which was then assented to by the others. *Bennett v. Baker*, 34 D. 655.

A verdict of a jury may be determined by average, or other similar means, provided the jurors agree upon such sum, after it is found, as their verdict; but they must not previously be bound by the contingent result, and must reserve to themselves the right to dissent therefrom. *Wilson v. Berryman*, 63 D. 78.

100. Reception of the verdict. — A mistake in stating the title of a case in entering a verdict is a mistake of the clerk, not of the jury. *Ramsey v. McCauley*, 58 D. 134.

The refusal of a judge to make special inquiry of the jury, on the morning after they had rendered their verdict, and after their separation, as to their finding upon a particular point, constitutes no ground of exception, because the inquiry would be too late. These inquiries are always made when the jury render their verdict, and before they separate. *Green v. Clay*, 87 D. 622.

101. Polling the jury. — A party has the right to have the jury polled, whether the verdict is brought in sealed or delivered *ore tenus* by the foreman. Denial of this right is error. *Rigg v. Cook*, 46 D. 462.

The right to have the jury polled is waived by omitting to exercise it when the verdict is opened and received in the presence of the jury. *Id.*

After a sealed verdict was returned, but before it was opened, one of the jury became insane. The court received the verdict in the presence of the rest of the jury, and denied a request to have them polled. *Held*, error, and that a *venire de novo* should be granted. *Norvell v. Deval*, 11 R. 413.

102. Form and sufficiency of the verdict, generally. — The jury can only find on facts put in issue; to find that a sale is "justifiable" is a conclusion of law beyond their province. *Jones v. Zollicoffer*, 7 D. 708.

A jury sworn to try a case alone cannot decide on anything not embraced by the issue. *Shain v. Markham*, 20 D. 232.

The verdict of a jury should respond to the issues which they are sworn to try. *Jenkins v. Richardson*, 22 D. 82.

* Knowledge of juror, when may be employed in rendering verdict, see note, 81 D. 266, 267.

* Right of party to poll the jury, see note, 80 R. 427-500.

For Index to Notes in American Decisions and American Reports, see Volume I.

Verdicts at common law might in actions *ex delicto* be separate, but in actions *ex contractu* must have been joint. *Jones v. Pletcher*, 24 D. 716.

A verdict for plaintiff on an issue of *non assumpsit* where payment is also pleaded, without noticing the latter plea, is informal merely, and not defective in substance. *Hanna v. Mills*, 34 D. 216.

A verdict in an action on a promissory note, which embraces the principal and interest thereon, is good, although it exceeds the damages claimed in the declaration. *Phillips v. Runnels*, 43 D. 109.

The jury only should assess damages on a note payable in bank notes. *Williamson v. McGinnis*, 52 D. 561.

The verdict of a jury should designate not only those of the plaintiffs for whom they find, but also those against whom they find; otherwise, the verdict would be imperfect, as not finding upon all the issues submitted. *Settle v. Alton*, 52 D. 393.

The circuit court cannot determine whether a jury found in conformity with instructions, when that finding, by the conditional instructions given, was expressly left to depend upon their own judgment as to the state of facts upon which they were to predicate such finding. *Britt v. Aylett*, 52 D. 282.

Where a particular piece of property is sued for in specie, and not in the alternative of damages, and the property sued for is sequestered for the purpose of keeping it within the jurisdiction of the court, a verdict for the plaintiff is sufficient, without assessing the value of the property. *Avery v. Avery*, 62 D. 513.

Where a plaintiff sues for two or more causes of action properly joined, to which the defendant pleads the general issue, if the jury in their verdict allow him a specified number of his causes of action and say nothing as to the others, the verdict is sufficient to authorize a judgment for him to the extent to which it finds for him, and will bar a second action for the causes of action not mentioned in express words in said verdict. *Wittick v. Traun*, 62 D. 778.

In an action of detinue for eight slaves, a verdict is defective which recites, "We find for the plaintiff, and assess the value of the slaves sued for," etc., and which proceeds to name and assess the value of seven of said slaves, without mentioning the eighth, and such verdict is not sufficient to authorize a judgment for plaintiff for any of said slaves. Rice, J., dissenting, held the verdict a good finding for plaintiff for the slaves named, and a finding for defendant for the one not named. *Ib.*

A verdict which finds that plaintiff has no right or interest in certain property is ordinarily sufficient without finding who, in fact, has such right or interest. *McDaniel v. Marygold*, 65 D. 786.

A verdict which does not refer to a mortgage in an action upon notes and to foreclosure mortgage, securing the same, leaves it doubtful if the jury passed upon the mortgage, and is defective. *Barnett v. Caruth*, 73 D. 255.

It is counsel's duty to see that a verdict is signed, and that it is for no more than was ordered. *Frink v. Frink*, 80 D. 189.

A judgment is erroneous when predicated upon the finding of a jury sworn to try "the issues joined between the parties," but instead of finding upon all the issues, they return a verdict special in form and referring to but one issue. *Meighen v. Strong*, 80 D. 441.

A judge's finding of facts should state the conclusions of facts, and not merely evidence tending to prove them. *Trudo v. Anderson*, 81 D. 795.

A joint verdict and a joint judgment thereon cannot be objected to by defendants having separate possessions, and who have been joined as defendants in an action to recover land, where no demand was made at the close of the trial for separate verdicts, and no objection or exception was taken to the verdict on that ground in time to afford an opportunity to correct it. *Hicks v. Coleman*, 85 D. 103.

No injury can result from a joint verdict in an action to recover real estate, where no damages have been claimed. *Ib.*

Where an issue is conflict of surveys, the verdict and judgment should respond to this issue, and not merely ratify the correctness of a survey made in a former suit, which constitutes no part of the pleadings. *Staford v. King*, 94 D. 304.

The object of a verdict is to respond to and decide issues between the parties upon the evidence adduced, and to declare their respective rights as involved in the issue with a certainty, so that the judgment can be entered with like certainty, and the ministerial officers can carry it into execution, without determining additional facts. *Ib.*

103. — in respect to damages. — In cases only involving questions of value and damage as questions of fact, the jury must, as a general rule, assess the amount of recovery. *Cooper v. Poston*, 85 D. 610.

104. Power of jury to give interest. — Equity will relieve against a mistake in a verdict by which the jury omitted to give interest. *Cohen v. Dubose*, 14 D. 709.

The form of a verdict given for a debt and interest should not be for the whole amount as a debt, but the verdict should be given for the debt, and the residue of the amount, being the interest recovered, should be in the shape of damages for the detention of the debt. *North R. M. Co. v. Shrewsbury Church*, 53 D. 258.

105. Effect of the verdict, generally. — A finding that the plaintiff ought to re-

For index to Notes in American Decisions and American Reports, see Volume I.

cover will operate as a finding that there has been an assignment of the bond sued upon, where the plaintiff sues in the character of assignee. *Armstrong v. Pressitt*, 32 D. 338.

A verdict of a jury on the facts directly in issue in one case is conclusive as to such facts, in a subsequent case between the same parties. *Isaacs v. Clark*, 36 D. 372.

A verdict rendered when the issue of fact is joined on one count, but before judgment is reached on demurrers to other counts, will be considered as rendered on the first count only. *Goodman v. Gay*, 53 D. 589.

A verdict is competent evidence of a demand and of judicial ascertainment of it, though no judgment is entered upon it, unless it is stayed, or in some way set aside, and the plaintiff is entitled to have judgment upon it at any time before the right is barred by the statute of limitations. *Person v. Barlow*, 72 D. 121.

The assignee of a verdict not reduced to judgment in favor of a bank which is afterwards dissolved by judicial decree has a beneficial interest which he is entitled to enforce, and being without remedy at law, not being a party to the record, he is entitled to a decree in equity equivalent to a judgment at law. *Ib.*

A verdict cannot operate as *res judicata*, for not until judgment does a matter become *res judicata*. *McReady v. Rogers*, 93 D. 333.

106. Effect of uncertainty or repugnancy. — A verdict is not void for uncertainty, which awards the debt mentioned in the declaration and interest subject to a specified credit. *Barrett v. Wills*, 26 D. 315.

A verdict is sufficient to sustain an appropriate judgment, if any uncertainty that may exist therein can be explained by reference to the record; and therefore, in an action for the recovery of a slave, a verdict in these words, "We, the jury, find for the plaintiff, with eighty dollars damages and costs of suit," is sufficient to support a judgment for the slave, and damages and costs of suit. *Avery v. Avery*, 62 D. 513.

A conditional verdict is bad at common law. *Irvine v. Bull*, 28 D. 708.

A conditional verdict to enforce specific performance of a contract to convey land, by giving damages to be released on a conveyance being made, is erroneous, if the plaintiff's declaration shows a wholly unexecuted verbal contract of which a court of equity would not decree specific performance. *Ib.*

A condition annexed to a verdict is in nature of injunction to stay proceedings at law, and the verdict is not vitiated by the uncertainty of the condition, which may be reduced to a certainty by the court, either with or without an issue. *Henry v. Rainan*, 64 D. 703.

A verdict, "We, the jury, find for the plaintiff one cent, and costs to the defend-

ant," is not ambiguous. The words "costs to the defendant," taken in connection with the context, mean that defendant recover costs. Plaintiff can recover no more costs than damages, and the verdict being one cent, the law, and not the jury, determines the question of costs; and in the above verdict the court may properly regard the words "costs to the defendant" as surplusage, and render a judgment for one cent damages, and a like sum in costs, and that defendant recover residue of costs. *Conner v. Winton*, 65 D. 761.

In an action of ejectment, where the verdict is silent as to one of the plaintiffs, the court is not at liberty to answer for the jury whether the judgment should be for the plaintiff or the defendant, and consequently the verdict is defective. *Wood v. McGuire*, 63 D. 246.

A verdict must comprehend the whole issue or issues submitted to the jury in a particular cause, and must find certainly, either for or against every party to the suit. *Ib.*

107. When a general verdict is sufficient. — A general finding by the jury is sufficient in actions of *assumpsit*. *Stout v. Calver*, 35 D. 438.

In an action on account, where the statute of frauds is relied upon as a defense, a general verdict in the words, "We, the jury, find for the plaintiff, John Smith," is sufficient to authorize a judgment for the amount in controversy. *Warren v. Smith*, 76 D. 115.

When a case involving two or more issues is submitted to a jury, with evidence tending to sustain them all, and a general verdict is rendered, such verdict is *prima facie* evidence that all the issues were found in favor of the party for whom it is rendered; and when a judgment on such a verdict is presented by him to defeat a recovery in a subsequent suit brought on the same cause of action, the burden of proving that the verdict in the first suit was rendered upon an issue presenting only a temporary bar, and that such bar has been since removed, or has ceased to operate, is thrown upon the plaintiff. If a party against whom such a verdict is rendered would avoid this effect of a general verdict, he must see to it that the jury by their verdict declare upon what issue it is rendered. *White v. Simonds*, 78 D. 620.

No error is committed by withdrawing special issues from a jury and receiving a general verdict, if counsel on both sides consent to it, where the jury announce that they cannot agree upon the special issues submitted to them, but can agree upon a general verdict. *Mitchell v. Hockett*, 85 D. 151.

108. Reconsidering the verdict. — Where a judge, without the express assent of the parties, directed the jury to bring in a sealed verdict, which they did, but when they were polled the next morning, one of them dissented, when the judge directed

For Index to Notes in American Decisions and American Reports, see Volume I.

them to retire, and they brought in the same verdict, all concurring, the court refused to set it aside for the irregularity. *Douglass v. Tousey*, 20 D. 616.

A party will be presumed to consent to the jury's separation upon bringing in a sealed verdict, if he does not object when the order is made. *Id.*

109. Amending and correcting the verdict.—The court will reject words in a verdict as surplusage, to have it conform to the issue. *Apthorp v. Backus*, 1 D. 28.

In assault and battery several pleas and issues were joined, and the jury assessed damages for the plaintiff. This was held as a substantial finding of all the issues in favor of the plaintiff, and it becomes the duty of the court to mold the verdict accordingly. *Worford v. Isbel*, 4 D. 633.

An informal verdict in an action of debt, by which more than was demanded is given to the plaintiff, will be amended by considering the surplus as damages, it appearing that the verdict was for the debt and interest. *Friedly v. Scheetz*, 11 D. 691.

A verdict defective or erroneous in a mere matter of form, not affecting the merits or the rights of the parties, will be amended by the court to conform it to the issue. *Little v. Larrabee*, 11 D. 43.

Error in a verdict appearing as a matter of calculation will be corrected and a proper verdict ordered entered. *Hanse v. N. O. Ins. Co.*, 29 D. 456.

Where the jury find a special verdict, and, submitting the case thereby appearing to the judgment of the court, conclude by a general finding for plaintiff or defendant, as the law of the case may be, the conclusion may be disregarded, and the proper verdict entered, where the law of the case but warrants a verdict in favor of one of the parties of a more restricted kind. *Hutchison v. Kelly*, 39 D. 250.

A party cannot complain of a modification of the verdict of a jury, made by the court, but not to his prejudice. *Rigg v. Cook*, 46 D. 462.

The court may mold a verdict so as to meet the facts of the case and the ascertained conclusions of the jury. *McMahan v. McMahan*, 53 D. 481.

An informal and erroneous verdict may be amended to conform it to the law and the intention of the jury, and a direction to the jury in an action for obstructing a private way, where they have returned a general verdict for the plaintiff without adding damages, to amend the verdict so as to give some damages, is not error. *Pearce v. McClenaghan*, 55 D. 710.

A mistake made by the clerk in preparing a blank verdict for a jury, in the Christian name of one of the defendants, may be corrected by the court after the return of the verdict, so as to make it conform to the

writ and other papers in the case, the jury being present, and approving the verdict as amended. *Inhab. of Readfield v. Shaver*, 79 D. 592.

A verdict may be amended when it furnishes all necessary facts; as where the jury, in consequence of a defective deed, find for the demandants for the entire premises described in a writ of entry, when, in fact, they owned only an aliquot part, and where the defect in the deed was not discovered at the trial. In such case, the verdict may be amended in conformity with the truth of the case, as disclosed by the deed in which the defect appears. *Peabody v. Hewett*, 83 D. 486.

The foreman of a jury, by mistake, announced a verdict different from that agreed to by the jury, and the verdict was so recorded. *Held*, that affidavits of the jurors were competent evidence to prove the mistake. *Dakruple v. Williams*, 20 R. 544.

Where the jury err in a matter of substance, by returning a verdict for the wrong party, or for a larger or smaller sum than was intended, and then separate, the verdict cannot be amended, but must be set aside; and the affidavit of the jurors is admissible to prove such mistake. *Little v. Larrabee*, 11 D. 43.

Every reasonable construction should be adopted for the purpose of working a verdict into form, so as to make it serve; but this rule is limited to cases where the jury have expressed their meaning in an informal manner. The court has no power to supply substantial omissions. *Wood v. McGuire*, 63 D. 246.

Altering a verdict on a certificate of a mistake in rendering it is not permissible after the verdict has been received and recorded, and the jury have been dismissed. *Walters v. Jenkins*, 16 D. 585; *Rigg v. Cook*, 46 D. 462; *Settle v. Alison*, 52 D. 393.

Such an improper alteration is the subject of a writ of error. *Walters v. Jenkins*, 16 D. 585.

110. Impeaching the verdict, generally.—A motion to set aside a verdict and reinstate a case is equivalent to a motion for a new trial, giving the court the same power over the verdict, and is therefore a proper remedy for mistake in the verdict. *Lucas v. Lucas*, 76 D. 642.

111. Grounds for setting it aside.—The court will not set aside a verdict upon the merits for mere technical defects in the declaration, where enough appears to show the foundation of the action, and the verdict and recovery may be pleaded in bar to another action for the same cause. *Baldwin v. O'Brian*, 1 D. 208.

Relief cannot be given against a verdict as being contrary to equity, unless the plaintiff knew the fact to be different from what the jury have found it, and the defendant

For Index to Notes in American Decisions and American Reports, see Volume L.

was not aware of it at the time of trial; or where there was no jurisdiction at law; or where the verdict is obtained by fraud. *Guthrie v. Kilpatrick*, 6 D. 557.

Estoppel is binding upon the jury where it has not been waived by the party in pleading, and a finding contrary thereto may be disregarded by the court. *Butler v. Newsom*, 17 D. 565.

A verdict will not be set aside because the jurors by whom it was given knew of facts affecting the credibility of the witnesses in the case. *McKain v. Love*, 27 D. 401.

A verdict for four hundred dollars for three months' breach of agreement not to engage in a certain kind of business for five years will not be set aside as unwarranted by law, and excessive, where the injury to the plaintiff, as by diverting his trade, was not capable of exact proof or definite computation, but depended very much on general estimate, which was peculiarly within the province of the jury; and no exception lies to the exercise of the discretion of the presiding judge in overruling a motion to set aside the verdict as unwarranted by law upon the evidence, especially where no instruction was asked at the trial on the limit of damages which the jury would be warranted in finding upon the evidence. *Doyle v. Dixon*, 93 D. 80.

112. What errors are cured by verdict. — Nothing will be presumed after verdict but what must have been necessarily proved under the averments of the declaration; and therefore the total want of an averment of a fact which constitutes the gist of the action will not be cured, after verdict, by the statute of jeofails. *Chichester v. Vass*, 1 D. 509.

A misconception of action is not cured by a verdict, under our statute of jeofails, where the verdict itself is objected to as given under a misdirection. *Truss v. Old*, 18 D. 748.

A verdict does not cure the want of a cause of action in the declaration. *Irvine v. Bull*, 28 D. 708.

The defects in a declaration amendable by leave of court are cured by the verdict. And a neglect to allege, in the declaration in an action against a constable for not executing an execution, that the alderman had jurisdiction of the case in which the execution issued, is a defect in form merely, which might have been so amended. *Corson v. Hunt*, 53 D. 568.

After verdict, it is too late to object that a note pleaded as a set-off for a certain sum was introduced, and allowed as for a greater sum. *Drew v. Towle*, 64 D. 309.

113. Special verdicts. — It is sufficient if the special verdict finds facts amounting to usury, though it does not expressly find the corrupt agreement. *Gibson v. Fristoe*, 1 D. 502.

A court cannot look beyond a special verdict for the facts. *La Frombois v. Jackson*, 18 D. 463.

A special verdict should find material facts, and not the evidence of those facts. *Ib.*

A special verdict should find the fact to be decided on, or evidence which conclusively proves it. *Ib.*

Facts not included within a special verdict will not be presumed to exist. *Lawrence v. Beaudien*, 25 D. 155.

A special verdict is irregular and unauthorized which presents only the question of the competency of the evidence offered to prove the incorporation of the corporation plaintiff. *Welland Canal Co. v. Hathaway*, 24 D. 51.

114. Sealed verdicts. — When the parties agree upon a sealed verdict, either party may have the jury polled when they come into court, and any of the jurors may dissent from the verdict to which they had previously agreed. *Rout v. Sherwood*, 5 D. 191.

There is no legal verdict but a public verdict delivered openly in court, and until it is received and recorded the jurors may alter it. *Ib.*

Jurors must be present personally in court when their verdict is opened, although they were directed to bring in a sealed verdict. If any of them then dissent, the verdict cannot be received. *Rigg v. Cook*, 46 D. 462.

115. Verdict subject to the opinion of the court. — A verdict subject to the opinion of the court upon facts stated authorizes the court to draw the same conclusions from such facts as the jury would have been entitled to draw. *Jackson v. Whitbeck*, 16 D. 454.

116. Findings by the court. — If the facts of the case are agreed upon, and the questions of law alone are submitted to the court for its judgment, the court can only respond to the questions of law arising from the admitted facts, and will not infer another fact and pronounce the law arising thereon. *Bott v. McCoy*, 56 D. 223.

A finding that a proposed railroad "will be specially injurious to the property of the plaintiffs, and other property similarly situated," must be construed to mean that the railroad would be specially injurious to the property of each of the plaintiffs in severalty, and in like manner specially injurious to the separate property of others similarly situated; and that although the cause of the injury would be common, the special injury to each would be several and direct, and not merely consequential. *Milham v. Sharp*, 84 D. 314.

A party requiring a finding on a point should specify the point, without dictating the terms of the finding. *Miller v. Steen*, 59 D. 124.

The sufficiency of evidence to justify its

For Index to Notes in American Decisions and American Reports, see Volume I.

findings can be reviewed in the court which found the facts only upon motion for new trial. *Prince v. Lynch*, 99 D. 427.

A court cannot re-examine evidence and substitute different findings of fact after trial and rendition of judgment and filing of findings. *Ib.*

VIII. TRIAL IN CRIMINAL CASES.

1. Right of Trial by Jury.

117. Generally.—The essential features of a trial by jury as known at common law were intended to be preserved and its benefits secured to the accused in all criminal cases by the provisions of the Ohio constitution, that "the right of trial by jury shall be inviolate," and that "in any trial in any court" the party accused shall be allowed "a speedy public trial by an impartial jury of the county." *Work v. State*, 59 D. 671.

118. Constitutionality of statutes affecting the right.—Every person prosecuted for crime has a constitutional guaranty of trial by jury, and no law can be enacted which shall take away this right or interpose such impediments to its exercise as unnecessarily or unreasonably to impair it. *Inhabitants of Saco v. Wentworth*, 58 D. 786.

An act which makes it difficult for accused to obtain trial by jury, beyond what public necessity requires, impairs individual rights, and is inconsistent with the provision of the constitution which guarantees their protection. *Ib.*

An act requiring conditions for the purpose of preventing a trial by jury is at war with the spirit of the constitution, and so far as it deprives one of this means of protection, it is void. *Ib.*

A statute requiring an accused, as a prerequisite for obtaining a jury trial, to give a bond in a large penal sum, conditioned to be void if he shall abstain from all violations of the provisions of the act during the pendency of the appeal taken for the purpose of securing a trial by jury, contravenes the provision of the constitution which guarantees to the accused a speedy trial by jury, and is therefore void; and no action can be maintained on such a bond. *Ib.*

A statute authorizing the grand jury, where an infant under the age of sixteen years is charged with crime, and the charge appears to be supported by evidence sufficient to put the accused upon trial, instead of finding an indictment, to return to the court that the accused is a suitable person to be committed to the house of refuge, and directing the court thereupon to order the commitment without trial by jury, is constitutional. *Prescott v. State*, 2 R. 388.

119. Waiver of trial by jury.—A jury may be waived in a criminal case. *State v. Holt*, 47 R. 544; but such waiver can only be upon the consent of both the prisoner and the state. *State v. Mead*, 30 D. 661.

A statute providing that in criminal prosecutions the accused may elect to be tried by the court instead of a jury, and giving the court power in such cases to try the cases and render judgment, is constitutional, and such election will bind the accused. *State v. Worden*, 33 R. 27; *Connelly v. State*, 31 R. 34.

120. Such waiver held unconstitutional.—In a criminal case the prisoner may not waive a jury. *State v. Carman*, 50 R. 741; and a statute enabling a prisoner accused of felony to waive a jury trial is unconstitutional. *In re Staff*, 53 R. 285.

121. Trial by less than twelve.—Number of the jury at common law could never be less than twelve. *Carpenter v. State*, 34 D. 116; and they must be impartially selected, and must unanimously concur in the guilt of the accused before a conviction can be had. *Work v. State*, 59 D. 671.

The number of jurors necessary at common law cannot be diminished, nor a verdict authorized short of a unanimous concurrence of all the jurors by the general assembly of Ohio; and the statute of 1853 authorizing a conviction upon the finding of a jury of six is void. *Ib.*

Diminishing the number of jurors impairs the right of trial by jury. *Ib.*

An act allowing juries of six men before justices of the peace is not unconstitutional, under a constitution protecting right of jury trial as at common law, for juries were not required in these courts at common law, and in such case a jury of any number may be authorized within the discretion of the legislative body. *Ib.*

Where an issue is submitted to eleven persons, their finding cannot be considered as the verdict of a jury, upon which a court would be warranted in pronouncing judgment. *Carpenter v. State*, 34 D. 116.

On the trial of an indictment, the prosecuting attorney proposed to go to trial with less than the legal number of names of jurors in the box to be drawn from. The defendant's attorney consented. The prisoner being convicted, — held, that such consent did not validate the conviction. *State v. Davis*, 27 R. 387.

In a trial of a capital felony, the prisoner is not bound by his consent to be tried by less than twelve jurors. *Territory v. Ah Wah*, 47 R. 341; but on an indictment for forgery, the prisoner is bound by his consent to be tried by less than twelve jurors. *State v. Kaufman*, 23 R. 143.

2. Bringing on the Trial.

122. Right to speedy trial.*—A speedy trial is one conducted according to fixed rules, regulations, and proceedings of

* Right to speedy trial, see note, 41 D. 604-607.

For Index to Notes in American Decisions and American Reports, see Volume I.

law, free from vexatious, capricious, and oppressive delays, created by the ministers of justice. *Nixon v. State*, 41 D. 601.

A statute giving a prisoner the right to an examination of the indictment, "at least two entire days before the trial," means two judicial days, and hence excludes the fraction of a day of its service. *Ib.*

Where a trial cannot possibly be commenced till the latter part of the last day of the term, its postponement till the next term is no infringement of the prisoner's right to a speedy trial. *Ib.*

A constitutional provision guaranteeing to every citizen a speedy and public trial in all criminal accusations is intended to prevent the government from oppressing its citizens by holding criminal prosecutions suspended over them, and to prevent delay in the administration of justice by obliging the courts to proceed with dispatch in the trial of criminal charges. *Ex parte Turman*, 84 D. 598.

A constitutional guaranty of a speedy and public trial of criminal charges does not mean that, in all the possible vicissitudes of human affairs, a person who is accused of a crime shall have a speedy and public trial in due form of law, because there may be times when the civil administration will be suspended by the force of uncontrollable circumstances. *Ib.*

A constitutional provision guaranteeing speedy trial to a person accused of crime extends to all grades of crime, but it cannot be held to place the accused upon such vantage ground that the state cannot demand from him such services as, under the circumstances of the country, he ought for the public good, or public safety, to render. *Ib.*

123. Service of copy of indictment. — A prisoner charged with felony may demand a copy of the indictment, on arraignment, and the refusal of it, if preserved by bill of exceptions, is error; but the right is waived by pleading and going to trial without objection. *McKinney v. People*, 43 D. 65.

124. — and lists of witnesses and jurors. — Under the act providing that one accused and indicted for murder shall have a list of the jury delivered to him two entire days at least before the trial, the accused is entitled to a list of the talesmen for the same length of time, where a *tales* has been awarded, unless such right be waived. *State v. Aaron*, 7 D. 592.

A list of the witnesses before the grand jury, examined in a capital case, will be directed to be furnished to the prisoner's counsel. *Com. v. Knapp*, 20 D. 491.

A defendant in a criminal action cannot object to a witness for the state on the ground that no notice of such witness had been given him, and that his name did not appear in the list of witnesses sworn before the grand jury, under a statute requiring

that the defendant in a criminal cause shall be furnished before arraignment with "a list of the witnesses who gave testimony before the grand jury." *Keener v. State*, 63 D. 269.

3. The Place of Trial, and how Changed.

125. The proper place of trial. — A statute providing that offenses committed within one hundred rods of the dividing line between two counties may be prosecuted and punished in either is not in violation of a constitutional provision securing to the accused the right to trial by a jury of the "county or district" wherein the offense was committed, and which county or district shall have previously been ascertained by law. *State v. Stewart*, 50 R. 388. *Contra, State v. Lowe*, 45 R. 570.

126. Grounds for change of venue.* — At common law the venue in a criminal case may be changed on application of the prisoner. *State v. Albee*, 60 R. 325.

4. Continuance and Postponement.

127. Grounds, generally. — Rules governing applications for continuance of causes are, in general, the same, both in civil and criminal cases, though in the latter the matter is to be scanned more closely. *Hyde v. State*, 67 D. 630.

128. Popular excitement, and prejudice. — A motion for a continuance of a criminal cause on account of popular excitement against the prisoner is within the discretion of the judge to overrule, on the ground that five months had elapsed from the alleged time of the committal of the offense, which, in his opinion, was sufficient time for the subsidence of any popular excitement arising out of the circumstances of the case; and no reason appearing to induce doubt that he has exercised his discretion wisely, his decision will be sustained in the appellate court. *Roberts v. State*, 58 D. 528. Compare *State v. Norris*, 1 D. 564.

A continuance will not be granted on account of public prejudice and excitement precluding a fair trial in a criminal case, where sufficient time has elapsed to allow the excitement to cool. *Mitchell v. State*, 68 D. 493.

Public excitement prevailing against one accused of crime, in the county where it was committed, added to other causes insufficient in themselves, ought to turn the scale in favor of a motion for a continuance. *Madrox v. State*, 79 D. 307.

When the principles of justice require a postponement of a criminal trial, it is the duty of the court to see that the trial is not precipitated to the injury of defendant. *Ib.*

129. Non-attendance of witnesses.† — To entitle a party to postponement of trial

* See note on change of venue, 74 D. 241-245.

† Rules as to continuance for absence of witnesses, see note, 74 D. 141-142.

For Index to Notes in American Decisions and American Reports, see Volume I.

on ground of absence of witnesses, three things are necessary: 1. To satisfy the court that the persons are material witnesses; 2. To show that the party applying has been guilty of no laches nor neglect; 3. To satisfy the court that there is reasonable expectation of his being able to procure their attendance at the future time to which he prays the trial to be put off. *Hyde v. State*, 67 D. 630.

The fact that witnesses are beyond the limits of the state is not good ground for continuance, when the defendant has had time to prepare his defense. *Id.*

A failure to make use of the statutory means to procure a witness's attendance, or to secure his deposition, where he is out of the state, on account of his promise to return in time to give his testimony, will not warrant a continuance. *State v. Cross*, 79 D. 519.

An error in refusing a continuance for the absence of a witness who afterwards attends and testifies in the party's behalf is thereby cured. *Mitchell v. State*, 68 D. 493.

A party indicted for murder is not entitled to a continuance of his trial, on the ground of the absence of an important witness, where his affidavit for such continuance fails to show that he had asked for a subpoena for the witness, or that he knew of no other witness by whom he could prove the same facts. *Wall v. State*, 70 D. 302.

130. The moving affidavits. — On motion for a continuance of a capital cause, the prisoner's affidavit of the absence of a material witness will be received in support of the motion. *Com. v. Knapp*, 20 D. 491.

A party moving a continuance of a criminal cause on the ground of his inability to subpoena a witness, by reason of the recent finding of the bill, and his close confinement since his arrest, must show that he has certain witnesses, giving their names, and must state what he expects to prove by them, in order that the court may determine whether or not the testimony would be material. *Roberts v. State*, 58 D. 528.

An affidavit for continuance in Iowa, for absence of a witness, must state his name and residence, and the facts showing the probability of procuring his testimony at the next term, the facts showing due diligence to obtain the witness or his testimony, and the facts to be proved by him. *State v. Shupe*, 85 D. 485.

131. Opposing affidavits. — Counter-affidavits to show a want of diligence and improbability of any reasonable expectation that the proposed testimony can be obtained at all, or at the time to which it is proposed to postpone the trial, may be received on application for a continuance of a cause for the purpose of the production of evidence. *Hyde v. State*, 67 D. 630.

132. Discretion of court to grant or refuse. — A mere continuance of a criminal case is within the discretion of the court. *McFadden v. Com.*, 62 D. 308.

The continuance of a cause is a matter of right when the affidavit therefor conforms to the statute, and want of proper diligence cannot be imputed, and there is no cause to suspect that the application is for delay. *Hyde v. State*, 67 D. 630.

The announcement by a judge refusing a continuance that "trial must proceed," affords no ground of exception. *Mitchell v. State*, 68 D. 493.

133. Avoiding continuance by admissions. — An admission of what was expected to be proved by an absent witness constitutes an admission, not merely that the absent witnesses would have sworn to certain alleged facts, but also that the facts alleged are absolutely true. *Dominguez v. State*, 45 D. 315.

A motion for continuance on ground of absence of witnesses should not be refused because the adverse party admits that the witnesses, if present, would testify as stated in defendant's affidavit; but notwithstanding this admission, the refusal of the motion will not be error if based upon a well-founded doubt of the verity of the affidavit itself, and a belief that the application was for delay. *Hyde v. State*, 67 D. 630.

Where the public prosecutor moved to postpone the trial of a person indicted for a misdemeanor, on account of the absence of witnesses, and the counsel for the accused offered in open court to admit that the witnesses, if present, would testify to the facts stated in the moving affidavit, and the application was denied, — *held*, 1. That the prisoner waived his constitutional right to be confronted with the witnesses; and 2. That the affidavit was competent evidence for the prosecution. *United States v. Sacramento*, 25 R. 742.

A statute providing that on a criminal trial, when the defendant moves for an adjournment on the ground of the absence of a material witness, the trial may proceed on the public prosecutor's stipulating to admit that the witness if present would testify as set forth in the affidavits, and that such statement might be read as his evidence, is not unconstitutional. *State v. Jennings*, 51 R. 236.

134. Second application. — The affidavit on a second application for a continuance on the ground of the absence of witnesses, after one continuance granted for the same cause, should be more explicit, and show what are the facts of the case, and what means of information applicant's witnesses possess; and if the second affidavit is less full, this may furnish ground to suspect

* See monographic note on discretionary nature of power to grant continuances, 74 D. 141-151.

For Index to Notes in American Decisions and American Reports, see Volume I.

that the object was delay. *Hyde v. State*, 67 D. 630.

After a refusal of a continuance asked on one ground, new grounds cannot be presented, under the Georgia practice. *Mitchell v. State*, 68 D. 493.

135. Adjournments and postponements. — A defendant is not entitled to demand a postponement of a trial as a matter of legal right, in order to afford him an opportunity to find persons who would join him in an affidavit to obtain a change of venue. *Wall v. State*, 70 D. 302.

A telegram from a judge to the clerk of the court, ordering an adjournment, is a "written order," and warrants the adjournment. *State v. Holmes*, 41 R. 121.

6. Impaneling the Jury; Challenges; Opinions.

136. Qualifications and competency. — A master Mason is not incompetent to sit as a juror in an action of slander wherein one of the parties belongs to the fraternity of Free Masons and the other does not. *Purple v. Horton*, 27 D. 167.

A juror must be a freeholder, in Virginia, in order to serve as such in a case of felony. *Dowdy v. Com.*, 60 D. 314.

An inhabitant of a county is competent to sit as a juror upon the trial of a person charged with larceny of the property of the county. *People v. Bennett*, 93 D. 551.

A juror was the second cousin of accused. This was not known to either until the case was being argued. The defendant pleaded insanity, and endeavored to prove that it was hereditary in the family. It was held that though it was a proper matter to be addressed to the discretion of the court if brought to its notice in proper season, it was not a disqualification of the juror. The peculiar nature of the defense did not alter the rule. *State v. Andrews*, 76 D. 593.

By statute, jurors are to be selected and put on the list from such persons as are assessed for personal property, or own a freehold estate in real property. P. owned a farm when he was put on the list, but was not assessed for personal property. Before the trial, he sold his farm, receiving a mortgage for part of the purchase-money; and at the time of the trial he was not a freeholder, and was not assessed for personal property. He was challenged. *Held*, that he was not a competent juror. The property qualification, when questioned by a challenge, must be that required to authorize the original selection of the individual as a juror. *Kelley v. People*, 14 R. 342.

On the trial of an indictment for stealing cattle, a person called as a juror is not incompetent merely by reason of his membership in an association, one of whose purposes is to prosecute cattle-thieves. *Boyle v. People*, 34 R. 76.

A member of a voluntary association formed for the prosecution of violations of certain laws is incompetent as a juror on the trial of a complaint for such a violation, instituted by an agent of the association, who is furnished by it with money for the expenses, and is paid for his services. *Com. v. Moore*, 58 R. 128.

Chinese may be lawfully excluded from juries, on the ground of alienage. *State v. Ah Chew*, 40 R. 488.

A juror not understanding and speaking English cannot be forced upon a prisoner, although his peremptory challenges may have been exhausted. *McCampbell v. State*, 35 R. 726; *Lyles v. State*, 19 R. 38.*

The objection that jurors on a criminal trial did not understand the English language is waived if not specifically taken at the trial. *Yanes v. State*, 32 R. 591.

The objection that a juror was not an elector must be raised before verdict, even in a capital case, it not being an absolute disqualification, but only ground of challenge. *State v. Jackson*, 41 R. 424.

137. Exemptions. — One who is exempt from jury duty may waive his privilege, and legally sit as a juror. *United States v. Lee*, 64 R. 293.

Persons exempted from service as jurors are not thereby disqualified to serve on a jury; and a verdict will not be set aside because a person so exempted was one of the jury. *State v. Forshner*, 80 D. 132.

A statute exempting persons over seventy years of age from service as jurors creates a privilege, and not a disability; and a criminal conviction is not rendered void by the fact that one of the grand jury indicting, and one of the petit jury convicting, were above that age. *Green v. State*, 43 R. 542.

138. Procuring the attendance of jurors. — In a precept to the sheriff to summon the grand and petit jury, it is sufficient to command him to cause to come before the judges twenty-four good and lawful men, without commanding him in what manner they are to be drawn or selected. *White v. Com.*, 6 D. 443.

A precept to the sheriff, commanding him to cause to come, etc., "twenty-four good and lawful men, of the body of the county of C., aforesaid, then and there to inquire, present, do, and perform such things as on behalf of the commonwealth shall be enjoined them," and also a competent number "of sober and judicious persons, and none other, as jurors for the trial of all issues," etc., contains no command to convene the petit jurors from the body of the county of C.; and therefore if it does not appear by the return or the panel that the petit jurors in fact came from the body of the county, the error is fatal. *Id.*

* Inability of juror to understand English, see note, 35 R. 728-731.

For Index to Notes in American Decisions and American Reports, see Volume I.

A writ of *venue facias* is not void because issued without a seal. *Maier v. State*, 26 D. 379.

A separate *venue facias* for summoning jurors ought to be issued for each of several persons jointly indicted, and not a single *venue facias* for all such persons. *McWhirt's Case*, 46 D. 196.

Where several persons jointly indicted demand and are allowed separate trials, a joint *venue facias* previously issued should be quashed, and a separate *venue* ordered to issue for each prisoner. *Id.*

A panel of jurors summoned partly by bailiffs is good; for presumably acting under the sheriff's authority, they are his deputies *pro hac vice*. *Conner v. State*, 71 D. 184.

The legislature may authorize the drawing of jurors by a board of commissioners to be appointed by the governor. *People v. Harding*, 51 R. 95.

139. Impaneling the jury, generally. — Jurors need not be called in the order of their names on the *venue*. *State v. Crank*, 23 D. 117.

Impaneling a jury on an indictment is sufficient, when the indictment is founded on presentment, without impaneling them on the presentment also. *Conner v. State*, 71 D. 184.

When the name of a juror is drawn in making up the jury for a murder trial, it is the right of the accused to have him put upon the jury or challenged by the state, although, since such juror was summoned, he has been convicted of an assault, and at the time he is drawn is confined in the county jail. The court cannot discharge such a juror of its own motion. *Boggs v. State*, 6 R. 689.

No legal verdict can be rendered in a criminal cause by a jury composed of more than twelve men. If a jury of more than twelve men have been impaneled, and the last juror sworn can be pointed out during the trial, he may be dismissed from the panel and the trial proceed. *Bullard v. State*, 19 R. 30.

The presence of a prisoner indicted for felony is necessary at the impaneling of the trial jury, and he may not waive the privilege, and his absence is not cured by the subsequent offer of the court to allow him to examine the jurors at the time of making peremptory challenges. *State v. Smith*, 59 R. 4.

140. Challenge to the array. — On a trial for murder, the prisoner, having challenged the array, may withdraw the challenge, and thus waive the irregularity. *Pierson v. People*, 35 R. 524.

141. Peremptory challenges. — A peremptory challenge will be allowed, although upon his *voir dire* the juror gives such answers that he could not be challenged for cause. *Com. v. Knapp*, 20 D. 491.

The right of peremptory challenge must be exercised before the examination of a juror as to his bias or opinions. *Com. v. Rogers*, 41 D. 458; *Com. v. Webster*, 52 D. 711.

The right of peremptory challenge does not give the right of separate trial, where several persons are jointly indicted for the same offense, as in such a case the right of peremptory challenge is in no degree narrowed or affected; but each prisoner has the right to challenge the full number, and in this respect is unaffected by what the others do. *Faulkins v. State*, 44 D. 431.

A juror challenged by one prisoner, and not by another, who is jointly indicted, is to be withdrawn as to all, as no man ought to sit as a juror upon a joint trial who is not, in the estimation of all the prisoners, indifferent as to all. *Id.*

The right of peremptory challenge is not a right to select a jury, but merely to exclude from the trial any persons who are disagreeable to the party on trial. *Id.*

The right to peremptorily challenge jurors exists only on the trial of the indictment, and not on the trial of preliminary or collateral issues. Hence the right does not exist when a prisoner is on trial with respect to his present insanity. *Freeman v. People*, 47 D. 216.

Defendants indicted for an affray are to be tried together, and for the purposes of the trial and in making their defense are to be considered as having one common interest; consequently each defendant will not be allowed seven peremptory challenges, and if one of the defendants has introduced evidence in his behalf, the state has a right to conclude the argument to the jury, although the other defendant has introduced no evidence. *Hawkins v. State*, 58 D. 517.

Where two or more persons are indicted and tried jointly, the state is entitled to no more peremptory challenges than when the trial is against one alone. *State v. Earle*, 13 R. 109.

142. Challenge for cause, generally. — Every challenge for principal cause must be for some matter which imports absolute bias or favor, and leaves nothing for the discretion of the court. *Freeman v. People*, 47 D. 216.

Challenges for cause are allowed on the trial of any preliminary or collateral issue as well as on the trial of the main issue. *Id.*

It is a principal cause of challenge to a juror on a trial for felony, that he was a member of the grand jury that found the indictment. *Dikworth v. Com.*, 65 D. 264.

143. Challenge to the favor for prejudice or bias. — If the defendant refuses to challenge a juror who is shown to have a bias against him, the prosecution cannot interpose such challenge. *People v. Mather*, 21 D. 122.

For Index to Notes in American Decisions and American Reports, see Volume I.

Jurors should be thoroughly impartial between the parties. One is incompetent to act as a juror who is hostile to either party, though such hostility does not have any especial reference to the suit or controversy on trial. *Freeman v. People*, 47 D. 216.

Sympathy with a prisoner and his family is not bias which will disqualify a juror in a capital case, where he states that he thinks he can give an unbiased verdict. *Com. v. Webster*, 52 D. 711.

144. **Scruples against capital punishment.***—It is a good challenge to a juror, for cause, on the part of the state, that he has conscientious scruples against finding a verdict of guilty, where the punishment is death. *Hyde v. State*, 67 D. 630; *Monday v. State*, 79 D. 314.

That a juror is opposed to capital punishment does not disqualify him from sitting in a capital case, where he states that he does not think his opinions will interfere with his doing his duty as a juror, although he fears that his views on that subject may influence others of the jury. *Com. v. Webster*, 52 D. 711.

Conscientious scruples entertained by a person, which would prevent him from assenting or agreeing to a verdict which would subject the accused to capital punishment, although justified by the evidence, disqualify him as a juror. *Williams v. State*, 66 D. 616.

A juror whose examination developed that he was opposed to capital punishment; who said "that he had conscientious scruples upon the subject of capital punishment; that they would bias his judgment,"—is not in a condition to impartially hear and examine the evidence; he does not stand indifferent between the prisoner and the state, and he should be excused. *Id.*

A juror testified that he "did have conscientious scruples on the subject of capital punishment, and that it would be against his conscience to render a verdict by which a party would be subjected to the punishment of death, but that he thought he could do justice as between the state and the accused." *Held*, that he was competent, as in the absence of any other possible evidence his answer under oath that he would do justice between the parties must be held to be conclusive. *Id.*

145. **Opinion of juror, when disqualifies, generally.**†—It was considered a good ground of challenge for cause that a juror should say on his *voir dire* that he did not know how much he might be influenced by his preconceived opinion. *Com. v. Knapp*, 20 D. 491.

Bias or partiality ought to be presumed

where the juror has formed an opinion without hearing the testimony or having a personal knowledge of the facts. *People v. Mather*, 21 D. 122.

A party is incompetent to sit as a juror who has formed and expressed a decided opinion as to the guilt or innocence of the prisoner. *Armistead v. Com.*, 37 D. 633; *People v. Mather*, 21 D. 122; *Freeman v. People*, 47 D. 216.

Where a party formed and expressed a decided opinion as to the prisoner's guilt, from a conversation with the prosecuting witness, he is incompetent to sit as a juror. *Armistead v. Com.*, 37 D. 633.

A preconceived opinion, to disqualify a juror, under the Massachusetts statute, must be something more than a vague impression formed from casual conversations or imperfect newspaper reports, and must be such as will be likely to prevent a candid, unbiased judgment after hearing the evidence. *Com. v. Webster*, 52 D. 711.

A juror must decide for himself whether his opinion is such as to prevent an unbiased verdict. *Id.*

A person is disqualified from serving as a juror when he has formed or expressed an opinion from what he has heard some one say respecting statements which had been made by some of the witnesses, notwithstanding the fact that the juror stated his opinion would not influence his verdict, but that he would be governed by the evidence. *Nelms v. State*, 53 D. 94.

A juror is not disqualified by the fact that he has conversed with a witness, and believes what he heard, but did not form any opinion of the guilt or innocence of the prisoner. *Thomson v. People*, 76 D. 733.

A juror is competent, and will not be held to have formed an opinion sufficient to disqualify him on a challenge for cause, where he states on his *voir dire* that from having heard a part of the evidence before the examining court, he has formed a partial opinion as to the guilt or innocence of the accused which, though it "might" to some extent, he does not think would influence his verdict, if he states, further, that he has no fixed opinion in the case that would influence his verdict. *Monroe v. State*, 76 D. 58.

A juror's expressed opinion that defendant is of bad character is not necessarily ground of disqualification. And certainly an expression to that effect, made jocularly before trial, and not in reference to the case on which the defendant is to be tried, will not disqualify him. Otherwise, bad men could never be tried, for want of qualified jurors. *Id.*

To render a juror incompetent on ground of implied bias, it must appear that he entertains a fixed and settled conviction of the guilt or innocence of the defendant, or that

* See note on conscientious scruples against conviction upon circumstantial evidence, 36 D. 532.

† See monographic note on opinions of jurors as ground for challenge, 36 D. 521-534.

For Index to Notes in American Decisions and American Reports, see Volume I.

he has expressed such a conviction. Whatever falls short of this does not amount to an unqualified opinion within the meaning of the statute. *People v. King*, 87 D. 95.

146. Impressions and hypothetical opinions.* — A hypothetical declaration or opinion does not disqualify the juror, unless it appears that his mind has acquired that bias which operates unconsciously, and leads him to indulge his own feelings under the mistaken belief that he is influenced solely by the weight of the evidence, and to yield more readily to the evidence which confirms than to that which conflicts with his previous impressions. *People v. Mather*, 21 D. 122.

A hypothetical opinion of a juror as to the guilt or innocence of the accused, founded upon what he has heard, but not previously expressed, does not disqualify him from serving, when, although he does not doubt the truth of what he has heard, he has no doubt but that, if the evidence should turn out otherwise, he would be able to decide according to the evidence, without being in any degree influenced by the impressions previously made on his mind. *Osiander v. Com.*, 24 D. 693.

Such an opinion can neither be a decided one nor one formed on deliberation. *Id.*

A juror who has a mere impression that the accused is guilty, or who has formed a contingent or hypothetical opinion respecting his guilt, is not liable to a challenge for principal cause. *Freeman v. People*, 47 D. 216.

A venireman is not disqualified by an impression adverse to the general character of the accused, if he has formed no opinion that the accused is guilty of the offense charged, and declares himself able to try the charge impartially. *Lohman v. People*, 49 D. 340.

147. Opinions based upon personal knowledge or derived from an authentic source. — Partiality or prejudice for or against the defendant is the true foundation for a challenge to a juror; hence a declaration of opinion, made upon an actual knowledge of the case, and not out of ill-will, was formerly no ground for a challenge. *People v. Mather*, 21 D. 122.

An opinion founded on a knowledge of the facts, or on information derived from those acquainted therewith, furnishes a good cause of challenge to a juror. *Id.*

148. Opinions based upon mere rumor or newspaper reports. — A challenge for cause was allowed where a juror on his *voir dire* says that he had no definite opinion, but, from his reading of the newspaper, that his prejudices were against the prisoner. *Com. v. Knapp*, 20 D. 491.

An opinion based on mere rumors or re-

ports disqualifies one from acting as a juror, if it is positive in its character. *People v. Mather*, 21 D. 122.

A person is not absolutely disqualified from acting as a juror who has formed or expressed an opinion respecting the guilt or innocence of the prisoner, when such opinion is based on a mere rumor. *Nelms v. State*, 53 D. 94.

Where a juror states on his *voir dire* that he has a fixed opinion as to the guilt of the accused, he is incompetent to try a criminal case, even though the opinion was formed from hearsay evidence. *Maddox v. State*, 79 D. 307.

It is no good cause of challenge that the juror has formed and expressed an opinion adverse to the prisoner, such opinion being founded on rumor, and the juror further stating that he could try the case according to the law and evidence, uninfluenced by any opinion he may have so formed from such rumor. *State v. Collins*, 16 R. 771.

Under a statute of Indiana, jurors who have read the evidence on a former trial of the same indictment as reported in newspapers, and formed and expressed opinions, derived therefrom, on the merits of the case, which it would require evidence to remove, but which would readily yield to evidence, are competent. *Guetig v. State*, 32 R. 99.

149. Opinion upon some only of the facts involved. — A juror answered that he had not formed or expressed an opinion as to the guilt of defendant, but that he had formed and expressed an opinion as to the fact of the killing of the deceased by defendant. Upon being challenged for actual bias, the court overruled the challenge. *Held*, that in order to constitute a good ground of challenge, the opinion must be as to the guilt or innocence of defendant of the crime laid to his charge. *State v. Thompson*, 74 D. 342.

150. The New York statute of 1872. — The New York act of 1872, relating to challenge of jurors in criminal cases, provides that the previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause to any person who is otherwise legally qualified to serve as a juror upon the trial of such action, provided the person proposed as a juror, who may have formed or expressed, or has such an opinion or impression, shall declare on oath that he believes that he can render an impartial verdict, and provided that the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his ver-

* See note on hypothetical opinions, 26 D. 524-525.

For Index to Notes in American Decisions and American Reports, see Volume I.

dict. *Held*, constitutional. The act properly applies to trials of offenses committed before its passage. *Stokes v. People*, 13 R. 492.

6. Trial and Decision of Challenges.

151. Time to interpose challenges.

— A juror once sworn cannot be challenged for any pre-existing cause. *Gillespie v. State*, 29 D. 137; *Com. v. Knapp*, 20 D. 534; *Keener v. State*, 63 D. 269; *State v. Powers*, 45 R. 138.

If an alien is drawn and impaneled on the jury, it is a good cause of challenge before trial; but if allowed to be sworn by the prisoner, it is too late after trial and conviction to make it a ground for a new trial. *State v. Quarrel*, 1 D. 637.

The objection that one of the jurors in a criminal case was a member of the grand jury who found the indictment, if not taken before the juror is sworn, cannot be made a ground for a new trial, though the prisoner swears that the fact was unknown to him until the jury retired. *Gillespie v. State*, 29 D. 137.

A motion by prisoner to discharge a juror and substitute another in his stead, on trial for felony, on ground that he was a member of the grand jury that found the indictment, made after the jury is impaneled and sworn, but before any evidence is introduced, should be granted, when it appears that the prisoner did not know this fact, and could not have known it with the exercise of reasonable diligence, before the jury was sworn. *Dilworth v. Com.*, 65 D. 264.

Objection to a juror made after the jury is sworn is addressed to the discretion of the court. *Ib.*

The court in its discretion may set aside jurors on score of incompetency, *propter affectum*, discovered after they are sworn, on the motion or with the consent of the prisoner, at any time before verdict rendered; and at the instance of the prosecution for like cause when the discharge of the jury without the consent of the prisoner would not result in a discharge of the latter, *semble*. *Ib.*

Upon a motion to discharge a juror, and substitute another, made by the prisoner after the jury have been sworn, it is not the duty of the prisoner or his counsel to instruct the court as to the proper course in case the motion is granted, and from a refusal to do so there is not to be inferred a motive to gain some ulterior or unfair advantage. *Ib.*

152. Order of challenges. — The state cannot pass by jurors until the remainder of a panel is gone through, before showing cause; this English rule allowing the crown to pass jurors is abrogated by the Georgia penal code of 1833. *Sealy v. State*, 44 D. 641.

A juror may be challenged for cause by

the prosecuting attorney after he has been formally passed as satisfactory, provided such challenge is interposed before the juror is sworn to try the cause. *McFadden v. Com.*, 62 D. 308.

153. How interposed. — In challenging a juror for principal cause or for favor, the ground of the challenge must be so distinctly stated that the court can see whether it is for principal cause or to the favor, and whether the facts alleged, if true, support the challenge. The challenger must state why the juror is not indifferent. He must suggest some facts or circumstances which, if true, show the juror to be positively disqualified, or which create a probability or suspicion that he is not or may not be impartial. *Freeman v. People*, 47 D. 216.

154. Trial of challenges by the court. — A challenge *propter affectum* is of two kinds: a challenge to the favor, and for principal cause. The former must be determined by triers, but the latter is usually decided by the court. If the facts are admitted, the court pronounces upon their effect; but when there is a dispute about them, triers ought to be appointed, whether the challenge is for principal cause or for favor. *People v. Mather*, 21 D. 122.

A challenge of a juror for principal cause must go upon the record; if demurred to, an issue of law is formed, which the court must determine; if the facts stated as the ground of challenge are disputed, an issue of fact arises, which must be decided by triers. *Ib.*

When an issue of fact arises upon a challenge for principal cause, and each party submits his evidence on this issue to the judge, and neither demands that triers be appointed to decide it, the competency of the court to try the issue cannot be subsequently questioned. *Ib.*

A challenge to a juror may be demurred to, or the opposite party may take issue on the facts stated, or may plead new matter in avoidance. *Freeman v. People*, 47 D. 216.

155. Submission of challenges to triers. — A challenge for favor must be determined by triers. *Freeman v. People*, 47 D. 216.

On the trial of a challenge for favor, it is error for the court to instruct the triers that the resort to them was in the nature of an appeal from the opinion of the court on the facts, and that a hypothetical opinion formed by the juror does not disqualify him. Such an opinion, while not an absolute disqualification, is some evidence of bias, and ought to be taken into consideration by the triers, in determining whether the juror is indifferent between the parties. Nor is the resort to triers in the nature of an appeal from the opinion of the court. *Ib.*

The oath which should be administered to triers of challenges to jurors is as follows:

For Index to Notes in American Decisions and American Reports, see Volume I.

"You do solemnly swear that you will well and truly try, and well and truly find, whether the juror is indifferent between the people of the state of New York, and the prisoner at the bar." *Id.*

156. Examining jurors on the voir dire.*—The prisoner is not allowed to examine the jurors as to whether they have made up their minds as to his guilt or innocence. *State v. Crank*, 23 D. 117.

An objection to a juror on a trial for felony, on the ground that he was a member of the grand jury that found the indictment, is not removed by statements made by him upon examination upon the voir dire, to the effect that he had formed no opinion, and had no bias against the prisoner. *Dilworth v. Com.*, 68 D. 264.

Only statutory questions respecting his competency should be propounded to a juror in a criminal case. *Monday v. State*, 79 D. 314.

On the question whether a juror could be asked on oath if he had expressed an opinion unfavorable to the prisoner, the court was divided. *State v. Norris*, 1 D. 564.

157. Waiver of challenges.—The exclusion of a juror on a peremptory challenge waives exceptions taken to points made and decided in disposing of challenges made to him for principal cause or for favor. *Freeman v. People*, 47 D. 216.

158. Swearing the jury.—A juror will be resworn in chief, where he states that he was under the impression that he had been sworn only on the voir dire. *Com. v. Knapp*, 20 D. 491.

The jury are judges both of law and fact in all criminal prosecutions under our constitution and laws, and as a necessary consequence should be sworn to decide according to both. *Patterson v. State*, 44 D. 530.

The swearing of the jury in a criminal case is wholly insufficient when they are not sworn to well and truly try, and a true deliverance make between the state and the prisoner, nor to give a true verdict according to the law and the evidence, but are simply sworn "to say the truth in the premises." *Id.*

It is not for the court to refuse to allow a juror to be sworn because he states that he has formed an opinion as to the guilt of the defendant, if such juror is accepted by the prisoner and is not challenged by the people. *Van Blaricum v. People*, 63 D. 316.

159. Review of determination of challenges.—The decision of the judge on an issue of fact arising upon a challenge of a juror will not be set aside and a new trial granted, except in cases warranting such action, if the challenge had been submitted to triers. *People v. Mather*, 21 D. 122.

The objection to a juror by a prisoner,

*See note on examining jurors on the voir dire, 23 D. 128-131.

which is improperly overruled, is not cured by the juror's name being struck off the panel by the prisoner, or his not being drawn as one of the jury to try him. *Dowdy v. Com.*, 60 D. 314.

7. Conduct of the Trial, Generally.

160. Powers and duties of the presiding judge.—The court has authority to impanel a jury to try whether a prisoner was standing mute obstinately, and if they should so find, to direct the plea of not guilty to be entered, and to proceed with the trial. *Butcliffe v. State*, 51 D. 459.

On a trial for murder, the color of accused is no ground of distinction in applying the principles of the law applicable to the case. *Campbell v. People*, 61 D. 49.

A judge may himself take down testimony in a criminal case, instead of appointing another to do it, and although he may inadvertently and improperly insert an occasional comment on the testimony, it will afford no ground for a new trial. *Mitchell v. State*, 68 D. 493.

On a rape trial, where a young female witness was embarrassed and unable to testify on account of laughter in the audience, the court removed from the room all the audience except the officers, attorneys, and jurors. *Held*, no error. *Grimmett v. State*, 58 R. 630.

161. Right of accused to be present.*—A prisoner accused of felony must be arraigned and plead in person; and in all subsequent proceedings he must appear in person, and not by attorney. *Sperry v. Com.*, 33 D. 261; *Sneed v. State*, 41 D. 102; *Hill v. State*, 86 D. 736; *Younger v. State*, 98 D. 791.

Such appearance must affirmatively appear by the record; and upon a recital therein that the defendant appeared by attorney, it will not be presumed that he was personally present. *Sperry v. Com.*, 33 D. 261.

The record of a conviction of felony must show how the jury were selected, tried, and sworn, and that the prisoner was present at these proceedings, and that the prisoner was present and pleaded in person at his arraignment. *Younger v. State*, 98 D. 791.

A person indicted for a criminal offense has a right to be present in court pending his trial, that he may discuss questions of law and fact, and point out and argue objections to the action of the jury, or to other proceedings in the cause. This right is guaranteed to him by section 10, article 1, of the constitution of Alabama. *State v. Hughes*, 36 D. 411.

The court may dispense with the appear-

*See monographic note on personal presence of accused, when necessary, 68 D. 219-228.

Trial in absence of accused, when may be had, see note, 28 D. 629-631.

For Index to Notes in American Decisions and American Reports, see Volume I.

ance of a party in a case of simple misdemeanor, and take the appearance of an attorney or agent as a compliance with the condition of a recognizance in such a case; but either is purely a matter of discretion with the court, which an appellate tribunal will not assume to control or direct. *Warren v. State*, 68 D. 214.

During a trial for felony the prisoner stepped to an ante-room connecting with the court-room by swinging doors, and only fifteen or twenty feet distant, to telephone to a witness, and was absent five minutes. This was against the district attorney's objection. During such absence the prisoner's counsel continued the cross-examination of a witness. *Held*, not a violation of the requirement that the prisoner shall "be personally present during the trial." *People v. Bragle*, 42 R. 269.

162. Trying the prisoner in shackles.*—A prisoner is entitled to appear for trial, upon his own plea of not guilty, free from all manner of shackles or bonds, unless there is danger of his escape. *People v. Harrington*, 10 R. 296.

The mere fact that a prisoner brought before the examining magistrate remains handcuffed during the proceedings, and in that condition waives a preliminary examination, will not support a plea in abatement to the information for the offense. *State v. Lewis*, 27 R. 113.

The impaneling of two jurors, on a trial for murder, while the prisoner was handcuffed and in the dock at the rear of the court-room, but within sight and hearing, is not fatal error. *Matthews v. State*, 42 R. 667.

163. Separate trials.—The state has the right to elect which of two prisoners, jointly indicted, severing in their defense, shall be first tried. *State v. Crank*, 23 D. 117.

One of several indicted jointly cannot demand a separate trial as a matter of right. It is within the discretion of the court to grant or refuse the right to a separate trial, even in a capital case. *State v. Soper*, 33 D. 665; *Hawkins v. State*, 44 D. 431.

A record which shows that a prisoner was tried separately necessarily shows that the court directed a separate trial. *Dias v. State*, 30 D. 448.

Defendants, upon application, have the right to be tried separately in all cases where they are indicted for an offense which does not require the joint act of two or more to constitute the offense; the rule is otherwise in those cases which require the concurrence of two or more in the commission of the offense. In cases of the latter class the matter rests in the legal discretion of the court before whom the trial takes place. *Horne v. State*, 92 D. 49.

*That the shackles should be removed on the trial of a prisoner, see note, 27 R. 116, 117.

When several persons are jointly indicted, they cannot claim separate trials as a matter of right. Such separation is a matter of discretion with the court. *State v. Collins*, 16 R. 771.

164. Counsel to assist prosecutor.—Court may appoint a special counsel to prosecute an indictment, where the solicitor-general, through bodily or mental ailments, is unable to perform that duty. *Mitchell v. State*, 68 D. 493.

The court possesses an inherent power to appoint one of the attorneys of the court, when necessary to prevent a failure of justice, to conduct the prosecution of a criminal. *Dukes v. State*, 71 D. 371.

165. Counsel for the accused.—The supreme court will not assign as prisoner's counsel one who is only an attorney of the court of common pleas. *Com. v. Knapp*, 20 D. 491.

A prisoner cannot be tried for felony without counsel to assist him, unless he expressly waives that right. *Valle v. State*, 35 R. 719.

Where a stenographer is supplied, it is not error to refuse to give time for counsel to take full notes. *State v. Hoyt*, 36 R. 89.

166. Entry of nolle prosequi.—A nolle prosequi may be entered at any time until the jury is charged, but cannot be entered afterwards; and the effect of entering a nolle prosequi after the jury is charged is an acquittal of the prisoner. *State v. McKee*, 21 D. 499.

The power to enter a nolle prosequi was, at common law, confided to the attorney-general alone. Under our statutes it is delegated to the district attorneys, to be exercised with leave of the court. *People v. McLeod*, 37 D. 328.

The court cannot order the entry of a nolle prosequi, on affidavits and other proofs submitted by the prisoner, the district attorney having made no application for leave to make such entry. *Ib.*

Nolle prosequi may be entered as to that one of two counts, in regard to which it is objected that an irregularity exists sufficient to warrant setting aside the verdict. *State v. Whittier*, 36 D. 272.

A prosecuting officer has the power, *virtute officii*, to enter a nolle prosequi in ordinary indictments; and this power may be exercised before a jury is impaneled or while the case is on trial, with the consent of the respondent, or after a verdict is rendered against him. The exercise of this power being discretionary on the part of the prosecuting officer, the court has no right to interfere, after a nolle prosequi has been entered, and allow the complainant to appear and prosecute the indictment. *State v. Smith*, 6 R. 480.

167. View of locus in quo.—A view of the place where a murder was committed will be permitted on the request of the jury,

For Index to Notes in American Decisions and American Reports, see Volume I.

acquiesced in by the counsel on both sides and by the prisoner. *Com. v. Knapp*, 20 D. 491.

A view of premises where homicide was committed may be granted under the Massachusetts statute. *Com. v. Webster*, 52 D. 711.

Where the court in a criminal case orders a view of premises by the jury at the prisoner's request, it is no error to allow them to go without the prisoner, in absence of any request on his part to accompany them. *Stellar v. State*, 55 R. 211.

168. Discharge of jury before verdict.—Where one of two persons indicted for conspiracy was acquitted, and the jury were unable to agree whether the other was guilty or not, the court, against the consent of the latter, ordered a juror to be withdrawn, and the jury discharged; and it was held that the court may, in its discretion, in a criminal case, discharge a jury who are unable to agree on a verdict, against the consent of the defendant, who may be brought to trial a second time for the same offense. *People v. Olcott*, 1 D. 168.

In capital cases, the court has no power, without the consent of the prisoner, to discharge the jury because they have not agreed and say they cannot agree upon a verdict, except in cases of absolute necessity. *Com. v. Cook*, 9 D. 465.

The discharge of the jury in a criminal case, without legal justification for the act, entitles the prisoner to a discharge, as if acquitted. *Mahala v. State*, 31 D. 591.

The right to discharge a jury in a criminal case, without the consent of the prisoner, exists only in cases of necessity, which may be classified under the following heads: 1. Where the court is compelled by law to adjourn before the jury can agree upon a verdict; 2. Where the prisoner's misconduct places it without the power of the jury to examine his case correctly; 3. Where no possibility exists that the jury will agree upon a verdict. *Id.*

The impossibility of an agreement upon a verdict, to justify the discharge of the jury, must be an impossibility founded upon some physical cause, such as sickness or insanity of a juror, or exhaustion of the jury; but that they cannot bring their minds to an agreement will not justify their discharge. Thus the discharge at half-past nine, Friday morning, of a jury to whom the case had been submitted at two o'clock, P. M., the previous day, because they are unable to agree upon a verdict, will entitle the prisoner to his discharge. *Id.*

In Virginia, the court may properly discharge the jury, in a case of felony, whenever a necessity for so doing exists. *Williams v. Com.*, 44 D. 403.

Mere inability of the jury to agree is not such a case of necessity as to permit the

court, in a case of felony, to discharge the jury without the consent of the accused. *Id.*

Where the jury has been improperly discharged in a case of felony, the accused is entitled to his discharge. *Id.*

The practice in Virginia in case of a hung jury, in a trial for felony, is, either to adjourn the court at the end of the term, taking no notice of the jury, when they are discharged by operation of law, or else to discharge them simultaneously with the final adjournment of the court. *Id.*

The trial of a criminal case does not begin, so as to prohibit the court from continuing or discharging the jury, until a full jury is impaneled and sworn, and the discharge of the jury after the trial has begun, in a capital case, is not a continuance of the cause, but an end of it, and an acquittal of the prisoner, unless done with his consent, or required by some overwhelming necessity. *McFadden v. Com.*, 62 D. 308.

On a trial for felony, it is proper for the court to discharge the jury, in the absence of the defendant, after they have deliberated, without agreeing, from four o'clock in the afternoon until six o'clock the next morning. *State v. White*, 27 R. 137.

169. Admissibility and sufficiency of evidence.—Settled rules of law relating to admission of testimony are the same in criminal as in civil cases. *State v. Dart*, 76 D. 596.

The testimony of complainants in an indictment as to reasons that induced them to believe their charges true, and as to their purpose in making them, may be excluded upon the trial, as it could have no effect upon the rights or liabilities of the defendants. *State v. McNally*, 56 D. 650.

The court commits no error in admitting irrelevant testimony, if it appears affirmatively from the record that the evidence became relevant by its connection with other testimony subsequently offered. *Lawson v. State*, 56 D. 182.

A defendant, on the trial of an indictment, not under oath as a witness, cannot be permitted to speak in presence of the jury, in order to rebut evidence of a witness for the government, who testified that he identified him by his voice. *Com. v. Scott*, 25 R. 81.

On the trial of an indictment, a written statement made by a witness for the prosecution, accompanied by a stipulation of the prisoner's former attorney that it might be read, was offered by the prosecution in evidence, the witness not being produced. The statement was admitted against the objection of the prisoner's acting attorney. *Held*, an infringement of the prisoner's constitutional right to be confronted with the witnesses against him. *Bell v. State*, 28 R. 429.

170. The order of proof.—The introduction of testimony out of the usual order

For Index to Notes in American Decisions and American Reports, see Volume I.

is within the discretion of the court. *Com. v. Eastman*, 48 D. 596.

A defendant has the right to suppose that evidence will be offered and received in its logical order, and is not bound to meet it before it becomes relevant to the case. *Brown v. People*, 97 D. 195.

It is not a matter of discretion with the court to reject evidence because it was not offered before the proper time for its admission. *Id.*

171. Objections and exceptions.—On a criminal trial, it is the duty of the court to exclude improper evidence offered by the state, even if not properly objected to by the prisoner. *State v. O'Connor*, 27 R. 291.

172. Striking out evidence.—Evidence *prima facie* irrelevant may be rejected at the time it is offered, or the court may let it in and repudiate it, if after all is heard, it is still irrelevant. *Lawson v. State*, 56 D. 182.

8. Counsel's Address to the Jury.

173. Limiting the time to be consumed.—The time in which defendant's counsel shall address the jury may be limited in a criminal case by the court in its discretion, and the supreme court will not interfere unless this discretion has been abused. *State v. Page*, 64 D. 229; *State v. Collins*, 16 R. 771.

The restriction of the argument in a murder case to four hours on each side is valid. *State v. Hoyt*, 36 R. 89.

Under the constitutional provision securing to persons accused of crime the privilege of counsel, it is error for a judge presiding at a criminal trial, to limit the prisoner's counsel to forty minutes for his argument. *Hunt v. State*, 15 R. 677.

In the trial of a felony, whether the prisoner is heard through one counsel or two, the length of the argument is not a matter for predetermination by the court. As argument progresses, the court may confine the range of it to the facts and law of the case, and may interdict idle repetition; but so long as counsel speaks to the point, proceeds in good faith, and wastes no time, the court should forbear to interfere, but leave the limits of the speech to the discretion of the speaker, until it is manifest that the discussion is complete, or the subject exhausted. *Williams v. State*, 27 R. 412.

On a trial of one charged with a felony, eleven witnesses were examined, and the evidence, which occupied half a day in its delivery, was circumstantial and conflicting. The accused was defended by two counsel, who were limited by the court to thirty minutes in the argument to the jury. *Held*, that this was an abuse of power which prevented a fair trial. *Dille v. State*, 32 R. 395.

On the trial of an indictment for larceny, where six witnesses were examined on be-

half of the people and three on behalf of the defendant, — *held*, error for the court to limit the arguments of counsel to five minutes each. *White v. People*, 32 R. 12.

174. Limiting the number of counsel or of speeches.—A statute prohibited the court in criminal cases from restricting the argument to a less number of addresses than two on a side. *Held*, not to apply where the accused had but one counsel, unless he himself chose to address the jury. *Morales v. State*, 28 R. 419.

175. Reading from books of law or medicine.*—Counsel has no right to read to jury facts of case at bar as stated in the report of the same case when formerly before the supreme court, for the purpose of contrasting them with the testimony of witnesses in the case at bar, and thereby to impeach their testimony. *State v. White*, 72 D. 533.

On a trial for felony, the prisoner's counsel, in his argument to the jury, proposed to read to them a statement of facts on an appeal in the same case, and the decision of the appellate court holding the evidence insufficient to convict, with a view to argue that the present evidence was also insufficient. The court refused to allow the reading. *Held*, no error. *Dempsey v. State*, 30 R. 148.

Refusal to allow counsel to read extracts from medical books to the jury is within the discretion of the trial court, and therefore not the subject of a writ of error. *Luning v. State*, 52 D. 153.

Reading medical books to jury is error. *People v. Hall*, 42 R. 477.

On the argument of a murder trial the district attorney, against objection, was permitted to read to the jury extracts from Browne's Medical Jurisprudence on the subject of insanity. There was no evidence that it was standard or scientific. *Held*, error. *People v. Wheeler*, 44 R. 70.

176. Abuses of the right of argument, generally.†—Constitutional guarantees to every one charged with crime, of the right to be heard by himself and counsel, do not warrant a statement of facts to the jury unauthorized by the evidence. *State v. McCall*, 39 D. 314.

Neither judge nor counsel should refer to the supreme court by way of menace, warning, or otherwise, except to cite its decisions in the progress of a trial, as by telling the jury that the court is responsible to the supreme court if it errs, or the like. *Mitchell v. State*, 68 D. 493.

On a murder trial, at the end of the opening address of the prosecuting attorney, the audience applauded. In his closing argu-

* Reading from law in books as part of the address, see note, 38 R. 578-82.

† Argument of counsel, what remarks are improper in, see note, 48 R. 326-329.

For Index to Notes in American Decisions and American Reports, see Volume I.

ment he alluded to this, and approved it. The court did not check nor reprimand the audience nor the counsel, nor caution the jury. This, it seems, was error. *Cartwright v. State*, 49 R. 826.

177. Commenting on defendant's failure to testify.*—On the trial of an indictment, the prisoner having testified on his own behalf, the prosecuting attorney was permitted, in addressing the jury, to comment on his appearance while testifying. *Held*, no error. *Huber v. State*, 26 R. 57.

If the counsel for the people, in a criminal trial, comments on the omission of the defendant to testify in his own behalf, it is ground for a new trial, although the counsel was stopped by the court, and the jury were instructed to disregard those comments. *Angelo v. People*, 36 R. 132; *Com. v. Scott*, 25 R. 87.

178. Inflammatory and improper language.†—On a murder trial, counsel for the prosecution, in argument, said to the jury: "Martin, the defendant, is a man of bad, dangerous, and desperate character; but I am not afraid to denounce the butcher-boy, although I may, on returning to my home, find it in ashes over the heads of my defenseless wife and children." There was no objection by defendant's counsel nor any interference by the court. *Held*, that a conviction should be set aside. *Martin v. State*, 56 R. 812.

9. Instructions to the Jury.

179. Relative functions of court and jury.—If the court admits evidence, the jury cannot reject it as incompetent; but they may disregard it as incredible. *Com. v. Knapp*, 20 D. 534.

180. Questions of law for the court.—Questions of law arising on the arraignment or in the progress of the trial in relation to the admissibility of evidence must be decided by the court. *Com. v. Knapp*, 20 D. 534.

Question as to whether proper foundation has been laid for introduction of secondary evidence is for the court, not for the jury. *Allen v. State*, 68 D. 457.

The words of an indictment, when not clearly written, are to be determined by the court from an inspection of the writing. *Com. v. Riggs*, 77 D. 333.

The admissibility of evidence is a question for the court to determine. It is error to leave the jury to decide the question of admissibility, and to instruct them to consider the evidence or not, as they find the one way or the other. *State v. Dick*, 86 D. 439.

181. Questions of fact for the jury.—It is a question of fact for a jury to

determine whether a note offered in evidence upon the trial of an indictment for counterfeiting is subscribed H. or N. Biddle, and their decision upon such question cannot be reviewed on error unless the note accompanies the record. *Hess v. State*, 22 D. 767.

The question of appropriation is for the jury. *State v. Trask*, 27 D. 554.

Whether the deceased came to her death by violent means or not, where the testimony of medical witnesses is conflicting, is a question of fact exclusively for the consideration of the jury. *State v. Rash*, 55 D. 420.

Sanity or insanity of a prisoner is matter of fact for the jury. The admissibility of evidence to establish insanity is a matter of law for the judge. *State v. Patten*, 63 D. 594; *Sterens v. State*, 99 D. 634.

182. Jurors as judges of the law.—The jury are the judges of the law as well as of fact, so far as they are involved in rendering a general verdict of guilty or not guilty. *Com. v. Knapp*, 20 D. 534; *State v. Croteau*, 54 D. 90; *Mitchell v. State*, 68 D. 493; *Kane v. Com.*, 33 R. 787; *Hudelson v. State*, 48 R. 171. *Contra*, *Washington v. State*, 35 R. 8.

An instruction that the "jury are not only judges of facts in case, but they are also the judges of the law," is erroneous, that doctrine having been abandoned in this country. *Williams v. State*, 66 D. 615.

A jury in a criminal case must accept the law to be as charged by the court. *Lord v. State*, 41 D. 729.

The jury has power, but not right, in a criminal case to disregard law as expounded to them by the court, and to render a verdict of not guilty where the law, if correctly administered, would result in a conviction; and their decision in such a case will be final, because the court cannot award a new trial. Such an improper exercise of power on their part does not, however, tend to prove that they are not bound to consider the instructions of the court as containing the law of the case. *Com. v. Van Tassel*, 71 D. 455.

When political power is conferred on a tribunal without restriction or control, such tribunal has the right to exercise it; the power of a jury in criminal cases to determine the whole matter in issue, submitted to their charge, is such a power which they may therefore lawfully and rightfully exercise. *State v. Croteau*, 54 D. 90.

To make a legal verdict, in a case of homicide, the jury must find the conclusion of law upon the facts; and notwithstanding it is their duty to receive a charge from the court, still the conclusion must be the result of their own conviction and understanding. *Keener v. State*, 63 D. 269.

183. The duty of the court as to instructions.—It is the right and duty of a judge sitting in a criminal trial to instruct the jury as to the law, if he think it proper

* Failure of defendant to testify, commenting on, whether permissible, see note, 27 R. 142-145.

† Argument, use of improper language and allusions in, see notes, 56 R. 814-824; 58 R. 648-655.

For Index to Notes in American Decisions and American Reports, see Volume I.

to so instruct them, and there is no law prescribing any particular time at which such instructions shall be given. *Quatkin v. Com.*, 33 D. 264.

In charging the jury, the charge, — *a.* Should be limited to a full explanation of the law of the case; *b.* All irrelevant matter found in the pleadings, evidence, or arguments of counsel should be stricken out; *c.* The evidence for the prosecution and defense should be clearly summed up; *d.* All strong expressions as to the guilt of the accused should be carefully avoided. *State v. Chandler*, 52 D. 599.

Judge, in charging jury, may call their attention to evidence of a particular fact or facts, if controverted, for the purpose of directing them to the rules of law that must govern them in arriving at the truth, and if uncontroverted, for the application of the law to the fact. All that is required of the judge is, that he should neither decide nor endeavor to influence the jury in their decision on the facts. *Jones v. State*, 62 D. 550.

It is the duty of the judge to declare what the law is, with its exceptions and qualifications, and then state hypothetically that if certain facts which constitute the offense are proved to their satisfaction they will find the defendant guilty, otherwise they will acquit him. *Keener v. State*, 63 D. 269.

The court may present facts in his charge, but must inform the jury that they are the exclusive judges of all questions of fact. *Horne v. State*, 81 D. 499.

A defendant in a criminal prosecution is entitled to have propositions of law governing his case plainly stated to the jury, in such a manner as to enable them to comprehend the principles involved. *Lancaster v. State*, 91 D. 288.

The jury should be distinctly instructed, where an indictment charges different offenses, as to the effect of a general verdict of guilty, and that they may convict on either count; and it is more satisfactory that they should do this. *State v. Nelson*, 94 D. 130.

The jury should be instructed to pass on the case of one or more of several defendants who are jointly indicted and put on trial together, before the other defendant or defendants have opened their defense, so that the latter may not be deprived of the evidence of co-defendants who are not inculpated by the evidence of the state, where there is little or no evidence against such defendants, and they are willing to be tried on the evidence of the prosecution. *Jones v. State*, 62 D. 550.

In criminal trials against two or more defendants, the judge has the right in his discretion to separate the evidence bearing upon the case of each, and to instruct the jury as to what is competent against one, and in-

competent against another. *State v. Collins*, 16 R. 771.

184. What instructions are proper — A judge's observation in his charge, that a witness's testimony differs materially from a statement which he is said to have made out of court, such being the fact, is not error. *People v. Genung*, 25 D. 594.

The constitutional provision that a judge may "state the evidence and charge the law" authorizes him to charge the law upon the evidence so stated. *Conner v. State*, 26 D. 217.

The jury may be instructed that a principle of law insisted upon by counsel is inapplicable, in view of the evidence in the case. *Id.*

The court may instruct the jury in a criminal case, on any question of law, whenever, in the court's opinion, justice requires it. *Blunt v. Com.*, 26 D. 341.

An instruction to the jury that they should believe one credible witness, when based upon a hypothetical case, and concluding, "Yet it is possible the witness might be mistaken or perjured," is not error. *State v. Rash*, 55 D. 420.

An instruction to the jury that they must take all circumstances together, and not separately, is not error, as all that is meant by such instruction is, that they must draw their conclusions from the whole of the circumstances, and pronounce their verdict as that conclusion should direct. *Id.*

The court may charge the jury that they may find a verdict of guilty on the first count of an indictment, inasmuch as the second is defective. *Roberts v. State*, 58 D. 528.

An instruction is not erroneous because it contains words of general signification capable of a meaning rendering the instruction erroneous, when from the evidence it appears that the jury could not have been misled thereby. *Belote v. State*, 72 D. 163.

Instructions should, generally, be hypothetical in form, and not assign a conclusive effect to circumstances, or assume that they are proved. Circumstances, generally, are not conclusive, but even where they are so, it should be left to the jury to determine whether those circumstances are established. *People v. Levison*, 76 D. 505.

In instructing the jury, it is proper for the court to direct them to determine the case by the evidence, and to disregard all other considerations. *Monday v. State*, 79 D. 314.

An instruction is not erroneous, where there is any evidence tending to prove facts upon which it is based, and it correctly states the law applicable to such evidence. *Breeze v. State*, 80 D. 340.

The court may state testimony and declare the law although it is erroneous to charge in respect to matters of fact. *People v. King*, 87 D. 95.

On the trial of an indictment against a

For Index to Notes in American Decisions and American Reports, see Volume I.

wife for being a common seller of intoxicating liquors, the judge charged the jury "that the fact that defendant did not go upon the stand to testify was a proper matter to be taken into consideration in determining the question of her guilt of innocence." *Held*, correct. *State v. Cleaves*, 8 R. 422.

185. What instructions are improper. — To instruct a jury on matters not in evidence is error. *State v. Hildreth*, 51 D. 369.

Instructing a jury that a witness probably desires to avoid further examination because, after his examination, he leaves the court, and, as appears by return to an attachment against him, cannot again be found, is error. *Coughlin v. People*, 68 D. 541.

Only such instructions should be given as are based on legitimate evidence in the case; and it is error to give irrelevant instructions, though they state correctly abstract principles of law, if they are calculated to mislead the jury. *Id.*

It is error to instruct a jury that "evidence which tends to establish the defendant's guilt also tends, in an equal degree, to prove that he was present at the time and place when and where the deed was committed; and if he seeks to prove an *alibi*, he must do it by evidence which outweighs that given for the state tending to fix his presence at the time and place of the crime." If evidence on behalf of a prisoner raises a reasonable doubt of his guilt, he must be acquitted, and this doubt may arise from the whole evidence in the case; and the rule is no different where the defendant sets up an *alibi* than it is where other affirmative matter is relied on. *French v. State*, 74 D. 229.

A charge which presents facts or suggests a conclusion from facts, without informing the jury that they are the exclusive judges of such facts, is erroneous. *Horne v. State*, 81 D. 499.

It was essential to establish the identity of certain notes found where the prisoner was said to have concealed them with the ones charged to have been stolen. The court in its charge said that "one twenty-dollar note was positively identified." *Held*, error, as the question of identity, no matter what the evidence, was for the jury. *Hill v. State*, 86 D. 736.

Where the prisoner has testified to material matters in his own behalf, it is error for the judge to instruct the jury that "one interested will not usually be as honest and candid as one not so." *Veatch v. State*, 26 R. 44.

The burden of proof remains upon the state throughout the trial to establish the guilt of the prisoner beyond a reasonable doubt upon the whole evidence; and an instruction that if defendant killed deceased, he is presumed guilty of murder, in the absence of proof to the contrary, and that it

devolves upon him to show a mitigation or justification, is erroneous. *State v. Wings*, 27 R. 329.

It is error to charge that reasonable doubt of guilt means doubt suggested by or arising out of the proof made, and that in considering the evidence and arriving at a verdict, "what is called common sense is perhaps the juror's best guide." *Densmore v. State*, 33 R. 96.

After instructing a jury that they are judges of the law as well as the facts, it is error to instruct them that "common sense" is their best guide, without limiting its application to the value and weight of evidence. *Wright v. State*, 35 R. 212.

186. Expressions of opinion. — An instruction to the jury "that it was competent for them to look to circumstantial testimony, as, for instance, the acts and conduct of accused, to ascertain his guilt, such as his absconding and concealing himself for the purpose of escaping the law, or his being possessed of or using large sums of money which he could not honestly account for," does not amount to an expression of opinion as to the guilt or innocence of the accused. *Bullock v. State*, 54 D. 369.

Any expression of opinion by a trial judge as to whether a fact in issue is or is not sufficiently proved is error, which error is not cured by announcing in his charge the jury's independency of him in all matters of fact pertaining to the issue. *State v. Dick*, 86 D. 439.

The weight of evidence under the California constitution is left entirely to the jury, and the court is not allowed to express an opinion in relation thereto, although it may state what facts are in evidence and what are not. *People v. King*, 87 D. 95.

187. Necessity of prayer for instructions. — An omission of a judge to charge the jury on a particular point must be brought to his attention before they have returned their verdict; and if he is not reminded of the omission until after the verdict, it is not error for him then to refuse to charge on such point. *State v. Collin*, 23 D. 230.

188. What requests to charge should be granted. — Where the general good character of the accused as a peaceable man is proved, the following is a correct charge, to wit: "If the prisoner be proved of good character as a man of peace, the law says that such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed but for such good character"; and if asked in writing, it is error to refuse it. *Fields v. State*, 11 R. 771.

189. What may be properly refused. — Abstract instructions which there is no

* Instructions to jury, proper subjects of, and to what extent judge may comment on evidence, see note, 72 D. 6:8-549.

For Index to Notes in American Decisions and American Reports, see Volume I.

evidence to support need not be given. *State v. Reigart*, 39 D. 628; *People v. Cunningham*, 43 D. 709; *McDaniel v. State*, 47 D. 93.

It is no error to refuse an instruction asking the court to comment upon facts in proof, or to direct the minds of the jury to such facts. *State v. Homes*, 57 D. 269.

An instruction proper in itself may be refused if interwoven with another instruction improper to be given. *Andre v. State*, 68 D. 708.

The court properly refused to charge the jury that "defendant is entitled to the benefit of every reasonable doubt upon every material fact involved in the case," and properly instructed the jury instead, that "the defendant is entitled to the benefit of every reasonable doubt of his guilt, remaining in the minds of the jury, after canvassing the whole of the testimony in the case." *Wise v. State*, 85 D. 595.

It is not error to refuse to give instructions which have already been given in substance. *People v. King*, 87 D. 95.

An instruction which has a tendency to mislead the jury should not be given. *State v. Benham*, 92 D. 417.

190. Duty of the court in granting or refusing.—An instruction should not be refused because the request was not handed in before argument, according to a rule of court. Such a rule ought to be regarded as binding by counsel, but cannot be laid down as an unbending rule of law, since the necessity for a request to charge may arise from what has already been charged by the judge. *People v. Garbutt*, 97 D. 162.

191. Correcting instructions.—An erroneous instruction is not cured by afterwards embodying in the charge the true rule of law applicable to the point. *Horne v. State*, 81 D. 499.

192. Further instructions.—A verdict will not be set aside where a court, in response to an inquiry propounded by a jury, correctly states the law. *Perkins v. Com.*, 56 D. 123.

The court has a right to give to the jury further or explanatory charges, in a case where counsel have voluntarily absented themselves from the court-room, if the prisoner be present. *Collins v. State*, 73 D. 426.

After a jury had retired to consider of their verdict the court sent to them, in answer to their request, an instruction in writing, and also a copy of the statute, without the knowledge of counsel on either side. *Held, error. State v. Patterson*, 12 R. 200.

10. Retirement and Deliberation of the Jury.

193. Custody of the jury.*—The jurors in a criminal case should not be per-

mitted to go at large after they are sworn until they are finally discharged. *Nomaquis v. People*, 12 D. 157.

The jury may be permitted to separate, even in a capital case, where the trial has to be adjourned from day to day. *State v. McKee*, 21 D. 499.

The court may permit the jury to separate during the progress of the trial, and before verdict. *Davis v. State*, 45 D. 559.

194. Oath to officer in charge.—A sheriff need not be specially sworn upon taking charge of the jury when they retire to consider of their verdict. *Davis v. State*, 45 D. 559.

195. Taking out exhibits.—A box found in possession of a prisoner accused of theft, and claimed to have a certain relation to the theft, which, on examining it before the jury, is found to contain a secret place in the lid in which are certain bank bills supposed to be counterfeit, may be delivered to the jury as it is, and be by them taken to the jury-room. *State v. Stebbins*, 79 D. 223.

196. Deliberation of the jury.—A jury need not give the same weight to the different parts of the confession of a prisoner, and may even totally disregard that part of the confession which is favorable to the prisoner, if it is contrary to the experience of mankind, or is contradicted by other evidence stronger than itself. *Bower v. State*, 32 D. 325.

197. Doctrine of "reasonable doubt."—The guilt of accused must be fully proved beyond a reasonable doubt, and no preponderance of evidence, however great, will suffice. *Billard v. State*, 94 D. 317; *Hipp v. State*, 33 D. 463; *Sumner v. State*, 36 D. 561; *Mitchell v. State*, 68 D. 493; but it is not requisite that the jury should believe a particular witness beyond all reasonable doubt. *State v. Smith*, 54 D. 578.

If it is uncertain which one of two or more persons is the guilty party, all must be acquitted, although it may be positively proved that some one of them committed the crime. *Campbell v. People*, 61 D. 49.

Reasonable doubt, to warrant acquittal in a criminal case, is not a mere possible doubt, but is such a doubt as, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. *Com. v. Webster*, 52 D. 711.

Such a doubt should be actual and substantial, not mere possibility or speculation. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the charge. *Billard v. State*, 94 D. 317.

*Rule that jury must be kept together, see note. 43 D. 76-87.

Separation of jury in criminal trials, see note, 60 R. 73-75.

For Index to Notes in American Decisions and American Reports, see Volume I.

Circumstantial evidence need not be so conclusive as to exclude every possibility of the defendant's innocence, in order to justify his conviction. If the jury, from the evidence, are satisfied of the defendant's guilt beyond any reasonable doubt, they may convict him, although there is no evidence proving or tending to prove it impossible for another person to have committed the crime. *Findley v. State*, 36 D. 557.

Defendant's failure to disprove some of the circumstances proved against him in a criminal case should have no weight with the jury, if, from all the circumstances proved, they are not satisfied of his guilt beyond a reasonable doubt. *Id.*

11. The Verdict.

198. Reception of the verdict, generally.—The jury must be present when their verdict is delivered in court, in order that the prisoner may have them polled, and the verdict is not final until pronounced and recorded. *Nomaque v. People*, 12 D. 157.

The jury returned their written verdict to the clerk, during a recess, without consent of the parties. They then separated for half an hour, discussing the verdict with many meanwhile. Being recalled by the court, and asked if they had agreed, they answered that they had, and they then handed the verdict to the court. *Held*, no error. *James v. State*, 30 R. 496.

199. — in absence of accused.—An accused has a right to be present when the verdict is returned, that he may have an opportunity to poll the jury if he so desires. *State v. Hughes*, 36 D. 411.

It is error to receive a verdict in a criminal case in the absence of the prisoner. *Temple v. Com.*, 29 R. 442. This principle applies where the prisoner is out on bail, the law not regarding the cause of his absence, as whether he is away voluntarily or against his will. *Sneed v. State*, 41 D. 102.

A verdict may be received in the absence of the accused, where, being on bail, he absconds pending his trial. *Fight v. State*, 28 D. 626.

Receiving a verdict in the absence of a prisoner does not entitle him to a discharge. *State v. Hughes*, 36 D. 411.

The verdict of a jury may be received in presence of the prisoner, although in the absence of and without notice to his counsel. *Stutcliffe v. State*, 51 D. 459.

A verdict may be rendered and judgment pronounced in defendant's absence in a criminal prosecution for a slight or inferior misdemeanor, such as gaming. *Warren v. State*, 68 D. 214.

A defendant waives his right to be present at rendition of a verdict of felony against him, if he is not in custody so as to be deprived of the power to attend, and is voluntarily absent. *Price v. State*, 72 D. 195.

A defendant cannot take advantage of his voluntary absence when a verdict of felony was rendered against him, if he was under recognizance of bail and present at the commencement of the trial, for thereafter he was in the custody of the law, and if he afterwards withdrew from the court or escaped so as not to be present at the return of the verdict, it is by his own unlawful act, of which he can take no advantage. *Id.*

Prisoner may voluntarily absent himself from the court-room during a portion of the progress of his trial. Consequently, where the jury in a trial for felony returned and stated that they had agreed upon a verdict, but had not reduced it to writing, and were sent back to prepare a written verdict, and where, when they returned, the prisoner was not present, and the jury returned their verdict, were polled by the prisoner's counsel, and discharged before his return, the prisoner will not be given a new trial, unless he show that his absence was enforced. *Hill v. State*, 86 D. 736.

It is not enough to show that an accused was absent from the court-room during the rendition of the verdict in his case. The burden is on him to show error, and he should make it appear that he was deprived of the right to be present, not merely that he was not present. *Id.*

After the jury have dispersed, with the prisoner's consent, leaving the verdict with the foreman, to be returned by him into court, it is not indispensable that the prisoner should be present when the act of return takes place in pursuance of the consent; and though he is confined in jail at the time, the verdict will not, on that account, be illegal. *Smith v. State*, 27 R. 393.

The verdict of a jury in a criminal case may be received in the absence of the prisoner's counsel, the prisoner himself being present. *Beaumont v. State*, 28 R. 424.

A verdict of felony inadvertently received in the absence of the prisoner is void and amounts to an acquittal, although his counsel were present and did not object; and the error cannot be cured, after the jury have been discharged, by immediately reassembling the jury, examining on oath those who had left the court-room, and again receiving the verdict in the presence of the prisoner. *Cook v. State*, 31 R. 31.

The prisoner in a case of felony not capital is entitled to be present when the jury bring in their verdict; this right cannot be waived by his counsel; but a verdict in his absence, the reception of which is assented to by his counsel, does not entitle him to a discharge, but only to a new trial. *State v. Jenkins*, 37 R. 643.

A bailed prisoner on trial for larceny voluntarily left the court-room during the deliberation of the jury, and on the coming in of the jury, being called and not appearing,

For Index to Notes in American Decisions and American Reports, see Volume L.

a verdict of guilty was received and sentence was pronounced in his absence. *Held*, no error. *Lynch v. Com.*, 32 R. 445.

A defendant indicted for felony, released on bail and voluntarily absent from the trial, may not complain of the reception of the verdict in his absence, especially when his counsel is present and answers for him. *Barton v. State*, 44 R. 743.

200. Polling the jury.* — The refusal of the court to poll the jury is error for which a judgment will be reversed. *James v. State*, 30 R. 496.

The consent of the defendant in an indictment to the jury's bringing in a sealed verdict is no waiver of his right to have the jury polled. *Stewart v. People*, 9 R. 78.

The defendant in a criminal case has no right to poll the jury. *State v. Hoyt*, 36 R. 89. This is a means which the court sometimes takes for its own guidance, but when the court is fully satisfied, it will not resort to it. *State v. Allen*, 10 D. 687.

A verdict rendered by each juror separately, instead of by the whole jointly, is valid, as where the jury, after consulting, came into court together to render their verdict jointly, but on the instance of the prisoner's counsel were polled, and each was called upon to say for himself whether he found the prisoner guilty or not guilty. *State v. John*, 49 D. 396.

201. Sufficiency of the verdict, generally. — Where the jury agree as to one or more of several defendants jointly indicted, but cannot agree as to the rest, and are discharged from necessity, their verdict, so far as agreed on, must be received. *Com. v. Cook*, 9 D. 465.

The verdict of the jury, "We find the defendant guilty of murder," written on the envelope of the indictment, on which no part of the indictment is written, but which is indorsed with the title of the case, the finding of the grand jury, and the names of the witnesses, and where there is no question raised, but that as a matter of fact, the finding of the jury refers to the indictment under which the prisoner was tried, will be held to be of sufficient certainty as to person and offense. *State v. Ferguson*, 27 D. 412.

The jury should render their verdict of guilty or not guilty orally, in open court, and a record should be made thereof. An improper written verdict attempted to be made should be rejected by the court. *Lord v. State*, 41 D. 729.

A verdict of "guilty of murder in the first degree" is invalid. *Wooldridge v. State*, 44 R. 706.

A verdict may be returned for manslaughter, and a valid judgment rendered upon such verdict, under an indictment charging

the prisoner with murder in the first degree. *Sutcliffe v. State*, 51 D. 459.

On the trial of an indictment for murder, the jury returned a verdict finding "the prisoner guilty of manslaughter." By statute, there were two degrees of manslaughter. *Held*, that the prisoner was properly sentenced as on a conviction of the higher degree. *Welch v. State*, 15 R. 690.

Upon the trial of an indictment for murder not charging any particular degree, the jury returned a verdict of "guilty," specifying no degree. The statute divided murder into two degrees. *Held*, that the verdict was bad, and that no judgment could be rendered on it. *Hogan v. State*, 11 R. 575.

Upon the trial of an indictment for murder, the jury returned a verdict of guilty, without specifying the degree. The statute divided murder into two degrees, and provided that the jury should specify the degree. *Held*, 1. That the verdict was bad, and that no judgment could be rendered on it; 2. That it being within the power of the defendant to have had the verdict corrected when rendered, he is considered as consenting to it, and as waiving objection to being tried before another jury. *State v. Rover*, 21 R. 745.

202. General verdict. — On an information containing several counts, setting forth one offense in different forms, evidence was offered in support of one count only, and the jury gave a general verdict of guilty. The verdict was held good. *State v. Smith*, 5 D. 132.

A general verdict of "guilty" upon an indictment containing two counts, one for stealing a horse, and the other for receiving a horse, knowing the same to have been stolen, is error, and entitles the prisoner to a *venire de novo*. *State v. Johnson*, 22 R. 666.

Upon a general verdict of guilty, judgment may be given upon any one or all of several felonies of the same degree, included in the indictment, as they may have been supported by proof. *State v. Crank*, 23 D. 117.

Verdict of "guilty on the first count" of an indictment is a general, not a special, verdict. *Roberts v. State*, 58 D. 528.

203. Special verdict. — A special verdict which states the felonious taking in one state, and the taking continued into another, cannot be supported as a felonious taking in the latter. *State v. Brown*, 1 D. 548.

A special verdict finding a defendant guilty of the offense charged in the indictment, but not finding him guilty in the county where the offense is alleged to have been committed, is insufficient. *Com. v. Call*, 32 D. 284.

Such a verdict does not amount to an acquittal, but the accused is entitled to a new trial. *Id.*

A jury have the right to find a special verdict, by which the facts are put on the rec-

* See note on polling the jury, 30 R. 497-500.

For Index to Notes in American Decisions and American Reports, see Volume I.

cord, and the law is submitted to the judges. *Com. v. Chatham*, 88 D. 539.

A special verdict is sufficient, if it finds all the substantial requisites of the charge, without following the technical language used in the indictment; and it is not necessary that, after stating the facts, they should draw any legal conclusions. *Id.*

A statute provided that when the defense of insanity was set up upon the trial of an indictment for murder, etc., the jury should find specially whether the defendant was insane when the alleged crime was committed, and that if they acquitted on that ground, the verdict should so state; that thereupon the court should sentence the defendant to confinement in the insane hospital until such time as the governor should discharge him; that such discharge should be granted whenever the prison inspectors should summon certain officers named to examine the defendant, and they should certify to the governor that he was no longer insane. *Held*, that the jury had the constitutional right to give a general verdict, but that a special verdict was not unauthorized. *Underwood v. People*, 20 R. 633.

204. Sealed verdict. — In a case of felony, the jury, by their foreman, sealed their verdict of guilty, using a printed blank form for the purpose, and intrusted it to their foreman, and separated overnight. The sealing of the verdict and the separation were by permission of the court, without the knowledge of the defendant or his counsel. The next morning the jury assembled in court, and the prisoner being present, the clerk asked if the jury had agreed, and the foreman answered that they had, and without saying more, handed the sealed verdict to the clerk, who opened and read it to the jury, and thereupon told them to harken to their verdict, as the court had recorded it. *Held*, irregular; the verdict must be pronounced by the foreman in open court, the effect of the sealed verdict being simply to preclude the idea of influence during separation. *Com. v. Tobin*, 28 R. 220.

205. Compromise verdict. — What does not constitute a compromise verdict, see *Monroe v. State*, 76 D. 58.

It is no objection in law to the verdict that a juror in a capital case at first was not for conviction, but finding a majority was against him, after deliberation with them, united publicly and of his own accord in the verdict. *State v. Godwin*, 44 D. 42.

A jury, having agreed upon a verdict of murder in the second degree, but disagreeing as to the term of imprisonment to be imposed, agreed that each member should mark a number not more than fifty nor less than five, and that the aggregate divided by twelve should stand as the number of years of imprisonment. *Held*, error. *Wood v. State*, 44 R. 701.

206. Amending and correcting the verdict. — A verdict of "guilty on the first account" may be corrected with respect to the orthography of the word "count," by an erasure, under the direction of the court, of the syllable "ac." *Roberts v. State*, 58 D. 528.

207. Interpreting the verdict. — A and B being indicted for a conspiracy to defraud C, the jury found a verdict that there was an agreement between A and B to obtain money from C, but with intent to return it again; this was held not to be a verdict of acquittal, or a verdict on which any judgment could be given. *People v. Olcott*, 1 D. 168.

A general verdict of guilty is understood to find a higher offense, if there is testimony to support it; and such verdict is not ground for a new trial. *State v. Nelson*, 94 D. 130.

208. Assessment of punishment by jury. — A verdict against a defendant, in manslaughter, must fix the punishment. *Dias v. State*, 39 D. 448.

The court will not revise or control the discretion of a jury in fixing the duration of punishment. *McWhirt's Case*, 46 D. 196.

A verdict finding prisoner "guilty of murder in first degree, and penitentiary for life," is sufficient to sustain his conviction and sentence accordingly. *Notes v. State*, 62 D. 711.

12. Arrest of Judgment.

209. Grounds for the motion, generally. — Upon an indictment for forging a check upon the Bank of Virginia, and obtaining a note of the said bank therefor, under a statute passed before the bank was established, and a verdict of guilty, — *held* that judgment must be arrested. *Com. v. Swinney*, 5 D. 512.

A motion in arrest of judgment can only be made on account of some intrinsic defect apparent on the face of the record, which would render the judgment in the case erroneous. *State v. Carrer*, 77 D. 275.

210. Insufficient grounds. — The fact that a juror, during the trial of a prisoner for murder, asked the prosecuting attorney, and afterwards the court, to procure the attendance of a certain witness whose evidence such juror believed to be important, is not a sufficient ground for arresting the judgment pronounced on a verdict of guilty rendered by the jury of which he was a member. *State v. Watkins*, 21 D. 712.

The illegality of a grand jury which presented an indictment cannot be taken advantage of on motion to arrest judgment; such objection must be pleaded in abatement. *State v. Carrer*, 77 D. 275.

211. Objections too late after verdict. — A statute provided that before any prisoner is tried for felony in a superior court he shall be examined before an inferior court, unless such examination be waived by

For Index² to Notes in American Decisions and American Reports, see Volume I.

his consent entered of record in such superior court. *Held*, that it was too late after the verdict and judgment in the superior court for a prisoner to insist that such statute had not been complied with. *State v. Stewart*, 23 R. 623.

Even in a capital case, if the court permits the jury to separate before submission, and the defendant does not object until after verdict, the objection is waived. *Henning v. State*, 55 R. 756.

13. The Sentence, and how Enforced.

212. Power and duty of the court.

—A court may pass sentence without having the original indictment before it, and if the original be stolen from the files its place may be supplied by a copy, like any other record or pleading. *Mount v. State*, 45 D. 542.

213. Time to pass—Delaying or suspending sentence. — On conviction of maintaining a nuisance, the court suspended sentence, on payment of costs, so long as the defendant should abate the nuisance. At a subsequent term the court imposed sentence of imprisonment and payment of costs. *Held*, void. *State v. Addy*, 39 R. 547.

214. Inquiry as to whether defendant has "anything to say," etc. — The record of a trial for a capital offense must show that prisoner was present when sentence of death was pronounced upon him, and that he was asked whether or not he had anything to say why such sentence should not be pronounced upon him. *Hamilton v. Com.*, 55 D. 485.

It is error not to ask the defendant, in a case of felony, why sentence should not be passed upon him, and that this was done must appear from the judgment entry. *Mulles v. State*, 6 R. 691.

It is not necessary that a prisoner convicted of a felony, not capital, should be asked before judgment what he has to say why sentence should not be pronounced against him. *State v. Taylor*, 21 R. 561; *Jones v. State*, 24 R. 658.

The record of a capital conviction failed to show that, before sentence, the prisoner was asked if he had anything to say why sentence should not be pronounced. *Held*, that the sentence should be reversed, and the prisoner remanded for resentencing. *McCune v. Com.*, 21 R. 7.

On a conviction of murder it is error to omit to ask the prisoner if he has anything to say why judgment should not be pronounced, but it does not necessitate a new trial, but only resentencing. *State v. Trueman*, 47 R. 840.

In sentencing for murder, it seems it is

not necessary to ask the prisoner if he has anything to say against the sentence. At all events, a motion in arrest of judgment, in which the omission is not set up as error, is a waiver of such right. *State v. Hoyt*, 36 R. 89.

215. Designating time of imprisonment. — Where a person was sentenced to imprisonment in the state prison for a term of one year, to commence upon the expiration of another term; and one year afterward the first judgment and sentence were adjudged void, — *held*, on *habeas corpus*, that the sentence either commenced to run immediately on rendition, and had expired, or it was void for uncertainty, and in either case, the prisoner was entitled to his discharge from the state prison. *Ex parte Roberts*, 16 R. 1.

216. Sentence where there are several counts or several offenses. — An indictment contained two counts. The first charged the defendant with breaking and entering a storehouse; the second charged him with stealing the goods. He was found guilty under both counts, and the judge imposed a distinct sentence on each count. *Held*, not erroneous. *Com. v. Birdsall*, 8 R. 283.

The prisoner was tried on an indictment containing many counts, each charging a different misdemeanor of the same kind. A verdict of guilty, on twelve counts, was returned, and a separate sentence, to the full extent allowed by law for a misdemeanor of the grade charged, was imposed on each count. *Held*, 1. That the sentence for a single offense was good; 2. That the further sentences were in excess of the jurisdiction of the court, and absolutely void, and not merely erroneous; 3. That the prisoner, after the execution of one sentence, was entitled to discharge on *habeas corpus*. *People v. Liscomb*, 19 R. 211.

217. Cumulative and alternative sentences. — If a person is convicted at the same term of court on two several informations of distinct offenses, and sentenced to three years' imprisonment for each, judgment may be given that one term of imprisonment shall commence at the expiration of the other. *State v. Smith*, 5 D. 132; *Petition of McCormick*, 1 R. 197.

The commencement of the term of a sentence of imprisonment "to take effect immediately after the expiration" of a prior sentence, is, if such prior sentence be reversed, the date of such reversal. *Brown v. Com.*, 26 D. 130.

Upon conviction of several misdemeanors of like character, charged in separate counts of the same indictment, the court has no power to impose a sentence, or cumulative sentences, exceeding in the aggregate the maximum punishment prescribed by statute for one offense of the character charged. *People v. Liscomb*, 19 R. 211.

² Failure to ask defendant whether he has anything to say why judgment should not be pronounced against him, see notes, 21 R. 5; 36 R. 87, 88.

For Index to Notes in American Decisions and American Reports, see Volume L.

218. Recalling and vacating sentence.—New sentence.*—The judge of a superior court has power to revise and increase a sentence imposed upon a convict, during the same term of court, and before the original sentence has gone into operation, or any action been had upon it. *Com. v. Weymouth*, 79 D. 776.

Where a prisoner has been convicted and sentenced, and duly committed in pursuance of the sentence, the power of the court to revise or change the sentence is at an end. *Brown v. Rice*, 2 R. 11.

A defendant who has been found guilty, generally, upon an indictment containing several counts for distinct offenses, and has been sentenced upon some of the counts to imprisonment, and has been imprisoned under such sentence, cannot be brought up at a subsequent term to which the case has not been continued, and be sentenced anew upon another count in the same indictment, even if the first sentence was erroneous. *Com. v. Foster*, 23 R. 326.

On a trial for murder, a verdict was rendered of involuntary manslaughter, and the jury assessed a fine. The court thereupon discharged the prisoner. Afterward, at the same term, the court set aside the judgment, in the absence of the prisoner, and entered judgment for the fine assessed, and for imprisonment. *Held*, valid. *Price v. Com.*, 36 R. 797.

219. Entry of judgment.—So much of a judgment as is an affirmation of the prisoner's guilt may be rejected as surplusage, and the fact that it was defectively stated cannot avoid the judgment. *Hawkins v. State*, 44 D. 431.

An error which will render a judgment voidable only is the want of adherence to some prescribed rule or mode of proceeding in conducting the action or defense. *Ex parte Gibson*, 91 D. 546.

An entry of a judgment in the minutes of the court should show that all the acts required by the statute to be done up to that stage of the case were performed. *Ib.*

A judgment entered in the minutes of the court is not void, if it appears therein that the court had jurisdiction of the subject-matter and the person of the defendant, however erroneous it may be, unless it is so uncertain in its terms as to be void on that ground. *Ib.*

TRIORES.

Of challenges to jurors, see TRIAL, 155.

TROVER.

[Includes the right of action and rules of procedure in suits for damages for the wrongful conversion of personal property.]

Between tenants in common, see CO-TENANCY, 48.

* Sentence, power of court to revise or amend, see note, 79 D. 779, 780.

Measure of damages in, see DAMAGES, 41.

What chattels are the subject of, see PERSONAL PROPERTY, 2.

When agent liable in, see AGENCY, 56.

When lies against carriers, see CARRIERS, 111.

When pledges liable in, see PLEDGE, 12.

I. WHEN IT LIES.

II. PROCEDURE.

I. WHEN IT LIES.

1. When trover will lie, generally.—An action of trover may be maintained for the recovery of property delivered in exchange for other property fraudulently described and not owned by defendant. *Waters v. Van Winkle*, 4 D. 387.

Trover, *assumpsit*, or case will lie against a bailee, if a conversion be proved. The effect of an election of the form of action considered with reference to the proof, and the nature of the defense. *Lockwood v. Bull*, 18 D. 539.

Trover for the amount of a promissory note will lie by the maker against the payee, who has transferred it in violation of the agreement pursuant to which it was given, and the transferee recovers judgment thereon against the maker. *Buck v. Kent*, 21 D. 576.

If that judgment was of any importance in determining the rights of the parties in trover, an exemplified copy ought to have been produced. *Ib.*

Trover will lie by one tenant in common against another for the loss or destruction of personalty while in his possession. *Hyde v. Stone*, 22 D. 582.

Trover lies wherever trespass *de bonis asportatis* will lie. *Pierce v. Benjamin*, 25 D. 396.

Trover is the proper remedy for trespass committed by mining coal and carrying it away from another's land by mistake. *Forryth v. Wells*, 80 D. 617.

A party entitled to the possession of a writing cannot take it by force or fraud; but in trover the manner of taking possession is immaterial, the gist of the action being the wrongful conversion. *Graham v. Warner*, 28 D. 65.

Trover lies to recover property appropriated by theft, as well as that taken by fraudulent means or by trespass. *Hutchinson v. Merchants' etc. Bank*, 80 D. 596.

A tree standing wholly on one's land, but extending its roots into, and its branches over, the land of another, belongs nevertheless to the former proprietor, and the latter is liable for the taking and conversion of fruit growing on the branches of such tree, which overhang his land. *Lyman v. Hale*, 21 D. 728.

Trover lies by a mortgagee in possession against a stranger for cutting trees upon the former's premises and taking them away,

For Index to Notes in American Decisions and American Reports, see Volume I.

the severance constituting the trees personal property, and the taking away the asportation for which the action lies. *Whidden v. Seelye*, 63 D. 661.

Trover is a transitory action, and lies for conversion of personal property in a foreign jurisdiction. *Id.*

A private action of trover is suspended until the public prosecution for the offense has been duly conducted and ended, but the private wrong is not merged in the public wrong, nor does the public prosecution supersede the private action. *Hutchinson v. Merchants' etc. Bank*, 80 D. 596.

If an action of trover is commenced within the period of limitation, after the conclusion of the public prosecution for a theft, it will not be barred by the statute; the action being suspended until that time, the statute of limitations cannot begin to run against the action until the disability is removed. *Id.*

In an action to recover the value of property alleged to have been stolen from the plaintiff by the defendant, — *held*, that the right of action was not suspended until the determination of a criminal prosecution against the offender. *Houck v. Minnick*, 2 R. 413.

2. When it will not lie. — Trover does not lie against one coming into possession by delivery or finding of goods, without proof of some tortious act on his part. *Burditt v. Hunt*, 43 D. 289.

Trover will not lie against an attaching officer for neglect in not taking proper care of the property attached. *Abbott v. Kimball*, 47 D. 708.

Conversion is the gist of the action, and without conversion, neither possession of the property, negligence, nor misfortune will enable the action to be maintained. *Rogers v. Huie*, 56 D. 363.

Trover will not lie unless defendant has converted property to his own use; and if not, then any other act to amount to a conversion must be done with a wrongful intent, either express or implied. *Id.*

A plaintiff cannot recover in trover, although there has been a technical conversion, if his real and substantial claim is merely to recover damages for the breach of an illegal contract. *Woodman v. Hubbard*, 67 D. 310.

3. Who may maintain it. — One joint owner of a chattel may bring trover or trespass for his separate interest, and the defendant cannot take advantage at the trial of the non-joinder of the other parties, but must plead it in abatement. *Wheelwright v. Depeyster*, 3 D. 345.

Trover will lie in favor of the executor of a deputy sheriff, for the conversion, by a stranger, of property attached by the deputy on meane process. *Badlam v. Tucker*, 11 D. 202.

One from whom goods have been stolen

may maintain trover, before the conviction or acquittal of the person accused of the taking. *Pettingill v. Rideout*, 25 D. 473.

Trover by the purchaser at an execution sale will lie, notwithstanding the conversion may have taken place before the sale. *Jewett v. Patridge*, 28 D. 173.

Trover will not lie for the owner of the reversionary estate in a chattel, prior to the determination of the particular estate. *Steele v. Williams*, 31 D. 646.

Trover cannot be maintained by owners of estate in remainder, to recover for a conversion occasioned by an absolute sale of the entire estate in the property by a purchaser from a precedent tenant for life, where such sale was made during the continuance of the particular life estate. *Lewis v. Mobley*, 34 D. 379.

Trover by an occupant, for an undivided moiety of crops of land worked on shares will lie against an officer selling the whole on execution against the land-owner. *White v. Morton*, 52 D. 75.

The original owner regaining possession of converted property with its accretions after conversion may recover the value of the property and its accretions if it be again converted, either by the original converter or by a stranger. *Moody v. Whitney*, 61 D. 239.

An administratrix may maintain trover for the conversion of a certificate of stock against one who received it from the heir, as security for a debt, where, after the death of the intestate owning the certificate, and before the appointment of the widow as administratrix, the widow and heirs indorsed it, and caused it to be sent by one of the heirs to a certain person for sale, and subsequently such heir, without the assent of the widow and the other heirs, made an agreement to pledge it as security for a debt which he owed, and gave an order on the custodian of the certificate for its delivery to the creditor, who supposed the heir owned it, and who obtained it and sold it. *Morton v. Preston*, 100 D. 146.

Plaintiff raked into heaps manure that had accumulated in the street, the fee of which was in the borough, intending to remove it. Before he could do so, and within twenty-four hours, defendant carted it away. *Held*, that plaintiff could maintain trover. *Haslem v. Lockwood*, 9 R. 350.

One falsely and fraudulently representing himself to be a member of a responsible firm of commission merchants obtained goods from the owner, giving a forged check of the firm in payment; he then shipped the goods to the firm, who in good faith sold them on his account to an innocent purchaser, who in turn sold them. *Held*, that the owner, being innocent, and not negligent, was entitled to recover for their value from the last purchaser. *Alexander v. Swackhamer*, 55 R. 180.

For Index to Notes in American Decisions and American Reports, see Volume I.

4. The necessary title or possession.*

— Plaintiff, to recover in an action of trover, must prove general or special property in himself and a right of possession at the time of the conversion by the defendant, a conversion by the defendant, and the value of the property. *Danley v. Rector*, 50 D. 242; *Turley v. Tucker*, 35 D. 449; *Hudspeth v. Wilson*, 21 D. 344; *Hyde v. Noble*, 38 D. 508; *Whitlock v. Heard*, 48 D. 73; *Brasier v. Ansley*, 51 D. 408; *Ames v. Palmer*, 66 D. 271; *Baxter v. Bush*, 70 D. 429; *Davidson v. Waldron*, 83 D. 206.

The plaintiff, to maintain an action of trover, must appear to be entitled to the thing in question, and to be in the actual and constructive possession thereof, at the time of the conversion. *Gage v. Allison*, 2 D. 682; *Lewis v. Mobley*, 34 D. 379.

Possession and the exercise of acts of ownership are sufficient evidence of title, *prima facie*, to maintain trover. *Jones v. Sinclair*, 9 D. 75.

If the plaintiff, in an action of trover, show a right to possession, either at the time of the taking or at the time of conversion, it will be sufficient. *Id.*

In trover, as in ejectment, plaintiff must recover on the strength of his own title, without regard to the weakness of that of his adversary. *Davidson v. Waldron*, 83 D. 206. And therefore the plaintiff cannot recover if defendant prove property in another when the conversion took place. *Hostler v. Skull*, 1 D. 583.

The property of personal chattels draws to it the possession, so that the owner, although not in actual possession, may bring either trespass or trover, at his election, against a stranger who takes them away. *Bird v. Clark*, 3 D. 269.

A mere naked possession, without some kind of property, is not sufficient to entitle a person to maintain trover. *Odiorne v. Colley*, 9 D. 39; *Laspeyre v. McFarland*, 7 D. 705.

The general owner of a chattel cannot maintain trover therefor during the continuance of a definite term for which he has parted with the possession of it. *Swift v. Moseley*, 33 D. 197.

Possession is sufficient evidence of title to enable plaintiff to maintain trover against a wrong-doer, although the title to the chattel may not be in the plaintiff, but in another; and if the defendant would protect himself by showing an outstanding title in another, he must connect himself with it by showing that he acted under the authority of him who was in fact the owner. *Louremore v. Berry*, 54 D. 188.

The sheriff's property in goods levied on is sufficient to support trespass or trover, for a taking or a conversion of them. *Lock-*

* What title or possession is sufficient to maintain trover, see note, 1 D. 585-586.

wood v. Bull, 13 D. 539; *Davidson v. Waldron*, 83 D. 206.

A sheriff having attached personal chattels, a person to whom he delivers them for safe-keeping is merely his servant, having no legal interest in the chattels, and cannot therefore maintain trover for them. *Ludden v. Leavitt*, 6 D. 45.

Where an officer takes goods upon an attachment or execution, and delivers them to a third person for safe-keeping, upon his written promise to return them on demand, such person has a sufficient interest in the goods to maintain trover for them. *Pool v. Symonds*, 8 D. 71.

In an action of trover by a purchaser of a lot of logs under execution, which had been validly levied upon some of them and invalidly upon the remainder, it is necessary for the plaintiff to show that he is entitled to the possession of the particular property which is the subject of the suit, or of some part of it which he can identify, or he cannot recover. *Brown v. Pratt*, 65 D. 330.

A second mortgagee of personal property, who is not in actual possession, cannot maintain an action in the nature of trover for its conversion. *Ring v. Neale*, 19 R. 316.

The bailor may maintain trover for a chattel bailed by him for a definite term, when the bailee, without the bailor's consent, puts it to a use different from that for which it was bailed. *Swift v. Moseley*, 33 D. 197.

Whether a naked trustee of a chattel can recover full damages in trover, *quære*. *Newsum v. Newsum*, 19 D. 739.

Where the special property is founded on possession, the possession must be peaceable and lawful, or acquired by some shadow of title from the absolute owner; a mere trespasser cannot by his trespass acquire possession sufficient to maintain trover. *Turley v. Tucker*, 35 D. 449.

The plaintiff, having a general or special property in himself as an individual, may bring trover in his own name, whether he acquired that property as a purchaser, as a common carrier, as a special bailee, or in the discharge of his duty as a sheriff or other public officer. *Brewster v. Vail*, 38 D. 547.

The possessor of a promissory note may maintain trover for its conversion, although the legal title to the note and the right to sue for the money due thereby is in the payee. *Louremore v. Berry*, 54 D. 188.

Possession by the finder of a lost article is sufficient to entitle him to maintain trover against any one who converts it, except the owner. *Brandon v. Huntsville Bank*, 18 D. 48.

Possession of a slave who finds a chattel is the possession of his master. *Id.*

Buildings erected by one person on land of another, with the latter's express consent, are the property of the former; and he, or those claiming under him, may maintain

For index to Notes in American Decisions and American Reports, see Volume I.

trover for them against the owner of the land. *Osgood v. Howard*, 20 D. 322.

One who has the right to the possession of a certain tract cannot maintain trover for stone and gravel dug therefrom, against one who has the actual adverse possession of the land and sets up title thereto. *Mather v. Trinity Church*, 8 D. 663.

Trover for iron ore may be maintained by one in possession of the land from which it was taken, who has dug the same under a conveyance of the right by the owner of the land, against a person taking and converting such ore after it is dug, and the action cannot be defeated by showing a previous conveyance of the right to take ore, to a stranger who had never been in possession or done anything under the contract. *Grubb v. Guilford*, 28 D. 700.

The owner of land out of possession may maintain trover for timber cut thereon by one not in actual possession of the premises. *Wright v. Guier*, 36 D. 108.

5. For what property it lies. — An action of tort for conversion of a gold coin issued by a private individual, of the value of ten dollars, and current in some parts of the country, and passed away by mistake for a half-dollar, and then by the receiver to a third person for the same amount, is maintainable against the last person after demand made and tender of a half-dollar. *Chapman v. Cole*, 71 D. 739.

Trespass will not lie against an officer and his purchaser at a judicial sale of a lot of saw-logs, where the levy was wrongfully made by such officer upon part of the logs, without distinguishing what part, and the part levied on was sold without being pointed out or separated from the rest, and the purchaser never took possession or attempted to exercise any control over the property. *Conkey v. Amis*, 74 D. 251.

A compliance with the conditions of an agreement sufficient to sustain trover for promissory notes is shown where it appears that the plaintiff and vendor delivered to the defendant the notes of the vendee for the purchase price of land conveyed by the vendee to the defendant, because the defendant was uneasy as to the title by reason of certain mortgages upon the land undischarged of record, and for the purpose of securing him against those mortgages, the notes to be held by the defendant until the plaintiff should "get up the mortgages" and the mortgage notes; that the plaintiff procured the mortgage notes and a quitclaim deed from one of the mortgagees, the other being dead, and tendered these notes to the defendant, together with his bond indemnifying the defendant against the mortgage undischarged of record, which bond the defendant accepted. *Robbins v. Packard*, 76 D. 134.

Trover will lie: For a judgment rendered

by a justice of the peace. *Hudspeth v. Wilson*, 21 D. 344. Contra, *Cobb v. Cornegay*, 45 D. 497.

By a judgment creditor, for a writ of execution issued on his judgment, and this though it had become an expired process. *Keeler v. Fassett*, 52 D. 71.

For wrongful conversion of a promissory note. *Davis v. Funk*, 80 D. 519.

For conversion of "shares of stock," rather than for the certificate. *Payne v. Elliot*, 35 R. 80; *Budd v. Multnomah Street R'y Co.*, 53 R. 355.

For grain consigned to a public warehouse, and there mingled with other grain; and where the owner of the warehouse transfers the warehouse and such contents to a national bank, to secure a debt, the latter must respond to such consignors for such grain, irrespective of its chartered authority. *German Nat. Bank v. Meadowcroft*, 35 R. 137.

Trover will not lie: For a portion purchased of a larger quantity of like property, where, subsequently to the purchase, there has been no further act done to specify and identify the part sold. *Woods v. McGee*, 30 D. 202.

For a judgment won at cards, and delivered to the winner. *Hudspeth v. Wilson*, 21 D. 344.

To recover the possession of personal property which the plaintiff has parted with for the purpose of defrauding his creditors; but the personal representatives of such a person may, after his death, maintain such an action for the benefit of his creditors, if his estate be otherwise insufficient to pay his debts. *Stewart v. Kearney*, 31 D. 482.

Against a sheriff for unfinished counterfeit coin found in the possession of a person arrested by him at the suit of a third person claiming to be the owner, where he does not show that it was put in its questionable shape without his knowledge or consent. *Spalding v. Preston*, 50 D. 68.

For a justice's judgment, overruling, on this point, *Hudspeth v. Wilson*, 21 D. 344; for a justice's judgment is not a record, but has one essential quality of a record, that it concludes the parties from denying the facts it affirms. It is a muniment in which both parties have an interest, but neither an exclusive one. *Cobb v. Cornegay*, 45 D. 497.

For the conversion of a judgment. *Platt v. Potts*, 53 D. 412.

For a note after judgment rendered on it, as the note then has no existence. *Id.*

For the value of a note paid before conversion, or in any manner legally discharged, for in fact it would have no value; but if the word "paid" was written across the face of the note by mistake, or by one without authority, this would not discharge the maker from his obligation to pay, and

For Index to Notes in American Decisions and American Reports, see Volume I.

consequently trover would lie for its conversion. *Louremore v. Berry*, 54 D. 188.

6. Who is liable. — Conversion by an officer of the law is a conversion by the persons employing him. *Calkins v. Lockwood*, 42 D. 729.

Where a salesman of a merchant takes into his employer's store, after close of business hours at night, a creditor of such employer, and selects goods therein to be taken in payment of the debt, which are sent off by the purchaser without the knowledge of the merchant, such purchaser acquires no title to the goods, but will be liable to the merchant for the value thereof, and for any damages he has sustained by reason of the taking and carrying away of the goods. But he will not be liable for the value of other goods packed up and sent off at the same time by the salesman to other creditors of his employer, unless it can be shown that he aided, assisted, and concurred in their being so taken and sent away. *Peshine v. Shepperson*, 94 D. 468.

Trover will lie: Against an officer who sells without notice property seized under process. *Wright v. Spencer*, 18 D. 76.

Against one who hires a horse to travel a certain distance, and goes farther; but if the owner receives payment for the hire of the horse for the actual distance traveled, the hirer is not liable in trover, although the horse may have been injured. The owner's remedy is case. *Rotch v. Hawes*, 22 D. 414.

Against a broker purchasing property from one who has no title, for value, and *bona fide*, and shipping it to his principal. *Williams v. Merle*, 25 D. 604.

Against one who aids and abets another in keeping property from its rightful owner. *Scott v. Perkins*, 48 D. 470.

Against a party to whom live-stock has been delivered, with power to sell them to pay for their keeping, if he convert them to his own use. *Whitlock v. Heard*, 48 D. 73.

Against a purchaser in good faith of stolen goods, if he has sold them subsequently. *Courtis v. Cane*, 76 D. 174.

Trover will not lie: Against a servant, for goods bought by master at unauthorized sale by a mortgagor in possession, and delivered by the mortgagor to the servant to be carried to his master, where the servant carries and delivers them, but has no knowledge of the want of authority to sell, and is guilty of no tortious act. *Burditt v. Hunt*, 43 D. 289.

Against an auctioneer, where he receives and sells stolen goods in the regular course of business, and pays over the proceeds of sale to the felon without notice that the goods were stolen. *Royers v. Huie*, 56 D. 363.

Against the personal representatives for a conversion by the deceased in his lifetime. *Chaplin v. Barrett*, 75 D. 731.

Against one who has received, in good

faith, and without gross negligence, stolen coupons of United States bonds, and has sold them and paid over the proceeds to his principal. *Spooner v. Holmes*, 3 R. 491.

Against one who hires a horse to drive to a particular place, and in returning takes a wrong road by mistake, and on discovering his mistake takes what he considers the best way back, which carries him by a circuit through another town. *Spooner v. Manchester*, 43 R. 514.

Against a railway conductor permitting a passenger to travel on his train with goods which the conductor knows to have been stolen, and thus escape, where he did not know that the passenger was the thief nor that the plaintiff was the owner. *Randlette v. Judkins*, 52 R. 747.

7. What amounts to a conversion, generally.* — A person may be guilty of a conversion without having the actual possession of the property. *Hall v. Amos*, 17 D. 42.

To constitute a conversion sufficient to support trover, it is not necessary to show a manual taking, nor that the defendant has applied it to his own use; but assuming a right of disposal, and exercising an exclusive right, constitutes a conversion. *Bristol v. Burt*, 5 D. 264; *Webber v. Davis*, 69 D. 87.

Any intermeddling with the property of another, in a manner subversive of the owner's dominion over it, is sufficient evidence of a conversion. *Reid v. Colcock*, 9 D. 729; *Allen v. Crary*, 25 D. 566.

Conversion is any wrongful exercise or assumption of authority, personally or by procurement, over another's goods, depriving him of their possession. *Hale v. Ames*, 15 D. 150.

Where a vendee takes possession and lets the premises, together with the use of chattels thereon belonging to the vendor, and receives pay for such use, there is sufficient evidence of a conversion. *Miller v. Plumb*, 16 D. 456.

One who is in possession of another's property is bound to surrender it upon demand; but if he does not know the owner, claims no property in himself, and is willing to give it up upon being exonerated, he is not guilty of a conversion. *Dowd v. Wadsworth*, 18 D. 567.

A tortious taking of another's chattel is a conversion. *Woodbury v. Long*, 19 D. 345.

The gist of trover is the disposing or assuming to dispose of another's goods without his authority. *Everett v. Coffin*, 22 D. 551.

A purchaser from a vendee in a conditional contract of sale, before the performance of the condition, is guilty of conversion when he treats and claims the property as his own.

* Conversion, what is, see note, 18 D. 151-153.

By finder of lost article, see note, 18 D. 55-56.

For Index to Notes in American Decisions and American Reports, see Volume I.

and states that the owner must look to the original vendee for payment. Trover may therefore be maintained against him in the absence of any demand for possession. *Houston v. Dyche*, 33 D. 130.

An unlawful taking of goods out of the possession of the owner, with intent to convert them to the use of the taker, is itself a conversion, and not merely evidence of it. *Clark v. Whitaker*, 48 D. 160.

A party is guilty of conversion, though he did not personally engage with the person who actually took possession of the property, and used, consumed, and disposed of it, if he co-operated with him in those acts by aiding and abetting him in doing them, and by his subsequent recognition, approval, and adoption of them; and so, also, is a party who, though having no active personal agency in the taking of the property or in the subsequent use or disposition of it, yet advised and assisted another in the measures adopted for the taking of it, received benefit from the taking, and subsequently approved and adopted it. *Ib.*

Any act of ownership over the property taken, which is inconsistent with the true owner's right of dominion over it, is evidence of a conversion. *Ragsdale v. Williams*, 49 D. 406; *Woodman v. Hubbard*, 57 D. 310.

To constitute conversion, possession, with a claim of title adverse to that of the true owner, is sufficient. *Maxwell v. Harrison*, 52 D. 335.

A breach of contract by a positive misconduct involving a loss or destruction of property bailed is a conversion. *Phillips v. Brigham*, 71 D. 227.

Where a party is ignorant of the title of a third person at the time he enters into a contract of exchange, but is afterwards informed of it, and then continues to claim and use the article exchanged, he is guilty of conversion, and an action of trover may be maintained against him without a demand. *Porter v. Foster*, 37 D. 59.

Trover cannot be maintained by an attaching officer against a receptor or bailee of the attached property, if it becomes materially damaged or lessened in value through the mere negligence or non-feasance of the bailee, as such neglect or non-feasance does not amount to a conversion. *Tinker v. Merrill*, 94 D. 345.

Conversion to sustain trover consists either in appropriation of the property to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim of title inconsistent with his own. *Ib.*

Conversion is never established by proof that property intrusted to defendant has been materially damaged or lessened in value

through the latter's mere negligence or non-feasance. *Ib.*

A sale of property by the hirer of it is a conversion thereof, and puts an end to the contract between the hirer and the latter, and the latter may maintain trover therefor against the purchaser, before the expiration of the time for which it was let. *Sanborn v. Colman*, 23 D. 703.

Where a party sells property claimed by another, and the proceeds are placed in the hands of a third person to abide a decision of their respective rights, and such party persuades the third person to pay him the sum he has received, without the privity or consent of the other, he waives the benefit of any arrangement made with the third person, and becomes liable at once to the other party if he was the owner of the property, though no decision has been rendered nor demand made of the defendant. *Higgins v. Brown*, 37 D. 54.

A person is guilty of conversion who sells property of another without the owner's authority, although he acts as the agent or servant of one claiming to be the owner, and is ignorant of his principal's want of authority. *Kimball v. Billings*, 92 D. 581.

Sawing trees out by and belonging to another, into logs, is a conversion. *Baker v. Wheeler*, 24 D. 66.

The fact that one takes possession of stolen property, as depositary or common carrier, will not charge him with conversion, but some action by which it is converted into something else, as into money or other property, either by sale, exchange, or collection, or some intermeddling inconsistent with the owner's right should be found, in order to make the person responsible who has obtained innocent possession. *Koch v. Branch*, 100 D. 324.

A defendant is not guilty of conversion where a wagon belonging to the plaintiff is brought to his premises and left there, and the plaintiff makes a demand for it, but of no one in particular, and there was no assertion of title on the part of the defendant, and no refusal to deliver the wagon, nor offer or threat to prevent the plaintiff from taking possession; where, in fact, throughout the whole transaction the defendant was entirely passive. *Ragsdale v. Williams*, 49 D. 406.

It is conversion if one hire a horse to be driven to one place and voluntarily drive him to another, and trover will lie. *Woodman v. Hubbard*, 57 D. 310.

Buying a horse from one who had no right to sell him, and subsequently exercising dominion over him by letting him to another person, amount to a conversion, although the buyer believed his title to the horse to be perfect; and no demand by the owner is necessary before commencing an action for the conversion. *Gilmore v. Newton*, 85 D. 749.

For Index to Notes in American Decisions and American Reports, see Volume I.

If one drives the cattle of another upon a highway in a direction known to him to be opposite to the owner's residence, and they are lost in consequence, he is liable for conversion, although he did not intend it. *Tobin v. Deal*, 50 R. 345.

8. What is a conversion as between persons occupying one of the legal relations. — In general, one joint tenant, tenant in common, or coparcener of a chattel cannot maintain trover against another merely because he is in exclusive possession. But if one joint owner destroy the property or do any act without the consent of the other, inconsistent with their joint ownership, or tending to destroy the other's joint interest or the property itself, trover will lie. *Cowan v. Buyers*, 5 D. 668.

If one joint owner of a chattel sells the entire chattel, it is a conversion for which trover lies. *Permyer v. Kelly*, 54 D. 177.

The agent of one joint owner selling entire chattel is guilty of conversion, whether he had notice of a co-tenant's rights or not, and is liable to an action of trover by a co-tenant, where neither negligence nor any fault whatever is imputable to the plaintiff. *Ib.*

A bailee may have trover against the bailor or his vendee, where the possession of the property has been fraudulently taken from the bailee in contravention of his rights. *McConnell v. Maxwell*, 26 D. 428.

A bailee is liable in trover where he refuses to deliver the property to one whom he knows to be the owner thereof, and from whom his bailor obtained the property wrongfully. *Doty v. Hawkins*, 25 D. 459.

An abuse by the bailee of the thing loaned or hired is a willful conversion, rendering him liable in trover, and precluding a return of the property in mitigation of damages, especially where it is essentially injured; as where an omnibus, hired for use only in a particular place, is driven with a heavy load to a different place, and damaged so as to require repairs. *Hart v. Skinner*, 42 D. 500.

Where a lessee of a chattel sells it during the continuance of the term for which it was leased, the lessor may maintain trover therefor. *Swift v. Moseley*, 33 D. 197.

9. Necessity of demand before suit. — Demand for a watch left with a watchmaker for repairs, and stolen from him through his negligence, is not necessary before bringing suit for the value of the watch, as the law requires no man to do a vain and nugatory thing. *Halyard v. Dechelman*, 77 D. 585.

10. — of tender of charges claimed by defendant. — Trover for goods may be sustained though a lien thereon exists in favor of defendant, if before the commencement of the action he had converted them by an absolute sale thereof. In such case no tender of the amount of the lien need be made, but the defendant may recoup the

damages to the extent of such amount. *Saltus v. Everett*, 32 D. 541.

11. Sufficiency and effect of the demand. — A demand by letter upon another to restore goods belonging to the writer is not sufficient to constitute a conversion, if no notice is taken of it; but if an answer is sent falsely, denying the possession of such goods, the demand becomes sufficient to charge the latter with a conversion. *Pattes v. Gilmore*, 45 D. 385.

Where a demand is made upon one member of a firm, after its dissolution, it is not sufficient to charge the other members with conversion of property delivered to the firm. *Ib.*

Plaintiff in an action of trover may make demand by agent. *Buel v. Pumphrey*, 56 D. 714.

Where the owner of property demands its return from the bailee, who has violated his contract of bailment, or makes any other effort for its recovery, this is not of itself a waiver of a previous conversion. *Cobb v. Wallace*, 98 D. 435.

12. When a refusal is a conversion. — A seizure of goods by an officer is not tortious, where he takes them under regular process in favor of a creditor of a fraudulent vendee, and therefore the vendor, to enable him to maintain trover therefor against the officer, must make demand upon him; but if demand being made, the officer refuses to deliver them without requiring any evidence of the title of the person making the demand, he will be presumed to have waived his claim to such information. *Thompson v. Rose*, 41 D. 121.

A declaration that a party "will not deliver the goods to any person whatsoever," when a demand has been made, will be deemed a refusal, and, *quoad* such goods, a conversion. *Buel v. Pumphrey*, 56 D. 714.

An agent making demand for delivery of property belonging to his principal must, as a general rule, prove his authority to make the demand; where, however, the party upon whom the demand is made makes no objection to the authority of the agent to make the demand, but puts his refusal to deliver upon other grounds, which cannot in point of law be supported, such refusal is a clear waiver of all objection to the authority of the agent, and amounts in law to a conversion. *Robertson v. Crane*, 61 D. 520.

A borrowed from B, an incorporated bank, four thousand dollars in confederate treasury notes, to be returned within ten days, and left with B, as security, four thousand dollars in its own bills, the latter being more valuable than the former. A, within the limited time, offered to return four thousand dollars in confederate treasury notes, and demanded back the four thousand dollars he had left with B as security. The latter refused to take the one or return the

For Index to Notes in American Decisions and American Reports, see Volume X.

other. *Held*, that B's refusal to return the four thousand dollars in its own bills was a conversion of those bills, and that trover lay for such conversion. *Abrahams v. Southwestern R. R. Bank*, 7 R. 33.

A, having agreed to erect a brick building for B, and to furnish all the materials, wrongfully took bricks belonging to C, but without B's direction. C thereupon notified B of the facts, and that he should look to him for payment, if the bricks were used in building the house. They were so used, and B paid A the sum specified in the agreement. *Held*, that B was liable to C for the value of the bricks. *Dawson v. Powell*, 15 R. 745.

A refusal of a party to deliver what *in foro conscientia* belongs to him, and ought to remain in his possession, is not a wrongful conversion. *Graham v. Warner*, 28 D. 65.

A refusal of goods after demand is no conversion, if the circumstances show that it is caused by a reasonable apprehension of the consequences, in a doubtful matter. *Fletcher v. Fletcher*, 28 D. 359.

A refusal from misapprehension of the law may be reasonable, and so prevent its having the effect of a conversion; therefore, where one intrusted with notes for collection was summoned, by trustee process, in an action instituted against his principal, and because of such process refused to deliver the notes upon order from his principal, there was no conversion, though such notes were not within the meaning of the act authorizing trustee process. *Id.*

Mere non-delivery by a common carrier will not constitute a conversion, nor will a refusal to deliver, on demand, if the goods have been lost through negligence, or have been stolen; there must be proof of a wrongful disposition or wrongful withholding. *Magnia v. Dismore*, 26 R. 608.

A qualified refusal by a common carrier to deliver goods on demand of one entitled to them does not constitute a conversion, if the qualification is reasonable and in good faith; and where the person making demand omits to produce any evidence of title to or to identify himself as the consignee, it is a question for the jury whether the qualification is reasonable, and the true reason for not delivering the goods. *McEntee v. New Jersey Steamboat Co.*, 6 R. 28.

Defendant received bills of exchange for acceptance, and on demand for them by the persons entitled thereto, he looked for them, but not finding them, said he might have burned them up with papers he considered of no value. *Held*, that he was not liable in trover, there being no evidence of a voluntary or intentional destruction or loss of the bills. *Salt Springs Nat. Bank v. Wheeler*, 8 R. 564.

13. — or evidence of a conversion. — A demand and refusal are not in themselves conversion, but *prima facie* evidence

of a conversion, which may be rebutted by other evidence. *Packard v. Getman*, 16 D. 476; *Lockwood v. Bull*, 13 D. 539; *Irish v. Cloyes*, 30 D. 446; *Denell v. Odell*, 38 D. 628; *Hawkins v. Hoffman*, 41 D. 767; *Thompson v. Rose*, 41 D. 121; *Magee v. Scott*, 55 D. 49; *Carr v. Clough*, 59 D. 245; *Webber v. Davis*, 69 D. 87; *Cobb v. Wallace*, 98 D. 435.

An absolute refusal to deliver property creates an inference in law that there has been a conversion; but one sued for a conversion should be permitted to show that his refusal to deliver the property was not unconditional, but was accompanied by a reasonable qualification or requirement. *Dent v. Chiles*, 26 D. 350.

Demand and refusal are evidence of conversion only where the property whereof they were predicated was in the possession of the party refusing. *Irish v. Cloyes*, 30 D. 446.

Conversion evidenced by an unqualified refusal is not obviated by subsequent acts in recognition of the owner's rights; therefore, where several days after an unqualified refusal to surrender to plaintiff his property, in defendant's possession, said defendant pointed out the property to a tax collector as that of plaintiff, and the collector thereupon made distress upon and finally sold the property, and applied the proceeds in discharge of plaintiff's tax bill, this was held not to obviate the conversion evidenced by the refusal. *Id.*

Demand and refusal are no evidence of conversion, when the defendant makes no claim to the property himself, but has a sufficient and well-grounded doubt as to the plaintiff's title, and refuses to give up the property until he has ascertained to whom it belongs; *aliter*, if he has not sufficient grounds to doubt plaintiff's title. *Zachary v. Pace*, 47 D. 744.

A defendant withholding goods from plaintiffs' bailee is guilty of conversion after demand; consequently, where goods belonging to the plaintiffs were in the possession of a third person who was doing some work upon them, and the defendant obtained possession of them, and on the demand of the third person for the goods to give them to the plaintiffs, refused to give them up, the demand and refusal are evidence of a conversion. *Bradley v. Spofford*, 55 D. 205.

A demand by an original owner and refusal by the converter, after converted property has passed into an improved condition, may be regarded as evidence of a conversion after the first taking, so as to admit of the owner recovering in trover the value of the property in its improved state. *Moody v. Whitney*, 61 D. 239.

Trover for goods, the possession whereof was originally lawful in defendant, can be maintained only by proof of some subsequent tortious act of defendant amounting to a conversion. *Fletcher v. Fletcher*, 28 D. 359.

For Index to Notes in American Decisions and American Reports, see Volume L.

An assertion of ownership over property in one's possession is not evidence of conversion, where made to a stranger not within sight of the property, nor in the presence of the real owner. *Irish v. Cloyes*, 30 D. 446.

14. In case of actual conversion, demand and refusal unnecessary. — Proof of demand and refusal in trover is not necessary where there has been an actual conversion. *Newsom v. Newsom*, 19 D. 739; *Jewett v. Patridge*, 28 D. 173. *Houston v. Dyche*, 33 D. 130; *Webber v. Davis*, 69 D. 87; otherwise if the possession was at first legal, and the holding afterwards tortious. *Buel v. Pumphrey*, 56 D. 714.

A party purchasing property from one who has no right to sell, and holding it to his own use, is guilty of a direct act of conversion without any demand and refusal. *Hyde v. Noble*, 38 D. 508.

A tortious conversion consists in a wrongful asportation of a chattel with intent to appropriate it to taker's use, and no demand and refusal are then necessary to maintain action. *Harker v. Dement*, 52 D. 670.

No demand is necessary to be made for the possession of stolen goods upon an innocent purchaser, after he has sold them to another person, for the reason that such sale is an actual conversion, and in such case a demand is not necessary. *Courtis v. Cane*, 76 D. 174.

In an action by the assignee of an insolvent debtor for alleged conversion of goods of debtor by a mortgagee of a portion of the goods, who has sold under the mortgage, besides the mortgaged goods, similar goods of the debtor not included in the mortgage, but intermingled and confused with the mortgaged goods, although the goods were sold and converted into money before any demand was made by the assignee upon the defendant, still, for the purpose of establishing a conversion, it is sufficient to show that the defendant has been in possession of particular parcels of property belonging to the plaintiff, which he has unlawfully converted to his own use by an actual sale, and an appropriation of the proceeds to his own benefit, and the plaintiff may recover for whatever articles belonging to him he can show have been thus disposed of, and need not show any demand and refusal. *Simpson v. Carleton*, 79 D. 707.

II. PROCEDURE.

15. Rules relative to parties. — An action of trover may be maintained against two or more defendants, if the evidence establishes a conversion by all. *Cowan v. Buyers*, 5 D. 668.

All the plaintiffs must recover, or none, in an action of trover for converting sundry chattels. *Pettibone v. Phelps*, 35 D. 88.

Where others have joined with a party in the conversion of property, it is not neces-

sary, in an action against him for the tort, to join the others. *Puttee v. Gilmore*, 45 D. 385.

A tenant in common may recover in trover against a stranger his aliquot share in a chattel, unless a plea in abatement is interposed; and after his recovery his co-tenant may recover likewise from the same defendant, and no plea in abatement can be interposed. *Harker v. Dement*, 52 D. 670.

A joint action in trover cannot be maintained against the seller, who is a tort-feasor and the bona fide purchaser of a chattel. *Larkins v. Eckmire*, 54 D. 651.

16. Declaration. — The declaration in trover for conversion of promissory notes need not state their dates or time of payment. *Bank of New Brunswick v. Neilson*, 29 D. 691.

A count in such a declaration, which describes the notes as "eleven other promissory notes, having the like drawers, indorsers, descriptions, and value as the said promissory notes in the first count mentioned," is bad on special demurrer, because it mixes them all together, without distinguishing the drawer and indorser of one note from another. *Id.*

Reference may be made to a prior count, to avoid great prolixity. *Id.*

In trover, goods should be described with convenient certainty, that the jury may know what is meant, and a count describing the goods as "divers goods, to wit, a lot of goods being in a store at Alton," is entirely uncertain, both as to the kind and quantity of goods, and is bad. *Edgerly v. Emerson*, 55 D. 207.

Plaintiff cannot recover for an interruption to his business, etc., in an action of trover, without a special count or averment in the declaration to that effect. *Agnes v. Johnson*, 62 D. 303.

17. Matters of defense. — One who has delivered goods to a commission merchant for sale may maintain trover against an officer who seizes them upon a writ against such merchant, and the officer cannot set up, in bar, any lien for expenses which the merchant may have upon the goods. *Jones v. Sinclair*, 9 D. 75.

That the defendant acted without fraud, and in ignorance of the plaintiff's rights in disposing of the goods, is no defense in an action of trover. *Everett v. Coffin*, 22 D. 551.

That the defendant acted under instructions from another, who himself had no authority, is no defense in such a case. *Id.*

The declarations made by a party, at the time, in response to a demand for the possession of property, may be received in evidence in his favor, to show that his refusal was qualified and reasonable, and not of a

* Title in third person, when a defense, see note, 100 D. 742-744.

For Index to Notes in American Decisions and American Reports, see Volume I.

character to render him liable for a conversion. *Dent v. Chiles*, 26 D. 350.

Evidence that a note was fraudulently obtained is admissible in bar of an action of trover, brought by the obligee therein against the obligor, for the conversion thereof by the latter; and such evidence may be given under the general issue. *Graham v. Warner*, 28 D. 65.

In an action of trover, the defendant may show in bar of the action anything that tends to establish that the subject of the suit was not the property of the plaintiff, that the defendant's possession or conversion is not unlawful, or that the thing itself is of no value. *Id.*

The application of converted property in discharge of the original owner's liabilities, with respect to it, will go in mitigation of damages, in trover brought for the conversion. So if the property converted was pointed out to a tax collector as that of plaintiff, and was thereupon by the collector levied upon and sold, and the proceeds of the sale applied in discharge of plaintiff's tax bill, this may be shown in mitigation. *Irish v. Cloyes*, 30 D. 445.

A right of action for a conversion is not waived by plaintiff's request to a tax collector who has seized the property as that of plaintiff, to postpone his sale. *Id.*

An officer may pay off the lien of a common carrier for freight on goods, in order to get possession of them, and upon doing so will stand in the place and have the rights of such carrier. But if, upon demand being made upon him by a claimant of said goods, he sets up no claim of lien, but makes an unqualified refusal, he will not be allowed afterwards to set up such lien as a defense, in an action of trover for the goods. *Thompson v. Roe*, 41 D. 121.

A defendant in trover cannot return property in mitigation of damages, where the taking was willful, and the property has been essentially injured, and where no rule for such return has been applied for. *Hart v. Skinner*, 42 D. 500.

The rule for a return of property in trover must be applied for, as the matter rests primarily in the discretion of the court below. *Id.*

The motive influencing defendant in a tortious conversion is material only in repelling a recovery of exemplary damages. *Harker v. Dement*, 52 D. 670.

Trover founded on possession can only be defeated when the true owner is known; a mere possibility that such owner will afterwards be discovered will not defeat such action. *Branch v. Morrison*, 69 D. 770.

The record of proceedings to try the right to personal property levied on, in which the title is adjudged against the claimant, is conclusive against him in an action of trover by him for the property against the

purchaser under the execution. *Shirley v. Fearn*, 69 D. 375.

A judgment and *distingas* against a claimant in a proceeding to try title to personal property levied on may be introduced by the purchaser under the *distingas* in an action brought by the claimant against him for the property, even though he acquired no title by his purchase, for it is competent for him to show that the plaintiff has no title, and is therefore not entitled to recover. *Id.*

It is no defense to an action of trover for property sold by defendant as agent of another, that the property was government bonds payable to bearer, if the principal was not the *bona fide* purchaser. *Kimball v. Billings*, 92 D. 581.

If the owner of property, with knowledge of facts constituting its conversion, again takes possession of it as owner, this will be evidence of a waiver of the conversion. *Cobb v. Wallace*, 98 D. 435.

A defendant in trover cannot show title in a third person with whom he has no privity, either to defeat the action or in mitigation of damages. *Harker v. Dement*, 52 D. 670; *Weymouth v. Chicago etc. Ry Co.*, 84 D. 763. Contra, *Boyce v. Williams*, 37 R. 618.

In an action of trover, when neither party has title to the property, the defendant may show title in a third person, under whom he does not claim, in order to defeat the plaintiff's action. *Smoot v. Cook*, 100 D. 741.

Possession of personal property is *prima facie* evidence of title; and if the defendant in trover had possession after the plaintiff had possession of the same property, such possession is sufficient evidence of title to sustain his defense until the plaintiff should prove title. *Id.*

A purchase in good faith, from one who has no title and no right to transfer the property, will not ordinarily constitute a defense to an action for its conversion; but this rule does not apply where the act of appropriation can be justified, as having been authorized in any manner by the owner of the property. *Hills v. Snell*, 6 R. 216.

R. pledged his pianos to F., who employed him to assist him in caring for and renting them. R. rented one of them in his own name to D. F. notified D. that he was the owner, and D. agreed to hold it for and return it to him at the end of the lease. To satisfy his own debt, R. subsequently sold it to P. and assigned to him the lease, P. having notice of F.'s claim. P. notified D. of the sale, and D. took a lease from him. In an action by P. to recover the piano from D., — held, that D. might effectually set up the title of F. in defense. *Pakntag v. Doutrick*, 43 R. 245.

In trover against a sheriff's officer for a wrongful seizure of chattels on execution, the defendant may show that the plaintiff

For Index to Notes in American Decisions and American Reports, see Volume I.

had no right of possession in his own name. *Stearns v. Vincent*, 45 R. 37.

A chattel mortgagor sued a third person for conversion of the mortgaged property. Subsequently the mortgagees seized the property under the mortgage, sold part of it, and transferred another part to the defendant. The mortgagor made a second mortgage of the property pending the action. *Held*, 1. That the making of the second mortgage was not an abandonment of the cause of action; but 2. The seizure by the mortgagees should be considered in mitigation of damages. *Dahill v. Booker*, 54 R. 465.

18. The plea, or answer. — A plea in bar amounting to the general issue in trover is bad. *Spalding v. Preston*, 50 D. 68.

19. What evidence is admissible and sufficient. — Possession, coupled with a claim of title and acts of ownership, is evidence of a conversion. *Dowd v. Wadsworth*, 18 D. 567.

The admission by one of the defendants in trover that they had received and disposed of the goods, made to one of the original consignees, who had inquired what had become of them, is sufficient evidence of a demand and refusal. *Everett v. Coffin*, 22 D. 551.

More formal demand is unnecessary after such an admission. *Ib.*

In trover against a purchaser from a vendee, the testimony of others who sold goods to the vendee about the same time is admissible to show that the vendee was then insolvent, and that he had no expectation of paying for the articles he purchased. *Rowley v. Bigelow*, 23 D. 607.

The production of a justice's execution without the judgment is sufficient to maintain an action by a constable against a stranger for taking the goods seized thereunder. *Spoer v. Holland*, 24 D. 37.

A constable's indorsement on the execution is evidence to identify the goods levied on, in such a case, and may be amended if insufficient for that purpose. *Ib.*

A constable's declarations are perhaps inadmissible to show what goods were levied on in such an action. *Ib.*

To maintain trover against an innkeeper for goods intrusted to him by a guest, actual conversion must be shown. *Hallenlake v. Fish*, 24 D. 88.

Demand and refusal are not sufficient to prove conversion by an innkeeper where the defendant has not, at the time, possession or control of the goods. *Ib.*

An action of trover by a person entitled to an estate in remainder in a female slave, to recover for a conversion alleged to have occurred during the existence of a precedent life estate, imposes upon the plaintiff the burden of proving the slave to have been alive at the time his estate in remainder vested in possession. *Lewis v. Mobley*, 34 D. 379.

The fact of a party's removal from the state is not evidence of conversion of property previously consigned to him for sale. *Pattis v. Gilmore*, 45 D. 385.

Possession of property by a defendant need not be proved in an action for its conversion; in many cases the parting with the possession is the very fact upon which the plaintiff relies to establish a conversion. *Zachary v. Pace*, 47 D. 744.

Evidence not tending to prove a natural and proximate consequence of the tortious act alleged in the complaint is inadmissible for plaintiff, in an action for the wrongful taking and withholding of slaves. *Burton v. Holley*, 65 D. 401.

A plaintiff in trover claiming title under a deed of joint owners must show its due execution by all the grantors; it is inadmissible to show a transfer of the interest of one owner, unless it is offered for this purpose alone. *Shirley v. Fearn*, 69 D. 375.

The guilt of defendant need not be proved beyond a reasonable doubt, in trover for goods stolen, to entitle the plaintiff to a verdict; but the jury are to decide according to the weight of evidence, as in other civil cases. *Sinclair v. Jackson*, 74 D. 476.

Testimony that plaintiff stated to defendant that he had witnessed improper intercourse between defendant's wife and a third person is inadmissible, in an action of trover for promissory notes, to show that the notes were given to the defendant or his wife as compensation for injury done her, or that the notes were voluntarily given to her. *Robbins v. Packard*, 76 D. 134.

In action by an assignee in insolvency for alleged conversion of debtor's goods by a mortgagee of a part of the goods, who has sold all of the goods, it is not error to admit, as evidence of the conversion of the property claimed, the reply of the mortgagee, to a demand by the assignee for the goods, that "he was sorry that he could not accommodate him, and he had been expecting this demand for several days." *Simpson v. Carleton*, 79 D. 707.

A, the tenant of timber-land of B, cut timber on that land, and also on adjoining land belonging to others, and sold it to C. B replevied the timber and converted it to his own use. In trover by C against B therefor, — *held*, that the *prima facie* presumption was, that A had the right to cut the timber on the adjoining property. *Wielack v. Grist*, 52 R. 473.

20. The damages recoverable. — 1. Generally. — If the defendant, in an action of trover, return the property before action is brought, and the same be accepted by the owner, he can only recover for the partial conversion. *Hepburn v. Sewell*, 9 D. 512.

Damages in trover are not severable where an entire sum is recovered for the conversion of articles for some of which trover will not

For Index to Notes in American Decisions and American Reports, see Volume I.

He, but the judgment must be reversed. *Miller v. Pham*, 16 D. 456.

A constable can recover only the amount of his execution in trover against an assignee of the debtor who has taken the goods after levy. *Spoor v. Holland*, 24 D. 37.

A rule of damages is a question of law in an action of trover, and the jury are to ascertain the quantum of damages according to the rules of law. *Baker v. Wheeler*, 24 D. 66.

A defendant in trover who repudiates possession of goods under contract, and claims by a wrongful conversion, cannot claim the benefit of the contract in mitigation of the damages. *Backenstoss v. Stahler*, 75 D. 592.

Whether the same rule of damages should be adopted in cases of conversion where the wrongful taking was by design as in those cases where it arose from mistake, *quere*. *Weymouth v. Chicago etc. R'y Co.*, 84 D. 763.

One who converts a certificate of stock must be regarded as having converted shares which the certificate represents, so that he cannot claim to be liable only for nominal damages for such conversion. *Morton v. Preston*, 100 D. 146.

2. *Measure of damages.**—The measure of damages in trover is the value of property at time of conversion. *Moody v. Whitney*, 61 D. 239; and interest from the time of conversion. *White v. Martin*, 26 D. 365; *Buford v. Fannen*, 1 D. 615; *Hepburn v. Sewell*, 9 D. 512; *Baker v. Wheeler*, 24 D. 66; *Clark v. Whitaker*, 48 D. 160; *Lee v. Mathews*, 44 D. 498. But a jury may go even beyond this. *Backenstoss v. Stahler*, 75 D. 592. Yet the jury cannot give vindictive damages. *McDowell v. Murdock*, 9 D. 684.

An agent who purchases female slaves, not knowing at the time that the title thereto was not in his vendor, will not be liable for the value of children of such slaves born after the delivery to his principal and before demand made or suit brought. *Lee v. Mathews*, 44 D. 498.

The old rule for measure of damages in trover, viz., the value of the thing at the time of conversion, and interest thereon up to the entry of judgment, has no application to the remedial system of Texas. In that state the amount of damages will vary according to the particular property to which it may be applied. *Prilgin v. Strickland*, 58 D. 124.

Plaintiff is entitled to recover the highest value of the property up to the time of the verdict. *Kid v. Mitchell*, 9 D. 702.

The measure of damages where an officer sells, without notice, property seized under

protest, is the diminution in price produced by the irregularity of the sale. *Wright v. Spencer*, 18 D. 76.

The owner of property tortiously taken is entitled to its enchained value until it has been so changed as to alter the title. *Baker v. Wheeler*, 24 D. 66.

The measure of damages for conversion of property by mistake, at a place where it was about to be sold, where the defendant removes it to another town and mixes it with other similar property so that it cannot be identified, is the value of the property at the place and time of conversion, with such increase as it may have received from fluctuations of the market and other causes independent of defendant's acts. *Weymouth v. Chicago etc. R'y Co.*, 84 D. 763.

The owner of logs tortiously taken and converted into lumber is entitled to recover the value of the lumber. *Baker v. Wheeler*, 24 D. 66.

Damages in trover for timber cut and hauled are confined to the value of the timber at the time of its severance from the freehold, if the possession of the converter subsequent to that time has been uninterrupted. *Moody v. Whitney*, 61 D. 239.

The measure of damages in trover for notes or other choses in action, executed by persons other than the defendant, is the value of the property, which is *prima facie* the amount due; but this may be rebutted by proof of its actual value, which may be much less, through the inability of the maker to pay. *Robbins v. Packard*, 76 D. 134.

The measure of damages in trover for notes executed by defendant is the amount due thereon at the time of the trial, without reference to the ability of the defendant to pay. *Id.*

The plaintiff in trover for notes of a third person may recover the amount due thereon at the time of the trial, where the notes were notes given by a vendee to the plaintiff for the purchase price of land, the plaintiff giving the vendee a deed, to become good upon the payment of the notes, and afterwards the vendee sold and quitclaimed the land to the defendant, who agreed with the plaintiff and vendee to pay the plaintiff the amount then due on the notes; and subsequently the defendant became alarmed about the title, because of certain mortgages outstanding of record, and the plaintiff thereupon, to assure him, gave him a deed of the property, and delivered to him the notes, to be held until the property should be relieved of the mortgages; and the defendant, with the plaintiff's consent, sold the land to a third person, and the plaintiff, having performed the agreed condition, demanded the notes, which the defendant refused to deliver. *Id.*

The owner of a slave unlawfully detained may recover not only his value, but also

* Measure of damages in trover, generally, see note, 11 D. 576-578.

Measure of damages when owner of special interest is plaintiff, see note, 52 D. 678-680.

Damages, measure of, where property is taken by mistake, see note, 36 E. 770.

Damages, measure of, where value of property has been increased by the wrong-doer, see notes, 33 E. 232-236; 54 E. 421-423; 24 L. 70-83.

For Index to Notes in American Decisions and American Reports, see Volume I.

damages for the value of his services from the time of the demand up to the time of the trial. And the jury may find the value and the specific damages in distinct amounts. *Pridgen v. Strickland*, 58 D. 124.

21. Judgment, and how enforced. — A judgment and verdict in trover are conclusive as to title to the goods claimed in another action for the same goods, where it is shown by parol that the question of title was the only matter in issue before the jury. *King v. Chase*, 41 D. 675.

22. Effect of judgment to transfer title.* — The right of property, in the subject-matter of an action of trover, is not vested in the defendant until judgment is satisfied. And upon such satisfaction the defendant is entitled to the increase of the property, between the time of conversion and satisfaction, and must bear the loss that has occurred. *Hepburn v. Sewell*, 9 D. 512.

A satisfaction of a judgment in trover passes the title to the defendant, the change so made having relation back to the time of the act of conversion sued upon, from which period defendant will have the benefit of all natural increase of the property. *White v. Martin*, 26 D. 365.

One electing to proceed in trespass or trover for taking or conversion of personal property abandons his property to the wrongdoer at that time, and proceeds for its value; so that when judgment is obtained and satisfaction made, the property is vested in the defendant by relation as of the time of the taking or conversion. *Acheson v. Miller*, 59 D. 663.

An unsatisfied judgment in trover does not give the defendant title to the property in question. *Atwater v. Tupper*, 29 R. 674.

TRUST DEED.

Mortgage distinguished from, see MORTGAGES, 6.

TRUST PROPERTY.

Distribution of, see TRUSTS, 64.

Purchase of, by trustee, see TRUSTS, 35.

Right of beneficiary to follow, see TRUSTS, 57.

When reached in creditor's suit, see CREDITORS' SUIT, 13.

TRUSTEES.

Appointment and powers of, see TRUSTS, II. Charity valid where no trustee named, see CHARITIES, 10.

Competency of, as witnesses, see WITNESSES, 61.

Conveyance to wife through, see HUSBAND AND WIFE, 94.

* Title, when passes by judgment in trover, see note, 11 D. 522-523.

Husband as trustee for wife, see HUSBAND AND WIFE, 97.

In insolvency, appointment and powers of, see INSOLVENCY, 12.

In insolvency, suits by, see INSOLVENCY, 15.

Injunctions against acts of, see INJUNCTION, 36.

Necessity of, in articles of separation, see MARRIAGE AND DIVORCE, 45.

Of corporation, see CORPORATIONS, 156.

Of insolvent railroad company, see RAILROAD COMPANIES, 14.

Of school districts, powers and duties of, see SCHOOLS, 9, 10.

Power of corporations to take as, see CORPORATIONS, 96.

Representative, when liable as, see EXECUTORS AND ADMINISTRATORS, 75.

When agent is trustee for principal, see AGENCY, 46.

When chargeable with interest, see INTEREST, 10.

When limitation begins to run for or against, see LIMITATIONS OF ACTIONS, 28.

Wife as trustee for husband, see HUSBAND AND WIFE, 98.

Who liable as, in trustee process, see ATTACHMENT, 9-19.

TRUSTS.

[Includes the relative rights, duties, and liabilities of persons, some of whom hold the legal title to property, the beneficial interest in which is in the others.]

Attachment of trust funds, see ATTACHMENT, 36.

Declarations of party to, as evidence, see EVIDENCE, 147.

Exception in statute of limitations in cases of, see LIMITATIONS OF ACTIONS, 72.

In favor of assignor for creditors, see ASSIGNMENTS, etc., 20.

Levying executions on lands held in trust, see EXECUTION, 41.

Mortgage distinguished from conveyance in trust, see MORTGAGES, 6.

Parol evidence to show creation of, by deed, see EVIDENCE, 113.

What lapse of time bars suits concerning, see LIMITATIONS OF ACTIONS, 53.

When beneficiary may sue, see ACTIONS, 8.

I. CREATION AND DURATION; INTERPRETATION, VALIDITY, ETC.

1. In General.

2. Requirements of the Statutes.

II. THE TRUSTEE.

1. Rights, Powers, and Duties of Trustees.

2. Liabilities of Trustees.

3. Death, Resignation, Removal, New Appointment, etc.

III. RIGHTS AND REMEDIES OF CERTAIN QUE TRUST.

For Index to Notes in American Decisions and American Reports, see Volume I.

I. CREATION AND DURATION; INTERPRETATION, VALIDITY, ETC.

1. In General.

1. Construction and validity of trusts, generally.*—A trust may be created for the benefit of a third person, as a creditor, without his knowledge at the time; and he may afterwards affirm the trust, and compel its execution. *Shepherd v. McEvers*, 8 D. 561.

A trust contrary to the avowed policy of the state will not be enforced through the equitable powers of the court. *Methodist Church v. Remington*, 26 D. 61.

A court of law will not entertain a question of validity of trusts, if an estate be conveyed to a grantee capable of taking the trust estate. *Miles v. Fisher*, 36 D. 61.

To constitute a direct trust, there must be,—1. A transfer to a competent person; 2. A fund or object transferred; 3. A *cestui que trust* or purpose to which the fund is to be applied. *Commissioners v. Walker*, 38 D. 433.

A trust is an obligation upon a person, arising out of confidence reposed in him, to apply property faithfully and according to such confidence. *Ib.*

A trust is created by an act of the legislature providing for "a sinking fund under the management of the auditor of public accounts and the president and cashier" of a specified bank, for the redemption of certain bonds. The officers named are trustees, and have the legal title to the money thus intrusted to them, and the power to loan it, and to sue for and recover it at law. *Ib.*

A trust of land created by will is of same effect as a trust created by deed. *Ross v. Barclay*, 55 D. 616.

Intent of a settlor in creation of a trust must be carried into effect, unless it contravenes some public policy of the law. *Wright v. Miller*, 59 D. 438.

A trust differs essentially from a contract, and will be enforced when the latter cannot be. *Crawford's Appeal*, 100 D. 609.

By an instrument in writing, D. assigned to his grandson, V., twelve thousand dollars in notes and mortgages, the amount to be taken by V. after the death of D., D. to retain the mortgages and notes during his life. There was no declaration of trust in the instrument in favor of V. On the back of certain notes and mortgages D. had, nearly six months before the execution of said instrument, written and signed assignments thereof to V. D. kept possession of the notes and mortgages until his death. *Held*, 1. That the instrument was a mere testamentary disposition of the twelve thousand dollars, and not being duly executed as a will, could not take effect as such; 2. That there being no consideration, the court would not complete

what it found imperfect, and establish a trust; 3. That the notes mentioned could, under the statute, be assigned only by indorsement and delivery, and not by a separate instrument; 4. That the assignment written on the notes did not make a complete transaction, and the court would not complete it. *Badgley v. Votrain*, 18 R. 541.

To constitute a trust, it is enough if the owner of property conveys it to another in trust, or if the owner of personalty unequivocally declares, either orally or in writing, that he holds it *in present*, in trust for another. *Ray v. Simmons*, 23 R. 447.

2. Trusts valid in part and void in part.—A statute authorized a town to issue bonds, to aid the construction of a railroad, upon the written assent of a majority of the tax-payers, certified by three specified commissioners. Two of the commissioners signed the certificate, but the third, although sharing in their deliberations, refused to concur. *Held*, that the certificate was conclusive, and evidence was inadmissible to show that the requisite number of tax-payers had not assented. *First Nat. Bank v. Town of Mount Tabor*, 36 R. 734.

3. Construction of deeds creating trusts.—A deed to two trustees, but executed by only one of them, is complete and operative as a conveyance in trust. *Tennant v. Stoney*, 44 D. 213.

A grantee who, at the time of conveyance, gives back to his grantor a written agreement in which he acknowledges that he receives the land conveyed as collateral security, and agrees to pay off certain of the grantor's debts out of the property conveyed, and turn over the balance, if any, to the grantor, constitutes himself a trustee for such purpose, and his liability will be enforced by a court of equity. *Pratt v. Thornton*, 48 D. 492.

A deed of trust not intended as a security for money is not void as to creditors and purchasers, if not proved and registered within six months from the time of its execution. *Green v. Kornegay*, 67 D. 261.

A settlement by a deed of trust upon the grantor's daughter, of certain slaves for life, and in the event of her marriage, then in trust for the joint use of herself and husband, and the survivor of them, and on the death of the survivor, to issue that may be born of such marriage absolutely, will, in a case where the daughter marries twice, and has issue of both marriages, vest the property in the issue of both marriages, share and share alike. *May v. May*, 68 D. 431.

The rights granted to a *cestui que trust* by deed executed in another state cannot be defeated, and the property rendered subject to the debts of the trustee or of the grantor, in consequence of non-registration in Mississippi, but registration in another state is not notice to a purchaser in Mississippi; and where a party acquires the legal title in the

* See notes on validity and effect of precatory trusts, 44 D. 572-579; 48 R. 494-499.

For Index to Notes in American Decisions and American Reports, see Volume I.

latter state by purchase from the trustee, *bona fide*, and for a valuable consideration, without notice, he will not be disturbed in his title at the instance of the *cestui que trust*. *Wyse v. Dandridge*, 72 D. 149.

A grant of land for a valuable consideration upon trust that the trustee "shall at all times permit all the white religious societies of Christians and the members of such societies to use the land as a common burying-ground and for no other purpose," is not upon a condition subsequent, but is void for the want of certainty in the beneficiaries. *Brown v. Caldwell*, 48 R. 376.

A, by deed, conveyed all her property, "both real and personal," to a trustee in trust, to pay the income to her during her life, and at her death to transfer the property as she should by will appoint, and in default of such will to convey the property to her "heirs at law." The trust property was all personal. A died intestate. *Held*, that the trust property being personalty, the word "heirs" meant the persons entitled to take under the statute of distributions, and that therefore the property went to A's husband, and not to her child. *Sweet v. Dutton*, 12 R. 744.

A wife, for the purpose of evading her husband's importunities to dispose of her lands, and for a loan from a trustee, conveyed them in trust to pay her the income for her life, and on her death for her children, with power to sell and to convey in certain contingencies, and reserving no power of revocation. The contingency of her surviving her husband was not provided for. The trustee sold, and invested the proceeds. *Held*, that on the husband's death the widow was not entitled to rescind the trust. *Keyes v. Carleton*, 55 R. 446.

A deed creates a mere equitable life estate in a married woman, and executes legal estate in her heirs, where it conveys real estate to a trustee in trust that she "may, during her life, have, hold, use, occupy, possess, and enjoy" the same, "and the rents, issues, and profits thereof, and the same to convert to her own proper use and benefit, notwithstanding her coverture, and that without the let, trouble, or control" of her husband, or liability for his debts, "as fully in every respect as if she were sole and unmarried, and from and immediately after her death, then to and for the use and benefit of her legal heirs and representatives." *Ware v. Richardson*, 58 D. 762.

A grantor's intention is to prevail in trusts for use of married women, but with the qualification that it must not contravene or defeat the established rules of construction. *Ib.*

The same mode of construction is adopted in cases of deeds as in devises, where property is given to the use of married women. *Ib.*

Where nothing appears on the face of a

trust deed to indicate a contrary intention (a woman and her children being the beneficiaries), it will vest an estate in the woman, and her children then born, and in one *en ventre sa mere*, as tenants in common; but no title vests in her children afterwards begotten. *Gay v. Baker*, 78 D. 229.

Under a conveyance of 385 acres of land, worth about twenty-four hundred dollars, in trust for the use and benefit of a married woman and her children, the trustee being directed to permit the husband to use the lands for the use and benefit of his wife and children, for their support and the education of the children, and upon the further trust, that upon his death the said lands are to be equally owned and divided by and between all the children then living, "and if the wife shall survive him, then she is to take a child's part of said land for her life only,"—*held*, construing the deed in connection with the value of the property, the condition, number, and relationship of the beneficiaries (including after-born children) to the grantor, that he intended the property should be jointly used and enjoyed by the wife and children as a family, and that her interest in it could not be separated and subjected, by bill in equity, to the payment of her debts. *Bell v. Watkins*, 60 R. 756.

4. Construing absolute deed as deed in trust.—A person, being subject to intoxication, and therefore fearing imposition, conveyed his property by an absolute deed to another, for the benefit of his child, a minor, but no declaration to this effect appeared in the deed. Parol evidence is admissible to prove the trust. *Gay v. Hunt*, 3 D. 681.

A secret oral contract between the grantor and grantee in an absolute conveyance, that it is to be in trust for all the grantor's creditors, will not support it if it is void under the statute of Elizabeth, without such contract. *Birely v. Staley*, 25 D. 303.

Such a secret agreement cannot be enforced by the grantor or his creditors at law or in equity. *Ib.*

A deed of mortgaged lands was executed by the mortgagor, husband and wife, to the mortgagee, upon the mortgagee's oral promise to the wife to sell the land, discharge the debt, and pay back the surplus or reconvey any portion unsold. *Held*, a valid and enforceable trust in equity. *Clark v. Hancy*, 50 R. 536.

5. Declarations of trust.—A parol declaration of trust, either of real or personal estate is valid, in the absence of any statute requiring its creation to be in writing. *Anding v. Davis*, 77 D. 658.

A parol agreement to pay hire for slaves is a sufficient declaration of trust to vest the equitable title in the *cestui que trust* without delivery; and the obligation of a father to provide for his daughter is a good and meri-

For Index to Notes in American Decisions and American Reports, see Volume I.

torious consideration to support a trust, except as to creditors. *Blake v. Jones*, 21 D. 530.

A trust is not created by a written acknowledgment by one party that another is entitled to certain property, without proof of a consideration for such acknowledgment. *Thompson v. Branch*, 33 D. 153.

To constitute a writing a declaration of trust, it must be of such a nature that the party must be believed to have intended it as such. Loose and inadvertent declarations are insufficient for that purpose. *Ocean v. Wheeler*, 43 D. 283.

Words of desire, recommendation, and confidence, in a will, may amount to a declaration of trust, when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice, or discretion. The testator willed to his wife his real estate "during her natural life," and his "personal estate of every description . . . absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among my children." By this will the absolute ownership of the personal property of the testator is given to his widow, with an expression of mere expectation that she will use and dispose of it discreetly as a mother, and no trust is thereby created. *Pennock's Estate*, 59 D. 718.

A trust is not created in favor of a son of a vendee of land by a mere declaration of the vendee, at the time of making the purchase, that "he was going to buy the land for his son," if there is no further proof of any agreement to do so, nor any evidence that the son furnished the money to pay for it. *Lloyd v. Lynch*, 70 D. 137.

An equitable title may be completely divested by a clear and unambiguous declaration of trust, although a further disposition of the legal title is still in contemplation. *Lane v. Ewing*, 77 D. 632.

Declarations of trust defining the nature of a trust executed by a trustee and *cestui que trust* after the execution of the trust deed and changing the character of the trust thereby constituted, cannot have a retroactive effect so as to divest an inchoate right of dower which attached to the subject-matter of the trust upon the execution of the trust deed. *Nicoll v. Ogden*, 81 D. 311.

Trustees cannot, by a declaration of trust, relieve themselves of any duties thereof, though they may voluntarily assume new duties. *Id.*

Where a mother, entitled to the whole of the property of her intestate son, signed articles of agreement by which, after waiving her right to administration and agreeing that letters issue to her son-in-law, it was agreed that the bulk of the property should

be invested, the interest to go to an invalid son while he lived, and the principal to his brothers and sisters upon his death, — *held*, that such instrument must be regarded as an assignment and declaration of trust with a trustee competent to carry it into effect. *Cressman's Appeal*, 82 D. 498.

An agreement constituting a declaration of trust is not revocable at the instance of a party competent to make it, merely because some of the *cestui que trust* who joined in the instrument were minors, or under the disability of marriage at the time of its execution. *Id.*

A bond and mortgage were executed to defendant and M., as executors, for eight thousand dollars. Of this amount six thousand dollars belonged to the estate, and the balance was lent to M. by the plaintiff. In an action to enforce a trust in the bond and mortgage for the plaintiff's loan, declarations of M., made soon after the loan, when she was feeble and expecting soon to die, to the effect that she had received the loan and that the plaintiff was to have an interest in the mortgage as security, and that she intended to execute a written acknowledgment to that effect, — *held*, competent, and constituting a valid and enforceable declaration of trust. *Barry v. Lambert*, 50 R. 677.

6. *Devises in trust.* — To raise a precatory trust, the words of recommendation or of hope used by the testator must be certain, — 1. As regards the objects to whom such terms are applied; and 2. The subjects of property given must be certain. The words are then considered imperative and create the trust. *Lucas v. Lockhart*, 43 D. 766.

A precatory trust was held created by this clause, following a devise of all of testator's real and personal property to his wife during her widowhood, viz.: "Fourth, during my wife's widowhood she is to have the entire use, profits, and control of my estate, and to her discretion do I trust the education and maintenance of my children during that time." *Id.*

Words in a will expressive of desire, recommendation, and confidence are not words of technical but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust, and the old Roman and English rule on this subject is not part of the common law of Pennsylvania. *Pennock's Estate*, 59 D. 718.

Real estate being devised to trustees and their heirs, to the use of or in trust for another and his heirs, if the testator has imposed upon the trustees any trust or duty, the performance of which requires that the estate should be vested in them, they will take an estate co-extensive with the duties to be performed; if not, the legal ownership will pass over to the beneficial devisee. *Ellis v. Fisher*, 65 D. 52.

For Index to Notes in American Decisions and American Reports, see Volume V.

An active trust is created and estate vested in trustees by devise of real and personal estate in trust "to collect and receive the rents, issues, interest, and income therefrom," and after deducting expenses, "to pay over the same unto the *cestui que trust* for his own use and benefit, or to such person as by his order in writing he may authorize to receive the same," and upon his decease, to assign, transfer, and convey the said estate so held as he by his last will shall appoint, and in default of appointment, to such person or persons, for such estates and in such shares, as would be entitled to the same had he died seized thereof intestate; but the income for life under such a devise becomes the absolute property of the *cestui que trust*, and therefore attachable by his creditors, and could only be secured to the *cestui que trust* by provisions in the will against alienation and liability for debts. *Guard Life Ins. Co. v. Chambers*, 86 D. 513.

A testator may bequeath certain land to a trustee to hold during the life of his (testator's) son, the trustee to let or demise the same, and pay the income over to the son, or at his option to permit the son to let and demise the same, and collect the income during his life, but provided that the land shall not be subject to the son's debts, nor under his control or management. *Rife v. Geyer*, 98 D. 351.

A testamentary provision in trust for founding and endowing a public library is not avoided by the direction to publish books written by the testator, averred to be atheistical, nor by a direction that the trustees shall not exclude any book "on account of its difference from the ordinary or conventional opinions on science, government, theology, morals, or medicine," the former not being a condition precedent, and the latter being a mere negative recommendation. *Manners v. Philadelphia Library Co.*, 39 R. 741.

A devise in trust "to assist, relieve, and benefit poor and necessitous persons, and to assist and co-operate with any such charitable, benevolent, religious, literary, and scientific societies and associations, or any or either of them, as shall appear to the trustees best to deserve such assistance or co-operation," is valid. *Suter v. Hilliard*, 42 R. 444.

A devise of a testator's entire estate to his wife, "recommending to her, at the same time, to make some small allowance, at her convenience, to each of my brothers and sisters, say, to each, one thousand dollars," does not create a trust in favor of the brothers and sisters. *Ellis v. Ellis*, 50 D. 132.

A devise in trust is void under rule against perpetuities, where the testator, after empowering and directing trustees named, to lease his hotel property and apply the rents, provides that "the period during which my trustees, and their heirs and successors, shall

have the power and are required to lease, as aforesaid, shall be so long as my said children, or any children or descendants of them, or any of them, left by them, or any of them, at the death of them, or any of them, shall live; it being understood that any lease made during the period aforesaid shall have full effect and continue for its stipulated term, notwithstanding the cessation of all of said lives before the end of the term"; for under these provisions the period for continuing the trust or power to lease may extend so as to embrace persons and lives not in esse at the time of the testator's death. *Barnum v. Barnum*, 90 D. 88.

A devise in trust to build a free school-house, and extend the education of poor children, is void at law for uncertainty. *Stonestreet v. Doyle*, 40 R. 731.

7. Legacies in trust. — Where a legacy is given to A, in trust for B, with a limitation over upon his death, B cannot compel A to convey the legal title to him. *Battle v. Petway*, 44 D. 59.

Where the present right to the whole profits of certain bank stock, devised to a trustee, as well as the absolute ultimate dominion of the shares, is devised to certain legatees, they have a right to have a transfer of the stock made to them. It would be different if from the nature of the trust the ownership of the *cestui que trust* was not immediate and absolute, or if their possession would defeat or endanger a legitimate ultimate distribution of the trust property. *Turnage v. Greene*, 62 D. 208.

If trusts are absolutely void under the rule against perpetuities, legacies springing out of them must also be regarded as void. *Barnum v. Barnum*, 90 D. 88.

A bequest of money to the trustees of an organized church, in trust, to apply the interest to the suppression of the manufacture and sale of intoxicating liquors, is valid. *Haines v. Allen*, 41 R. 555.

8. Parol trusts. — Writing is not essential to the creation of a trust; but the statute of frauds requires that its terms and conditions must be clearly manifested and proved in writing, under the hand of the party to be charged, before the court will carry it into execution. *Steele v. Steele*, 9 D. 256.

A trust of personality may be created by parol. The statute of frauds does not extend thereto. *Kimball v. Morton*, 43 D. 621.

The statute of frauds does not apply to resulting trusts or trusts by operation of law; resulting trusts are provable by parol, notwithstanding the statute of frauds. *Osborne v. Endicott*, 65 D. 498.

A party who undertakes to establish a resulting trust by parol takes the burden of proof on himself. He claims an estate in land, not only without a deed, but in opposition to the written title; ordinarily such

For Index to Notes in American Decisions and American Reports, see Volume L.

trusts should not be favored. *Strimpyler v. Roberts*, 57 D. 606.

A trust arising or resulting by implication or construction of law out of a conveyance of lands is one expressly excepted from the operation of the Georgia statute of frauds by the statute itself. *Maddox v. Rowe*, 68 D. 535.

The principle that a trust estate cannot legally exist without a declaration in writing, signed by the party who holds the legal estate, does not apply to secret trusts and confidences, created for the purpose of defeating or delaying creditors, which may always be proved by parol. *Hills v. Elliot*, 7 D. 26.

When a mortgagee assigned her interest in the mortgaged premises, and promised orally to repay the money and interest, unless the assignee should receive the money from the mortgaged premises, she was held liable as the trustee of the assignee, to the amount of the money so promised. *Id.*

A trust in land cannot be raised by parol. *Jackson v. Miller*, 21 D. 316; *Irvine v. Ivers*, 63 D. 420; *Ratliff v. Ellis*, 63 D. 471. Contra, under the Texas statute, *James v. Fulcro*, 55 D. 743.

If A voluntarily conveys land to B, the latter having taken no measure to procure the conveyance, but accepting it, and verbally promising to hold the property in trust for C, the case falls within the provision of the statute of frauds requiring trusts to be expressed in writing, and a court of equity will not enforce the parol promise. *Lantry v. Lantry*, 2 R. 310.

9. **Executory trusts.**—An executory trust is one where the beneficiary is not yet clothed with an equitable title, but has a mere right to have some act done which will vest in him such equitable title. *Nicoll v. Ogden*, 81 D. 311.

An executory trust is constituted and *cestui que trust* have no equitable title to land where, by a declaration of trust executed by them, they provide that the trustee shall not convey it to them until after partition, and then in severalty, or that he shall sell it and divide the proceeds among them; and dower cannot attach to property thus held. *Id.*

10. **Simple and special trusts.**—Trusts are either simple or special; in the former, the trustee is passive and performs no duty, and the trust is purely technical; in the latter, he is active, being an agent to execute the donor's will, and the trust is operative. *Dodson v. Ball*, 100 D. 586.

A simple trust gives to the *cestui que trust* a right to the possession, control, and disposal of the property, and the legal estate becomes executed in him, unless it is necessary to remain in the trustee, to preserve the estate for the *cestui que trust*, or to pass it to others. *Id.*

A special trust maintains the legal estate in the trustee, to enable him to perform the duties devolved on him by the donor, and gives the *cestui que trust* only a right in equity to enforce the performance of the trust. *Id.*

A simple or passive trust cannot continue the legal estate in the trustee, except for a proper and useful purpose, such as the law will protect; and as soon as the purpose fails or ceases to exist, the legal estate becomes executed in the *cestui que trust*. *Id.*

Equity preserves a special trust to give effect to a donor's right of dominion over his property; as to a passive trust, it permits it to fall in favor of public policy. *Id.*

11. **Implied trusts, generally.**—Trusts result by implication of law in two cases only: 1. Where a purchaser of land has paid the purchase price with his own money, and taken the conveyance in the name of another, or where he has paid with the money of another and taken the conveyance in his own name; and 2. Where a trust has been declared of part of the estate, from which the law implies an intent to reserve the beneficial ownership of the residue. *Kieler v. Kieler*, 27 D. 308.

Loose and vague declarations of intention by one member of a family, in letters to his brothers, in regard to his holding land in trust for the other members, are not sufficient evidence to charge him with a trust by implication. *Steere v. Steere*, 9 D. 256.

To raise a trust by implication, or operation of law, an actual payment, or actual loan of the money by the *cestui que trust*, at the time of the purchase, must be shown. *Id.*

Where two persons sold personal property belonging to another, with his assent, and took bonds from the purchasers in their own name, and collected a portion of the purchase-money, a court of equity will infer some conventional arrangement between the parties, in the nature of a trust, which it will enforce. *Ringgold v. Ringgold*, 18 D. 250.

No equitable presumption of trust arises where the grantee of property is related to the person from whom the consideration proceeds, in such a manner that the latter is under a moral or natural obligation to provide for the former, but *prima facie* the transaction will be regarded as an advancement for the benefit of the nominee. This may be rebutted by evidence clearly showing that a trust was intended to be created in favor of the person who paid the purchase price. *Mut. F. Ins. Co. v. Deale*, 79 D. 673.

No express or implied trust is created by a transaction whereby one of two partners who are embarrassed with debts executes a deed to the other, absolute on its face, with a consideration expressed, of both his individual property and interest in the partner-

For Index to Notes in American Decisions and American Reports, see Volume L.

ship property, for the purpose of enabling the grantee to raise money by mortgaging the same to pay the firm debts. *Burt v. Wilson*, 87 D. 142.

A grantee holds land in trust for a grantor to the extent of the purchase-money, where he has received an absolute conveyance and has failed to make any payment of the purchase price, and such trust descends to the representatives and heirs of the grantee, against whom a lien for the purchase-money will be enforced. *Ib.*

Every person is a trustee who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, and is liable either at law for money had and received, or in equity for breach of trust. *Finney v. Cochran*, 37 D. 450; *Stockard v. Stockard*, 46 D. 79.

Where a person agreed, verbally, to bid in land for another at a sheriff's sale, he shall be bound and decreed to hold in trust, though he took the conveyance in his own name, and the plea of the statute of frauds will not avail him, when he has tendered an account, in which he charged the other with the amount of the purchase-money. *Denton v. McKenzie*, 1 D. 664. S. P., *Miller v. Antle*, 92 D. 495.

12. — and how created by will. — A trust in an absolute devise may be established by parol proof of contemporaneous declarations of the testator and subsequent declarations of the devisee in possession, that the devise was made for the benefit of a third person upon the devisee's suggestion and promise to hold it in trust. *Hoge v. Hoge*, 26 D. 52.

A devisee's active or passive agency in procuring the devise must be shown, it seems, in order to enforce such a trust. *Ib.*

One enabled to bid in property at less than its value, by falsely representing that he is acting for or in the interest of the defendant in execution, will be converted into a trustee for the benefit of such defendant. *Grumley v. Webb*, 100 D. 304. S. P., *Ryan v. Dox*, 90 D. 696.

13. Constructive trusts. — 1. *When a trust arises.* — Persons acquiring title by fraud are trustees for the injured party. *Coleman v. Cocke*, 18 D. 757; *Lewis v. Lewis*, 43 D. 540.

When necessary, the heir will be regarded as a trustee, and the rents and profits may accumulate in his hands for the benefit of the executory devisee, until the vesting of the estate; and the court may, in its discretion, appoint a receiver of them for that purpose. *Rogers v. Ross*, 8 D. 575.

A legatee who takes an estate subject to a trust takes it as a trustee. *McCants v. Bee*, 16 D. 610.

One obtaining, as an assumed protector of certain illegitimate children, a compromise in their favor, and as the result of such

compromise, a conveyance to himself of certain real estate, cannot claim that the children had no interest in the property, and that he holds it discharged of the trust. *Sweet v. Jacobs*, 31 D. 252.

A mortgage to one person to secure the debt of another makes the former a trustee of the latter, who may compel an assignment to be made, or may have a foreclosure decreed for his benefit. *Lady Superior v. McNamara*, 49 D. 184.

A married woman obtaining a patent from government will be regarded as the trustee of one who had entered the land, and finding her in possession without any claim to a right of pre-emption, had paid her for her improvements, and for yielding possession to his vendee, if with the money thus obtained she entered a claim of pre-emption, and obtained the patent. *Groves v. Fulsome*, 57 D. 247.

A trustee *de son tort* is he who of his own authority enters into the possession or assumes the management of property which belongs beneficially to another. He is subject to the same rules and remedies as other constructive trustees. *Morris v. Joseph*, 91 D. 386.

One who assumes the management and control of land of another thereby constitutes himself the trustee of the owner, and can do nothing prejudicial to the interests of such owner while such relations exist. He cannot acquire title to the land at tax sale for a delinquency which occurred while he had control, although the fiduciary relation may have ceased at the time of the sale. *Ib.*

2. *When no trust will arise.* — A trust does not arise from a mere breach of contract, but the remedy is at law. *Cowan v. Wheeler*, 43 D. 283.

No trust arises on a conditional contract to convey land, especially where the conditions are not performed. Hence, where a surety for the purchaser of land takes the conveyance in his own name as security, and gives the purchaser a written agreement to convey to him upon condition that he pays the notes for the purchase-money, but the latter, after paying part, fails to pay the residue, without the surety's fault, the surety will not be adjudged a trustee, nor will the contract be enforced against him. *Ib.*

That the alleged trustee in such case has sufficient funds of plaintiff to perform the conditions of the contract will not render him chargeable as trustee, especially where the funds are not alleged to be in his hands for that purpose, though if he held them for that purpose it might amount to virtual performance of the conditions entitling the plaintiff to a specific performance. *Ib.*

The acquisition of property by larceny or trespass does not create the relation of trustee and *cuius que trust*; and therefore such relation is not created where a person abstracts

For Index to Notes in American Decisions and American Reports, see Volume X.

securities not intrusted to him, and substitutes forged securities in their place. *Doyle v. Murphy*, 74 D. 165.

The owner of mortgaged cattle sold them, and with the proceeds paid his debt to a bank in another county, where the mortgage was not filed, the cashier having no knowledge of the circumstances except that the money arose from a sale of cattle. *Held*, that the bank was not liable to the holder of the mortgage for the proceeds. *Burnett v. Gustafson*, 37 R. 190.

14. Resulting trusts in real property. — 1. General rules.* — Whether a conveyance taken in the name of another than the person paying the consideration is an advancement to such other, or a resulting trust is created, depends upon the character of the transaction at its inception. *Dudley v. Bonworth*, 51 D. 690.

The death of the nominal purchaser and descent of the mere naked title does not destroy or impair a resulting trust. *Id.*

A resulting trust in notes secured by mortgage attaches to land mortgaged to secure their payment, when the mortgage is foreclosed by the person holding the legal title to the notes. *Buck v. Swazey*, 56 D. 661.

A trust resulting from payment of consideration by a third person, on a purchase of land, results only in favor of such person, and descends to his heirs, and does not inure to the benefit of one for whom the purchase might have been intended to be made. *Padgett v. Lawrence*, 40 D. 232.

A resulting trust may be rebutted even by parol declarations of the person in whose favor it would otherwise be raised. *Adams v. Guerard*, 76 D. 624.

A resulting trust will be upheld, although the title to the land is acquired through a judicial sale. *Beagle v. Wentz*, 93 D. 762.

A resulting trust will be upheld against the objection of uncertainty, where a creditor verbally agreed to reconvey to the debtor fifteen acres of land around the debtor's house, part of a tract of fifty-eight acres, if the debtor would waive his exemption, and permit the whole tract to be sold at sheriff's sale, under an execution levied upon it, and to be bought in by the creditor. The law presumes that the land was meant to be laid off in a reasonable shape, and the parties can afterwards do it, or if one will not, the other can, on notice. *Id.*

Where a trust results by operation of law, as, for instance, where there is a devise or bequest to a person "upon trust," and no trust is declared, etc., in such cases the trust results to the heirs at law or personal representatives, and extrinsic evidence will be rejected. *Saylor v. Plaine*, 1 R. 34.

2. When a trust will result. — Implied or

resulting trusts arise where a purchase is made by one person in the name of another. Such trusts arise by operation of law, are not within the statute of frauds, and may be proved by parol. *Mutual Fire Ins. Co. v. Deale*, 79 D. 673. S. P., *Jackson v. Miller*, 21 D. 316; *Bavington v. Clarke*, 21 D. 432; *Foot v. Colvin*, 3 D. 478; *Williams v. Hollingsworth*, 47 D. 527; *Baker v. Vining*, 50 D. 617; *Neill v. Kesse*, 51 D. 746; *Irwin v. Ivers*, 63 D. 420; and are subject to execution against the beneficiary. *Smith v. Gray*, 34 D. 664. But under the statute of frauds, such trusts must arise from some conveyance or deed. *Jackson v. Morse*, 8 D. 306.

As a general rule, a resulting trust arises in favor of one who advances money to another for the purchase of land. *Sullivan v. McLennan*, 65 D. 780; *Smith v. Strahan*, 67 D. 622.

Where land is purchased with money of two or more persons, and the conveyance taken by agreement in the name of one of them, a resulting trust arises in favor of the others. *Dow v. Jewell*, 45 D. 371. S. P., *Buck v. Swazey*, 56 D. 681; *Osborne v. Endicott*, 65 D. 498; *Jenkins v. Frink*, 89 D. 134.

If an agent purchases property in his own name with the funds of his principal, he holds in trust for the latter, and may be compelled to convey. *Hall v. Sprigg*, 12 D. 506; *Depeyster v. Gould*, 29 D. 723; *Moffatt v. Shepard*, 52 D. 141.

One buying land with the money of another, and taking the legal title in his own name, becomes trustee of a resulting trust in favor of the latter, even though he stood in no fiduciary character to the person whose money has been used. *Beck v. Urrich*, 53 D. 507.

Where executors were authorized by will to sell land devised to the testator's family on giving security, and they sold the land, and employed the money it produced in the purchase of other lands, these circumstances, together with evidence of the declarations of one of the executors, will be sufficient to raise a trust for the family in the lands thus purchased. *Wallace v. Duffield*, 7 D. 660.

Land of an intestate confirmed to one of the heirs, in the orphans' court, at the appraisalment, may be shown to be held in trust for the others, when the trust is in writing, without impugning the sanctity or validity of the decree of the orphans' court. *Bavington v. Clarke*, 21 D. 432.

Where a declared trust in a deed is void, a trust arises by implication in favor of those who paid the purchase-money. *Methodist Church v. Remington*, 26 D. 61.

When one makes a purchase of land in the name of another, and pays the consideration money, a resulting trust immediately arises by virtue of the transaction, and the nominal purchaser will be a trustee for the person

* See mono-graphic note on resulting trusts, 51 D. 751-760.

For Index to Notes in American Decisions and American Reports, see Volume X.

paying the purchase-money; this presumption of a resulting trust may be rebutted by circumstances, but the burden of proof rests upon the nominal purchaser. *Dudley v. Bosworth*, 51 D. 690. *S. P., Smitheal v. Gray*, 34 D. 664; *Portis v. Hill*, 65 D. 99. This rule extends to purchasers from the commonwealth. *Strimpfster v. Roberts*, 57 D. 606.

Where the object for which a conversion of real estate into personalty is made fails, either wholly or in part, so that the proceeds thereof are not legally and effectually disposed of by the testator, there is a resulting trust in favor of the heirs at law *pro tanto*. *Hawley v. James*, 32 D. 623.

A testator died seised of lands in another state, which, by his will, he devised to his executors and trustees to be sold, and directed the proceeds to be invested in lands in the state where he was domiciled at the time of his death, upon trusts which were illegal and void by the laws of that state. *Held*, that there was a resulting trust in favor of the heirs at law as to the land devised, and that the executors and trustees would be decreed to transfer the legal title to such heirs. *Id.*

A trust results to a fraudulent debtor for the creditors on a purchase of land in another's name by such debtor to defraud his creditors, and the debtor's interest is subject to sale on execution, and the execution purchaser may in equity compel the holder of the legal title to convey to him, to surrender possession, and to account for the rents and profits. *Dunnica v. Coy*, 69 D. 420.

Where a mortgagor with warranty pays off a prior mortgage on the same land, the payment will inure to the benefit of the second mortgagee. But if the money with which such payment is made is furnished in part by a third person, who takes an assignment of the mortgage to himself, and for his own benefit, a resulting trust in his favor attaches at once to the conveyance from the first mortgagee to the mortgagor, to the extent of the portion of the mortgage debt actually paid off by his money. *Kelley v. Jenness*, 79 D. 623.

Where land is purchased with the money of a husband, in the name of the wife, there is a resulting trust in his favor, and she will be declared a trustee for him for the benefit of his creditors. *Belford v. Crane*, 84 D. 155.

A resulting trust is created in a creditor for a debtor as to a part of the debtor's land which the creditor verbally agreed to reconvey to the debtor, if he would waive his exemption and permit the whole tract to be sold at sheriff's sale, under an execution levied upon it, and to be bought in by the creditor. *Beegle v. Wentz*, 93 D. 762.

Allegations in a bill that A laid out the money of A, B, and C in the purchase of

land for their common use, benefit, and advantage, under an agreement that A and B were to be owners in fee and tenants in common, each of a moiety, and that C was to have wood from the land during her life, and that a deed was taken by A, are sufficient allegations of such a purchase to raise a resulting trust. *Dow v. Jewell*, 45 D. 371.

Where notes secured by mortgage are purchased by the joint funds of two persons, and the purchase is taken in the name of one only, a resulting trust arises in favor of the other, to the extent of the funds he has advanced, and this trust is not discharged by a memorandum made by the person taking the legal title, which, after reciting the joint interest of the two, adds that the person taking the title agrees to account and pay to the other one half the sums received on the notes as collected. *Buck v. Swasey*, 56 D. 681.

3. *When no trust results.*—A resulting trust does not arise on a purchase of land for another's benefit where the purchaser uses his own name and credit, and the undertaking to act for the other's benefit is by parol. *Fowke v. Slaughter*, 13 D. 133.

A resulting trust to a grantor, contrary to the express terms of his conveyance, cannot be raised. *Squire v. Harder*, 19 D. 446.

A conveyance in fee, with warranty, estops the grantor from alleging an interest in the purchase-money which will raise a resulting trust to him. *Id.*

A resulting trust cannot arise in a patent from the government for land for which no consideration was paid. *Jackson v. Miller*, 21 D. 316.

A resulting trust cannot arise out of a fraud upon the government. *Id.*

A resulting trust is a mere creature of equity, and does not arise where there is an express declaration of trust by the parties in writing, nor in fraud of the laws of the land, as in the case of an alien purchasing land, and having the deed made to a citizen, in which case no trust results in favor of such alien. *Leggett v. Dubois*, 28 D. 413.

Where the person making a purchase of land in the name of another, and paying the consideration money himself, is under a natural or moral obligation to provide for the person in whose name the conveyance is taken, no presumption of a resulting trust arises, but the transaction will be regarded *prima facie* as an advancement for the benefit of the nominal purchaser. *Dudley v. Bosworth*, 51 D. 690. *S. P., Lisloff v. Hart*, 57 D. 203; *Dickinson v. Davis*, 80 D. 202.

A resulting trust will not be raised or enforced in contravention of public policy, or the provisions of a statute, as in the case of a conveyance in the name of another, made to hinder, delay, or defraud the creditors of the purchaser. *Dudley v. Bosworth*, 51 D. 690.

For Index to Notes in American Decisions and American Reports, see Volume I.

A resulting trust does not exist in favor of the heirs of persons who made an assignment to another of a money demand and a conveyance of certain real estate, absolute upon their face, and importing a valuable consideration; but upon an express verbal condition that the proceeds from the collection of the demand and the sale of the real estate should be held in trust for the heirs of the assignors and grantors. *Irvine v. Ivers*, 63 D. 420.

A resulting trust does not always arise from advance of purchase-money. It does not follow that because money has been furnished by one party for the purchase of land that a trust thereby results that cannot be explained or defeated. While the advance may create such a trust, it must be subject to the rights of others, and cannot be allowed to intervene to defeat prior and superior equities. *Sullivan v. McLennan*, 65 D. 780.

Neither a resulting nor express trust arises or is created under the Minnesota statutes, in favor of one who settles upon and improves government land, and agrees, by parol, with another that the latter should enter it in his own name at the land-office, pay for it, and convey it to the former upon repayment of the purchase price. *Wentworth v. Wentworth*, 72 D. 97.

A presumption of trust arises in favor of one who pays purchase-money of land, when it is conveyed to a stranger, but such a presumption is rebutted in case the purchase can fairly be deemed to have been made for another, from motives of natural love and affection. Thus a purchase by a parent in the name of a child is deemed *prima facie* an advancement from which no trust results; and the presumption that such a purchase is intended for a provision is stronger in the case of a wife than of a child. *Dickinson v. Davis*, 80 D. 202.

Before the passage of the Georgia act of 1821, making all estates estates in fee unless some less estate be expressly limited, a marriage settlement conveyed an entire legal estate to a trustee, and then declared a trust in favor of a husband and wife, during the life of the one who should longest live; with remainder to their children, without expressly confining the remainder to a life estate in the children, or expressly declaring it to be an estate of inheritance in them. In 1819, the same parties bought other property, and took a deed professing to declare the same trusts as the marriage settlement, and declaring a trust in favor of the husband and wife, during the life of the one who should longest live; with remainder to their children, and "their heirs," thus pursuing the intent of the marriage settlement, but using new words of expression. *Held*, that any resulting trust which might have arisen under the marriage settlement was rebutted

by the deed of 1819. *Adams v. Guerard*, 76 D. 624.

15. **Resulting trusts in personal property.**—Where one person purchases a chattel with the funds and for the use of another, but takes the bill of sale in his own name, a resulting trust arises in favor of the owner of the fund, and he may elect to take the chattel or the fund; but the purchaser holds the legal title to the chattel. *Guphill v. Isbell*, 19 D. 675.

A trust results in favor of the principal when property is purchased by an agent, in his own name, with his principal's funds. *Crocker v. Crocker*, 88 D. 291.

M. held a judgment against plaintiff for two thousand dollars, and offered to discharge it for five hundred dollars, but plaintiff did not accept the offer. R., a stranger to plaintiff, applied to M., and by falsely representing that he was acting for plaintiff, induced M. to assign the judgment to him, R., for five hundred dollars. *Held*, that plaintiff had no interest in the transaction, and that he was not entitled to the benefit of the purchase of the judgment. *Garvey v. Jarvis*, 7 R. 335.

16. **What is a sufficient payment of consideration to raise a resulting trust.**—A resulting trust arises only in favor of a party paying the consideration, or some part thereof, at the time of the purchase, where land is purchased and the conveyance taken in another's name, and a subsequent payment will not suffice. *Pinnock v. Clough*, 42 D. 521. S. P., *Hollida v. Shoop*, 59 D. 88; *Buck v. Swazey*, 56 D. 681; *Burden v. Sheridan*, 14 R. 505.

To establish a resulting trust by parol, there must be the clearest and most indisputable proof that the purchase was made for the party claiming such trust, and the purchase-money paid by him. *Hollida v. Shoop*, 59 D. 88.

After a purchase with a party's own money or credit, a subsequent tender or reimbursement by another may be evidence of some other contract, or the ground of some other relief, but cannot by retrospective effect produce a resulting trust. *Id.*

Where the party who pays the consideration upon a purchase of land directs the deed to be made to one to whom he is indebted, as a security for such debt, he thereby renounces the benefit of the consideration, and no trust arises in his favor. *Jackson v. Morse*, 8 D. 306.

When the money of one forms only a part of the consideration of land purchased in the name of another, the land is charged with a resulting trust *pro tanto*, if the proportion of the money paid by each can be clearly ascertained; but no resulting trust arises when the amount belonging to one and the other is unknown or uncertain. *Baker v. Vining*, 50 D. 617.

For Index to Notes in American Decisions and American Reports, see Volume I.

Parol testimony of declarations of a deceased person, that another person was jointly interested with him in the purchase of certain land, the deed to which was taken in the name of such deceased person alone, is not competent to raise a resulting trust in such other person, without proof of the payment of part of the purchase-money by him. *Neill v. Keese*, 51 D. 746.

If a party who sets up a resulting trust in lands has made no payment, he cannot be permitted to show by parol evidence that the purchase was made for his benefit. *Irvine v. Ivers*, 63 D. 420.

To create a resulting trust, the deed need not show a consideration furnished by a third person, but it may be shown by any note or memorandum of the nominal purchaser, though the statute of frauds be pleaded. *Osborne v. Endicott*, 65 D. 498.

A resulting trust does not exist in favor of one who pays part of the price of land conveyed to another, unless such payment has been made for some specific part or distinct interest in the estate. *McGowan v. McGowan*, 74 D. 668.

No use results to a grantor in a deed expressing a consideration, though it is merely nominal, and never paid, and parol proof that the conveyance was intended to be in trust for the grantor will not raise a trust. *Hogan v. Jaques*, 97 D. 644.

A verbal promise by a grantee to reconvey land upon receiving back his debt will not be enforced, either at law or in equity, especially against a purchaser for a valuable consideration without notice. *Ib.*

2. Requirements of the Statutes.

17. Adoption of early English statutes. — The statute 27 Henry VIII., chapter 10, called the statute of uses, is part of the common law of Massachusetts. *Johnson v. Johnson*, 83 D. 676.

18. Their operation, generally. — The statute of uses operates to transfer the property to the person entitled to the use, dispensing with livery of seisin. *Chapman v. Glassell*, 48 D. 41; *Ramsay v. Marsh*, 13 D. 717.

The statute of uses does not extend to personal property. *Rice ad. Burnett*, 42 D. 336.

A use was a mere confidence in a friend, before the statute of uses, that the feoffees to whom the lands were given should permit the feoffor and his heirs, and such other persons as he might designate, to receive the profits of the land. *Ware v. Richardson*, 56 D. 762.

The statute of uses transferred the use into possession by converting the estate or interest of the *cestui qui use* into a legal estate, and by destroying the intermediate estate of the feoffee. *Ib.*

A trust is a use not executed under the

statute of uses in the *cestui que use*, but the legal estate is vested in the grantee or trustee. *Ib.*

Special trusts are not within the statute of uses, and a trust to hold for the separate use of a married woman is special; if the woman becomes sole, the special trust for her separate use ceases, and the legal estate vests fully in her. *Stacey v. Rice*, 67 D. 447.

A use executed by the statute is a legal estate to all intents and purposes, as much as if it had been given by the instrument creating the estate, without the intervention of a trustee. *Ib.*

19. What is a valid express trust within the statutes. — An active operative trust is created and an estate vested in trustees by a devise of real and personal property, in trust, to lease and let the real estate, to keep the personal estate invested on bond and mortgage, or other safe security, to collect and receive the rents, interest, and profits thereof, and to pay over the net income to the children of the testator; the uses not being such as are executed by the statute of uses, nor by the common law of Pennsylvania. *Barnett's Appeal*, 86 D. 502.

A trust restricted to lives in being at death of testator, or to the survivor of them, does not infringe the rule against perpetuities. *Ib.*

The law concerning active trusts discussed. *Ib.*

Where, by agreement, two parties obtained a road franchise in the name of one upon a bill drawn by the other, and each of them constructed one half of the road, and the one in whose name the franchise stood took possession and collected the tolls on their mutual account, on the understanding that they were to share equally therein, — held, that an express trust was created, of which the party in possession was the trustee. *Miles v. Thorne*, 99 D. 384.

B., holding the legal title to real property, but upon a secret parol trust for his wife and her brother K., executed a deed thereof, absolute in form, in which his wife joined, to K., the brother, without any pecuniary consideration and without the knowledge or consent of K. B. caused the deed to be recorded. Subsequently, B. said to K.: "The property of your sister has been deeded to you, and I want you to look after her interests, and see that she has her property." K. replied, "All right," or "Very well," or words to that effect. Afterward, K., in a letter to his mother, and also in a document intended to be a will, incidentally recognized the conveyance as a trust. Held, that the assent of K. to the conveyance, in connection with the words of B. informing K. thereof; created an express trust in favor of B.'s wife, and that the subsequent letter and document were sufficient evidence of the

For Index to Notes in American Decisions and American Reports, see Volume I.

trust within the statute of frauds. *Kingsbury v. Burnside*, 11 R. 67.

20. What express trusts are invalid. — An express trust upon land conveyed by a decedent cannot be created by an inventory of the estate that includes land as part of the estate, but states the title to be in another, notwithstanding the grantee was present when the inventory was made, and knew of it, but made no objection. It is no writing of the grantee, and amounts to no more than parol evidence. *Ratliff v. Ellis*, 63 D. 471.

An express trust upon land conveyed by a decedent to one who becomes administrator cannot be created by a charge for payment of taxes in the administration account, when it is not shown that the taxes were levied on this land, although it appears that the amount of the charge is the same as the tax would have been upon this land. The evidence is too uncertain to constitute a written acknowledgment of the administrator that the land was part of the decedent's estate. *Id.*

A mere dry trust will not be sustained when persons equitably entitled to any property take absolutely the entire beneficial interest, and the trustee has no duty to perform; unless it be a special trust intended to accomplish some object, as to preserve contingent remainders, protect property for the sole and separate use of a married woman, or from the creditors of the *cestui que trust*. *Kay v. Scates*, 78 D. 399.

A trust will not be sustained on the ground that it is for the sole and separate use of a woman, if she was unmarried when the will took effect, and there was at the time no marriage in immediate contemplation. *Id.*

21. What trusts are executed by the statutes. — A use is executed where there is in *esse* a person seised to the use, a *cestui que use*, a well-defined use, and a seisin out of which it is to issue, and the property vests in the *cestui que use* from the date of the deed creating the use. *Moore v. Shultz*, 53 D. 446.

Power to dispose of the estate by will given to a *cestui que use*, in the deed creating the use, effects nothing, as the deed vests in him the fee. *Id.*

A use will not be prevented from being executed in the *cestui que use* by the mere interposition of a trustee to protect and secure a trust estate in a third person, even though a married woman, unless there is attached to the trustee the performance of some active functions or duties in order to support the trust. *Ware v. Richardson*, 56 D. 762.

A use is executed in the trustee when the devise or deed is in trust "to collect and pay over" the rents and profits to another. *Id.*

A use is executed in the *cestui que use* when

the devise or deed is in trust to permit another to "enjoy" the rents and profits. *Id.*

An implied trust is not within the statute of uses, and consequently does not become executed by force of that statute. Such a trust can only be executed by a voluntary conveyance of the trustees, a decree in chancery, or a judgment in ejectment. *Strimpfer v. Roberts*, 57 D. 606.

Trusts will not be considered executed, but will be treated as executed, and the legal estate as vested in the *cestui que trust*, where the persons named as trustees have no duties to perform which require the seisin or possession of the estate to be in them, and the persons for whose use the trust was created are *sui juris*. *Kay v. Scates*, 78 D. 399.

A trust will not be considered executed until the time at which the full beneficial enjoyment of the interest devised shall vest. *Id.*

A present gift for a present and lawful purpose amounts to a vested and executed trust for that purpose. *Philadelphia v. Girard*, 84 D. 470.

Where the entire beneficial interest is in the *cestui que trust*, without restriction as to enjoyment, the trust should be considered as executed. No conveyance of the legal title is necessary, though it will be decreed for the purpose of removing a nominal cloud from the title. *Rife v. Geyer*, 98 D. 361.

If a trust is perfectly created, so that the donor has nothing more to do, and the one seeking to enforce it has need of no further conveyance, and nothing is required of the court to give effect to it as an executed trust, it will be given effect notwithstanding want of consideration and of change in the possession of the property. But if the transaction is incomplete, the court will not complete it without first inquiring into its origin and consideration. *Badgley v. Volrain*, 18 R. 541.

22. Effect of state statutes relative to uses and trusts. — The contingent right of a trustee to receive the rents and profits of land purchased in the names of the testator's children, until and even after such children have attained the age of twenty-two, if he shall think proper, is not a trust authorized by the New York revised statutes. *Wood v. Wood*, 28 D. 451.

A trust in personality is not affected by the provision in the revised statutes of New York abolishing all uses and trusts not therein authorized (1 R. S. 721, 2d ed., sec. 45), that provision relating only to trusts in realty. *Kane v. Gott*, 35 D. 641.

A trust to executors to sell realty, invest the proceeds in stocks, etc., and accumulate the income, and dispose of it as directed by the will, is not prohibited by the provision of the revised statutes abolishing uses and trusts not therein authorized, the property directed to be sold being regarded as personality. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

The limitation of suspension of absolute ownership of personality to two lives, by the revised statutes, relates only to future contingent estates. *Ib.*

The North Carolina act of 1812 of the revised statutes, chapter 45, section 4, did not mean to change the nature of trusts, the relation between the trustee and *cestui que trust*, or the rights of the latter against the former. It was not intended to embrace cases in which the trustee could not voluntarily convey to the *cestui que trust* the legal estate without incurring a breach of trust to other persons. *Battle v. Pelway*, 44 D. 59.

The fourth section of the Pennsylvania act of assembly of April 22, 1856, relative to creation of trusts, is prospective, and has no application to a case which arose before the passage of the act. *Lingenfelter v. Ritchey*, 98 D. 308.

23. The doctrine of *cy pres*. — The principle of *cy pres* in executing trusts is not applied in Pennsylvania, because no court possesses the specific powers necessary to give it effect, and because it is grossly revolting to a sense of public justice. *Methodist Church v. Remington*, 26 D. 61.

The doctrine of *cy pres*, in Pennsylvania, is that by which a well-defined charity, or one where the means of definition are given, may be enforced in favor of the general intent, even where the mode or means provided for by the donor fail by reason of their inadequacy or unlawfulness. *Philadelphia v. Girard*, 84 D. 470.

When a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person who has provided for it, it must be performed with as close approximation to that scheme as is reasonably practicable. It is the doctrine of approximation, and is not at all confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence. *Ib.*

Vidal v. Girard, 2 How. 127, established the validity of trusts created by will in this case, and the heirs of Stephen Girard are now concluded by the decree therein. *Ib.*

II. THE TRUSTEE.

1. Rights, Powers, and Duties of Trustees.

24. Appointment of trustee. — A trustee of an express trust is a person in whose name a contract is made for the benefit of another. *Harney v. Dutcher*, 55 D. 131.

A state legislature may appoint trustees and convey property to be held in trust, for any object, public or private. *Commissioners v. Walker*, 38 D. 433.

Any person may hold as a trustee who is capable of confidence and of holding real or personal property. *Ib.*

Corporations may now hold as trustees. *Ib.*

A trust may be confided to the incumbents of certain offices and their successors in office. *Ib.*

Women may be appointed as executive trustees of the court, where it will promote the interests of all concerned; as where a committee is selected to take charge of the person of a female lunatic, or of a lunatic husband, father, etc. *Gibson's Case*, 17 D. 257.

Officers whose duties are incompatible with the duties of trustees, such as register, clerk, or judge of a court, cannot be employed as trustees. *Ib.*

Infants and *femes covert*, being incompetent to contract, cannot act as trustees for the sale or disposition of property where security is required to be given. *Ib.*

A trustee must be a citizen and resident within the jurisdiction of the court, so as to be continually under its control, and to be the better able to discharge the trust; hence no person can act as such who is in a position subjecting him to the necessity of occasional absence from the state for long intervals. *Ib.*

A chattel interest to commence in *future* may be created without the aid of a trustee. *Jaggers v. Estes*, 49 D. 674.

The appointment of trustees under the New York absent and absconding debtor's act is conclusive evidence that the steps leading to the appointment were regular, provided jurisdiction of the proceeding is shown. *Wood v. Chapin*, 67 D. 62.

Proceedings against an absent or absconding debtor are not vitiated, or a conveyance of his property by trustees invalidated, by the failure of the officer before whom the proceedings were had to file his report within the statutory time, or by the failure of the trustees to record their appointment within the statutory time; for the statute is directory merely. *Ib.*

Trustees appointed under the New York absent and absconding debtor's act take title to his property, — not a mere power to convey, — and their title dates from the first publication of notice. *Ib.*

Jurisdiction to appoint a trustee becomes vested in the court of chancery, and does not depend upon acquiring jurisdiction of the heirs or personal representatives of the deceased trustee, where a trustee is appointed by a deed which provides that in case of his decease or legal incapacity the trust estate shall vest in such court, which shall execute the trust declared. *Morrison v. Kelly*, 74 D. 169.

25. His estate or interest. — A different rule of construction is not necessarily to be applied to trust estates than that governing legal estates; accordingly limitations of the trusts of a term are decided according to the doctrines applicable to real estates. *Cudworth v. Thompson*, 4 D. 617.

The *cestui que trust* cannot deny his trust.

For Index to Notes in American Decisions and American Reports, see Volume I.

tee's title, in an action at law, where he admits that he is in possession under him; and when sued by such trustee, or by a purchaser under him, he cannot put the plaintiff to the proof of what he has thus admitted. *Den v. Alberson*, 22 D. 719.

The word "heirs" is not necessary to create an estate in fee in trustees when such an estate is clearly essential to the purposes of the trust. *Chamberlain v. Thompson*, 28 D. 390; *Gould v. Lamb*, 45 D. 187.

A trustee appointed by the court of another state, in the place of a deceased trustee to whom land in Pennsylvania has been conveyed, obtains no title to the land so as to enable him to maintain ejectment for it. *Williams v. Maua*, 31 D. 465.

The assent of the *cestui que trust* to a trust created in his favor will be presumed, and therefore the estate vested in his trustee is not overreached by the lien of a judgment obtained against the grantor, intermediate the creation of the trust estate and the acts of the beneficiary indicating his assent to the trust. *Skipwith v. Cunningham*, 31 D. 642.

A trust created upon the vesting of the legal title in the trustee cannot be destroyed otherwise than by the renunciation of the *cestui que trust*. *Id.*

A trustee will be considered as taking the legal title, when it becomes necessary that the title should be vested in him in order to execute the declared purposes of a will. *Morton v. Barrett*, 39 D. 575; *Rife v. Geyer*, 98 D. 351.

A trustee may recover in ejectment against his *cestui que trust*. *Beach v. Beach*, 39 D. 204.

Where a trustee is under no obligation to convey to a defendant, the jury will not be directed to presume a conveyance to him. *Id.*

The legal title to real estate and personality remains in the trustee where it has been vested in him to be held for one person until marriage; afterwards for the joint use of husband and wife, and of the survivor, with contingent remainder over. *Rice ads. Bursett*, 42 D. 336.

The legal estate will not vest in a trustee in case of a trust for the use of a married woman, unless the instrument creating the trust assigns to the trustee the performance of some duty necessary for her enjoyment of the estate. *Ware v. Richardson*, 56 D. 762.

An instrument will be so construed as to vest legal estate in trustees if possible, where an estate is devised or conveyed to trustees for the separate use of a married woman, because such a construction will but effectuate the intention of the donor. *Id.*

In all cases where it is doubtful what estates trustees have, they are presumed to take an estate large enough to enable them to accomplish the purposes of the trust; but the trustee will never, by construction, be

held to take a greater estate than the nature of the trust demands. *Coulter v. Robertson*, 57 D. 168; *Gould v. Lamb*, 45 D. 187.

Trustees take exactly that quantity of interest in an estate which the purposes of the trust require, and in the absence of any express limitation, sufficient to carry the legal inheritance, the estate of the trustees may be enlarged and extended into such an estate as the nature of the trust may require; the construction in this respect to be governed mainly by the intention of the testator, as gathered from the general scope of the will. *Ellis v. Fisher*, 65 D. 52.

A devise to trustees for a particular purpose vests the legal estate in them as long as the execution of the trust requires it, and no longer. *Steacy v. Rice*, 67 D. 447; *Coulter v. Robertson*, 57 D. 168.

A trustee's title does not cease at death of a married woman, where slaves are conveyed to him by deed, his heirs, executors, and administrators, in trust for her sole and separate use during her life, and after her death, for the use, benefit, and behoof of her children by her present husband, and their heirs forever. *Bryan v. Weems*, 65 D. 407.

A testator having devised an estate to trustees in trust for use and benefit of a *feme covert* during her natural life, and at her death to the use of the heirs of her body, and in default of heirs of her body, then to his (the testator's) own right heirs, the trustees take only a legal estate for the life of the *feme covert*, the evident intention of the trust being to protect the property against the marital rights of the husband, and upon the death of the *feme covert*, the legal title vests in the heirs of her body as purchasers, under the limitation in the will. *Ellis v. Fisher*, 65 D. 52.

The title held by a defendant as trustee may be transferred by sale under an execution against him. *Giles v. Palmer*, 69 D. 756.

An active trust is created requiring the legal estate in the trustee by a provision in a will bequeathing land to a trustee, to be leased by him, and the income paid over to the testator's son during his life, remainder to his heirs, and with a further provision that if the trustee desires, he may permit the son to let the land and collect the income, but that it is not to be liable for his debts or in any wise under his control. *Rife v. Geyer*, 98 D. 351.

Whenever it is necessary for the accomplishment of any object of the creator of a trust that the legal estate should remain in the trustee, then the trust is a special, active one. *Id.*

The true test as to whether a trust is an active one, requiring a legal estate in the trustee, is, Would a court of equity in Pennsylvania decree a conveyance of the legal title? *Id.*

Where land is devised to a trustee, with

For Index to Notes in American Decisions and American Reports, see Volume I.

directions to give the income thereof to the testator's son, for life, or to permit the son to himself collect the income, the trustee takes a legal estate which is not divested by this permission to the son, and the latter's estate is only an equitable one. *Id.*

Where a trustee conveys his legal title to his *cestui que trust* in violation of the will creating the trust, it is a breach thereof, and the conveyance is absolutely void. *Id.*

Lands were conveyed to trustees, their heirs and assigns, to sell sufficient to pay certain debts, and then to lease and support a certain beneficiary for life; the residuum to be held for the benefit of the grantor's heirs at the expiration of the life estate; reserving to the grantors power by appointment or will to direct where the residue should go; the trustees, in their discretion, upon request of the grantors, to sell and convey any portion. *Held*, that the trustees took the whole estate, and the beneficiaries only an equitable interest; and that if by the acts or negligence of the trustees the estate of the trustees had been defeated by adverse possession, the interests of the remaindermen were also defeated. *Bennett v. Garlock*, 35 R. 517.

26. Acceptance by trustee, and how proved. — A trustee's acceptance is not essential to the existence of a trust. *Field v. Arrowsmith*, 39 D. 185; *Stone v. King*, 84 D. 557.

A court of chancery will execute a trust, whether the trustee assents or not. *Field v. Arrowsmith*, 39 D. 185.

Where the grantee in a deed of trust agreed to accept the trust, and the deed was put on record pursuant to the directions of the grantor, the delivery was sufficient. *Steele v. Lowry*, 19 D. 581.

An estate conveyed in trust to two persons, one of whom refuses to act as trustee, vests in the other. *Scull v. Reeves*, 29 D. 694.

An executor accepting a trust accepts it entirely, and cannot renounce a portion of it. *Ross v. Barclay*, 55 D. 616.

Lands in Pennsylvania subjected by a testator to a trust, other than for payment of debts, of which the executors in New York are trustees, can be conveyed only by the executors accepting all the trusts under the will, or by their rejecting the trusts entire, and procuring the appointment of a trustee in Pennsylvania. A middle course of renouncing the executorship and trust, so far as regards the lands in Pennsylvania, and procuring the appointment of an administrator with the will annexed in Pennsylvania, will fail, for he cannot execute the trust, and they cannot renounce it in part. *Id.*

A trustee may maintain an action without proving his acceptance of the trust; his bringing of the suit and acting as trustee are sufficient. *O'Neill v. Henderson*, 60 D. 568.

It is a sufficient delivery of a deed of trust if the draughtsman informs the bargainee of its existence, and he consents to act as trustee under it. *Green v. Kornegay*, 67 D. 281.

A voluntary deed of trust was delivered by the grantor to the trustee named therein, who communicated this fact to the *cestuis que trust*, and promised to have the deed recorded. To avoid executing the trust, the trustee afterwards returned the deed to the grantor, who destroyed it. *Held*, a complete delivery to the *cestuis que trust*. *Stone v. King*, 84 D. 557.

27. Rights and powers, generally. — Trusts, with respect to funds created by will for distribution at a future period, are either discretionary or directory: Discretionary, where no directions are given as to the manner in which the fund shall be invested prior to its final appropriation in satisfaction of the trust; directory, where the manner in which the fund shall be invested is pointed out. *Decker v. Cantrell*, 81 D. 576.

A trustee is bound to manage and employ the trust property for the benefit of the *cestui que trust* with the care and diligence of a provident owner. *Hutchinson v. Lord*, 60 D. 381.

Where no express or implied directions can be derived from the will of the donor as to the investment of trust funds, it is the duty of the trustee to whom money is conveyed in trust to invest it in good and safe securities. *Kimball v. Reding*, 64 D. 333.*

A trustee being directed to use his "best skill and judgment" in investing trust funds, his powers and discretion are not enlarged by the use of the words "best skill and judgment." *Id.*

An investment, to be deemed safe, must have some evidence that it is so, to distinguish it from a mere adventure; it must have a valuation, yield an actual income, and not be founded upon remote contingencies. Buying stock in a contemplated railroad is not a safe investment, but a mere adventure. *Id.*

A trustee does not transcend his power or abuse his trust by paying over to the *cestui que trust*, money, in good faith, when charged by the will of testator to do so when in his judgment it seems necessary. *Id.*

Trustees for the benefit of another cannot recover in that capacity where they do not seek to do so, and have repudiated the trust relation by bringing the action in their own right. Thus where A paid purchase-money, and took a conveyance to B of an undivided one half of a tract of land, and after the death of A and B the heirs of B, in their own right, sued the grantor for partition, they cannot recover as trustees for benefit of A. *Portis v. Hill*, 65 D. 99.

A trustee under a deed of trust has no power to impose new terms or conditions, or

* Investments by trustees and liability for, see note, 57 R. 111-114.

For Index to Notes in American Decisions and American Reports, see Volume I.

to alter or vary those contained in the deed. *Cassell v. Ross*, 85 D. 270; *Hunt v. Townsend*, 100 D. 63.

28. Seeking advice from the court. — The right of plaintiffs to seek advice and direction of the court in performance of their duties as trustees is not dependent on defendant's acts and proceedings, whether legal or illegal. It is not necessary that defendants should be made parties, or that any decree be entered against them if they are so made. *Treadwell v. Salisbury Mfg. Co.*, 66 D. 490.

If plaintiffs state a case entitling them to the aid and advice of the court in the performance of their duties as trustees, a suitable decree may be entered to fully meet this part of the prayer of the bill, without any inquiry concerning the legality of the acts or proceedings of a corporation defendant. *Id.*

The court of chancery has general power and authority to entertain jurisdiction of cases in which trustees ask for protection in the performance of their duties; but the cases which fall under this head of equity are those in which there are conflicting claims to the trust estate, or it is doubtful, upon the construction of the will, deed, or other instrument creating the trust, to whom the property, or the beneficial interest in it, belongs. *Id.*

A bill in equity cannot be maintained by trustees who are stockholders in a corporation, under a claim for protection and advice in the execution of their trusts, and thereby subject the corporation, and all their acts and proceedings, to the jurisdiction of a court of chancery. *Id.*

Where a testator devises to a trustee, with directions to invest the trust fund in land in a particular place, and to apply the rents and profits to the use of his children until they attain a certain age, the court may authorize an investment in another place upon the same trust, with the consent of all those having vested or contingent interests in the fund. *Wood v. Wood*, 28 D. 451.

The chancellor may assent, for parties who are infants, and within his jurisdiction, to such change of investment. *Id.*

29. Power to sue in his own name. — Trustee may reduce the trust estate to possession, and may sue or defend a suit at law in regard to it, if the instrument by which the trust was created does not inhibit. *Huckabee v. Billingsly*, 50 D. 183.

A trustee may maintain an action at law for the possession of the trust fund or estate. *Commissioners v. Walker*, 38 D. 433.

A trustee may maintain trover against his *cestui que trust* for a conversion of the trust property. *Guphill v. Isbell*, 19 D. 675.

A trustee may bring an action as trustee which he would be estopped to bring in his individual capacity. *Worthy v. Johnson*, 54 D. 393.

A trustee of an express trust may prosecute an action in behalf of the trust in his own name. *Harney v. Dutcher*, 55 D. 131.

Section 33 of the Kentucky code, enabling trustees to bring actions in their own names without joining the beneficiaries, has not changed the rule under the old practice providing that a trustee under a mortgage made to secure the payment of money to others could not sue for a foreclosure and sale without making the *cestui que trust* parties. *Bardston etc. R. R. Co. v. Metcalfe*, 81 D. 541.

A trustee, to maintain action in his own name, without joining the *cestui que trust*, under that section, must allege or show that the beneficiaries are numerous, and that it is impracticable to bring them before the court within a reasonable time. *Id.*

When a trustee is entitled to sue in his own name without joining the beneficiaries, it is error to give him judgment for the money. The court should retain control over it for the benefit of those entitled to it. *Id.*

30. Power to dispose of trust property, and how exercised.* — The trustee in a trust deed can convey to a purchaser an absolute title at law, whether the trust has been performed or not, but it is defeasible in equity by the party injured by a breach of the trust. *Taylor v. King*, 8 D. 746.

A conveyance by a trustee under a deed of trust passes the legal title to the estate; and in an action of ejectment for the same, the purchaser need not show that, in making the sale, the trustee had complied with the conditions specified in the trust deed. *Reece v. Allen*, 46 D. 336. S. P., *Gale v. Mensing*, 64 D. 197.

A quitclaim deed from trustee to trustor reinvests the trustor with the legal estate, and divests the trustee of it. *Huckabee v. Billingsly*, 50 D. 183.

A trustee under a deed giving him power to sell and convey can sell and convey such title only as is vested in him by his conveyance. Such an agent has no authority to bind his principal or grantor by a covenant in his name. *Barnard v. Duncan*, 90 D. 416.

A trustee's conveyance under such power is valid without warranty or personal covenants; in fact, there can be no warranty of title on such sales, and all purchasers are bound to know it. *Id.*

Authority to convey merely gives no implied power to make covenants. *Id.*

A trustee cannot be required to enter into any personal covenants for title, or against encumbrances generally, where he has sold real estate under a deed of trust. He sells in his fiduciary capacity only, and acts as a mere agent to sell and convey, and as a trustee to execute the trust declared. *Id.*

* Conveyance by trustee, effect of, see note, 64 D. 199-203.

For Index to Notes in American Decisions and American Reports, see Volume I.

The usual trustee covenant against acts and encumbrances done or suffered by himself is the only one which can be required of a trustee executing a mere naked power of sale under a deed of trust. *Ib.*

Trustees having power under deed to sell and convey real estate, as well as executors, administrators, guardians, mortgagees, assignees for the benefit of creditors, and other like trustees, who have no other interest in the property than a legal title with power to sell and convey, are exempted from responsibility in making sales, except where fraud exists, or where they voluntarily enter into personal covenants of warranty. *Ib.*

A vendee may lawfully demand an ordinary trustee covenant of a trustee who sells to him under power of sale, as the trustee cannot object to covenanting against acts or encumbrances done or suffered by himself; but if the vendee absolutely refuses to complete his purchase unless a deed with full general warranty of title is tendered, it amounts to a waiver of any demand for a covenant against the trustee's own acts merely, and of all objections to the deed that was tendered because of its not containing such a covenant. *Ib.*

One who takes a conveyance of real estate in trust for a married woman may mortgage the same to secure the payment of the purchase-money, where the deed and mortgage are executed at the same time, and form part of the same transaction. *Mavrich v. Grier*, 93 D. 373.

Trustees authorized to sell real estate and invest the proceeds in stock are not thereby empowered to exchange the trust property for other real property. *Ringgold v. Ringgold*, 18 D. 250.

Where a deed of trust minutely prescribes the circumstances under which, and the manner in which, the trustees may dispose of the trust property, they are not at liberty to dispose of it in any other manner. If they voluntarily confess judgment, contrary to the provisions of the trust deed, such judgment is not a lien upon the trust property, and can only bind the individual property of the parties confessing it. *Hunt v. Townshend*, 100 D. 63.

A conveyance by a trustee, in violation of the trust, cannot be impeached by a stranger to the trust. *Coxe v. Blenden*, 26 D. 83.

The trustee is guilty of a breach of trust in selling the trust property under disadvantageous circumstances which it was in his power to avoid. *Hunt v. Bass*, 24 D. 274.

A will devised property to a certain trustee and his personal representatives, to hold for the use of the testator's son during his life, and for the use of his children after his death, with power to the trustee, but not to his representatives, to lease. *Held*, that a lease for ninety-nine years, renewable for-

ever, was not void. *Collins v. Foley*, 52 R. 505.

31. Public and private sales.—Where land is given to a trustee to sell the same "at auction or otherwise, in whole or in parcels, on giving three weeks' notice thereof," he can sell the same at private sale; the direction as to notice has only a reference to a sale at public auction. *Minusc v. Cox*, 9 D. 313.

The beneficiaries of a trust may acquiesce in and confirm a sale by the trustee by acts which will preclude them from afterwards calling the sale into question; but such acts, to amount in equity to a confirmation of the sale, must have been done with a full knowledge on their part of their legal and equitable rights which are affected by it, and of the defects of the title so confirmed. *Mulford v. Minch*, 64 D. 472.

The measure of damages where a purchaser at a trustee's auction sale refuses to perform his contract, and the property is resold on the same day within the hours mentioned in the advertisement, but at an enormous sacrifice, in consequence of most of the bidders having departed, is not the difference in price between the two sales, though it would be the proper criterion of damages actually sustained if the latter sale had been fairly made on proper notice; but even that would not be conclusive. The common-law rule is to give no more damages than the actual loss sustained; and where the property is shown to be still worth as much as was bid for it, the damages can be little more than nominal. *Barnard v. Duncan*, 90 D. 416.

32. Validity of sales by trustee.—Trustee to make a sale is allowed a greater discretion in Maryland than is granted to a master in chancery in England; but such sales have, as occasion required, been guarded with more precautionary restrictions than those adopted by the English court. *Murdock's Case*, 20 D. 381.

In ordering a resale by a trustee, the court may direct the highest bid at the previous sale to be rejected, where it appears that the bidder is unable to comply with his bid, or has acted fraudulently, or has attempted to baffle the court. *Ib.*

A trustee may be directed or allowed to report two or more persons as the highest bidders, upon the express condition that if the highest bidder does not comply with the terms of sale, the next bidder may be received as the purchaser, where there is just reason to believe that there is a combination of bidders to embarrass the sale, or the highest bidder has no ostensible means of payment. *Ib.*

A sale by trustees upon credit may be an act of good faith and the proper exercise

* Power of sale, when trustee vested with, by implication, see note, 57 D. 209-217.

For Index to Notes in American Decisions and American Reports, see Volume I.

of discretion, according to circumstances. *Hoffman v. Macbail*, 64 D. 637.

Where a trustee in a trust deed is authorized to sell for cash upon default of payment of the money for which the deed was given, he cannot sell on credit; and if he does sell on time, the sale may be set aside as void. *Cassell v. Ross*, 85 D. 270.

Where a trustee holds land in trust to convey one half thereof to a certain party upon request, or if no request is made for a conveyance, to sell the whole, and account to the party named for one half of the proceeds of the sale, the trustee may sell the whole tract, or any part of it, and such sale will be in conformity with the trust; and if no request is made for a conveyance during the lifetime of the trustee, at his death his representative takes the land upon the same trust, and if he sells, the purchaser acquires a good title discharged of the trust. *Paul v. Fulton*, 82 D. 124.

At a sale by a trustee under a power, where the facts or means of information concerning the condition and value of the thing sold are equally accessible to both parties, and nothing is said or done which tends to impose on the other, or to mislead him, there is no fraud of which the law can take notice; but where material facts are accessible to the vendor only, and he knows them not to be within the diligent attention, observation, and judgment of the other party, he is bound to disclose those facts, and make them known to the purchaser. *Barnard v. Duncan*, 90 D. 416.

Where the trustee in a deed of trust with a power of sale gives notice for a certain number of days, advertises the property, and puts it up for sale at public auction, and the property is struck off to a bidder, the trustee cannot upon the same day resell the property because the purchaser refuses to complete his contract; there must be a new publication of notice. *Id.*

A trustee's sale under a power contained in a trust deed should be made with precision, to render it valid. The notice of sale should contain such facts as would reasonably apprise the public of the place, time, and terms of sale, and the property to be sold. But mere omissions and inaccuracies in these respects, not calculated to mislead, and working no prejudice, will not be regarded. Therefore, where the deed empowers the trustee to sell at public auction at the court-house in a certain town and county, and the notice states that the sale will be for cash, at the court-house door in such town, but without naming the county, or stating that it will be at public auction, the notice is sufficient, until it is shown that injury results therefrom. *Powers v. Kueckhoff*, 97 D. 281.

Sales and titles founded on powers of sale contained in trust deeds should not be

avoided for slight reasons. But where the power has not been executed in accordance with essential conditions, the sale and deed will be held to be utterly void, at law and in equity. *Id.*

A deed of trust gave a power to the trustee, "or his legal representative," to sell the property conveyed by the deed on default of payment of the debts for which it was conveyed as security. *Held*, that the power could not be exercised by the administrator of the trustee, but only by his successor in the trust. *Warnecke v. Lembo*, 22 R. 86.

33. Rights and liabilities of purchasers. — If a trustee sell without giving public notice, when he is directed to give such notice, the sale is valid as to a purchaser, the trustee being held responsible for a deficiency, if any. *Minus v. Cox*, 9 D. 313.

Where a testator devised the residue of his property to his three sons, directing that the share of one should be deposited by his executor with the others, and giving the executor a power to sell, — *held*, that an attaching creditor of the son could not hold against a purchaser at a sale of the estate by the executor, pursuant to the power. *Braiman v. Stiles*, 13 D. 445.

A purchaser at a trustee's sale, in a creditor's suit, may be ordered to make payment directly to the creditors upon the trustee's death before payment. *Ocombe v. Jordan*, 22 D. 236.

Upon the death of the purchaser at a trustee's sale, before completing payment, his representatives having assets may be compelled summarily to bring in the residue of the purchase-money. *Id.*

A resale may be ordered on the purchaser's death before payment in such a case, for the purpose of raising the residue of the purchase-money. *Id.*

In sales by a trustee, the rule *caveat emptor* applies. *Sutton v. Sutton*, 56 D. 109.

At a sale by a trustee under a trust deed, the purchaser takes only such right and interest as the trustee has power to convey, where at the time of the sale the purchaser has notice of a deed conveying a portion of the property purchased. *Rives v. Dudley*, 67 D. 231.

The immediate grantee or purchaser at a trustee's sale under a trust deed is bound at his peril to examine the title he is purchasing, and must see that all precedent conditions of the sale are complied with by the trustee. Without this he cannot protect himself by insisting that he is a purchaser in good faith without notice, and the sale may be set aside. The rule is believed to be different, however, with a remote purchaser. *Cassell v. Ross*, 85 D. 270.

An innocent purchaser at a trustee's sale under a trust deed, without notice, will not

For Index to Notes in American Decisions and American Reports, see Volume X.

be affected by a previous arrangement or agreement between the debtor and creditor. *Powers v. Kueckhoff*, 97 D. 281.

34. Right to deal with the estate, generally.*—Trustees are not allowed to deal with the trust estate for their own benefit. *Miller v. Davidson*, 44 D. 715.

A person having charge of the property of another, who confounds the same with his own so that it cannot be distinguished, must bear all the inconvenience of the confusion, and is liable for the utmost value of the property. *Brackenridge v. Holland*, 20 D. 123. This principle applied to the case of an executor who had mixed the assets of the estate with his own property, and had invested them. *Myers v. Myers*, 16 D. 648.

The relation of trustee and *cestui que trust* is usually, as well in fact as in law, a relation of personal trust and confidence. *Tull v. Davis*, 100 D. 385.

Contracts between *cestui que trust* and their trustees, although not void, are strictly scrutinized by courts of equity, in order that no injustice may be done the *cestui que trust*; and before the same will be upheld, it must appear that the latter were free to act as rational, intelligent men. *Ringgold v. Ringgold*, 18 D. 250.

The utmost good faith is required where a fiduciary relation exists, in all transactions, so as to prevent undue advantage being taken; and if in such a case there is any suspicion of artifice or undue influence, equity will pronounce the transaction void. *Juan v. Toulmin*, 44 D. 443.

A trust cannot be revoked, or the trust estate applied to other purposes, unless the beneficiary has dissented from the trust. *Stockard v. Stockard*, 46 D. 79.

A trustee may contract with the *cestui que trust* in relation to the trust property, where the power of disposal of it is in the beneficiary. *Marshall v. Stephens*, 47 D. 601.

Where a creditor is appointed trustee in a deed of trust by the debtor, in favor of the debtor's wife and children, and the conveyance declares the property to be "free and exempt from the debts, contracts, and encumbrances" of the debtor, if the creditor signs the deed it is equivalent to a covenant or agreement on his part that the property shall be free from his own debt, and he cannot afterwards subject the property to his debt. *Strong v. Willis*, 52 D. 364.

A party is not permitted to allege his own fraud; consequently a trustee in a deed of trust by a debtor, who is also a creditor of the debtor, cannot impeach the conveyance as fraudulent so as to subject the property to his debt. *Id.*

* Liability of trustee dealing with trust estate, see note, 40 D. 516.

Dealings of trustee with *cestui que trust*, see note, 16 D. 516, 517.

35. Right to purchase the trust property.—1. *The general rule forbidding such purchase.*—A trustee cannot purchase for himself nor deal with the *cestui que trust*, in reference to the trust estate. *McCants v. Bee*, 16 D. 610; *Grumley v. Webb*, 100 D. 304.

A trustee cannot be a purchaser at his own sale. *Singstack v. Harding*, 7 D. 669; *Dorsey v. Dorsey*, 6 D. 506; without first divesting himself of his fiduciary character. *Murdock's Case*, 20 D. 381; *Pratt v. Thornton*, 48 D. 492.

A trustee cannot purchase at his own sale, either in person or by another, and a sale made to himself of the trust estate is invalid, and the *cestui que trust* is entitled, as of course, to have it set aside. *Armstrong v. Campbell*, 24 D. 556; *Davis v. Simpson*, 9 D. 500; *Richardson v. Jones*, 22 D. 293; *Salmarsh v. Beene*, 30 D. 525.

A trustee cannot sell and buy the same property because of the antagonistic interest in the two positions. *Tiedale v. Tiedale*, 64 D. 775; *Remick v. Butterfield*, 64 D. 316. He is not prohibited from purchasing, but if he does, it will be for the benefit of the *cestui qui trust*, who may, within a reasonable time, have a resale, or the trustee may be held to his purchase. *Brackenridge v. Holland*, 20 D. 123.

A trustee is not permitted by a court of chancery to buy the trust fund for his own benefit, without the consent of the beneficiary, which must be clearly proved. If he does, he still holds subject to the trust. *Field v. Arrowsmith*, 39 D. 185; *Chorpenning's Appeal*, 72 D. 789.

A trustee is bound to fidelity in the interests of his trust, and will not be permitted to make a profit by the relationship. This rule is inflexible, without regard to considerations paid by trustee, or his honesty of purpose. *Chorpenning's Appeal*, 72 D. 789.

A trustee appointed by a court of equity to sell real estate cannot buy at such sale, either on his own account or as the agent of a third person. *North Baltimore Building Ass'n v. Caldwell*, 90 D. 67.

A trustee in a deed to secure debts, who is an attorney at law and in fact of the creditor, cannot make a valid sale of the property to himself. *Washington etc. R. R. Co. v. Alexandria etc. R. R. Co.*, 100 D. 710.

2. Scope and extent of the rule.—Where a power is given to an executor to sell for the benefit of a third person, a purchase by the executor from his *cestui que trust* is not favored in equity, and he cannot maintain a bill for specific performance based on such purchase. *Munro v. Allaire*, 2 D. 330.

Purchases by a trustee from his *cestui que trust* will not be sustained by courts of equity unless, after the most rigorous scrutiny, it clearly appears that there is no fraud or concealment in the transaction, and no advantage taken by the trustee of information

For Index to Notes in American Decisions and American Reports, see Volume L.

obtained by him in that capacity. *McCants v. Bee*, 16 D. 610.

A purchase of the trust estate at sheriff's sale by a fraudulent trustee, pending litigation between him and his *cestui que trust*, confers no title; and the sheriff's deed can stand only as a security for what was advanced upon the execution. *Keaton v. Cobb*, 18 D. 596.

A trustee's purchase at a sale of the trust property is not void; it will bind the *cestui que trust* if he acquiesces; if he dissent in a reasonable time, the trustee will be considered as holding for him. *Jennison v. Hapgood*, 19 D. 258.

The trustee's purchase of the trust property is void, both as to himself and as to others jointly interested with him in the purchase. *Hunt v. Bass*, 24 D. 274.

An agreement entered into by a commissioner appointed by the orphans' court to sell real estate, by which the property to be sold is to be purchased by another person, and afterwards divided between them, will not be enforced in equity. *Saltmarsh v. Beene*, 30 D. 525.

A trustee cannot purchase at his own sale, or at a sale by his co-trustees; and if a trustee becomes interested in such purchase, the *cestui que trust* may have that purchase set aside, and the property re-exposed for sale; or the court may set aside the sale entirely, and order the purchase-money refunded. *Scott v. Freeland*, 45 D. 310. And whether the sale was private or public, the *cestui que trust* may insist on having the experiment of another sale, without proving that the trustee made a bargain advantageous to himself, and without showing actual injury. *Bank of Old Dominion v. Railroad Co.*, 74 D. 302. The manner of making such resale and of taking the account with such purchaser stated by the court. *Buckles v. Laferty*, 40 D. 752.

The trustee's designs in purchasing at sheriff's sale are immaterial, whether it be for himself or for the purpose of quieting his title as trustee; because, no matter what his intention might be, the law will protect *cestui que trust* against the acts of the trustee. *Spindler v. Atkinson*, 56 D. 755.

The rule that a trustee cannot purchase trust property for his own account forbids that a receiver who has bought in on foreclosure of a mortgage property of which he held the equity of redemption as receiver should be allowed to hold the property as against a *cestui que trust* who elects to claim the benefit of the purchase. *Jewett v. Miller*, 61 D. 751.

A trustee purchasing at his own sale cannot derive any benefit therefrom, though he has acted without moral turpitude, and the *cestui que trust* may still treat him as trustee, a court of equity relieving him to the extent

of allowing him a lien on the property for any advances of a reasonable nature which he may have made. *Mulford v. Minch*, 64 D. 472.

Trustees cannot purchase at their own sales, either directly or indirectly, and if they do, such purchase will be set aside on the proper and reasonable application of the parties interested. This doctrine applies to purchases by parties acting in any fiduciary capacity which imposes upon them the obligation of obtaining the best terms for the vendor, or which has enabled them to acquire a knowledge of the property. *Hoffman S. C. Co. v. Cumberland Coal & I. Co.*, 77 D. 311.

To support a purchase by a trustee from the *cestui que trust* of part of the trust property, the trustee must divest himself of his character as trustee, and enter into a new and distinct contract with the *cestui que trust*; and it must appear that the latter has the fullest information concerning the transaction and the trust, and that no advantage is taken by the purchaser of information acquired by him in the character of trustee. *Smith v. Townsend*, 92 D. 637.

Cestui que trust are not estopped from impeaching deeds given by them to their trustee, by reason of their having taken legacies under his will, which were not made a charge on the particular property derived under the deeds; nor does any case of election arise under such circumstances. *Id.*

Cestui que trust, who secure the vacation of deeds executed by them to their trustee, which convey part of the trust property, are in equity bound to repay to the trustee the purchase-money, and sums expended in repairs and permanent improvements, with interest. *Id.*

The doctrine in question is not confined to a particular class of persons, such as guardians, trustees, or solicitors, but is a rule of universal application to all persons coming within the principle that no party can be permitted to purchase an interest where he has a duty to perform inconsistent with the character of a purchaser. *Maryland F. Ins. Co. v. Dalrymple*, 89 D. 779.

The case of pledgor and pledgee comes within this rule, which rests upon grounds of public policy, and is enforced without regard to the question of *bona fides*, in the particular case. *Id.*

In cases of pure trust, resort to a court of equity must be had for relief, and that court will grant relief where there are special circumstances requiring such interference in cases of *quasi trusts*. *Id.*

A person taking entire control and management of a consolidated corporation consisting of several corporations created by laws of different states, and conducting the same as one company for the better security and protection of a mortgage of some of the

For Index to Notes in American Decisions and American Reports, see Volume I.

corporate property, thereby becomes a trustee, not only for the mortgagee, but also for the mortgagor corporations; and his purchase of the trust property at a foreclosure sale under another mortgage will inure to the benefit of the *cestui que trust*, upon his being reimbursed the amount of his bid, with interest. And as such trustee, he is bound to account; and it is error to hold that the right of the mortgagor corporation to an accounting will depend on the redemption from the sale to such trustee under the second mortgage. *Racine & M. R. R. Co. v. Farmers' L. & T. Co.*, 95 D. 595.

3. *Its limits and exceptions.*—It seems that a purchase by a trustee who is also a *cestui que trust* may be sustained, if it be to save the property from loss. *Munro v. Allaire*, 2 D. 330; *Spindler v. Atkinson*, 56 D. 755.

It is not universally true that such a sale is void at all times and under all circumstances. *Van Dyke v. Johns*, 12 D. 76.

A purchase by a trustee can be questioned only by the *cestui que trust*. *Wilson v. Troup*, 14 D. 458.

The rule forbidding such purchases is for the beneficiary's protection, and not for that of the trustee. *Richardson v. Jones*, 22 D. 293.

Equity will not vacate such sale on application by the trustee or the agent through whom the purchase was made. *Ib.*

Unreasonable delay in taking steps to have set aside a sale by a trustee to himself will imply an election to treat the sale as valid, and a confirmation of it may be justly inferred after the lapse of eight or ten years. *Scott v. Freeland*, 45 D. 310. S. P., *Van Dyke v. Johns*, 12 D. 76; *Harrison v. McHenry*, 52 D. 435; *Follansbe v. Kilbreth*, 65 D. 691.

A trustee may purchase at sheriff's sale property held in trust under a deed void as to the grantor's creditors, and must be treated as the purchaser of the grantor's entire interest at the date of the deed, in the absence of fraud on his part in connection with such sale. *Spindler v. Atkinson*, 56 D. 755.

A trustee cannot hold trust property for his own benefit, but is entitled to reimbursements for his expenditures and improvements, although he can purchase such property at a sheriff's sale made without his instrumentality. *Ib.*

The interest of *cestui que trust* inures to the benefit of the creditors when purchased at a sheriff's sale by a trustee of a deed of trust void as to creditors. *Ib.*

A trustee may purchase the interest of his *cestui que trust* when its sale by a public officer is inevitable. *Chorpenning's Appeal*, 72 D. 789.

A purchase of property by a trustee of the *cestui que trust* is not void, but voidable; although such a sale will not only be set aside

for fraud, but upon a very slight showing of advantage or bad faith; but when it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, concealment, or advantage taken by the trustee of information acquired by him as such, the purchase will be upheld and enforced. *Buell v. Buckingham*, 85 D. 516.

36. Right to acquire adverse interest in trust property.—A trustee, mortgagee, tenant for life, or purchaser who gets an advantage by being in possession, and purchases an outstanding title or encumbrance, cannot use it for his own benefit, but must be considered as holding it in trust for him under whose title he entered. A court of equity will, however, lend its aid to secure or reimburse all advances properly made by a trustee or agent to fortify the title. *Morgan v. Boone*, 16 D. 153. S. P., *Green v. Winter*, 7 D. 476; *Morrison v. Caldwell*, 17 D. 84; *Winwall v. Stewart*, 70 D. 549.

An adverse claim purchased by a trustee inures to the benefit of the *cestui que trust*. Hence, where one holding a tract of land, one half to himself, and one half as trustee for another, buys in an adverse claim, the latter is entitled to the benefit of half of such claim, and is liable for half the purchase-money and interest. *McClanahan v. Henderson*, 12 D. 412.

Where one holds land, one half for himself and one half in trust for another, if he relinquishes to an adverse claimant any part of the land, he must either show the superiority of the adverse title, or submit to have the land relinquished taken out of his own moiety. *Ib.*

Where a trustee has possession of the trust estate for his *cestui que trust*, he cannot, by any act of his own, without communication with the *cestui que trust*, so change the nature of his possession as to make it adverse; and if he part with the possession to a third person, in whose favor time would operate, and regain it by purchase or descent, he takes it charged with the trust. *Armstrong v. Campbell*, 24 D. 556.

Property is clothed with the trust, upon return to the hands of the trustee, after an unauthorized disposition thereof by him. *Hunt v. Bass*, 24 D. 274.

Possession of a trustee is considered as that of the beneficiary. *Miller v. Bingham*, 36 D. 58.

Adverse possession, between the trustee and *cestui que trust*, cannot exist where the trust is express. *Ib.*

Whether a trustee can change the trust subject by substituting other property in its place to be held subject to the same trusts, *quære*. *Heth v. Richmond etc. R. R. Co.*, 50 D. 88.

A trustee cannot sell the trust subject without a substitution of property of equal value. *Ib.*

For Index to Notes in American Decisions and American Reports, see Volume I.

A trustee, by asserting an adverse right to property, cannot divest himself of the character of trustee, nor vest title in himself until after the statute of limitations has run. *Moffatt v. Buchanan*, 54 D. 41.

An implied trust is ended and the trustee holds adversely to the *cestui que trust* from the time when he manifests an intention to claim and enjoy as his own the land subject to the trust, by failing to make a conveyance to the *cestui que trust* at the time agreed upon, and by taking out a patent for the land in his own name. *De Cordova v. Smith*, 58 D. 136.

An express trust is determined by the act of the trustee whenever he denies the right of the *cestui que trust*, and assumes absolute ownership of the property he holds in trust adversely to and within the knowledge of the *cestui que trust*. *Robertson v. Wood*, 65 D. 140.

A *cestui que trust* electing not to consider the trustees' purchase of outstanding disputed claims as being made on his account, and engaging in a protracted litigation with them for the establishment of their legal title under the purchase, cannot, after the lapse of six years from the purchase, and after a court of law has decided in favor of the trustees, come into a court of equity and have the purchase held for his benefit. *Wisehall v. Stewart*, 70 D. 549.

37. Execution of trust where there are two or more trustees.*—Three trustees of an absconding debtor's estate must be appointed under the Pennsylvania domestic attachment act, and qualify, before any of them can act; but if one afterwards dies, the survivors may sue as trustees. *McCreedy v. Guardians*, 11 D. 667.

A majority of trustees, having powers of a general nature, all of whom are assembled, may act if regular notice has been given. But where a certain number of trustees are, by act of assembly, to be appointed and sworn, all must be appointed and sworn before a majority can act, though the law vests in the majority all the powers of the whole. *Id.*

A contract by which one trustee agrees, for a pecuniary compensation to himself, to permit his co-trustees to have control of the trust fund, is in violation of law, and the court will neither enforce it while executory nor relieve from it when executed, especially where both parties are *in pari delicto*. *Foot v. Emerson*, 33 D. 205.

Several persons associated in a private trust or agency must all concur, in order to bind the parties for whom they act. *Low v. Perkins*, 33 D. 217.

Declarations made by one of such persons are not evidence of the acts of all. *Id.*

* When a majority of the trustees may execute the trust, see note, 11 D. 674, 675.

Survivorship of co-trustees, see note, 18 D. 163, 164.

Co-trustees must jointly execute such duties of their office as demand the exercise of judgment and discretion, although mere ministerial acts may be performed by one of them. *Vandever's Appeal*, 42 D. 305.

A trustee cannot justify acting alone on the ground of necessity, where his co-trustee was near at hand and might have been consulted without detriment to the interests of the trust. *Id.*

38. Compensation.*—Trustees are entitled to compensation for their services. *Muscogee Lumber Co. v. Hyer*, 43 R. 332.

A trustee's compensation may be increased, diminished, or withheld altogether, according to the circumstances of each case, in the sound discretion of the court. *Gibson's Case*, 17 D. 257.

The compensation of a trustee should be put at the lowest estimate, where the transactions of the trust are involved in obscurity, which might have been removed by a proper attention to duty. *McDowell v. Caldwell*, 16 D. 635.

The English rule is, that trustees are not entitled to any compensation for their services; but the English courts allow them a certain *per diem* under the name of an indemnity. *Ringgold v. Ringgold*, 18 D. 250.

Trustees in Maryland are allowed the same compensation for their services as are allowed to executors, etc., by statute. *Id.*

The trustees of real estate who have had the care of it for years, and have received a commission upon the income, may be allowed a further compensation out of the corpus of the estate on the termination of their trust. *Biddle's Appeal*, 24 R. 183.

A trustee who is also a lawyer may be allowed compensation for necessary services of a professional character concerning the trust after as well as before his appointment. *Perkins's Appeal*, 56 R. 208.

39. Commissions.—Commissions or poundage fees are allowed trustees in making sales, both by law and the rules of the court. *Gibson's Case*, 17 D. 257.

To prevent double commissions, as where a trustee dies after partly executing his trust, and another is appointed, the compensation should, if possible, be apportioned between them, according to the labor, trouble, and deserts of each. *Id.*

Where a deceased trustee has received full commissions, his successor should be allowed no more than a necessary recompense for his trouble. *Id.*

Half commissions may be allowed to the second trustee, in such a case, on the amount collected by him. *Id.*

Five per cent commission will not be allowed a trustee for simply receiving and paying over dividends of stock to his *cestui que trust*. *Turnage v. Greene*, 62 D. 203.

* Compensation of trustees, under the laws of the several states, see note, 17 D. 266-274.

For Index to Notes in American Decisions and American Reports, see Volume I.

A trustee is entitled to no commissions where he accepts the trust coupled with an interest, and the deed expressly provides for the payment of the expenses of the trust, but is silent as to whether he shall have compensation for his trouble and attention. *Imboden v. Hunter*, 79 D. 116.

40 Reimbursement for expenditures. — A trustee is entitled to interest on advances made for the use of the *cestui que trust*. He is also entitled to an allowance for depreciated money paid him for rent of the trust estate; for expenses incurred in erecting necessary and proper buildings, although the *cestui que trust* was not consulted. *Dhwoorth v. Sinderling*, 2 D. 469.

A trustee will be remunerated for necessary improvements rendering permanent benefit to the estate of the beneficiary. *Myers v. Myers*, 16 D. 643. But he cannot deduct the amount expended by him for additions and improvements on the trust estate, to the prejudice of the *cestui que trust*. *Pratt v. Thornton*, 48 D. 492.

Where one holds land, one moiety for himself and one moiety as trustee for another, he is entitled to be reimbursed one half the amount expended in improvements, and is liable for one half the rents. *McClanahan v. Henderson*, 12 D. 412.

Where there is a trust to sell land, to raise money to pay off encumbrances, etc., a trustee should not be allowed for improvements of the trust estate, though made in good faith, as in building houses and mills, clearing lands, and making roads. He is entitled only to necessary expenditures, as for repairs, etc. *Green v. Winter*, 7 D. 475.

A trustee of real estate may, at his discretion, pay off an encumbrance on the trust property. *Pratt v. Thornton*, 48 D. 492.

A trustee who in good faith pays out money to discharge a lien on land may retain the land as security, though the transfer to him was in fraud of creditors. *McMeekin v. Edmonds*, 26 D. 203.

Courts of chancery never permit trustees, of their own authority, to break in upon the capital of the trust fund. To sanction the expenditure after it has been made would give a license to trustees that would endanger estates committed to them. *Hester v. Wilkinson*, 44 D. 303.

Purchases by trustees, including executors, administrators, and guardians, when made in obedience to the duties of the trust, impose upon them a personal liability; the seller must look to them for payment, and they must look to the trust estate for reimbursement. *Sanford v. Howard*, 68 D. 101.

41. Rights of third persons dealing with trustees. — Co-operation of a stranger with a trustee in an act amounting to a breach of the trust, will render him liable for the loss occasioned thereby, if he had such notice of the existence of the trust as

was sufficient, ordinarily, to awaken distrust, or put him upon inquiry. *Bunting v. Ricks*, 32 D. 699.

Actual knowledge of the existence of a trust is not required to render a person liable who acts together with a dishonest trustee in a matter constituting a misapplication of the trust fund. *Id.*

A purchaser from a trustee who sells in his own right need not pay the purchase-money, though he has accepted a deed and given his bonds; as to unpaid purchase-money, he is a volunteer. *Beck v. Uhrich*, 53 D. 507.

A judgment creditor purchasing at a trustee's sale cannot require the trustee to credit the surplus on his judgment, but he must pay to the trustee the purchase price in full before he can require a deed, and he must move as any other person would be required to do to subject said surplus fund to the payment of his claim. *Cook v. Dillon*, 74 D. 354.

If a trustee commits a breach of trust by loaning the assets of the trust to a third person, the latter is bound to indemnify the trustee; and if he has the trust property in specie, a court of equity will compel him to restore it to the trustee from whom he borrowed it. *Abbott v. Reeves*, 88 D. 510.

A pledge by a trustee to secure his own debt, of what is known to be trust property, is *prima facie* unauthorized, and one taking such security is bound at his peril to ascertain whether the trustee has power to give it. *Shaw v. Spencer*, 97 D. 107; 1 R. 115.

The term "trustee," in stock certificates issued to the holder in his name "as trustee," is sufficient to put persons on inquiry as to the holder's right to pledge them for his own debt, and a pledgee taking them without inquiry does so at his peril. *Id.*

42. When purchaser from trustee will take subject to trust. — 1. The general rule. — A purchaser from a trustee, with knowledge of the trust, takes subject to the trust. *Smith v. Daniel*, 16 D. 641; *Shepherd v. McEvers*, 8 D. 561; *Talbott v. Bell*, 43 D. 126; *Heth v. Richmond etc. R. R. Co.*, 50 D. 88.

One coming into possession of trust property, with notice of the trust, shall be bound as a trustee. *Kinloch v. FOn*, 26 D. 196; *Pierce v. McKeehan*, 45 D. 636; *Carpenter v. McBride*, 52 D. 379; *Lathrop v. Bampton*, 89 D. 141.

An executor or trustee has no right to apply to his own use the trust fund; and a purchaser, knowing of the trust, purchases at his peril the trust property so applied. *Graf v. Castleman*, 16 D. 741.

A trust may attach to property, though the purchase of it by the trustee was irregular. *Heth v. Richmond etc. R. R. Co.*, 50 D. 88.

A recovery in trover by a trustee without

For Index to Notes in American Decisions and American Reports, see Volume I.

satisfaction vests the legal title in the defendant, and he becomes the trustee, and a court of equity will aid the *cestui que trust* against either the trustee or vendee for the recovery of the property. *Bust v. Bush*, 51 D. 675.

A trust estate is not such after-acquired title as inures to the benefit of a grantee of the trustee who makes the conveyance in his individual capacity. And an implied trust is governed by the same general rules as other trusts. *Kelley v. Jenness*, 79 D. 623.

A purchaser of corporate stock, with notice of a trust in favor of a third person, takes nothing as against the *cestui que trust*. *Crocker v. Crocker*, 88 D. 291.

2. *What is sufficient notice of the trust.* — To make the purchaser of a legal title a trustee, it is not necessary that he should have notice as to the particular *cestui que trust*; it is sufficient if he has notice that the person from whom he buys is but a naked trustee; he is then bound to inquire and find out the *cestui que trust*. *Maples v. Medlin*, 3 D. 687.

The possession of a *cestui que trust* exercising all the acts of ownership is not notice of a secret trust to a purchaser. *Scott v. Gallagher*, 16 D. 508.

The possession of a *cestui que trust* becomes adverse when the legal title is conveyed in violation of the trust. *Id.*

A breach of trust occasioned by misapplication by the clerk of a court of the proceeds of a negotiable promissory note, held by him in trust, is sufficient to charge one who took the note in ignorance of the character in which it was retained by the officer, but was cognizant that it had been given to a commissioner, in payment at a sale under his direction, in obedience to a decree of court. *Bunting v. Ricks*, 32 D. 699.

Purchasers of a resulting trust estate are not innocent purchasers for value, where the consideration is that they will pay the debts of the grantor, and support him and his wife. Purchasers upon such a consideration must look to the title, and the equities to which it is subject. *Dow v. Jewell*, 45 D. 371.

A purchaser must take notice of the title and its defects as it appears of record, where he buys at a sale made by a mortgagee or trustee under a power to sell for the payment of debts. He cannot legally demand covenants for title contained in the conveyance to the trustee. *Barnard v. Duncan*, 90 D. 416.

Evidence of usage among brokers to buy and sell, in the market and without inquiry, stock certificates issued in the name of one as trustee, and by him transferred in blank, is not admissible to vary the established rule of law that the word "trustee" in such a certificate is sufficient to put the purchaser on inquiry, and that he takes it at his peril. *Shaw v. Spencer*, 97 D. 107.

A father paid the purchase-money, and took a deed in the name of his daughter, a minor, the deed expressing a consideration paid by him. He held possession of the premises for thirty-eight years. The daughter and her husband, having surreptitiously obtained the deed, conveyed the property. *Held*, that the purchaser from her, for value, had notice of the resulting trust, and was guilty of fraud, and that a release to the father might be presumed. *Jackson v. Matzdorf*, 6 D. 355.

3. *Rights of purchaser who is ignorant of the trust.* — The trust may be enforced against a purchaser without knowledge thereof, where he still retains the property in his hands. But it is otherwise where he has parted with the property. *Smith v. Daniel*, 16 D. 641.

A purchaser from a trustee without notice holds the property discharged of the trust. *Hudnal v. Wilder*, 17 D. 744. But the trustee will be held answerable to the full value of the trust. *Rife v. Geyer*, 98 D. 381.

A purchaser without notice, who has acquired the legal title, and paid his money without notice of a trust, is protected in equity, even against the *cestui que trust*. *Wyse v. Dandridge*, 72 D. 149; *Beck v. Ulrich*, 53 D. 507. This rule applies as well to chattels as to real estate. *Wyse v. Dandridge*, 72 D. 149.

A subsequent purchaser of trust property cannot be protected as an innocent purchaser, unless his plea or answer contain explicit averments that he purchased for a valuable consideration, without notice, and that he has taken a conveyance of the legal title. *Smith v. Gray*, 34 D. 664.

A resulting trust is beyond the contemplation of the Texas statute respecting the rights of creditors, and is protected against one who acquires a judgment lien against it without notice, although a purchaser in good faith, for a valuable consideration, and without notice, would take the estate discharged of the trust. *Blankenship v. Douglas*, 82 D. 608.

A *bona fide* purchaser, without notice, of corporate stock, will be protected against a secret trust in favor of a third person, where such person, by his own voluntary act, has conferred the apparent right of property in the stock upon the vendor. *Crocker v. Crocker*, 88 D. 291.

2. Liabilities of Trustees.

43. *In general.* — Trustees or assignees are personally liable for omission to do what would be plainly beneficial to the trust property or to the *cestui que trust*, though acting in the utmost good faith. *Hutchinson v. Lord*, 60 D. 381.

A devise to an infant, with directions that another occupy the land during the infant's

For Index to Notes in American Decisions and American Reports, see Volume I.

nonage, for the support of the family, but not to use the land in any other way, will not entitle the trustee or the infant's guardian to charge the land with improvements made thereon. *Findley v. Wilson*, 14 D. 72.

A trustee who causes improvements to be made on the land of his ward by holding out the expectation of a lease, where no such lease can legally be made, is liable personally. *Ib.*

Where a naked trustee executes a release under seal, of a lien for the payment of money, in which he acknowledges the receipt of the money, he holds the money in trust, and is liable for the same. And his acknowledgment estops him, both at law and in equity, from denying the fact of receiving the money. *Lincoln v. Purcell*, 73 D. 196.

A trustee expressly authorized to make expenditures necessary for the repair or protection of the estate, and having no trust funds on hand, may, by express agreement, exempt himself from liability therefor, and make the expenditure a charge upon the estate; but in the absence of such agreement, the trustee is individually liable, and he cannot, by a mere subsequent promise to pay out of the estate, create a lien thereon, although the creditor acted upon the faith and credit of the estate. *New v. Nicol*, 29 R. 111.

44. Liability for losses.*—Trustees are liable for parting with the dominion of trust property, and permitting it to be squandered, though the deed to them did not specify the trust upon which it was made. *Kinloch v. l'On*, 26 D. 196.

To invest trust money on good security is the duty of a trustee. *Commissioners v. Walker*, 38 D. 433.

If trustees loan money without due security, they are liable in case of loss by insolvency. *Gray v. Fox*, 22 D. 508.

Loaning money on private security, especially where infants are concerned, is not, within the meaning of the English cases, a compliance with the rule that due security is to be taken by the trustee. *Ib.*

Land security or public stock should be taken by the trustee, in this country, who loans the trust money. *Ib.*

An order of the orphans' court that the money loaned remain on interest is no protection to the administrator, such order being beyond the jurisdiction of the court. *Ib.*

The permission of the court to loan the money should first be had; the money should not be loaned and an order of approval applied for afterwards. *Ib.*

A trustee is not answerable for losses

* See monographic note on the investments which a trustee may make without being liable for resulting loss, 40 D. 506-518.

Losses of trust property for which trustees are not liable, see note, 76 D. 799-805.

occurring without any fault or negligence on his part. *Knowlton v. Bradley*, 43 D. 609.

The rule that a trustee cannot in any case invest funds in his hands upon personal security has not been adopted in New Hampshire. *Ib.*

If a trustee, having trust funds in his hands, neglects to invest them or take security in some mode, a good reason should be shown. *Ib.*

A trustee cannot establish the fact of loss of the trust fund by his own uncorroborated testimony. *Seawell v. Greenway*, 75 D. 794.

He is allowed to testify to the extent of a loss by theft or robbery; but a foundation for this testimony must be first laid by proving the theft or robbery *aliunde, scilicet*. *Ib.*

A trustee who, in good faith, received confederate treasury notes in payment of promissory notes held in trust, under the Georgia act of 1863, acted under color of law, and is protected by the act of 1866, and the ordinances of the conventions of 1865 and 1868. *Campbell v. Miller*, 95 D. 389.

He might, in good faith, prior to adoption of the Georgia code in 1863, receive payment of promissory notes held in trust in such currency as was generally received by prudent men in the transaction of their own business, and reinvest the same in the note of a person who was then entirely solvent. *Ib.*

A trustee who received confederate currency in payment of promissory notes held in trust, before the adoption of the Georgia code in 1863, and after its adoption invested it in securities not authorized by law, and without an order of court, did so at his own risk, and is liable for the value of the currency at the time when it should have been reinvested. *Ib.*

A trustee who changes an investment of trust funds with the consent of the *cestui que trust*, who is of legal age, is not liable for any loss growing out of such new investment. *Ib.*

A trustee may show that an investment or change of investment made by him was prudent. *Ib.*

Trust funds must be kept separate from the private funds of the trustee, or he will be liable in case of loss. They must be deposited and loaned as trust funds, and kept separate from other funds. *Coffin v. Bramlett*, 97 D. 449.

A trustee who mingles trust funds with his own thereby becomes debtor to such fund. If he deposits them in his own name, and they are lost through the bank's insolvency, he is liable; so an investment of them in stocks in his individual name is a breach of the trust. *Ib.*

A trustee agreed to purchase and pay for a farm for the use of the *cestui que trust*, out of the proceeds of the trust estate. He pur-

For Index to Notes in American Decisions and American Reports, see Volume I.

chased, and gave his bond, secured by a mortgage on the premises; but he refused to pay the bond when due, and procured a foreclosure and sale of the farm by the mortgagee, at a loss. He was held liable for this loss and for costs of suit. *Green v. Winter*, 7 D. 475.

A will directed the executors to use their judgment as to investing the estate, at the same time recommending keeping one half in real estate. When defendant was appointed trustee, more than half the fund was invested in government bonds, and none in real estate. He sold the bonds and invested the greater part in railroad bonds at eighty-five per cent of their par value, and the promissory note of an individual secured by such bonds. He was an experienced bank officer, and took advice as to the investment. The railroad was a line of 125 miles in Vermont, forming part of a continuous line from Portland to Ogdensburgh, and the bonds were secured by mortgage on the franchises and property of three railroad corporations out of Massachusetts, and were selling at from eighty to ninety per cent of their par value. The roads were managed by reputable men, and the bonds were regarded as an excellent investment. Subsequently, the bonds greatly depreciated. Held, that defendant was not chargeable with the loss. *Brown v. French*, 28 R. 254.

45. Liability for negligence. — A trustee in possession of trust property is only bound to ordinary diligence in its preservation and protection. *Campbell v. Miller*, 95 D. 389.

He may receive payment of promissory notes held in trust, when due, in such currency as a prudent man would receive for debts due him individually under similar circumstances. *Id.*

Trustees are liable for gross negligence, and for their own acts, in not carefully securing money which was in their hands, and put out by them, but not for failure to sue at once a former trustee while in good credit, or on first hearing of his insolvency, when there was not probability of recovering at that time. *Konigmacher v. Kimmel*, 21 D. 374.

46. Liability for acts of co-trustees.* — Co-trustees are bound to watch over the conduct of each other, and to know of the collection of funds belonging to the trust estate; and if one of two trustees fails to apply money collected by him from a sale of the trust fund to certain outstanding indebtedness, and the other trustee knows of the receipt of such money, and makes no effort to have the same so applied, the latter is jointly chargeable for interest with his associate. *Ringgold v. Ringgold*, 18 D. 250. S. P., *Deaderick v. Cantrell*, 31 D. 576.

* Liability of one trustee for acts and defaults of co-trustees, see note, 42 D. 288-293.

Trustees joining in a receipt for money will raise a presumption that it came equally into the possession or under the control of all, and there must be direct and positive proof to rebut the presumption. Where, in consequence of any act or agreement of one trustee or executor, money comes into the hands of his co-trustee or co-executor, both are held liable for it. *Monell v. Monell*, 9 D. 298.

The unaccounted balance of a fund entrusted to the management of several will be charged to those in default through failure to account. *Johnson v. Johnson*, 29 D. 72.

A joint trustee permitting his co-trustee to retain the trust fund for many years, without inquiry as to whether it has been invested so as to answer the purposes of the trust, will be liable, because of his neglect, for the conduct of his co-trustee. *Deaderick v. Cantrell*, 31 D. 576.

A joint trustee of a directory trust failing to see that the trust fund is invested in the manner pointed out is liable for the abuse of the trust by his co-trustee. *Id.*

47. Liability to account. — The law discountenances all but the most open and satisfactory dealing between parties standing in a fiduciary relation, as they do not deal at arm's-length. *Diller v. Brubaker*, 91 D. 177.

A trustee is bound to put his *cestui qui trust* in possession of the full and true state of his affairs before any settlement will bind. *Id.*

48. When chargeable with interest. — If there is no unreasonable delay in applying the trust money according to the directions of the trust, and there is no application made of it to his own use, a trustee will not be chargeable with interest. *Minus v. Cox*, 9 D. 313.

If, in the management of the trust fund, the trustees exceed their power, or make unproductive investments, they are chargeable with interest; and if they apply the same to their own use, they are chargeable with compound interest. *Ringgold v. Ringgold*, 18 D. 250.

Trustees are chargeable with compound interest on the ground of the presumed gain to them, from the use of the trust fund, and if the circumstances are such as to forbid such presumption, and it appears that they invested the trust fund in good faith, although in violation of their trust, and that they have not derived any profit from such investment, they will not be charged with compound interest. *Id.*

Rests of six months allowed trustees without interest, to reinvest the fund, are not unreasonable. *Id.*

A trustee mixing trust money with his own, and keeping no separate account, must be charged with interest at five per cent an-

For Index to Notes in American Decisions and American Reports, see Volume I.

nually at least, and his bondsmen may be liable in case of loss. *Knowlton v. Bradley*, 43 D. 609.

49. Proceedings on trustee's bonds. — Where encumbrancers are not parties to proceedings appointing a trustee to sell the property and pay off the encumbrances, they are not bound to seek payment out of the proceeds of the sale in the trustee's hands, nor they are bound to abide by a loss on account of the trustee's default. In such a case the court may order a second trustee to pay off the encumbrances without impairing the rights of the encumbrancers against the sureties of the first trustee. *Brooks v. Brooks*, 38 D. 310.

Where the condition of a trustee's bond is broken, but on account of the death of the trustee before the creditor has become properly recognized, the latter's remedy at law is lost, equity will grant relief against the sureties of the trustee. *Id.*

Equity will not extend the liability of sureties beyond the clear intent and import of their contract; but if to such an extent they cannot at law be held liable, by reason of fraud, accident, or mistake, equity, to prevent a failure of justice, will interfere and enforce the execution of their contract according to its obvious meaning and design. *Id.*

3. Death, Resignation, Removal, New Appointment, etc.

50. Effect of death of trustee. — Upon the death of one of two trustees, the entire trust estate does not vest in the survivor, but a moiety of the same vests in the heirs or devisees of the deceased trustee. *Sanders v. Morrison*, 18 D. 161.

The *ius accrescendi* is destroyed by statute, in Kentucky, in trust estates as well as in all others. *Id.*

Trustees having died without executing the trust, chancery may appoint a trustee to effectuate the same. *Bull v. Bull*, 20 D. 86.

Upon the death of a trustee appointed to sell realty under a decree in chancery, the court may proceed in a summary way to compel his administrator to account for and pay over money which came into his hands by virtue of the trust. *Coombs v. Jordan*, 22 D. 236.

The administrator of a trustee may sue for a debt accrued in the trustee's lifetime, and before the appointment of another trustee. *Lahy v. Holland*, 50 D. 705.

51. Discharge. — A trustee can be discharged only by decree of a court of equity, by force of a provision in the deed, or by the consent of all the parties interested. *Ross v. Barclay*, 55 D. 616.

Evidence establishing the existence of a trust does not justify a presumption that the trust has been surrendered; nor does delivery of the property to one not authorized to

discharge the trustee amount to a surrender of the trust. *Guphill v. Isbell*, 19 D. 675.

52. Resignation. — A trustee who accepts cannot renounce. *Ross v. Barclay*, 55 D. 616; without the consent of the *cestui que trust* or the direction of the court. *Shepherd v. McEvers*, 8 D. 561.

A *quondam* trustee may sue after resignation for a debt agreed to be paid to him, or "such other trustee as may be lawfully appointed," and the debtor cannot object that he is not the proper party. *Lahy v. Holland*, 50 D. 706.

Payment to a trustee after his resignation will absolve the debtor from liability under a contract to pay to such trustee, or such as may be appointed. *Id.*

53. Removal. — The court may displace a trustee, where he removes from the state, or neglects his duty, or is guilty of injurious or improper conduct. *Gibson's Case*, 17 D. 257.

Where trust property is misapplied by the trustee, the remedy is by a petition for their removal, and not an action at law by the beneficiary to recover the property from them. *Methodist Church v. Remington*, 28 D. 61.

54. Substitution. — A railroad company's deed of trust of its property, made to secure certain bonds, provided that if the trustee should become incapable of acting, any court of record of a certain county, upon application of three fifths of the bondholders, and notice to the president or any director of the company, might appoint another trustee. The trustee, president, and directors went into the enemy's lines, and remained there during the war of the rebellion. Held, that an order of the county court, substituting another person as trustee, without notice, and a sale by such substituted trustee, were utterly void. *Washington etc. R. R. Co. v. Alexandria etc. R. R. Co.*, 100 D. 710.

III. RIGHTS AND REMEDIES OF CESTUI QUE TRUST.

55. The estate or interest of the *cestui que trust*.* — Property conveyed to a trustee for the benefit of the issue of a contemplated marriage, and to be sold on the direction of the grantor, inures to the benefit of such issue, although the grantor die without directing the sale. *Steele v. Lowry*, 19 D. 581.

A legislative act transferring the legal title of a mere naked trustee, and vesting it in the *cestui que trust*, in a case where the latter, by a resort to the proper tribunal, might have compelled such transfer, is constitutional and valid. *Ref. Prot. Dutch Church v. Mott*, 32 D. 613.

The *cestui que trust* cannot call for the

* Legal estate, when vests in beneficiary under statute of uses, see note, 78 D. 406-410. Conveyance of legal title to *cestui que trust*, when presumed, see note, 58 D. 472-473.

For Index to Notes in American Decisions and American Reports, see Volume I.

legal title, when, from the nature of the trust, his ownership is not immediate and absolute, and when it would defeat or put it in his power to defeat or endanger a legitimate ulterior limitation of the trust. *Battle v. Petway*, 44 D. 59.

Where property is given to a trustee for the use of a beneficiary, the assent of the latter to receive it on the condition of the grant must be signified either to the grantor or to the trustee. *Lockhart v. Wyatt*, 44 D. 481.

A conveyance from trustee to *cestui que trust* is presumed when the latter has been for a long time in possession of lands which the former ought to have conveyed; but such presumption is not raised in favor of him who attacks or holds in opposition to the equitable right. *Harman v. Kelley*, 45 D. 552.

Where a trustee who, holding both the legal and equitable title to real estate in trust for partners in a land speculation, whose rights are accordingly personal, by the direction and with the consent of the *cestuis que trust*, conveys the land to another without specifying the nature of the trust, by such conveyance raises a simple trust, and the right of the *cestuis que trust* becomes thereby changed from personalty to an equitable estate of inheritance, in which the widow of one of the *cestuis que trust* is dowable. *Nicoll v. Ogden*, 81 D. 311.

56. How far his interest is alienable.*—A purchase by a trustee of the *cestui que trust's* interest is always viewed with great jealousy. *Bruch v. Lantz*, 21 D. 458.

Fraud or an advantageous purchase need not be shown in such a case. *Id.*

The *cestui que trust* may assign, without being guilty of champerty, when he, or his trustee, is in possession, although another person may, for a short time, have held possession of a portion of the land. *Falls v. Carpenter*, 28 D. 592.

Where the court cannot decree a conveyance of the legal title at the suit of the *cestui que trust*, the trustee's estate would not be divested by a sheriff's sale under execution against the *cestui que trust*. *Battle v. Petway*, 44 D. 59.

The *cestui que trust* cannot create a trust in his own favor to the prejudice of his creditors, by investing his individual property in a building on the land held in trust; and the rents and profits of such building will be applied in satisfaction of the creditors' judgment. *Woodruff v. Johnson*, 55 D. 247.

Where a trustee executes a power of attorney to a third person with authority to release the deed, and the latter does so by and in the name of the trustee, and the land is released, not to the grantor in the trust deed,

but to a purchaser under him, the deed of trust will be treated as duly and regularly released. *Bryan v. Stamp*, 56 D. 139.

An interest in the trust estate may be conveyed, and the person conveying will be equally compelled to convey when he acquires title, as if the title had been in him at the time of making such contract. *Buck v. Swasey*, 56 D. 681.

A resulting trust is created in notes secured by mortgage, where the purchase is made with the joint funds of two persons and the title is taken in the name of but one; and in such a case, if the *cestui que trust* conveys an interest in the property to the plaintiff, a trust is created in his favor which attaches to the land if the mortgage is foreclosed, and the trustee can bring a suit in his own name against the trustee to enforce the trust. *Id.*

The assignee of an interest in a trust estate may maintain an action in his own name in equity, although he could not maintain such an action at the common law. *Id.*

On assignment of an interest in a trust estate, the trustee holds the land in trust for the assignee, and a conveyance will be directly enforced from the trustee in his favor, and the conveyance when made will discharge the assignor from so much of his contract as shall thereby have been performed. *Id.*

The equitable title may be divested out of the *cestui que trust* otherwise than by alienation, before the trust is actually performed, where an agent converts himself into a trustee for his principal by making a nominal purchase to himself. *Follansbe v. Kilbreth*, 65 D. 691.

The *cestui que trust* may divest himself of his equitable title by repudiating the acts and purchase of the trustee when he discovers that the latter has practiced any fraud towards him, but he may waive the fraud and claim his rights as *cestui que trust*; or he may treat the purchase as his own by selling his equitable title before he has discovered the fraud; or such equitable title might doubtless be destroyed by mutual agreement of both parties, without fraud on either side; or possibly be defeated by laches or subsequent misconduct on the part of the *cestui que trust*. *Id.*

An agent and trustee may divest *cestuis que trust* of their equitable title, without their consent, by repudiating the agency, when the *cestuis que trust* have fraudulently induced the trustee to act for them and incur personal responsibilities which he would not have undertaken but for the fraud practiced upon him. *Id.*

A court of equity will not permit the *cestui que trust* to show a speculative disposition toward his trustee. If the former discovers facts justifying a repudiation of the latter's acts, he is bound, after investigation, or a reasonable time therefor, to declare whether

* Judgments against trustee, when bind *cestui que trust*, see note, 34 D. 722-725.

For Index to Notes in American Decisions and American Reports, see Volume I.

he will avail himself of that right or not, and cannot lie by indefinitely for the purpose of affirming the bargain if a profitable one, or repudiating it if it is a losing one. *Ib.*

The founder of a trust by will may secure the income to the beneficiary by prohibiting his alienation of it, and its seizure by his creditors, in anticipation. *Broadway Nat. Bank v. Adams*, 43 R. 504.

57. His right to follow the trust property. — Upon breach of trust by a trustee, the *cestui que trust* may follow the estate into the hands of a stranger, or he may have his remedy against the trustee personally to recover for damages caused by his unauthorized act. *Huckabee v. Billingsly*, 50 D. 183.

A trustee cannot convert money into land or land into money at his pleasure unless specially authorized; and if he invests money in land, the *cestui que trust* may take the land or demand the money, at his option. *Kaufman v. Crawford*, 42 D. 323.

The *cestui que trust* may be subrogated to the rights of an administrator, where land held in trust by a deceased trustee has been sold on credit by the administrator. The notes taken in payment will be canceled, and the money will be ordered to be paid by the innocent purchasers to the *cestui que trust*. *Vandever v. Freeman*, 70 D. 391.

Money delivered to a person to pay debts, and converted by him, is not a trust fund, authorizing the one who reposed the confidence, or his representatives, to recover it as such. *Doyle v. Murphy*, 74 D. 165.

A trust assumed by a testator will not be enforced against his executor, where identity of trust fund is entirely lost, and the property claimed is not shown to be the fruit or product of the property originally covered by the trust. *Lathrop v. Bampton*, 89 D. 141.

Equity will follow a trust fund so long as its identity exists, or when it can be shown that it is the product of the original property of the *cestui que trust*; and the right of reclamation attaches to it until detached by the superior equity of a *bona fide* purchaser for a valuable consideration without notice; but the right of pursuing it fails when the means of ascertainment fail. *Ib.*

Before the *cestui que trust* can claim specific real or personal property, he must show that it is the identical property originally covered by the trust, or that it is the fruit or product thereof in a new form. *Ib.*

Identity of trust estate in the hands of testator is entirely lost where his executor has possession of his testator's property, and it cannot be shown that such trust estate is in the hands of the executor in its primary condition, or that it was converted by the testator into the property, or any part of it, which subsequently came into the executor's possession. *Ib.*

The *cestui que trust* may elect to hold the original or substituted property, when he can identify the trust fund, either in its original or in a substituted form, or he may hold the trustee personally liable; but if he cannot identify the property, he must rely on the personal liability of the trustee. *Ib.*

In following a trust fund consisting of money, it is not necessary to identify individual pieces or coins, but it is sufficient to show a separate and independent fund or value, readily distinguishable from all other funds. *Ib.*

The *cestui que trust* has simply a claim against the estate of his trustee, where the latter during his lifetime mingled the money of the *cestui que trust* with his own, and after his death neither the trust money nor property into which it was converted could be identified in the hands of the executor; and such claim must be presented to the executor for allowance as required by the probate act. *Ib.*

Equity will follow the fund through any number of transmutations, and preserve it for the owner, so long as it can be identified, no matter in whose name the legal right stands. *Farmers' & M. N. Bank v. King*, 98 D. 215.

If money has been converted by the trustee or agent into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership. *Ib.*

N. put \$469 into the hands of W. in trust. W. deposited it in bank with other moneys to his own credit, and afterward drew out and applied to his own use all but \$91. Subsequently, he drew checks for that balance, and some \$1,400 in another bank, in favor of R., to secure him against his liability for W., on an official bond. Held, that N. could not recover his money from R. *Neely v. Rood*, 52 R. 302.

58. Remedies to enforce trusts, generally. — A purchase of land by a guardian, which he declared at the time to be for the use of his ward, is not such a trust as can be enforced by the ward. *Kisler v. Kisler*, 27 D. 308.

Heirs of the founder of an eleemosynary corporation have no visitatorial power where the trustees are not themselves objects of the donor's charity, and are vested by the founder with a general control, superintendence, and management of the trust, which in effect gives them the power of visitors; as where a certain sum of money is bequeathed to certain trustees and their successors, who afterwards become incorporated, in trust, to invest the same in such secure manner as they shall think best, and to apply the income to the pay or maintenance of a faithful and competent instructor in a certain school to be established by them, for pious and indigent youth, and authorizing the trustees and their successors

For Index to Notes in American Decisions and American Reports, see Volume I.

"to make from time to time such rules and regulations as they may believe best adapted to insure success." *Sanderson v. White*, 29 D. 591.

A bill by the heirs in such a case to compel the trustees to a discovery as to their investments, and to an execution of the trust, will not lie. *Ib.*

A trust created for the benefit of a third person, without his knowledge at the time, may be afterwards affirmed and enforced by him. *Woodbury v. Bowman*, 31 D. 40.

An agreement without consideration to execute a trust *in futuro* is not binding; but where the trust is actually undertaken and commenced, equity will enforce it. *Switzer Skiles*, 44 D. 723.

A trust arising from an illegal transaction may be enforced in favor of an innocent party. Hence, where a trustee for creditors of an insolvent combines with others to obtain from the government, in fraud of the law, the legal title to certain land conveyed by the debtor to such trustee, the creditors of the insolvent, not being parties to the fraud, may enforce against the trustee the trust existing in their favor in the property. *Miller v. Davidson*, 44 D. 715.

A money compensation for a trust upon land may be decreed when from the circumstances it is more equitable, and the amount will be the original purchase-money and interest. *Heth v. Richmond etc. R. R. Co.*, 50 D. 88.

A *cestui que trust* may maintain ejectment upon a demise in his own name, though the legal estate be still in the trustee, in a case where the purposes of the deed have been satisfied, and also in the case of a resulting trust. *Doggett v. Hart*, 58 D. 464.

Where the *cestui que trust* brings ejectment, the jury is permitted to presume that a regular surrender has been made by the trustee of his estate, thereby clothing the *cestui que trust* with the legal title, and enabling him to recover in the action: 1. Where the purposes of the trust estate have been satisfied; 2. Where the beneficial occupation of the estate by the possessor induces a supposition that a conveyance of the legal estate has been made to the party beneficially interested; 3. Where the trust is so plain that a court of equity would not hesitate to compel the trustee to make a conveyance to the *cestui que trust*. *Ib.*

A *cestui que trust* coming into equity to assert the legal title must allege that the trustee has refused the use of his name in an action at law. *Ib.*

A conveyance by a grantor in a trust deed, and the trustee, of lands settled in trust, is a fraud on the beneficiaries in remainder named in the trust; and equity will entertain a suit in their behalf to cancel it, notwithstanding that they were unborn when the trust was created; that the time has not

yet arrived when they are to enter on the enjoyment of the remainder; and that the conveyance was made under authority of a decree of court (fraudulently obtained). *Wright v. Miller*, 59 D. 438.

Where a party obtains a conveyance of property in trust, to reimburse himself and another for money paid, and a suit is brought to enforce the trust on the part of the second *cestui que trust*, equity will grant a decree compelling the trustee to pay to the plaintiff the amount to be secured. *Miller v. Thatcher*, 60 D. 172.

Beneficiaries under a trust deed may maintain an action for the enforcement of the trust and the recovery of that portion of the trust funds to which they may be entitled. *Lexington Life etc. Ins. Co. v. Page*, 66 D. 165.

A trust will be enforced, notwithstanding the consideration is voluntary, if it is created and declared in conformity with the statute of frauds. *Lane v. Ewing*, 77 D. 632.

An executory agreement to create a trust will not be enforced if it is upon a voluntary consideration. *Ib.*

A bill to compel conveyance of the legal title from the trustee may be sustained, though no demand for the title is made before suit brought, but the complainant will be subjected to costs. *Forbes v. Hall*, 85 D. 301.

If an action to enforce a trust could have been maintained against testator, it can be against his executor; but if it could not have been maintained against the testator, it cannot be against his executor. *Lathrop v. Bampton*, 89 D. 141.

A *cestui que trust*, when forced to rely upon his trustee's personal liability, occupies a position towards the estate of the trustee which is no better, but is identical with, that of a simple contract creditor. *Ib.*

Trustees holding notes, given by other parties for the benefit of a railroad corporation, cannot refuse to surrender such notes to the beneficiary simply on the ground that a condition named in such notes, the failure to comply with which would render them void, had not been complied with. *Des Moines Valley R. R. v. Graff*, 1 R. 256.

A party assigned certain securities in trust to another to satisfy a certain indebtedness, and to hold the balance subject to his order, which trust was accordingly accepted. The assignor afterwards directed the balance of the money received under the assignment to be paid over to a third party. *Held*, that this party could maintain an action for money had and received against the person holding the money; for the acceptance of the trust was equivalent to an express promise to the person who should be ordered to receive the money. *Weston v. Barker*, 7 D. 319.

The person for whose benefit a trust is

For Index to Notes in American Decisions and American Reports, see Volume I.

created may compel the performance thereof, in equity, although he may be no party to the contract. Accordingly, where the first of several judgment creditors entered into a written agreement with those subsequent to the second, that if they would allow the first to purchase at sheriff's sale a certain portion of the judgment debtor's realty, without let or hindrance, he would discharge the remainder of the realty from his judgment, and would pay the second judgment creditor, — *held*, that the latter, although no party to the agreement, could enforce the contract in equity. *Rodney v. Shandland*, 12 D. 70.

B. deposited in a savings bank certain moneys in his own name as trustee for R. B. gave the bank-book to R., who returned it to B., in whose control it remained. B. was childless. R. was his step-daughter. It was in evidence that B. was a man of few words, and that he treated R. as his daughter. In an equity suit by R. against the administrator of B., claiming the deposit as trust funds held by B. for R., — *held*, 1. That the trust was completely constituted; 2. That the trust being constituted, the fact that it was voluntary was no reason for refusing relief. *Ray v. Simmons*, 23 R. 447.

59. Jurisdiction of equity. — As a general principle, where confidence is reposed, and that confidence is abused, courts of equity will grant relief. *Highberger v. Stiffer*, 83 D. 593.

Where a legal or actual fiduciary relation exists between two persons, where the one exercises influence and control, and the other reposes trust and confidence, as a protection against overweening confidence, independent of any ingredients of positive fraud, as a matter of public policy, courts of equity will interpose to prevent a man from stripping himself of his property. *Ib.*

Equity alone can compel a trustee to execute or surrender his trust. *Guphill v. Isbell*, 19 D. 675.

Trusts of personality will be enforced by chancery. *Kimball v. Morton*, 43 D. 621.

Trusts arising under a will, and requiring equitable interposition, are within equity jurisdiction, and the fact that the trusts were created by a will will not exclude a chancery court from the exercise of its jurisdiction. *Wade v. Am. Col. Soc.*, 45 D. 324.

Where the legal title passes to a trustee, equity will enforce the trust, although the purchase-money was paid by the trustee himself, and the trust is declared for his children. *Dennison v. Goehring*, 47 D. 505.

Equity will not assume jurisdiction to establish trusts in every case where a mere confidence has been reposed or a credit given. *Doyle v. Murphy*, 74 D. 165.

Equity never interferes with the execution of a use by statute, unless, or any longer than, there is something for the trustee to

do, which, being done, will produce a different result from the statute. *Adams v. Guernard*, 76 D. 624.

Where trusts, even of an official character, have been violated, equity takes jurisdiction. *Norton v. Hixon*, 79 D. 338.

Trusts in land, created in favor of an insolvent, either with or without full consideration, may, in the absence of fraud, be enforced in equity by the beneficiary against the trustee. *Baker v. Evans*, 86 D. 456.

60. Limitations of suits involving trusts. — Although trusts are not strictly within the statute of limitations, yet equity has adopted the principles of that act. *Wallace v. Duffield*, 7 D. 660.

The statute of limitations protects the possession of a party claiming under the trustee, and adverse to the *cestui que trust*, after the surrender of the trust. *Guphill v. Isbell*, 19 D. 675.

Where by contract between the complainant and defendant, the latter was authorized to sell the lands of the former, and account for two thirds of the proceeds, retaining the other third as compensation, this constitutes the relation of trustee and *cestui que trust*, and although the remedies at law and in equity are concurrent, the statute of limitations is no bar to an account; and if the defendant contracts to sell the lands to a partnership, of which he is a member, the sale is voidable at the instance of complainant, and if the defendant sell the warrants of survey for such of the lands as cannot be discovered, and then take them back from his vendee, and locate them in his own name, he cannot hold the lands thus located, against the principal. *Armstrong v. Campbell*, 24 D. 556.

Courts of equity, equally with courts of law, are bound by statutes of limitation in all cases of bailments, loans, etc., although express trusts, where the remedies at law and in equity are concurrent. *Ib.*

A trust created in a party by implication, as where he has obtained property by fraud or unlawful means, although there is no remedy at law, also comes within the statute of limitations. In such cases the trust is not created by contract, nor does the relation of trustee and *cestui que trust* exist. *Armstrong v. Campbell*, 24 D. 556; *Lexington L. etc. Ins. Co. v. Page*, 86 D. 165.

An appointee in trust may plead the statute of limitations or not; and if he fails to do so, those for whom he holds the property have no right to do so. *Leigh v. Smith*, 42 D. 182.

The statute runs in case of a trust estate in favor of a stranger in exclusive adverse possession against both the trustee and the *cestui que trust*, whether for life or in remainder. *Smith v. Biffe*, 44 D. 156.

A conveyance by one of several trustees of an estate is manifestly defective, but an em-

For Index to Notes in American Decisions and American Reports, see Volume I.

try thereunder is sufficient to set the statute of limitations in motion against the trustees and *cestui que trust*. *Id.*

Lapse of time is not a bar to the enforcement of a resulting trust, where the trustee has acknowledged the trust, and there has been no adverse possession and no laches on the part of the beneficiary in bringing his bill for relief as soon as the trust is denied. *Dow v. Jewell*, 45 D. 371.

The rights of a *cestui que trust* under an express trust cannot be barred by the statute of limitations so long as the trust exists. *Pratt v. Thornton*, 48 D. 492; *Lexington Life etc. Ins. Co. v. Page*, 66 D. 165.

To trusts falling exclusively within the jurisdiction of equity, the presumption, from lapse of time, of satisfaction, payment, or waiver, does not apply. *Hightower v. Thornton*, 52 D. 412.

On the repudiation of a trust, the trustee's possession becomes adverse, and suit must be prosecuted within the time allotted by law, otherwise the claim will be barred; and it is immaterial whether the trust was cognizable at law or in equity. *Tinnen v. McBane*, 60 D. 205.

The rule that a technical or direct trust is not barred by lapse of time is subject to the qualification that it is barred: 1. Where circumstances exist calculated to raise a presumption from lapse of time of a discharge or extinguishment of the trust; 2. Where there is a remedy by action at law to which a limitation is expressly fixed; 3. Where an open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act as upon an asserted adverse title. *Phillips v. State*, 64 D. 635.

61. Parties. — *Cestui que trust* need not be joined in an action by a creditor to reach trust property in the hands of administrators or trustees who have the control of, and whose duty it is to protect, the property. In such case, the defense of the trustees is the defense of the *cestui que trust*, and their presence in court is not necessary to the protection of their interests. *Winslow v. Minn. & Pac. R. R. Co.*, 77 D. 519.

Equity has power to allow a *cestui que trust* to be made a party defendant, where facts exist to justify it. But the court will require him to present his defense, that they may judge of its sufficiency, and he must show that the relief sought, if granted, would prejudice his rights and interests. *Id.*

In an action by one of several *cestui que trust*, to declare and enforce implied trust in relation to land, all the persons who are entitled to or claim to be entitled to a portion of the trust estate are proper parties defendant. *Jenkins v. Frink*, 89 D. 134.

Where vacant lots in a city are conveyed to trustees in trust for a husband and his wife,

and the survivor of them for life, and at the death of the survivor to be conveyed to their children who should be living at the death of the survivor, and the descendants of such of the children as should be then dead leaving descendants; and upon the further trust that if said husband should think it expedient to sell the lots, or any part of them, the trustees should permit him to do so, the proceeds of the sale to be secured and held upon the same trusts, — if the husband dies without selling the lots, leaving his wife and children surviving him, the trust to sell will continue, and a court of equity may execute it. And if the widow file a bill against the children and trustees for a sale of the lots, the court may decree a sale, and the descendants of any child dying in the lifetime of the widow will be bound by the decree. The rule in reference to the representation of parties applies to such a suit, and the parties before the court will represent any such descendants as may become entitled under the trusts of the deed. *Faulkner v. Davis*, 98 D. 698.

If suit be brought to enforce a trust to sell created by a deed, and all persons in being who are interested in the object of the suit are convened before the court as parties, it is competent for the court to decree accordingly; and any title acquired under such decree is good, not only against those persons, but all others who may afterwards come into being and become interested in the trust. *Id.*

Where property is conveyed to trustees and their heirs forever on trusts declared in the deed, the heirs of the grantor have no interest in the subject, and are not to be regarded until all the trusts are satisfied. And in a suit for the execution of the trusts, they have no legal or equitable interest, and are not necessary or proper parties. *Id.*

62. Remedies for violation of trust. — Trustees who violate their trust in a sale of the trust property are liable to the *cestui que trust* for the utmost value of the property sold, but where the actual value can be clearly ascertained, that is the measure of indemnity. *Ringgold v. Ringgold*, 18 D. 250.

A sale of the trust property, by one trustee to his co-trustee, is a breach of the trust, for which both are liable. *Id.*

A *cestui que trust* who incurs costs at law in defending against his trustee a title purely legal, instead of coming at once into the proper forum for redress, cannot recover such costs in equity; but he is entitled to repayment of the costs paid to the trustee. *Keaton v. Cobb*, 18 D. 595.

It is a breach of trust to permit trust property to be diverted from its destination, or to diminish its value. *Pearson v. Moreland*, 45 D. 319.

For index to Notes in American Decisions and American Reports, see Volume I.

Investment by a trustee in the stock of a bank which has suspended specie payments is a breach of his trust. *Morris v. Wallace*, 45 D. 642.

A trustee cannot invest the trust property in his own name. If he does so, the *cestui que trust* may either insist upon a transfer of the investment, or charge the trustee with the amount invested, with interest. *Ib.*

An abuse of trust does not confer any privilege on the guilty party, nor on those in privity with him. *Brown v. Johnson*, 51 D. 118.

Cestui que trust may, during the continuance of the trust, maintain a bill against the trustee to vacate deeds obtained from them by the trustee. An equity, and a right to apply to have the deeds vacated, arises as soon as the trustee departs from his legal duty. *Smith v. Townsend*, 92 D. 637.

A *cestui que trust* can maintain an action at law against the trustee for money had and received, where the trust has been closed and settled, and the amount due the *cestui que trust* has been established and made certain. *Gould v. Emerson*, 96 D. 720.

63. Proceedings to compel accounting. — A court of equity, as part of its original and inherent jurisdiction, will compel the proper application of a trust fund, and require the trustee to render an account of his proceedings under the trust. *Dole v. Olmstead*, 85 D. 397.

A trustee refusing to account to referees for rents and profits of certain parts of the trust estate is chargeable with the reasonable income of such rents and profits, in the judgment of the referees. *Green v. Winter*, 7 D. 475.

A trustee's refusing to account furnishes a good reason for adopting against him the most rigid rule of calculation. *Myers v. Myers*, 16 D. 648.

A trustee or quasi guardian who is compelled to account to his *cestui que trust* is entitled to credit for the sums expended by him in the acquisition of the trust property. *Hanna v. Spotts*, 43 D. 132.

In a bill by the beneficiaries against a trustee for an accounting, the trustee ought not to be charged with the loss of a slave taken from the beneficiaries in Tennessee, upon a judgment against their grantor, and which the trustee residing in North Carolina failed to recover before being barred by the statute of limitations. *Hester v. Wilkinson*, 44 D. 303.

The *cestui que trust* may maintain an action of account render against his trustee receiving profits of land. *Dennison v. Goehring*, 47 D. 505.

The circuit court has ample jurisdiction to settle the account of a trustee appointed on a judgment of forfeiture against a bank. *Coulter v. Robertson*, 57 D. 165.

A probate account is a statement of re-

ceipts and payments by the trustee concerning the estate confided to his care, the detailed statement of its administration while in his hands, what has been received and from what sources, what has been paid out and for what purposes, and the balance, if any, remaining. From the nature of such account, a claim for damages for a tort cannot be included in it. *Brown v. Howe*, 69 D. 276.

An order of court approving an account of a trustee, in which he claims a certain credit, is not conclusive as to his right to such credit, but the court may, at a future time, investigate and restate the account. *Seawell v. Greenway*, 75 D. 794.

Orders passing accounts of trustees may be considered as orders or judgments *in rem*, subject to be set aside upon future inquiry into the correctness of the accounts. *Ib.*

A trustee may be called into a court of equity by *cestui que trust*, at any and all times, for the purpose of having an accounting of the trust property. *Smith v. Townsend*, 92 D. 637.

An executor can be held to account as trustee, where he has come into possession of a trust fund or its substitute, so that the same can be identified, and charged as such upon the same terms as his testator held the trust; and the relationship of trustee and *cestui que trust* will be added to that of executor. *Lathrop v. Bampton*, 89 D. 141.

In a suit against a trustee of corporate property, who is managing it for the protection of a mortgagee thereof, to compel an accounting, the decree should be that the account be first taken and stated, and that a reasonable time be given for redemption from a sale to the trustee under a second mortgage, and for payment of such balance as should be found due upon the first mortgage debt, after deducting the net earnings of the property; and that in default of such redemption and payment being made, the property be sold in satisfaction of the first mortgage debt. *Racine & M. R. R. Co. v. Farmers' L. & T. Co.*, 95 D. 595.

In the accounting by a trustee who has managed property of the mortgagor railroad corporation for the protection of the mortgagee, the mortgagor corporation is entitled to a credit for the earnings of a line of road which had been constructed by such trustee, with money furnished by the mortgagee, along the line of the road owned by the mortgagor, and which, by its contiguity to the latter road, rendered it less valuable than it would otherwise have been. *Ib.*

By deed made in May, 1860, three bonds, secured by mortgages of real estate, were assigned to B., in trust, to invest the proceeds, as soon as received, "in such manner as the said B. may think proper, on consultation with" the *cestui que trust*, and then to permit them to receive the income. The

For Index to Notes in American Decisions and American Reports, see Volume I.

cestui que trust removed, shortly afterward, from South Carolina, where the trust was created, to New York, and remained there during the war with the Confederate States. In 1862 and 1863 B. collected the bonds in confederate treasury notes, then much depreciated, and invested the proceeds in bonds of the Confederate States, without consultation with the *cestui que trust*, with whom it was, at that time, impracticable to communicate. *Held*, that B. committed a breach of trust, and that he was liable to account to the *cestui que trust* for the sums received. *Held*, further, that the obligors in the bonds were not liable to account to the *cestui que trust*, for that they were discharged by their payments to B. *Mayer v. Mordecai*, 7 R. 26.

64. Distribution of trust funds.—The court of chancery has jurisdiction, in Maryland, under the act of 1785, chapter 72, and supplement, to decree a sale of trust property for the purpose of a division among the parties entitled to it, upon competent and satisfactory proof that the same is not susceptible of partition without loss, and that a sale will be advantageous to the parties. *Smith v. Townsend*, 92 D. 637.

If a power to lease included in a trust is void because of the invalidity of the trust under the rule against perpetuities, the right to share in the distribution of the rents given by the instrument creating the trust will necessarily fail. *Barnum v. Barnum*, 90 D. 88.

Where trust funds, of which income, interest, or profits are given to a person for life, and the principal bequeathed over upon the death of the life tenant, are invested either by the trustee, or at the death of the testator, in stock or shares of an incorporated company, the value of which consists in part of an accumulated surplus or undivided earnings laid up by the company, such additional value is part of the capital, which, as well as the par value of the shares, must be kept by the trustee intact for the benefit of the remainderman; but the earnings on such capital, as well as upon the par value of the shares, belong to the life tenant. When an extra dividend is declared out of the earnings of the company, it belongs to the life tenant, unless part of it was earnings carried to the account of accumulated profits, or surplus earnings at the testator's death or at the time of the investment, if made since his death, in which case so much must be considered as part of the capital. *Van Doren v. Olden*, 97 D. 650.

Where the property of a corporation consists wholly of real estate, and a part of it is taken by eminent domain, the compensation therefor, if distributed as a dividend to the share-holders, belongs to the capital, and not to the income of a trust fund invested in the shares. *Heard v. Eldredge*, 12 R. 687.

Where a will provides for a trust to pay income to one for life with remainder to another, and the trustee invests in bonds at a premium, payable at a certain day, he may deduct from the interest received on each bond enough to make good, by successive deductions, the amount of such premium, without regard to the market value of the bonds at the time of deduction. *New England Trust Co. v. Eaton*, 54 R. 493.

A testator bequeathed the "income, profit, and products" of certain stock in a corporation to a person for life, remainder over. Afterward, the corporation increased its capital stock, allowing each stockholder the option to take at par as many new shares as he held of the old. The trustees under the will sold part of their "options" to take the new shares, and with the proceeds bought new shares. *Held*, that the new shares were capital, and went to the remainderman. *Moss's Appeal*, 24 R. 164. S. P., *Brinley v. Grou*, 47 R. 618. But compare *Willbank's Appeal*, 3 R. 535.

TUG-BOATS.

Collisions between tows and, see SHIPPING, 57.

TURNPIKE COMPANIES.

1. Charters.—A charter of a corporation authorizing it to maintain a toll-road is a contract, and within the protection of the clause of the constitution of the United States prohibiting the several states from passing any laws impairing the obligation of contracts. *Backus v. Lebanon*, 35 D. 466; *Derby T. Co. v. Parks*, 27 D. 700.

The repeal of such a grant impairs the obligation of the contract, and is unconstitutional, unless the right of appeal is reserved or the corporation consents. *Derby T. Co. v. Parks*, 27 D. 700.

A consideration is unnecessary to render binding an executed legislative grant of such a right. *Id.*

A grant to a private corporation must be construed strictly, but not so as to defeat the object of the grant; and the laws relating to public highways in Maryland must be given a liberal construction. *Douglass v. Boonsborough Turnp. Co.*, 85 D. 647.

2. Public easement in the road.—An easement in a turnpike road is vested in the public in substantially the same manner as is that in a common highway. *State v. Maine*, 71 D. 89.

Resumption by the sovereign power of the franchise of a turnpike company leaves the public easement in the road disburdened of the tolls, but otherwise unaffected. *Id.*

By a transfer of a turnpike road from the public to a corporation, the title to the soil is not changed, but remains in the owners of the soil of the adjoining lands, and they have the same use and enjoyment of it that

For Index to Notes in American Decisions and American Reports, see Volume I.

they had before. The easement or right of way is transferred to the corporation, to be held by them while they work and keep the road in repair, subject to the public's right to use it upon paying toll. *Douglass v. Boonsborough Turnp. Co.*, 85 D. 647.

The distinction between the occupation of a highway by a railroad or a canal and by a turnpike company is, that the occupancy of the former is permanent and exclusive, while the turnpike is considered a public highway over which every citizen has a right to travel in his own mode of conveyance, and the imposition of tolls is only a method of keeping the road in repair. *Id.*

3. Damages to land-owners. — The owner of land taken for a turnpike is presumed to have received compensation for a perpetual public easement when the road was first laid out, and he is not entitled to any further compensation, when the legislature subsequently converts such turnpike into a public highway. *State v. Maine*, 71 D. 89.

Where a corporation is empowered by statute to establish and build a turnpike, and land is condemned, and compensation made to the then owners of the soil, a subsequent purchaser takes *cum onere*, and the legislature may, by a subsequent act, authorize the corporation to occupy and grade the road, without any new condemnation and compensation to such purchaser. Any compensation which could be claimed in such a case would be by the community which had borne the burden of the original condemnation. *Douglass v. Boonsborough Turnp. Co.*, 85 D. 647.

4. Tolls. — The notice of an application to the legislature for an increase of tolls on a turnpike road under the control of the applicants is not absolutely necessary to be given to a party engaged in carrying the mails over said road under a contract with the United States, but who is not bound by his contract to carry the mails on said road, and the want of such notice will not avoid the grant passed in pursuance of such application. *Derby T. Co. v. Parks*, 27 D. 700.

An allegation in the application, of a mistake in the charter authorizing the construction of such road, with respect to the rate of tolls, but referring to the inequality of the tolls as evidently proving that fact, is a matter of inference, and though erroneous, is not necessarily fraudulent. *Id.*

The omission to state in such application that the mails are carried over the road under a contract with the United States, by a third party, is not such a suppression of the truth as to amount to a fraudulent concealment. *Id.*

The regulation that a toll-road company should keep the rates of toll constantly exposed to view is mandatory; and if not complied with, deprives the company of the

benefit of the penalty for passing without paying toll. *Middle Bridge Prop'rs v. Brooks*, 29 D. 510.

Collecting tolls before being authorized to do so, or collecting in excess of the amounts authorized, is a ground for forfeiting a franchise. *People v. Kingston T. R. Co.*, 35 D. 551.

A statute construed, and held to authorize the charging of tolls for the full distance between two turnpike gates, though a less distance was traveled by the person of whom toll was demanded. *Id.*

5. Toll gates and houses. — The proprietors of a turnpike road have no authority to erect a gate upon an existing public highway, unless specially authorized by the legislature. *Wales v. Stetson*, 3 D. 39.

A person who has paid toll, or who is exempt from paying thereof, has the right to open the gate and pass through; but he must not commit a breach of the peace in so doing. *Pingry v. Washburn*, 15 D. 676.

A turnpike corporation may make any use of the land on which it has an easement, necessary for the enjoyment of its franchise. It may, therefore, erect a house for its toll-gatherer, cut down trees, and dig a cellar and well for the accommodation of the house, on land over which the turnpike runs, without being liable in trespass to the owner of the land. *Tucker v. Tower*, 19 D. 350.

A license granted to turnpike corporation under the general turnpike act is evidence of the completion of the road, so as to warrant the erection of toll-gates, but it is not conclusive of the completion of the road in an action in the nature of a *quo warranto*. *People v. Kingston T. R. Co.*, 35 D. 551.

A turnpike corporation cannot erect a toll-house on another's land except by license of the owner, and when it ceases to be used as a toll-house, the owner of the land may revoke the license, and remove the house as a nuisance. *Lancaster T. Co. v. Rogers*, 44 D. 179.

A toll-house erected in a highway by a turnpike company becomes a nuisance when it ceases to be used as a toll-house, and any one may remove it. *Id.*

A turnpike company cannot maintain trespass for the removal of an abandoned toll-house erected partly on another's land, in consideration of the owner's use of the road free of toll, and partly in the highway, where, after it has ceased to be used as a toll-house, the owner of the land removes it. *Id.*

The charter of a plank-road company authorized it to build its road from a point in the city of Detroit, and to erect gates according to their reasonable discretion, subject to the condition that none should be placed in the city; afterward the city limits were so extended as to include a gate erected by the company. *Held*, that the rights of the company were not thereby restricted, and that

For Index to Notes in American Decisions and American Reports, see Volume I.

the gate did not thereby become a nuisance, subject to injunction at the suit of the state. *Chops v. Detroit etc. Plant Road Co.*, 26 R. 512.

6. Liability for failure to keep road in repair. — A turnpike corporation's liability for injuries arising from want of repair of road is co-extensive with that of towns, under a charter making it liable for "all damages" to any person from whom toll is demandable, and damage must therefore not only be special, but direct. *Baxter v. Winocski Turnp. Co.*, 52 D. 84.

A turnpike corporation is not liable for general damages resulting from not attempting to travel a highway, or from not being able to travel as expeditiously as otherwise, because of its insufficiency. *Id.*

A turnpike company may be indicted for failure to maintain its road in repair prescribed by the charter, but not for failure to construct the road in the prescribed manner. *State v. Godwinsville etc. Road Co.*, 60 R. 611.

7. — for injuries caused by defects. — A turnpike corporation is not liable for injuries caused to adjoining property by digging clay from a highway, if ordinary care and prudence is exercised. *Baxter v. Winocski Turnp. Co.*, 52 D. 84.

Plaintiff's horse, while being driven on a highway with due care, became frightened without plaintiff's fault and ran off the highway, across private property, onto defendant's turnpike, where he was injured by falling over a defective bridge which defendant was bound to repair. *Held*, that defendant was liable. *Baldwin v. Greenwoods Turnp. Co.*, 16 R. 33.

A turnpike company, exacting toll for public travel on its road, negligently suffered the same to become, and to its knowledge to remain a long time, out of repair, by means of a large hole near the center of the track. The plaintiff, riding on horseback on said road, having no knowledge of the defect, and being in no way negligent, her horse became frightened by the hole, shied, threw her to the ground, and injured her. *Held*, that she might recover damages from the company therefor, without alleging that the horse came in contact with the hole, or that there was not room to pass on either side. *Brooksville etc. Turnp. Co. v. Pumphrey*, 26 R. 76.

8. Forfeiture of franchise. — Failure of a turnpike corporation to construct its road is *per se* a misuser, forfeiting the franchise conferred. *People v. Kingston T. R. Co.*, 35 D. 551.

An extension by the legislature of the time for completing a road does not bar an information in respect to a part of the road completed before the passage of the act. *Id.*

A waiver of causes of forfeiture is not presumed from the passage of a statute giving a turnpike corporation an extension of time in which to complete its road. *Id.*

ULTRA VIRES.

General doctrine of, see CORPORATIONS, 108-111.

Doctrine of, as applied to cities, see MUNICIPAL CORPORATIONS, 63.

UMPIRES.

Appointment and powers of, see ARBITRATION, etc., 16-18.

UNCERTAINTY.

Bequests to charity, when void for, see CHARITIES, 9.

Effect of, in devise, see DEVISE, 6, 7.

Effect of, on validity of deed, see DEEDS, 96.

In contracts, see CONTRACTS, 83.

In description of land conveyed, see DEEDS, 67.

In testimony on probate of will, see WILLS, 50.

In verdict, effect of, see TRIAL, 106.

In will, effect of, see WILLS, 53.

Setting aside verdict for, see NEW TRIAL, 23.

UNCOMMUNICATED THREATS.

Evidence of, when admissible, see HOMICIDE, 57.

UNCURRENT MONEY.

Payments in, see PAYMENT, 26, 27.

Tender of, see TENDER, 5.

UNDERTAKINGS.

In claim and delivery, see REFLEXION, 15.

On appeal, enforcement of, see APPEAL, VI.

On attachment, see ATTACHMENT, 47.

Original, not within statute of frauds, see GUARANTY, 12.

When work an estoppel, see ESTOPPEL, 14.

UNDISCLOSED PRINCIPAL.

Rights and liabilities of, see AGENCY, 84-87.

UNDUE INFLUENCE.

Contesting wills for, see WILLS, VI.

When amounts to fraud, see FRAUD, 3.

When avoids deed, see DEEDS, 100.

UNITED STATES.

[Includes decisions relating to the general government as a body politic. Similar decisions relating to the several states are under STATES.]

Attachment of property by, see ATTACHMENT, 4.

Judgments of courts of, as evidence, see EVIDENCE, 200.

Title of, to public lands, see PUBLIC LANDS, I.

1. Sovereignty of. — The ultimate political sovereignty of the government created by the federal constitution resides in the United States of America. *Chancely v. Bailey*, 95 D. 350.

Sovereignty is indivisible and unalienable. *Id.*

The powers granted to federal govern-

For Index to Notes in American Decisions and American Reports, see Volume I.

ment by the states, as expressed in the constitution, vest in that government, with respect to such powers, the supreme, irresistible, absolute, uncontrolled authority over the people of the respective states, so as to act efficiently and directly upon them as individuals. *Id.*

2. Cessions of land to. — A state legislature ceded to the United States jurisdiction over certain land, to be occupied as a "Home for Disabled Soldiers," by a corporation organized under act of Congress. *Held*, that the title to the land being in the corporation and not in the United States, it remained subject to the jurisdiction of the state courts. *In re O'Connor*, 19 R. 765.

Semble, that a state cannot abdicate its jurisdiction over places within its limits, unless the title thereto has been vested in the United States, and that as to such places the jurisdiction of the state to enforce its laws and to punish crime continues until Congress has, by some further legislative act, extinguished the state authority, and vested exclusive jurisdiction in the federal courts. *Id.*

3. Power to contract. — Power to lease lead mines on the public land not subject to entry does not reside in the President of the United States, either by virtue of his office or from acts of Congress. *Lorimier v. Lewis*, 39 D. 461.

The United States government has power under last two clauses of section 8, article 1, of federal constitution, to construct an aqueduct drawing its supply of water for the city of Washington from within the limits of Maryland, and using and occupying land for that purpose in Maryland, by permission and consent of the state. *Reddall v. Bryan*, 74 D. 550.

The United States, in its political capacity, may enter into contracts, take bonds, receive real or other property as security for debts, and the like, in cases not previously provided for by law; and no legislative authorization is required therefor, but the power exists as incident to the general right of sovereignty; the government, as a body politic, being authorized, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, to enter into contracts not prohibited by law, and appropriate to the just exercise of those powers. *Dikes v. Miller*, 78 D. 571.

4. Suits by or against. — Suits against the United States cannot be sustained in the courts of a state. *Orleans Nav. Co. v. Schooner Amelia*, 12 D. 516.

Vessels of the United States cannot be seized to compel the payment of toll. *Id.*

The United States may sue in their own name on a note indorsed to them, whether

it is negotiable in form or not. *United States v. White*, 37 D. 374.

Government, as a sovereign, cannot be sued. *United States v. Murdock*, 89 D. 652.

UNITED STATES SUPREME COURT.

Construction of constitutional provisions by, see CONSTITUTIONS, 5.

Generally considered, see COURTS, 12.

UNLAWFUL VOTING.

See ELECTIONS, 15.

UNLIQUIDATED DAMAGES.

When limitation begins to run on claims for, see LIMITATIONS OF ACTIONS, 36.

See DAMAGES.

UNLIQUIDATED DEMANDS.

Not subjects of set-off, see SET-OFF, etc., 2.

UPPER AND LOWER PROPRIETORS.

Relative rights of, see MILLS, 5; RIPARIAN RIGHTS, 18; WATERCOURSES, 10-15.

USAGES.

Effect of, on construction of marine policy, see INSURANCE, 101.

Effect of, on construction of statutes, see STATUTES, 45.

Effect of, on mode of delivery by carrier, see CARRIERS, 46.

Effect of, on question of deviation, see INSURANCE, 142.

Effect of, on validity of sales by factors, see FACTORS, 9.

Generally, see CUSTOM.

Of miners, see MINES AND MINING, 2.

When probable by parol, see EVIDENCE, 96.

USE AND OCCUPATION.

Actions for, see LANDLORD AND TENANT, 47-49.

Action for, between tenants in common, see CO-TENANCY, 49.

Assumpsit for, see ASSUMPSIT, 15, 16.

When purchaser liable for, see VENDOR AND PURCHASER, 31.

USER.

Establishment of highways by, see HIGHWAYS, 5.

Of easement, when raises presumption of grant, see EASEMENTS, 5.

Presumption of dedication from, see DEDICATION, 14.

USURY.

[Includes the taking of compensation for use of money in excess of the amount allowed by law; and agreements for such unlawful interest.]

As a defense in foreclosure, see MORTGAGES, 84.

For Index to Notes in American Decisions and American Reports, see Volume I.

As a defense in suit on bill or note, see **BILLS AND NOTES**, 295.

By national bank, see **BANKS AND BANKING**, 69, 70.

Effect of law of place, see **BILLS AND NOTES**, 248.

I. WHAT CONSTITUTES USURY.

II. THE DEFENSE OF USURY

III. EFFECT OF USURY.

IV. REMEDIES.

I. WHAT CONSTITUTES USURY.

1. General principles.* — Any loss imposed on the borrower in addition to the amount lent and lawful interest, whatever form it may assume, is a violation of the law restricting the lender to a specified rate of interest, and renders such contract liable to the penalty imposed by such law. *Clague v. Creditors*, 20 D. 300.

To constitute usury, it is essential that there be a loan of money. *Foot v. Emerson*, 33 D. 205.

Allegations and proof that a written contract is not usurious, where it appears to be so, must be explicit and clear of all doubt. *Lockwood v. Mitchell*, 70 D. 78.

2. The corrupt intent. — The existence of a corrupt and unlawful intent on part of lender to take illegal interest is essential, in order to make a transaction usurious. *Condit v. Baldwin*, 78 D. 137.

In order to constitute usury, both parties must be consenting to the unlawful interest, namely: the lender to ask, the borrower to give; and there must be proof of a lending and a borrowing. *Price v. Campbell*, 1 D. 535.

Therefore, if a bill of exchange be drawn on an obscure man in Scotland, although the payee may expect it will be protested, yet, if there was no agreement between him and the drawer that it should be protested, the transaction is not usurious. *Id.*

On a question of usury, it is the intention of the parties which determines the nature of the transaction, and no matter what the form, where there is really a loan at more than legal interest, no shift or device can take it out of the statute. The original intention must often be learned by matter dehors the particular instrument of writing between the parties; and what the intention was, whether a real sale or one merely colorable so as to evade the statute, is a question for the jury. *Tyson v. Rickard*, 5 D. 424.

A stipulation to repay the principal in money is not necessary to constitute a loan; it is enough if the principal is secured, and not *bona fide* put in hazard, and it matters not what the nature of the security is, if it is insufficient, for if the principal is secured, and more than legal interest is reserved, it is usury. *Id.*

* See monographic note on usurious contracts, what are, law governing, etc., 55 D. 291-400. See also note, 51 D. 736-738.

A person being indebted to another in a sum upon which usurious interest was paid, it was agreed that a debtor of the former should assume this obligation. Accordingly, this party gave his promissory note to the creditor of the former for the debt, including the usurious interest, the amount of which note was, however, less than his own indebtedness, he paying the balance to his creditor, and being thus released. In an action upon this note, — *held*, that the transaction was not usurious, the jury finding no intent or contrivance to evade the statute. *Beares v. Barstow*, 6 D. 25.

A sale of bank stock, at whatever price, is not usurious, if not intended as a cover for a loan at unlawful interest, and if there be no combination for that purpose between the seller of the stock on credit, and one to whom the purchaser sells it for cash. *Greenhow v. Harris*, 8 D. 751.

3. Effect of the law of place.* — Usury is not established against a note made another state, by the fact that it bears a higher rate of interest than that allowed by the law of the state where it is sued, unless the note is drawn payable in the latter state, or there is affirmative evidence that the law of the state where it was made prohibits the rate of interest promised. *Davis v. Garr*, 55 D. 387.

Evasions of usury laws are not countenanced, and when courts detect them, they will withhold any aid to those who make foreign contracts a pretense for exacting usury at home. *McAllister v. Smith*, 65 D. 651.

A promissory note is controlled, as to defense of usury, by the laws of the state where it is made, dated, and payable, and not by the laws of the state where it is negotiated. *Jewell v. Wright*, 86 D. 372.

An agreement made in New York to be executed there must be governed by the laws of that state, and if, by those laws, the same would be usurious and void, it will be so held elsewhere. *Clague v. Creditors*, 20 D. 300.

A contract is not void for usury which is made in Wisconsin with a New York bank, for the payment in Wisconsin to said bank of a sum of money, with interest at ten per cent, though the New York law avoids all contracts which provide for payment of more than seven per cent interest, if the Wisconsin law makes no such provision, — the law of the place of performance governing in determining the validity of the contract. *Kennedy v. Knight*, 94 D. 543.

The defendant, by a power of attorney, authorized L., "as my agent, to make drafts on me from time to time, as may be necessary for the purchase of lumber on my account, and to consign the same to the care

* Place where contract is made controls question of usury, see note, 55 D. 608-614.

For Index to Notes in American Decisions and American Reports, see Volume I.

of S. & Co." L. drew drafts in his own name, which the plaintiff discounted upon the faith and possession of the power of attorney. The drafts were drawn and discounted in Canada, but specified no place of payment. In an action upon the draft, — *held*, that the contract was to be governed by the laws of Canada; and as usury is not a defense there, the plea of usury was not maintainable. *Merchants' Bank v. Griswold*, 28 R. 159.

A promissory note bearing lawful interest was made in New Brunswick, and secured by mortgage on lands in Maine. After the note was due, illegal interest was exacted for forbearance of payment. By the law of New Brunswick, usurious contracts were void, and the lender forfeited both principal and interest; but in Maine, the rate of interest was not limited. In an action to foreclose the mortgage, — *held*, that the mortgagor could not avoid the mortgage, as it was valid in its inception; that the statute imposing a forfeiture of the principal and interest was in the nature of a penalty, and of no effect outside of New Brunswick, and that the extra interest paid was not a set-off. *Lindsay v. Hill*, 22 R. 564.

A, residing in Mississippi, sold cotton to B, a resident of Tennessee, and received therefor the note of B, under seal, dated in Mississippi, but payable in Tennessee to the order of D, a resident of Mississippi, who indorsed it. It was a condition of the sale that the note should be indorsed by the defendant, a resident of Tennessee. The defendant, with knowledge of the facts, indorsed the note in Tennessee, and it was there delivered to A, and by him sold to plaintiff, who was ignorant of the facts. The defendant was the last indorser. The note bore a rate of interest lawful in Mississippi, but not in Tennessee. *Held*, that the note, so far as related to the defendant, was governed by the laws of Mississippi, and was valid; there was an implied warranty on defendant's part that the note was a valid contract, and executed in a state where the interest demanded was lawful. *Overton v. Bolton*, 24 R. 367.

Where an agreement for a loan of money is made in New York, and the money there advanced, a note payable in New York, and given as security pursuant to the terms of the agreement, though made in Nebraska, is a mere incident of the agreement, and is governed by the laws of New York; and therefore it may be void by reason of the usury laws of that state, though valid according to the laws of Nebraska. *Sands v. Smith*, 93 D. 331.

Where a resident of this state makes a note here, dated, payable, and intended to be discounted here, and specifying no rate of interest, and the note is first negotiated in another state, at a rate of interest lawful

there, but unlawful here, it is invalid for usury. *Dickinson v. Edwards*, 33 R. 671.

A bond dated in North Carolina, and specifying no place of payment, although delivered in Virginia, is governed by the usury law of North Carolina. *Morris v. Hockaday*, 55 R. 607.

Where the borrower resided in Ohio, the laws of which state, at the time, allowed parties to contract for any rate of interest not exceeding ten per cent, and the lender resided in Pennsylvania, where six per cent was the legal rate of interest, on a loan of money made in Ohio, the parties had a right to stipulate in the note for interest at ten per cent per annum, payable semi-annually, and make the note payable in Pennsylvania, without thereby rendering the contract usurious. *Kilgore v. Dempsey*, 18 R. 306.

In such case, if the borrower, at his option, purchases exchange at a premium, and remits the amount of interest to the place of payment in this form, the premium thus paid for the exchange will not render the contract usurious. *Id.*

A note made in Ohio by a citizen of Illinois, specifying no place of payment, but for money to be used in Illinois, at a rate of interest lawful in Illinois, but unlawful in Ohio, is valid in Ohio. *Scott v. Perlee*, 48 R. 421.

The plaintiff, a Pennsylvania banking corporation, agreed in that state with defendant, a citizen of New York, for the renewal of a note made by the latter and held by the former. The renewal note was made, dated, and payable in New York, and was mailed by the defendant to the plaintiff, with a check for the discount. The discount was at a rate lawful in Pennsylvania, but unlawful in New York. *Held*, that the note was not usurious in New York. *Wayne County Savings Bank v. Low*, 37 R. 533.

A note made in South Carolina, payable in North Carolina, securing a mortgage of lands in South Carolina, upon interest lawful in South Carolina, but usurious in North Carolina, is enforceable in South Carolina. *Thornton v. Dean*, 45 R. 796.

B., a resident of Virginia, took a promissory note made by himself, and indorsed by other residents of Virginia, blank as to date and place of payment, to Maryland, where he inserted a date and place of payment in Maryland, and negotiated it at a rate of interest usurious under the laws of both states. This note was renewed by one made and indorsed by the same parties, which was also usuriously discounted in Maryland. A renewal note for the amount due, made and indorsed, and payable in Virginia, by the same parties, was given for the second note. By the laws of Maryland, usury only avoids a contract as to the excess of interest agreed; by those of Virginia, it invalidates it. *Held*, 1. In an action on the last note, that the

For Index to Notes in American Decisions and American Reports, see Volume I.

original contract was a Maryland one, and could be enforced there; 2. That the note in suit was but a continuation of the old debt, made with reference to the laws of Maryland, and not being void there, could not be avoided in Virginia. *Turpin v. Tucker*, 8 Leigh, 93, explained and limited. *Bowman v. Miller*, 18 R. 686.

4. Devices to cover usury, generally. — A contract, to be usurious, must be substantially a lending and borrowing; and if this be understood, no shift or contrivance will enable the parties to evade the law. *Tardeveau v. Smith*, 3 D. 727.

Where two persons exchange notes for the purpose of raising money at an interest exceeding the rate allowed by law, A giving his note to B, and receiving B's note in return, together with a commission greater than the legal interest on the note of A, the transaction is a shift to evade the statute of usury, and B's note is void; and no evidence of a usage of trade will be admitted to avoid the defense. *Dunkham v. Gould*, 8 D. 323.

Covering up a usurious loan by a sale of land at an extravagant price is a device to evade the statute which will not be permitted to avail the lender in equity. *Morgan v. Schermerhorn*, 19 D. 449.

5. What constitutes usury in respect to bills and notes. — Ten per cent interest in Mississippi is usurious, and an agreement to extend the time of payment of a note on condition that the balance due should bear ten per cent interest is usurious, and the payee forfeits all the interest due, the note being payable in Mississippi. *Brown v. Lowry*, 46 D. 545.

A transaction is usurious which provides as a condition to the renewal of an existing loan that new notes, really payable at the same place as the old ones, shall be made payable at another place, so that the lender may exact the difference of exchange in addition to the legal interest. *Price v. Lyons Bank*, 88 D. 368.

The maker of a note for a certain sum, payable in currency with legal interest, in order to obtain an extension of time gave a new note for the amount, payable in gold coin, or in currency with the premium on gold, at a certain date. Held, that the second note was usurious. *Gates v. Hackel*, 11 R. 45.

A promissory note was executed, payable six months after date, with interest, annually, at fifteen per cent from "due until paid." The first six months' interest was paid in advance, and after maturity many installments of interest, at fifteen per cent, were paid, usually every six months in advance, for several years. Held, usurious, and not within the rule allowing a rate of interest exceeding the statutory rate, after maturity, as liquidated damages for non-payment, when inserted with the sole design of

securing prompt payment. *Sanner v. Smith*, 31 R. 70.

A subsequent negotiation of a note upon a usurious consideration cannot defeat action thereon against the maker, if it had a legal inception in the hands of the holder. *Catlin v. Gunter*, 62 D. 113.

An agreement to pay interest from date of note, if note is not punctually paid at maturity, is not usurious, and may be enforced. *Rogers v. Sample*, 69 D. 349.

A promissory note is not usurious in its inception, but is binding on the makers, where it is drawn payable to their order, and by them indorsed in blank and delivered to an agent to be discounted for them at the legal rate of interest, and the agent delivered it to a broker to raise money upon it, and the broker pledged it to secure an advance, and afterwards sold it at a usurious rate of discount, applying part of the proceeds to the payment of the advance, and giving the rest to the agent, who converted it, and the transferees in turn sold the note for its full face value to others, innocent of the usurious transaction. *Ayer v. Tilden*, 77 D. 355.

A reservation in a note that interest thereon shall be payable semi-annually is not usurious. The whole interest may be reserved in advance. *Goodrich v. Reynolds*, 83 D. 240.

A promissory note is not usurious which stipulates that the principal shall draw more than the legal rate of interest from date, if the note be not paid when due, unless it appears that interest had been included in the face of the note. *Fisher v. Anderson*, 95 D. 761.

The receiving of interest upon interest is not a violation of the statute of usury; and a note given for interest upon arrears of interest is valid. *Stewart v. Petree*, 14 R. 352.

Under a statute allowing interest at a specified rate, "upon the amount of such note, payable annually," the reservation of such interest payable semi-annually is not usurious. *Cook v. Courtwright*, 48 R. 681.

6. — bonds. — An award was made that the defendant should pay to the plaintiff a certain sum; but at the day of payment, not having the money, he agreed with the plaintiff to give more than six per cent for indulgence. A bond was given for the principal sum; and the amount above the legal interest was paid partly in money, and a note given for the balance. Upon an action on the bond, — held, that the transaction was usurious, and the bond void. *Gibson v. Newton*, 1 D. 559.

7. — commissions, bonuses, etc.* — A party gave another his promissory notes, receiving those of the latter to the same

* Bonuses, when usurious, see notes 56 D. 394, 396; 29 R. 70-75

For Index to Notes in American Decisions and American Reports, see Volume I.

amount in exchange, and a commission of two and a half per cent, which was in excess of the legal interest, for the time the notes had to run. The transaction, — *held*, to be usurious. *Fanning v. Dunham*, 9 D. 283.

A contract to pay, as commissions to a commission merchant, two per cent in addition to legal interest, for moneys advanced, is usurious. *Stark v. Sperry*, 40 R. 47.

Where commission merchants were in the habit of receiving and forwarding to New York produce sent to them by a country merchant, and of accepting his drafts, and charging two and a half per cent commission, in addition to interest, on advances made to meet these drafts, when he had no funds in their hands, — *held*, that the charge was not usurious, it appearing that it was not a cover for a loan, and that this was the practice of other merchants engaged in similar business. *Trotter v. Curtis*, 10 D. 211.

To constitute usury, an unlawful or corrupt intent is necessary; a *bona fide* charge by a banker or broker of a commission for extra trouble or incidental expenses is not usurious. *Nourse v. Prime*, 11 D. 403.

Where a husband, as agent for loaning his wife's money, takes a commission for himself beyond the rate of legal interest, without his wife's knowledge or consent, the loan is not vitiated for usury. *Brigham v. Myers*, 33 R. 140.

In consideration of advances by plaintiff, who were cotton factors, defendant agreed to repay the advances with ten per cent interest, and also to ship to plaintiff two hundred bales of cotton, to be sold on commissions, and failing so to do, to pay commissions for every bale deficient. *Held*, not usurious, and supported by a sufficient consideration. *Norwood v. Faulkner*, 53 R. 717.

An agreement between a commission merchant and a dealer in produce by which the former is to advance money to the latter, at legal interest, to enable him to buy and carry produce to be sold by the former, and for the care, management, and sale of which the former is also to receive a percentage upon the amount advanced, — *held*, not usurious in itself, the commission charged not being unusual or unreasonable, and the borrower not being in any strait; and also *held*, that the fact that the borrower voluntarily took charge of and managed the produce himself did not change the nature of the agreement. *Matthews v. Coe*, 26 R. 583.

A bonus paid for a loan by a borrower from a banking and building association organised under the Connecticut act of 1850 does not render the loan usurious. *West Winsted Savings Ass'n etc. v. Ford*, 71 D. 66.

Where an agent intrusted with money to invest at legal interest exacts, without the knowledge or authority of his principal, a bonus for himself, as the condition of making a loan, this will not constitute usury in

the principal, or affect the security in his hands. *Condit v. Baldwin*, 78 D. 137.

8. — discounts. — A debtor on a bond assigned to his creditor other bonds of solvent parties to a much larger amount than his own bond, but at such a discount as left a large part of his own bond still unpaid, and for the balance due he gave a new bond, with sureties, payable at a future day, with legal interest. It was *held* that the transaction was usurious. *Gibson v. Frieble*, 1 D. 502.

Where a bank discounts a note at the usual rate of interest upon condition that the person offering the note for discount shall receive post-notes payable at forty-five, sixty, and ninety days as cash, and the said post-notes are received and paid as cash, the note discounted is usurious. *Bank of Elizabeth v. Ayers*, 11 D. 535.

When a bank, in its discounts, reserves greater interest than is allowed by its charter, the contract falls within the general usury law. It is not void. The bank may recover the principal sum lent, but without any interest. *Planters' Bank v. Sharp*, 43 D. 470.

It is not usury for a person to discount commercial paper, and deduct the interest at the time of the discount. *Parker v. Cousins*, 44 D. 388.

In discounting commercial paper, it is not usurious to reckon the month as thirty days, the year as three hundred and sixty days, and compute the interest at one half of one per cent for thirty days. *Id.*

Where it is agreed to renew a note every sixty days for the same amount, upon paying the discount, and upon the renewals every sixty-fourth day is charged for twice, the notes are not usurious. *Id.*

A note taken by a bank is void for usury when more than the rate per cent allowed by its charter is taken or reserved. *Russell v. Faylor*, 59 D. 631.

9. — mortgages. — A security made on a good and *bona fide* consideration cannot be made invalid by reason of a subsequent usurious assignment. Hence, if a mortgage be assigned to a third person, who pays the amount due thereon to the mortgagee, the mortgagor cannot avoid it in the hands of such person on account of an agreement to pay him a sum exceeding the money paid, and legal interest. *Bush v. Livingston*, 2 D. 316.

A stipulation in a mortgage for the payment of attorney's fees in case of default and a suit in foreclosure is not usurious. *Weatherly v. Smith*, 6 R. 663.

10. — various other contracts. — A person being indebted in the sum of twelve hundred pounds, payable in four annual installments, in little more than three years, agreed with another that the latter, in consideration of the sum of eight hundred pounds in cash paid by the former, should discharge

For Index to Notes in American Decisions and American Reports, see Volume L.

his debt. This agreement was held usurious and void, notwithstanding the party so agreeing to assume the debt might derive advantage by buying the bonds of the creditor at a discount, or by selling him tobacco at a high price. *Watkins v. Taylor*, 5 D. 436.

A party borrowed a sum of money from another, and for security pledged a slave, the lender to have the use of the slave for interest. As the value of the slave was greater than legal interest on the sum advanced, the contract was held usurious. *Raynolds v. Carter*, 37 D. 642.

A bond given to redeem the slave, in such a case, is usurious and void. *Id.*

An agreement by a creditor to forbear for one year, after debt is due and payable, in consideration of the debtor's promise to pay twenty per cent interest, is usurious, whether the debtor had or had not previously agreed to pay the creditor whatever interest the creditor might have to pay for other money in consideration of his forbearance to the debtor. *Shirley v. Welby*, 71 D. 244.

An agreement for a greater rate of interest than that allowed by statute on a pre-existing debt for an extension of the time for its payment is within the statute, and usurious. *Id.*

A contract for a consideration exceeding legal interest to forbear enforcing payment of a note, which is not in itself tainted with usury, will not operate to taint the note with usury, but will render the contract void therefor, and the money paid thereon will be applied as a credit on the note. *Mallett v. Stone*, 85 D. 545.

A usurious loan is none the less usurious because it was made to enable the borrower to take up securities which were not tainted with usury, and such securities were assigned to the usurious lender as collateral. *King v. Cushman*, 89 D. 366.

Where one intrusts his money to another to loan, and the agent, without the knowledge of his principal, receives unlawful interest or a bonus, which he appropriates to himself, the transaction is usurious. *Cheney v. White*, 25 R. 487.

A loan made through the lender's agent, the lender understanding that the agent is to charge the borrower for the agent's services in procuring the loan, in addition to lawful interest, and the agent receiving pay therefor accordingly, is usurious. *Payne v. Newcomb*, 39 R. 69.

Charging interest on monthly balances, according to the custom of a stock-broker, does not constitute usury. *Hatch v. Douglas*, 40 R. 154.

Stating accounts and calculating interest is not usurious, by parties dealing with commission merchants agreeing that rests shall be made quarterly. *Brown v. Vandyke*, 55 D. 250.

An agreement to pay a sum of money by

a day certain, and more than legal interest afterwards by way of penalty if the debt be not punctually paid, is not usurious. *Gower v. Carter*, 66 D. 71.

Payment of charges for taxes on a mortgage by the mortgagor under an agreement to that effect, with simple interest on each item from the time it was paid, is not usurious. *Banks v. McClellan*, 87 D. 594.

A loan is not rendered *per se* usurious from the fact that the lenders exacted, as a condition of making the loan, that the borrower should secure to them the payment of a subsisting and genuine debt due them from a third person. *Valentine v. Conner*, 100 D. 476.

A builder contracted to build houses for \$54,700, payable in annual installments, to bear interest at 7.30 per cent. The legal rate of interest was six per cent. Held, that if the interest was a part of the contract price of the houses, the contract was not usurious. *Græme v. Adams*, 14 R. 130.

An agent procuring a loan for his principal, charged and received from him five per cent of the amount and one hundred dollars for going to Chicago and procuring a release of an encumbrance, without the knowledge of the lender or his deriving any benefit therefrom. Held, not usurious. *Ballinger v. Bourland*, 29 R. 69.

Partners in the banking business agreed that each should be allowed six and one half per cent interest annually on the average amount of his deposits, and should be charged ten per cent on the amount of his overdrafts. Held, not usurious. *Payne v. Freer*, 43 R. 640.

11. Purchase of negotiable paper for less than full value, when not usurious. — The sale of a promissory note, with the seller's indorsement, at a discount exceeding the lawful rate of interest, is not usurious if made *bona fide*, and not as a cover for a loan. *Lloyd v. Keach*, 7 D. 256.

Such a sale being *prima facie* valid, the burden of proof rests upon the party who claims that it was usurious. *Id.*

If a bill be free from usury as between the immediate parties to it, no after transaction with another person can, as respects those parties, invalidate it. So that such a bill may be sold to a purchaser for an amount less than the face and legal interest thereon for the time it has to run, and such purchaser may recover the full amount of the maker or acceptor. *Munn v. Commission Co.*, 8 D. 219.

A *bona fide* note given for value may be sold in the market for less than its face, without usury. *Flemming v. Mulligan*, 13 D. 707.

A note sold at a greater discount than the legal interest does not thereby become usurious, if the payee has received it in a business transaction. *Ramey v. Clark*, 40 D. 645.

For Index to Notes in American Decisions and American Reports, see Volume I.

A sale of negotiable paper at a discount is not usurious, as between the vendor and vendee, where the former is the holder and apparent owner, and represents that the paper belongs to him, and is business paper, although such representation is false, and the paper was in fact made for the sole purpose of sale at a usurious discount, if the vendee purchases *bona fide*, with no knowledge of such purpose. *Holmes v. Williams*, 40 D. 250.

The purchase of an accommodation note, at a rate of discount greater than legal interest, if made in good faith, and without knowledge of the character of the paper, is not a usurious transaction, and the defense of usury is not available in an action brought by the purchaser on such note against the maker. *Dickerman v. Day*, 7 R. 156; *Ramsey v. Clark*, 40 D. 645.

The promisee in a certain note indorsed it and delivered it to his clerk, with instructions to raise money on it by selling it to the plaintiff as his own property. The clerk sold it to the plaintiff at a discount of thirty-three and one third per cent, representing it as his own, and indorsed it without recourse to himself; and it was held, in an action by the plaintiff against the promisee, as indorser, that the transaction was usurious. *Ruffin v. Armstrong*, 11 D. 774.

A sale, by an agent employed therefor, for less than its face, of the principal's note, payable to his own order and indorsed by him, is usurious, although the purchaser supposes that he is merely purchasing the note in the market, and does not know that the seller is acting only as an agent. *Sylvester v. Swan*, 81 D. 734.

Usury laws of the state of New York have no application to a sale of choses in action, and extend only to the loan or forbearance of money. *Bailey v. Smith*, 84 D. 385.

II. THE DEFENSE OF USURY.

12. The right to set up usury as a defense.—An act of the legislature provided that in an action at law the adverse party may be compelled to answer interrogatories upon oath; and when so answered, they may be used as evidence, as if procured upon a bill in chancery for discovery. *Held*, that in order to support the defense of usury by such answers, it is not necessary to tender the principal and legal interest. *Zeigler v. Scott*, 54 D. 395.

Usury or other illegality in an obligation is no defense to a creditor's bill, brought by a judgment creditor to enforce satisfaction of his judgment recovered upon such obligation. The judgment can only be impeached upon a direct proceeding brought to reverse or annul it. *Bank of Wooster v. Stevens*, 59 D. 619.

The repeal of usury laws takes away the defense of usury in actions thereafter brought

on any contract, whether made prior to or after the repeal. *Woodruff v. Scruggs*, 11 R. 777.

In an action on a promissory note the defendant set up the defense of usury. *Held*, that the defense was good, although the usury laws had been repealed after the action was brought. *Smith v. Glanton*, 19 R. 31.

An agreement to withdraw the plea of usury is against public policy, and cannot be enforced; but where a defendant, having once pleaded usury, withdraws the plea in consideration that the plaintiff will consent to a continuance, he ought not to be afterward allowed to amend by filing the same plea again. *Clark v. Spencer*, 19 R. 98.

13. Who may avail himself of the defense.*—The maker of a promissory note valid in its inception, which has been indorsed for a usurious consideration, may take advantage of the usury in an action by the indorsee. *Lloyd v. Keach*, 7 D. 256.

Where a person, for the purpose of raising money, agrees with another to procure a note signed and indorsed by other parties, but not by himself, which the lender agrees to discount at usurious interest, and such note is accordingly obtained and discounted, an indorser thereon may resist payment on the ground of usury. *Warren v. Crabtree*, 10 D. 51.

The defense of usury is personal to the borrower and his heirs or representatives. *Stephens v. Muir*, 65 D. 764; *Stein v. Indianapolis Building etc. Ass'n*, 81 D. 353; *Lee v. Steamster*, 45 R. 549.

Usury, it seems, may be set up by a vendee of real estate subject to a usurious mortgage, with consent of the party who made the usurious contract and who was to suffer by it; and if such person be made a party to the action, he may urge usury as a ground of equitable relief to himself. *Stephens v. Muir*, 65 D. 764.

Where an agent for loaning money takes a security in his own name as principal, upon usurious interest, the borrower, supposing him the principal, may plead usury. *Erickson v. Bell*, 36 R. 246.

14. Who may not.—A purchaser of real estate subject to a mortgage tainted with usury cannot set up the usury against a bill for foreclosure. *Stephens v. Muir*, 65 D. 764; *Stein v. Indianapolis Building etc. Ass'n*, 81 D. 353.

Interest on a usurious contract may be recovered, unless the party affected by the usury sets up the usury in his answer, and tenders the principal sum. *Rock River Bank v. Sherwood*, 78 D. 669.

A borrower who has not agreed to pay usurious interest cannot maintain the defense of usury to an action to recover the money loaned, on the ground that a third

*That the defense of usury is personal, see note, 55 D. 398-400.

For Index to Notes in American Decisions and American Reports, see Volume I.

person has paid the usury demanded by the lender for making the loan. *McArthur v. Schenck*, 11 R. 643.

Where one purchases land subject to a mortgage lien, and, as a part of the consideration, agrees to pay the mortgage debt, he cannot defend against the mortgage on the ground of usury. *Cramer v. Lepper*, 20 R. 156.

The plea of usury is a personal privilege, and if the debtor declines to avail himself of it, no stranger to the transaction can; therefore a second mortgagee cannot plead usury in a prior mortgage either to defeat or postpone its lien. *Frickett v. Mitchell*, 22 R. 287; *Ready v. Huebner*, 32 R. 749.

A purchaser at a sale by an assignee in bankruptcy, of land subject to a mortgage of which he has notice, cannot set up usury against the mortgage. *Nance v. Gregory*, 40 R. 41.

One who borrows money on a mortgage, covenanting that it is a valid lien, wholly unpaid, and subject to no defense, is estopped, as are also his privies, from setting up the defense of usury against it. *Union Dime Savings Inst. v. Wilnot*, 46 R. 137.

The defense of usury, being unavailing to a corporation in New York, cannot be invoked by its surety. *Freese v. Brownell*, 10 R. 239.

A surety cannot avail himself of usurious interest paid by his principal on a non-negotiable note, after the execution of the note in reduction thereof. *Lamoille Co. Nat. Bank v. Bingham*, 28 R. 490.

A surety who has given his own note in part payment of his principal's usurious note cannot plead usury in an action upon his own note. *Culver v. Wilber*, 30 R. 385.

16. Pleading usury as a defense. — Usury is clearly admissible under the plea of *non assumpsit*, because the effect of such evidence is to prove that the promise was not obligatory, but void *ab initio*. *Solomons v. Jones*, 5 D. 533.

Where, by statute, the taking of usury does not avoid the contract, but only forfeits the interest, the defense of usury is not admissible under the plea of *non assumpsit*, but must be pleaded specially and proved strictly as averred. *Frank v. Morris*, 11 R. 4.

In real actions, under the general issue of *nil disseisin*, a subsequent purchaser may give evidence of usury, to avoid a prior conveyance from his grantor. *Hills v. Elliot*, 7 D. 28.

A plea of usury is defective if it do not allege a corrupt agreement upon the part of the lender to take more interest than the law allows. *McFarland v. State Bank*, 37 D. 761.

16. Evidence. — Evidence of the amount paid for the hire of a negro is admissible, if it tend to throw light upon an alleged usurious transaction, by showing that the prin-

cipal and interest of the original debt had been paid by the hirer. *Greer v. Caldwell*, 58 D. 553.

III. EFFECT OF USURY.

17. Upon securities, generally. — A contract reserving a rate of interest higher than that allowed by law is not void; the obligee may recover the principal sum, with the legal rate of interest. *Bank of Chillicothe v. Swayne*, 32 D. 707.

If a usurious note is given for a valid pre-existing debt, it will not cancel the pre-existing debt; that will remain unsatisfied by the nugatory and void security, and the creditor will be remitted to his original title thereto and remedy therefor. *Parker v. Cousins*, 44 D. 388.

The reservation of an illegal rate of interest does not prevent recovery of the principal and legal interest thereon. *Philadelphia & S. R. R. Co. v. Lewis*, 75 D. 574.

If usurious interest is taken out in advance, it makes a case of want of consideration, in a note covering the amount, to the extent of such interest. *Musselman v. McElhenny*, 85 D. 445.

A promise made in a note to pay usurious interest in future is a promise, to that extent, without consideration. *Id.*

Plaintiff advanced money to pay a mortgage, taking another mortgage to secure the advance. The second mortgage was declared void for usury. *Held*, that the usury did not affect the first mortgage, and the second mortgage being void, the prior mortgage revived and could be enforced by plaintiff. *Patterson v. Birdsall*, 21 R. 609.

A valid obligation is not invalidated by a usurious agreement for the extension of the time of payment, but the sum paid for forbearance will be applied as payment. *Real Estate Trust Co. v. Keech*, 25 R. 181.

18. Upon renewals and new securities. — Usury in a transaction avoids all subsequent securities growing out of it. *Price v. Lyons Bank*, 88 D. 368.

A promissory note was given in payment of a debt, the promisor agreeing to pay a usurious rate of interest. After sundry payments of interest at the rate agreed, and of part of the principal, a new note was given for the balance of the principal due, on which lawful interest only was reserved or taken. This note, being in part paid, was also canceled, and a third note given for the balance. In an action by the indorsee of the latter note against the promisor, — *held*, not to be tainted with the usurious interest paid on the first note. *Chadborn v. Watts*, 6 D. 100.

Where a security was originally void for usury, another security substituted therefor is still affected by the original usury, and a holder cannot recover thereon, it not appearing that he was or was not a *bona fide* purchaser, or had knowledge of the transaction. *Bridge v. Hubbard*, 8 D. 86.

For Index to Notes in American Decisions and American Reports, see Volume I.

A new security, including a sum for unlawful unpaid interest, is so far without consideration, and liable to abatement to that extent. *Smith v. Stoddard*, 81 D. 778.

A person gave a note for five hundred dollars, for a valuable consideration, payable in sixty days, and when it fell due, to obtain a further time of sixty days, he gave his due-bill for fifty dollars, and a renewed note for five hundred dollars, payable sixty days after date. The transaction was held usurious, and the note for five hundred dollars, as well as that for fifty dollars, was void. *Motte v. Dorrell*, 10 D. 675.

Where, upon the renewal of a note, a premium above seven per cent is exacted, the new note is usurious, although a separate note is given for the premium. *Swartwout v. Payne*, 10 D. 223.

A usurious note given in renewal of a former valid one does not affect the antecedent debt. *Id.*

Where a note is given on a usurious contract, and partly paid, and a new note given for the balance, such new note is also usurious. *Warren v. Crabtree*, 10 D. 51.

A new note given between the original parties, for part or all of a usurious note, is itself usurious and void; but a note taken in renewal of such usurious note by an innocent indorsee is valid. *Flemming v. Mulligan*, 13 D. 707.

If a usurious security be given up, and a new security taken for the sum advanced and legal interest, the latter security will be good; for the borrower's moral obligation to pay the principal and legal interest is a sufficient consideration therefor. *Kilbourn v. Bradley*, 3 D. 273.

Where one pays part of a usurious note, and gives a new note for the residue, the new note will not be infected by the usury. *Bank of Elizabeth v. Ayers*, 11 D. 535.

19. Effect of subsequent agreement to cure prior usurious one. — Where a judgment entered on a bond and warrant of attorney given as security for a usurious loan was set aside without declaring the bond void, and the defendant afterwards promised to pay the sum actually lent, — held, that this promise was valid, and would support an action of *assumpsit*, and that the plaintiff would be entitled to judgment thereon on bringing in the usurious securities for cancellation. *Early v. Mahon*, 10 D. 204.

The taint of usury is purged by change of parties in a case where a bond executed by three persons for a loan of money at usurious interest is subsequently superseded by a new bond for the amount of the former bond, principal and interest, which new bond is signed by two persons, strangers to the former bond, as principals, and by one of the former obligors, as surety. *Drake v. Chandler*, 28 D. 762.

20. Rights of innocent purchasers.

— If a promissory note is given for a usurious contract, it is absolutely void, even in the hands of an innocent holder, who has received it in the fair and regular course of trade, without knowledge of the usury. *Wilkie v. Roosevelt*, 2 D. 149; *Solomons v. Jones*, 5 D. 538; *Flemming v. Mulligan*, 13 D. 707; *Ayer v. Tilden*, 77 D. 355.

A defendant, being charged as indorser upon a promissory note, gave his own note in lieu thereof. The original note was void for usury, but defendant was ignorant of this fact when he gave his note in renewal. Held, that defendant could defend for usury against a *bona fide* purchaser of his own note for value. *First Nat. Bank v. Plankinton*, 9 R. 453.

A *bona fide* purchaser, without notice, under a sale made by virtue of a power of attorney contained in a mortgage, is not affected by usury in the original contract. *Jackson v. Henry*, 6 D. 328.

The defense of usury to a note given for a usurious consideration is cut off by an indorsement thereof before maturity to a *bona fide* purchaser without notice. *Woodworth v. Huntoon*, 89 D. 340.

Though the statute against usury declares the usurious contract and security utterly void, yet this is only between the original parties on the instrument infected with usury. Where the original usurious contract has been changed by a new contract founded on it, in which an innocent person is a party, the defense of usury cannot be set up against such innocent purchaser. *Jackson v. Henry*, 6 D. 328.

Where the holder of a note, knowing it to be usurious, transfers it to another as part of the consideration for a purchase of land, with the assurance that it is good and valid, the transferee, upon failing to recover on the note on account of the usury, may treat it as a nullity, and bring *assumpsit* against the purchaser of the land for the consideration. *Swartwout v. Payne*, 10 D. 223.

21. — of third persons. — A usurious bond is void in the hands of a third person, not an assignee for value, without notice. *Raynolds v. Carter*, 37 D. 642.

IV. REMEDIES.

22. Recovering back usury at law.

— One who has paid more than the legal rate of interest may recover the excess in an action of *assumpsit*, and is not limited to the remedy prescribed by the statute to prevent usury. But to entitle the plaintiff to recover, he must show that he has done all that equity requires. *Wheaton v. Hubbard*, 11 D. 284.

If a borrower pays up the amount of a usurious debt to the lender, and afterwards sues to recover it back in an action for money had and received, he can only recover

For Index to Notes in American Decisions and American Reports, see Volume L.

the usurious excess, and no more. *Zeigler v. Scott*, 54 D. 395.

The form of action in *assumpsit* to recover back usury, given by the statute to the party who has paid it, is no less a mode of redressing an injury caused by personal wrong and oppression, than if the action sounded wholly in tort. *Nichols v. Bellows*, 54 D. 85.

The right to sue for usury paid by a bankrupt does not vest in his assignee. *Ib.*

The payment of usury on a note operates in law as part payment of the note, where the security on which the payment is made includes both the loan and the stipulated usury. But when separate securities are given for the usury, whether at the time of the negotiation of the loan or afterwards, and the usury, when paid, is applied on such securities, the debtor is at liberty to treat such a payment as having no connection with the legal demand, and bring his action to recover it back. *Ib.*

A mortgagor cannot maintain an action to recover usurious interest, collected by sale of the mortgaged premises under a power of sale contained in the mortgage deed; and the fact that the execution of the power was against the wishes of the debtor at the time does not aid him. *Perkins v. Conant*, 81 D. 305.

Where usurious interest is paid on a note after its execution, it amounts to a payment of so much on the principal; and if the amount thus paid exceeds the principal, it may be recovered back. *Musselman v. McElhenny*, 85 D. 445.

23. When relief will be granted in equity.—A party seeking equitable relief from a usurious contract will not be entitled to an injunction against proceedings at law, or to an answer, until he pays or tenders the amount actually borrowed. *Morgan v. Schermerhorn*, 19 D. 449.

An injunction already granted will not be dissolved in such a case, if an answer is put in without objection, if usury appears, and the complainant is still willing to pay what is really due. *Ib.*

The payment of usury by the maker of a note to a *bona fide* indorsee thereof before maturity is regarded as an involuntary payment, since his defense of usury is cut off, and he may recover it back from the payee of the note by a suit in equity; and it seems that the maker has a remedy at law. *Woodworth v. Huntton*, 89 D. 340.

24. When relief will be refused.—Plaintiff purchased real estate subject to a mortgage and, as part of the consideration, agreed to pay the mortgage debt. *Held*, that plaintiff could not maintain a bill in equity to restrain a sale of the premises by the mortgagee under a power in the mortgage, on the ground that the mortgage debt was usurious. *Hough v. Horsey*, 11 R. 484.

25. Pleading.—An excess of interest paid under a usurious contract may be ap-

plied in payment of interest afterward accruing, where usury is pleaded and proved, but forfeiture of the loan is not prayed for. *Lockwood v. Mitchell*, 70 D. 78.

26. The relief granted.—A bill was filed to stay proceedings upon a usurious deed of trust, on the ground that the complainant had no opportunity at law to plead the usury, but he prayed for no discovery, but, on the contrary, averred he had proof of the fact. It was held that he ought not to be relieved upon the condition of his paying the principal without interest, but that the trustee should be altogether enjoined from selling, until by some proper proceeding, taken by the *cestui que trust*, the validity of the contract could be established, when the injunction should be dissolved, but if not established, perpetuated. *Marks v. Morris*, 5 D. 481.

When the lender on a usurious contract seeks the aid of equity to enforce the contract, and the borrower pleads and proves usury, the security will be declared void, and ordered to be given up and canceled. But where there has been a judgment at law in favor of the lender, and the borrower files his bill for relief against the judgment, he must offer to pay the principal and interest lawfully due. *Fanning v. Dunham*, 9 D. 283.

Relief upon a usurious contract at law or equity, when sought by the borrower, will be administered only as to the surplus above the principal and lawful interest. *Baughner v. Nelson*, 52 D. 694.

A borrower is always under moral obligation to pay the sum loaned, with legal interest thereon. *Ib.*

Such moral obligation of the borrower cannot be enforced by courts when he is before them in the position of defendant. *Ib.*

Usury is a personal defense; and when set up against a subsequent purchaser, only the amount of illegal interest is to be deducted from the conditional judgment for the amount due on a mortgage. *Ladd v. Wiggin*, 69 D. 551.

Where a suit impeaching a mortgage debt for usury is dismissed under an unauthorized contract, and in prejudice of an insane mortgagor's rights, there being in fact usury in the transaction, the trustees of the lunatic, upon being required to account to the mortgagor for the principal and interest, are entitled to a credit of all excess of interest paid beyond the lawful rate. *Lockwood v. Mitchell*, 70 D. 78.

The right of a borrower to insist upon a forfeiture by the lender of the whole interest, though a legal right, is not to the full extent an equitable one. If the borrower goes into equity in respect to a usurious contract, he will be compelled to pay the principal and legal interest, because there is a moral obligation resting upon him to do so. *Welch v. Wadsworth*, 79 D. 236.

A deduction for unlawful interest actually

For Index to Notes in American Decisions and American Reports, see Volume L.

paid will not be allowed, in favor of a debtor, when suit is brought on a new security taken for the principal, and given upon a *bona fide* settlement of all the former transactions between the parties. *Smith v. Stoddard*, 81 D. 778.

A plaintiff may recover interest on a usurious contract up to the highest legal rate not prohibited by the statute, if such be the express terms of the contract. *Ib.*

§7. Penalties for usury. — Parties to usurious contracts hold any right they may have to penalties given by law, subject to a modification or repeal by the legislature, and a consequent direct or indirect validation of the contracts. *Welch v. Wadsworth*, 79 D. 238.

Usury does not subject to penalties or forfeitures in Indiana, since 1863. *Muselman v. McElhenney*, 85 D. 445.

Penalties imposed by the usury laws of one state are not recoverable in another. *Blaine v. Curtis*, 59 R. 702.

UTTERING.

Of forged paper, see FORGERY, 7.

VACATING.

Assessments for local improvements, see MUNICIPAL CORPORATIONS, 53.

Decree of divorce, see MARRIAGE AND DIVORCE, 76.

Entry of satisfaction of judgment, see JUDGMENTS, 113.

Execution sales, see EXECUTION, 95-100.

Highways, proceedings for opening, see HIGHWAYS, 27.

Irregular satisfaction of execution, see EXECUTION, 177.

Judgments, see JUDGMENT, 123-128.

Justices' judgments, see JUSTICE OF THE PEACE, 29.

Premises, effect of, on fire policy, see INSURANCE, 56.

Public sale, see JUDICIAL SALE, 16-20.

Sale in foreclosure, see MORTGAGES, 103.

Sale of decedent's lands for payment of debts, see EXECUTORS, etc., 118.

Sentence, see TRIAL, 218.

VALIDITY.

Of administrator's bond, see EXECUTORS AND ADMINISTRATORS, 18.

Of agreements for separate maintenance, see MARRIAGE AND DIVORCE, 43.

Of appeal bonds, see APPEAL, 84, 174.

Of assessment of taxes, see TAXES, 34.

Of assessments on stock, see CORPORATIONS, 71.

Of assignments, see ASSIGNMENT, 20.

Of assignments for creditors, see ASSIGNMENTS, etc., I.

Of assignments of leases, see LEASES, 26.

Of assignments of mortgages, see MORTGAGES, 61.

Of attachment bonds, see ATTACHMENT, 125.

Of auction sale, see AUCTION, 7.

Of awards, see ARBITRATION, etc., 27-29.

Of bottomry bonds, see SHIPPING, 10.

Of captures, see WAR, 22.

Of ceremonial marriage, see MARRIAGE AND DIVORCE, 11.

Of charitable bequests, see CHARITIES, 4, 9.

Of charter-party, see SHIPPING, 17.

Of chattel mortgages, see CHATTEL MORTGAGES, II.

Of claims against decedents' estates, see EXECUTORS, etc., 83, 89.

Of city ordinances, see MUNICIPAL CORPORATIONS, 20.

Of contracts, generally, see CONTRACTS, V.

Of contracts for sale of land, see VENDOR AND PURCHASER, 1-12.

Of contracts of guaranty, see GUARANTY, 2.

Of contracts of suretyship, see SURETSHIP, 3.

Of contracts respecting officers' compensation, see OFFICERS, 28.

Of contracts, what law governs as to, see CONTRACTS, 154.

Of conveyances attacked for fraud, as between the parties, see FRAUDULENT CONVEYANCES, 17, 18.

Of corporate elections, see CORPORATIONS, 141.

Of covenants, see COVENANTS, 10, 11.

Of dedication to public use, see DEDICATION, 6.

Of deeds, see DEEDS, IV.

Of deeds of homesteads, see HOMESTEADS, 16, 17.

Of devises, see DEVISE, I.

Of elections, see ELECTIONS, 4.

Of execution sales, see EXECUTION, 94-101.

Of express trusts, see TRUSTS, 19, 20.

Of foreclosure sales, see MORTGAGES, 96.

Of foreign decrees of divorce, see MARRIAGE AND DIVORCE, 77, 78.

Of gifts *causa mortis*, see GIFTS, 21.

Of gifts *inter vivos*, see GIFTS, 4.

Of grant, how inquired into, see GRANTS, 17.

Of indentures of apprenticeship, see APPRENTICES, 1, 2.

Of instruments conferring powers, see POWERS, 1.

Of insurance policies, see INSURANCE, 9, 10.

Of judgments, as against creditors, see JUDGMENT, 43.

Of judicial sales, see JUDICIAL SALES, 5.

Of land grants, see PUBLIC LANDS, 21.

Of land patents, see PUBLIC LANDS, 30.

Of letters patent, see PATENTS, 10.

Of levy of execution, see EXECUTION, 48.

Of licenses between individuals, see LICENSES, 1.

Of life policies, see INSURANCE, 67.

Of marine policies, see INSURANCE, 92, 93.

Of marriages, see MARRIAGE AND DIVORCE, 3-14.

Of marriage settlements, see MARRIAGE AND DIVORCE, 19.

Of mortgages, see MORTGAGES, II.

For Index to Notes in American Decisions and American Reports, see Volume I.

Of mortgages of homesteads, see **HOMESTEADS**, 22.
 Of mortgages with power of sale, see **MORTGAGES**, 112.
 Of negotiable paper, see **BILLS AND NOTES**, III.
 Of official bonds, see **OFFICERS**, 42.
 Of ordinary penal bonds, see **BONDS**, 11-17.
 Of pardon, see **PARDON**, 5.
 Of parol leases, see **LEASES**, 2.
 Of parol partition, see **PARTITION**, 2, 3.
 Of partnership agreements, see **PARTNERSHIP**, 23.
 Of receipts, see **RECEIPTS**, 1.
 Of registration of deed, see **DEEDS**, 53.
 Of releases, see **RELEASE**, 8.
 Of replevin bonds, see **REPLEVIN**, 37.
 Of sale in foreclosure of lien, see **MECHANIC'S LIEN**, 26.
 Of sale in partition, see **PARTITION**, 26.
 Of sale of land for payment of debts, see **EXECUTORS**, etc., 115.
 Of sale of land for taxes, see **TAXES**, 48.
 Of sale under power in mortgage, see **MORTGAGES**, 117.
 Of sales by factors, as affected by usage, see **FACTORS**, 9.
 Of sales by trustees, see **TRUSTS**, 32, 35.
 Of sales of decedents' lands, see **EXECUTORS AND ADMINISTRATORS**, 52.
 Of sales of infants' lands, see **INFANTS**, 13.
 Of sales of personalty, see **SALES**, 6-14.
 Of sheriffs' deeds, see **EXECUTION**, 134.
 Of special agreements upon dissolution, see **PARTNERSHIP**, 84.
 Of statutes, see **STATUTES**, II.
 Of statutes of Confederate States, see **WAR**, 27.
 Of statutes taxing travel, see **TAXES**, 16.
 Of statutes to suppress gaming, see **GAMING**, 1.
 Of subscriptions, see **SUBSCRIPTION**, 1.
 Of subscriptions by county in aid of railroads, see **COUNTIES**, 20, 22.
 Of subscriptions to stock, see **CORPORATIONS**, 63.
 Of Sunday contracts, see **SUNDAY**, 1-5.
 Of tax deed, see **TAXES**, 50.
 Of tender, see **TENDER**, 6, 7.
 Of town meetings, see **TOWNS**, 11.
 Of transfers of stock, see **CORPORATIONS**, 37.
 Of trusts, see **TRUSTS**, I.
 Of usages and customs, see **CUSTOM**, 2, 3.
 Of wills, generally, see **WILLS**, III.
 Of written leases, see **LEASES**, 6.

VALUATION.

In cases of loss under marine policies, see **INSURANCE**, 163, 164.
 Of property assessed, see **TAXES**, 35.

VALUE.

Maximum value of homestead exemption, see **HOMESTEAD**, 8.
 Of dower interest, how ascertained, see **DOWER**, 42.

Of goods shipped, concealment of, see **CARRIERS**, 17, 98.
 Opinions on questions of, see **WITNESSES**, 124.
 Parting with, to make one a *bona fide* purchaser, see **BILLS AND NOTES**, 139, 140.
 Proof of, generally, see **EVIDENCE**, 260.
 Proof of, on trial for larceny, see **LARCENY**, 23.

VARIANCE.

Between allegations and proof, see **MALICIOUS PROSECUTION**, 12.
 Between declaration and writ, see **PLEADING**, 20.
 Between indictment and proof, see **DISORDERLY HOUSES**, 8; **FORGERY**, 14; **HOMICIDE**, 25; **INDICTMENT**, 39; **LARCENY**, 27; **RAPE**, 10.
 Between judgment and execution, see **EXECUTION**, 7.
 Between pleadings and proofs, see **PLEADING**, 6.
 In actions on bills and notes, see **BILLS AND NOTES**, 271.
 Waiver of objection for, see **APPEAL**, 57.
 When material, see **SLANDER**, 37, 38.

VEHICLES.

Duty of carrier of passengers respecting, see **CARRIERS**, 67.
 Public regulation of, by city, see **MUNICIPAL CORPORATIONS**, 28.

VENDITIONI EXPONAS.

Necessity of, and when awarded, see **EXECUTION**, 80.

VENDOR AND PURCHASER.

[Includes contracts for the sale or exchange of real property, and the relative rights and liabilities of the parties arising out of such contracts. Contracts for the sale of chattels are treated under **SALE**.]

Competency of, as witnesses, see **WITNESSES**, 62.
 Declarations of vendor as evidence, see **EVIDENCE**, 134.
 Measure of damages in actions between, see **DAMAGES**, 26-33.
 Right to interest as between, see **INTEREST**, 16.
 What deemed fixtures as between, see **FIXTURES**, 10.

I. CONTRACTS FOR THE SALE OF LAND.

1. *Validity and Requisites, Generally; and Herein of the Statute of Frauds.*

2. *Interpretation, and Rights of Parties.*

II. RIGHTS OF BONA FIDE PURCHASERS.

1. *In General.*

2. *Actual and Constructive Notice.*

III. THE VENDOR'S LIEN.

IV. REMEDIES.

1. *Of the Vendor.*

2. *Of the Purchaser.*

3. *Rescission.*

For Index to Notes in American Decisions and American Reports, see Volume I.

I. CONTRACTS FOR THE SALE OF LAND.

1. *Validity and Requisites, Generally; and Herein of the Statute of Frauds.*

1. Distinction between contract to sell, and deed or other conveyance. — An instrument in writing, signed and sealed by the owner of land, with blanks as to the name of the bargainee, and left with an agent authorized by parol to fill the blanks with the name of the purchaser, and the price, though ineffectual as a deed, may be specifically enforced as a contract for the sale of land, signed for the person to be charged therewith by his lawfully authorized agent. *Blackhall v. Parish*, 78 D. 239.

2. Necessity and sufficiency of the consideration. — Certainty as to the consideration of an agreement for the sale of land is sufficient, where it is stated therein that the premises were previously purchased by the vendor from the vendee, and the consideration is expressed to be "the same sum" which the vendor paid for the same, with interest. *Atwood v. Cobb*, 26 D. 657.

A contract for the sale of lands is void for want of consideration, where nothing is paid or agreed to be paid therefor by the party with whom the contract is made. *Bean v. Burbank*, 33 D. 681.

The consideration of such a contract need not be recited in the instrument, but it must exist in fact, and proof of it is essential to the legal enforcement of the contract. *Ib.*

A stipulation in a contract of sale of land to repay purchase-money at a specified time, if the vendee desires it, is not void for want of consideration; for the purchase and payment of the price furnish a sufficient consideration. *Eno v. Woodworth*, 53 D. 370.

Such a stipulation is not void for want of mutuality, even though it does in terms require that the vendee, on demanding repayment of the price, will return the property; a condition to that effect will be implied; or a return may be enforced in equity. *Ib.*

3. Validity of the contract, generally. — Where the vendor of lands thinks he is selling one parcel, and the vendee thinks he is purchasing another parcel, their minds do not agree, and there is no contract, although both parties acted in good faith. *Kyle v. Kavanagh*, 4 R. 560.

4. Validity of oral agreement to convey. — Where the statute of frauds enacted in a state omitted the English provision that no action should be brought to recover damages on any contract for the sale of land, unless the agreement shall be in writing, and signed by the party to be charged therewith, or by some other person by him lawfully authorized, — held, that a parol contract for the sale of land was valid, so as to support an action for damages, though made with an agent who had merely parol authority. *Ewing v. Toss*, 2 D. 455.

A verbal contract to convey land made prior to the statute of frauds is valid. *Allen v. Beal*, 13 D. 203.

The Pennsylvania statute of frauds does not apply to parol contracts for sale of lands in another state, and does not avoid such contracts, though made in Pennsylvania. *Siegel v. Robinson*, 93 D. 775.

A contract for the sale of land must be in writing, under the Mexican law. *Hoen v. Simmons*, 52 D. 291.

In parol sales of land, all evidence of verbal contract will be rejected, if being taken as true it does not make out such a case as to entitle it to stand as an exception to the statute of frauds. *Poorman v. Kilgore*, 67 D. 425; *Marcy v. Stone*, 54 D. 736; or unless there has been such a part performance as cannot be compensated in damages. *McKown v. McDonald*, 82 D. 576; *White v. Beard*, 30 D. 552.

Contracts by parol for land are generally regarded as voidable merely. *Sims v. Hutchins*, 47 D. 90. And if such an agreement is subsequently carried out in good faith, the grantee's title cannot be affected by a judgment against the grantor, which was rendered after the making of the agreement, and before the execution of the conveyance, in performance thereof. *Mims v. Morse*, 45 D. 590.

A verbal sale of land may be sustained by the vendor's oath in favor of the vendee. *Houser v. Lamont*, 93 D. 755.

An oral agreement by the vendee of land to reconvey it is within the statute of frauds; and where it appears in a bill for specific performance that the agreement was oral, the fact can be taken advantage of by demurrer. *Akrend v. Odiorne*, 19 R. 449.

5. What is an interest in lands, within the purview of the statute of frauds. — When a contract comprehends an interest in trees standing, with a right in the vendee to sever them, the subject-matter is then an interest in land within the statute of frauds. *Slocum v. Seymour*, 13 R. 432; *Owens v. Lewis*, 15 R. 295.

A sale of a crop of peaches then growing in the seller's orchard, the buyer to gather and remove the peaches as they mature, — held, not within the statute of frauds as a sale of an interest in land. *Turner v. Piercy*, 17 R. 591.

6. What contracts respecting lands are within the statute. — Where lands are sold and conveyed by deed describing the metes and bounds, lines, and supposed quantity, a parol agreement, at the same time, to pay the grantee for all that it shall fall short on measurement is void, being within the statute of frauds. *Bradley v. Blodget*, 1 D. 11.

A contract for sale of lands need not be under seal, under the statute of frauds. *Warrall v. Munn*, 55 D. 330.

For Index to Notes in American Decisions and American Reports, see Volume I.

The statute of frauds has no application to the enforcement of a penalty for not completing the contract of sale of land agreed upon, by making a bid at an execution sale. *Lockridge v. Baldwin*, 70 D. 385.

A parol agreement is within the statute of frauds, and cannot be enforced, unless it has been partly performed, where it is to convey land to the plaintiff when he should pay the defendant the purchase price the latter had paid for it. *Wentworth v. Wentworth*, 72 D. 97.

An oral agreement by A with B to pay for land to be deeded by him to C is void, although B deeds the land accordingly. *Liddle v. Needham*, 33 R. 359.

An agreement whereby the lands of defendant should be sold to other persons at an improved value, to be caused by the complainant's exertions, and after sales were so made, that the complainant should receive one half of the proceeds, he first paying the price agreed on by the parties, and performing the acts agreed to be done by him to entitle him to his share of the proceeds, is not a contract for the sale of land, and need not be in writing. *Lesley v. Rosson*, 77 D. 679.

A verbal agreement to rescind a contract under seal for the sale of land, made after payments are due, and founded upon no new consideration, unless followed by an actual abandonment of the sale by both parties, and a restoration of the property, so far as possible, to the vendor, will be treated as invalid in a suit by the vendor for the stipulated purchase-money. *Pratt v. Morrow*, 100 D. 381.

An oral agreement between two parties to become jointly purchasers of certain lands, and to hold the same in undivided moieties, is within the statute of frauds. *Green v. Drummond*, 1 R. 14.

Where, in pursuance of such an agreement, a purchase was made in the name of D. alone, although G. advanced a portion of the purchase-money, a conventional trust that could be enforced was not created, the same being within the provisions of the seventh section. *Ib.*

There being no deed or conveyance of the legal title to D., while the contract of purchase remained executory, no resulting trust within the meaning of the eighth section of the statute could arise in favor of G. *Ib.*

A mutual transfer of possession of lands, under a parol contract, which continues exclusive and undisturbed for nineteen years, is a valid transfer of titles, and is not within the statute of frauds. *Moss v. Culver*, 3 R. 601.

A and B mutually agreed by parol that each should make a will of her real and personal estate in favor of the other, and the wills were so made, but B afterward made another will, in favor of other parties, and

died. *Held*, that the agreement was a contract for the sale of lands within the statute of frauds, and therefore void. *Gould v. Mansfield*, 4 R. 573.

7. Form and execution of the memorandum. — A memorandum of a contract for the sale of land signed by the vendor alone is sufficient, under the statute of frauds, to enable the vendee to enforce it; his own assent to the contract being provable by evidence *aliunde*. *Ives v. Howard*, 67 D. 500; *Worrall v. Munn*, 55 D. 330; *McCrea v. Purmort*, 30 D. 103; *Gartrell v. Stafford*, 41 R. 767.

A memorandum reading "I agree to sell," signed by vendor, describing the land, expressing the consideration and the time of payment and of giving possession, imports an agreement of sale, and not a mere offer to sell, and is sufficient as against the vendor, under the statute of frauds. *Ives v. Howard*, 67 D. 500.

A contract is not invalid because of the omission of the word "dollars," in an offer to sell "forty acres of land for ten per acre," which was accepted, the purchaser agreeing to pay "what you ask,—four hundred dollars,"—there being no possibility of doubt as to its meaning. *Northwestern I. Co. v. Meade*, 94 D. 557.

The acceptance of an offer to sell land, but fixing a different place for the delivery of the deed and payment of the money than the residence of the respective parties or the place named in the offer, is not an unconditional acceptance so as to bind the seller. *Ib.*

A contracted with B for the sale of a lot of land, the only written evidence of the contract being several receipts, signed by A and his agent, acknowledging the receipt of certain sums of money from B "in part payment for a house and lot," without describing the premises, or furnishing any data for ascertaining their locality. *Held*, that said writings were insufficient to take the case out of the statute of frauds, and that part performance of the agreement was also insufficient. *McGuire v. Stevens*, 2 R. 649.

A mere receipt for money on account of a purchase of land, and a letter from the purchaser, referring only generally to an existing contract, do not constitute a valid contract within the statute of frauds. *Smith v. Jones*, 42 R. 72.

8. Sufficiency of the memorandum. — 1. *What is sufficient.* — Where a statute of frauds provided that "no person shall be charged on any promise, etc., unless the agreement on which such action shall be brought, or some note or memorandum thereof shall be in writing,"—*Held*, that an agreement relating to the sale of lands must have the consideration for the promise, as well as the promise itself, in writing. *Scars v. Brink*, 3 D. 476.

For Index to Notes in American Decisions and American Reports, see Volume L.

On the sale of land the following receipt was held sufficient as a memorandum within the statute of frauds: "Received of O. twenty dollars, being on account of a plantation on the Cypress, sold to him this day, for two thousand two hundred dollars, payable in different installments, as per agreement." *Cosack v. Descoudres*, 10 D. 681.

A deed executed by defendant is a sufficient memorandum under the statute of frauds, though not delivered, to support a decree for specific performance of a contract to exchange lands. *Parrill v. McKinley*, 58 D. 212.

The memorandum need not set forth the whole contract, but the substance only, to satisfy the statute of frauds; and where, in a contract for the sale of land, there was a stipulation that the purchaser was to pay certain annuities charged thereon, the omission of such stipulation from the memorandum signed by the vendor, where the purchaser in his bill admits it and avers his readiness to pay the annuities, is no bar to specific performance. *Ives v. Hazard*, 67 D. 500.

The memorandum need not show a consideration already paid, to be good under the statute of frauds. *Ib.*

The memorandum required by the statute of frauds to maintain an action on the contract for the sale of any interest in land must clearly show, either by itself or taken in connection with some other writing contemporaneous with or referred to in the memorandum, what that interest is. *Farwell v. Mather*, 87 D. 641.

A memorandum required by the statute of frauds may be interpreted by resort to oral evidence. The court may ascertain by such evidence the relations of the parties to any property which will satisfy the terms of the memorandum, but the writing, whether consisting of one paper or several, must describe or identify the subject of the contract. *Ib.*

The requirement of the statute of frauds of a written memorial of a contract for sale of land is satisfied by a receipt for money "for land" shown to be the land in contest, strengthened by the admissions of the personal representatives of the party to be charged as to his liability and duty. *Müller v. Antle*, 92 D. 495.

A memorandum describes property with sufficient certainty to satisfy the statute of frauds, and to enable the contract to be specifically performed, where it is of "a house and lot of land situated on Amity Street, Lynn, Mass.," and parol evidence is admissible to apply the description to a house and lot on such street, owned by the vendor at the time the memorandum was signed. *Hurley v. Brown*, 96 D. 671.

Neither party can contend that there is no memorandum in writing signed by the party to be charged when a written instrument

exists which is evidence of a contract for a mutual exchange of lands *in presenti*, and though not enforceable in itself unaided by extraneous evidence for want of certainty in specifying what lands were exchanged by the parties, is made certain by the subsequent acts of the parties in taking possession and consummating the exchange. The vendee in possession cannot set up such defense, more especially when the vendor is able and willing to convey. *Overstreet v. Rice*, 96 D. 279.

In a written contract to convey real estate, the words "a house on Church Street" are a sufficient description of the estate to satisfy the requirements of the statute of frauds; and the house may be identified by parol evidence. *Mead v. Parker*, 15 R. 110.

A defendant executed to plaintiff a negotiable instrument, which stated that the consideration was land sold him by plaintiff. In a suit upon that instrument, — *held*, 1. That the suit was on the note, and not on the contract of sale of the land; 2. That, as a memorandum of the sale, it did not need to be signed by the vendor; 3. That it was enforceable as a note, although it might not be a sufficient memorandum under the statute of frauds. *Crutchfield v. Donathon*, 30 R. 112.

A draft for the purchase-money of lands, drawn by an agent without disclosing his principal's name, is a sufficient memorandum under the statute of frauds. *Neaves v. North State Mining Co.*, 47 R. 529.

2. *What is not.* — Where deeds were drawn, and the vendor took them home and wrote to the vendee that the deeds were ready, and requested her to attend and settle the business, but he died before the parties met, — *held*, not to be such an agreement in writing as will take the case out of the statute of frauds, as the letter did not distinctly set forth the terms of the agreement, or refer to a written instrument in which they are set forth, and that the party accepted such terms. *Givens v. Calder*, 2 D. 686.

A written memorandum of an agreement for the sale of lands is not sufficient, within the meaning of the statute of frauds, unless it discloses the terms of the contract and the parties thereto. *Sherburne v. Shaw*, 8 D. 47.

A memorandum of a contract for sale of an interest in lands which consisted merely of an invoice commencing with the words, "Invoice of articles purchased by S. Pipkin and R. Oliver of Wm. R. James, this twenty-ninth August, 1836," and after specifying numerous articles, concluding with the words, "One ice-house and lot, \$140," is not a sufficient memorandum, within the statute of frauds, to bind the purchaser in respect to the real property, and he may recover the purchase-money paid thereon. *Pipkin v. James*, 34 D. 652.

For Index to Notes in American Decisions and American Reports, see Volume I.

A deed of land signed by a vendor, and kept in his possession without delivery to the vendee, is not a sufficient memorandum of the contract to satisfy the statute of frauds. *Johnson v. Brook*, 66 D. 547.

Where a husband and wife agree to convey their interest in a tract of land, a deed thereof executed by the husband alone is not a complete memorandum of the contract, and is insufficient under the statute of frauds. *Ib.*

A memorandum in writing agreeing to give a certain sum "for the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture," etc., and to pay a certain sum quarterly until the principal and interest are paid, and "in addition pay over the \$1,215 to be received from P., and the proceeds and goodwill of the Times, all of which sums shall be deducted from" the gross sum to be paid, is not sufficient to take the contract out of the statute of frauds. *Farwell v. Mather*, 87 D. 641.

No action upon such a contract can be supported by the addition of oral proof that the memorandum was intended to apply to an unexpired lease of a certain building, subject to a certain ground-rent, in which building the press and other articles were situated and the Times newspaper was printed; that P. had agreed and bargained with the vendor, in consideration of \$1,215, for a release and conveyance of a small portion of the land included in said lease; and that there was no other building anywhere owned or held by the vendor under a lease to which the description would apply. *Ib.*

Telegrams signed by the vendee of real estate are insufficient to constitute a memorandum under statute of frauds, where they do not describe, mention, or refer to the subject-matter of the contract otherwise than by showing the terms of part payment, and directing the agents of the vendor to draw up a contract accordingly. *Hazard v. Day*, 92 D. 790.

A letter written by an owner of real estate to his agent, and received by him, stating that he would sell a certain portion thereof at a certain price, is not an agreement under the statute of frauds, although the agent communicates its contents to a proposed purchaser, who orally agrees to purchase upon the specified terms. *Steel v. Pyle*, 30 R. 388.

9. What performance or payment will take the case out of the operation of the statute. — Payment of a substantial part of the purchase-money in the execution of a parol agreement for the sale of lands is such a part performance as will take the case out of the statute of frauds, and will warrant a specific performance. *Townsend v. Houston*, 27 D. 732. But such payment must be clearly made in execution of the contract. *Houston v. Townsend*, 12 D. 109.

Part performance may be proved, generally, by parol; but the payment of money being an equivocal act, the fact that it was paid in execution of the contract must either be admitted or proved by writing. *Ib.*

The terms of the contract may be proved by parol, the fact of a part performance having been first established. *Ib.*

A promise to pay for land actually conveyed need not be in writing. *Whitbeck v. Whitbeck*, 18 D. 503.

Suit may be brought on a parol contract for the sale of lands, after the same has been fully executed, and nothing remains to be done except to pay over the purchase price. *Linscott v. McIntire*, 33 D. 602.

A contract relating to lands partly executed by one of the parties may be proved by parol, and specific performance decreed, in order that one side may not take advantage of the other. *Townsend v. Houston*, 27 D. 732.

The court must be able to ascertain the terms of an agreement partly performed, in order to warrant a specific performance. *Ib.*

Equity decides upon equitable grounds in contradiction to the positive enactments of the statute of frauds, and in case of part performance will admit parol testimony to prove a parol contract relative to land. *Ib.*

The act relied upon as a part performance should be such as would not have been done independent of some agreement or contract relative to land. *Ib.*

The act must, to a certain extent, be a joint act, or such as clearly indicates a mutual assent. *Ib.*

The distinguishing principle is, that the part performance must be something done in the execution of the agreement, and not as preparatory or as an inducement. *Ib.*

The receipt of the purchase-money by the vendor, proved by writing, is a part execution of a contract for the sale of land. *Ib.*

If upon a parol sale of land a note for the price be given, and before the note is paid, or an action brought, a conveyance be made and executed, the purchaser cannot rely upon the want of a writing evidencing the original sale, to defeat an action upon the note. *Edelein v. Clarkson*, 38 D. 177.

A parol contract for the sale of lands of which possession is to be given before payment made, and the possession is thereafter accordingly given to the vendee, is sufficiently executed thereby to estop the vendee from setting up a failure of consideration to an action upon a note given for the price. *Ib.*

A part performance of a verbal contract for sale of land takes the contract or sale out of the statute of frauds. *Maddox v. Rowe*, 68 D. 535; and warrants specific enforcement where there has been delivery with acts of ownership on both sides. *Parrill v. McKimley*, 58 D. 212.

For Index to Notes in American Decisions and American Reports, see Volume I.

Though the fourth section of the statute of frauds of England, upon which the doctrine of the effect of part performance of a parol contract for the sale of lands is founded, is omitted from the statute as enacted in the state of Pennsylvania, yet that doctrine as declared by the courts of chancery in England is recognized as a part of the law of that state. *Fugh v. Good*, 37 D. 534.

10. What will not do so. — Part performance of a parol contract for sale of land does not take it out of the statute of frauds. *Box v. Stanford*, 51 D. 142; nor entitle either party to sustain an action at law for damages suffered from non-performance of the residue. *Norton v. Preston*, 32 D. 128.

Payment of purchase-money is not alone sufficient to take a parol contract for the sale of land out of the statute of frauds. *Gangwer v. Fry*, 55 D. 578. There must also be a distinct and notorious transmission of the possession from one party to the other. *Myers v. Byerly*, 84 D. 497.

Payment of a part or the whole of the purchase price is insufficient to take a contract out of the statute of frauds. *Allen v. Booker*, 19 D. 33; *Johnston v. Glancy*, 28 D. 45; *Blanchard v. McDougal*, 70 D. 458; *Pinnock v. Clough*, 42 D. 521; *Baldwin v. Palmer*, 61 D. 743; *Poland v. O'Connor*, 93 D. 327.

A refusal by a vendor to execute a parol agreement of sale of real estate is not a fraud taking the case out of the statute of frauds, where the purchaser has paid no portion of the purchase-money, made no lasting and valuable improvements, and has not been let into possession. *Roma v. Rowe*, 83 D. 184.

Plaintiff and defendant made an oral contract for the sale of property by the plaintiff to the defendant, and each deposited a sum of money with a third party, to be paid by him to either, in case the other should fail to fulfill his part of the contract. Held, that the deposit was not an "earnest" within the statute of frauds. *Howe v. Hayward*, 11 R. 306.

The person contracting to purchase, having deposited part of the purchase-money with her agent to pay the vendor as soon as he executed the deed, and the agent informing the vendor of it, is not such a performance as takes the case out of the statute; nor does the purchaser taking possession of the land, without any known permission of the vendor, make such a part performance. *Givens v. Calder*, 2 D. 686.

On a parol contract for the sale of lands, the fact that it formed a part of the agreement itself, that it should be reduced to writing, and that the defendant fraudulently evaded this part of the contract, is not sufficient to take the case out of the statute of frauds. *Box v. Stanford*, 51 D. 142.

The doctrine of part performance is not to be extended to new cases which do not come clearly within the rules and precedents al-

ready established. The statute of frauds should not be further encroached upon. *Gangwer v. Fry*, 55 D. 578.

Part performance of a parol contract is allowed by a court of equity to dispense with the requirements of the statute of frauds, upon the principle of preventing a fraud. A court of law has no such dispensing power. *Baldwin v. Palmer*, 61 D. 743.

It is not every possible act of a vendee, done with reference to a parol contract for sale of land, that will remove it from the statute of frauds, but only those to which he has been induced by positive action or permission of the vendor; or at most by those results that naturally flow from the agreement. *Poland v. O'Connor*, 93 D. 327.

The purchase of a building by a vendee in a parol contract for sale of land, with a view to placing it on the premises, will not take the contract out of the statute of frauds. *Id.*

11. Effect of purchaser's going into possession. — The court must determine what acts constitute possession so as to defeat an action of trespass, or make out a contract for the sale of the land, so as to take the case out of the statute of frauds, and it is error to leave those questions to the jury. *Baring v. Peirce*, 40 D. 534.

A parol agreement by one person, to purchase land and convey it to another whenever advances are repaid, is void under the statute of frauds; and an entry by the latter upon the land before it is purchased by the former is not such possession, under and in part execution of the contract, as will take it out of the statute. *Myers v. Byerly*, 84 D. 497; *Johnson v. Hanson*, 41 D. 54; but possession is an indispensable accompaniment of every parol contract that hopes for specific performance. *Workman v. Guthrie*, 72 D. 654.

It is no part performance of a verbal agreement for the sale of land, where vendee takes possession and erects a building, but without direction, knowledge, or consent of the vendor. *Hoen v. Simmons*, 52 D. 291; *Johnston v. Glancy*, 28 D. 45.

Temporary erections, or surveying land, or repeated acts of ownership, such as cutting timber, do not constitute such a possession as will take a parol contract for the sale of lands out of the statute of frauds, though such acts constitute the only possession usually taken of uncultivated timber-land. *Gangwer v. Fry*, 55 D. 578. S. P., *Baring v. Peirce*, 40 D. 534.

Possession taken by a purchaser under an agreement for sale of lands, at a time when the seller had no control over them, is not such part performance of the agreement as will take it out of the operation of the statute of frauds; and neither is the building of a mill on other lands of the purchaser, where the agreement merely provides that if the

For Index to Notes in American Decisions and American Reports, see Volume I.

mill is built, the price of the lands will be less. *Osborn v. Phelps*, 48 D. 133.

Remaining in possession by a tenant is not a sufficient part performance. *Johnston v. Glancy*, 28 D. 45; unless it is shown that when the contract was made it was specially agreed that thenceforth the tenancy should cease and the possession should be deemed to be under the contract. *Blanchard v. McDougal*, 70 D. 458; *Thompson v. Thompson*, 68 D. 638.

If a purchaser by parol takes possession under his contract, and afterwards attorns to the vendor as landlord, or fixes upon himself any other character than that with which he entered, he lets go his equities, and his possession is referred to his new agreement. *Rankin v. Simpson*, 57 D. 668.

The mere fact that the plaintiff, after the making of the contract, and until the commencement of the action, continued to reside upon the land, and to improve and cultivate the same, is not a part performance. *Wentworth v. Wentworth*, 72 D. 97.

Acts of possession done after a vendor has disavowed a parol contract for sale of land, made by an unauthorized agent, are without warrant, and will not take the contract out of the statute of frauds. *Poland v. O'Connor*, 93 D. 327.

Possession taking a parol contract for the sale of land out of the statute of frauds is not shown by proof that the vendee used the lot which adjoined his warehouse for storing lumber and wagons. *Id.*

A contract held to be merely executory, where a father, who owned a tract of unimproved land, said to his son that he would give him one half of the land, not designating which, if he would remain with him a year, although the promise, in nearly the same terms, was afterwards repeated, designating the north half, and although the son assented and remained with his father, and some marks were made to indicate the line, and some improvements were made; and the whole tract will pass at a sheriff's sale under a judgment entered against the father prior to a conveyance of the land from the father to the son. *Willey v. Day*, 88 D. 562.

A parol contract for the sale of land by an agent of the owner, and his admission of the purchaser into possession, are unauthorized, and do not take the case out of the statute of frauds, nor furnish a defense to an action of trespass by the owner, where the agent is acting under a special authority requiring him to enter into written contracts for the sale of the land. *Baring v. Pearce*, 40 D. 534.

A vendee under an alleged parol contract in possession for a long time is not held to proof so rigid as under a recent sale. *Willey v. Day*, 88 D. 562.

A parol sale of land, accompanied by posses-

sion, passed a title as valid and legal as a written conveyance in Texas before the adoption of the principles of the statute of frauds. *Briscoe v. Bronaugh*, 46 D. 108.

Possession delivered in pursuance of a parol agreement is such a degree of performance as to take the contract out of statute of frauds. *Ryan v. Dox*, 90 D. 696. But a continuance of possession by one purchasing while in possession will not do so, it seems; but the purchaser cannot be turned out until the purchase-money is repaid. *Thompson v. Thompson*, 68 D. 638.

Entering into possession by the vendee, with the consent of the vendor, is a part performance which will entitle the vendee to prove the terms of the contract by parol. *Townsend v. Houston*, 27 D. 732.

To take a parol contract for the sale of land out of the statute of frauds, there must be unequivocal and satisfactory evidence of possession given and entered upon, or of acts clear, certain, and definite in their object, and having reference to the contract. *Poland v. O'Connor*, 93 D. 327; *Wentworth v. Wentworth*, 72 D. 97; *Gauger v. Fry*, 55 D. 578.

Delivery of possession by a vendor to his vendee and continuation thereof by the latter, together with the payment of a considerable part of the purchase-money, will take a parol agreement for the sale of land out of the statute of frauds, provided the possession be taken and continued under the contract. *Blanchard v. McDougal*, 70 D. 458.

12. — and making improvements. — The statute of frauds is not a good defense where the party relying on it has been guilty of fraud in permitting another to make improvements on lands without objection. *Town v. Needham*, 24 D. 246.

The plaintiff, owning a piece of wild land, told the defendants that the premises should be theirs as long as they lived, and put them in possession of the same. The defendants occupied the premises for a number of years, and made extensive improvements upon them. *Held*, that the expenditures made upon permanent improvements constituted, in equity, a consideration for the promise of the plaintiff, and that the performance of the promise, although by parol, could be enforced in equity, and that an action of ejectment would not lie against defendants in possession. *Freeman v. Freeman*, 3 R. 657. S. P., *Kurtz v. Hübner*, 3 R. 685; *Hardisty v. Richardson*, 22 R. 57; *Johnston v. Glancy*, 28 D. 45.

The provision of the statute of frauds concerning contracts not to be performed within a year does not apply to contracts for the sale of lands; and therefore where one entered and made improvements on land under an oral agreement to pay for it and to receive a deed in two years, — *Held*, that

For Index to Notes in American Decisions and American Reports, see Volume I.

a suit for specific performance would lie. *Fall v. Hazelregg*, 15 R. 278.

A entered on land belonging to B, and without his knowledge or permission cleared it and made certain improvements. B afterwards agreed by parol with A, against whom he had brought an action of ejectment for possession, that he would sell the land to A, or pay him for the improvements. It was held that though the promise to sell the land was clearly void by the statute of frauds, yet the promise to pay for the improvements was not within the statute. *Frear v. Hardenbergh*, 4 D. 356.

Parol gift of land is not so far executed by reason of improvements as to take the case out of the statute of frauds, and prevent a rescission, where it appears that the donee has been in possession five years, but has made improvements not to exceed the value of one year's rent, and those not of permanent value. *Wack v. Sorber*, 30 D. 269.

A parol contract to convey land is not taken out of the statute of frauds by the fact that in pursuance of it, a son left his trade in town to go upon a farm, cleared and fenced the land, erected farm buildings, planted an orchard, and the like, under a promise by his father to give him the land in consideration of his services, and his coming to live thereon. *McKowen v. McDonald*, 82 D. 576.

2. Interpretation, and Rights of the Parties.

13. The relation and respective rights and interests of the parties, generally. — He who is bound to do the first act has the right of election. Accordingly, where a party bound himself to convey four hundred acres of land out of one of two tracts, he has his election out of which tract he will convey. *Fleming v. Harrison*, 4 D. 691.

Waste after a contract or sale, where possession is to be delivered at a future day, must be borne by the vendor, if committed by his tenants. In such a case, he must tender compensation before he can require the vendee to perform his part of the contract. *Durrett v. Simpson*, 16 D. 115.

A parol grant of a branch line from a principal line of water-pipes from a fountain creates a tenancy at will only. It does not disable the grantor from executing a prior contract of sale. *Id.*

Where a vendee receiving his deed is unable to pay the bond given for the purchase-money, the vendor, knowing this, may make a new agreement, and take back all or part of the land, and release the whole or part of the debt. *Bavington v. Clarke*, 21 D. 432.

Different parts of a bargain for the sale of land take effect simultaneously, or in such order as may best effectuate the intention of the parties, whatever may be the order in

which the documents are executed. *Whelock v. Freeman*, 23 D. 674.

A grantor with a warranty who puts a third person in possession is presumed to act on behalf or as agent of his grantee. *Warner v. Page*, 24 D. 607.

A contract for the sale of land is *in fieri* while it remains unexecuted by a conveyance, after which the purchase-money may not be detained or recovered back but by force of a covenant or fraud, for any encumbrance or defect of title whatever. *Lighty v. Short*, 24 D. 334.

No principle of law allows one man to substitute himself as the vendor, in a contract for the sale of land, in place of another, against the will of the vendee. *Taylor v. Porter*, 25 D. 155.

A policy issued to a vendor of property before the sale, and not assigned to the purchaser, protects his insurable interest to the extent of the unpaid purchase-money, but does not affect the purchaser's liability for such unpaid balance. *Etina F. Ins. Co. v. Tyler*, 30 D. 90.

A purchaser of land, under a contract of sale, can do nothing to the prejudice of his vendor's rights so long as the relation continues. *Meadows v. Hopkins*, 33 D. 140.

A vendor's right to immunity from acts to his prejudice by a purchaser in possession does not depend on the vendor's having title to the land at the time of sale. *Id.*

A vendor of real estate holds the legal title as security for the payment of purchase-money, where he has given no deed to the purchaser. *Conner v. Banks*, 52 D. 209.

Where a vendor of real estate executes a bond to make title, the contract will be considered in a court of equity as in the nature of a conveyance to the purchaser, and a reconveyance back by way of mortgage. *Id.*

Where one of two joint owners of land, who are bound by contract to convey it, transfers his interest to his co-owner, the latter will then be bound to convey to the party entitled to demand such conveyance, even though such party be his former co-owner, who joined with him in the contract. *Kerr v. Day*, 53 D. 526.

Where the grantor of land gives to the grantee the right to cut lumber thereon, without limitation as to the person who may do it, subject to a lien thereon for the payment of the purchase-money of the land, the lumber may be lawfully removed from the land by persons who have contracted with the grantee for getting it out, and the grantor will be regarded as having fully authorized such contract. *Spofford v. True*, 54 D. 621.

Outstanding titles or encumbrances purchased in by a vendor or mortgagor inure to the benefit of the vendee. *Bush v. Cooper*, 59 D. 270.

For Index to Notes in American Decisions and American Reports, see Volume I.

In an agreement or contract for sale of lands, the vendor becomes trustee of the land for the benefit of the vendee, and the trust thus acquired by the vendee arises or results by the implication or construction of law. *Maddox v. Rowe*, 68 D. 535.

Where a vendor of real estate surrenders the possession of the premises to the vendee, or where the vendee is in possession thereof at the time of sale, and the vendor afterwards, without the vendee's consent, takes possession of the same, he is liable to the vendee for any rents received by him during such possession. *Shawhan v. Long*, 96 D. 164.

14. Interpreting the contract as respects the covenants contained in it. — By an agreement under seal, the defendant covenanted to pay, by a certain day, a stipulated sum for a lot of land, and the plaintiff therein covenanted that he would then, on the performance of this covenant, "execute to him, his heirs and assigns, a good warranty deed of conveyance." In an action for a breach by the defendant, — *held*, that the covenants were dependent, and the words "a good warranty deed of conveyance" referred to the instrument, and not to the title, and a plea that the plaintiff was not seised was bad, as the action being on a specialty, a failure of consideration was no defense. *Parker v. Parmele*, 11 D. 253.

A vendor who sells and covenants to convey, without warranty, "all his right, title, and interest" in land, is bound to show that he has some right, title, or interest that he can convey. *Johnson v. Tool*, 25 D. 162.

Such a covenant implies that he has some right, title, or interest which will pass by a conveyance to the vendee, and if he has none, the stipulation on his part is a nullity, and the contract will be rescinded at the instance of the vendee. *Id.*

Such vendor need not show, however, that he has the best title, nor even a title regularly derived from the commonwealth, to comply with such agreement, but he must show that he had at least some right to the land. *Id.*

A naked possession might be such a right as would, if transferred and conveyed, satisfy such covenant on the vendor's part. *Id.*

A person agreeing to convey so many acres of land out of a larger tract, provided that quantity remains unsold and free from certain claims, may select it from any part of such larger tract, but he must lay it off, and show that it is unsold and free from such claims. *Id.*

Where a covenantor agrees to convey to the covenantee, by a day certain, one of several lots, to be selected by the covenantee, if the latter fails to make a selection by that day, the right to do so passes to the covenantor, and he may tender a conveyance of

* Encumbrances, purchaser's right to deduct for, see note, 49 D. 579-582.

either of the lots. *Bell v. Quarles*, 26 D. 280.

A sale of one of the lots mentioned in such covenant by the covenantor after the day fixed for the covenantee to make his selection amounts to an election by the former that the latter shall not have the lot sold, and a subsequent selection of that lot by the covenantee is invalid. *Id.*

The failure of the covenantee to select a lot prior to the day that the covenantor was bound to convey will not defeat his right to recover damages, if the latter fails to tender him a deed of one of the lots. *Id.*

The measure of damages in such action would be, where no demand is made on the covenantor to convey any particular lot, the value of any unsold lot, and interest from the commencement of the action. *Id.*

In an agreement to convey, words that party "shall have the privilege of purchasing" are sufficient in equity to entitle him to a conveyance of all the estate of the vendor at the time of the contract, although such words are not so comprehensive as a positive agreement to convey, which means, when not qualified by words or circumstances, to convey the fee. *Hawralky v. Warren*, 90 D. 613.

In a contract for the sale of land, the vendee agreed to pay the purchase-money in installments, and the vendor to deliver the deed upon payment of the last installment. *Held*, that the covenants were independent, and that the vendor could enforce payment of all the installments without first tendering the deed. *Bowen v. Bailey*, 2 R. 601. But see, contra, by the same court, *Robinson v. Harbour*, 2 R. 671.

Where the vendee of land covenants to pay for it by installments, and the vendor covenants to make title upon the payment of the last installment, the covenants of the vendee, except the last one, are independent; but the vendee's covenant to pay the last installment, and of the vendor to make title, are dependent, because they are concurrent acts of the parties to be done or performed at the same time; and to entitle either the vendor or vendee to maintain an action against the other, he must aver and prove performance, or tender or offer of performance, of his part of the agreement. *Robinson v. Harbour*, 97 D. 501.

15. — as respects the description of the premises to be conveyed. — He who sells property on a description given by himself is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain liable for that variance. *McCall v. Davis*, 94 D. 92.

In a written contract for the sale of land, the premises were described as "the east ½ of N. W. ¼, sec. 27, T. 38, 14 E. of 3d P. M."

For Index to Notes in American Decisions and American Reports, see Volume I.

The range and position of the land to the base line were omitted. *Held*, that this description was sufficient, because a reference to the government land surveys would show that there is no township 38 south of the base line and 14 east of the 3d P. M., and hence it must be north of the base, and in 14 east of said meridian, which would locate the land in Cook County. *White v. Hermann*, 99 D. 543.

A contract for a conveyance of lands is good and binding, if their description is sufficient to enable a surveyor to locate them; and this is a question for the jury, to be determined from the evidence, unless it is manifest from the instrument that such lands cannot be located. *Id.*

The court will not permit a contract for the conveyance of land to fail, when, from the entire instrument and the general acts of the government, it can be seen what was intended by the parties. *Id.*

16. How far the purchaser is deemed the owner. — A purchaser of land, under a verbal agreement, who has paid the purchase-money and gone into possession, has only an equitable interest in the premises before conveyance. *Jackson v. Morse*, 8 D. 306; *Chapman v. Glassell*, 48 D. 41; *Monroe v. West*, 79 D. 524.

He is entitled to whatever advantage may thereafter arise to it, and bound to sustain any loss that may befall it. *Reed v. Lukens*, 84 D. 425; *Brewer v. Herbert*, 96 D. 582. Which equitable interest he cannot set up as a bar to a recovery in ejectment, although he is in the actual possession under the bond. *Nickles v. Haskins*, 50 D. 154; *Brill v. Stiles*, 85 D. 364. But when he has completed his part of the contract, by paying the purchase-money, and receiving written evidence of the agreement of the vendor to convey the premises, he acquires such title as may be asserted in a court of equity against the holder of the legal title, whether in the vendor or his vendee, with notice. *Brill v. Stiles*, 85 D. 364; *Peterson v. Orr*, 53 D. 484.

Title in equity passes from the date of a contract of sale of real property, though before the vendee takes possession, and before a conveyance or payment of any part of the purchase-money. Nor does the insertion of a stipulation in the contract, to deliver at a future day, have any effect on this rule. The whole foundation of this doctrine of equity is, that the equitable title and interest passes by the contract of sale, and from the time of its execution; and it contemplates delivery of possession as well as payment of purchase-money, and a conveyance at a future period. *Brewer v. Herbert*, 96 D. 582.

Where the language of a contract is, that the vendor "has this day sold to" the vendee his house and lot, it clearly imports a binding contract, then executed and con-

summated. By such terms, the title in equity passes from the date of the contract. The contract is not for a sale at a future day. *Id.*

In equity, the vendee is not owner adversely to lien of vendor, but is treated as a trustee for him, until the payment of the purchase-money. *Walton v. Hargroves*, 97 D. 429.

A vendor, under an agreement for the sale of lands which are in the possession of the vendee, cannot maintain an action for an injury to the freehold, committed while the vendee is in possession. *Ives v. Ores*, 47 D. 401.

A contract for the purchase of land, made *bona fide* for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not then paid. A judgment obtained by a third person against the vendor, between the making the contract and the payment of the money, during which the vendee was in possession, cannot defeat the equitable interest thus acquired, nor is it a lien on the land affecting the right of the vendee. *Hampson v. Elden*, 3 D. 530.

17. Purchaser's right to possession. — One who enters upon land under an executory contract to purchase cannot be evicted by the vendor, unless by some act he makes his possession tortious, as by denying his vendor's title, or by refusing to surrender possession upon sufficient demand and notice; and a mere failure to pay the purchase price will not be sufficient. *Harle v. McCoy*, 23 D. 407.

The right of possession under a contract for the sale of land remains in the vendor until full payment is made and the vendee has complied with everything required to entitle him to a conveyance; it is not sufficient that he has paid part of the purchase price and executed his notes for the residue. *Holmes v. Schofield*, 29 D. 364.

One who enters upon land under a contract of sale is but a tenant at will, until the execution of the conveyance, and though he may have paid the purchase-money, his tenancy may be determined by a demand for the possession, and if this be refused, the possession may be recovered in an action of ejectment. *Doe v. Brown*, 41 D. 217. *Foley v. Wyeth*, 79 D. 771.

A purchaser under a contract inoperative as a conveyance, but good as an agreement to convey, who has paid the purchase-money and entered into possession of the premises, will be protected by a court of equity against subsequent purchasers with notice. *Dutton v. Warschauer*, 82 D. 765.

18. Representations and warranties on part of vendor. — 1. *In general*. — A vendor must disclose all material facts of which he knows vendee to be ignorant. *Barnard v. Duncan*, 90 D. 416.

For Index to Notes in American Decisions and American Reports, see Volume I.

There may be fraud in suppressing and concealing material facts, as well as in direct misrepresentation, if the other party is knowingly suffered to deal under a delusion. *Id.*

A vendor is not responsible in damages for every unauthorized, erroneous, or false representation made to the vendee, although it may have been injurious; the representation must have been false, have been fraudulently made, and have occasioned damages. *Hammatt v. Emerson*, 45 D. 593.

The owner of premises must be supposed to be peculiarly cognizant of the quantity of land fit for cultivation in a tract which he undertakes to sell or lease. And a stranger coming to buy or lease has both a natural and proper right to look to him for such information and to expect the truth. *Mitchell v. Zimmerman*, 51 D. 717.

The doctrine of implied warranty applies only to articles susceptible of a standard quality, or which are sold by samples, and does not extend to lands which have no standard quality. *Pollard v. Lyman*, 2 D. 64.

2. *As to title.*—There is a distinction between the sale of goods and of land in respect of a warranty of title, which is implied in the former, but not in the latter. *Dorsey v. Jackson*, 7 D. 611.

A fraudulent representation relating to the title to land renders the person making it responsible the same as if made in regard to something collateral. *Outler v. Avery*, 23 D. 586.

What is done in good faith, in a contract for a sale or purchase, is merged in the purchase when consummated, and cannot be overhauled; but if representations are known to be false when made, the subsequent consummation of the agreement cannot shield the defendant. *Id.*

In every contract for the sale of land, unless contrary intention is expressed, there is an implied undertaking on the part of the vendor, available at law as well as in equity, while the contract remains executory, to make out a good title, clear of all defects and encumbrances. *Dwight v. Outler*, 64 D. 105. S. P., *Herrod v. Blackburn*, 94 D. 49; *Cullum v. Branch Bank*, 37 D. 725.

Caveat emptor is the rule between vendor and vendee of realty. *Collier v. Harkness*, 71 D. 216. The vendee must examine the records and title for himself, and so far the rule of *caveat emptor* may be said to apply to him. But misrepresentations or suppression of material facts are matters collateral to the written contract or deed, and may be inquired into on the ground of fraud. *Barnard v. Duncan*, 90 D. 416.

Though the state of a title appear from the records, a misrepresentation by the vendor with respect thereto will not be the less fraudulent. *Parham v. Randolph*, 35 D. 403.

Imperfect titles are subject of sale, and a

contract to convey one of them implies no warranty. When the vendee buys simply a title or claim to land, he does so at his own risk. *Herrod v. Blackburn*, 94 D. 49.

19. *Duty of vendor to convey or tender deed.*—The vendor must prepare and tender a deed of conveyance, where he covenants to give a title to the purchaser on the payment of the purchase-money. *Walting v. Kinnard*, 60 D. 216; and demand the purchase-money of vendee, before he can maintain an action for the purchase price, upon an agreement for the sale and purchase of the land, where the stipulations of the parties are dependent. *Smith v. Henry*, 44 D. 540; *Parker v. Parmele*, 11 D. 253.

An assignment by the vendor of a bond for purchase-money, on which the action is brought, does not affect his duty to tender a conveyance and demand payment of the purchase-money before the bringing of the action, as under our statute the assignment of a writing obligatory does not deprive the defendant of any defense he may have had against the payee. *Smith v. Henry*, 44 D. 540; *Wallace v. Shafer*, 37 D. 687.

Where a vendor of land agrees to convey legal title on payment of a certain number of installments of the purchase-money, and before those are paid other installments become due, he may retain his legal title as security for the full amount due when the payment is made, and may use such title to compel performance. *Thompson v. Carpenter*, 45 D. 681.

A tender of the vendor's own deed, without procuring his wife's relinquishment of dower, is not a satisfaction of his covenant to make the vendee "a good and perfect deed." *Greenwood v. Ligon*, 43 D. 775.

When no time is specified in a bond to convey, the law implies that the conveyance is to be made in a reasonable time. *Cock v. Taylor*, 5 D. 650.

If no day be specified for the delivery of the deed and of possession, in a contract for the sale of land, but the money is to be paid after the delivery of the deed, it must be understood that the deed was to be delivered and possession given without delay. If, therefore, on account of a misunderstanding of the parties in relation to the terms of sale, this is not done, the grantor is bound to account for the profits of the land after the contract, and the grantee to pay interest on the money from the time it would have been payable had the deed been immediately delivered. *Hundley v. Lyons*, 7 D. 685.

Where time is given for the payment of the purchase-money, on the sale of land, the vendor is bound to deliver a deed to the vendee at any time of demand before the expiration of the credit. *Eveleth v. Scribner*, 28 D. 147.

Where time is not made the essence of the contract for the sale of real estate, the bar-

For Index to Notes in American Decisions and American Reports, see Volume L

gainer will be held to the contract and compelled to convey, though the purchase-money was not paid or tendered at the exact time fixed in the contract for the payment, provided that compensation can be made him for the delay, and it appears to be conscientious that the conveyance should be made. But the rule is otherwise where parties have made the payment of the money a material and essential part of the contract, and unless the money is paid or tendered at the stipulated time, the obligation of the bargainer to convey is at an end. *Hall v. Delaplaine*, 68 D. 57.

On a parol contract for the sale of land, partly performed by entry into possession and removal of a store therefrom, if the vendor refuses to give a deed when demanded, he cannot, at the expiration of the term for credit, offer the deed and demand the purchase-money. *Beck v. Scribner*, 28 D. 147.

A tender of conveyance is unnecessary where the other party had declared his unwillingness to accept it. *Lynch v. Postlethwaite*, 12 D. 495. But if the land is subject to encumbrances not declared at the time of the sale, the vendor must satisfy the jury beyond a doubt that he could and would have removed them, or he will not be entitled to damages. *Hampton v. Speckenagle*, 11 D. 704.

Where a party should deliver a deed on a day certain, and at the day was ready with the deed, and would have tendered it, but for the evasion of the other party, it was held equivalent to a tender. *Borden v. Borden*, 4 D. 32.

Where, by articles of agreement for the sale of land, the plaintiff was to give a lawful deed of conveyance to the defendant, who was to pay a certain sum therefor, and procure a sheriff's deed of the property sold for unpaid taxes, to be made to plaintiff, it was held that the plaintiff could not recover the consideration agreed to be paid, without making and offering to the defendant a deed of conveyance, although the latter had taken the sheriff's deed in his own name, and had never conveyed to the plaintiff. *Dearth v. Williamson*, 7 D. 652.

Where a grantee requests the grantor to purchase an outstanding title, and executes his note in payment therefor, the grantor agreeing when the purchase is made and the note paid, to execute a quitclaim deed, he is not in default in failing to make and deliver such deed, and there is no failure of consideration until the note is paid in full. Before such time the grantee has no right to demand the deed. *Cassell v. Ross*, 85 D. 270.

In America, each successive grantor of realty is presumed to give to his grantee only his deed of conveyance, retaining the immediate deed to himself to rely upon its covenants in case of failure of title. In

England, the title deeds go with the land to the purchaser. *White v. Hutchings*, 88 D. 766.

Replevin or detinue will lie to recover a deed withheld from the person in whom the title to the land thereby conveyed is vested; and if a deed should be lost or destroyed, a court of equity would relieve against its loss, by compelling the execution of another deed. *King v. Gilson*, 83 D. 269.

20. Duty of purchaser to demand deed. — To sustain an action by the purchaser on a contract to convey, it is necessary to demand a deed of the vendor, and after waiting a reasonable time, to call on him and offer to receive it. *Fuller v. Williams*, 17 D. 498; *Blood v. Goodrich*, 24 D. 121. And in case of the vendor's death before such demand, it must be made in like manner of the heirs, to enable the vendee to sue the personal representative on the contract. *Fuller v. Williams*, 17 D. 498.

That the heirs are numerous and widely dispersed does not dispense with demand upon them. *Id.*

Demand upon the administrator is nugatory, as he has no control of the land. *Fuller v. Williams*, 17 D. 498. Contra, *Herdon v. Harrison*, 69 D. 399.

A positive refusal to convey on the first demand dispenses with any further demand. *Blood v. Goodrich*, 24 D. 121.

A demand on one of several joint vendors, and his refusal to execute the deed, dispenses with a demand on the others. *Id.*

21. Which party should prepare the deed. — The costs of conveyance fall upon the purchaser in the absence of an agreement. *Winter v. Jones*, 54 D. 379.

The English rule is, it seems, that the vendee must prepare the conveyance and tender it for execution. *Fuller v. Hubbard*, 16 D. 423. S. P., *Morrison v. Caldwell*, 17 D. 84.

A vendee need not aver tender of a deed to vendor for execution in his plea to an action by the vendor for the purchase-money, the plea alleging a failure of the plaintiff to execute a deed (overruling *Drewnen v. Boyer*, 5 Ark. 497, and *Byers v. Aiken*, 5 Id. 419). *Smith v. Henry*, 44 D. 540. For the vendor must prepare the deed under a contract to execute and deliver a good and sufficient deed. *Tinney v. Ashley*, 26 D. 620.

The vendor need not prepare and tender a deed as a condition precedent to forfeiture of contract of sale for non-payment of purchase-money. If the purchaser wishes to comply with his contract, he must offer to pay. *Wells v. Smith*, 31 D. 274.

22. What sort of deed purchaser may insist upon. — 1. In general. — Where one covenants "to give a deed of" certain premises contracted to be sold, the covenant is fulfilled by executing a conveyance of the property, without warranty or personal covenants. *Ketchum v. Evertson*, 7 D. 384; *Van Epps v. Schenectady*, 7 D. 330. For under an

For Index to Notes in American Decisions and American Reports, see Volume 2.

agreement to sell land, a covenant to convey a good title does not necessarily entitle the covenantee to a warranty deed. *Kyle v. Kavanagh*, 4 R. 560.

A covenant to furnish a warranty deed means a deed with special warranty, and not a deed with general warranty and with covenant against encumbrances. *Withers v. Baird*, 32 D. 754.

A purchaser of a fee-simple is only entitled to a covenant against acts of grantor and his heirs; that is, a covenant of special warranty. *Lloyd v. Farrell*, 86 D. 563.

A vendor of real estate in his own right is bound to convey the same with general warranty unless it be otherwise agreed between the parties. *Hoback v. Kilgore*, 21 R. 317.

Under a general contract to sell real property, the vendor will be required to convey by a deed containing covenants of general warranty; covenants against vendor's own acts merely will not be sufficient. *Dwight v. Outler*, 64 D. 105.

A contract for the conveyance of real estate by deed, with the "usual covenants," entitles the grantee to covenants of seisin, of right to convey, against encumbrances, of quiet enjoyment, and of warranty. *Wilson v. Wood*, 68 D. 231.

What are the "usual covenants" in deeds in a given locality may be referred to a master to inquire. *Id.*

A covenant to give a "clear deed," the vendor having a life estate only in the land, which is known to the vendee, entitles the vendee to a life estate only, and in case of a breach, even though the measure of damages is the value of the land, it is the value of the life estate, and not of the fee, which is to govern. *Rohr v. Kindt*, 39 D. 53.

A contract "to make a warranty deed free and clear of all encumbrances" is not satisfied by a deed containing covenants of general warranty and freedom from encumbrances unless the grantor has at the time a perfect and unencumbered title; and if the grantee accept the deed in ignorance of an existing encumbrance, he may afterwards reject it on discovering the encumbrance. *Porter v. Noyes*, 11 D. 30.

It is a fraud on the part of the vendor to conceal the fact that part of the land contracted for belongs to a third person; and a covenant of warranty in a deed by such third person is not an execution of the contract of the vendor to convey with warranty. *Cook v. Grant*, 16 D. 564.

The vendor cannot compel the vendee to accept a conveyance of the land by such third person after considerable delay, where the property had greatly depreciated. *Id.*

A covenant to give a "lawful deed of conveyance" means a deed conveying a lawful or good title. *Dearth v. Williamson*, 7 D. 652.

A contract by three to convey land with

warranty is not complied with by a conveyance with warranty by one of the three warrantors, and a release or quitclaim deed from the other two. *Lawrence v. Parker*, 2 D. 10.

A purchaser of land who refuses to accept the deed tendered, on account of an alleged defect in it, cannot show as a ground of damages that the vendor was unable to deliver possession. *Pickering v. Stapler*, 9 D. 336.

2. *Meaning of "good and sufficient deed."* — A bond to make a good and sufficient deed to land requires a general warranty. *Fleming v. Harrison*, 4 D. 691. And a contract to give a "good and sufficient warranty deed" is satisfied by a valid warranty deed conveying such title as the grantor has. *Tinney v. Ashley*, 26 D. 620; *Green v. Covilland*, 70 D. 725; *Babcock v. Wilson*, 35 D. 263.

A contract to deliver a "good and sufficient deed, with covenants of warranty," will be held to mean a good and sufficient title, when it appears from the agreement and the attendant circumstances that such was the intention of the parties. *Tindall ad. Den*, 40 D. 220.

An agreement to give a good and valid deed calls for a deed that will convey the title to the land. *Stow v. Stevens*, 29 D. 139; *Greenwood v. Ligon*, 43 D. 775; *Everson v. Kirtland*, 27 D. 91. For the defendant admits plaintiff's title by the execution of such agreement, and cannot afterwards deny it; and the plaintiff is not bound to produce further evidence of title than the agreement. *Tindall ad. Den*, 40 D. 220.

The deed must be good and sufficient, both in form and substance, to convey a valid title to the land which the covenantor has agreed should be conveyed. *Everson v. Kirtland*, 27 D. 91.

A party contracting in writing to sell a lot of land, and "to convey and release the same to the vendee by a good and sufficient deed," binds himself to give a good title to such land; and when he has given such a deed in pursuance of the agreement, he cannot complain that its covenants protect the vendee from certain liens which it was verbally understood he should be liable for. *Story v. Conger*, 93 D. 546.

A deed good in form only is not a sufficient compliance with the covenant to make "a good and perfect deed." Good title is necessary to make "a good and perfect deed." *Feemster v. May*, 53 D. 83.

23. *Rights and duties of purchaser in respect to payment of price.* — A clause in an agreement for the sale of land, to the effect that if the vendee or his assignee should fail to pay the purchase price within ten days after the same becomes due, he thereby forfeits all claim to said land and

* What satisfies contract for good and sufficient deed, see note, 11 D. 84-89.

For Index to Notes in American Decisions and American Reports, see Volume I.

the moneys paid thereon, "and this bond, in such event, shall be void, both in law and equity, and the title to said lots shall continue in the original proprietor, as if no sale had been made," will be construed as a penalty to insure a prompt performance by the purchaser, and not as releasing the vendee from liability upon his failure to pay the purchase price. *Mason v. Caldwell*, 48 D. 330.

In equity, time is not considered to be of the essence of the contract for the conveyance of real estate, unless the parties expressly agree that it shall be so regarded, or unless it follows from the nature and purposes of the contract. *Jones v. Robbins*, 50 D. 593.

The time of payment is, in equity, regarded as formal, in ordinary cases of sales of real estate, and as meaning only that the purchase shall be completed within a reasonable time and substantially according to the contract, regard being had to all the circumstances. *Id.*

Where a party is too sick to attend to business at the time when a payment under a contract for the sale of real estate becomes due, that fact will prevent a forfeiture of his right under the contract, on account of his failure to make the payment at that time, especially if, after his recovery, he seeks permission of the other party to make the payment, and the latter shows by his conduct that he intended, from the time of the default, to insist upon the forfeiture, and that he would not have accepted any subsequent tender. *Id.*

A vendor may insist on the payment of or security for the purchase-money on tendering a deed of the land sold, as a condition of delivering the deed. *Salmon v. Hoffman*, 56 D. 322.

A delay of twenty days is unreasonable, and the vendor is not bound, where he agrees to convey timber to the vendee if the latter shall make and deliver notes in payment within a week, or within that time set a day for the consummation of the contract. *Misell v. Burnett*, 69 D. 744.

The neglect of the vendee to comply with his agreements is not excused by the circumstance that the title to the land was in litigation, if the litigation was pending when the contract was made, and an adverse determination was provided against by the vendee by taking the guaranty of a third person. *McAusland v. Pundt*, 93 D. 358.

The entry of a judgment against a vendor of land is not constructive notice to the vendee in possession, and subsequent payments to the vendor are not at his peril. *Filley v. Duncan*, 93 D. 337.

Actual notice given by a judgment creditor to the vendee, of the entry of his judgment against the vendor, will not, it seems, make subsequent payments by the vendee to the vendor payments at his peril. *Id.*

A party unconditionally accepting an offer to sell land for cash cannot demand a deed or obtain the right of possession until he has tendered the purchase-money to the vendor in person at his residence or elsewhere; and so the vendor cannot maintain his action for the price until he has properly tendered to the other his deed at the latter's residence. *Northwestern I. Co. v. Meade*, 94 D. 557.

Defendant executed a bond for a warranty deed, to be delivered on a certain day if the purchase-money was then paid. The plaintiff paid some money down. At the time appointed, defendant was unable to make title, but plaintiff was ready, willing, and able to perform. *Held*, that the delivery of the deed and the payment of the money were concurrent; that plaintiff need not bring the money into court to keep the tender good; and that he could recover the money paid down. *Clark v. Weis*, 29 R. 60.

A vendor and vendee do not stand in relation of mortgagee and mortgagor, so that in equity the vendee will have the same time to perform that is given to a mortgagor to redeem. *Kirby v. Harrison*, 59 D. 677.

24. Right of purchaser to dispute vendor's title. — One entering under an executory contract of purchase is bound by the title of his vendor as though he had entered as tenant. *Fowler v. Cravens*, 20 D. 153. S. P., *Greene v. Munson*, 31 D. 605; *Seabury v. Stewart*, 58 D. 254.

A vendee in possession, having recovered purchase-money, must restore the possession to the vendor, and cannot dispute his title, or set up the title of a third person. *Fowler v. Cravens*, 20 D. 153.

One who enters under a contract for the purchase of lands, and makes permanent improvements, cannot, before complying with the terms of the contract, convey to another a title which, though buying in ignorance of the contract, he can set up against the person with whom it was made. *Bowser v. Walker*, 18 D. 670.

Instances in which vendee may deny vendor's title considered. *Smith v. Babcock*, 93 D. 498.

The title of a vendor may be denied in an action by him to recover damages for the removal by the defendants under the direction of the vendee, and while the premises were in the latter's possession under a contract of purchase which was subsequently rescinded, of buildings which were standing upon said premises. The defendants, having made no contract with the vendor, are trespassers merely, so far as he is concerned, and the idea of estoppel or privity is inapplicable, and it is therefore, and for the reason that they are liable to the real owner only for an injury to the reversion, that they may show that the plaintiff is not such owner. *Id.*

25. — or buy in outstanding title. — A purchaser who goes into possession

For Index to Notes in American Decisions and American Reports, see Volume I.

under a contract of sale cannot set up any outstanding title which he may have purchased in, unless he first make a *bona fide* surrender of the possession, and bring his action to try that title. *Greeno v. Munson*, 31 D. 605; *Champlin v. Dotson*, 53 D. 102.

A vendee who buys in outstanding encumbrances, or procures another party to do so for the benefit of the vendee, will not be permitted to set up an adverse title under them against the vendor. *Champlin v. Dotson*, 53 D. 102; until he has, *bona fide*, surrendered his possession, or by some unequivocal act repudiated the contract, and this is known to the vendor. *Greeno v. Munson*, 31 D. 605.

A vendee who purchases outstanding encumbrances will only be entitled to be credited for the amount which he expended in purchasing the encumbrances. If he should claim more than this, a court of equity will interpose to prevent a recovery. *Champlin v. Dotson*, 53 D. 102.

The relation of landlord and tenant does not exist between vendor and vendee, and the vendee entering under a void contract of sale may buy in an outstanding title superior to his vendor's, and rely upon it in ejectment, or a bill in equity for possession prosecuted by the vendor. *Richmond v. Bowles*, 73 D. 153.

A vendee under a void contract of sale, who purchases an outstanding paramount title, is not liable to the vendor for the contract price less the amount necessarily expended for the better title, though he would have been so liable had the contract of sale been a valid one, even where the vendor had no title. *Id.*

26. Right of vendor to set up hostile title.* — A vendor of a tract of land who derives his title from one grant or source cannot set up another conflicting claim, acquired before or after the sale, to prejudice the title of his vendee. *Finley v. Lynch*, 5 D. 635.

27. Remedies of purchaser for defects in title. — If the vendor represents his title as clear and undisputed, an inconsiderable interference, so small as not to raise a presumption that it would materially have influenced the purchaser, is not sufficient to vacate the contract in equity, the remedy being for damages against the vendor at law. *Finley v. Lynch*, 5 D. 635.

A vendor's loss of meane conveyances in a chain of title cannot be used by the vendee as an objection to the title after partly executing the contract by taking possession, for the defect may be supplied by a bill *in perpetuam rei memoriam*; still less can he object where he has not performed his own covenants, and the lost deed is found before the title is tendered. *Cassell v. Cooke*, 11 D. 610.

A purchaser of land, knowing the title to

* Subsequent title acquired by vendor, when vests in vendee, see note, 53 D. 543-545.

be defective, takes the risk upon himself. *Rohr v. Kindt*, 39 D. 53; being presumed to have been compensated for the risk in the collateral advantages of the bargain. *Lighty v. Shorb*, 24 D. 334.

Where there is a covenant against a known defect, the vendee shall not detain the purchase-money, unless the covenant has been broken. He shall be bound to perform his engagement wherever his knowledge and the state of the facts continue to be the same as they were at the time of the conveyance. *Lighty v. Shorb*, 24 D. 334.

One who accepts a conveyance with covenants for title, upon which he has an adequate remedy at law, cannot enjoin the assignee of a note for part of the purchase price, because of an encumbrance, without asking a rescission. The rule is otherwise if the grantor has become insolvent; but if he were insolvent at the time of the sale, and the purchaser knew this, and relied upon covenants running with the land, and contained in prior conveyances, he is not entitled to any injunction. *Morrison v. Beckwith*, 16 D. 136.

Vendee of one of several joint owners of a tract of land, between whom a partition has taken place, cannot, if evicted, demand from a vendee of another of the joint owners a portion of the land sold to him, but he must pursue his vendor in an action of warranty. *Compton v. Mathews*, 22 D. 167.

Where there is a contract for sale of several adjoining parcels of land for an entire sum, with general warranty of title, and the purchaser is evicted from a portion for want of title, he may hold the remainder, and have proportionate abatement or compensation, although there was a mutual mistake as to the title. *Butcher v. Peterson*, 55 R. 89.

A bond executed by the vendor of a tract of land to the vendee, as indemnity to the latter for the loss of the land by a paramount title, is founded upon a sufficient consideration, although the vendee has not been evicted by such paramount title. *Butler v. Triplett*, 25 D. 136.

Where the vendor of a tract of land covenants with the vendee that if any of the land is lost he will convey, of another tract, two acres for every one lost, and a paramount title appears, of which the vendor has notice, and subsequent to which he sells the land out of which the indemnity was to be made, for a price paid, per acre, equal to that he received for the first tract sold, he will be accountable to the first vendee for the proceeds of twice as many acres as have been lost, although that amount be double the consideration that the latter paid for it. *Id.*

The right of a purchaser of land to a good title is given by the law, and does not rest upon the agreement of the parties. *Cullum v. Branch Bank*, 37 D. 725.

Equity will not require the payment of

For Index to Notes in American Decisions and American Reports, see Volume E.

purchase-money when a pre-existing encumbrance is discovered, no conveyance having been executed. *Id.*

Vendee's extinguishment of an encumbrance inures to the benefit of the vendor, and entitles the vendee to a proportionate abatement of the purchase price. *Meadows v. Hopkins*, 33 D. 140.

A vendee who takes security from his vendor against an existing mortgage upon the land sold is not confined to such security after a foreclosure and eviction thereunder, if both the vendor and his securities are or become insolvent, but is entitled to a *pro tanto* abatement of the purchase price as against the vendor and those claiming under and liable to the equities existing against him. *Andrews v. McCoy*, 42 D. 669.

A vendee in possession under a deed of warranty, with no fraud made manifest, and with nothing to show that the covenantor is not able to pay any damages that may be recovered against him, has no right to call his vendor into a court of equity to litigate an adverse legal title. *Vick v. Percy*, 45 D. 303.

The purchaser has a right to have the unpaid money first applied to relieve his land of lien or encumbrance. *Withers v. Carter*, 50 D. 78.

A purchaser may deduct the amount of encumbrances from the purchase-money due, where he has given a mortgage therefor, though the encumbrances were known to him at the time he made the contract of purchase. *Wolbert v. Lucas*, 49 D. 578. S. P., *Martin v. Atkinson*, 50 D. 403.

A sale by the sheriff, of land in the possession of a vendee under a contract for the sale thereof, amounts to an eviction, and vacates such contract. *Martin v. Atkinson*, 50 D. 403.

The price paid by a vendee in a contract for the sale of land, who repurchases the same after it has been sold under a mortgage or judgment lien existing at the time of the contract, is no criterion of the damages he has sustained in an action against his vendor for the eviction. *Id.*

A mistake in regard to the validity of a grantor's title is no ground for relief to a purchaser, when he purchases land without agreement, express or implied, for a conveyance with warranty of the title. *Sutton v. Sutton*, 56 D. 109.

A vendee of real estate is put on guard as to title by a contract to convey to him lots "by the same title" by which a certain person "held them at the time of his death." Such language is as forcible as the legal maxim of *caveat emptor*; and it is sufficient, where he claims a defect in the title, that the conveyance placed him in actual possession of the premises. *Salmon v. Hoffman*, 56 D. 322.

A purchaser of real estate, upon becoming aware of the invalidity of his title, may sur-

render to the rightful owner, and he is under no obligation to his grantor to remain and litigate, and probably recover the value of improvements made by such grantor. *Dress v. Towle*, 64 D. 309.

A vendor having knowledge of a defect in his title cannot bind his vendee, ignorant of the facts, by an agreement to assume all the risk of the title; the concealment of the facts in such a case is a constructive fraud. *Lloyd v. Farrell*, 86 D. 563.

Where a husband has contracted to convey land, and his wife afterwards refuses to join in a deed and relinquish her dower, the vendee may either accept performance by the husband to the extent of his ability, and retain so much of the purchase-money as shall be proportionate to the utmost possible outstanding or contingent interest not certainly conveyed to him, without interest, until the title is perfected, or refuse such partial title, and have his action for damages for the breach of the contract. *Leach v. Forney*, 89 D. 574.

A purchaser who becomes unable to return property before he discovers a defect of title of the vendor is remediless, unless he has protected himself by covenants of warranty; and this rule applies to sales by executors and administrators. *Ware v. Houghton*, 93 D. 258.

A vendee of land will be allowed only fair value of what is not conveyed, where the vendor is unable to give a perfect title, and the vendee elects to take such title as the vendor can give, with compensation for the deficiency. *Woodbury v. Luddy*, 92 D. 731.

Defects of title which court of equity will consider are such as exist at time of inquiry, and not such as existed at the time of the contract of sale. Consequently, where a vendee has held possession under the title derived from his vendor until defects which existed at the time of the sale have been cured by the statute of limitation, or by adverse possession, he will not be allowed to take advantage of them. *Piedmont Coal Co. v. Green*, 98 D. 799.

Where a purchaser goes into possession of premises under a contract of sale, and the title of the vendor fails, or he is unable to make conveyance as stipulated by the contract, such purchaser cannot retain possession and enjoyment of the premises by virtue of the contract, and at the same time avoid the payment of the purchase price. *McIndoe v. Morman*, 7 R. 98.

The vendor may maintain an action for a strict foreclosure and forfeiture of the purchaser's rights under the contract, unless the latter offer to rescind; and it is not necessary that the plaintiff should tender a deed conveying a clear title before such action can be brought or maintained. *Id.*

28. Compensation for deficiency in quantity of land. — As a general rule, when a person sells land by the metes and

For Index to Notes in American Decisions and American Reports, see Volume I.

bounds of an original grant, if the purchaser gets all the land embraced by that grant, he has no cause of complaint, except where there is a special covenant, or some willful misrepresentation. *Bond v. Quattlebaum*, 10 D. 702.

Relief for the deficiency in a sale of lands will be granted in equity where the grantor misrepresented the quantity of acres in the tract, although the sale may have been in gross, and not by the acre. *Pringle v. Samuel*, 13 D. 214.

If a line be shown to a party as the southern boundary of a tract of land which he is about to purchase, whereby he is induced to give eight dollars an acre for the entire tract, supposing it to lie north of the line, when only about half of it lies on that side of the line, and that which lies south of it is only worth two dollars per acre, he may, if he elect, have the land north of the line at the price agreed upon, and the residue at one fourth of that price, the excess of the purchase price to be deducted from the sale notes. *Jopling v. Dooley*, 24 D. 450.

The conveyance of a particular tract without specification of quantity does not bind the vendor to a warranty of any particular number of acres, though there may have been an expectation in both parties to the sale founded on documents and other evidence known to both, that the tract contained a larger quantity than it actually does. *Moore v. Vick*, 32 D. 301.

A vendee of land is not entitled to a deduction for a deficiency in the quantity of the land conveyed, from the amount of the bond given therefor, where the sale is *per aversionem*, or for a gross sum for the whole premises, and not at a stipulated price per foot or acre, the land being described by designated boundaries, followed by a specification of the quantity, unless there has been fraud or willful misrepresentation by the vendor. *Morris Canal Co. v. Emmett*, 37 D. 388.

An abatement in the purchase price will be allowed in a suit to foreclose a mortgage given for the purchase price, though the contract is executed, where a tract contains less land than the contract of sale and deed call for. *Couse v. Boyles*, 38 D. 514.

When a misrepresentation is made by the vendor as to the quantity of land, though innocently, the right of the purchaser is to have what the vendor can convey, with an abatement out of the purchase-money for so much as the quantity falls short of the representation. *Mitchell v. Zimmerman*, 51 D. 717; *Walling v. Kinnard*, 60 D. 216.

The sale of land in bulk is not defeated by a deficiency in quantity. *Faure v. Martin*, 57 D. 515.

The only evidence of the value is the price paid where chancery is attempting to adjust a sale of land fraudulent as to quantity. It

will look alone to the agreement of the parties to determine the value of the premises in question. *Harrell v. Hill*, 68 D. 202.

Where there is a deficit in land purchased in gross as containing a certain number of acres, equity will withhold any compensation and damages, because the vendee had the means afforded him at the time of his contract to detect the deficit. *Emerson v. Navarro*, 98 D. 534.

In the absence of fraud or mutual mistake, a vendor of land is bound by his contract as to quantity, although the result contravenes his intention. *Heyer v. Lee*, 29 R. 537.

A sale was made of "three tracts of land containing nine hundred ninety-one and a quarter acres, and allowance at twelve shillings and six pence per acre." The vendor afterwards obtained patents in his own name, and executed a conveyance of the tracts to the vendee according to courses and distances as in the patents, and stating them as "containing in the whole nine hundred ninety-one and a quarter acres, and allowance, etc., be the same more or less." The vendee, having previously paid a part of the purchase-money, gave his bonds to the vendor on the day after the conveyance, for the remainder of the purchase-money. Upon a survey made twelve years afterwards, the tracts were ascertained to fall short eighty-eight acres. Held, that the vendee was not entitled to any deduction from his bonds, on account of the deficiency. *Smith v. Evans*, 6 D. 436.

The maxim *caveat emptor* will not be applied to protect a fraudulent grantor. *Pringle v. Samuel*, 13 D. 214.

The fact that a vendee was a neighbor and saw the land daily makes no difference, and the doctrine of *caveat emptor* has no application. *Couse v. Boyles*, 38 D. 514.

When land is sold as containing so many acres, "more or less," but the parties contemplate the land as containing the amount called for in the deed, the party sustaining the loss must be allowed for it, if on a survey a material variance between the amount called for and the actual amount is found to exist. *Couse v. Boyles*, 38 D. 514; *Harrell v. Hill*, 68 D. 202. But a deficiency of eight acres in a tract of 552 acres is no more than a purchaser who buys for more or less may reasonably expect. *Nelson v. Matthews*, 3 D. 620. Yet a deficiency small in itself, but large in proportion to the whole tract, will be compensated for, especially where the purchase was brought about by the false assertions of the grantor. *Pringle v. Samuel*, 13 D. 214.

A contract for the sale of a specified farm added to the designation of it the words "containing ninety-six acres, be the same more or less." The agreed price was sixty dollars per acre. The vendor gave a deed, stating the number of acres in the same

For Index to Notes in American Decisions and American Reports, see Volume I.

way, which the purchaser accepted, he giving a mortgage for the price, computed for ninety-six acres at sixty dollars per acre. In an action (between the original parties) to foreclose this mortgage, the purchaser and mortgagor proved that the quantity was overstated in the deed and mortgage; that by survey the farm contained only eighty-six acres. *Held*, that the deficiency was no ground for reducing the sum recoverable on the mortgage. *Fawc v. Martin*, 57 D. 515.

To estimate upon equitable principles a deficiency in the quantity of land conveyed, subtract what the grantor had a right to believe himself possessed of at the date of sale, as shown, for instance, by his own estimate given in for assessment shortly before, and leaving abrasions of river lands, etc., to be covered by the words "more or less" in the deed, from the number of acres expressed in the deed, and the remainder will be the deficiency. *Harrell v. Hill*, 68 D. 202.

29. Liability of purchaser for excess in quantity.—Whenever it does not appear that land was sold by the tract and not by the acre, the grantee is responsible for the excess of the number of acres above the estimated quantity; and in ascertaining the amount to be paid for such excess, the average value per acre of the whole tract is the proper rule. *Handley v. Lyons*, 7 D. 685.

The vendee in a contract for sale of land is entitled to the excess in ordinary cases, by reason of his liability to loss in case of a deficit. His hazard of a loss is the consideration he pays for the excess, and if that consideration be wanting, he must rely on his express contract, if he would claim an excess. *O'Connell v. Duke*, 94 D. 282.

The sale of land by the acre, the quantity being estimated, is binding, though actual measurement should show a deficiency or excess. *Ashcom v. Smith*, 21 D. 437.

Where land is sold at public vendue, by the acre, the vendor saying that he would sell it at a specified number of acres, "more or less," and that it should be measured, the vendee is bound to take it, though the quantity should considerably exceed that specified, and though that was the quantity stated in the published advertisement. *Id.*

A vendee refusing to complete the sale is liable in damages to the vendor in such a case. *Id.*

The measure of damages in such a case is the difference in price on a resale where the vendor has acted *bona fide*, and with reasonable care. *Id.*

The loss may be cast on the vendor in such a case, by grossly improper conduct, or wanton delay in reselling, or negligence on his part. *Id.*

Mere unskillfulness, without *mala fides*, or negligence, if not palpable, will not charge the vendor with the loss. *Id.*

Land was deeded as "containing 140 acres, more or less," and was paid for at the orally agreed price of \$27 an acre, and the consideration stated in the deed was the amount of that quantity at that price. Before the execution of the deed it was orally agreed that the land should be surveyed, and if it exceeded that quantity, the purchaser should pay for the excess, and if it fell short, the vendor should refund for the deficiency, at that rate. The quantity proving to be in excess, — *held*, that the vendor was entitled to recover therefor, and that oral evidence was competent to prove the agreement. *Ludeke v. Sutherland*, 29 R. 66.

The classification of contracts for the sale of land, with reference to the question of equitable relief to the injured party in case of an unreasonable surplus or deficit stated; adopting and approving the rules in *Talbot v. Harrison*, 2 Dana, 258. *O'Connell v. Duke*, 94 D. 282.

30. Compensation for improvements in case of eviction.—A *bona fide* occupant is entitled to charge for improvements exceeding the rent. *Ewing v. Handley*, 14 D. 140. *S. P.*, *Herring v. Pollard*, 40 D. 653; *Martin v. Atkinson*, 50 D. 403.

One in possession of land under an agreement of purchase which required him to make large expenditures for improvements thereon, as a condition upon which he was to receive his deed, where the title proves to be defective, has an equitable lien upon the land for the value of his improvements. *Gibert v. Peteler*, 97 D. 785.

Improvements by a vendee in possession who has paid the purchase-money should be allowed for, although they exceed the rents and profits, if the vendor disaffirms the contract and refuses to refund the purchase-money without suit; but the vendee should not be allowed for improvements made after obtaining judgment for the price paid, and rents should commence at that time. *Ewing v. Handley*, 14 D. 140.

The general equity rule is, that an occupant of land is regarded as the employee of the real owner, and not as his tenant, in clearing and fencing, and rendering it fit for cultivation; but after it is fit for cultivation, the accounts between the owner and occupant should be adjusted on the principles governing landlord and tenant; but many exceptions should be made. *Id.*

Where a son who is the tenant of his father's estate makes improvements thereon in pursuance of a promise from the father that upon his death the title to the land shall vest in the son, and the father dies without giving such title, neither the vesting of the title to the land, upon which the improvements were erected, in the son as one of the heirs of the intestate, nor the assignment of such land to the son under an agreement among the heirs, can be regarded as a per-

For Index to Notes in American Decisions and American Reports, see Volume I

formance of the intestate's contract. The son may therefore recover of the estate the value of the improvements erected. *Smith v. Smith*, 78 D. 49.

A son may recover the value of improvements erected, where, being the tenant of his father's estate, he makes such improvements under a promise from the father that upon his death the title to the land shall vest in the son, but the father dies without such title vesting in the son, and an agreement among the heirs contemplates an equal division of the intestate's estate among all the heirs, allowing the son no compensation for the improvements more than he would have received as an heir at law, had the improvements been made by him gratuitously, and exclusively for his father's benefit. *Id.*

Where a son who is the tenant of his father refuses to make improvements until he has his father's promise that upon his death the title to the land shall vest in the son, if the son makes the improvements, but fails to get the title to the land, such improvements inure to the benefit of the estate, but the son may recover the value thereof. *Id.*

Plaintiff entered upon defendant's land under a verbal contract of purchase, and sowed crops with consent of defendant. Afterward, defendant refused to carry out the contract of sale, and ejected plaintiff. *Held*, that plaintiff was entitled to the crops. *Harris v. Frink*, 10 R. 318.

One who is let into possession under a parol contract to purchase is a tenant at will so far as relates to the emblements. *Id.*

A purchaser of land, knowing the title to be defective, buys at his own risk, and he is not entitled to compensation for improvements placed upon it from the rightful owner who seeks to recover the land in ejectment, although the latter may have known that the improvements were being made, and made no objection. *Walker v. Quigg*, 31 D. 452.

No compensation will be allowed in equity for improvements put upon land by one who has entered under a contract to obtain the title, which he has, subsequently to his entry, repudiated. *French v. Seely*, 32 D. 758; or where he fails to comply with the contract. *Seabury v. Stewart*, 58 D. 254.

A subpurchaser, waiving his claim for specific performance, and suing for compensation for improvements made, should bring in the same parties and establish the same equities as if he were seeking a specific performance. *Henderson v. Pickett*, 16 D. 130.

31. Liability of purchaser for use and occupation. — One in possession under a contract for the purchase of land is not liable to pay rent on the implied contract for the use and occupation, if the owner fail to execute a conveyance. *Little v. Pearson*, 19 D. 289; *Dwight v. Outler*, 64 D. 105; in absence of an express promise to pay rent. *Dennett v. Penobscot Fair Ground Co.*, 2 R. 58.

A vendee under a verbal contract for the sale of land sustains the relation of tenant at will to his vendor, and is liable to an action for use and occupation of the premises, where the vendee, with the vendor's permission, goes into occupation, without any agreement to pay rent, and fails to pay for the land, and voluntarily abandons the premises. *Patterson v. Stoddard*, 74 D. 490.

Where the owner of land, with valuable buildings on it, contracts to convey it at a future day on payment of a stipulated price, secured by the purchaser's notes presently given, the purchaser presently taking possession, and the buildings are destroyed by fire, without fault of either party, before payment and conveyance, the vendee is not bound to take the land and pay the notes, but the vendor is entitled to the value of the use and occupancy during the vendee's possession. *Gould v. Murch*, 35 R. 325.

32. — for rents and profits. — A vendee in possession of land, under a contract of purchase, is not chargeable with rents, nor entitled to interest on the money paid, as long as the parties abide by the contract. *Taylor v. Porter*, 25 D. 155.

One in the possession of real estate, under a contract for the purchase thereof, is accountable to the actual owner for the rents and profits, after the extinguishment of the title in him under whom possession was taken. *Webb v. Conn*, 13 D. 225.

A vendee in possession, disaffirming the contract, and recovering damages for non-conveyance, is liable for rents, subject to the value of improvements placed by him on the land. *Craig v. Martin*, 19 D. 157.

33. Conditions, and how performed. — A vendee of land sold subject to a condition of repurchase is entitled to the rents and profits accruing between the sale and repurchase. *Bennet v. Holt*, 24 D. 455.

Where a purchaser of land agrees to pay the purchase-money, upon the vendor's delivering to him United States patents therefor, such vendor cannot enforce payment before performing the condition precedent, although Congress may, subsequently to the making of the agreement, have passed an act which rendered the delivery of such patents unnecessary or impracticable. *Chouteau v. Russell*, 31 D. 191.

Where defendant agreed to remove certain encumbrances from premises conveyed to plaintiff by a certain day, in consideration thereof to be allowed a certain sum on a debt due plaintiff, the removal of the encumbrances by that day is not a condition precedent, and defendant not having removed the encumbrances till the day had passed, he is still entitled to set off the sum stipulated in an action by the plaintiff on the original indebtedness, the plaintiff not having reconveyed the premises to him. *Roberts v. Marston*, 37 D. 52.

For index to Notes in American Decisions and American Reports, see Volume L.

Where plaintiff has suffered damages by the delay, in such a case, he has a right to have them deducted from the amount he agreed to allow for the premises. *Id.*

Where land is conveyed on condition that unless the grantee pay certain notes the deed shall be "void so far as to make good any non-fulfillment of said conditions," a breach of the condition will entitle the grantor to obtain possession and hold the property as a pledge or mortgage, until the condition is performed. *Fisk v. Chandler*, 50 D. 612.

A condition in a contract for the sale of land, "that if default should be made in fulfilling any part of the contract on the part of the purchaser the seller might regard the contract as forfeited, and resell the land," will not exempt the seller, if he enforces the forfeiture, from accounting to the purchaser for payments made, over and above damages accruing from the breach of agreement to the seller. *Gilbreth v. Grewell*, 74 D. 266.

An agreement to convey land if the vendee should find oil upon it is to be construed as an agreement to convey the land if oil should be found within a reasonable time. *Dark v. Johnston*, 93 D. 732.

A vendor's agreement, in a contract for the sale of a house and lot, to deliver possession of premises at a future day, does not amount to a condition that the contract shall be void if there is any change in the state or value of the property on the day for its delivery. *Brewer v. Herbert*, 96 D. 582.

34. Effect of conveyance to merge contract to convey.—When a deed is made in pursuance of a prior agreement, the agreement is thereby made a nullity, and the rights of the parties are controlled by the deed. *Kerr v. Calvit*, 12 D. 537. *S. P.*, *Hunt v. Amidon*, 40 D. 283; *Timms v. Shannon*, 81 D. 632. *Contra*, *Speed v. Hann*, 15 D. 78.

A grantee who accepts a deed with a special warranty, and executes bonds and mortgage for purchase-money, cannot claim deduction or abatement from the mortgage debt by reason of an outstanding encumbrance on the land within the warranty, in a suit brought by an assignee to foreclose the mortgage. *Timms v. Shannon*, 81 D. 632.

35. Construction of contracts for exchange of lands.—Under a parol contract of exchange of lands, where the contracting parties have occupied the tracts exchanged, neither can recover rents of the other. But on declaring such exchange void, the value of the lasting improvements at the time of the decree should be taken into consideration by the court. *Stark v. Connady*, 14 D. 76.

Where one of two parties to an agreement for the exchange of lands executes his con-

veyance, and the other then refuses, but afterwards executes his conveyance also, which is accepted, such acceptance is a bar to an action by the first grantor for the rent of the land granted by him between the dates of the two conveyances. *Warner v. Bacon*, 69 D. 253.

Where one party to an oral agreement for the exchange of lands has executed and delivered his deed, and the other has refused to fulfill his agreement or delivered an invalid deed, an action for money had and received cannot be maintained against the latter, although the land conveyed to him was estimated at a fixed sum, and has been since sold by him and converted into money. The action should be for the price of land sold and conveyed. *Bayford v. Pearson*, 85 D. 764.

Taxes on lands mutually exchanged by warranty deeds, which the parties to such deeds agree shall be set off against each other, are a part of the consideration; and in an action against the vendor by one deriving title by warranty deed from the vendee to recover money paid by the plaintiff to remove the encumbrance so assumed by the vendee, parol evidence of the agreement concerning the taxes is admissible. And if, in such case, it be considered that the warranty of the vendor was broken, still the vendee could agree upon the damages, and, upon their payment, the breach would be satisfied. *Robinius v. Lister*, 95 D. 674.

II. RIGHTS OF BONA FIDE PURCHASERS.

1. In General.

36. Who are deemed to be bona fide purchasers without notice.—A purchaser means one who has acquired the legal title, and not merely one who holds a bond for a conveyance. *Gilpin v. Davis*, 5 D. 622. And in equity is one who, without fraud and for value, acquires a right or interest. *James v. Morey*, 14 D. 475.

To constitute a person a purchaser for a valuable consideration, without notice, it is necessary that he should have paid the money and obtained a conveyance before notice. *Blight v. Banks*, 17 D. 136.

Payment in full before receiving notice of an equity is essential to constitute a bona fide purchaser. *Dugan v. Vattier*, 25 D. 105.

Between a purchaser in good faith under the recording act, and a bona fide purchaser within the decisions of the courts of equity, there is no distinction. *Grimstone v. Carter*, 24 D. 230.

When a creditor merges his judgment into a title, without actual or constructive notice of prior equities, he becomes a purchaser within the meaning of section 2220 of the Revised Statutes of Iowa, 1860, relating to

* Who is a bona fide purchaser without notice, see note, 86 D. 62.

For Index to Notes in American Decisions and American Reports, see Volume I.

registry of conveyances of land, and is entitled to equal protection, in the absence of opposing equitable circumstances, with any other subsequent *bona fide* purchaser. *Halloway v. Platner*, 89 D. 517.

37. Who are not so deemed. — The doctrine of *caveat emptor* applies to a purchaser where the title to the land depends upon the construction of a will, which is on record. *Tongue v. Nutwell*, 79 D. 649. S. P., *Fallon v. Chidester*, 26 R. 164.

To constitute one a *bona fide* purchaser, he must, before he has notice of a prior equity, either part with his property on the credit of the estate, or give up some security, or part with some right, or place himself in a worse position than he would have occupied had he received the notice before his purchase. *Dickerson v. Tillinghast*, 25 D. 523.

One who takes a conveyance of an estate in payment of a debt, without notice of a prior unrecorded mortgage, is not a subsequent *bona fide* purchaser as against the mortgagee. *Id.*

A grantee in a voluntary deed is not a *bona fide* purchaser, who will be protected against an outstanding mortgage of which the grantor had notice; and where such voluntary deed is made for the benefit of the grantor's creditors, the latter acquire no rights under it as against the mortgage. *Willis v. Henderson*, 38 D. 120.

One to whom a bond and mortgage, given to secure the price of property upon a fraudulent sale, is assigned without any pecuniary consideration being paid, but simply as a gift, does not occupy the position of a *bona fide* purchaser, so that the contract cannot be rescinded as to him. *Baker v. Lever*, 23 R. 117.

He is not a *bona fide* purchaser, who has sufficient notice to put him on inquiry. *Durdell v. Haley*, 19 D. 444; or who merely takes the legal estate in payment of or as security for a previous debt. *Dickerson v. Tillinghast*, 25 D. 523; or who has knowledge in fact of a prior unrecorded conveyance. *Matter of Conrad Leiman*, 3 R. 132.

38. How far protected. — A *bona fide* purchaser from a fraudulent grantor obtains a title which cannot be affected by the fraud. *Dugan v. Vattier*, 25 D. 105.

A *bona fide* purchaser of land, without notice of a mistake in the certificate of a deed, does not by reconveying to his grantor thereby transmit to him the superior equity he acquired as an innocent purchaser. *Simpson v. Montgomery*, 99 D. 223.

A *bona fide* purchaser from a fraudulent grantee will hold as against the original grantor. *Somes v. Brewer*, 13 D. 406; *Durell v. Haley*, 19 D. 444.

A subpurchaser, in whole or in part, of an equity will be protected from the acts of the original vendor and vendee, and may

have a specific execution if he can show a complete equity against his immediate vendor, and also against the holder of the legal title. *Henderson v. Pickett*, 16 D. 130.

A purchaser with notice, from an innocent purchaser without notice, of a prior unrecorded conveyance, is protected by the innocence and want of notice of his grantor. *Bell v. Twilight*, 45 D. 367; *Boynston v. Rees*, 19 D. 325.

A *bona fide* purchaser, without notice of any fraudulent design, will be protected under the statute of frauds. *Garland v. Rives*, 15 D. 758. S. P., *Scott v. Gallagher*, 16 D. 508; *Thomas v. Mead*, 19 D. 187; *Hall v. Delaplaine*, 68 D. 57; *Harper v. Bibb*, 69 D. 397.

A *bona fide* purchaser is not affected by fraud in his vendor where the latter has the legal title to the property sold. *Miles v. Oden*, 19 D. 177. But a *bona fide* purchaser from one having no title cannot obtain any title, for he who has no title can convey none, and a bad title is not made good by the ignorance of the purchaser of its defects, or his want of knowledge of the better title. *Barnes v. Meeds*, 49 D. 390.

A *bona fide* purchaser for value takes an estate subject to no other liens than such as attached to it at the time of purchase. *Follett v. Reese*, 55 D. 472. And without notice of an equitable lien holds the property discharged of the lien. *White v. Dougherty*, 17 D. 802. S. P., *Collier v. Harkness*, 71 D. 216. And without notice of agreement to join fences is not bound by such agreement. *Howe v. Seat*, 72 D. 202. And without notice of equities in favor of the owner of adjoining land, arising out of verbal agreements between him and the grantor, will not be bound thereby. *Climer v. Wallace*, 75 D. 135.

An innocent purchaser, without notice, of a tract of a land from a person holding the legal title thereto takes it discharged of a trust created by a previous contract to convey to another party, because of the laches of the latter in taking his deed; but where the vendor only holds the equitable title to the land, notice thereof is communicated by a contract to convey, as well as by deed, and the rights of the parties are governed by the maxim, *Qui prior est tempore, potior est jure*. *Craig v. Leiper*, 24 D. 479.

A purchaser for value without notice of fraud in his vendor stands upon as high ground in equity as any other creditor or cestui que trust. *Hunter v. Lawrence*, 63 D. 640.

One who has purchased land by parol, paid the price, and entered into and retained peaceable possession, will be protected in equity against the claim of a subsequent judgment creditor of his vendor. *Snyder v. Martin*, 41 R. 670.

Upon common-law principles, a voluntary

For Index to Notes in American Decisions and American Reports, see Volume I.

conveyance is void against subsequent *bona fide* purchasers for a valuable consideration without notice. *Fleming v. Townsend*, 50 D. 318.

Where a judgment is recovered against a vendor of land of which the vendee is in possession, and the land is sold under the judgment, the vendee who has without notice of the judgment completed his purchase, and received a deed from his vendor before the sheriff's sale, may sustain a bill in equity to have the sheriff's deed declared void, and the possession of the premises decreed to the plaintiff. *Filley v. Duncan*, 93 D. 337.

A, owning certain lands, and intending to convey the same to his daughter as a gift, executed a deed in which, through a mistake of the draughtsman, the premises were incorrectly described, and the name of the daughter's husband inserted instead of her own as grantee. No consideration was paid or promised for the conveyance, although a consideration was named in the deed. The deed was delivered to the daughter and duly recorded, and she was placed in possession. Afterward the husband executed a mortgage, containing the same erroneous description of the premises, to a *bona fide* mortgagee, who, upon foreclosure, purchased the premises and took a sheriff's deed containing the same erroneous description. Suit was brought by the purchaser to correct the description; whereupon A, having then first discovered the error in his former deed, executed and delivered to his daughter another voluntary deed, wherein she was named as grantee, and the premises correctly described. *Held*, 1. That the purchaser having acted in good faith, and without any notice of a defect in the husband's title, A was estopped from denying that the deed to the husband was made in good faith, or that the grantee was properly named therein; 2. That the daughter, being a voluntary grantee, had no claim, either under the original deed or under the one executed pending suit; 3. That the deed to the husband was not void for uncertainty in the description of the premises conveyed, and that the plaintiffs were entitled to have their deed reformed. *German Mut. Ins. Co. v. Grim*, 2 R. 341.

39. Purchaser of equitable title holds subject to equities.*—A purchaser of an equitable title takes it subject to all equities, though he purchases *bona fide*, for a valuable consideration, and without notice thereof. *York v. McNutt*, 67 D. 607. S. P., *Polk v. Gallant*, 34 D. 410; *Craig v. Leiper*, 24 D. 479.

Where A contracted to sell a house and lot to B, and C purchased of B all his right, etc.,—*held*, that C, though a *bona fide* pur-

chaser without notice, must take the property subject to all the equity existing between the original parties, A and B. *Murray v. Gouverneur*, 1 D. 177.

Where two persons have, in good faith, purchased at different times a tract of land from the same person, who holds only the equitable title thereto, the first purchaser has the best right, and must prevail, the equities being equal otherwise. *Craig v. Leiper*, 24 D. 479.

The assignee of a bond for the title takes it subject to defenses available against the original vendee, notwithstanding he purchased for a valuable consideration, and without notice of such defenses. *York v. McNutt*, 67 D. 607.

40. Rules of pleading and evidence respecting good faith and want of notice.—Where one pleads that he was a *bona fide* purchaser without notice, he must, to support that plea, allege and prove not only that he had no notice of the plaintiff's rights before and at the time of the purchase, but also that he actually paid the purchase-money before such notice. And the fact that the purchase-money was secured, but not paid before notice, will not sustain the plea. *Jewett v. Palmer*, 11 D. 401. S. P., *Jackson v. McChesney*, 17 D. 521; *Doswell v. Buchanan*, 23 D. 280; *Grimstone v. Carter*, 24 D. 230; *Bush v. Bush*, 51 D. 675; *Keerts v. Agnes*, 65 D. 314; *Warner v. Whittaker*, 72 D. 66.

The rule in ejectment is different, because there the strict legal title must prevail. *Jackson v. McChesney*, 17 D. 521.

The defense of *bona fide* purchase for a valuable consideration, and without notice, can be set up by way of answer, against a plaintiff asserting a prior equitable claim, as well as by a plea in bar founded on such notice. *Baynard v. Norris*, 46 D. 647.

An answer setting up the defense of *bona fide* purchase must allege that, at the time of conveyance, the grantor or mortgagor was seized, or pretended to be seized, and was in possession of the premises conveyed. *Id.*

The plea of *bona fide* purchaser for value, without notice, must set forth the various requisites of the defense with convenient certainty, and must explicitly deny notice of the plaintiff's claim before execution of the conveyance and payment. *Cummings v. Coleman*, 62 D. 402. For a decree will be made against a purchaser for a valuable consideration who does not deny notice. *Blake v. Jones*, 21 D. 530.

To entitle a party to the protection which a court of equity extends to a subsequent *bona fide* purchaser, he must make a full statement of all the facts and circumstances of his case, so that the court may be able to do perfect equity between the parties. *Keerts v. Agnes*, 65 D. 314.

*Purchaser of equitable title, whether and when entitled to protection as purchaser in good faith, see note, 97 D. 438-439.

For Index to Notes in American Decisions and American Reports, see Volume I.

2. Actual and Constructive Notice.

41. What amounts to notice of equities, generally. — A parol sale of land, where the consideration is paid and possession delivered, is good as between the parties; but to make it valid as to a *bona fide* purchaser, there must be clear evidence of notice to him, either actual or legal. Legal notice exists only where there is a violent presumption of actual notice. *Billington v. Welsh*, 6 D. 406.

Notice given by the tenant in possession under the claimant of an equitable title is as available against the purchaser as if given by the claimant himself. *Gallion v. McCaslin*, 12 D. 208.

Actual notice of title can be given by him only in whom the title is vested. *Woods v. Farmere*, 32 D. 772.

Notice of the existence of a deed is not inferred from proof of general report in the neighborhood that the land had been sold, and the communication of such report to defendant; nor from an intimation by one not interested in the land that another title is outstanding; nor, generally, from information given by a person not interested in the property. *Wilson v. McCullough*, 62 D. 347.

The burden of proving actual notice of a deed or instrument affecting title to land, so as to affect a mortgage, is upon the person asserting that such notice existed. *Id.*

A purchase with notice of a secret trust must be made out by clear proof of actual notice, or of facts which put the party upon such inquiry as, if pursued with ordinary diligence, would have led him to the knowledge of such trust. *Id.*

A mere rumor, or suspicion of defect in title to real estate, or an outstanding interest in a third person, will not operate as constructive notice to a purchaser thereof. *Parker v. Kane*, 65 D. 283.

A subsequent purchaser of lands is chargeable with notice of a decree in chancery by which the rights of a party to the lands are declared, and will hold them subject to such rights. Where, therefore, a tract of land held by a husband under a contract of purchase is set apart as alimony to his wife by a decree of divorce, a subsequent assignment of the contract by the husband and a conveyance from the original vendor to the assignee will not impair the rights of the wife; the grantee will hold nothing but the mere legal title, which he will in equity be bound to convey to her. *Blue v. Blue*, 87 D. 267.

Notice to a purchaser of an equitable interest need not come from the party interested, or his agent; for it is sufficient if it comes *alibunde*, provided it is of a character likely to gain credit. *Butcher v. Yocum*, 100 D. 625.

Where a widow attempts to convey an equitable interest of an heir, his grandfather

is a proper person to give notice of such equitable interest to the purchaser. *Id.*

Defendant drew a deed, and as notary public took the acknowledgment of its execution, and also drew notes, executed by the grantee, for the unpaid purchase-money. Four years afterward he bought the premises. *Held*, that he was not chargeable by these facts with notice of the vendor's claim and lien for unpaid purchase-money. *White v. Fisher*, 40 R. 287.

42. Putting on inquiry. — Whatever will put a purchaser upon inquiry, and lead to knowledge, is notice. He is bound to make inquiry where there is anything that would lead a prudent man to make it, and he is therefore presumed to have known all that inquiry would have revealed to him. *Gibson v. Winslow*, 84 D. 552. *S. P.*, *Wilson v. McCullough*, 62 D. 347; *Parker v. Kane*, 65 D. 283.

Information given to a purchaser which ought to put him on inquiry is sufficient notice in equity. *Price v. McDonald*, 54 D. 657.

Actual possession of a party is sufficient intimation of his rights to put a purchaser upon inquiry as to the nature of such possession, and where he neglects to make it, equity charges him with the consequences of a knowledge of the title. *Hardy v. Summers*, 32 D. 167; *Baynard v. Norris*, 46 D. 647; *Dutton v. Warschauer*, 82 D. 765.

The failure of a vendee to inform himself on the subject as to which the notice of sale was silent cannot be imputed as a wrong to the vendor, who neither said nor did anything to mislead him. *Hendricks v. Stark*, 93 D. 549.

A party will be charged with notice of the contents and effect of an instrument which actually affects the land conveyed to him, and which without doubt includes that land, if, after becoming aware of its existence, he fails to make suitable inquiry, notwithstanding that the party whose interest would prompt him to misrepresent should inform him that the encumbrance was paid off or discharged, without, however, furnishing any proof of that fact. *Price v. McDonald*, 64 D. 657.

43. Liens or equities apparent on face of deed. — Purchasers cannot claim to be innocent purchasers, so as to discharge the lien of a previous owner, who, by reference to their vendor's title deed, and by inquiry, could have learned that he purchased upon a credit, and that payment had not yet been made. *Honore v. Bakewell*, 43 D. 147.

A vendee of land is charged with notice of the facts recited in the deeds through which he claims, and is estopped to deny the same. *Talbot v. Bell*, 43 D. 125. Hence, if he acquires title under a deed which shows that the premises have been leased,

For Index to Notes in American Decisions and American Reports, see Volume I.

and the rents assigned to a specified person for a certain period, he holds such premises under an obligation to pay such rents to such person. *Childs v. Clark*, 49 D. 164.

So a subsequent purchaser is affected with constructive notice of the amount of purchase-money remaining unpaid, where his deed provides he shall pay the amount then due by grantor. *Manly v. Blason*, 52 D. 60. And where a patent was issued to N., assignee of the administrator of H. R., deceased, — held, that such recital was sufficient to charge a subsequent purchaser with notice of the rights of the heirs of H. R. *Reeder v. Barr*, 22 D. 782.

44. — or shown by record. — Where land is claimed by entry from the state, every person dealing therewith is presumed to know the fact, whether it has or has not been granted by the state, because this is a matter of record, which ordinary diligence can ascertain, and which all interested are bound to know, if material, before they contract. *Craig v. Leiper*, 24 D. 479.

A purchaser for valuable consideration from a patentee in possession takes free of all equitable claim as against the patentee's title of which he had no actual notice, although documentary evidence of a mistake in the issue of a patent existed in the files and records of the general land-office, and the record in the proper register's office of the entry certificate was in the name of a party other than the patentee. *Schnee v. Schnee*, 99 D. 183.

No one will be presumed to have had knowledge of the registration of an instrument which could not prejudice him, as his claims are paramount thereto. *Woods v. Farmers*, 32 D. 772.

A purchaser of the legal title is not bound to take notice of a lien upon land recorded against former owner of the equitable title through whom the purchaser does not derive title, and whose name does not appear in connection with it. *Harper v. Bibb*, 69 D. 397.

A bona fide purchaser from a grantee in a state patent is not bound to take notice of a judgment lien on the land recorded against one who formerly held a certificate for the patent, and who, after the lien attached, conveyed to the purchaser's grantor, who obtained the state patent direct to himself. *Id.*

45. Notice from fact of land being adversely held. — Possession of lands puts a purchaser or creditor on inquiry as to the title of such person. *Morgan v. Morgan*, 21 D. 638. *S. P., Grimstone v. Carter*, 24 D. 230; *Bryan v. Ramirez*, 68 D. 340; *Knos v. Thompson*, 13 D. 246. And in the absence of any precaution of this kind, he takes the land subject to the equities of the person so in possession. *McKee v. Wilcox*, 83 D. 743.

One who purchases an estate knowing it to be in the possession of tenants is bound to

inquire what estates they hold. *James v. Morey*, 14 D. 475; *Chesterman v. Gardner*, 9 D. 265; *Hood v. Fahnstock*, 44 D. 147.

Notice of a title imparted by possession is restricted by the registration by the tenant of an evidence of title that would justify his possession. *Woods v. Farmers*, 32 D. 772.

The grantee of land in another's possession is presumed to know all the circumstances relating to the title of the person in possession. *Haddock v. Wilmarth*, 20 D. 570; *Knos v. Thompson*, 13 D. 246.

The actual possession by a beneficiary of lands is notice of the trust to a purchaser. *Pritchard v. Brown*, 17 D. 431.

Actual possession of land by or under one holding a contract for conveyance thereof to him, where such possession is consistent with the contract, is sufficient to affect with notice a second purchaser from the original vendor. *Kerr v. Day*, 53 D. 526.

The possession of real estate, open and notorious, by one holding an unrecorded deed, is evidence of notice to a subsequent purchaser, of the first grantee's title; but the possession must exist at the time of the acquisition of title or deed of the subsequent grantee from the common grantor. *Hunter v. Watson*, 73 D. 543.

Undisturbed possession by the equitable owner has generally been considered legal notice; but it must be a clear, unequivocal possession. Accordingly, where A bought by parol from B a corner of B's tract, paid for it, was put into possession, and had buildings erected, but at the same time had no survey of the part, or other admeasurement to reduce it to a certainty, and on B's own part there was a forge, dwelling-house, grist and saw mill, and other buildings, which, together with A's buildings, might be taken as one establishment, the possession of A was held not to be legal notice of his title to a purchaser at sheriff's sale, under a judgment against B. *Billington v. Welch*, 6 D. 406.

Notice to subsequent purchasers of the grantor's land of the grant of a right to erect a dam will not be conclusively presumed from the erection and occupation of the dam by the grantee for six months in the year, and by a stranger for the other six months. *Boynston v. Rees*, 19 D. 326.

A purchaser under a judgment will not be presumed to have examined the register's office for the debtor's will, and cannot contend that as the terms of the will justified the tenant's possession, that possession was evidence of no further title. *Woods v. Farmers*, 32 D. 772.

Registration by an executor of a will in which he is a devisee will not operate to restrict the notice of title conveyed by his possession of the land devised, and to which he has claims paramount to those of the devisee. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

Where an origin of possession is shown during an ancestor's lifetime, no presumption of seisin by descent can be made, in order to explain the possession. *Id.*

Constructive notice of an unrecorded lease for life is not given by the fact that the lessee and lessor are both in possession of the premises, so as to take priority over a subsequent mortgage by the lessor to a mortgagee in good faith, where there was the same possession by the lessor and lessee before the lease. *Bell v. Twilight*, 45 D. 367.

46. Effect of notice. — A purchaser, with notice at any time before he is clothed with the legal title of an outstanding equity, is bound by such prior equity. *Halley v. Oldham*, 41 D. 262; *Wilkinson v. Branch Bank*, 42 D. 617; *Gallion v. McCaslin*, 12 D. 208; and this notice may be actual personal notice, or it may arise from open and notorious possession of the land by the vendee. *Filley v. Duncan*, 93 D. 337.

When a defendant purchases land with notice of the plaintiff's equitable title, and that his vendor's only interest arises from his having paid part of the consideration of the contract, through which the plaintiff derives title, he will be compelled to convey to the plaintiff on repayment of that sum. *Pugh v. Bell*, 15 D. 142.

A purchase from infant plaintiffs avails nothing. *Id.*

Actual notice of an unregistered conveyance renders it impossible for a subsequent purchaser to protect himself against it. *Tuttle v. Jackson*, 21 D. 306.

Notice prior to the payment of the purchase-money will bind a party as effectually as if received before purchase. *Price v. McDonald*, 54 D. 657.

A vendee of land who purchases with a knowledge of an existing right of way over it is bound to perform his engagement to pay the purchase-money, when the state of facts continues to be the same as it was at the date of the purchase. *Wilson v. Cochran*, 86 D. 574.

A purchaser of land for a valuable consideration, with notice of a prior deed for same land made by the grantor during infancy, but without notice of a subsequent ratification of that deed, will hold the land against the prior grantee. *Black v. Hills*, 87 D. 224.

One has as perfect a legal right to purchase land which his grantor has conveyed during minority as to purchase land that has never been conveyed at all; and he is not to be denied the position of an innocent purchaser because he has notice of the deed made during minority. *Id.*

A grantee who takes land in payment of a precedent debt, and with full knowledge of the circumstances under which his grantor acquired title, takes it subject to all the equities which existed against it in the

hands of the grantor. *Tapley v. Tapley*, 88 D. 76.

A subvendee taking the legal title to land, charged with a vendor's lien, and with notice, accepts the title *cum onere*, and is in no better position than the original purchaser, and whatever is enough to excite attention, or put such subvendee on inquiry, is notice. *Parker v. Foy*, 5 R. 484. S. P., *Converse v. Blumrich*, 90 D. 230.

III. THE VENDOR'S LIEN.

47. Origin and nature of the lien.*

— The vendor's lien was adopted by the courts of equity from the civil law. *Wellborn v. Williams*, 52 D. 427. *Lupin v. Marie*, 21 D. 256.

The vendor and vendee have mutual liens, the former for the purchase-money still due, and the latter for that which has been paid, in case it is to be restored. *Farmer v. Samuel*, 14 D. 106.

The estate is security for purchase-money to be paid until an actual conveyance. *Winborn v. Gorrell*, 40 D. 456.

On a conveyance of land by deed, a lien arises in equity for the unpaid purchase-money. *Gee v. McMillan*, 58 R. 315; if the title is still in the vendee. *Dunlap v. Burnett*, 45 D. 269.

By the civil law, a vendor has a lien upon the land sold, for any part of the purchase-money remaining unpaid, and this without any agreement. *Briscoe v. Bronaugh*, 46 D. 108.

A vendor's lien is founded upon an implied trust between the vendor and purchaser. The trust attaches to the land, and follows it into the hands of a subsequent purchaser with notice. *Id.*

A vendor's lien attaches where a purchaser gives bonds and personal security for purchase-money, but does not take a conveyance, nor pay the money. *Glover v. Rawlings*, 47 D. 108.

A vendor of real estate has a lien for unpaid purchase-money against the vendee, his heirs, privies in estate, volunteers, and all subsequent purchasers with notice that the purchase-money remains unpaid. *Prima facie*, such lien exists without special agreement for that purpose; and it devolves upon the purchaser to show that the lien was not intended to be resumed. *Ellis v. Temple*, 94 D. 200.

A vendor's lien does not exist, in a proper sense, until established by a decree of a court of equity. *Wellborn v. Williams*, 52 D. 427.

The doctrine of an equitable lien for purchase-money of land should not be extended beyond its proper limits, and ought not to be applied where it is evident that the parties never intended to apply it. *Moore v. Holcombe*, 24 D. 683.

* See note on the existence, waiver, and assignability of vendor's lien, 28 D. 139-201.

For Index to Notes in American Decisions and American Reports, see Volume I.

Where an agreement to indemnify is part of the consideration for a sale of land, no lien attaches before a breach of the covenant to indemnify. *Michigan State Bank v. Hastings*, 41 D. 549.

A vendor's lien for the unpaid purchase-money of land which he has given a bond to convey overreaches the lien of any subsequent judgment creditor of or purchaser from the vendee. *Gillespie v. Bradford*, 27 D. 494.

The existence of the vendor's lien on land for the unpaid purchase-money, even as between vendor and vendee, is, in North Carolina, not yet settled. *Johnson v. Cawthorn*, 27 D. 250.

Such a lien certainly does not exist as against creditors of the vendee, enforcing their debts, nor as against purchasers at execution sale, who bought with notice that the purchase price of the land was not yet paid. *Ib.*

The holder of a title bond can resist recovery by a vendor only by bill to redeem the premises, the vendor's lien for the unpaid purchase-money being in the nature of a mortgage. *Chapman v. Glassell*, 48 D. 41.

A vendor's lien differs from an equitable mortgage, the latter being founded upon an implied contract, the former not. *Wellborn v. Williams*, 52 D. 427.

A lien for unpaid purchase-money on lands, legal title being reserved in vendor, has same legal effect as a deed and mortgage back to secure such delinquency; and is unlike the equitable lien of vendor who has conveyed legal title and acknowledged receipt of purchase-money, having none of its odious characteristics. *Moore v. Anders*, 60 D. 551.

A vendor's lien is upon whole and every part of land. If a part be lost by paramount title, so as to entitle the vendee to an abatement, the residue of the land is liable for the balance. *Mims v. Lockett*, 68 D. 521.

A vendor's lien is upon land, especially when sold with notice, and not upon the proceeds. *Ib.*

A vendor's lien, after absolute conveyance, is not a specific, absolute charge upon property, but only an equitable right of the vendor to resort to it in case the purchase-money is not paid. *Baum v. Grigsby*, 81 D. 153.

A distinction between the lien of vendor after absolute conveyance, and the lien of vendor when contract of sale is unexecuted, stated. *Ib.*

To create a vendor's lien, there must be a debt for unpaid purchase-money in a fixed amount, due directly to the vendor. If the vendee's obligation consists of a collateral covenant, or is for the discharge of the liability of a third person, and the conveyance is absolute, no lien is retained. *Harvey v. Kelly*, 93 D. 267.

An express reservation of a vendor's lien

in a deed amounts to an equitable mortgage; and the rights of the vendor and vendee depend on their contract, and not on a mere implication of law. *Ib.*

Where an agreement is made for the sale of real estate, the purchaser to have immediate possession, but the title to remain in the vendor till the money is paid, an express lien on the land is thereby created in favor of the vendor. *Layton v. Badollet*, 12 D. 258.

There is no distinction between a legal title conveyed to secure the payment of the purchase-money and a legal title retained to secure it. In both cases, equity considers the estate only security for the debt, upon the discharge of which the debtor is entitled to a conveyance in the one instance and a reconveyance in the other. *Ellis v. Temple*, 94 D. 200.

A vendor's lien upon land for its purchase-money is not impaired because the obligation taken for its payment includes the price of personal property sold at the same time, when the amount to be paid for the land can be ascertained by proof. *Russell v. McCormick*, 6 R. 707.

The equitable lien of the vendor of land for unpaid purchase-money is subordinate to a special lien acquired by a creditor of the vendee, whether with or without notice, before proceedings are instituted to enforce such equitable lien. *Fain v. Inman*, 19 R. 577.

48. Who may claim a lien. — Where the vendee assigns the contract, and the assignee takes possession of the land, the vendor, though he has no right of action against the assignee for the purchase-money, may, however, by virtue of his lien on the land, call upon him to pay the money, or to surrender the land, or to have it sold in satisfaction of the lien. *Champion v. Brown*, 10 D. 343.

A vendor retains no lien for the purchase-money on the claim of his vendee, where, after the sale to him, the vendor asserts title in himself, and conveys the same land to another. *Blight v. Banks*, 17 D. 136.

A vendor has a lien on real estate, for the purchase-money, even after delivery of possession, unless he has taken independent security or the land has passed to a bona fide purchaser. *Lubin v. Marie*, 21 D. 256.

The assignee of a note given in part consideration for the purchase price of land, to secure the payment of which the vendor reserved the legal title in himself, is entitled to have his debt satisfied out of the land. *Graham v. McCampbell*, 33 D. 126.

No distinction can be drawn between the cases of a legal title conveyed and a legal title reserved, to secure the payment of a debt. *Ib.*

Where a deed is not to be executed till payment is made in a contract for the sale of

For Index to Notes in American Decisions and American Reports, see Volume I.

real and personal estate, the vendor has a lien on all the property for the purchase price. *Clarks v. Curtis*, 37 D. 625.

A vendor may follow personally into hands of third persons to whom the vendee has sold it *pendente lite*, in such a case. *Id.*

A vendor of real estate retains a lien on the same, for the unpaid purchase-money, unless he has expressly or impliedly waived it, which may be enforced against the vendee and all persons claiming under him with notice, although a deed has been executed to the vendee conveying the legal title. *Hall v. Chick*, 39 D. 327.

No lien arises for the purchase-money when loaned by a third person to the purchaser of land; nor is such person privy to the sale between the vendor and purchaser. *Stansell v. Roberts*, 42 D. 193.

An order drawn by a vendor on a vendee indebted for purchase-money may, in equity, be treated as a transfer of so much purchase-money, and the drawer may enforce a vendor's lien therefor. *Kniesly v. Williams*, 46 D. 193.

Where a parol sale of lands passes a legal and valid title, the want of a writing does not affect the right of the vendor to retain a lien upon the land to secure the payment of the purchase-money. *Briscoe v. Browne*, 46 D. 109.

A party who has parted with his lien for the purchase price of real estate and afterwards comes into the possession of the legal title to the same land as a trustee, under a trust deed which provides for a certain disposition of the land, cannot revive his lien and hold said land subject to it. *Follett v. Reese*, 55 D. 472.

A vendor has a lien on land sold for the payment of the purchase-money, even where the title has been fully conveyed, if he has taken no security for the payment; and the rights of a vendor who has not conveyed the title cannot be of less efficacy. *Salmon v. Hoffman*, 56 D. 322.

A vendor's position is analogous to that of mortgagee, where he has not conveyed the title to the land sold. *Id.*

A vendor, in a contract for the sale of land, by expressly reserving the legal title and giving bond or covenant for title on the payment of purchase-money, retains a lien for unpaid purchase-money, of which subsequent purchasers or encumbrancers claiming under vendee must take notice. *Moore v. Anders*, 60 D. 551.

One who contracts to purchase property, giving to his vendor a mortgage upon other property to secure the payment of the purchase-money, but who by a subsequent agreement secures the substitution of another in his place as purchaser, by the terms of which the mortgage remains security for the payment of the purchase-money by the substitute, is neither a vendor of nor a

co-purchaser with the substitute, and obtains, by reason of the mortgage, neither a joint interest with the substitute in the property purchased nor a lien upon it, especially when by the agreement of substitution the title was to vest absolutely in the substitute. *Schroeder v. Paterson*, 70 D. 163.

A lease for a term of years is personal property, and the vendor of such property has no general lien upon it for unpaid purchase-money after he has parted with the possession. *Cade v. Brownlee*, 77 D. 95.

An equitable lien for the purchase-money of land is not created by a mere recital on the face of the deed that the purchase-money remains unpaid and is to be paid annually. And where no intention to charge the purchase-money as a lien on the land is expressed in the deed, the law will not imply such an intention, and no lien is created as against a purchaser thereof at sheriff's sale as the property of the grantee. *Hiebler v. Green*, 86 D. 569.

A grantor is defined to be one who gives, bestows, or concedes a thing, and in legal parlance is understood to be one who executes a deed or conveyance, and may be distinguished from a vendor, who is a seller, or a person who disposes of a thing for money. *Russell v. Watt*, 93 D. 270.

A vendor's lien may be enforced in favor of one who is not grantor of the land, and though the deed to the vendee is executed by a third person. Thus the owner of land made a parol gift of it to his daughter. She sold the land to another, taking his notes for the price. The grantor executed the conveyance to the vendee, and the price not having been paid, the vendee (the daughter) was permitted to enforce her lien therefor. *Id.*

Plaintiff's land was sold by the sheriff, at auction, under an execution, and bought by defendant, who bid more than enough to satisfy the execution. *Held*, that plaintiff had a lien on the land for the excess of the purchase-money. *Yarborough v. Wood*, 19 R. 44.

In Massachusetts the vendor of real estate, by an absolute deed, has no lien thereon for the unpaid purchase-money, in the absence of a written agreement of the parties to that effect. *Ahrend v. Odiorne*, 19 R. 449.

49. Against whom a lien may be claimed. — 1. *In general.* — A vendor has a lien upon real estate for the purchase-money remaining unpaid, and it subsists against the vendee, his heirs, and all others who take under him with notice. *Clover v. Rawlings*, 47 D. 108; *Manly v. Stason*, 52 D. 60; *Walton v. Hargroves*, 97 D. 429. This lien, however, does not exist against a *bona fide* purchaser without notice, nor prevail against a creditor who may have acquired a judgment or execution lien upon the property before a bill has been filed by the ven-

For Index to Notes in American Decisions and American Reports, see Volume 2.

dor to enforce his lien. *Lincoln v. Purcell*, 73 D. 196.

A specific lien, or a lien created by contract, will be operative against the creditors, bona fide purchasers, and all other persons, without regard to actual notice, where the conveyance reserving the lien has been properly recorded. *Id.*

Coverture is not a bar to a suit to enforce a vendor's lien on real estate. *Perry v. Roberts*, 95 D. 689; *Pylant v. Reeves*, 25 R. 605; *Kent v. Gerhard*, 34 R. 612.

A vendor's lien will prevail against a vendee, and against volunteers and purchasers under him, with notice, or having an equitable title only; against assignees claiming by a general assignment made under bankrupt or insolvent laws, or by a failing debtor for the benefit of creditors; against the claim of dower by the wife of the purchaser; and against a judgment creditor of the vendee. *Walton v. Hargroves*, 97 D. 429.

2. *Subsequent creditors of vendee.* — A vendor's lien may be asserted against judgment creditors of the purchaser, but not against bona fide purchasers from the latter without notice. *Aldridge v. Dunn*, 41 D. 224.

Where an absolute conveyance is made of land, a receipt given for the purchase-money and possession delivered to the vendee, part of the purchase-money being paid and the bond of the purchaser, with a surety taken for the residue, the vendor has not a lien for the residue against judgment creditors of the vendee whose judgments are subsequent to the conveyance, although they may have had notice that a portion of the purchase-money still remained unpaid. *Kaufelt v. Bower*, 10 D. 428.

A vendor's lien cannot be allowed to prevail against the creditors of the vendee who have subsequently acquired a lien upon the estate, with or without notice, either by judgment or in any other mode, before a bill has been filed by the vendor to assert his lien. The lien, though it relates to the date of the conveyance, does not acquire the character or effect of a specific lien until the filing of a bill to enforce it. As between the vendor and subsequent lien creditors of the vendee, it becomes a question of priority of liens, irrespective of notice and all other considerations. *Ellis v. Temple*, 94 D. 200.

3. *Subsequent purchasers from vendee.* — A vendor's lien cannot be enforced against a bona fide purchaser without notice. *Kilpatrick v. Kilpatrick*, 55 D. 79; *Blight v. Banks*, 17 D. 136.

A lien of vendor is implied from the supposed intentions of the parties, and so long as it is confined to the parties and to those claiming under them, with notice, it is not liable to objection; but if a vendor conveys the land to the vendee in such a manner as to make him appear to be the complete owner with full power to sell, he will not be

permitted to use his secret lien to the injury of those who, in ignorance of it, for a valuable consideration, have acquired either the legal title or an equitable encumbrance. *Moore v. Holcombe*, 24 D. 633.

The assignees are necessary parties to a bill brought by such original vendor to subject such lands to sale under the equitable lien claimed by him. *Id.*

A subsequent purchaser of land subject to a vendor's lien is bound by an implied as well as actual notice thereof; and he is chargeable with notice of such lien, if the conveyance to him refers to the deed to his vendor, which, though unrecorded, recites a part of the consideration as "secured to be paid" at a future time, these words not necessarily or properly importing personal security. *Johnston v. Groatney*, 14 D. 135.

A vendor discharging the vendee from liability for part of land conveyed, and taking the promise and note of a subvendee in lieu thereof, has in equity a lien on the part so purchased by such subvendee. *Honore v. Bakewell*, 43 D. 147.

Where a vendor retains the legal title, the land is liable in the hands of subpurchasers for the balance of the purchase-money unpaid. *Armstrong v. Mudd*, 50 D. 545.

A vendor's lien cannot be enforced against purchaser at execution sale of the land against the vendee, if he purchases for a valuable consideration and without notice, *semble*. *Kilpatrick v. Kilpatrick*, 55 D. 79.

On execution sale of land which the judgment debtor holds by title bond, from the execution creditor, nothing passes but the equity of redemption, and the purchaser takes the land subject to the vendor's lien. *Rice v. Willbourn*, 25 R. 549.

A presumption of law is, that the purchaser of land upon which a specific lien is reserved holds under and consistent with the lien until the contrary is shown by him. *Lincoln v. Purcell*, 73 D. 196.

Where the vendor intrusts to the vendee, to be delivered for record, a mortgage given by the vendee to secure the payment of the purchase-money, and the latter, before recording the mortgage, sells the land to bona fide purchasers by written contracts merely executory, giving to such purchasers no present legal interest or right of possession, and the mortgage is afterwards recorded before the mortgagee has any notice of the rights of such purchasers, he has an equity superior to theirs, and may subject the land to the payment of his debt. *Antel v. Converse*, 91 D. 115.

To protect a purchaser from a vendor against the lien of a prior vendor, he must have purchased and paid the price in full, without notice of the lien; and he must make this defense either by plea or specific answer. *Ellis v. Temple*, 94 D. 200.

Purchasers and mortgagees of an equitable

For Index to Notes in American Decisions and American Reports, see Volume I.

estate take the same subject to the vendor's equity; and purchasers and mortgagees of the legal estate, with notice of the lien before paying the purchase-money, will be postponed to the vendor's equity. *Walton v. Hargroves*, 97 D. 429.

T., the owner of land, being indebted to G., to secure the debt, gave the latter the sale of the land. He sold to B., to whom T. executed a deed of conveyance, B. giving his note to G. for the purchase-money, and it was agreed that the vendor's lien for the purchase-money should exist. *Held*, that the vendor's lien existed in favor of G. against a vendee from B. of the land, with notice. *Perkins v. Gibson*, 24 R. 644.

50. Transfer of the lien. — The equitable lien which the vendor of land retains, after an absolute conveyance, for the unpaid purchase-money, is not assignable. *Baum v. Grigsby*, 81 D. 153; *Richards v. Leaming*, 81 D. 239; *Hecht v. Spears*, 11 R. 784.

The lien created in favor of the vendor when the title is not to pass until the price is paid is not merely personal to him, but may be assigned, and the assignment will be supported in equity to promote the ends of justice. *Lagow v. Badollet*, 12 D. 258.

The vendor in such a case being a mere trustee of the legal title for the purpose of conveying to the purchaser, on payment of the purchase-money, a purchaser at an execution sale of the vendor's interest in the land, having knowledge of the agreement, takes subject to the trust, and will be compelled to execute it. *Id.*

By the transfer of a note given for the purchase price of real estate, the lien which the vendor has upon the land passes with it, as the note is the principal thing, and the lien is but an incident to secure its payment. *Conner v. Banks*, 52 D. 209; *Johnston v. Gwathmey*, 14 D. 135; *Kern v. Haslerigg*, 71 D. 360; *Griffin v. Camack*, 76 D. 344; *Robinson v. Harbours*, 97 D. 501; *Stevens v. Chadwick*, 15 R. 348; *Sloan v. Campbell*, 36 R. 493. Contra, see *Wellborn v. Williams*, 52 D. 427. And it makes no difference that the payor is under the disability of coverture at the time of the execution of the note. *Perry v. Roberts*, 95 D. 689.

The assignee of notes given for the purchase-money of land has no lien. *Jackman v. Hallock*, 13 D. 627; *Briggs v. Hill*, 38 D. 441; *Wellborn v. Williams*, 52 D. 427; *Richards v. Leaming*, 81 D. 239; *Simpson v. Montgomery*, 99 D. 228.

The assignee of a note given for the purchase price of land, who takes it without recourse against the assignor, cannot enforce the lien of the vendor. *Hall v. Click*, 39 D. 327; *Schnebly v. Ragan*, 28 D. 195.

The assignee does not waive his lien by the mere fact that he may also have a lien upon land sold to the assignor. *Johnston v. Gwathmey*, 14 D. 125.

The fact that notes thus assigned are identical in times of payment, with installments of purchase-money recited in the deed to be still due, is sufficient, *prima facie*, to show that they were part of the consideration of such deed. *Id.*

The assignment of a note for the purchase-money for land, secured by a lien expressly reserved by contract for the vendor's benefit, under bond for title on payment of purchase-money, carries with it vendor's lien by way of mortgage security, as an incident to the debt, and may be so enforced by the assignee. *Moore v. Anders*, 60 D. 551.

The vendor's lien may be enforced by a transferee of a note payable to bearer, given for the purchase price of land, where the lien is reserved in the note. *Murray v. Able*, 70 D. 330.

The vendor's lien does not exist in favor of an assignee of a note for purchase-money assigned after conveyance of the land to the wife of the vendee. *Massey v. Gorton*, 90 D. 287.

51. Extinguishment of the lien. — Where an equitable lien for the purchase-money exists on lands which the grantee conveys to another, who is ignorant of the existence of the lien, and who gives to his grantor bonds for the purchase-money, which the latter assigns to third persons who take them without notice, and for a valuable consideration, such lien is lost, and the unpaid purchase-money in the hands of the obligor belongs to the assignees, and not to the original vendor. *Moore v. Holcombe*, 24 D. 683.

As against a remote vendee, a vendor's lien upon land does not subsist after the statute of limitations has run against a note given for the purchase-money, and the first vendee cannot extend the lien by payments upon the note. *Tate v. Hawkins*, 50 R. 181.

A vendor's lien is not discharged by the death of the vendor and the consequent transfer of the debt to his heir or devisee. *Tiernan v. Beam*, 15 D. 557; nor by a judgment of a county court allowing and ordering the payment of a claim against an estate. *Hays v. Horine*, 79 D. 518; nor because the statute of limitations has barred an action on notes given therefor. *Bisell v. Nix*, 31 R. 38.

The vendor's right to file a bill to subject the land to sale for the payment of purchase-money in arrear, where he has not parted with the title, cannot be affected by the lapse of any time short of that requisite to raise the presumption of payment. *Hanna v. Wilson*, 46 D. 190.

Part payment does not extinguish the vendor's lien. It still remains a security for the balance unpaid. *Hays v. Horine*, 79 D. 518.

Where the lien once existed, it still con-

For index to Notes in American Decisions and American Reports, see Volume I.

linnea, unless intentionally displaced or waived by consent of the parties. *Id.*

On a purchase of land, the vendee gave his bank check for the amount of a cash payment. The check was not presented until four weeks afterward, and there were no funds to pay it, the vendee having withdrawn them two weeks previously. *Held*, that the vendor's lien was not lost. *Madden v. Barnes*, 30 R. 703.

52. Foreclosure of the lien. — 1. *Right of action — Jurisdiction — Parties.* — A vendor may have recourse in equity to his lien after he has unsuccessfully attempted to collect the debt at law. *Aldridge v. Dunn*, 41 D. 224.

Equity has jurisdiction to enforce a vendor's lien, and it is not necessary that a judgment should be obtained before application by the vendor to the chancellor for the enforcement of his lien. *Armstrong v. Mudd*, 50 D. 545.

The lien may be enforced in an action on a note for the purchase price of land, where the code abolishes distinctions between actions at law and suits in equity. *Kern v. Haslerigg*, 71 D. 360.

The vendor's lien for purchase-money, both as to the legal and equitable claim, may be enforced in one proceeding, under the Indiana statute. But if the vendor see fit to first resort to his legal claim, he does not thereby waive his right ultimately, if necessary, to resort to his equitable claim. *Dibbles v. Mitchell*, 77 D. 99.

The vendor may file a bill to enforce his lien upon failure of vendee to pay, although the price was to be paid in specific articles, and not in money. *Harvey v. Kelly*, 93 D. 267.

A vendor's lien cannot be enforced in a bill brought by himself to the use of the assignees of a note taken for the purchase-money, and assigned to them as collateral security for another debt. They should be made parties to the bill. *Pleasant v. Riddle*, 48 D. 92.

Where a transfer of land is made pending a suit to enforce a vendor's lien thereon, it is not necessary to make the vendee a party, for he is affected with notice of the *lis pendens*, and his interest is subject to the judgment rendered therein. *Kern v. Haslerigg*, 71 D. 360.

2. *Pleading — Evidence — Defenses.* — The vendor's lien is limited to the amount expressed in the deed as against a *bona fide* purchaser for value and without notice from the vendee; and the grantor as against him cannot be permitted to aver or prove a different consideration. *Kilpatrick v. Kilpatrick*, 55 D. 79.

A vendee under an executory contract of sale does not hold adversely to the vendor, and he cannot invoke the analogy of the statute of limitations, in the absence of a

holding positively hostile to the vendor, to defeat a bill to enforce the vendor's lien. The same rule applies between vendor and vendee as between mortgagee and mortgagor. *Relife v. Relife*, 73 D. 467.

In all cases where the vendee gives the vendor his notes to secure the payment of the purchase-money, payable at different times, and takes from the vendor a bond for title when the money or last installment is paid, performance is a condition precedent to the right of recovery; and the assignee of the vendor cannot proceed in equity to enforce the vendor's lien against the land without averring and proving a performance of the covenant on the part of the vendor, or tender or offer to perform, before the filing of the bill. The averment in the bill that the assignor of the note is ready and willing to execute a deed on payment of the purchase-money is not sufficient to sustain it. *Robinson v. Harbour*, 97 D. 501.

3. *Judgment, and how enforced.* — Where all the lands subject to the lien are in the same situation, the different parts sold must contribute ratably to the discharge of the lien. *Blight v. Banks*, 17 D. 136.

Where a portion of the land remains unsold in the hands of the original purchaser, that part must first be subjected to the discharge of the lien, and if it be sufficient for that purpose, the portion sold, even in the hands of a purchaser with notice, will be held free from the lien. *Id.*

A judgment directing a sale of real estate on a vendor's lien, there being no averment of insolvency or a want of other property, is erroneous. *Elyer v. Crabbs*, 56 D. 711.

A decree by a court of equity for a deed from one defendant to another, in a suit to enforce a vendor's lien, is not matter of which the plaintiff can complain, where the court also decided that he had no lien or right in the premises, and decreed costs against him. *Mann v. Lewis*, 100 D. 747.

Money in court arising from a sale of lands under execution is subject to a grantor's lien before the sale is confirmed. *Boos v. Ewing*, 49 D. 478.

Such lien will be protected although the purchase-money is not yet due, and although it may in the end result to the benefit of one of two tenants in common to whom the land was conveyed. *Id.*

4. *Personal judgment.* — The existence of a valid defense at law is no ground for a decree *in personam* for the unsatisfied balance due after exhausting the proceeds of the land upon a bill to enforce a vendor's lien. *Cobb v. Duke*, 72 D. 157.

Equity cannot render a decree *in personam* for the unsatisfied balance, in addition to a decree of sale of the land, upon a bill to enforce a vendor's lien, the rule being the same as upon a bill to foreclose a mortgage. *Id.*

Equity will not render a decree *in personam*

For Index to Notes in American Decisions and American Reports, see Volume I.

for an unsatisfied balance remaining after exhausting the proceeds of the land, on the ground that there are doubts or embarrassments as to the title. *Id.*

58. **Waiver of the lien.**—1. *General principles.**—A vendor's lien may be waived, either expressly or by implication. *Mims v. Lockett*, 68 D. 521.

Prima facie, a vendor's lien exists, and it lies on the vendee, or a purchaser from him with notice, to show that the vendor agreed to waive it. *Briscoe v. Bronaugh*, 46 D. 106; *Hays v. Horine*, 79 D. 518.

2. *What amounts to a waiver.*—Where encumbrances are created on land subsequent to agreement for the sale thereof, the agreement cannot be enforced while the encumbrances burden the land. *Withers v. Baird*, 32 D. 754.

Failure to assert a vendor's lien for three years furnishes a strong presumption that it is considered waived. *Conover v. Warren*, 41 D. 196.

No waiver arises from an extension of credit to the purchaser. *Aldridge v. Dunn*, 41 D. 224.

The vendor's lien is not waived: By a stipulation in the agreement that the purchaser is not to remove a certain steam-engine on the land until the money is paid, though this constitutes an express lien on the engine. *Lagow v. Badollet*, 12 D. 258.

By making a conveyance and taking a note or bond, with personal security for the balance due. *Tierman v. Beam*, 15 D. 557.

By taking the purchaser's note for the amount due. *Aldridge v. Dunn*, 41 D. 224; *Manly v. Slason*, 52 D. 60; *Baum v. Grigsby*, 81 D. 153.

By acceptance of a check upon the bank for the purchase-money which was never presented or paid, but subsequently surrendered and canceled, and a note for the amount, antedated to the same date, taken in its stead. *Honore v. Bakewell*, 43 D. 147.

By the taking of an order on a third person for the amount of the purchase-money, if such order is never accepted by such third person; and the vendor may, on the refusal of such third person to accept the order, at once proceed on the bond for the purchase money, to recover the amount due. *Knisely v. Williams*, 46 D. 193.

By the vendor taking a note for the purchase-money, with the privilege of allowing the vendee to pay it in leather. *Ploesman v. Riddle*, 48 D. 92.

By the fact that the vendor transfers, as collateral security for another debt, a note which he has taken for the purchase-money. *Id.*

By taking a mortgage on the land conveyed, as security, if the intention was to rely upon the land solely for payment; and

*See note on the waiver of the vendor's lien, 23 D. 223-224.

such lien, therefore, takes precedence over the lien of judgment creditors, obtained after the taking and before the recording of the mortgage. *Boos v. Whiting*, 49 D. 478.

By extending time of payment of a note given for the purchase price of real estate by taking a new note in its stead. *Conner v. Banks*, 52 D. 209; *Mims v. Lockett*, 68 D. 521.

By vendor's acceptance of a mortgage for the purchase price, which turns out to be forged. *Fouch v. Wilson*, 28 R. 651.

3. *Effect of taking a new or distinct security.*—The taking of new and distinct security for the payment of the purchase-money waives the lien that a vendor has upon the property sold for the payment of the purchase price. *White v. Dougherty*, 17 D. 802. S. P., *Blight v. Banks*, 17 D. 136; *Follett v. Reese*, 55 D. 472.

A vendor's lien on land is presumed to be waived by his taking other security, such as a note for the purchase-money, indorsed by a third person, a mortgage on other property, a pledge of goods, or the personal responsibility of a third person, and can be repelled only by direct proof to the contrary. *Marshall v. Christmas*, 39 D. 199. S. P., *Conover v. Warren*, 41 D. 196; *Dibblee v. Mitchell*, 77 D. 99; *Kendrick v. Eggleston*, 41 R. 90.

The taking by the vendor of lands, of the note of the purchaser, with a third person as surety thereon, is *prima facie* evidence of a waiver of the vendor's lien for the purchase-money, but it may be rebutted by satisfactory proof of an express agreement that the lien should be retained. *Fonda v. Jones*, 2 R. 669. S. P., *Willis v. Gay*, 26 R. 323.

A vendor's implied lien for purchase-money is merged or waived, in general, by taking a mortgage as security. *Burnap v. Cook*, 85 D. 507. But compare *Anketel v. Converse*, 91 D. 115.

The lien does not attach, where the vendor took personal security, and gave a conveyance after two years for the purpose of allowing the vendee to raise money by mortgaging the land, the making of the conveyance being an abandonment of the equitable lien. *Clower v. Rawlings*, 47 D. 108.

Whether acceptance of a renewed note for the purchase-money, and which includes other considerations, is an implied waiver of vendor's lien, is a question of law for the court, and not one of fact for the jury. *Mims v. Lockett*, 68 D. 521.

The lien is waived by the taking of any security, either personal or material; or by the neglect to enforce the lien for a considerable time, though short of the time prescribed by the statute of limitations. *Richards v. Leaming*, 81 L. 239.

Where one conveys land to a married woman, and takes a deed of other lands from her husband, with covenants of warranty, in part payment, and the husband's

For Index to Notes in American Decisions and American Reports, see Volume 1.

promissory note for the balance, he waives his lien as vendor and can resort only to the husband for payment. *Andrus v. Coleman*, 25 R. 289.

IV. REMEDIES.

1. Of the Vendor.

54. In general.—The vendor may elect to treat either as a trespasser or as a tenant at will one who with his consent enters upon land under a contract of purchase, but fails to pay as he agreed; and he may maintain against him either trespass or *assumpsit* for use and occupation. *Woodbury v. Woodbury*, 90 D. 555. Contra, see *Smith v. Stewart*, 5 D. 186.

55. Right to sue for purchase-money.—A parol promise by a purchaser of land to pay for the same, made during the negotiation for its purchase, is merged in the note given for the consideration at the time of the agreement, and the holder of the note cannot waive it, and sue on the original promise. *Wheelock v. Freeman*, 23 D. 674.

The vendor may maintain his action for the purchase-money, without having executed a conveyance of the land, or offered to do so, when the promise to pay is independent of the covenant to make title. *Hageman v. Sharkey*, 29 D. 627.

A lien created by the vendor after the agreement to convey will not prevent him from enforcing payment of the purchase-money, if he gives adequate security for the indemnification of the vendee. *Thompson v. Carpenter*, 45 D. 681.

The vendor may sue the vendee on a note for the purchase-money, though the latter yielded possession to a purchaser at a sheriff's sale under a judgment against the vendor, older than the deed of the vendee, unless actual eviction is shown. *Dennis v. Heath*, 49 D. 51.

The vendee may be decreed to pay the purchase-money, though no deed be decreed from the vendor to the vendee, when the vendor has only an equitable title in the property, and has sold his interest, authorizing and empowering the vendee to acquire the legal title. *Bailey v. James*, 62 D. 659.

A vendor who waives his right to receive the purchase-money in installments, as prescribed by the contract, and allows the whole to remain unpaid until the last installment falls due, must then tender a conveyance, before he can sue the purchaser for the price. *Beecher v. Conradt*, 64 D. 535.

A vendor expressly covenanting to furnish the vendee a complete chain of title for each of several parcels of land, and failing so to do, the vendee not to be bound to pay for those portions of the land for which he might be unable to furnish such title, is estopped from saying that his vendee has not been injured by his failure to perform such covenant; nor can he be heard to say that

the title of his vendee has become invulnerable by lapse of time, or been perfected in any other manner. *Stillman v. Canalea*, 78 D. 530.

A sale of land by the vendee, with or without warranty, is not a waiver of an express condition, upon the performance of which alone the vendor was entitled to claim the payment of the purchase-money. *Id.*

A vendor of land, under executory contract, cannot recover the balance of the purchase-money from the vendee, where he recovers judgment against the vendee, on the vendee's failure to pay the first installment due, and becomes the purchaser of the land at sheriff's sale. *Graf v. Kelly*, 82 D. 580.

If the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase-money. *Wells v. Calnan*, 9 R. 65.

Therefore, where plaintiff contracted to sell and convey to defendant a farm having buildings thereon, and to deliver a deed in "fee-simple of said premises," upon the payment by defendant, on a day named, of the price stipulated, and before the day named and the tender by plaintiff of the deed the buildings on the premises were burned, and the value of the premises greatly reduced thereby, — held, that plaintiff could not maintain an action upon the contract. *Id.*

56. Matters of defense.—1. In general.—The rule of *caveat emptor* applies to a purchase of real estate after the conveyance has been executed and received; and the purchaser cannot recover back the purchase-money, if paid, nor resist an action therefor, if unpaid, unless as a consequence of covenants contained in his deed. *Cullum v. Branch Bank*, 37 D. 725.

Eviction or failure of title does not at law constitute a defense to an action for the purchase price of lands, although the conveyance thereof contained covenants of general warranty. *Id.*

A vendee in possession cannot defend against an action for the payment of the purchase-money of land. *Giles v. Williams*, 37 D. 692.

A vendee in possession may resist the action for purchase-money without surrendering possession, if the vendor is unable to make title according to his agreement, and the vendor, in such a case, must rescind the agreement and sue for the possession. *Gans v. Renshaw*, 44 D. 152.

The vendee does not waive objections to vendor's title by taking possession under an agreement to convey if he was ignorant of the defect at the time. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

Vendor's title must be beyond doubt, or he cannot compel the purchaser to take the land and pay the purchase-money. *Id.*

The vendor cannot recover the purchase price of land contracted for, if it appears that he has no title. *Miles v. Stevens*, 45 D. 621.

The vendee cannot resist payment of purchase-money, on ground of defect of title, while he retains the warranty bond and continues in the possession of the land. *Lynch v. Baxter*, 51 D. 735.

In an action on a note given for the purchase of land, the possession of a warranty bond for title and possession of the land afford ample and legal consideration to entitle the plaintiff to recover, without regard to title. *Id.*

In an action for the purchase price of land, where the defendant set up as a defense that the land conveyed was not the land which he intended and agreed to purchase, a charge to the jury, that if the defendant was negotiating for one thing, and the plaintiff was selling another, and their minds did not agree as to the subject-matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff, is correct. *Kyle v. Kavanagh*, 4 R. 560.

C. bought certain real estate, upon which there was a mortgage, took a deed containing a covenant of warranty and the usual full covenants, and gave his bond for the payment of a portion of the purchase-money. A foreclosure of the original mortgage was permitted by the grantor, and C. bid off the property at the sheriff's sale, but immediately assigned his bid to H., to whom the deed was executed. In an action on the bond, — held, that there had been an eviction of C., and that he was not liable. *Cowdry v. Coit*, 4 R. 690.

2. *Failure of consideration or title, when a defense.* — Failure of consideration is a good plea to an action on a promissory note, as where the plea shows that the note was given in consideration of a bond to convey lands in fee-simple, within a specified time, and that the lands were not so conveyed, and that the obligor in the bond had not title to the lands. *Tyler v. Young*, 35 D. 116.

Where on a public sale of town lots, it is in proof that a certain lot extending to the Tombigbee River was on the day of sale reserved as a depot for a railroad, which was to have its terminus at that point, and the lot bought by the defendant, and other lots similarly situated, were regarded at the sale as front business lots, and consequently brought higher prices, and afterwards the railroad was abandoned and the lot intended for the depot was sold out in small lots, covered, at the time of the trial, with cotton-sheds, cutting off from the river the lot purchased, and making it a back instead of

a front lot, causing it to greatly depreciate in value, these facts would justify and require a court of equity to rescind the contract, and will form a good defense to an action on a writing obligatory given for the price. *Anderson v. Hill*, 51 D. 130.

Where the vendee received a bond for title, to be made when the purchase-money was paid, and that was payable in installments, the right to enforce payment is not distinct and independent from the ability to make title, and the defendant may set up and show in bar of the action on the notes a want of title in the vendor. *Feemster v. May*, 53 D. 83.

A defect of title to the land is a good defense to the vendee in an action for the purchase-money, so long as the contract is executory; and the vendor must show that the vendee purchased at his own risk, and with knowledge of the defect, or that he agreed to take such title as the vendor had. *Cooper v. Singleton*, 70 D. 333.

A vendee in an executed contract for realty cannot resist payment of the purchase-money for defect or failure of title, as a general rule, both in England and in the United States; but unless there have been fraudulent representations, must pay the money, and rely upon the covenants in his deed; but the rule is otherwise in Texas, and the vendee, after conveyance, may resist payment for a total failure of title, though there be no fraud, and is not compelled to resort to his covenants, especially where the vendor is or may be insolvent or beyond the reach of the court, unless the vendee takes a conveyance with warranty, with knowledge of the defects, when he cannot resist payment unless he has been evicted. *Id.*

The distinction between the liabilities of a vendee in an executory and a vendee in an executed contract for the sale of realty is, that the former should be relieved from payment on showing defect of title, unless the vendor shows that he knew the defect at the sale, and consented to take such title as the vendor had; while the vendee in an executed contract, to escape payment, should show, beyond doubt, failure of title in whole or in part, danger of eviction, and circumstances *prima facie* repelling the presumption that he knew, and took the risk of the defect at the time of the sale. *Id.*

It is a good defense to an action by the vendor for the price of land, brought after the last installment of the price is due, that he agreed to convey the patent title of the land to the vendee, and that he never had such title, and is unable to convey it. *Runkle v. Johnson*, 83 D. 191.

The vendee may defend the action for the price by showing that title is defective, when the subject of the contract of sale is the land itself, because he has a right to a title to the land clear of defects and encum-

For Index to Notes in American Decisions and American Reports, see Volume I.

branches, in the absence of any stipulation to the contrary. *Herrod v. Blackburn*, 94 D. 49.

3. *When not a defense.* — In an action on a promissory note for the purchase-money of land conveyed with covenants of seisin and warranty, failure of title or want of title in the grantor is no defense. *Lloyd v. Jewell*, 10 D. 73.

And where the deed contained a condition that upon breach of any covenant therein, the damages might be paid in cash to the amount received in money, and the residue by surrendering such notes given for the purchase-money as remained unpaid, in an action on one of the notes, some of them having been paid, — *held*, that the defendant could not show a breach of the covenant of seisin for part of the land, to the value of the note. *Id.*

A purchaser holding undisturbed and undisputed possession of property under a sale cannot, in an action on a promissory note given for the price, set up as a defense that the title to the property was not in the seller at the time of the sale. In such a case there is not properly a failure of consideration so as to allow the consideration to be impeached, under a statute, regulating the proceedings in justices' courts, which allows the maker of a promissory note to impeach its consideration and show a total or partial failure of the consideration. *Morrison v. Edgar*, 57 D. 238.

The vendor having conveyed the equitable interest existing under a title bond, and authorized the vendee to acquire the legal title, the vendee's default in failing to obtain the legal title furnishes him no defense against the payment of the purchase-money. *Bailey v. James*, 62 D. 659.

The defense of failure of title to the payment of the price of land is extinguished if the party attempting to set up an adverse title is, by his acts toward the vendee at such sale, estopped from setting up such title. *Beaupland v. McKeen*, 70 D. 115.

Actual eviction is necessary to constitute a defense on the ground of failure of consideration from a defect in title, where a deed has been given, and the purchaser has entered into possession; although an eviction is not necessary where there has been no conveyance. The grantee, who is not evicted, but remains in undisturbed possession, must rely on his covenants, except in case of fraud. *Timms v. Shannon*, 81 D. 632.

The defense of want of title may be met by a showing on the part of the vendor that he still owns the title in equity, and can control it for the benefit of the purchaser. *Runkle v. Johnson*, 83 D. 191.

Where a vendor who has sold land on installments brings action for the first installments before the last one becomes due,

want of title may be no defense, for he may claim the whole time until the contract matures to acquire title. *Id.*

Want of title cannot be set up against payment of purchase-money by a vendee who has protected himself by covenants of warranty, unless he shows a previous eviction, or in cases where there has been fraud; and this rule applies to personal as well as real property. *Ware v. Houghton*, 93 D. 258.

4. *Non-performance by vendor.* — An action for the purchase price of a town lot cannot be successfully resisted upon the ground of the failure of the vendor to comply with his promise made, as owner of the town in which the lot was situated, at the time of the public sale at which it was bid off, to erect a storehouse in the town, and to build a bridge across a river that passed through the town. *Miller v. Howell*, 32 D. 26.

The purchaser of lands with covenants for title cannot, in an action on a note given for the purchase-money, prove a breach of the covenants, there being no suggestion of fraud, of eviction, or of insolvency. *Guice v. Sellers*, 5 R. 476.

Where covenants are mutual and concomitant, neither party can enforce the contract against the other without showing performance, or tender of performance, on his own part. Accordingly, where an agreement was entered into between the plaintiff and defendant for the sale of a tract of land to the latter, one third of the purchase-money to be paid on a certain day, when a title was to be given free from all encumbrances, and the remaining purchase-money to be paid by installments, and the defendant entered into possession, but not having paid the first installment on the day named, no conveyance was tendered, but subsequently a deed was tendered, which the defendant refused to accept, part of the first installment never having been paid, — *held*, in an action by the plaintiff to recover the purchase-money, that the defendant could not give evidence of damages sustained through the plaintiff's unwillingness or inability to make title on the day. *Cassell v. Cooke*, 11 D. 610.

5. *Fraud.* — The vendee of a tract of land cannot resist the payment of the purchase price on the ground of fraud and failure of consideration, when it appears that he entered upon and continued in the quiet possession of the land after he discovered the falsity of the representations that it was free from encumbrances. *Christian v. Scott*, 18 D. 68.

Fraud is not, at law, a defense to an action to recover the purchase price of lands, if the purchaser has accepted a conveyance, and retains possession of the land. *Cullum v. Branch Bank*, 37 D. 725; and the property is not shown to be absolutely worthless, and has not been returned or reconveyed on dis-

For Index to Notes in American Decisions and American Reports, see Volume I.

covering the fraud. *Van Epps v. Harrison*, 40 D. 314.

Evidence raising a suspicion that the vendor holds under a fraudulent conveyance to him as creditor, by a failing debtor, though not amounting to clear proof of fraud, should be left to the jury in an action by such vendor against a purchaser from him to recover the purchase-money for the premises, where the latter defends on the ground of a defect in the title. *Gans v. Renshaw*, 44 D. 152.

The defense of fraud in a contract of sale may, apart from and independent of any defect of title, be made in an action for the price of the land, although the defendant has not been evicted or disturbed in the possession of his lot. *Anderson v. Hill*, 51 D. 130.

6. *Encumbrances, dower right, etc.* — Encumbrances known to vendor and vendee at the time of the sale, and provided against by a covenant of warranty in the deed, constitute no ground of defense to an action for the purchase price. *Fuhrman v. Loudon*, 15 D. 608.

An agreement in writing that the vendee might pay off the notes given for the purchase price by discharging an encumbrance on the realty is binding, and not revocable at pleasure. *Joy v. Hull*, 24 D. 625.

A right of dower in the grantor's wife to a part of the land conveyed by a warranty deed cannot be set up, in an action upon a note given for the purchase price, to show a failure of the consideration. *Whistler v. Hicks*, 33 D. 454.

7. *Outstanding title.* — A vendee in possession cannot set up an outstanding title in a third person as a defense to an action brought to recover the purchase price of the land. *Larkin v. Bank of Montgomery*, 33 D. 324.

A purchaser of land from one who acquired it by parol gift from her father, and who gave to her vendee her father's conveyance of the same, is estopped, in an action by the vendor for the price, from setting up as a defense that the gift to the daughter was void because not in writing, or from setting up a title adverse to that conveyed by the deed. *Russell v. Watt*, 93 D. 270.

57. *Offsets in action for price.* — A deficiency of quantity so great as to defeat the object of the purchase is a good cause for rescinding a contract for the sale of lands; or it may be set off as an offset against the bonds given for the consideration money. *Pringle v. Witten*, 1 D. 612.

A set-off of any encumbrances discharged may be set up by the vendee, but he is still liable for the balance. *Tod v. Gallagher*, 16 D. 571.

A purchaser of land under a deed containing covenants against encumbrances, if he subsequently pays off and discharges any encumbrance, may set off what has been paid by him against the amount due on a mort-

gage for the purchase price, if what was paid was actually due, or he had given notice to his vendor requiring him to pay off the encumbrance. *Grant v. Tallman*, 75 D. 384.

Vendees may set off, to the extent of the unpaid purchase-money, the value of growing timber taken from the land by the holder of an adverse title while in possession under an order of restitution, although the vendees were not entitled to a conveyance until the purchase-money was paid, and had taken no covenant for prior possession, where the vendor sold the land pending an action of ejectment, and, on recovery, put his vendees in possession, from which they were evicted on reversal of the judgment, and upon a retrial, judgment was again rendered against him, which he suffered to remain final, but on succeeding in another ejectment, he restored his vendees to possession. *Weakland v. Hoffman*, 88 D. 560.

Where a person who has purchased land, but has not yet procured a conveyance, desires to sell it to another, and when he proceeds to do so, suggests that, to save writing, the purchaser take a deed directly from the person holding the legal title, which suggestion is adopted, and it afterwards transpires that there was a mortgage on the land, which the purchaser had to pay, he can recoup this amount upon a note which he has given to the person from whom he has purchased, and who induced him to take the conveyance from the third person. *Brown v. Crowley*, 99 D. 462.

58. *Pleading.* — A declaration in *assumpsit* by a vendor, on a contract for the sale of real property, ought to state a positive assumption by the defendant, and to aver that the plaintiff was seized of a good estate in fee-simple. *Hampton v. Speckenagle*, 11 D. 704.

In *assumpsit* for the price of land sold, the complaint need not allege that the contract was in writing. *Kibby v. Chitwood*, 16 D. 143.

The plea of a vendee in an executed contract must aver want of knowledge of a defect in title to the land purchased, where he seeks to defeat a recovery of the purchase-money on the ground of such defect. *Cooper v. Singleton*, 70 D. 333.

The defense of defect or failure of title is of equitable nature in an action to recover the price of land sold, and a plea setting up such defense should aver facts which would warrant relief in equity. *Ib.*

A plea by the husband's vendee that the title is defective because the property was community property, and that the vendor's wife is dead, leaving several children, should show the condition of the community estate, so as to negative any idea that the heirs may be satisfied out of other property, in an action for the purchase-money. *Ib.*

In an action for the purchase-money under

For Index to Notes in American Decisions and American Reports, see Volume I.

an agreement for the sale of land, by which the plaintiff bound himself to give possession and execute a warranty deed upon the payment of the purchase-money, the declaration alleged that plaintiff had at all times been ready and willing to perform his part of the agreement; but the defendant pleaded that the plaintiff was not seized of the land agreed to be conveyed. *Held*, that under the issue thus raised, plaintiff was called upon to prove his title. *Negley v. Lindsay*, 5 R. 427.

59. Evidence. — The vendor suing for purchase-money must show that he has performed or offered to perform his part of the contract. *Tyler v. Young*, 35 D. 116.

The vendor may rely upon his tender of a deed without producing the evidence of his title, the burden being on the purchaser to show such a defect in the title as justifies him in refusing to accept the deed. *Dwight v. Cutler*, 64 D. 105.

Parol evidence cannot be given by a witness to show that he was seized of any part of the land conveyed, in order to rebut the claim and title of the vendor to any portion of the land included in the deed, or to show that the title to any part of the land so conveyed was not in the vendor at the time of the conveyance. *Sharpe v. Gibson*, 2 D. 529.

An action for the breach of a written agreement to purchase land, brought before the expiration of the time given for the purchase, cannot be maintained by proof of an absolute refusal on the defendant's part ever to purchase. *Daniels v. Newton*, 19 R. 384.

In an action upon promissory notes given in part payment for a distillery and fixtures, the defense set up was that by reason of certain violations of the revenue laws, by the payee of the notes and vendor of the property, prior to the purchase by the defendant, a portion of the property was, after such purchase, seized, condemned, and sold by the officers of the United States, whereby the defendant's title failed and the property was lost. On the trial the defendant put in evidence the record of the seizure and condemnation. It did not disclose by whom or at what time the penalty which worked a forfeiture and loss of the property was incurred. An offer of the defendant, to prove by extrinsic evidence that the illegal acts established by the decree were done by those operating the distillery before the purchase by him, was excluded by the court. *Held*, that such exclusion was error. *McKnight v. Devlin*, 11 R. 715.

60. Resale on non-payment of price. — The vendor, under a contract for the sale of land, after he has been notified by the vendee of his refusal to complete the purchase, may resell the land, and hold the vendee liable for the stipulated penalty. *Baney v. Killmer*, 44 D. 109.

The election, once made, is irrevocable. *Id.*

61. Action to recover the land on purchaser's failure to perform. — 1. *The right of action.* — A vendor under a contract for the sale of lands may maintain ejectment therefor against his vendee, who has entered into possession by the consent of the vendor, but who has made default in the payments stipulated for in the contract, and which were conditions precedent to the execution of a conveyance to the vendee. *Browning v. Estes*, 49 D. 760; *Seabury v. Stewart*, 58 D. 254. *Hicks v. Lovell*, 49 R. 679.

The possession of a vendee under a contract for the sale of land, entered into by permission of the vendor, becomes tortious when the vendee disaffirms the contract, disavows the title under which he has entered, or refuses payment of the purchase-money. *Browning v. Estes*, 49 D. 760.

The vendor has an election to treat the vendee as a tenant or a trespasser, where the latter has been let into possession and fails to comply with his contract. *Seabury v. Stewart*, 58 D. 254.

The vendor conveying to a stranger after default of the vendee in possession in not paying according to contract does not release the latter or render his possession adverse to the vendor's grantee, and the latter stands in the vendor's shoes; so where the vendor's executors, having power to sell, convey to a stranger after the vendee's default. *Id.*

A vendee refusing to go on with his contract after paying part of the purchase-money forfeits the amount already paid, and the vendor may bring ejectment and recover the land agreed to be conveyed. *Estes v. Browning*, 60 D. 233.

Where one is in possession of real estate under bond for title, and has given a note for the purchase price, which he fails to pay, the obligor may either sue on the note and subject the land and other property to its payment, or he could eject the possessor from the land, unless the latter should bring the money into court and claim a specific performance of the agreement, he not having waived it otherwise than by failure in point of time of payment. *Walker v. Emerson*, 73 D. 207.

2. *Notice to quit* given on the same day that ejectment is brought by a vendor to a vendee in possession under an executory contract of sale, or to one holding under the vendee, is insufficient; in such a case, reasonable notice, to be determined by the circumstances of each case, must be given. *Fears v. Merrill*, 50 D. 226.

One entering into possession of land with the owner's consent is as much entitled to notice as a tenant under a lease, or one who enters under an executory contract; if his entry is peaceable and lawful, he is never to be regarded as a trespasser, unless he holds over after notice, or does some tortious act. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

Notice must be given by the vendor to the vendee in possession under an executory contract for the sale of land, to enable the vendor to avoid the contract and reclaim his possession, unless the vendee, by his own wrongful act, has placed himself in the attitude of a wrong-doer, as by denying the title of him who holds the fee, or claiming under adverse title; but a mere neglect to pay the purchase-money when due is not sufficient for that purpose. *Id.*

A vendor executing a bond for title to his vendee upon the payment of the purchase-money at a future day, and putting him into possession, may, if the money is not paid when due, by first giving to the vendee reasonable notice to quit, avoid his contract and maintain an action of ejectment for the land; or if the vendee has by his own act placed himself, in legal contemplation, in the attitude of a trespasser, the vendor may treat him as such, and sue without giving notice. *Id.*

When possession is obtained by vendee, under an agreement to convey, notice to quit, when he fails to comply with the requirements of the contract, is unnecessary. *Glascock v. Roberts*, 55 D. 103. *Seabury v. Stewart*, 58 D. 254.

3. *Matters of defense.* — The vendee cannot avail himself of an outstanding title disclosed by the vendor in his evidence, or by a grantee of the vendor, so as to prevent a recovery in ejectment, where he is in possession under a contract of purchase, and is in default as to payment. *Seabury v. Stewart*, 58 D. 254.

The equitable title arising out of the contract for sale of land is a defense, where law and equity are blended, to an action instituted to recover the possession of the land. *Tibbeau v. Tibbeau*, 59 D. 329.

A contract for sale of land under which the purchase-money has been paid and possession delivered is a good defense to an action by the grantor to recover the possession of the land or of the title deeds delivered. *Id.*

A condition of a contract for purchase of land, that a party let into possession may purchase on payment of a certain sum of money, time not being of the essence of the contract, would entitle the party to make such payment within a reasonable time after the commencement of an action in ejectment. *Taylor v. Baldwin*, 73 D. 736.

4. *Measure of damages* in ejectment by the vendor against a vendee in possession under an executory contract for the sale of land is the value of the land from the date of the demand and refusal, as the cause of action does not arise till that time. *Fears v. Merrill*, 50 D. 226.

62. Suit in equity to enforce vendor's lien. — A decree for the sale of land to pay a balance due under a title bond is not

against the vendee personally, but against the land, and the personal liability of the vendee is not in question; consequently a defendant cannot object to such a decree on the ground that the contract for the sale of the land was entered into by his co-defendant in their joint names, without his knowledge or consent, and without any subsequent ratification by him. *Mosby v. Wall*, 55 D. 71.

63. — or for specific performance. — The vendor as well as the vendee may invoke the power of a court of equity to enforce the specific performance of a contract for the sale of land. *Old Colony R. R. Corp. v. Evans*, 66 D. 394.

The vendor's right to specific performance is not defeated on the ground that he has an adequate remedy at law, since the measure of damages at law is not the contract price, but only the difference between this and the market value of the land at the time of the breach of the contract. *Id.*

Where the vendee waives his right to abandon the contract, he will be compelled to perform it. *Pugh v. Cheseldine*, 37 D. 414.

The vendor may maintain a bill for specific performance, where the vendee refuses to accept a conveyance or to pay the purchase-money, notwithstanding the remedy at law for the money; but a final decree for the money, in such a case, with an award of execution, is wrong; the decree should direct a sale of the premises in case of default in payment, and should require the complainant to deposit with the master a proper conveyance to be delivered upon payment of the money. *Andrews v. Sullivan*, 43 D. 53.

Delay of the vendor in not tendering the deed until after the day, where he has covenanted to convey land on or before a certain day, "on payment" of a part of the purchase-money, does not prevent his maintaining a bill for specific performance, where the money was not paid or tendered on the day or afterwards, and the vendor's delay was owing to an unexpected absence from home on the day, and he has used due diligence in trying to perform his contract after his return. *Id.*

The vendor of land, who has given bond to make title to the vendee on payment of the purchase-money, cannot maintain a bill for the specific performance of the contract until he has put the vendee in default by the tender of a deed. The covenants, to make title, and to pay the money, are concurrent, mutual, and dependent; and neither party can insist on a performance of the contract without an offer or tender of performance on his part; and this rule applies with equal force in law and equity. *Robinson v. Harbour*, 97 D. 501.

2. Of the Purchaser.

64. Action for possession. — A vendor representing that an entire tract can be

For Index to Notes in American Decisions and American Reports, see Volume I.

acquired under a warrant which he holds for a certain number of acres, when part of the tract only can be legally acquired thereunder, and thereby inducing the vendee to enter into articles for the purchase of the land acquired by said warrant, and subsequently procuring a warrant for the residue of the tract, will be treated in equity as a trustee *ex maleficio*, and in ejectment in the nature of a bill for specific performance, the vendee, upon proof of such representations, can recover the entire tract. *Tyson v. Pasmore*, 44 D. 181.

A vendee never in possession is not liable for interest on unpaid purchase-money in ejectment brought by him to enforce the contract. *Id.*

The grantor has a superior right to land until the purchase-money is paid, or the mortgage given therefor is foreclosed, where, simultaneously with the conveyance, such mortgage is executed; and especially if the grantor is in possession after the vendee has made default, he cannot be turned out of possession by process of ejectment or trespass to try title, although the debt and mortgage are barred by the statute of limitations. *Dunlap v. Wright*, 62 D. 506.

A district court of the United States has jurisdiction to render judgment of eviction against a remote vendor with notice of suit, and in favor of a remote vendee with special warranty. The vendor is concluded by judgment in such case. *Hunt v. Orwig*, 66 D. 144.

The vendor cannot, in an action between himself and a remote vendee, impeach the consideration expressed in his deed to his immediate vendee in order to lessen the amount of recovery; nor can he in such action avail himself of fraud practiced upon him by his vendee. *Id.*

A grantor with covenants of warranty is not entitled to notice to quit, or demand of possession, before the commencement of an action of ejectment against him by the grantee, or those claiming under the latter. *Dodge v. Walley*, 83 D. 61.

65. — or specific performance. — If the vendor acts *mala fide*, and refuses to convey because the land has increased in value, the vendee may compel a specific performance, or recover as damages the difference between the contract price and the enhanced value. *Baldwin v. Munn*, 20 D. 627.

An action at law by the vendee in a contract for the purchase of real estate to recover back an installment of the purchase price paid, upon the vendor's failing to convey as agreed, amounts to a rescission of the contract, and it cannot afterwards be specifically enforced at the instance of the vendee. *Herrington v. Hubbard*, 33 D. 426.

Such action is a disaffirmance of the contract, and is, in legal contemplation, notice

to every person of such fact; so that thereafter the vendor is at liberty to treat the contract as rescinded, and to sell and convey the land to a third person. *Id.*

Where the vendee gives his notes to the vendor, who agrees to convey the land to him upon payment of the notes, the vendor will not be decreed to convey the land until an account is taken of the amount of principal and interest due on the notes, and a day is fixed for the payment of such amount into court for the party entitled. *Johnson v. Jackson*, 61 D. 522.

A vendee may enforce performance, in a district court, of a contract to convey community land in Texas, as against the vendor's widow and heirs, although the vendor has since died, and the succession and administration of his estate is still open in the county court, and the vendee has been appointed administrator. The vendee's claim is not a money demand which must be presented to and allowed by an administrator, or which the vendee, being himself administrator, must file. *Robinson v. McDonald*, 62 D. 480.

A vendee is entitled to specific performance, with abatement in price, where a vendor of land misdescribes it as to quality in the agreement. *Harbers v. Gadsden*, 62 D. 390.

A vendee seeking to enforce specific performance need not tender a deed to the vendor for execution before bringing suit. *Young v. Daniels*, 63 D. 477.

Where, under a contract to convey, the vendee requires a marketable title, and the wife of the vendor refuses to join in the conveyance, equity will not compel the vendor to procure a conveyance or release by his wife, or require him to furnish indemnity against her right of dower, unless in cases of clear fraud. *Hawralt v. Warren*, 90 D. 613.

A vendor who contracts to convey an estate which he has not at the time will be compelled to specifically perform his contract if he afterwards becomes the owner. *Filley v. Duncan*, 93 D. 337.

In a suit by a subpurchaser for specific performance, the intermediate vendors through whom he has acquired his equity are generally necessary parties. *Henderson v. Pickett*, 16 D. 130.

A decree in a suit by a subpurchaser against the intermediate vendors and the holder of a legal title, for a specific performance of a contract of sale, is conclusive on all the parties; and hence, to entitle him to such decree, he must establish a valid equity against each. *Id.*

Where one party to a contract, in consideration of the other party's undertaking to pay him for a tract of land, covenants to convey the land to such party, without naming any time for performance, the pay-

For Index to Notes in American Decisions and American Reports, see Volume L.

ment of the money, not the promise to pay it, is the real consideration for the promise to convey; and in an action on such covenant the plaintiff must aver either that he paid the money, or that he has tendered, and is ready and willing to pay it. *McCoy v. Bizbee*, 27 D. 258.

A bill for specific performance may be amended to ask rescission, together with other relief, in a suit on a contract to exchange lands, where it appears on the trial that the defendant cannot make title. *Parvill v. McKinley*, 58 D. 212.

If a person agree to convey 500 acres out of one of two tracts of land, it is erroneous to decree a conveyance of 250 acres out of each tract. *McConnell v. Dunlap*, 3 D. 723.

An agreement was made for the sale of land during the existence of paper money, part payment to be made in June, 1780, when a conveyance was to be made, and the remainder in twelve months thereafter. The money was not paid or tendered at the day, nor was a conveyance made. A bill being brought by the vendee for a specific performance, he was, under the circumstances of the case, decreed a conveyance upon his paying the value of the land at the time of the contract, instead of the value of the purchase-money agreed upon, according to the scale of depreciation. *White v. Atkinson*, 1 D. 470.

The plaintiff under an oral agreement for the sale of land took possession, paid in full, and made valuable improvements. One of the defendants, with knowledge of her rights, forcibly took possession of the land, dug a cellar, moved a house thereon, and made additions to it. The house could have been removed without material injury to the land. The plaintiff's vendor deeded the land to that defendant, and the latter afterward deeded to other defendants who had full knowledge of the facts. Held, that specific performance being decreed, the court would not authorize the removal of the house, although the defendants acted in the belief that the plaintiff's claim was invalid. *Honsik v. Delaghe*, 56 R. 634.

66. What title purchaser will be compelled to accept. — A bond to "make an indefeasible title in fee-simple, such as the state makes," demands a deed with general warranty; and under such obligation the court will not compel the vendee to accept a title that is doubtful. *Kelly v. Bradford*, 6 D. 656.

If a purchaser can get the substantial inducement to his contract, he may insist upon taking and be made to accept a title to so much as can be given, compensation being made for the deficiency. *Evans v. Kingsberry*, 14 D. 779.

A purchaser contracting for a good title cannot be compelled to accept a mere equitable title, or a good legal title which is

subject to litigation in chancery in consequence of some valid equitable claim. *Morris v. Mowatt*, 22 D. 681.

The vendor in a contract for the sale of a tract of land, or his legal representatives as such, can alone make such title as the vendee will be compelled to accept, and the administrator of such vendor who holds in his own right the title to the land agreed to be conveyed, cannot compel the vendee to accept the title under his contract with the deceased. *Taylor v. Porter*, 25 D. 155.

A vendee who has, without success, made every reasonable effort to obtain the title contracted to be conveyed to him, and who has abandoned the possession and filed his bill for a rescission, cannot then be compelled to accept the title. *Id.*

A covenant to sell and convey requires the giving a good title to the covenantee, free from all encumbrances. *Sibley v. Spring*, 28 D. 191.

On a breach of such covenant, the covenantee may recover the value of certain services, part consideration for the covenant, with interest. *Id.*

A conveyance of land subject to a quitrent under a covenant to convey "clear of all encumbrances," does not satisfy it, and the vendee cannot be compelled to take the land with compensation for the encumbrance, and the vendee's knowledge of the existence of the quitrent shortly after the bargain, and making a payment thereon, do not alter the case. *Gans v. Renshaw*, 44 D. 152.

Equity will compel a vendee to take a good title subject to a pecuniary charge, where adequate security is given, although it will not compel him to take a defective title. *Thompson v. Carpenter*, 45 D. 681.

A vendee of land under an executory contract does not waive an objection to the title merely by going into and remaining in possession. There must be other facts, such as show that he had a knowledge of its defects, and intended to accept such title as could be made, and to rely, in case of its failure, upon the covenants of warranty for redress. *Jones v. Taylor*, 56 D. 48.

A party contracting to purchase an entire estate will not be compelled to take part of it in case a defect appear in the title to the balance, even if proportionate compensation can be awarded for the part in respect to which the title is defective. *Gibert v. Peters*, 97 D. 785.

67. Action for breach of contract in failing or refusing to convey. — 1. *The right of action.* — On a contract for a tract of land, if the vendor be able to convey but a part only, the vendee may at his election compel a conveyance of that part, and recover damages for the deficiency, or he may refuse to take such part, and recover damages for the whole. *McConnell v. Dunlap*, 3 D. 723.

For Index to Notes in American Decisions and American Reports, see Volume I.

The vendee's remedy on a breach of a contract to convey, on payment of the purchase-money, where payment has been duly made, is by action on the contract, and he cannot rescind the contract and sue for the purchase-money and interest. *Fuller v. Hubbard*, 16 D. 423.

The vendee must demand a conveyance in such a case, after paying or tendering the purchase-money, and must attend to receive it, after waiting a reasonable time for it to be made out. *Ib.*

Refusal of the vendor to make title on demand warrants the vendee in bringing an action on the contract for the breach thereof, although such action does not necessarily suppose the contract to be at an end. *Duncan v. Jeter*, 39 D. 342.

A vendee need not surrender possession or demand a deed before suit for breach of a contract to convey land on a day named, where no precedent act is to be performed by the vendee, nor even though such precedent act is required if the vendor has no title. *Shaw v. Wilkins*, 49 D. 692.

2. *Rules of pleading.* — Where a vendor who agrees to convey, upon the payment of money and the execution of notes at a certain time, before that time conveys to another, the vendee in an action for the breach must aver readiness to perform, although a tender of performance is not necessary. *Stow v. Stevens*, 29 D. 139.

In such a case, if part of the money has been paid, the vendee may regard the contract as rescinded, and sue in *assumpsit* for the sum advanced. *Ib.*

Damages for breach of an unexecuted parol contract to convey land cannot be recovered under a declaration for goods sold and delivered or money had and received. *Gangwer v. Fry*, 55 D. 578.

Evidence tending to establish a claim for damages for breach of a parol contract to convey land is irrelevant when offered under a declaration for goods sold and delivered or money had and received. *Ib.*

Plaintiff suing for breach of a parol contract for purchase of a moiety of land subsequently sold to another by the vendor may waive the tort, and recover a moiety of the money received at the second sale, under a count for money had and received, if the contract has been so far executed as to take the case out of the statute of frauds, and to vest in the plaintiff an interest or estate in the land, so as to entitle him to a conveyance. *Ib.*

3. *Evidence.* — The value of the premises in an action to recover damages for breach of contract to convey land may be proved by plaintiff, not only by showing the worth of other property of equal value adjacent to that in controversy, at or near the date of the instrument, but even the value of lands of a different quality, lying in the immediate vicinity, leaving it for the jury to deter-

mine the difference in value. *White v. Hermann*, 99 D. 543.

Evidence of value of land shortly after it should have been conveyed is admissible to show what its value was at that time in an action for breach of contract to convey. *Abell v. Munson*, 100 D. 165.

On a contract to convey "about sixty-five acres," the vendee is not bound to accept thirty or thirty-six acres. And in an action by the vendee for breach of such a contract, parol evidence is inadmissible to prove a sale of sixty-five acres, or the vendor's representation that there were at least sixty-five acres. *Baltimore Permanent etc. Soc. v. Smith*, 39 R. 374.

4. *Measure of damages.* — A vendor commits a fraud in selling a specified tract of land, knowing he has no title. In this case the damages should be the value of the land estimated at the time of the trial, it not appearing when the contract was to be performed. *McConnell v. Dunlap*, 3 D. 723.

A vendor who contracts to sell and convey land must respond to the vendee in damages, to the extent of the difference between the contract price and the value of the land at the time of the breach, where he has the title, and for any reason refuses to convey it, as required by the contract. *Pumpelly v. Phelps*, 100 D. 463. S. P., *Shaw v. Wilkins*, 49 D. 692; *Hall v. Delaplaine*, 68 D. 57; *Warner v. Bacon*, 69 D. 263.

A vendor who contracts to sell and convey land is liable to the vendee in nominal damages only, for breach of contract, where he contracts in good faith, believing he has a good title, and afterwards, on discovering his title to be defective, for that reason refuses or is unable to fulfill his contract; but this rule should not in any degree be extended, but strictly limited to those cases coming exactly within it. *Pumpelly v. Phelps*, 100 D. 463.

A vendor who contracts to sell and convey land must make good to the vendee his loss of bargain, where he knows at the time that he has not the title or the power of conveyance, although he may have acted in good faith, and believed that he should be able to procure a good title for the vendee. *Ib.*

The measure of damages for failure of vendor to convey realty, by deed with covenants of general warranty, according to agreement, he being disabled to comply with the contract by reason of failure of his title without his own fault, is the amount of the purchase-money and interest. *Hall v. Delaplaine*, 68 D. 57. S. P., *Herndon v. Harrison*, 69 D. 399; and the expenses of the plaintiff for travel, board, and counsel fees while attending to the execution and fulfillment of the contract. *Baltimore Permanent etc. Soc. v. Smith*, 39 R. 374.

A vendee suing for damages for breach of

* Contract to convey realty, measure of damages on breach of, see note, 100 D. 467, 468.

For Index to Notes in American Decisions and American Reports, see Volume I.

contract to convey land can recover nothing, where the vendor, before suit, offered to return the notes given for the purchase price, and brings them into court and tenders them to the plaintiff. *Herndon v. Harrison*, 69 D. 399.

A vendee is not entitled to interest on damages for breach of a contract to convey land from the time of the breach, as matter of law, though the jury may, perhaps, allow interest, in their discretion, by way of enhancing the damages under proper circumstances. *Shane v. Wilkins*, 49 D. 692.

5. *Compensation for improvements*.—If land be sold by a verbal sale, and possession given to the purchaser, he will be allowed in equity for improvements made by him, if the vendor refuses to convey the property. *McCampbell v. McCampbell*, 15 D. 48.

Where a vendee in possession under a parol agreement for the purchase of lands makes improvements upon the premises, he cannot recover the value of such improvements in an action at law upon the refusal of the vendor to fulfill the contract. *Smith v. Smith*, 78 D. 49.

68. *Action for damages for defects in title, eviction, etc.*—1. *Right of action*.—A vendee cannot set up defects or want of title in vendor in defense of action for purchase-money, nor rescind the contract and recover back what he has paid, but must rely upon his covenants, where there is no fraud, and he has obtained any benefit by the conveyance, or acquired any estate or interest whatever in the premises. The covenants are for his protection in case his title is defeated by some outstanding title. *Brown v. Manning*, 74 D. 736.

Where a contract is sought to be avoided on the ground of fraud or failure of consideration, if any value appears to attach to defendant's title, a condition to reconvey in the verdict will do equity; and if after verdict it should appear that a reconveyance ought to be made, the court may restrain execution until it is made. *Babcock v. Case*, 100 D. 654.

Where a contract is made for the sale of land, the vendor to give a warranty deed on payment of the purchase-money, and between the time of the contract and the making of the deed a portion of the land is condemned for a railroad, damages for the taking of the land belong in equity to the purchaser, and he cannot treat such taking as an encumbrance and recover therefor on the covenants in the deed. *Stevenson v. Lochr*, 11 R. 36.

A owned land under a deed on its face subject to a lien for unpaid purchase-money. He conveyed to B an undivided fourth interest thereof, with warranty, B assuming in consideration thereof to pay one fourth of the lien debt. By agreement between A and his grantors, the amount of the lien

debt was reduced to a sum less than that due from B, no part of which had been paid, and the land was sold to satisfy the lien. Held, that B was not entitled to any recovery on the warranty; that he was entitled to share in the reduction of the lien debt, and liable to A for one fourth thereof as reduced. *Snyder v. Summers*, 27 R. 778.

2. *The damages recoverable*.—The measure of damages, where a vendee of land is evicted, is the purchase-money, with interest during the time while the vendee was liable for mesne profits. *Fernander v. Dunn*, 65 D. 607.

An evicted vendee who has enjoyed the land for a period before paramount title accrued, during which he was not liable for mesne profits, cannot recover against his vendor interest on the purchase-money during this period. *Id.*

Where there is an entire failure of title to real estate conveyed with covenants of warranty, the measure of damages for breach of covenants, in absence of fraud, is the purchase-money and interest. *Phillips v. Reichert*, 79 D. 463.

Where eviction is partial, damages will bear same proportion to the whole purchase-money that the value of the part to which the title fails bears to the whole premises, estimated at the price paid. *Id.*

Covenants bind the covenantor that he is seised of land, and that he will warrant and defend title, or in default thereof that he will return the purchase-money and interest; or if the title fail in part, that he will return a ratable proportion of the purchase-money and interest. *Id.*

The fact that land was bought for a particular purpose, which was known to the vendor, can make no difference in respect to the rule of damages for a breach of the covenants. *Id.*

Where title to land fails in whole or in part, and fraud can be shown, or concealment, which would be evidence of it, it will constitute a good ground of action, in which the purchaser can recover all his damages. *Id.*

The basis of damages for partial failure of title is the relative general value of the part to which the title fails compared with the whole, without limitation of the purposes to which it may be applied, or for which it may have value. *Id.*

Where a title to a part only of the land fails, the sale cannot be rescinded, and the whole consideration recovered back, but damages will be recovered in proportion to the extent of the defect of title, or the value of the part lost, in proportion to the price of the whole. *Morris v. Phelps*, 4 D. 323.

The measure of damages for failure or defect of title to part of the land conveyed is the relative value which the part taken away bears to the whole, as fixed by the price

For Index to Notes in American Decisions and American Reports, see Volume I

agreed upon for the whole, subject, however, to proof by the parties that the part lost was of greater or less value from particular advantages or disadvantages. But the expense of improvements cannot be considered in estimating such damages. *Beaupland v. McKeen*, 70 D. 115.

69. Action for compensation for deficiency in quantity of land conveyed. — When misrepresentation is made as to quantity, though innocently, the purchaser has a right to have what the vendor can give, with an abatement out of the purchase-money for so much as the quantity falls short of the representation; and compensation or abatement on account of the deficiency ought to be in proportion to the price given for the whole tract as represented, without regard to foreign estimates of the value of the land. *Harrell v. Hill*, 68 D. 202; *Cabot v. Christie*, 1 R. 313. This rule prevails, although the land was described in the deed as so many acres, "more or less." *Smith v. Fly*, 76 D. 109.

A deficiency of sixty-seven acres in a tract expressed in the deed to contain six hundred and ten acres, more or less, is not such a deficiency as will entitle the grantee to a rescission of the contract; but where it appears that the deed to the grantor stated the number of acres in the tract to be but five hundred and forty-three, this fact was held to be evidence of the grantor's knowledge of the quantity contained in the tract; and equity will decree the grantor to repay to the grantee the average price per acre for the deficiency. *McCoun v. Delany*, 6 D. 635.

A purchaser of a specific tract of land, erroneously designated on a surveyor's map as containing a certain number of acres, cannot, in the absence of deceit or fraud on the part of the grantor, recover a proportionate part of the purchase price, upon discovering that there was a less quantity of land than that shown on the map, although the land was paid for at so much per acre. *Farmers' & M. Bank v. Galbraith*, 51 D. 498.

When there is a very great difference, as thirty-three per cent, for instance, between the actual and estimated quantity of acres of land sold in gross, courts of chancery everywhere will give relief on the ground of gross mistake. *Harrell v. Hill*, 68 D. 202.

An action at law for money had and received cannot be maintained to recover back the money paid for the number of acres alleged to be deficient, where there has been a material deficiency in the quantity of land conveyed by deed, describing it as so many acres, "more or less." The purchaser must resort to a court of equity to obtain relief on the ground of mistake. *Smith v. Fly*, 76 D. 109.

An action for a diminution of price for deficiency will not lie where land fronting on

a bayou is sold by described metes and bounds, except the rear boundary, which is not defined, as containing a certain number of arpents. In such case the sale is one per aversionem, the depth of the land is presumed to be forty arpents, and the vendee takes all the land within the boundaries mentioned. *Davis v. Millaudon*, 87 D. 517.

Where a contract for the sale of land is fully executed and the purchase-money paid, the vendee cannot maintain an action for a deficiency in the quantity without proof of fraud or mutual mistake. *Kreiter v. Bomberger*, 22 R. 750.

Where, upon a sale of land, the quantity is made an essential element of the bargain, and is relied on to fix the price, and by mistake of fact there is a deficiency in the quantity paid for and purporting to be conveyed, the excess of payment may be recovered at law, but not in equity. *Pickman v. Trinity Church*, 25 R. 1.

The rule that the title to land cannot be tried in an action for money had and received is not applicable where the action does not involve the title to the lands for which such money was paid, but only of lands of a third party upon which those lands are bounded. *Id.*

Land was sold at a fixed price per square foot; the grantee, relying upon a survey, procured by the grantor, paid the agreed price for the quantity thus indicated; the deed stated the same sum as its consideration, purported to state the true length of the lines and the correct number of square feet, and bounded the grant on one side by T.'s land; whether the amount was correctly stated depended on the question whether the grantor or T. owned a strip of land lying between lots conceded to be owned by them respectively, and conveyed by the deed in question. *Held*, that if T. owned the strip, an action for money had and received would lie to recover the excess of the price paid, but that a bill in equity would not. *Id.*

70. Action to recover back purchase-money. — The cases where the vendee of real estate may recover back moneys paid by him under a contract for its purchase are: 1. Where the rescission is voluntary by mutual consent, and without default on either side; 2. Where vendor cannot or will not perform contract on his part; 3. Where vendor has been guilty of fraud in making the contract; 4. Where by terms of contract it is left in power of vendee to rescind by act on his part, and he does it; 5. Where neither party is ready at the stipulated time, but each is in default. *Boston v. Olifford*, 18 R. 547.

If a purchaser pay a portion of the purchase price of lands, and the contract of sale be not enforceable because within the statute of frauds, he has a lien on the property to secure the repayment of the amount paid.

For Index to Notes in American Decisions and American Reports, see Volume I.

He has not the right to retain the possession until paid out of the rents, but is entitled to a decree for the sale of a quantity sufficient to cover his lien. *McCampbell v. McCampbell*, 15 D. 48. S. P., *Wickman v. Robinson*, 80 D. 789.

A purchaser of real estate cannot recover back the purchase-money in an action for money had and received, where the title proves defective, unless there be fraud or warranty. *Dorsey v. Jackman*, 7 D. 611.

An encumbrance discovered before the execution of the conveyance must be discharged by the vendor, whether there be an agreement to covenant against it or not, unless it be contingent; and then if it be agreed in the articles that the vendor shall covenant against it, the vendee having reserved that particular remedy, shall not resort to the additional one of detaining the purchase-money. But if actually evicted, he may detain or recover it back, though the intended covenants would not have extended to the particular encumbrance or defect by which the eviction was occasioned. *Lighty v. Shorb*, 24 D. 334.

A purchaser having paid money on a contract within the statute of frauds, either to the vendor or to a third person, to be paid to him on the execution of a conveyance, cannot recover the same on the ground of the invalidity of the contract, if the vendor is ready and willing to perform it. *Coughlin v. Knowles*, 39 D. 759; *Sims v. Hutchins*, 47 D. 90; *Cobb v. Hall*, 70 D. 432; *Galwey v. Shields*, 27 R. 351; *Day v. Wilson*, 43 R. 76. But see *Scott v. Bush*, 12 R. 311.

Money paid in part performance of a parol contract for the purchase of land can only be recovered on the ground of the unwillingness or inability of the vendor to convey according to contract, or of a mutual abandonment of the contract. *Sims v. Hutchins*, 47 D. 90.

A vendee paying money with a privilege of refusing to complete the purchase may recover the money back in an action of *assumpsit* upon such refusal. *Johnson v. Evans*, 50 D. 669.

A vendee's executor is a proper party complainant to demand relief in equity against a fraudulent vendor, where the only relief to be obtained is a return of the purchase-money, and no descendible or transmissible interest in the land under the purchase remained in the vendee. *Bryant v. Boothe*, 68 D. 117.

The vendee's executor is not barred of relief against a fraudulent vendor by becoming the purchaser at a sale previously made under order of the probate court, when all the vendee's right and interest in the land had been extinguished prior thereto. *Id.*

In *assumpsit*, the grantee may recover against the grantor, in whole or in part, the price of land not conveyed to him, and in

such case parol proof is admissible to show that the purchase price has been paid and a conveyance refused. *Goodspeed v. Fuller*, 71 D. 572.

The vendee need not tender the balance of the purchase-money for land before he can maintain an action against the vendor to recover back the money paid on his contract, when the vendor admits that he has not the title and could not convey. *Smith v. Lamb*, 79 D. 381.

Where land agreed to be conveyed is to be paid for in services, and the vendor refuses to perform his agreement after the vendee has performed part of his contract, the amount for which the latter will have a lien thereon is the value of the services actually performed, estimated according to the contract price. *Wickman v. Robinson*, 80 D. 789.

An action will not lie in favor of a vendee in an executory contract for the sale of lands, to recover a portion of the purchase-money paid by him, where the buildings on the land had been destroyed by fire, without the vendor's fault, after such payment and before the payment of the balance, it not appearing that the buildings formed the chief inducement to the purchase. *Bautz v. Kuhworth*, 25 R. 737.

C. agreed to purchase and B. to sell certain lands, C. to pay the purchase price in installments, for which he gave notes, B., upon the payment of the last due note at maturity, to execute to C. a deed of the lands. C. paid all but the last note. When that was due, he was not ready to pay it, but B. did not prepare and tender a deed of the land. Thereafter B. surrendered the last note to C., and sold the land to another party. Held, that B., not having executed and tendered to C. a deed at the maturity of the last payment, failed to put C. in legal default, was equally derelict with him, and, having sold the land, C. was entitled to recover back the amounts previously paid under the contract. *Boston v. Clifford*, 18 R. 547.

71. Action for relief against payment of purchase-money. — A court of equity will grant relief where the vendor of real estate, by false and fraudulent representations respecting its quality, induces another to purchase it, when he was not in a situation to ascertain its quality by ordinary diligence, and where adequate remedy at law cannot be had. *Sherwood v. Salmon*, 5 D. 167.

A purchaser of land warranted by the vendor to be free of all encumbrance, will not be denied relief in equity against his bond for the purchase-money, because of the fact that before making the purchase he was fully apprised of the encumbrance. *Stockton v. Cook*, 5 D. 504.

A purchaser of land who is in undisputed

For Index to Notes in American Decisions and American Reports, see Volume I.

possession, and has received a conveyance of the same with warranty, cannot have relief in equity against payment of the purchase-money, on the ground of a defect in the title. *Abbott v. Allen*, 7 D. 554. S. P., *Coleman v. Rowe*, 37 D. 164; *Vick v. Percy*, 45 D. 303.

Failure of title to land sold, if there be no fraud or warranty, furnishes no ground for equitable relief against a contract for the payment of the purchase-money. *Barkhamsted v. Case*, 13 D. 92.

Where there has been a partial failure of consideration in a sale of lands, the remedy is, in general, in equity. *Parham v. Randolph*, 35 D. 403.

A purchaser is entitled to relief in equity on the ground of fraud, although he has taken a covenant from his vendor which covers the precise injury sustained. *Cullum v. Branch Bank*, 37 D. 725.

Relief in equity will be given a purchaser of lands against his obligation to pay the purchase-money, if it appear that he holds under a conveyance, with covenants of warranty, that he has been evicted by title paramount, and that his grantor is insolvent. *Cullum v. Branch Bank*, 37 D. 725. S. P., *Woodruff v. Bunce*, 38 D. 559.

Fraud on the part of the vendor may entitle the vendee to relief in equity, as where the former, being aware of a defect in the title, concealed it from the latter, or suppressed an instrument by which an encumbrance had been created. *Cullum v. Branch Bank*, 37 D. 725.

Equity will not grant relief to a vendee in possession, with covenants of warranty, in the absence of fraud or eviction, but will grant such relief when the vendor or his personal representatives have agreed to an abatement in the purchase price. *Elliott v. Thompson*, 40 D. 630.

A vendee will not be granted an injunction against a suit for the purchase-money on ground of vendor's misrepresentation as to the productiveness of the property. *Collier v. Harkness*, 71 D. 216.

Where a contract was made to sell a tract of land stated to contain a number of acres, more or less, and it afterward turns out there is less than the quantity stated, the purchaser will not be relieved in equity. *Jolliffe v. Hite*, 1 D. 519.

Where a contract was made for the sale of nine hundred acres of land, more or less, and the tract is found to contain only seven hundred and sixty-five acres, the purchaser will be relieved in equity, it appearing that the seller knew of the deficiency at the time of the sale, but did not disclose it. *Bedford v. Hickman*, 2 D. 590.

In case of a sale of land by the acre, relief is to be granted for all deficiencies not reasonably imputable to the variation of instruments, and small errors in surveys, whether

the purchaser has expressly retained an election to have the tract surveyed or not. *Nelson v. Carrington*, 6 D. 519.

72. Action for fraud or deceit. — 1. When the action lies. — Where a person was induced to purchase land upon the false and fraudulent representation that a certain privilege was annexed thereto, but which is not included in the deed, he may maintain an action on the case against the grantor. *Monell v. Colden*, 7 D. 390.

A false representation by the vendor, by which the vendee is induced to purchase land, need not be proved to have been made by the vendor knowing it to be false, to entitle the vendee to recover damages. *Munros v. Prichett*, 50 D. 203.

A party who undertakes to sell land which he has already conveyed to another is, in construction of law, responsible for a fraud upon the purchaser, although at the time he made the second deed he had forgotten that he had executed the prior conveyance, and had no intention to deceive or defraud the second purchaser. *Alvarez v. Brannon*, 68 D. 274.

A vendor of land who knowingly misrepresents material facts will not be permitted to derive any benefit from the transaction; but the injured party has, in such a case, the right to elect to rescind the contract and recover the purchase-money, or to proceed upon the covenants in his deed. *Id.*

A vendor is guilty of fraud if he conceals a defect in title to land, which does not appear on the face of the title deeds; and the vendee may either bring an action on the case or file a bill in equity for relief. *Bryant v. Boothe*, 68 D. 117.

The measure of equitable relief for fraudulent concealment by the vendor of a defect in title to government land, in consequence of which the vendor's entry of the land was vacated and canceled, is a return of the purchase-money, with interest thereon, and the value of the vendee's improvements made on the land, less the rents and profits of the land. *Id.*

2. When it does not. — Where a vendor misrepresents the value of land lying in a neighboring county, the vendee cannot maintain an action for deceit though he has never seen the land, as he has it in his power to ascertain its value. *Saunders v. Hatterman*, 37 D. 404.

Fraudulent misrepresentations of a vendor of real estate as to the price which he paid therefor are not actionable. *Holbrook v. Connor*, 11 R. 212.

False representations as to the condition, situation, and value of real estate, knowingly made by the vendor to the purchaser, are not actionable, unless the purchaser has been fraudulently induced to forbear inquiry as to their truth; and in such case, the means by which he has been thus induced to for-

For Index to Notes in American Decisions and American Reports, see Volume I.

bear inquiry must be specifically set forth in the declaration. *Parker v. Moulton*, 19 R. 315.

3. *Illustrations.* — A master and commissioners in partition parted a decedent's land and laid out a street bounding on the line of an adjoining land-holder. Afterwards, but before the partition was put upon record, or the street opened, the latter laid out a town plat, which was lithographed. It exhibited the street, with streets on his own plat opening into it, but the seller gave no information that the first-named street was on his neighbor's land. He sold lots at auction according to the plat, which was exhibited on the day of sale. The plat of the commissioners was afterwards set aside, and the street vacated. *Held*, that the vendor was liable for damages to a vendee of lots; for diminution in the value thereof, caused by the non-existence of the vacated street. *McCall v. Davis*, 94 D. 92.

The defendant made a conveyance of land to the plaintiff, not actually including a certain lot of seventeen acres, which defendant had represented and plaintiff had been led to believe to be covered by the deed. By a proviso in the deed, plaintiff assumed the burden of maintaining a line fence, being induced to consent to the proviso by false representations of the defendant in regard to the amount of fence which his neighbors would be obliged to maintain. Part of the purchase-money for the land was paid in government bonds, the defendant agreeing to take them at par and pay the interest and premium, and there was a considerable sum due to the plaintiff thereon. By a bill in equity, the plaintiff prayed that the defendant be compelled to convey the additional seventeen acres, to release plaintiff from the proviso, and to pay the amount due on the bonds. *Held*, that the conveyance prayed for could not be decreed; that the remedy relating to the proviso and to the bonds was adequate at law; and that, as the plaintiff did not offer to rescind the whole contract, there was no remedy in equity. *Glass v. Hulbert*, 3 R. 418.

The vendor of land represented to the purchaser, who had never seen it, lived at a distance of seven miles from it, and was unacquainted with its value, that he had been offered twelve hundred dollars for it, and fraudulently procured a third person to corroborate his statement. The offer was fictitious, and payable in property either worthless or at greatly exaggerated values. The land was worth much less than the price paid. *Held*, that the vendor was liable in damages to the vendee for the fraud. *Kenner v. Harding*, 28 R. 615.

73. *Other remedies of the purchaser.* — A person properly entitled to the custody of title deeds of his estate may come into equity and obtain a decree for a specific de-

livery of them if they be wrongfully withheld. *Snoddy v. Finch*, 70 D. 216.

A bill to obtain a specific delivery of title deeds should allege danger of loss or destruction of the deeds in the keeping of him who withholds them. *Id.*

A power of attorney is an essential part of a conveyance by attorney, and the grantee may maintain a bill against the attorney for its specific delivery; but since other purchasers from the attorney may need the instrument to establish the agency, the court will decree that the defendant deposit it with the register of the court for the use of all interested. *Id.*

3. *Rescission.*

74. *General principles.* — A contract in relation to land will not be rescinded in part and enforced in part; but if, in entering into such contract, a defect in the land has been fraudulently concealed from one of the parties by the other, such party may have it entirely rescinded, or he may recover compensation for the defect so concealed. *Jopling v. Dooley*, 24 D. 450; *Bailey v. James*, 62 D. 659.

A written agreement for the sale of land may be discharged by a parol agreement between the parties, without canceling the articles or surrendering possession so as to defeat an ejectment to enforce specific performance brought by the vendee against subsequent purchasers from the vendor. *Boyce v. McCulloch*, 39 D. 35.

One party cannot rescind without the other's consent, express or implied, a contract for the sale of land, where there was no appearance of fraud on either side, and the contract did not reserve to one party the right to put an end to it, and it was not subject to any express or implied condition, the breach of which would confer such a right. *Fay v. Oliver*, 49 D. 764.

A contract rescinded *ab initio* as to part, and at the election of one party, must be wholly rescinded; consequently an entire contract for the sale of two distinct parcels of land for a single sum, which has been partly executed by the giving of a deed for one of the tracts, cannot be rescinded by the grantee as to the other tract, unless the contract is wholly rescinded. *Id.*

Acquiescence of the vendee in a rescission of the contract cannot be inferred where he proposes to pay the consideration with the highest rate of interest, and brings suit for specific performance before the vendor indicates any intention of declaring the contract at an end. *Young v. Daniels*, 63 D. 477.

A mistake in a representation of fact material to a contract is sufficient ground for setting it aside. *Alvarez v. Brannan*, 68 D. 274.

It seems that, as a general rule, a delay to

For Index to Notes in American Decisions and American Reports, see Volume I.

rescind, after discovery of the fraud, does not operate as a waiver of the right, or as a confirmation of the fraudulent contract. *Baker v. Lever*, 23 R. 117.

75. Grounds for rescission by vendor.

— Where money is not paid at the day appointed, by a purchaser of land, and he thereupon agrees that if the whole is not paid by a certain future day, all prior payments shall be forfeited, and the agreement be at an end, the vendor is not at liberty to rescind the contract upon non-payment at such future day. *Decamp v. Feay*, 9 D. 372.

Where, on the sale of land, part of the purchase-money is paid, and notes for the balance are executed, and the vendor gives to the vendee a bond to convey the title to him upon the punctual payment of the notes, and the vendee goes into possession, the contract is mutual and dependent, and the vendor cannot put an end to it without performance or a valid offer to perform on his part. *Johnson v. Jackson*, 61 D. 522.

Failure of the obligee in a bond for title to pay the purchase price agreed does not absolutely and of itself put an end to the contract. *Walker v. Emerson*, 73 D. 207.

The rights of a vendee under a contract for conveyance of land upon payment of purchase-money cannot be forfeited by the vendor, though default has been made in the payment of the price, while he has no title to convey, and is not in a position to perform his part of the contract. *Converses v. Blumrich*, 90 D. 230.

Where parcels of land, not intended to be sold, are included in a deed through the fraud of the vendee, and no part of the consideration is paid or received on account thereof, the vendor may set up the fraud and avoid the conveyance of those parcels without returning the consideration paid or setting aside the entire deed. *Bartlett v. Drake*, 1 R. 101.

Where an agreement for the sale of land is conditioned to be void if the vendee shall fail to fulfill, and the vendee so fails, the vendor may treat it as void or as in force. *Wilcoxon v. Stitt*, 52 R. 310.

76. Necessary steps prior to rescission by vendor.— Rescission of an executory contract for the sale of lands is sufficiently indicated by the re-entry of the vendor upon the land, after a default in the payments, and his conveyance of the land to another. *Castleberry v. Peirce*, 24 D. 774.

Where a vendee contracts for the purchase of land and takes possession, but fails to pay a portion of the purchase-money for nine months after it is due, and the vendor during all the time holds the vendee's bonds for its payment, without offering to surrender them, and recognizes the contract as still subsisting, after the default, the latter cannot put an end to the contract without a formal and reasonable notice that if the pur-

chaser will not fulfill it, he will not hold himself further bound. *Falls v. Carpenter*, 28 D. 592.

Such vendee may, upon paying the amount due, enforce specific performance from the vendor, or from a person who purchased with notice of the existence of such contract. *Id.*

The vendor cannot rescind the contract and claim payment under it at the same time. Hence, where, after part payment, the purchaser, pursuant to an oral agreement, gives his note, with the vendor as surety, for a certain debt of the vendor in payment of the balance, with the understanding that the vendor is to hold the title as security, and that if he has to pay the note, the original debt shall be still due, and the vendor, having paid the note, recovers the land from a vendee of the purchaser, he cannot claim the balance of the purchase-money from the deceased purchaser's estate, but must refund the part already paid, which is to be set off against his claim as surety. *Davis v. Smith*, 48 D. 279.

The vendor cannot abandon the contract without refunding to the vendee the money paid by the latter in part performance of it. *Johnson v. Jackson*, 61 D. 522.

Where the vendor who has reserved a right to declare a forfeiture for default of payment does so declare such forfeiture, the vendee may prevent the forfeiture by immediately tendering the amount due. *Hall v. Delaplaine*, 68 D. 57.

Where the declaration of forfeiture for non-payment of purchase-money was mailed by vendors of land at Madison, Wisconsin, to the vendees at Tiffin, Ohio, on the 19th of March, tender of the purchase-money on the 30th of the same month would be in time to save the forfeiture. *Id.*

Vendors reserving an option to declare the contract void for default in payment at stipulated time must, to avail themselves of the reservation, declare their option at the time of the default. *Id.*

Lapse of time alone cannot terminate contracts for sale of land conditioned to be void at the election of the vendor upon the failure of the vendee to fulfill the covenants, conditions, and agreements thereof; for time is not of the essence of the undertaking to pay money by such contracts, and default in payment must be followed by some act of the vendor indicating his election to consider the contract at an end. *Converses v. Blumrich*, 90 D. 230.

77. Grounds for rescission by purchaser.— 1. *Generally.**— A purchaser is entitled to rescind a contract for the sale of real estate, if such estate is taken from him in consequence of an encumbrance made by his vendor and unknown to him at the time

* Right of vendee to rescission and reimbursement, see note, 12 D. 312-314.

For Index to Notes in American Decisions and American Reports, see Volume I.

of the purchase. *Cullum v. Branch Bank*, 37 D. 725.

A sale without warranty of an equitable interest in realty claimed under a contract of sale of such equitable interest implies an undertaking that such contract was made by one competent to contract; and where the contrary proves true, it is ground for the rescission of the sale. *Bailey v. James*, 62 D. 659.

A vendee in possession of land before conveyance has no right to rescind his contract of purchase, there being no eviction by title paramount. *Gale v. Green*, 12 D. 548.

A purchaser has no right to rescind a contract for the purchase of land because it was not reduced to writing, if the vendor has complied with his contract, or is willing to do so. *Roseland v. Garman*, 19 D. 54.

The vendee cannot rescind a contract induced by fraud, after disposing of the property, by offering to restore what he received for it, although he disposed of the property before the discovery of the fraud. His remedy is an action for damages, or a reduction from the contract price to the same extent, if that is yet unpaid. *McOrville v. Carlton*, 86 D. 700.

Where a vendor of lands executed to his vendee a bond for a deed, in which he agreed to execute a deed to his vendee in sixty days from the date thereof, without any conditions, and received the vendee's note for the remainder of the purchase-money, with a power of attorney to confess judgment, and at the expiration of sixty days offered to make a deed, if the vendee would execute a mortgage to secure the unpaid note, which the vendee refused to do, and the vendor, not having complied with the conditions of his bond, afterwards obtained judgment by confession on the note in a foreign county, without notice, and the vendee not having exercised any right of ownership over the land, nor by any subsequent act committed himself to a performance on his part, — *held*, that the vendee had a right to treat the contract as rescinded, and to enjoin the collection of the judgment. The vendee had a right to insist upon the contract as it was made; and the offer to make a deed imposing conditions would be the same as if no offer of a deed had ever been made. *Cooper v. Tyler*, 95 D. 442.

2. *Inability of vendor to convey title contracted for.* — Where a party purchases land with a view of acquiring a certain right or privilege thereto attached, and where it happens that the vendor is unable fully to secure such right or privilege as warranted, the vendee will be entitled to a total rescission of the contract, or an adequate abatement of the price paid. *Lide v. Thomas*, 4 D. 581.

Where by the conditions of the contract the purchaser is required to deposit part of

the purchase-money, and the vendor is unable to convey a good title, pursuant to the articles, the purchaser may disaffirm the contract, and recover back his deposit. *Judson v. Wass*, 6 D. 392; *Dwvett v. Simpson*, 16 D. 115.

The vendee may rescind for vendor's inability to convey, and recover the money paid on the contract in an action for money had and received. *Smith v. Lamb*, 79 D. 381; and this without first tendering to the vendor the purchase-money due, and demanding a deed; and the vendee may exercise this right where the vendor has permitted a mortgage executed by him, and existing at the time of the purchase, to be foreclosed, and the land sold thereunder. *Wilhelm v. Fimple*, 7 R. 117.

Where the contract provided that the conveyance was to be with warranty, except as to an encumbrance specified therein, the existence of an unsatisfied mortgage at the time the vendor should have conveyed, and although such mortgage was recorded, was held to exonerate the purchaser. *Judson v. Wass*, 6 D. 392.

If on a sale of land in separate lots and parcels to one person, the title to one or more of such lots fails, the vendee cannot rescind *in toto*, but he must accept a conveyance for such of the lots as the vendor is authorized to convey. *Van Rye v. Schenck*, 7 D. 330.

If, at the time of a contract for the sale of land, there is a lease outstanding, unknown to the vendee, the latter may rescind, as the vendor is not in a situation to give a perfect title. *Tucker v. Woods*, 7 D. 305.

Where a vendor fails for a great length of time to make title according to his bond, the purchaser may either sue at law for the breach, or in equity for rescission. *Humble v. Hinkson*, 13 D. 195.

An agreement to convey in fee-simple is satisfied by a conveyance without covenants. Hence the existence of a judgment against the vendor will not, at law, authorize the vendee to rescind the contract. *Fuller v. Hubbard*, 16 D. 423.

The time fixed for performance is, at law, of the essence of the contract, and if the vendor is not ready to perform his agreement at the time stipulated, the purchaser may elect to consider the contract as terminated. *Tyler v. Young*, 35 D. 116.*

Failure of title to one undivided seventh of land, purported to be conveyed with two other undivided sevenths, for a specific sum, is ground for the rescission of the entire contract, but the contract being entire, it cannot be rescinded in part and enforced as to the residue; and if the vendee decline to rescind the entire contract, he must pay the whole purchase-money. *Bailey v. James*, 62 D. 659.

3. *Deficiency in quantity.* — A purchaser is

For Index to Notes in American Decisions and American Reports, see Volume I

entitled to have a contract for the sale of land rescinded, where there is a great deficiency in the quantity of land agreed to be conveyed. *Glover v. Smith*, 1 D. 687.

A purchaser of land who discovers, upon receiving the conveyance, that a part of it has previously been sold, may either keep the part conveyed and claim compensation for the residue, or reject the conveyance and seek compensation for the whole. *Carnel v. May*, 12 D. 453.

4. *Misrepresentations, generally.* — Misrepresentation on a plat of land, produced at the time and place of a public sale, is a good ground for rescinding the contract; as in the case where a fine stream of water is laid down with a good mill-seat on it, in the center of a tract of woodland only fit for lumber, and which stream, upon examination, turned out to be only a dry gully three fourths of a year, without any running water in it. *State v. Gaillard*, 1 D. 628.

Where the vendor of land misrepresents the location of its boundaries to the vendee at the time of the sale, the sale will be set aside in equity, notwithstanding the representation was innocently made. *Bibb v. Prather*, 2 D. 711.

Where a grantor represented that the land conveyed comprised a certain spring, knowing such representation to be false, by reason of which the grantee was deceived in regard to the location of the premises, equity will set aside the conveyance. *Walker v. Dunlop*, 9 D. 787.

Chancery will rescind a contract for purchase of land, where the vendor represented to the vendee that a field of forty acres of rich bottom land on an adjoining tract was included in the purchase, although such vendor had been previously informed by the owner of such tract that he had run out the line between them with a pocket-compass, and had ascertained that the field belonged to him. *Camp v. Camp*, 36 D. 423.

A statement in an agreement for the sale of land, "to embrace two hundred acres at the harbor of Elk Creek, best suited for the site of a city," will be construed to be a representation that there was a harbor there, which, if untrue, will vitiate the contract on the ground of fraud. *Miles v. Stevens*, 45 D. 621.

Equity will rescind a contract for sale of land when the vendor has fraudulently misrepresented the number of acres contained in the tract. *Yost v. Shaffer*, 56 D. 509.

The vendor cannot deprive the vendee of his right to have the contract rescinded in equity because of the vendor's fraudulent misrepresentations as to the quantity of land sold, by afterwards purchasing and offering to convey to the vendee an adjoining tract sufficient to make up the deficiency. *Id.*

Equity will rescind a contract for sale of land on the ground of fraud practiced on the

vendee, where at the time of the sale the vendor represented to the vendee that the land was good for agricultural purposes, above the influence of the waters of the river, and not subject to overflow, except from the backwater of a certain bayou, although he knew at the time that the land was subject to general overflow, which diminished its value, the purchaser being at the time unable to ascertain from appearances whether the land was subject to overflow or not. *Alexander v. Bercsford*, 61 D. 538.

The vendee, upon discovery of the fraud, may rescind the contract, and bring action to recover what he has paid upon it in money, services, or materials, whether the contract be by parol or in writing. *Brown v. Manning*, 74 D. 736.

A contract for sale of land is tainted with fraud, and void, where the vendor, by making representations to the vendee about the ownership or possession of the land, which he knew to be false, induced him to enter into a contract which he otherwise would not have made, and which is to his damage. *Id.*

The mere giving of a deed to the vendee while there is a deed on record of the same land to another does not *per se* constitute fraud on the part of the vendor, for it may, and frequently does happen that it would be perfectly safe for the vendee to take the deed and rely upon his covenants for his security. *Id.*

5. *Misrepresentations as to title.* — Though there has been no eviction, equity will rescind a sale of lands, obtained by false representations that the title was good, whereas there was a superior outstanding title. And this though there are covenants of warranty to which the vendee might resort at law. *Parham v. Randolph*, 35 D. 403.

Where the vendor makes misrepresentations in relation to the title, though innocently and under a belief of their truth, and the vendee is thereby deceived to his prejudice, the latter is entitled, without previous eviction, to rescind. *Riner v. Dugan*, 77 D. 687.

Where the owner of a tax title sells it representing it to be good, and the purchaser relies upon such representations, a relation of trust is created between the parties, which compels the vendor to exhibit the truth of the case as it exists, whether he knows it or not; and his ignorance of the truth, having undertaken truly to state it, will not redeem a falsehood regarding the title, in any material matter, from being a fraud which will avoid the sale. *Babcock v. Case*, 100 D. 654.

6. *Concealment.* — Where the vendor of a tract of land knows the inducement to the purchaser to be the acquisition of the elder title, and knows his grant to be of a junior date, and does not disclose the facts to the

For Index to Notes in American Decisions and American Reports, see Volume I.

purchaser, the contract of sale will be rescinded. *Kennedy v. Johnson*, 4 D. 666.

A contract for the sale and purchase of land will be rescinded, where the vendor fails to disclose that the land was covered by two adverse claims and elder patents. *Peebles v. Stephens*, 6 D. 660.

A fraudulent concealment of the nature of the title by the vendor, or fraudulent representations with regard to it, are grounds for the rescission of the contract, although the title and encumbrances are of record. *Campbell v. Whittingham*, 20 D. 241.

The omission of vendor to disclose an encumbrance on land, where no fraud appears, and the vendee receives no injury, the encumbrancer releasing the encumbrance, presents no case for a rescission of contract. *Ib.*

78. Necessary steps prior to rescission by purchaser. — A vendee in a contract of purchase is not compelled to go out of the state to notify the vendor that he renounces the contract; he may abandon the possession without notice. *Taylor v. Porter*, 25 D. 155.

An agreement that a contract may be rescinded by a return of the deed by which it is evidenced by a certain day, cannot if the deed be lost, be fulfilled by the grantee's informing the grantor thereof, and further, that he renounces the benefit of the contract. *Morrow v. Campbell*, 31 D. 704.

Rescission of a contract for the sale of lands, by the vendee, does not follow, unless he performs, or offers to perform, on his part, and abandons the possession of the land to the vendor. *Duncan v. Jeter*, 39 D. 342. *S. P.*, *Smith v. Busby*, 57 D. 207; *Mecklem v. Blake*, 99 D. 68.

The vendee is not bound to surrender possession prior to claiming a right to rescind, where large payments have been made by him upon the land, which he cannot recover from his vendor, owing to the latter's insolvency. *Bryan v. Loftus*, 39 D. 242. *S. P.*, *Duncan v. Jeter*, 39 D. 342.

The vendee may resort to chancery for rescission and yet retain possession of the land, as security for money paid, where the vendor is insolvent, and unable or unwilling to make the title. *Greenlee v. Gaines*, 48 D. 49.

The vendee is not bound to rescind as soon as an occasion arises, if his right to do so depends upon a continuing default upon the part of his vendor, as upon an inability of the latter to make the title for which he has covenanted, but may in such a case for a time waive his right, and afterwards, while the default yet continues, may assert it and rescind the contract. *Bryan v. Loftus*, 39 D. 242.

To avoid a contract for purchase of land on the ground of fraud in the vendor, the vendee must repudiate the contract and demand its rescission immediately upon discov-

ering the fraud; and if, after such discovery, he remains quietly in possession for a long time, he cannot afterwards avoid the contract. *Blen v. Water etc. Co.*, 81 D. 132.

Where a vendee has been induced to purchase property by means of fraud on the part of the vendor, mere want of diligence in discovering the fraud does not deprive the vendee of his right to rescind because thereof; he owes the fraudulent vendor no duty of active vigilance, and if he acts promptly after actual discovery of the fraud, he has a perfect right to rescind. *Baker v. Lever*, 23 R. 117.

79. Matters of pleading and practice in suits for rescission. — A vendee desiring to rescind the contract need only show the inability of the vendor to perform it, and need not show tender of purchase-money on his own part. *Bunkle v. Johnson*, 83 D. 191.

An averment of an offer to rescind would be established by proof that the opposite party had prevented or dispensed with a formal tender of a deed. *Stille v. McDowell*, 85 D. 590.

80. Effect of rescission. — On rescinding a contract the law requires that the parties should be placed *in statu quo*, and it rests with the party objecting to the application of this rule to make out a clear case. *Carneal v. May*, 12 D. 453; *Taylor v. Porter*, 25 D. 155; *Smith v. Brittain*, 42 D. 175; and where possession has passed to the vendee, it should be restored, unless there has been a lawful and *bona fide* eviction. *Humble v. Hinkson*, 13 D. 195; *Bryan v. Loftus*, 39 D. 242.

Upon the rescission of a contract for the sale of land for failure of the vendor to make the vendee a title as agreed, the former must take back the property without compensation for casual destruction, decay, or dilapidation of buildings, or other improvements, not caused by any negligent act or omission of the vendee; but the latter is liable if he has sold and removed, or wantonly injured or destroyed, such improvements. *Taylor v. Porter*, 25 D. 155.

Where one having agreed by parol to sell land rescinds the contract, the other party may maintain an action to recover back money paid him on account of the purchase. *Gillet v. Maynard*, 4 D. 329; *Castleberry v. Pearce*, 24 D. 774.

Where a vendee of land on failure of title, instead of suing on the bond, sues for cancellation of the contract, the heirs of the vendor are not liable, in respect of lands descended from their ancestor, to refund the purchase-money received by him in his lifetime, prior to 1792, but they are liable as far as they have received personal assets from the ancestor. *Humble v. Hinkson*, 13 D. 195.

A vendee whose contract is dissolved has a lien on the land for the purchase-money

For Index to Notes in *American Decisions* and *American Reports*, see *VOLUME I*.

and interest, and for the value of his improvements, and should not be compelled to surrender possession without payment or security therefor. *Griffith v. Depew*, 13 D. 141. *S. P., Flint v. Cuny*, 28 D. 505; *Bryan v. Loftus*, 39 D. 242.

Upon the disaffirmance of the contract, the vendee is chargeable with rents until he surrenders possession, and is entitled to interest until his money is refunded. *Taylor v. Porter*, 25 D. 155.

Where there has been a partial payment by the vendee in such a contract, upon it being disaffirmed, there should be an equitable adjustment of rent and interest. *Id.*

Where a contract for the sale of land is dissolved for the vendor's default, both the interest on the purchase-money and the rent should be reckoned from the time of filing the bill for dissolution of the contract. *Griffith v. Depew*, 13 D. 141.

Where, after the vendee has entered under a contract for the sale of land, the contract is rescinded on account of the misrepresentations of the vendor and his inability to make a good title, the vendee will not be obliged to pay rent beyond the profits actually received. *Richardson v. McKinson*, 12 D. 308.

Upon the rescission of a contract of sale of land, the vendee in possession is entitled to recover the value of lasting improvements made by him. *Richardson v. McKinson*, 12 D. 308; *Griffith v. Depew*, 13 D. 141; *Bryan v. Loftus*, 39 D. 242. But see *Gillet v. Maynard*, 4 D. 329.

A vendor, in consideration of the prompt payment of a sum of money, agreed to sell lands on condition that, in case of the failure of the vendee in the performance of all or either of the covenants on his part, the vendor should have the right to declare the contract void, and take immediate possession of the premises. In the construction of this contract,—*held*, that where the vendee enters upon the performance of the contract, and, paying part of the purchase-money, makes default which is inexcusable, and the vendor, being without default, exercises the right given by the contract of declaring the same terminated, and in doing so acts fairly and within the scope of the power, then no action can be maintained by the vendee to recover back what he has paid; but a vendor who is himself in fault for fraud or violation of his contract cannot exercise the power so given without making restoration of what he has received under it. In such case the law would imply a promise to repay the purchase-money received, and an action for money had and received would lie. *Wheeler v. Mather*, 8 R. 683.

VENDOR'S LIEN.

For purchase-money. see *VENDOR AND PURCHASER*, III.

VENUE.

Change of, in civil cases, see *TRIAL*, 6-12.
Change of, in criminal cases, see *TRIAL*, 126.
How laid in indictment for conspiracy, see *CONSPIRACY*, 14.
Local and transitory actions, see *ACTIONS*, 9.
Of actions for trespass, see *TRESPASS*, 12.
Review of motions for change of, in criminal cases, see *APPEAL*, 170.

VERBA DE PRÆSENTI.

Validity of marriage by mutual consent in, see *MARRIAGE AND DIVORCE*, 12.

VERDICT.

Against evidence, reversal for, in criminal case, see *APPEAL*, 160.
Against law or evidence, new trial for, see *NEW TRIAL*, 23-28, 77.
Against weight of evidence, see *APPEAL*, 68, 69.
Assignability of, see *ASSIGNMENT*, 8.
Contrary to law, reversal for, see *APPEAL*, 35.
Conviction on defective, no bar to further prosecution, see *JUDGMENT*, 82.
Discharge of jury before, when no jeopardy, see *JUDGMENT*, 81.
Discharge of jury before, when jeopardy, see *TRIAL*, 168.
Effect of, as evidence, see *EVIDENCE*, 198.
Errors in pleadings cured by, see *PLEADING*, 191.
Impeachment of, by jurors' affidavits, see *NEW TRIAL*, 50, 51.
In action for divorce, see *MARRIAGE AND DIVORCE*, 78.
In actions for assault, see *ASSAULT*, 15.
New trial for irregular arrival at, see *NEW TRIAL*, 22, 75.
Not set aside for admission of improper evidence when, see *NEW TRIAL*, 9.
Objections cured by, see *APPEAL*, 51.
On trial of feigned issue, see *EQUITY*, 52.
On trial of garnishee's liability, see *ATTACHMENT*, 108.
Reception and sufficiency of, in civil cases, see *TRIAL*, VII.
Reception and sufficiency of, in criminal cases, see *TRIAL*, 198-208.
Reception of, on Sunday, see *SUNDAY*, 10.
Setting aside for repugnancy or uncertainty, see *NEW TRIAL*, 28.
Sufficiency of, in ejectment, see *EJECTMENT*, 42, 43.
What objections too late after, see *TRIAL*, 211.
When constitutes estoppel, see *ESTOPPEL*, 15.
See also *FORCIBLE ENTRY*, 13; *FORGERY*, 15; *LARCENY*, 29; *REPLEVIN*, 30.

VERIFICATION.

Of claims against decedent's estate, see *EXECUTORS*, etc., 93.
Of pleadings, see *PLEADING*, IV.

For Index to Notes in American Decisions and American Reports, see Volume L.

VESSELS.

Character of, as affecting jurisdiction of admiralty, see ADMIRALTY, 6.
Collisions between, liability for, see SHIPPING, V.
Enforcement of liens upon, see SHIPPING, IV.
Power of master to sell, see SHIPPING, 33.
Sales of, see SHIPPING, 6, 7.
Seizure of, for violation of municipal law, see INTERNATIONAL LAW, 3.
Taxation of, see TAXES, 17.
Title to and ownership of, see SHIPPING, I.
When common carriers, see CARRIERS, 5.

VESTED.

Estates, what are, see ESTATES, 7.
Remainders, how created, see DEVISE, 24.
What legacies are, see LEGACIES, 6.

VESTED RIGHTS.

Laws in derogation of, see STATUTES, 18.

VETO.

Passing bill over, see STATUTES, 7.

VIDELICET.

Office of, in pleading, see PLEADING, 2.

VIEW.

Of locus in quo, by jury, see TRIAL, 47, 167.

VIOLATION.

Of city ordinances, penalties for, see MUNICIPAL CORPORATIONS, 22.
Of excise laws, see INTOXICATING LIQUORS, 8-15.
Of exemption laws, remedies for, see EXEMPTION, 163.
Of injunctions, see INJUNCTION, 59, 60.
Of internal revenue laws, penalties for, see REVENUE, 9.
Of trust, remedies for, see TRUSTS, 62.

See BREACH.

VOIR DIRE.

Examining jurors on, see TRIAL, 156.
Examining witnesses on, see WITNESSES, 38.

VOLUNTARY BONDS.

See BONDS, 15.

VOLUNTARY CONVEYANCES.

When fraudulent as to creditors, see FRAUDULENT CONVEYANCES, 5-16.

VOLUNTARY DISSOLUTION.

Of corporation, see CORPORATIONS, 170.
Of partnership, see PARTNERSHIP, 70.

VOLUNTARY NONSUIT.

See TRIAL, 65.

VOLUNTARY PAYMENTS.

Effect of, see PAYMENTS, 12.

VOTE.

By proxy, see CORPORATIONS, 140.
What necessary to enact statute, see STATUTES, 2.

VOTERS.

Bribery of, see ELECTIONS, 16.
Right to vote, see ELECTIONS, 1, 2, 10, 11.

VOUCHERS.

On accounting by personal representatives, see EXECUTORS, etc., 129.

VOUCHING.

Of covenantor, to defend, see COVENANTS, 42.

WAGERS.

[Includes the validity of wagers or bets; the rights and liabilities of stakeholders; and suits founded upon wager considerations. The offense of gaming is under that title.]

Illegality of wager contracts, see CONTRACTS, 96.

Insurance policies in nature of, see INSURANCE, 10, 93.

1. What constitutes a wager.—Wagers at the common law were legal, and might be enforced, unless they were against public policy, or of an immoral tendency, which affected the feelings, interests, or character of a third party, or tended to disturb the peace of society. *Stoddard v. Martin*, 19 D. 643.

Wagers upon the result of an election give to one party a pecuniary interest in the election of a person to office, and to another the same interest in such person's defeat; consequently, such wagers are against public policy, and therefore invalid. *Id.*

Elections are not games within the meaning of the statute against games and gambling devices. *Hickerson v. Benson*, 40 D. 115.

Bets previous to an election, upon its event, or made subsequently, upon matter connected with the canvass, are illegal and void, upon principles of public policy and morality. *Id.*

An instrument given in payment of the purchase price of land, in which the vendee promises to pay to the vendor \$902, if cotton should rise to eight cents by a certain time, and if not, to pay \$500, is not a wager on the price of cotton. *Ferguson v. Coleman*, 45 D. 781.

"By," in such an agreement, must be construed to mean "on or before," and not "on or near." *Id.*

Horse-racing is a game, within the meaning of the statute of Missouri to restrain gaming. *Shropshire v. Glascock*, 31 D. 189.

A contract to forfeit a certain amount in case of a failure to run a horse-race is a valid contract, and an action may be maintained upon a note given for such amount. *Kirkland v. Randon*, 58 D. 94.

For Index to Notes in American Decisions and American Reports, see Volume I.

A prize offered for a horse that will trot in the best time less than a given time is not a wager. *Misner v. Knapp*, 57 R. 6.

2. Invalidity, generally.* — Idle wagers and all gaming contracts may be properly held to be void. *Monroe v. Smelly*, 78 D. 541; and all wagers upon matters in which the parties have no interest beyond what is created by the wager itself. *Holt v. Hodge*, 25 D. 451.

Wagers upon an abstract question of law, not arising out of pre-existing circumstances, or upon the manner in which public officials have executed their trust, although not immoral *per se*, will not be enforced by a court of law. *Smith v. Brown*, 49 D. 748.

Wagers contrary to principles of morality or sound policy are not recoverable. *Rust v. Gott*, 18 D. 497. Therefore, an action upon a check shown to have been given in pursuance of a bet cannot be maintained. *Edgell v. McLaughlin*, 36 D. 214.

Wagers are recoverable, unless prohibited by statute, contrary to public policy, or calculated to affect the interest, character, or feelings of third parties. *Johnson v. Fall*, 65 D. 518.

A wager that a railroad will not be completed within a given time is valid at common law, and not prohibited by the laws of Illinois as having an immoral, indecent, or illegal tendency. *Beadles v. Bless*, 81 D. 231. And questions as to its effect upon the advancement of the work, and upon the interests of the public or of third parties are questions of fact, which cannot be decided on demurrer. *Johnson v. Fall*, 65 D. 518.

A wager on the event of an election, being against principles of public policy, is void, and no action can be maintained for its recovery. *Busa v. Riker*, 4 D. 292; *Jeffrey v. Ficklin*, 36 D. 456; though made after the election, but before the canvass is completed; because the tendency is to promote inquiry into the legality of elections, and thus to excite dissensions and possible disturbances among the people. *Rust v. Gott*, 18 D. 497.

A wager as to the result of a presidential election in another state, made after the vote has been cast, is not void as being against public policy. Such a wager was not void at common law, and is not forbidden by the Illinois statute. *Smith v. Smith*, 74 D. 100.

A wager on the result of a presidential election is, in Vermont, wholly illegal, and if made in Canada by citizens of this state, for the purpose of evading our laws, is as invalid as if made here. *Tarleton v. Baker*, 44 D. 358.

A wager on a horse-race is void as against morals and public policy. *Gridley v. Dorn*, 40 R. 110; *Dunman v. Strother*, 46 D. 97.

A check given to an agricultural society to enable the drawer to enter his horse in competition in "a trial of speed" at an ex-

hibition, for a premium offered by the society, is void under the statute against wagers and horse-racing. *Comly v. Hillegass*, 39 R. 774.

A wager as to whether an execution can be collected is not "gaming," nor a wager upon a "game," but is void as against public policy, as between the original parties, but valid as to a bona fide transferee of a check given therefor. *Boughner v. Meyer*, 40 R. 139.

3. Action to recover back.* — Money bet on an election which is paid over by the stakeholder to the winner, contrary to the orders of the loser, after the result of the election is known, may be recovered back. *McAllister v. Hoffman*, 16 D. 556.

Horse-racing or horse-trotting is a game within the statute "to prevent gaming for money or other property." And money lost by betting on a trotting-match may be recovered back by the loser. The statute, with respect to the party losing, is remedial, not penal. *Ellis v. Berle*, 36 D. 726.

4. When the action will not lie. — Bet or wager lost, and the money or property delivered to the winner, courts will not aid in its recovery, both parties being equally derelict. *Allen v. Dodd*, 40 D. 632; *Hockaday ad. Willis*, 40 D. 606; *Doune v. Quarles*, 12 D. 337; unless made recoverable by statute. *Stacy v. Foss*, 36 D. 755; *Allen v. Dodd*, 40 D. 632; *Babcock v. Thompson*, 15 D. 235.

The title of goods lost at play and paid down is good in the hands of the winner, even against the loser, after expiration of three months. *Hockaday ad. Willis*, 40 D. 606.

Plaintiff and defendant made a wager as to the result of a presidential election, in another state, and deposited the money with a stakeholder. The plaintiff lost, and the stakeholder paid the money to the defendant. In an action to recover the money back, — held, 1. That the wager was against public policy and void; 2. That the plaintiff could not recover back the money. *Gregory v. King*, 11 R. 56.

5. Who may sue. — A statute provided that any person who lost money to another in gaming might recover it. Held, not to apply to a proprietor of a faro bank who lost money to persons betting against the bank. *Brown v. Thompson*, 29 R. 416.

A statute giving a right of action for money lost at gaming, to the loser, "or any other person," does not include the loser's wife. *Moore v. Settle*, 56 R. 889.

6. Position of stakeholders. — A stakeholder of money wagered upon the result of an election cannot pay over the money lawfully, in opposition to the order of his principal; nor can he refuse to deliver

* See note on the validity of wagers, 11 R. 56, 58.

* See note on actions on wagers, 12 D. 329, 330.

For Index to Notes in American Decisions and American Reports, see Volume I.

up the wager if demanded before the determination of the final result of the election. *Jeffrey v. Ficklin*, 36 D. 456.

Where one gives money to another to bet upon an election, and latter so uses it by depositing it with a stakeholder, this is an illegal act, but the party depositing it may retract his illegal act. The money is not forfeited for the benefit of the stakeholder, but he holds it as bailee of the depositor, who may resume it at any time before it is paid over to the winner. *Hardy v. Hunt*, 70 D. 787.

Money in hands of a stakeholder, wagered on an election, is a deposit without consideration, subject to be reclaimed by the depositor on demand, or to attachment by his creditors, at any time before it is paid over, whether such money belonged to the depositor or was given to him for the purpose of being staked, betting on elections being prohibited by statute. *Reynolds v. McKinney*, 99 D. 602.

Notice to a stakeholder by one of the parties to a wager, to retain the money deposited in his hands, arrests it, and he may not afterwards pay over the money to either, whatever the determination of the event upon which depends the wager. *Shackleford v. Ward*, 36 D. 435.

A stakeholder is not a party in interest to a contract, nor is he always necessarily apprised of the nature of the contract between the parties depositing money with him. *Alford v. Burke*, 68 D. 449.

A stakeholder is bound to pay a deposit to the party entitled to it, without any express promise by him, as the law implies one if the contract was legal between the parties making the deposit. *Id.*

Parties to an illegal and void contract may disaffirm it, and claim from the stakeholder their deposits. *Id.*

A stakeholder cannot set up in defense the illegal contract when defending against a party who claims his deposit. *Id.*

A stakeholder cannot assume the position of one of parties to contract, and call on the court to recognize its validity and sustain the title of the other party to the money. *Id.*

Neither a stakeholder nor a party to the illegal contract can set it up as a test of his right to recover; and although the stakeholder might retain the deposit as against the winner, the winner may, by repudiating the contract, recover his deposit from the stakeholder on his refusal to pay. *Id.*

A stakeholder is the proper person to decide who has won a wager, unless the parties have fixed upon some other tribunal to determine that question. *Smith v. Smith*, 74 D. 100.

7. Their liabilities. — Money held by a stakeholder on a bet may be recovered by the depositor, provided he notifies him before delivery of the stakes not to pay over.

Gilmore v. Woodcock, 31 R. 255. S. P., *Wilkinson v. Tousley*, 10 R. 139; *Bledsoe v. Thompson*, 57 D. 777; *Tarleton v. Baker*, 44 D. 358; *Hickerson v. Benson*, 40 D. 115; *Stacy v. Foss*, 36 D. 755.

The rule that a person may declare his dissent from an illegal wager before the event happens, and recover back his money, does not apply if the relative condition and chance of the two parties is materially changed, or the value of the risk is greatly altered; then the rule *potior conditio defentis* prevails. *Hickerson v. Benson*, 40 D. 118.

The New York statute to prevent betting and gaming gives the party to a wager an unconditional right to recover his stake from the stakeholder. The fact that the stakeholder, after the determination of the wager, paid the stakes to the winner by direction or consent of the loser, is no defense to an action afterwards brought by the latter, under the statute. *Storey v. Brennan*, 69 D. 629.

A special demand on a stakeholder is not necessary, before instituting suit to recover the money deposited, if he has informed the depositor that he has paid over the money which it is sought to recover, to the other party to the wager, in opposition to instructions previously given. *Shackleford v. Ward*, 36 D. 435.

Where a wager is made on the result of a public election, and the stakeholder pays the stake after the result is generally known and publicly announced, but before the issue of the official certificate, the loser, having, after the payment, but before the issue of the certificate, notified him not to pay, may maintain an action against him for his stake. *Lewis v. Bruton*, 49 R. 816.

An action will not lie against a stakeholder on an election bet by the losing party, if the stakeholder has paid over the money, after the election, in good faith to the winner. *Bates v. Lancaster*, 51 D. 696.

Plaintiff and another deposited money with defendant, as stakeholder, upon an unlawful wager. Plaintiff, claiming to have won, demanded the entire deposit of defendant; but defendant refused to comply with the demand, and paid the money to the other party. In an action by plaintiff to recover the amount deposited by him, — held, that plaintiff's right was not defeated by the fact that his demand covered the whole amount of the stake, and was made an affirmation of the wager. *Hale v. Sherwood*, 16 R. 37.

A joint action to recover money deposited on an illegal wager cannot be maintained against the stakeholder by several contributors to the fund. *Mytinger v. Springer*, 38 D. 774.

A stakeholder paying over money without the consent of a majority of the judges,

For Index to Notes in American Decisions and American Reports, see Volume I.

is liable to the winner, in case he cannot collect the bet from the loser. *Dauterive v. Broussard*, 39 D. 550.

Where a principal places his money in hands of agent to bet upon election, and it is so used by the agent, who deposits it with a stakeholder, where it is attached by the creditors of the agent, and the stakeholder was cited to appear before the justice's court out of which the attachment issued, and knowing the facts, he stated them, whereupon a judgment was rendered that he pay the money over to the creditors, which he did, the principal may maintain an action against the stakeholder for the money, and the judgment of the justice's court is no protection to him, as he should have defended against the same in some manner, interpleaded, or appealed therefrom. *Hardy v. Hunt*, 70 D. 787.

8. Claims founded upon gaming considerations. — A bond given for money won at horse-racing, or to secure a forfeiture for failure to run a horse-race, is void. *Shropshire v. Glascock*, 31 D. 189.

A bond given to secure payment of money lost by betting on an election is void, as being against public policy, although neither of the parties were voters. *Bettie v. Reynolds*, 55 D. 417.

A bond given to indemnify a stakeholder against all liability for giving up to the winner money deposited with him on an election bet is void, and no action can be sustained thereon. *Columbia B. & B. Co. v. Haldeman*, 42 D. 229. But if the bond be assigned to a bona fide purchaser for value, and the obligor convey to him, neither he nor his heirs or representatives can afterwards question the consideration, where the statute against gaming violates deeds only in the hands of the winner. *Chiles v. Coleman*, 12 D. 396.

A court of equity will not enjoin a judgment at law rendered on a promissory note given for the price of a horse originally lost at gaming, and actually delivered to the winner, but afterwards sold to the loser upon his executing to the winner the note for the price which he agreed to pay on the repurchase. *Bell v. Parker*, 28 D. 55.

A delivery of the property to the winner, in discharge of the gaming contract, changes the right in the property as between the parties; and the repurchase thereof by the loser does not renew the gaming contract so as to make the price agreed to be paid, the thing actually lost, nor so as to make the agreement to repay void as being founded on a gaming consideration. *Id.*

Gaming transactions are viewed with stronger condemnation by the courts of South Carolina than by the English courts. *Bledsoe v. Thompson*, 57 D. 777.

Gaming is prohibited by statute in California. The consideration for a debt contracted

thereat is illegal as between the parties, and as to all persons except bona fide holders without notice. A check given in payment of such debt is void. *Fuller v. Hutchings*, 70 D. 748.

The collection of money won at "ten-pins" will not be enforced by the courts. *Monroe v. Smelly*, 78 D. 541.

The common-law rule that an action will lie on a wager, though parties have no previous interest in the subject of the wager, is subject to the qualifications that no action will lie on a wager contrary to public policy, or immoral, or in any respect tending to public detriment, or if it affects the interests, feelings, or character of third person. *Id.*

Evidence that a wager was public talk and influenced subscription to railroad stock is not admissible in an action on a wager that a railroad will be completed within a certain time. *Beadles v. Bless*, 81 D. 231.

One who trains a horse for a race, on which money is bet, cannot recover for his services, whether the race is run or not, as such services are in aid of a gaming transaction, which a horse-race is, and which is in violation of law. *Mosher v. Griffin*, 99 D. 541.

A horse-trainer may recover money laid out and expended for feed and shoes for a horse which he is fitting for a race, on which money is bet; for whether the race is run or not, it is necessary that the animal should be fed and shod, and such items are not necessarily a part of the gaming transaction. *Id.*

Chancery has jurisdiction to restrain the enforcement of an unexecuted and illegal wager contract, but it must be clearly alleged and proved that the stakes are not paid over. *Petillon v. Hipple*, 32 R. 31.

C. sold and delivered to H. a horse upon his written agreement to pay \$140 one day after the re-election of G. as President of the United States, but conditioned to be void if G. was not re-elected. Before election, H. tendered the horse to C., and demanded back his agreement, but C. refused to receive the horse or deliver up the agreement, and H. retained the horse as bailee. G. being re-elected, C. demanded the price, and H. refusing, but being ready and willing to return the horse, C. sued for the value, under a statute prohibiting wagers and permitting such action to be brought by the loser. *Hell*, that the transaction was a wager, and void; that H. was at liberty to rescind by surrendering the horse; and that he was not liable under the statute unless he had subsequently converted the horse. *Harper v. Orain*, 38 R. 589.

WAGES.

Forfeiture of, see MASTER AND SERVANT, 5
Rights of seamen as to, see SHIPPING, 42-45.
When exempt from attachment, see ATTACHMENT, 40.

For Index to Notes in American Decisions and American Reports, see VOLUME I.

WAIVER.

- Of benefit of statute of frauds, see **CONTRACTS**, 60.
- Of challenge to juror, see **TRIAL**, 30, 157.
- Of condition against double insurance, see **INSURANCE**, 44.
- Of constitutional provisions, see **CONSTITUTIONS**, 15.
- Of costs, by accepting payment of debt, see **COSTS**, 4.
- Of defects in form of action, or in process and pleading, see **ACTIONS**, 13-15.
- Of defects in levy of execution, see **EXECUTION**, 50.
- Of defects in pleadings, see **PLEADING**, 186-189.
- Of defense of infancy, see **INFANTS**, 54.
- Of demand and notice of dishonor, see **BILLS AND NOTES**, 221-224.
- Of demand and notice, proof of, see **BILLS AND NOTES**, 288.
- Of deviation, by insurers, see **INSURANCE**, 143.
- Of errors, on trial, see **ERROR**, 25, 26.
- Of exemption from attachment, see **ATTACHMENT**, 43.
- Of exemption from execution, see **EXECUTION**, 162.
- Of forfeiture of lease, see **LEASES**, 34.
- Of grounds of forfeiture of franchise, see **CORPORATIONS**, 175.
- Of homestead rights, see **HOMESTEADS**, 30.
- Of jury trial, see **TRIAL**, 119.
- Of lien of execution, see **EXECUTION**, 70.
- Of liens, generally, see **LIENS**, 8.
- Of mechanic's lien, see **MECHANIC'S LIEN**, 15.
- Of notice and proofs of loss, by insurers, see **INSURANCE**, 31, 32.
- Of objections, generally, see **TRIAL**, 57.
- Of objections on appeal, see **APPEAL**, 48-63.
- Of objections on criminal trial, see **APPEAL**, 164.
- Of objections to depositions, see **DEPOSITIONS**, 23.
- Of objections to jurisdiction, see **JURISDICTION**, 15.
- Of performance of conditions by assured, see **INSURANCE**, 21, 22.
- Of performance of contracts, see **CONTRACTS**, 117.
- Of preliminary proofs of loss by fire, see **INSURANCE**, 62.
- Of preliminary proofs of loss under marine policy, see **INSURANCE**, 175.
- Of privilege as to criminal testimony, see **WITNESSES**, 117.
- Of privilege from arrest, see **ARREST**, 13.
- Of privileged communications, see **ATTORNEY AND CLIENT**, 52.
- Of rights founded on abandonment to insurer, see **INSURANCE**, 161.
- Of strict performance, see **CONTRACTS**, 132.
- Of strict tender, see **TENDER**, 18.
- Of tort, and suit in *assumpsit*, see **ASSUMPSIT**, 17, 18.
- Of trial by jury, see **TRIAL**, 3.

Of vendor's lien, see **VENDOR AND PURCHASER**, 53.

WAR.

[Includes the effect of war upon the rights, liabilities, and remedies of citizens of the belligerent countries or states, and of neutrals; also, its effect upon judicial proceedings. Decisions relating to the late civil war form the bulk of the title.]

- Act of enemy, when excuses carrier, see **CARRIERS**, 26.
- Effect of, on payment of premiums on life policies, see **INSURANCE**, 74.
- Effect of, to dissolve partnership, see **PARTNERSHIP**, 74.
- Effect of, to excuse demand and notice of dishonor, see **BILLS AND NOTES**, 220.
- Effect of, to suspend statute of limitations, see **LIMITATIONS OF ACTIONS**, 79.
- Judicial notice of existence of, see **EVIDENCE**, 24.
- Notes in aid of public enemy, see **BILLS AND NOTES**, 71.
- Taking property in time of, see **EMINENT DOMAIN**, 27.

I. GENERAL PRINCIPLES.

II. THE LATE CIVIL WAR.

I. GENERAL PRINCIPLES.

1. What amounts to war.*—A state of peace and the continuance of treaties is presumed by all courts of justice until the contrary is shown. *People v. McLeod*, 37 D. 323.

Private hostilities, however just or general, do not constitute a legitimate and public state of war. *Id.*

War may be public, private, or mixed. Private war is unknown in civil society, except so far as it may be exerted by way of defense between private persons. To public war, at least two nations are essential parties. Mixed war can be carried on only between a nation on one side and private individuals on the other. *Id.*

The right of a nation or any of its citizens to invade another nation and harm its property or citizens does not exist until public war is lawfully denounced. *Id.*

Public war is of two kinds: 1. By public declaration; 2. By war denounced without such declaration. The first is called solemn or perfect war, and extends to all the inhabitants of both nations. The second is styled unsolemn or imperfect war, because made by special declaration, and limited to particular objects, beyond which it does not authorize measures of hostility. *Id.*

The employment of soldiers to aid in executing process or in punishing or arresting individuals does not constitute a state of public war. *Id.*

War is simply an exercise of force by bodies politic against each other for the pur-

* Levying war against United States, what is, see note. 94 D. 579-581.

For Index to Notes in American Decisions and American Reports, see Volume L.

every species of private contract made with subjects of the enemy during war is unlawful. *Billgerry v. Branch*, 100 D. 679.

Contracts entered into between belligerent enemies are absolutely null. *Hennes v. Gilman*, 96 D. 396. No valid contract can exist, nor any promise arise by implication of law, from any transaction with an enemy during hostilities, and if, after the war has ceased, an action is brought against a citizen upon any contract arising out of such illicit intercourse, the defendant may set up the illegality of the transaction as a defense. *Dorsey v. Kyle*, 96 D. 617.

11. — upon rights of property. — War does not of itself suspend at once and everywhere constitutional guaranties of liberty and property. *Johnson v. Jones*, 92 D. 159.

12. — upon commercial intercourse. — During the existence of war between independent nations, all communication, correspondence, and intercourse between the citizens of the belligerent powers, except such as may be warlike in its character, or licensed by the sovereign power, must absolutely terminate; and all contracts and agreements between citizens of one of the belligerent powers with those of the other, unless brought within the above exception, are illegal and void. *Mims v. Armstrong*, 97 D. 472.

Intercourse which is prohibited by the law of nations between citizens of two belligerents during a state of war includes any act of voluntary submission to the enemy, or receiving his protection, as well as any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. *Kershaw v. Kelsey*, 97 D. 124.

Cases defining what intercourse between belligerents is prohibited by the law of nations cited and discussed at length. *Id.*

13. — upon bills of exchange. — A check or bill of exchange drawn by a citizen of one belligerent upon a citizen of the other during war is unlawful and void. *Billgerry v. Branch*, 100 D. 679.

14. Suits by and against alien enemies.* — Enemies in war have no right to enter and use the courts of the adverse party; but it is competent for the legislature to permit them to do so, on such terms as it may prescribe. *Peerce v. Carakadon*, 6 R. 281.

* Alien enemies, who are, see note, 88 D. 779, 780.

Contracts with alien enemies, and right to sue thereon in our courts, see note, 96 D. 624-632.

As a general rule, an alien enemy is not allowed to sue in the courts of the country with which he is at the time in hostility. This, however, is a personal disability, of temporary duration, and is founded upon reason and policy, and to some extent upon the necessity of the case. *Dorsey v. Kyle*, 96 D. 617.

An alien enemy may be sued at law, though he may not sue, as neither reason nor policy forbids judicial proceedings against an alien enemy in favor of a friendly citizen. *Id.*

The plea of an alien enemy goes only to the disability of plaintiff. It is not a matter of privilege, but a disability that suspends the right to maintain an action in the courts of the country to which the party is an enemy. There is no such thing as a plea by the defendant of his own alien enmity to the government in whose courts he is sued. *Id.*

Where a debtor has left the state and become an alien enemy, his being such does not make him the less a non-resident debtor, and his position as an alien enemy does not suspend the right of his creditors to proceed by attachment or otherwise against property which he left in the state. All the remedies provided by law against the property of an absent or non-resident debtor remain open to them, and if those remedies are pursued in the mode prescribed by law, they will bind such debtor, though he be an alien enemy. *Id.*

II. THE LATE CIVIL WAR.

15. What constitutes a state of civil war. — The late rebellion was a civil war. *Hedges v. Price*, 94 D. 507.

When a party in a rebellion occupy and hold a certain portion of territory in a hostile manner, have declared their independence, have cast off their allegiance, have organized armies, and have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. *Lewis v. Ludwick*, 98 D. 454.

16. Commencement and end of the late civil war. — Rebellion in this country had matured into civil war on the 10th of May, 1862. *Bell v. Louisville etc. R. R. Co.*, 89 D. 632.

17. Military arrests. — Belligerent rights will not justify the citizens adhering to a belligerent power, or the common soldiery, without authority of law or the order of their military commander, in arresting and imprisoning or using violence towards citizens not arrayed in hostility to their cause. *Cochran v. Tucker*, 91 D. 276.

Any soldier has the right, in time of war, to arrest a belligerent engaged in acts of hostility toward the government, and lodge him in the nearest military prison, and to use such force as may be necessary for that purpose, even unto death. This is the law of war. *Johnson v. Jones*, 92 D. 129.

For Index to Notes in American Decisions and American Reports, see Volume I.

The commanding officer may arrest a person, whether a citizen or alien, under authority of martial law, whom he finds within his lines giving aid or information to the enemy, and detain him so long as may be necessary for the security or success of his army. *Id.*

A belligerent is the subject of a hostile power, and his character in that regard depends upon that of the community to which he belongs. *Id.*

The people of the Confederate States were recognized as belligerents during the civil war, but citizens and residents of the Northern states, not engaged in war, were not belligerents, and subject to arrest by the federal authorities as prisoners of war, although they were domestic plotters against the government of the United States, in full sympathy with the confederates, and rendering them moral co-operation and aid. *Id.*

A defendant in an action for trespass for an illegal arrest may prove in mitigation of vindictive or exemplary damages, and for the purpose of rebutting the presumption of malice, that the arrest was made by virtue of an order of the President of the United States, in time of war, for alleged disloyal practices of the plaintiff, although a special plea setting up such order is not a bar to the action. *Id.*

18. **Martial law.*** — Military law consists of rules prescribed by Congress for the government and discipline of troops, and applies only to persons in the military or naval service of the government. *Johnson v. Jones*, 92 D. 159.

Martial law is not law in any proper sense, but merely the will of the military commander, to be exercised by him only on his responsibility to his government or superior officer; and when once established, it applies alike to citizen and soldier. *Id.*

Martial law must be permitted to prevail on the actual theater of military operations in time of war as an unavoidable necessity, resulting from the very nature of war. *Id.*

The government may be justified in treating a district as virtually attached to the theater of military operations, and in enforcing martial law therein, so far as may be necessary to the public safety, if in a district remote from the theater of military operations the popular sentiment is so disloyal to the government that one who aids and abets the public enemy cannot be rendered powerless for mischief and brought to justice by the arm of the civil law. *Id.*

The exercise of martial law can be defended upon no ground beyond its enforcement on the actual field of military operations, which is the result of an overmastering necessity, and its establishment in districts which, though remote from the seat of war,

are yet so far in sympathy with the public enemy as to obstruct the administration of the laws through civil tribunals, and render a resort to military power a necessity, as the only means of restraining disloyalty from overt acts, and preserving the authority of the government. *Id.*

Martial law cannot be resorted to in that part of a country where the civil courts, in the midst of loyal communities, are exercising their ordinary jurisdiction, although the government may be prosecuting a war for the suppression of a rebellion in other parts of the country; and if a person is arrested in such a loyal community, and deprived of his liberty by order of the President of the United States as commander-in-chief, and as incident to a state of war, without legal process, for alleged disloyal practices therein, such arrest will be unlawful, and the parties making it will be liable to an action therefor. *Id.*

Congress has no power through a retrospective law to deny all redress to a person whose property or liberty was illegally taken under a military order. *Id.*

19. **Rights of the belligerents.** — In a war between independent sovereignties, abuse of belligerent power by soldiers in the service of their nation cannot be inquired into by the judiciary of the other, but this rule does not apply to a domestic war between the people of the same nation. *Christian County Court v. Rankin*, 87 D. 505.

The Kentucky statute, act of 1864, providing a "civil remedy for injuries done by disloyal persons" does not, so far as it applies to soldiers, intentionally or constitutionally extend to belligerent rights, but embraces only trespasses and spoliation committed by them in their own individual right and for their own benefit. *Christian County Court v. Rankin*, 87 D. 505; *Bell v. Louisville etc. R. R. Co.*, 89 D. 632.

The destruction of the cars of a railroad by confederate forces is a lawful exercise of belligerent right when it was necessary to prevent the transportation of federal troops and cut off their supplies. *Bell v. Louisville etc. R. R. Co.*, 89 D. 632.

The rights of belligerents, as recognized by international law between two independent sovereign powers, do not apply to a civil war between the states. Therefore, the arrest and seizure of the person and property of a private citizen, not in arms, but engaged in his ordinary occupation, by confederate soldiers under orders from their superior officer, are unlawful, and render all persons trespassers who were present, seizing, assisting, aiding, or abetting, and they are liable for the consequences of their unlawful acts. *Yost v. Stout*, 94 D. 194.

Government has the sovereign right to repress a rebellion by all the machinery of its civil power, and when that fails, the bel-

* See note on martial law, 92 D. 180-182.

For Index to Notes in American Decisions and American Reports, see Volume I.

ligerent right to do it by military force. *Hedges v. Price*, 94 D. 507.

The government, in asserting its belligerent rights in suppressing a rebellion, thereby gives rebels no rights which they did not have before, further than the government may choose to accord those rights, nor does the law of nations confer any rights upon the rebels which the established government refuses to concede. *Ib.*

The rules, rights, and immunities of international wars do not appertain in civil wars, except so far as reason and necessity require, and the two conditions harmonize. *Ib.*

The rules, rights, and immunities of international wars do not appertain in civil wars to the extent of relieving individuals engaged therein from personal responsibility for acts committed by them under the authority of the rebel government. *Ib.*

The war of rebellion in the United States, commencing in 1861, was a civil war, producing all the consequences *inter partes* of an international or public war, and the appellant in this case, who allied himself with the Southern cause, and joined the confederate army, and occupied towards the citizens of Maryland an enemy's status, was held to be an alien enemy. *Dorsey v. Dorsey*, 96 D. 633.

Belligerents and belligerent rights are properly applicable only to sovereign powers engaged in war. In all other cases they apply *sub modo*, and in a limited and qualified sense. In cases of rebellion, where one party strives to obtain independence, and the other to reduce the insurgents to obedience, no such recognition occurs. Yet in the latter case a concession to the extent of humane treatment and exchange of prisoners is recognized as a belligerent right in favor of the insurgents. *Smith v. Stewart*, 99 D. 709.

In an action of trespass for inducing confederate soldiers to cut and take plaintiff's timber, etc., it appeared that the plaintiff and defendant owned adjoining farms; that during the war the surrounding country was at times occupied by the confederate army, which, on one occasion, cut a large amount of valuable timber from plaintiff's farm, and took and used other of his property at the suggestion and by the advice, as was alleged, of the defendant, who sympathized with the confederate cause. *Held*, that the cutting of the timber and taking of the property being by virtue of belligerent rights, the plaintiff could not recover. *Held*, further, that the belligerent rights of both parties to the war were the same and equal in extent. *Smith v. Braxton*, 2 R. 678.

A citizen assisting confederate soldiers in the capture of a federal soldier does not thereby render himself liable to a civil action by the captive. *Wright v. Winningham*, 5 R. 35.

30. Recognition of insurgents. — The admission by us of the existence of a civil war between two foreign powers entitles both to the sovereign rights of war, and to claim from us the obligations of neutrality, although we have not acknowledged the independence of one of the powers. *Walley v. Schooner Liberty*, 32 D. 114.

The federal government was the sovereign, and the only sovereign, in the civil war, for recognizing and regulating belligerent rights, and on that subject no single state had any sovereignty. *Price v. Poynter*, 89 D. 631.

The federal government did not recognize the confederate forces as belligerents *de jure*, but practically as belligerents *de facto*, and as such reserved the power to impose such terms and conditions upon them, on the suppression of the rebellion, as the future peace and security of the country demanded. *Foot v. Stout*, 94 D. 194.

After the commencement of hostilities in the civil war between the confederate forces and those of the federal government, the latter granted to the rebellious forces belligerent rights to exchange prisoners, make cartels, and pass flags of truce; but at no time during the rebellion did the federal government recognize the existence of the confederate government, nor grant it the authority or right to arrest or take the persons or property of private citizens. *Ib.*

The government of the United States never acknowledged or recognized the Confederate States as a political power, or as having any right or authority to command the obedience of any one. *Hedges v. Price*, 94 D. 507.

The government of the United States conceded belligerent rights to the Confederate States only to the extent of treatment and exchange of prisoners, and not to the extent of relieving individuals from personal responsibility for acts committed by them under the authority of the confederate government. *Ib.*

The government of the United States never acknowledged insurgents as a government *de facto*, or in any sense a political power. *Hawver v. Seldenridge*, 94 D. 532.

The recognition of the government of a revolted state or province by a neutral power is *casus belli* for the power claiming dominion over the revolted country, if such recognition precedes the exhibition by the newly formed government of its ability to maintain its independence. *Smith v. Stewart*, 99 D. 709.

The blockade of the Southern ports and the exchange of prisoners during civil war, by the United States government, though the exercise of a belligerent right, cannot be construed into a recognition by the federal government of the Confederate States as a belligerent power or *de facto* government. *Ib.*

For Index to Notes in American Decisions and American Reports, see Volume I.

21. Powers of military officers. — A military officer's right to seize and destroy or appropriate private property never exists except in case of urgent necessity for the public service, or to prevent it from falling into the hands of the public enemy. *Farmer v. Lewis*, 89 D. 610; *Yost v. Sloat*, 94 D. 194.

The order of a military commander during the late civil war requiring a bank to pay to him certain moneys was equivalent to a garnishment of such moneys. *Mandeville v. Bank of Louisiana*, 92 D. 641.

The payment made by a bank of moneys due one of its depositors, to a military commander, pursuant to his order, operates as a discharge of such bank, and such depositor cannot recover his deposit from the bank. The bank had no right to question the legality or propriety of the order, and no power to resist its enforcement. *Id.*

War existed in Tennessee after the proclamation of the President and the act of Congress in 1861 recognizing the existence of war, and declaring Tennessee to be one of the states in insurrection and rebellion, and the military authorities of the United States were properly holding a post in that state; and an officer of the United States service in command of the post had the right to exercise all the discretionary powers of a commander, coming within the scope of his military duty, for the proper exercise of which discretion he was responsible alone to his superiors in command. *Sutton v. Tiller*, 98 D. 471.

A commander of a detached post, during the existence of the war, has for the time and within the limits of his command the same powers and discretion as the commander of a department; and if, in the discharge of what he regarded as his duties as commander, he saw proper to take a pistol from a person, and turn it over to the government, either upon the ground that it was government arms, or because in his opinion the safety of his command or post required him to disarm the person, then he would not be liable in damages for the act before the courts of the country. The act is to be taken, not as the act of the individual, but as the act of the government, whose sovereignty he represents. *Id.*

A military commander would be liable in damages if he made use of his military position as a mere pretext to enable him to extort private property for his own use, or was prompted by a spirit of wantonness and oppression. *Id.*

Whatever the President of the United States as commander-in-chief might do, if personally present, may be done by the superior officer in command of any district, unless restrained by orders, or by the peculiar nature of the service in which he is engaged. *Heffernan v. Porter*, 96 D. 459.

An action for false imprisonment will lie against a confederate officer, who imprisons a citizen while acting in his military capacity; and in such an action the plea of belligerent rights is no defense, nor is the officer's liability affected by a pardon granted to him, by the President of the United States, for offenses arising by reason of participation in the rebellion. *Caperton v. Martin*, 6 R. 270.

A sheriff paid the surplus of a sale on execution to another than the person entitled thereto, by order of the military authorities in Missouri. In an action on the sheriff's bond to recover the amount, — held, that the section of the state constitution providing that no person should be prosecuted for any act done in pursuance of military authority was void in such a case, as impairing the obligation of contracts. *State v. Gatzweiler*, 8 R. 119.

The statute of limitations as enacted by Congress (12 Stats. at Large, 757), limiting actions for wrongs done, etc., under military authority, to two years, is applicable alike to cases in the federal and state courts. *Id.*

22. Validity of captures. — The distinction between privateering and piracy is the distinction between captures *jure belli* under color of governmental authority, and for the benefit of a political power organized as a government *de jure* or *de facto*, and mere robbery on the high seas committed from motives of personal gain, like theft or robbery on land. In the one instance the acts committed inure to the benefit of the commissioning power; in the other, to the benefit of the perpetrators merely. *Fifield v. Pennsylvania State Ins. Co.*, 86 D. 523.

Capture by a privateer in commission under the so-called government of Confederate States was held not to be piracy, for the reason that the President of the United States recognized such government, and the vessel as a privateer thereof, by exchanging the crew of such vessel, which had been subsequently captured, as prisoners of war. *Id.*

The capture of a town is not an unlawful act in a military sense, but is allowable by the laws of war between antagonistic parties recognized as belligerents. *Witherspoon v. Farmers' Bank*, 87 D. 503.

The plea of a belligerent right will not justify the capture or destruction of such public property as court-houses, churches, and property of literary institutions, unless used for some military purpose by the captor's enemy. *Christian County Court v. Rankin*, 87 D. 506.

The confederate forces became the owners of the property captured by them from the United States, and the government, being thus lawfully deprived of title, could only acquire it again by recapture from the enemy, or by repurchase. *Cesena v. Thurman*, 89 D. 628.

For Index to Notes in American Decisions and American Reports, see Volume I.

The laws of civilized warfare entitle each party in a civil war to same right of capture or destruction of the enemy's property; and when either the capture or destruction of property by one of such belligerents is lawful, it is equally lawful by the other; and if unlawful by one, it is equally so by the other. *Bell v. Louisville and Nashville R. R. Co.*, 89 D. 632.

23. Seizures. — One who resided within the lines of the confederate army during the late war might be considered *prima facie* as an enemy of the United States, and his property as enemy's property, and liable to seizure as such. Where the federal lines were extended over his place of residence for a limited time, and the occupation of the latter army was precarious, this does not change his status. But where the occupancy of the federal troops is permanent, a resident within their lines is entitled to the protection of the law, and his property is not subject to seizure, except for such causes as the law of necessity in time of war justifies. *Taylor v. Jenkins*, 88 D. 773.

The private property of a loyal citizen is not subject to seizure and appropriation, even for public use, nor to prevent its falling into the hands of the enemy, unless there existed an absolute necessity for doing so; and when an order is given to take the property, the discretionary power given the officer must be sustained by the facts then existing. *Id.*

An unauthorized seizure of a citizen's property by the military forces, and placing it with other property of the army without marking it or otherwise appropriating it, does not divest the owner's title. *Id.*

24. Blockade. — A violation of a blockade is not deemed a personal offense by the law of nations. It only affects the vessel and cargo; and unless they are captured *in delicto*, the offense is purged. *Saymanaki v. Plassan*, 96 D. 382.

25. Confiscation. — Private property on land, in times of war, is exempt from confiscation, even in case of absolute conquest of the enemy's country. But exception is made in cases of property taken from enemies in the field, or in besieged towns, by levies of military contribution, where the property is contraband of war, or is necessary for military supplies or purposes. *Hawkins v. Nelson*, 91 D. 492.

The act of 1862 of Congress does not *ipso facto* work a forfeiture of property subject to confiscation, or of itself prohibit those engaged in rebellion, or giving aid or comfort thereto, from continuing the title therein; but the forfeiture results from a judgment of a court in proceedings in which the United States is a party, and the proceeds of sale go to the government of the United States. *Galbraith v. McFarland*, 91 D. 281.

The conveyance of land by one engaged in

rebellion against the United States is valid as against all persons except the United States, under the act of 1862 of Congress, and liable only to be contested by the government under a regular proceeding to confiscate the land conveyed. *Id.*

The confederate government and its officers are estopped from calling peaceable citizens of Kentucky enemies, or treating their property as that of enemies, by the fact that that government claimed political sovereignty over the state, provided a government for her, and gave her full representation in its Congress. *Terrill v. Rankin*, 92 D. 500.

The federal act of 1862 authorizing the taking of all sorts of property in the revolting states might have authorized a retaliatory enactment by the confederate government. But in the absence of such enactment, the officers of the confederate government were not authorized to order the taking by force of private property of non-combatant citizens, in violation of the laws of war. *Id.*

Land was seized, confiscated, and sold under the act of Congress of July, 17, 1862, providing for the seizure and confiscation of "the property of rebels." *Held*, that only the life estate was seized and sold, and that a state statute limiting the right of action in such cases would not bar the right of the reversioner to recover possession of such land after the termination of the life estate. *Dewey v. McLain*, 12 R. 418.

An executor during the war received money bequeathed to legatees residing in Indiana, which was afterward confiscated by the confederate government. *Held*, that the confederate government had authority as an exercise of belligerent rights to confiscate the property as of an alien enemy, and that act released the executor from his responsibility therefor. *Newton v. Bushong*, 12 R. 553.

One for a valuable consideration orally agreed with another to assign to him a portion of a deposit in a bank, and at the same time drew and delivered to him his check therefor. This was before the passage of the federal confiscation act. The payee duly presented the check and demanded payment, at the same time informing the bank of the assignment. The bank promised to pay the check on its identification of the payee. The check being presented the next day, payment was refused on the ground that the entire deposit had meantime been seized by the United States government under the confiscation act. In an action against the bank on the check, — *held*, 1. That the assignment could be proved by parol; 2. That the seizure was invalid as to the plaintiff; 3. That the confiscation act does not authorize the seizure of corporate property; 4. That an adjudication of forfeiture by the district court was without jurisdiction.

For Index to Notes in American Decisions and American Reports, see Volume I.

and invalid. *Risley v. Phoenix Bank*, 33 R. 421.

26. Claims for horses lost in the service. — The taking of horses by the confederate forces from a private citizen is excusable, as a lawful exercise of a belligerent right, if they were taken for the public use of the army, under military authority, express or implied, however wrongful in fact. *Price v. Poynter*, 89 D. 631.

The brand "U. S.," on a horse, without brand "L. C.," denoting that it has been inspected and condemned to be sold, is *prima facie* evidence that the horse once belonged to the United States, and requires rebutting evidence to show that it has since passed to some other owner. *Cesena v. Thurman*, 89 D. 628.

Possession by the confederate forces of a horse branded "U. S." raises a presumption that it had been captured by them, which is strengthened, instead of weakened, by the absence of the brand "L. C.," denoting that the horse had been inspected and condemned to be sold by the United States. *Ib.*

Where a horse, the property of defendant, a non-combatant during late war, was taken by a military force into an adjoining county, branded, and abandoned upon plaintiff's premises, who claimed and used him as his own until defendant afterwards, unknown to plaintiff, recovered possession of him, — in order to recover him plaintiff must show that at the time of his capture he belonged to that class of property liable to seizure by the general laws of war, or of the United States, or the orders of the war department. *Hawkins v. Nelson*, 91 D. 492.

27. Validity of statutes passed by insurgent states. — The existence of the state of Alabama as a member of the federal union was not destroyed by the passage of the ordinance of secession. *Watson v. Stone*, 91 D. 484.

The government of the state of Alabama during the war and while under the control of the confederacy was *de facto*. There was an exercise of every function of government, and it was actual in the complete exercise of all its powers. *Ib.*

The legislative acts of the state of Alabama while that state was a member of the confederacy were binding upon its citizens, and will protect those who acted in conformity to them; and such acts will be enforced by the United States after the restoration of its authority, although they were repugnant to the policy of its laws. *Ib.*

The legislative acts of a *de facto* government are valid, so far as they are executed or have had operation, even though its wrongful existence be afterwards decided or ascertained. All executed acts of a *de facto* government stand on as firm a basis as if done by a *de jure* government. *Ib.*

The Mississippi statute prohibiting the

prosecution of actions or suits for debt against southern soldiers who have been called into active service by the state authorities, while such soldiers are or may be engaged in the military service of any of the southern states, is constitutional. *State v. McGinty*, 93 D. 264.

The ordinance of the Mississippi convention of 1861 to raise means for defense of the state, and the tax levied in consequence thereof, were rendered void by the ordinance of the convention of 1865, which declared the fundamental act of the convention of 1861 to be null and void, and the state can assert no rights founded on and proceeding from those acts. *Ib.*

The act of the rebel legislature of Alabama is invalid, because such legislature constituted one of the departments of a state government established in hostility to the constitution of the United States, and cannot be regarded, therefore, in the courts of the United States as a lawful legislature, or its acts as lawful acts. *Ray v. Thompson*, 94 D. 696.

The act of the rebel legislature of Alabama, the tendency or purpose of which is to force the circulation of confederate currency, is illegal, unconstitutional, and wholly without force as a law, as it aided the prosecution of the war of rebellion against the United States government. *Ib.*

The act of December 9, 1862, authorizing guardians, etc., to make loans to the Confederate States, and to purchase and receive in payment of debts confederate currency, is wholly void as being in aid of rebellion against the United States, and money so loaned or received by them will not be credited to them upon a settlement of their accounts. *Hall v. Hall*, 94 D. 703.

Many acts of a legislature are not compulsory commands, except to the courts which are charged with their enforcement. They are only enabling acts; mere permissions under whose authority a person may act or refrain from acting. If he voluntarily acts under them, and they turn out to be unconstitutional or invalid, they afford no protection for his acts. *Ib.*

The exception in the Texas stay laws, as to demands against "alien enemies" and "persons who abandon the country," were intended to apply to citizens of the loyal states in the Union, and to citizens of Texas who were compelled to abandon their homes on account of their fidelity to the national government, and showed such laws to be in aid of the rebellion, and therefore null and void. *Sequestration Cases*, 98 D. 494.

State governments did not cease to exist during civil war, in the states engaged in the rebellion, and their legislation in the exercise of such powers as appertained to them under the United States constitution was valid; but all acts of such governments as were in

For Index to Notes in American Decisions and American Reports, see Volume I.

hostility to the United States, or in disregard or in conflict with its constitution, or intended directly or indirectly to aid the rebellion, were absolute nullities, and they cannot be invoked in support of any rights or for the protection of any persons acting under them. *Id.*

An inferior court was established by an act of the legislature of an insurgent state during the rebellion; after the suppression of the rebellion a judge was elected for six years, and his election was ratified by the legislature. The legislature afterward, and before the expiration of the six years, abolished the court. *Heid.*, that the act was never a valid law; that the legislature had the constitutional right to abolish the court; and that thereafter the judge had no claim to the salary. *Perkins v. Corbin*, 6 R. 698.

28. Provisional or temporary governments. — The order of the military governor of Louisiana, made while the city of New Orleans was under the dominion and control of the federal military authorities, and requiring the judges of other courts of the parish of Orleans to hold the sessions of the fourth and fifth district courts, and to terminate pending cases, gave such judges full authority to exercise in those courts the functions of the judges thereof. *Lanfear v. Meester*, 89 D. 658.

The United States could not make a conquest of its own territory during the civil war, nor by the triumph of arms gain any higher rights over the soil and inhabitants of the revolted district than it enjoyed before the war. The general laws, *proprio vigore*, would extend over the revolted territory, when the rebellion was suppressed and the inhabitants coerced into obedience. *Rutledge v. Fogg*, 91 D. 299.

A revolted territory actually occupied by a military power of the United States was subject to the laws of belligerent occupation, pending the civil war; and its authority being *ex necessitate*, paramount, it might suspend the municipal laws of the territory, or permit them to remain in force. *Id.*

The temporary government and laws for a territory seized and occupied by the United States in time of war may be established by the President, in the exercise of his constitutional power as commander-in-chief of the army and navy, and by the military officers under his authority. *Id.*

A temporary government established by military authority of the United States in time of war, over territory seized and occupied, had power to levy and collect taxes pending the military occupation. *Id.*

Taxes assessed, *flagrante bello*, for municipal purposes by municipal authorities, who held their offices by virtue of the military power of the United States over territory seized and occupied, may be collected

after the belligerent occupation has ceased. *Id.*

The "provisional government of Kentucky," attempted to be established during the civil war, was never in any sense a *de facto* government, never having been recognized by the political department of the United States nor of the state of Kentucky as such; and where the political departments refuse or fail to recognize a government *de facto*, the judiciary never does. *Simpson v. Lovering*, 96 D. 252.

The commander of the military forces of the United States had power, during the civil war, to establish, in any district in the insurrectionary states held in firm possession by force of arms, and during such belligerent occupation, such temporary government as he might deem proper, and to appoint and control the necessary officers and agents, and to prescribe the modes in which such governments should be administered. *Hefserman v. Porter*, 98 D. 459.

The right to establish a government is not dependent upon the right of conquest, but is incident to the mere right of belligerent occupation. A nation cannot conquer its own territory, but it may subdue and occupy such portions of it as are in insurrection; and the right to govern for the time being is necessarily embraced in the right of subjugation and occupation. *Id.*

The right of a military occupant to govern implies the right to determine in what manner and through what agencies such government is to be conducted. The municipal laws of the place may be left in operation, or they may be suspended, and other laws put in force. The administration of justice may be left in the hands of the ordinary officers of the law, or these may be suspended and others appointed in their place. Civil rights and civil remedies may be suspended, and military laws and military courts and proceedings may be substituted for them; or new tribunals may be established, and new legal remedies and civil proceedings may be introduced. *Id.*

A conqueror exercises for the time being powers of a *de facto* government; and the jurisdiction and authority possessed and exercised by the tribunals created by him must depend upon his discretion; and in this respect the act of every military commander is the act of the commander-in-chief until disapproved or annulled, and is of necessity to be obeyed as such. *Id.*

29. Effect of the war on commercial intercourse. — War will operate to render void commercial contracts entered into during its pendency, between citizens of one of the belligerents with those of the other belligerent; will suspend the civil remedy upon existing contracts between similar parties, and will dissolve pre-existing contracts of continuing performance, such as those of

For Index to Notes in American Decisions and American Reports, see Volume I.

partnership and insurance. *Leathers v. Commercial Ins. Co.*, 92 D. 483.

The rules concerning the effect of war upon contracts between belligerents will apply as well to a civil war as to an international war, when the former has been authoritatively recognized by the domestic government, for in such case it becomes, as to its legal incidents and consequences, quasi international. But until so recognized, it is a mere insurrection, and will not affect commercial intercourse and transactions. *Id.*

Contracts and other acts of commercial intercourse between belligerents were not made illegal by the civil war in the United States until after the proclamation of the President of August 16, 1861, issued under authority of the act of Congress of July 13, 1861, providing that the President might issue a proclamation interdicting all commercial intercourse between the citizens of the then and thereby recognized belligerent states. *Id.*

Every person within the military lines of the United States during the late civil war was belligerent with reference to person residing within the confederate lines, and a contract entered into between such belligerents was absolutely null and void. *Hennen v. Gilman*, 96 D. 896.

The acts of Congress and the proclamations of the president prohibiting commercial intercourse during the civil war, with insurrectionary states did not affect agreements made in those states between persons being there, whatever might be their citizenship, for the leasing of real estate therein, the payment of rent there out of the products of the land, or the delivery of and payment for personal property already upon the demised premises, to be used thereon. *Kershaw v. Kelsey*, 97 D. 124; 1 R. 142.

The subsequent unlawful forwarding of cotton raised on the land by the defendant's son does not affect the validity of the agreements contained in the lease. *Kershaw v. Kelsey*, 1 R. 142.

All contracts entered into between citizens of the United States and citizens of the Confederate States during the late civil war were illegal and void, unless licensed or permitted by the President of the United States, not only because all intercourse between citizens of the different belligerents was forbidden by the act of Congress of the United States of July 13, 1861, and the proclamation of the President in pursuance thereof, but also because the principle of international law forbidding all intercourse between the citizens of independent nations during the existence of war was applicable to the war between the United States and the Confederate States. *Mims v. Armstrong*, 97 D. 472.

The demand of payment of a check made

by a resident of Vicksburg upon a bank in New Orleans while commercial intercourse between Vicksburg and New Orleans was prohibited by proclamation of the President, was illegal. *Billgerry v. Branch*, 100 D. 679.

The late rebellion was war, and citizens on opposite sides were alien enemies, and their relations, under the constitution, were suspended and superseded for the time by new relations under the laws of war. *Id.*

International law applied to contracts and transactions between residents within the limits of the confederacy and residents in territory under federal authority. *Id.*

A contract was made, the consideration of which arose from the following transaction: H., of Kentucky, drew and delivered to C., of the same state, an order addressed to E., of Texas, requesting him to pay money in his hands to T., also of Texas. The order was transmitted through the lines, and executed. Held, that this transaction was not a violation of the proclamation of the President of the United States of August 16, 1861, prohibiting all commercial intercourse between the loyal and rebellious states, Kentucky being loyal and Texas disloyal, and that the contract supported by this transaction was valid. *Haggard v. Conkwright*, 3 R. 297.

The relation of attorney and client between a resident of the North and a resident of the South was terminated by the late war. *Blackwell v. Willard*, 6 R. 749.

80. — on commercial paper. — A note given for the rent of a hospital building during the late rebellion was not void, where the circumstances were such that the furnishing of a building for hospital purposes was immediately required by the dictates of common humanity, for the diseased and wounded belligerents. Any citizen might lawfully provide it, under such circumstances, and a note given for its rent would not be an act in aid of rebellion. The existence of such circumstances was a question of fact for the jury. *Fottrell v. German*, 98 D. 442.

While neither a soldier nor citizen can lawfully give aid or comfort to a rebel soldier actually in arms, and while contracts giving aid and comfort to rebellion are illegal and void, the moment that such rebel soldier is *hors de combat*, the situation is changed, and his life may be preserved, and his sufferings relieved, though the effect is to preserve a soldier to the enemy, and thus indirectly aid the rebellion. *Id.*

A check drawn and indorsed in Virginia, during the late civil war, upon a bank in New Orleans, while New Orleans was under the permanent possession and control of the federal forces, is void, and the contract of indorsement is void, though all the parties, except the New Orleans bank, were resi-

For Index to Notes in American Decisions and American Reports, see Volume I.

dents and citizens of the Confederate States. *Billgerry v. Branch*, 100 D. 679.

The defendant, in an action on a promissory note, alleged that the note was given for slaves taken by the plaintiff from Missouri to Arkansas, after the proclamation declaring that state in insurrection. *Held*, that the transaction was in violation of law, and that the note could not therefore be collected. *Carson v. Hunter*, 2 R. 529.

The defendants, at the breaking out of the rebellion of 1861, were copartners doing business at Savannah, Georgia, where one of them, named Wheaton, resided. Two of the defendants did business as copartners in New York, where they resided. On the 23d of August, 1861, the plaintiff's agent purchased of the Savannah firm a bill of exchange. It was drawn by Wheaton in the name of his firm on the New York firm of defendants. By an act of Congress passed July 13, 1861, the President was authorized to declare certain districts in insurrection, and that thereupon all commercial intercourse should cease and become unlawful. On the 16th of August, 1861, the President, by proclamation, declared the district in which Savannah is situated in a state of insurrection. *Held*, that the drawing of the bill of exchange was illegal and void, and within the rule prohibiting contracts with the enemy during war, and no action could lie against any of the parties to it. *Woods v. Wilder*, 3 R. 684.

The copartnership between Wheaton and the other defendants was dissolved by the war, and the defendants were not bound by the contract of Wheaton made after such dissolution. *Id.*

Defendants were copartners, doing business both in Savannah and New York. *Held*, that a bill of exchange, drawn during the war by the firm in Savannah on the firm in New York, was void. *Id.*

A note given since the war to the mayor and council of Savannah, for a tax assessed by the city authorities during the existence of the confederate government, but not collected, is void for want of consideration. *O'Byrne v. Mayor*, 5 R. 532.

A note given for such tax, and for ground-rent due the city, by contract made prior to the war, is void as to the tax, but good as to the rent. The consideration is clearly severable, as the record shows precisely how much of it was for tax, and how much for rent. *Id.*

Action on a promissory note. Plea, that when the note was made, plaintiff was a citizen of Minnesota, and defendant a citizen of Arkansas, aiding the rebellion, and public enemies of the United States. *Held*, that the plea was good. *Rice v. Shook*, 11 R. 783.

Where an agent of the war department of the confederate government issued the fol-

lowing instrument: "Confederate States Depositary, Wilmington, pay Messrs. Coolie & Co., or order, twenty thousand dollars," which was indorsed by the payees to the defendant, who indorsed it to another person, by whom it was indorsed to the plaintiff, — *held*, that the instrument was illegal; that such illegality was apparent upon its face, and extended to all the indorsements. *Cronly v. Hall*, 12 R. 597.

An agent of the confederate government drew a negotiable order on the war department, and it was indorsed to plaintiff for value. *Held*, illegal. *Id.*

31. — on running of interest. — Interest continues to run in time of civil war on debts due from a citizen of one belligerent to a citizen of the other. *Spencer v. Brower*, 5 R. 254.

On the 14th of August, 1860, the plaintiff loaned the defendant, a citizen of Minnesota, the sum of seventeen thousand dollars, upon a bond and mortgage on lands in that state, conditioned for the payment of the principal in five years, with interest payable semi-annually. The plaintiff was at the time a resident of North Carolina, and so continued to the date of the action, and not there nor elsewhere engaged in the service of the United States, but during the whole period he had an agent in the state of Minnesota. In an action brought to foreclose the mortgage, — *held*, that the plaintiff was entitled to recover the interest accruing on the bond during the rebellion and before maturity. *Lash v. Lambert*, 2 R. 142.

32. — on transfers of title to land. — A mortgage executed during the continuance of a civil war, by a citizen of one of the Confederate States to a citizen of one of the Union states, was illegal and void. *Hyatt v. James*, 92 D. 505.

A deed of lands in Iowa, executed in 1863, by a citizen of Virginia to a citizen in Ohio, is void. *Hill v. Baker*, 7 R. 193.

On vacating a sale of lands of a testator, made under order and decree of the so-called court of probate of the late confederate government of Alabama, if such sale has been made for confederate treasury notes of the so-called "Confederate States of America," the purchaser should be charged with the value of the use and occupation of the land during his possession, and allowed credit for the value of confederate treasury notes at the date of the purchase, if the sale was for cash, and if said notes were of benefit to the testator's estate or his heirs, and for the value of all necessary repairs and improvements by him made on said land. *Moore v. Tuthill*, 6 R. 710.

33. — on legal proceedings. — The right of citizens to prosecute and defend actions, and other judicial proceedings, cannot be abrogated or even suspended; this right being guaranteed both by section 8 of the

For Index to Notes in American Decisions and American Reports, see Volume I.

Minnesota bill of rights, and by section 2 of article 4 of the constitution of the United States. *Davis v. Pierce*, 82 D. 65.

The act suspending the privilege of prosecuting and defending actions and judicial proceedings, as to persons aiding the rebellion against the United States, is unconstitutional and void. *Ib.*

The act of 1861 staying civil process against any person in the service of the state or the United States for the term of such service, and thirty days thereafter, is constitutional, the stay being for a definite and not unreasonable time, considering the exigencies of the government at the time when it was passed, and the fact that the statute of limitations in favor of the soldier was by the act suspended during his exemption from process. *Breitenbach v. Bush*, 84 D. 442.

The act of 1861 gives but one stay, to be computed from time of original muster, and a re-enlistment would not renew it. *Ib.*

Levari facias sur mortgage is process within the meaning of the stay law of April 18, 1861. *Ib.*

The legislature may superadd a legal stay to a prior one voluntarily given by the creditor. *Ib.*

The Kentucky amnesty act of February 28, 1867, is unconstitutional in so far as it affects or was intended to effect civil remedies for private wrongs. *Terrill v. Rankin*, 92 D. 500.

War does not have the effect of preventing a citizen of a state from enforcing its laws in the courts of the state, so as to subject a non-resident enemy's real estate, situated in the state, to the payment of a debt contracted before the war began, and secured by a mortgage on the property itself, executed and recorded here, whilst the debtor himself was a resident of the state. *Dorsey v. Dorsey*, 96 D. 633.

War has no effect upon a purchaser's title, where defendant, absent in enemy's country, is served by publication. The law as to proceeding against a non-resident by order of publication applies to all non-residents, whether alien enemies or not. All that is required is strict compliance with the statute. Impossibility of receiving and complying with the notice makes no difference. So a notice by publication to defendant, while absent in the confederate lines, was held effectual to bind him; that a sale of mortgaged property after such notice was valid; and that neither war nor residence in the enemy's territory could be set up to avoid the proceedings, and defeat the title of the purchaser acquired thereunder. *Ib.*

A person who by his own voluntary act assumed the attitude of an alien enemy to the state of Maryland, and to the government of the United States, went from Maryland to Virginia during the late civil war, allied himself with the Southern cause, and

joined the confederate army, cannot claim exemption from process of attachment in behalf of antecedent creditors against his property remaining in Maryland, on the ground that he was an alien enemy, and that "all legal remedies were suspended during the period of hostilities." *Dorsey v. Kyle*, 96 D. 617.

A compulsory payment of a debt to a receiver of the Confederate States, under process of garnishment and a decree of the district court of the Confederate States of America, is no bar to the recovery of the debt. *Sequestration Cases*, 98 D. 494.

Where a citizen and resident of New York had a suit pending in North Carolina previous to the late war, and during the war his debtor there paid up his indebtedness to the attorney or agent of such non-resident, — held, that such action was void, and that the relation of attorney and client was terminated by the war. *Blackwell v. Willard*, 6 R. 749.

Any securities held by a citizen and resident of New York previous to the late war, upon persons resident in North Carolina, could not be extinguished *durante bello*, either through the agency of the courts there, or through the former agents and attorneys of such non-resident. *Ib.*

Therefore, where a debtor to a citizen or resident of New York paid off said claim to a clerk and master in such state in confederate currency, before such currency had depreciated to any extent, such payment is a nullity. *Ib.*

The service of a summons issued from a confederate court during the rebellion is not binding upon the party to appear, and a judgment entered thereon is void. *Thompson v. Mankin*, 7 R. 628.

An action was commenced before the war, in Arkansas, against a citizen of Ohio, who appeared by a duly authorized attorney and filed his plea. After the state had seceded, the action was tried, the same attorney defending, and judgment was rendered for the plaintiff. In an action in Ohio on the judgment, — held, that the Arkansas court was without jurisdiction, and that the attorney could not confer jurisdiction by consent. *Pennyroyt v. Foote*, 22 R. 340.

34. — to suspend running of statute of limitations. — The statute of limitations was suspended in Alabama during the period in which the courts were virtually closed by the war. *Coleman v. Holmes*, 4 R. 121.

35. Status of the Confederate States. — The status of the Confederate States, so called, as a government, discussed, but not decided. *Fyfield v. Pennsylvania Ins. Co.*, 86 D. 523.

An ordinance of secession, by which it was sought to withdraw the state of Alabama from the Union was an absolute nullity; the rightful state of Alabama, the constitution-

For Index to Notes in American Decisions and American Reports, see Volume L.

ally constituted member of the Union, was never out of the Union, though its government was suspended by the war. *Hall v. Hall*, 94 D. 703.

The rebel state government of Alabama was unconstitutional and wholly void; the general assembly of this illegal government and its laws partook of its nature, and were equally invalid, illegal, and void. *Id.*

In no proper legal sense can either the government of the so-called Confederate States, or of the state of Alabama, during the rebellion, be called a government *de facto*. They were rebel governments, and nothing more; they never obtained possession of the rightful government of the state by which it became a member of the Union; they never struggled to get possession of such rightful government, but rather to set up and establish a new, separate, distinct, and hostile government, having nothing in common with the legal government. *Chisholm v. Coleman*, 94 D. 678.

The governments of the several rebellious states constituted parts of and constituted the Confederate States government, and partook of its nature and character. As such latter government never in any sense became a government *de facto*, neither did the governments of any of the several rebel states. *Id.*

A government *de facto*, in a proper legal sense, is a government that unlawfully gets possession and control of the rightful legal government, and maintains itself there, by force and arms, against the will of the rightful legal government, and claims to exercise the powers thereof. *Id.*

The Confederate States of America, and the state governments organized under it, in relation to the United States and its loyal citizens, were not governments *de jure* or *de facto* as those terms are used in the law of nations. *Cusell v. Backrack*, 97 D. 436; 2 R. 590.

The confederate government was one *de facto* as to its own citizens. In reference to all matters of internal, private, and domestic import, not affected by the laws and constitution of the United States, and which were completed and consummated, — in other words, executed, — the confederate government and the state governments under it were governments in fact for the time being for the purpose of protecting the rights of persons and property, and as an immunity to its citizens from liability and punishment for obeying the laws of such government. *Id.*

The courts will leave parties *in pari delicto* exactly as it finds them. Thus where parties who were residents within and adherents to the confederate government during the late civil war had a controversy as to their legal rights as existing under that government, the courts of the legitimate gov-

ernment, when restored, denied their active aid to either party, and left them exactly as they found them. *Id.*

The fact that the Confederate States were a belligerent power did not constitute them a government *de facto*, nor did they attain that status because they established a government of their own and exercised jurisdiction over the country which they embraced. *Smith v. Stewart*, 99 D. 709.

A government *de facto* arises only where the established government has been subverted by successful rebellion, and the new government exercises undisputed sway for the time over the whole country, or where the people of any portion of a country subject to the same government throw off their allegiance to that government and establish one of their own, and show, not only that they have established it, but their ability to maintain it. *Id.*

The government of the Confederate States did not attain the status of a government *de facto*. The authority set up by them was illegal and void. *Id.*

The plaintiff, in payment of a tax levied by the state on his cotton, in 1866, tendered to the sheriff a "cotton note," issued under an act of the confederate legislature of 1861, and made receivable in payment of all present or future taxes. The sheriff refusing to receive the note, plaintiff brought suit for an injunction to restrain the sale and compel acceptance. *Held*, that the Confederate States government being neither a *de jure* nor *de facto* government, its acts were not binding on a succeeding lawful government; and that the notes in question, being issued in aid of the rebellion, were void, and therefore not receivable. *Thomas v. Taylor*, 2 R. 625.

The courts of Louisiana having declared all contracts the consideration of which was confederate money illegal and void, the courts of Mississippi will not enforce a note given in Louisiana for a loan of such money. *Ivey v. Lalland*, 2 R. 606; 97 D. 475.

A promise to pay a note in confederate bonds or in Tennessee money will be enforced as to the latter, it being valid. *Hanauer v. Gray*, 99 D. 226.

36. Reconstruction acts. — The reconstruction laws of Congress permit the state governments to continue, and their laws, as far as constitutional, to be administered. *Sequestration Cases*, 98 D. 494.

WARD.

Domicile of, see DOMICILE, 13.

See GUARDIAN AND WARD; INFANTS.

WAREHOUSE RECEIPT.

Delivery of goods sold by indorsement of, see SALES, 45.

Nature of, and rights of holder, see WAREHOUSEMEN, 2.

For Index to Notes in American Decisions and American Reports, see Volume I.

WAREHOUSEMEN.

[Includes the rights, duties, and liabilities of persons whose business it is to keep goods on storage for compensation.]

Liabilities of, generally, see **BAILMENT**, 19.
Carrier, when liable only as, see **CARRIERS**, 43, 44; **EXPRESS COMPANIES**, 5; **RAILROAD COMPANIES**, 48.

1. Nature of the contract with. —

The employment of a warehouseman and forwarding merchant in the usual course of his business imports a hiring, and that he is to be paid. *Graves v. Smith*, 80 D. 762.

A transaction is a sale, and not a bailment, and the risk of loss by accident is upon the warehouseman, where he receives wheat, and with the depositor's consent, or by custom, mixes it with that of others, with the understanding that it is to be at the disposal of the warehouseman, and that when the depositor should present the receipts, the warehouseman would either pay the market price therefor, or redeliver the wheat, or other wheat equal in amount and quality. *Chase v. Washburn*, 59 D. 623.

Where grain of different owners becomes intermingled in one common mass, according to the usage of warehousemen, and without objection by the owners, it becomes common property, owned by the several parties in the proportion in which each contributed to the common stock, and the several owners are subject to sustain any loss *pro rata* which may occur by diminution, decay, or otherwise. *Dole v. Olmstead*, 85 D. 397.

When corn of different owners blended in a warehouse falls short of the amount put in, and for which warehouse receipts are given, the holders of the receipts must share the loss proportionately. *Id.*

One who deposits wheat for storage, knowing that it is to be commingled with wheat owned by the warehouseman, and that the latter is selling and publicly shipping from the common mass, is estopped to assert title as against an innocent purchaser in the usual course of business. *Preston v. Witherspoon*, 58 R. 417.

2. Warehouse receipts.* — A warehouseman's receipt is a contract of parties as to the property stored, and parol evidence is inadmissible to change or vary its terms. *Leonard v. Dunton*, 99 D. 568.

A warehouseman's receipt for grain does not clothe the holder with any specific or general lien on the property of the warehouseman, although that should consist also of grain put in common bulk with that of the holder of the receipt; but such property of the warehouseman remains subject to sale and transfer, precisely as though such a receipt had not been given; and the holder of

the receipt has only the obligation of the warehouseman for proper storage and delivery of his grain, according to the terms thereof, or on default has a right to recover the damages growing out of a breach of the contract. *Dole v. Olmstead*, 85 D. 397.

The holder of a receipt for grain in a warehouse who has become an owner in common with others by the intermingling of the grain of all in one common mass, if he has received the full quantity called for by his receipt or a larger proportion than his ratable share, would, in view of a deficiency, be bound to account for such excess received by him in proportion to the loss. *Id.*

A purchaser of pork in a warehouse who takes warehouse receipts therefor, indorsed in blank by his vendor, and then, to enable the vendor to withdraw the pork from the warehouse for the purpose of overhauling and repacking it, delivers the receipts back to the vendor, who transfers them to a *bona fide* purchaser, still remains the owner of the pork, and may maintain replevin for it against the warehouseman, for there was no negligence on his part, or any departure from the ordinary course of business; nor is he chargeable with negligence because he did not surrender the original receipts and take out new ones in his own name before delivering them back to the vendor, since this would not have guarded third persons against the fraud of the vendor. *Burton v. Curyea*, 89 D. 350.

A warehouseman is estopped from denying the description of property in the receipt, so far as it relates to matters which are or ought to be within his knowledge or that of his agents; but not in respect to matters not open to ordinary inspection, and visible, and where a local custom requires that the kind of property described in the receipt must, for the purpose of purchase and sale, either have a well-known brand, or be inspected, as a condition of purchase, and that purchasers rely on the warehouse receipt only for custody, and not for quality or kind. *Hale v. Milwaukee Dock Co.*, 99 D. 169.

3. — and rights of assignees. — The liability of a warehouseman to the assignee of the original bailor of goods will not protect such goods against the creditors of the bailor if his assignee's title has been adjudged invalid. *Burton v. Wilkinson*, 46 D. 145.

The Iowa code, section 949, authorizes the assignee of a warehouse receipt, by which the maker promises to deliver a certain quantity of corn, to sue in his own name, subject, however, to any defense or set-off, legal or equitable, which the maker had against the assignor, before notice of the assignment. *Merchants' etc. Bank v. Hewitt*, 66 D. 49.

A warehouse receipt for a certain number of bushels of corn, to be delivered to the

* Receipt of warehouseman, whether conclusive against him, see note, 100 D. 243-244.

Warehouse receipts, their transfer and negotiability, see note, 84 D. 752-754.

For Index to Notes in American Decisions and American Reports, see Volume I.

order of the person to whom the receipt is given, at a certain place, in sacks, in good order, free of charges, risk of fire excepted, is not a negotiable instrument under the laws of Iowa. *Ib.*

The use of the words "to be delivered to his order," in a warehouse receipt for a quantity of corn, do not of themselves manifest any intention on the part of the maker to render it negotiable. *Ib.*

A warehouse receipt may be transferred without indorsement, so as to pass title to the property, if the owner makes the transfer with that intent, in a case where the receipt recites that the property therein mentioned is "deliverable to bearer." *Rice v. Cutler*, 84 D. 747.

A Wisconsin statute of 1860, providing that warehouse receipts may be transferred by indorsement, and what effect they shall have when so transferred, does not operate to prevent in all cases a passing of title without indorsement, the language being permissive, and not imperative, and the right existing independently of statute. The object of the statute is not to prevent the owner of property from passing the title in any manner previously effectual for that purpose, but to protect those dealing with persons who are intrusted with such evidences of title only as factors or agents. *Ib.*

The fact that warehouse receipts are taken in discharge of prior indebtedness will not deprive the transferee of the protection to which he would otherwise be entitled as an innocent purchaser without notice that his vendor acquired title by fraud. *Ib.*

Warehouse receipts are not negotiable so as to enable the person holding them to transfer a greater right or title to the property mentioned in them than he has himself. They stand in the place of the property itself; the delivery of the receipts has the same effect as the delivery of the property, no greater and no less; and a transfer of a warehouse receipt by the person in possession of it gives no higher title than would the transfer of the property by the same person. *Burton v. Curyea*, 89 D. 350.

In the absence of a statute provision a warehouse receipt is not negotiable, and an assignment of it conveys no better title than the assignor had. *Solomon v. Bushnell*, 60 R. 475. *S. P.*, *Second Nat. Bank v. Walbridge*, 2 R. 408.

The indorsement and delivery of a warehouse receipt of goods stored transfers the ownership of the property only, and not the contract itself. *Hale v. Milwaukee Dock Co.*, 9 R. 603.

In an action by the assignee, for the value of a warehouse receipt, to recover the property described therein, — *held*, that the obligation of the warehouseman, in the absence of fraud or neglect on his part, was discharged by delivering the property actually

received in store, although it did not answer the description of the receipt. *Ib.*

Possession of a warehouse receipt, regularly indorsed, is presumptive evidence of ownership of the goods described therein. *Davis v. Russell*, 28 R. 647.

L., at the city of New York, indorsed and delivered to the plaintiff a warehouse receipt for goods on storage in Boston, by which the warehouseman agreed to deliver the goods to L. on payment of charges, but containing no agreement to deliver to his order. *Held*, 1. That the effect of the transfer was to be determined by the law of Massachusetts; 2. That no title passed to the plaintiff as against a creditor of L. attaching the goods before notice of the transfer was given to the warehouseman. *Hallgarten v. Oldham*, 46 R. 433.

The transfer of a warehouseman's receipt for goods on storage carries title, without notice to him or agreement by him to hold for the transferee. *Durr v. Hervey*, 51 R. 594.

Where a warehouse receipt runs to the bailor personally, and is not negotiable in form, the bailor may not effect a transfer of the title by mere delivery of the receipt without the consent of the warehouseman. *Gill v. Frank*, 53 R. 378.

4. Diligence or care required.— Warehouseman is liable only for ordinary care of goods intrusted to him. *Schmidt v. Blood*, 24 D. 143; *Vincent v. Rather*, 98 D. 516. And if the warehouseman, without the owner's consent, mixes the property with other property, and ships the same for sale, he will be liable to the owner for the value of the property thus deposited. *Chase v. Washburn*, 59 D. 623.

On September 9, 1876, the plaintiff shipped from Boston to Baltimore, by defendant's steamer, boxes of books, under a bill of lading providing that freight must be removed from the wharf, at the place of discharge, during business hours on the day of discharge, or it was liable to be stored at the risk and expense of the owner; all merchandise at the owner's risk while on the wharf. The steamer arrived at Baltimore on the 12th of September, and the goods were on that day discharged, and put on the defendant's wharf, but not on the highest part. A notice was the same day mailed to the plaintiff, stating that the goods were ready for delivery, and must be removed within twelve hours or they would be stored at the plaintiff's risk and expense. The plaintiff did not receive this notice, and he did not call for his books until the 18th. On Sunday, the 17th, an unusually violent storm of rain and southeast wind occurred, and flooded the wharf. This was the first time the part of the wharf where these goods were stored had been submerged, although in a period of twenty years another

For Index to Notes in American Decisions and American Reports, see Volume I.

part had been flooded, the water then rising to within a few inches of the part in question. The wharf was well covered, and ordinarily was secure for storage, and watchmen were employed night and day. Signs of a violent storm and rise of water were noticed before eight o'clock of the morning in question; the water rose steadily all day until 2 P. M., and then suddenly rushed over the wharf. The watchman did all he could to remove the goods, but was unable, owing to the rise of the water and the absence of assistance, to save them. *Held*, that the defendant had not used due and reasonable care, and that evidence of its custom to store goods on the wharf was properly rejected. *Merchants' Transp. Co. v. Story*, 33 R. 293.

Defendant received in his storehouse household furniture of the plaintiff, depositing it in a room with two locks, of one of which plaintiff held the key, and assuring the plaintiff that the goods would be guarded and safe. Some of the goods were stolen by persons in charge of the building. *Held*, that whether the contract was of bailment or hiring, the defendant was bound to ordinary care and prudence in guarding the goods. *Jones v. Morgan*, 43 R. 131.

The plaintiff having recovered some of the goods by means of detectives and legal proceedings, and repaired such of it as was damaged, — *held*, that she might recover her expenditure therefor. *Id.*

Warehousemen are responsible for due care in storing the goods intrusted to them in a place of reasonable safety, and are to be charged only upon proof of their own negligence, or that of their servants in the course of their employment. *Aldrich v. Boston etc. R. R. Co.*, 1 R. 76.

A warehouseman having in his possession goods subject to owner's directions as to their shipment, is at liberty, in the absence of instructions, to use his discretion in shipping by the usual or best route; but if he has specific instructions, he is bound to follow them. *Graves v. Smith*, 80 D. 762.

Where a shipper of goods notifies a warehouseman that he has contracted with a certain railroad company to carry them to their destination, and the warehouseman replies that "it is all right," he has no right to afterwards send the goods in any other way; and if he does so, and they are lost, he will be liable therefor. *Id.*

A warehouseman having in his possession goods of A, and also of B, delivered by mistake to C the goods of B, on an order from A, of whom C had purchased goods to fill an order from D. The goods were received from C by D, and appropriated to his own use by him without notice or knowledge of the mistake, and in good faith. *Held*, that D was not liable to the warehouseman, either in *assumpsit*, because there was no privity

of contract, or in tort, for their conversion, because the warehouseman's own act contributed to the misappropriation. *Hills v. Snell*, 6 R. 216.

A warehouseman is bound to keep the approaches on his premises safe for the use of his customers. Unless he does so, he is liable for an injury, although no one may ever have been hurt before. And even if the customer knows the approach to be dangerous, it is not necessarily negligent in him to use it. *Nave v. Flack*, 46 R. 205.

In an action against a warehouseman for a failure to keep safely goods intrusted to him, if it appears that the damage was caused by the fall of the warehouse, the burden of proof is on the plaintiff to show that such damage was caused by the negligence of the defendant. *Willett v. Rich*, 56 R. 684.

5. Fees for storage. — A purchaser of a warehouse receipt for grain subject to charges for storage will be personally bound for the storage, even though he has removed the grain with the consent of the warehouseman. *Cole v. Tyng*, 76 D. 735.

6. — and lien therefor.* — A warehouseman has a lien upon the balance left in his hands of an entire lot of merchandise intrusted to him at the same time, after a delivery of part, for the storage of the whole. *Schmidt v. Blood*, 24 D. 143.

The lien of a warehouseman is specific, not general; and where the ownership in the goods bailed is entirely in the bailor, or a purchaser from him, each parcel of the goods is liable for the warehouse charges, not only for its particular proportion, but for the whole thereof, provided the whole was received under one bailment. *Steinman v. Wilkins*, 42 D. 254.

A warehouseman with whom a common carrier stores goods may retain possession of the same, when so instructed by the carrier, until "back charges thereon are paid." *Allen v. Carver*, 81 D. 430.

7. Liabilities of warehousemen, generally.† — A warehouseman, who has given a receipt which entitles the holder to the goods stored upon presentation thereof, is liable to an attaching creditor of the bailor, if he surrenders the goods to a holder of such receipt, who purchased the same after the date of attachment. *Smith v. Pickett*, 50 D. 385.

Fraudulent representations by a warehouseman, or a previous demand upon him, must be shown, in an action against him, where he delivered a quantity of wheat on board plaintiff's vessel upon the order of the owner, representing that he had delivered a certain number of bushels, whereupon plaintiff was induced to issue his bill of lading to the

* Lien of warehouseman, see note, 42 D. 257-260.

† Duties and liabilities of warehousemen, including liability for negligence, see note, 24 D. 145-160.

For Index to Notes in American Decisions and American Reports, see Volume I.

owner for that quantity, and where it afterwards was discovered that there was a less quantity, and the plaintiff became liable for the deficiency. *Norris v. Milwaukee Dock Co.*, 91 D. 464.

Where a purchaser of a warehouse and grain agrees to assume all the contracts of a vendor growing out of the business, an action will lie against him on a receipt previously given by the vendor for grain, stipulating that the grain should be delivered on demand or the money paid; but the vendor should be joined as a party defendant. *Hardy v. Blazer*, 92 D. 347.

A warehouseman who receives wheat on storage, giving memoranda stating that the wheat was No. 2 wheat, is not estopped from showing that the wheat delivered to him was not No. 2 wheat, nor from showing that he is entitled to discharge his contract by returning the same wheat that he received. And a purchaser to whom the owner of the wheat transferred the memoranda, and delivered written orders directing the warehouseman to deliver the wheat to the bearer, has no greater right, as against the warehouseman, than his vendor had. *Robson v. Seart*, 100 D. 238.

Where servants of warehousemen are present during the destruction of the warehouse by fire in the night-time, their neglect to remove goods from the warehouse is not such negligence as will charge the warehousemen, unless it be shown that such was a part of the service for which the servants were engaged. *Aldrich v. Boston etc. R. Co.*, 1 R. 76.

Plaintiff sent his goods, in charge of G., to defendant's warehouse, for storage. G. put his name on the goods, and left a written notice with defendant not to give them up without his consent. Plaintiff then sent a written notice to defendant, saying: "Please hold the same, subject only to my written order. The property is mine." Soon after, plaintiff demanded the goods of defendant, who refused to deliver them up, even after plaintiff had offered him a bond of indemnity, and to pay all charges. Subsequently, the sheriff levied on the goods, under two executions against G., and, on the following day, an execution against plaintiff came into the sheriff's hands. The goods were sold on one of the executions against G., and the proceeds applied in payment thereof. *Held*, that defendant was liable for the value of the goods on the ground that he ought to have given up the goods on demand and offer of indemnity by plaintiff, or commenced a suit by bill of interpleader to determine the respective rights of plaintiff and G.; and that, as the goods were in fact plaintiff's, the levy and sale of them under an execution against G. did not mitigate the damages, notwithstanding the fact that the sheriff also held an execution against plaintiff, under

which he did nothing. *Ball v. Liney*, 8 R. 511.

The defendant, proprietor of a warehouse for storage, represented it in circulars to be fire-proof on the exterior. A statute required such buildings to have fire-proof metal window shutters. There were no shutters, and the window frames were of wood. By that representation the plaintiff was induced to store goods in the warehouse. The warehouse caught fire from another building on the window frames, and with its contents was consumed. *Held*, that a nonsuit on the ground that the representation was a mere opinion was error. *Hickey v. Morrell*, 55 R. 824.

W. shipped cotton to New Orleans by railroad, taking a through bill of lading. The railroad company, a warehouseman, and a steamboat company, had a general contract by which the railroad agreed to receive cotton from shippers and deliver to the warehouseman, who agreed to hold it till the arrival of the steamboat, and then ship thereon for New Orleans. W. knew nothing of this contract. *Held*, that the railroad company could not bind W. by a contract with the warehouseman in reference to W.'s cotton, which would relieve the warehouseman from the consequences of his own negligence, or impose on W. the consequences of the contributory negligence of the railroad company. *Merchants' Wharfbat Assoc. v. Wood*, 60 R. 76.

The cotton being burned while in the hands of the warehouseman, who had failed to ship by the first boat for New Orleans, but had awaited the departure of the boat with whose owner he had the general contract above alluded to, — *held*, that if he, as a man of ordinary prudence, had notice from the surrounding circumstances of the danger from fire to which the cotton was exposed, it was his duty to ship it by the first opportunity. *Ib.*

But if the fire did not occur from any of the causes which should have reasonably excited apprehension, but from another and distant source, not a cause of reasonable apprehension of danger from fire, then the warehouseman was not liable for the loss. *Ib.*

It being lawful in Mississippi for railroads and steamboats to do business on Sunday, a wharfbat proprietor is liable for negligence in not shipping goods on Sunday, if it is his custom so to ship goods. *Ib.*

8. Liability for losses or failure to deliver. — A warehouseman is not liable for goods stolen by his servant, without negligence on his part. *Schmidt v. Blood*, 24 D. 143.

The onus of showing negligence is on the plaintiff in such a case, unless there is a total default in delivering or accounting for the goods. *Schmidt v. Blood* 24 D. 143; *Clafin v. Meyer*, 31 R. 467.

For Index to Notes in American Decisions and American Reports, see Volume I.

Defendants had in their possession, as warehousemen, goods of plaintiff, a part of which they failed to deliver to him. In an action of *assumpsit* for non-delivery, — *held*, that the burden of proof was on defendants to show either a delivery, or that they had used ordinary care in keeping the goods. *Boies v. Hartford etc. R. R. Co.*, 9 R. 347.

In an action against a warehouseman for the loss of goods by fire, alleged to have been occasioned by his negligence, the burden of proof is on the plaintiff to show such negligence. *Denton v. Chicago etc. R'y Co.*, 35 R. 263.

Warehousemen are not insurers against loss by accidental fire. *Aldrich v. Boston etc. R. Co.*, 97 D. 74.

Where a warehouseman receives grain on storage, and puts it in a bin with his own and that belonging to others, and sells therefrom, always reserving enough to answer the demand of each owner, he is not liable to the depositors for loss by fire not attributable to his fault. *Rice v. Nixon*, 49 R. 430.

If a warehouseman receive goods, he cannot dispute the title of the bailor in a suit brought by that person against him; but if the goods were taken from the bailee by lawful process, he may show this in excuse for not delivering them. *Burton v. Wilkinson*, 46 D. 146.

In an action against a warehouseman for loss of certain cattle which were shown to have escaped while being driven to water by defendant's servants, expert evidence is admissible, for the purpose of showing the degree of care which was used, as to how many hands would be necessary to drive the same number of animals of the same kind under similar circumstances, this matter not being one within the common knowledge of the jurors. *North Missouri R. R. Co. v. Akers*, 96 D. 183.

In an action against a railroad company as warehouseman and forwarder, for loss of oil by leakage, as the result of its neglect and want of ordinary care, recovery may be had for such loss as plaintiff can establish to the satisfaction of the jury by competent and admissible evidence; he is not required to prove to a mathematical certainty the amount of oil lost. *Baltimore etc. R. R. Co. v. Schumacher*, 96 D. 510.

Warehousemen are responsible for due care in storing goods in a place of reasonable safety, and are chargeable with loss only upon proof of their own negligence, or that of their servants in the course of their employment. *Aldrich v. Boston etc. R. R. Co.*, 97 D. 74.

Warehousemen are not liable for a loss resulting from a failure of their servants to rescue goods in the warehouse from destruction by an accidental fire in the night, at which such servants are present, but not in the course of their employment. *Id.*

A custom among warehousemen that when goods are placed in a warehouse other than the particular one to which they are consigned, they are allowed to remain there, will not excuse the real consignee for liability for loss of the goods, if caused by his neglect in allowing them to be stored in a warehouse less secure than his own. *Vincent v. Rather*, 98 D. 516.

Warehousemen who advertise that goods consigned to them will be stored in a fire-proof house are liable if they store them in a wooden house which is less safe, and afterwards burned, and this even though the goods were shipped to and stored in the warehouse of the wrong consignee, if, after the discovery of the mistake by the real consignees, they allow the goods to remain in such warehouse. *Id.*

Assumpsit will lie against a warehouseman for damages for the breach of his contract to deliver, on demand, wheat stored with him; and though trover might also lie, the rule that a party cannot waive the tort and sue in *assumpsit* for money had and received, unless money has actually been received, has no application to such a case. *Leonard v. Dunton*, 99 D. 568.

The measure of damages against a warehouseman sued in *assumpsit* for breach of his contract, in failing to deliver on demand wheat stored with him, is the value of the wheat at the time it should have been delivered. *Id.*

Where a warehouseman receives wheat and stores it, agreeing to keep it for a short time without charge, and deliver it on demand, and is afterwards sued in *assumpsit* for damages in failing to deliver, the action is not defeated by a neglect or refusal to pay storage after the demand to deliver is made. In such case, the warehouseman is entitled to storage only after notice that it would be charged is given. *Id.*

9. Transfers of goods stored by warehousemen. — The assignee of a mass of grain in a warehouse belonging to a number of persons, who by reason of its intermingling have become owners in common, is trustee for all the parties in interest; and where there is a deficiency in the quantity of the grain, and in consequence the several owners are unable to show the respective quantities due them from the mass, a court of equity will have jurisdiction to bring such trustee and all the parties before it, and to do complete justice between them. *Dole v. Olmstead*, 85 D. 397.

Where a warehouseman having in store grain of various persons, for which he has given receipts, together with grain of his own (the whole being kept in one common bulk by the consent of all parties), transfers, by verbal assignment, all the grain thus in store to a creditor to secure his debt, to be held subject to the rights of the different

For Index to Notes in American Decisions and American Reports, see Volume L.

owners, the assignee will hold the property as a trustee for the benefit of all parties in interest, and will be bound to deliver to the receipt-holders all the grain which belonged to them and which was in store at the time of assignment, but beyond that will incur no liability; and whatever grain was in store belonging to the warehouseman, the assignee will have the right to retain and apply to his own debt. *Ib.*

On an assignment by a warehouseman of a bulk of grain in a warehouse to secure his own debt, such grain consisting partly of his own and partly of that stored with him, and for which he has given receipts, and there is included in the assignment contracts for the purchase of grain made by the warehouseman, upon which he had advanced some money and received a portion of the grain, the assignee becomes the equitable owner of such contracts, to the exclusion entirely of the holders of the grain receipts from the warehouseman; and the assignee has the right to complete such contracts, and appropriate the grain he may receive upon them to his own debt, after deducting the money he advanced to complete them. *Ib.*

On an assignment by a warehouseman of a mass of grain, for the purpose of securing his debt, where such grain was partly his own and partly stored by persons who took his receipts therefor, the assignee purchasing any of such receipts would be subject to sustain his *pro rata* share of the loss occasioned by any deficiency precisely as would the original holders. *Ib.*

The assignee of a warehouseman acquires no interest in corn stored with his assignor, and for which the latter has given receipts to the real owners; and if such assignee sells the corn, and appropriates the proceeds to his own use, he will be liable to the holders of the receipts for the amount received by him, with interest thereon from the date of the sale. *Dole v. Olmstead*, 89 D. 386.

A warehouseman, having in store wheat of his own, may effectually pledge part of it to secure his own debt, by his warehouse receipt, and without separating the wheat from the mass. *Merchants' etc. Bank v. Hibbard*, 42 R. 465.

10. Bonded warehouses. — The provision in the act of Congress of March 23, 1854, that goods deposited in a private bonded warehouse shall be at the exclusive risk of the owner or importer, was for the exclusive benefit of the U. S. government, and does not relieve a warehouse-keeper from the duty of exercising ordinary care and prudence in protecting goods committed to his keeping, nor from the obligations of other warehousemen to their patrons. *Schwerin v. McKie*, 10 R. 581.

Where goods have been deposited with bonded warehousemen, upon which the duties have been paid, their failure to deliver

them when demanded casts upon them the onus of accounting for the same. And, in an action against them for refusing to deliver the goods, interest upon their value is a proper item of damages. *Ib.*

In such an action, the defendants gave evidence tending to show that their warehouse was broken open and the goods removed by burglars, although the defendants had used reasonable precautions to protect their warehouse from burglars. The court charged the jury, in substance, that, to make this defense available, the evidence must be such that from it they could fairly assume that the goods were lost by means of the burglary. *Held*, that this charge was not erroneous. *Ib.*

WARRANT.

Arrest by officers without, see ARREST, 19.

Arrest by private person without, see ARREST, 21.

City warrants, see MUNICIPAL CORPORATIONS, 59.

County warrants, see COUNTIES, 23.

For arrest, form, sufficiency and how served, see ARREST, 14-18; PROCESS, 36.

For collection of taxes, see TAXES, 40.

For collection of school tax, see SCHOOLS, 6, 7.

For public lands, see PUBLIC LANDS, 15-17.

In justices' courts, see JUSTICE OF THE PEACE, 14.

Of arrest of fugitive from justice, see EXTRADITION, 11.

Of attorney, confession of judgment by, see JUDGMENT, 148.

Of surrender of fugitive from justice, see EXTRADITION, 15.

WARRANTIES.

By vendor, on sale of land, see VENDOR AND PURCHASER, 18.

Covenants of, their effect, and how broken, see COVENANTS, 29-34.

Damages for breach of covenant of, see COVENANTS, 57.

In an assignment, see ASSIGNMENT, 23.

In fire policy, see INSURANCE, 48.

In life policy, see INSURANCE, 69.

In marine insurance, see INSURANCE, 103-114.

In sale of chattels, damages for breach of, see DAMAGES, 30.

Of goods sold, action for breach of, see SALES, 101-104.

Representations distinguished from, see INSURANCE, 13.

What amounts to, in insurance policy, see INSURANCE, 11-13.

What implied in indorsement, see BILLS AND NOTES, 104.

What implied in sale by sample, see SALES, 84.

For Index to Notes in American Decisions and American Reports, see Volume L.

WASTE.

[Includes what acts on the part of one in possession of land in which another has an interest constitute waste, and the remedies therefor.]

Accountability of tenant in common for, see CO-TENANCY, 23, 50.

Liability of tenant for, see LANDLORD AND TENANT, 27.

Staying, by injunction, see INJUNCTION, 37.

1. What constitutes waste, generally. — Waste, in this country, is not to be defined by the rules in the English law in all respects, and from the situation of this country the cutting of timber for the purpose of clearing the land is not waste. What shall be deemed waste must, in a considerable degree, be left to the jury upon the evidence; but if trees be cut, not for the sake of clearing the land, but for sale, it is waste. *Ward v. Sheppard*, 2 D. 625.

Waste is whatever tends to the destruction of the inheritance or to its depreciation in value, and may be committed of land as well as in houses and timber. *Wilds v. Layton*, 12 D. 91; *Smith v. Sharpe*, 57 D. 574.

Waste is the abuse or destructive use of property by him who has not an absolute, unqualified title; trespass is an injury or unauthorized use of another's property by one who has no right whatever. *Duwall v. Waters*, 18 D. 350.

Eventual waste is that done by an admitted particular tenant, after the institution of a suit involving the title, or a partition suit. *Id.*

An act is not waste which is not prejudicial to the inheritance, as a general rule. *Pynchon v. Stearns*, 45 D. 207.

Erecting new houses or opening a way on premises is not waste, though cellars are dug under the houses, and drains are made on each side of the way. *Id.*

Raising the surface of land by depositing earth thereon is not waste in Massachusetts, unless prejudicial to the inheritance. *Id.*

Tearing boards from buildings and destroying fences is waste. *Clemence v. Steere*, 53 D. 621.

Taking rock from a bluff within the boundaries of a right of way granted over another's land, for use in macadamizing streets and building culverts, amounts to a commission of waste, which will be enjoined at the suit of the proprietor of the land. *Smith v. Rome*, 63 D. 238.

An insolvent debtor's use of his estate for its ordinary purposes, according to its nature, cannot be impeached for fraudulent waste. He may sell, in the usual way, the lumber, fire-wood, coal, ore, fruit, or grain produced by his land, without violating the rights of lien-holders. *Witmer's Appeal*, 84 D. 505.

2. — as between landlord and tenant. — Where wood is cut down on leased land by the lessee or his assigns in such a manner as materially to injure the inher-

ance, it is waste, and the lessee is liable to an action for the breach of the covenant against waste; and where there was a right of re-entry for a breach of the covenants, — held, that the lessor could maintain ejectment. Where wild and uncultivated land, wholly covered with wood and timber, is leased, the lessee may fell part of the wood and timber, so as to fit the land for cultivation, without being liable for waste; but he cannot cut down all the wood and timber, so as permanently to injure the inheritance. *Jackson v. Brownson*, 5 D. 258.

A tenant is generally responsible for all waste done to the premises, not caused by the act of God or the public enemy, or the acts of the lessor himself. And where a house, which a lessee for a year held under a lease without special covenants, was destroyed by an armed mob, which the lessee had reason to believe would attack the house on account of his using the same for the purpose of distributing a certain newspaper, — held, that the lessee was liable in an action on the case, in the nature of waste. *White v. Wagner*, 7 D. 674.

A change of nature of property by a tenant is not waste in Massachusetts, unless prejudicial to the inheritance, as by converting arable land into woodland, meadow into pasture, or the like; but it is held otherwise in England, because such alterations change the course of husbandry. *Pynchon v. Stearns*, 45 D. 207.

3. — tenants in common. — A tenant in common is not guilty of destructive waste, in removing fixtures from a mill out of use for want of repairs, and using them temporarily in a mill of his own; nor in burning rotten and useless timber attached to the mill-dam. *Dodd v. Watson*, 72 D. 577.

When one of the several tenants in common of a mine is working it in the usual way, and not excluding his co-tenants, he may not be called to account to them in an action for damages as for waste, nor restrained from thus working the mine. *McCord v. Oakland Quicksilver Mining Co.*, 49 R. 686.

4. — life tenant and remainderman. — A tenant for life is liable to account for waste where he has cut down more of the wood on the estate than is necessary to the enjoyment of his estate, to the injury of the remainder in fee. *Johnson v. Johnson*, 29 D. 72. Although the object is to restore the land to pasture, as it originally was when the life estate commenced, and although it might have been good husbandry in an owner of the fee to have so restored it. *Clark v. Holden*, 66 D. 450.

A remainderman can not maintain an action for waste after taking a lease from the tenant of the preceding estate for years, for his full term, for part of the land, as to

For Index to Notes in American Decisions and American Reports, see Volume E.

the part of the land so leased, whether the waste was committed before or after the lease, for the estates to that extent are thereby merged; so, though the lease reserves to the lessor the right to erect buildings on the leased premises, and provides for the payment of rent, if there is no reservation of a right of re-entry for non-payment. *Pyncheon v. Stearns*, 45 D. 207.

An action of waste by reversioner against life tenant is provided for by statute in Rhode Island, and the liability of the life tenant therein, though very stringent, is to be fairly and reasonably enforced. *Clemence v. Stearns*, 53 D. 621.

Converting meadow into pasture by life tenant is waste in England, but not so in Rhode Island, unless detrimental to the inheritance and contrary to the ordinary course of good husbandry. *Id.*

Permitting pasture to become overgrown with brush is waste on the part of a tenant for life in England, but not so in Rhode Island, unless there be such neglect in cutting the brush as a man of ordinary prudence would not permit. *Id.*

A life tenant cutting and selling wood is guilty of waste, he having a right to cut wood only for fuel and repairs; but if the reversioner assents to the cutting and sale, he cannot claim a forfeiture on their account, and if the estate is by will charged with the comfortable support of the tenant, and the wood cut and sold went for the tenant's support, that fact is to be considered in determining the question of assent. *Id.*

Cutting hoop-poles is waste by a life tenant, unless that is the ordinary mode of managing the farm, but not otherwise. *Id.*

A life tenant is not bound to repair a house which is out of repair when received, if not repairable, or if the expense of repairing it would exceed its value; otherwise, if repairs would make it tenantable. *Id.*

Destruction by life tenant of a house not tenantable is waste, unless it be with the reversioner's consent; and the life tenant is liable, even if the house be torn down without his permission after his leaving the premises. *Id.*

The removal of a crib erected by life tenant not annexed to freehold is not waste. *Id.*

Tearing down an old and unstable barn which is in danger of falling and injuring the life tenant's cattle is not waste, unless its condition was due to the tenant's neglect to repair. *Id.*

Waste forfeits the part of premises wasted, but by a destruction of the dwelling-house the whole premises are forfeited. *Id.*

Changing an estate from pasture to woodland by tenant in dower, in suffering wood to grow up on land which was pasture before, is not waste. *Clark v. Holden*, 66 D. 450.

A tenant for life has no right to commit

waste under a reservation of "all the right, title and interest in and unto the above-named land and premises for and during my natural life." *Webster v. Webster*, 66 D. 705.

Evidence is not competent on the question of waste, of the practice of the tenant for life in using the land when he was the owner in fee-simple. *Id.*

A tenant for life is not chargeable with waste committed to injury of remainderman, unless the evidence affirmatively shows such facts as will sustain the charge; and the presumption is in favor of the tenant for life until the contrary appears. *Lynn's Appeal*, 72 D. 721.

5. Remedies, generally. — In the application of the law of waste, regard must be had to the circumstances of a new and unsettled country. *Findlay v. Smith*, 8 D. 733.

At the time the waste is committed, the party must have title to the land to sustain his action for the injury. *Hughlett v. Harris*, 12 D. 104.

The common-law remedies against waste were: A prohibition commanding the sheriff to prevent its being done, and a writ of waste after the injury had been done, to recover the place wasted and treble damages. *Dewall v. Waters*, 18 D. 350.

There was no process at common law to prevent a threatened trespass upon realty, however great or irreparable. *Id.*

A writ of *estrepement* lay at common law in aid of an action to recover real property, to prevent any injury being done thereto pending the controversy. This remedy is corrective as well as preventive; for if the prohibition is violated the plaintiff may recover damages. *Id.*

This writ is treated as a remedy against waste, but where there is no privity of title between the parties in the action to which it is auxiliary, the injury which it seeks to prevent is, in chancery acceptance, trespass rather than waste. *Id.*

To prevent waste, pending a suit to determine a title, the only remedy in England seems to be the writ of *estrepement* which has fallen into disuse; although in a variety of other cases the court of chancery exercises its conservative power to protect the subject of litigation from waste, injury, or loss, pending a suit. *Id.*

6. — by action for damages. — An action may be maintained by a remainderman or reversioner after the purchase by him of the particular estate, for waste committed before. *Dupree v. Dupree*, 69 D. 757.

An action for waste is not defeated by the transfer of the premises, pending the action, by the plaintiff to the defendant. *Dickinson v. Mayor*, 30 R. 492.

Damages must be assessed in an action of waste for the place wasted over and above the value of the place. *Clemence v. Stearns*, 53 D. 621.

For Index to Notes in American Decisions and American Reports, see VOLUME I.

7. — by injunction. — Equity has jurisdiction to restrain a tenant for life from wasting the property, or to compel him to give security to have the personality forthcoming at the termination of the life estate. *Smith v. Daniel*, 16 D. 641.

Only under special circumstances will the court grant an injunction where waste has been committed by a tenant, to prevent his removing timber which had been cut. Ordinarily, it will only interfere to prevent or stay future waste. *Watson v. Hunter*, 9 D. 296.

An injunction lies to stay waste whenever an action of waste would lie, whether there is any privity of title or not, and in other cases where such an action could not be brought. *Duwall v. Waters*, 18 D. 350.

An injunction and account of past waste may be sought in one suit, but a bill for an account of waste will not lie where an injunction cannot be asked or granted. *Ib.*

In England, an injunction to stay waste will be granted where there is a subsisting privity of title or contract admitted by the answer, or an uncontroverted legal or equitable title in the plaintiff; but not where the bill states that the defendant relies upon an alleged adverse title in himself, or where the plaintiff's title is positively denied by the answer. *Ib.*

An injunction to stay waste pending litigation lies wherever an action at law or suit in equity has been brought, in which the title has been or may be drawn in question, whether the subject of the controversy be realty or personalty. *Ib.*

Privity of title or contract is unnecessary to support the injunction in such cases. *Ib.*

Such injunction is auxiliary to the suit or action involving the title, and follows its fate. *Ib.*

Denial of the plaintiff's title in the answer does not warrant the dissolution of an injunction against waste pending the suit. *Ib.*

Ordinary use and cultivation are not inhibited by such an injunction. *Ib.*

A separate bill for an injunction against waste, pending a suit here to try the title, is irregular; the relief should be sought by a petition in the original suit. *Ib.*

Injunctions to stay waste are granted almost as a matter of course. *Smith v. City Council*, 63 D. 298.

8. — or order to stay waste. — A remainderman has a right to an order to stay waste on premises in which he is interested. *Miles v. Miles*, 64 D. 362.

WATER.

Description of lands bounded by, see DEEDS, 65.

Liability of carrier by, see CARRIERS, 12.

Surveys of lands bounded on, see SURVEYS, 2.

Title to land under, see RIPARIAN RIGHTS, 5.

WATERCOURSES.

[Includes the right of property in running water, surface or subterranean, and to its use and natural flow; including various easements and privileges connected with such use. Also, remedies for diversion or obstruction of running water, and for flowage of land. Several of these topics, however, are also treated in the titles referred to below.]

Enjoining diversion or pollution of, see also INJUNCTION, 24.

Obstructions caused by bridges, see BRIDGES, 5.

Right to use for mill purposes, see MILLS, 2.

Water rights of miners, see MINES AND MINING, 10, 11.

What are common to the public, see FISHERIES, 2.

What are within admiralty jurisdiction, see ADMIRALTY, 2.

See also MILLS; NAVIGATION; RIPARIAN RIGHTS.

1. What is a watercourse. — A watercourse is a channel or canal for conveyance of water, particularly in draining lands; it may be natural, as when it is made by the natural flow of the water, caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial, as in the case of a ditch or other artificial means used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow in consequence of the nature of the surface of the surrounding land. *Eari v. DeHart*, 72 D. 395.

A watercourse is ancient if the channel through which it naturally runs has existed from time immemorial. *Ib.*

The question whether a watercourse is ancient does not depend upon the quantity of water discharged by it. *Ib.*

An ancient natural watercourse exists where the face of the country is such as necessarily to collect in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and where such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows and has flowed from time immemorial. *Ib.*

Where surface water, supplied by the falling rains and melting snow from a hilly region or high bluffs, by the natural formation of the ground is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite and natural channel through which it escapes at regular seasons, and such has always been the case within the memory of man, one adjacent land-owner has no right to obstruct such flow, to the damage of another. *Gibbs v. Williams*, 37 R. 241.

But there must be a distinct channel, the

For Index to Notes in American Decisions and American Reports, see Volume I.

bed of a stream, with well-defined banks, out through the turf and into the soil by the flowing of the water, presenting on a casual glance to every eye the unmistakable evidences of the frequent action of running water, and not a mere depression; and such flow must be necessary to prevent the flooding of a considerable tract of land. *Ib.*

A lake, when fed by streams and having a natural channel, and whose waters find exit by percolation in a perceptible current through a bed of gravel, is a running stream, and may not be obstructed so as to set back upon the lands of another. *Hebron Gravel Road Co. v. Harvey*, 46 R. 199.

In an action for the diversion of a watercourse it appeared that, at a point on defendant's land about five rods from plaintiff's land, the water ceased to flow between defined banks, but spread out over the surface of the ground, and so ran to and across plaintiff's land, and then began to flow again in a defined channel. *Held*, that the stream did not cease to be a natural watercourse, and that plaintiff could maintain the action. *Macomber v. Godfrey*, 11 R. 349.

2. Right to the use of the stream. — 1. *General rules.*—Every riparian owner has equal right to use of water in a natural stream running through his land, for every useful purpose to which it can be applied, as it is wont to run, without diminution or alteration, but he cannot use it to the prejudice of any proprietor above or below him, unless he has acquired a right to do so by grant, license, or prescription. *Wadsworth v. Tillotson*, 39 D. 391; *Society v. Morris Canal Co.*, 21 D. 41; *Phumleigh v. Dawson*, 41 D. 199; *Tillotson v. Smith*, 64 D. 355; *Stein v. Burden*, 65 D. 394. He is liable to owners below him only for an entire diversion or abstraction of the water in such stream, or for an unreasonable use thereof. *Elliot v. Fitchburg R. R. Co.*, 57 D. 85. Such owner may use the entire stream for manufacturing purposes, provided that the water is returned to the channel for the benefit of those below, and that parties having prior rights are not injured thereby. *Society v. Morris Canal Co.*, 21 D. 41.

An owner of land has a legal right to the use of a stream of water which has flowed through it immemorially, and the violation of such right is a private nuisance. *Gardner v. Newburgh*, 7 D. 526.

Property in water, and in the use and enjoyment of it, is as sacred as the right to the soil over which it flows. *Campbell v. Smith*, 14 D. 400.

Use of water in a flowing stream is open to all, subject to the restriction that a person is not permitted to use it to the injury of those through whose land it passes. *Hoy v. Sterrett*, 27 D. 313.

The right of a riparian owner to the use of water flowing in a natural stream through

his land is not an easement or appurtenance, but is annexed to the soil and is parcel of the land. *Wadsworth v. Tillotson*, 39 D. 391.

Property in water is usufructuary, and consists not so much in the ownership of the fluid itself as the advantage of its use. *Eddy v. Simpson*, 58 D. 408.

Party over whose land a stream flows has a right to its reasonable use during its passage. The right is not in the *corpus* of the water, and only continues with its possession; nor can a party reclaim water that he has lost. *Ib.*

Riparian proprietor has not a right to use a reasonable quantity of water for purposes of his business, but only a right to such use as he can make of the water without materially diminishing it in quantity or corrupting it in quality. *Wheatley v. Christman*, 64 D. 667.

Riparian proprietor may conduct water to any part of his land, and use it so diverted for the same purposes and to the same extent as when flowing in its natural channel, and may recover the same damages for any loss from interference by another. *Ib.*

Running water is not and cannot be made the subject of private ownership so long as it continues to flow in its natural course. A right may be acquired to its use, which will be regarded and protected as property, but this right carries with it no specific property in the water itself. *Kidd v. Laird*, 76 D. 472.

Every proprietor of land on banks of a stream has, naturally, equal right to the use of the water, and this right to use implies a right to control it, and to a reasonable extent to diminish its volume. *Davis v. Getchell*, 79 D. 636.

2. *Rights of prior appropriators.*—The right by prior appropriation has regard to the *quantum* of water withdrawn from a stream common to both parties, and not to the *quantum* of fall. *McCabmont v. Whitaker*, 23 D. 102.

A riparian proprietor can acquire no exclusive privilege in running water by mere priority of appropriation. *Hoy v. Sterrett*, 27 D. 313.

A party and his privies are estopped from claiming the water of a stream by right of prior appropriation, when such party has stood by and seen another appropriate the water at great expense without informing the latter of his prior right. *Parks v. Kilham*, 68 D. 310.

A prior right to the use of natural water of a stream does not entitle the owner of such a right to the exclusive use of the channel. So long as his water right is not interfered with, there is no reason why the bed of the stream may not be used by others as a channel for conducting water. If such prior owner receives his full supply, as prior to the use of the channel by others to carry water introduced therein, he has no

For Index to Notes in American Decisions and American Reports, see Volume I.

cause for complaint. *Butte C. & D. Co. v. Vaughn*, 70 D. 769.

Percolating water, collected and running in a defined channel, is property, the use of which is acquirable by grant or appropriation. *Cross v. Kittle*, 58 R. 558.

3. *What is a reasonable use.*—After a conveyance of a part of a stream of water, a change in the mode of using it, which does not increase the quantity, is not actionable. *Bullen v. Runnels*, 9 D. 55.

The water power to which a riparian owner is entitled consists of the difference between the surface of the water in its natural state, where it first touches his land, and the surface where it leaves it. *McCalmont v. Whitaker*, 23 D. 102.

The reasonableness of the use of water in a stream by a riparian owner depends upon the quantity taken, the size of the stream, and various other circumstances. *Elliot v. Fitchburg R. R. Co.*, 57 D. 85.

What is a reasonable use of water in a stream has been in some cases so long settled by common consent, or is so obvious in itself, that it is determinable as matter of law. *Snow v. Parsons*, 67 D. 723.

The reasonableness of the use of a stream, when it is not settled by custom, and is in its nature doubtful, is a question of fact to be determined by the tribunal trying the facts. *Id.*

Riparian proprietor must be allowed to use a stream in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below; consequently, in an action against a tanner for discharging waste bark into a stream, to plaintiff's injury, evidence which tends to show that tanneries cannot be operated to any useful purpose without thus disposing of their waste bark is admissible and very material. *Id.*

In determining what would be a reasonable use of a stream by a tanner, evidence that it had been a universal custom and practice to discharge spent bark of tanneries into streams on which they were situated, ever since the country was first settled, is admissible, and if proved would have almost the force of a law. *Id.*

The different owners of lands through which a stream flows are each entitled to a reasonable use of the same, and an injury to one owner incidental to the reasonable use of the stream by another, gives no right of redress. *Dumont v. Kellogg*, 18 R. 102.

Thus, where it was alleged that defendant, who was owner of lands upon a stream above plaintiff, by constructing a dam with a large reservoir, caused a material diminution of the flow of the stream through plaintiff's lands by reason of evaporation, etc.,—*held*, that plaintiff could not maintain an action therefor. *Id.*

In determining the question of reasonable

use, the jury are entitled to consider the general usage of the country in similar cases. *Id.*

4. *Liability for improper use.*—An improper or malicious use of flowing water by one riparian proprietor renders him liable in damages to another lower down on the same stream. *Hoy v. Sterrett*, 27 D. 313.

The doctrine that a riparian owner has a right to the reasonable use of waters of a stream does not apply to the case of one who erects a dam, breakwater, or other obstruction, so as to turn the current of the stream over onto the land of another, for the purpose of protecting his own land from the encroachment of the stream. *Gerrish v. O'ough*, 97 D. 561.

5. *Floating logs.*—In the absence of prescription or user, it is not a public right to float logs down a non-navigable stream which is only fit for that purpose during periodical freshets; the bed and banks of such a stream are under the absolute ownership and control of the riparian owner. *Hubbard v. Bell*, 5 R. 98.

A conveyance by the state of all its right, title and interest in and to the land over which a stream passes does not convey to the grantee any exclusive right of property in the easement for the passage of logs upon the stream, and does not authorize him, nor those claiming under him, to use exclusively, or to destroy, the public easement existing upon the stream at the date of its execution. *Treat v. Lord*, 66 D. 298.

One has the right to use a public stream in a proper and reasonable manner to float his logs, and if they strand on the land of a riparian owner, he is not liable for any injury thereby to the land, unless negligent, and may enter upon such land to reclaim the logs; but is liable for any improper use of the stream or unnecessary injury to the land. *Carter v. Thurston*, 42 R. 584.

6. *Illustrations.*—Plaintiff established a dam and acquired a water right upon a certain stream. Defendant did likewise upon another stream. After defendant had used the water at his dam it found its way by natural courses into plaintiff's stream above his said dam. Defendant afterwards erected a dam above plaintiff's, and interfered with his flow of water, claiming the right to withdraw from said stream as much water as flows into it from his first-mentioned stream. *Held*, that when the water left defendant's dam he lost all right to and interest in it, and when it joined the stream in possession of plaintiff, plaintiff became entitled thereto, and defendant could not withdraw it. *Eddy v. Simpson*, 58 D. 408.

The owners of land on opposite sides of a stream agreed by covenant, running with the land, jointly to erect a dam, each to have the use of half of the water. The title to the land passed by various intermediate conveyances to plaintiff on one side of the stream, and defendant on the other. *Held*, that an

For Index to Notes in American Decisions and American Reports, see Volume I.

action on the case would lie by plaintiff against defendant for using more than half of the water. In such a case nothing less than an absolute denial of the right to one-half of the water, followed by an enjoyment inconsistent with its existence for a period of twenty-one years or more, can amount to an extinguishment of it. *Lindeman v. Lindsey*, 8 R. 219.

3. Right to natural flow of the stream.—The common-law rule as to water-rights is that each owner of land through which a stream of water flows, is entitled to have it flow in its natural course, and may have an action for any diversion of it to his injury. *Martin v. Bigelow*, 16 D. 696.

Inferior proprietor has a right to uninterrupted flow of water in surface watercourse leading to his land over the land of an adjoining proprietor. *Haldeman v. Bruckhart*, 84 D. 511.

There must be a previous appropriation of the water to some use by such land-owner before he can be said to sustain any damage. *Martin v. Bigelow*, 16 D. 696.

The common-law rule is modified in Vermont as being inapplicable to our circumstances. *Ib.*

Where one introduces water into a stream and then diverts a portion of the stream, and does not permit it to flow through the land of a riparian proprietor below, the latter cannot complain if the quantity and quality of the stream as it flowed in its natural state, are not diminished or altered. *Society v. Morris Canal Co.*, 21 D. 41.

A mill-owner may change the character and use of his mill at pleasure, if his neighbor's mill is not injured thereby and the water is restored to its accustomed channel. *Blanchard v. Baker*, 23 D. 504.

A man is entitled to the enjoyment of a stream in its natural flow; it is not enough that one who has diverted the water has left what could be utilized by expense and trouble. *Crooker v. Bragg*, 25 D. 555.

One through whose lands a stream naturally flows is entitled to have the whole pass through it, though he may not require the whole or any part for the use of machinery. *Ib.*

The volume of water which flows in a creek in winter and spring is generally no criterion whatever as to the quantity of water which flows in the summer and fall. *Burden v. Stein*, 62 D. 758.

An artificial watercourse constructed by contributions of several riparian owners is subject, in absence of a special contract, to substantially the same rules as govern the use of a natural one. Each proprietor of a lot is entitled to the benefit of the fall of the water upon his own land, but cannot abridge the same right existing in either of the neighboring proprietors on either side of him. *Townsend v. McDonald*, 64 D. 508.

A lake can be drained only by the natural outlet, for the owners along a creek forming such outlet have a legal right to the natural flow of the waters of the lake through it, and any artificial drain would deprive them of this flow. *Mohr v. Gault*, 78 D. 687.

It is not essential to a watercourse that the banks should be absolutely unchangeable; the flow constant, the size uniform, or the waters entirely unmixed with earth, or flowing with any fixed velocity. *Bassett v. Salisbury Mfg. Co.*, 82 D. 179.

An inferior proprietor has no right to the uninterrupted flow of water from an unknown subterranean stream which flows out upon his land in the form of springs or otherwise, from that of his neighbor. He has no servitude in such a stream upon the land of his neighbor which he has a natural right to enforce. *Haldeman v. Bruckhart*, 84 D. 511.

An inferior owner has no right to percolations or filtrations from the land of his neighbor. *Ib.*

A well-marked distinction between flowage of water in surface and sub-surface channels discussed and explained. *Ib.*

A riparian proprietor has no property in water itself, and it cannot be appropriated to his exclusive use; although, it seems, that for the purpose of irrigation and other natural uses, he may entirely consume the stream; and he may use the momentum of the stream as a power, or turn the stream on his land by a dam or other means. *Rhodes v. Whitehead*, 84 D. 631.

4. Use of stream for irrigation.*—The proprietor of land through which a stream flows may employ its momentum as a power for beneficial purposes, and may use the water for domestic purposes, to water stock, and for irrigation, provided there be no unreasonable detention or essential diminution of it. *Blanchard v. Baker*, 23 D. 504.

The right of irrigation can be exercised only by restoring the water not wanted for that purpose to its accustomed channel. *Ib.*

5. Title acquired for adverse possession.†—Adverse right may exist in a stream, founded upon a prior occupation by another. *Society v. Morris Canal Co.*, 21 D. 41.

There is no actual property in running water, but the interest therein is of a usufructuary kind, though it may be nevertheless vested and absolute. *Ib.*

After a lapse of twenty years, during which adverse possession of a water-right has been continuously maintained, a grant will be presumed in favor of the adverse

* Appropriation of water for irrigation purposes, rights acquired by, see note, 38 D. 643-645.

† See monographic note on rights which may be acquired by appropriation of water, 48 D. 2-28.

For Index to Notes in American Decisions and American Reports, see Volume I.

holder; but possession for the full period is indispensably necessary to defeat the right of the proprietor of the ancient channel. *Campbell v. Smith*, 14 D. 400.

The presumption of a grant of the right to water does not arise from the mere submission of the owner to an adverse enjoyment thereof, for a period less than twenty years. *Ib.*

A right to divert a stream, running through another's land, may be acquired by adverse enjoyment for twenty years. *Coalter v. Hunter*, 15 D. 723.

A mere license to divert a stream, or a loan of the use of it, cannot be ripened into a right by lapse of time. *Ib.*

The use of a stream for the purposes of a drain, not being adverse, gives no prescriptive right. *Baker v. Boston*, 22 D. 421.

A mill privilege not yet occupied is a valuable property which no one can legally impair or destroy by diverting from it the natural flow of the stream, although it may be impaired by the exercise of certain lawful rights originating in prior occupancy. *Blanchard v. Baker*, 23 D. 504.

The prior appropriation of water of a stream by a riparian proprietor, confers no exclusive right to the use of it as against another riparian proprietor, unless the latter's rights are impaired by grant or license, or the prior appropriation has continued adversely for more than twenty years. *Heath v. Williams*, 43 D. 265.

Twenty years' open and continuous use of water of a stream by a riparian owner gives a prior right against a lower owner, even though the latter has no need of the water during that time, and the lower owner has only a waste-water privilege. *Obrey v. Fesner*, 57 D. 711.

Title by prescription is raised by a uniform and uninterrupted diversion of water for the period prescribed by the statute of limitations; and the water may be used or applied in various ways, but no material change, injurious to other owners, will be allowed. *Stein v. Burden*, 60 D. 453.

Adverse enjoyment for twenty years, of a water-course, by one riparian owner, to the prejudice of another, will establish a right; but mere non-user by one proprietor will not enlarge the right of a neighbor. *Townsend v. McDonald*, 64 D. 503; *Pillsbury v. Moore*, 69 D. 91.

The right to use of water is acquired in a particular manner by uninterrupted adverse enjoyment of such use for over twenty years. *Pillsbury v. Moore*, 69 D. 91.

Adverse enjoyment by another is what destroys owner's right to use of water. *Ib.*

6. Right to cut ice.*—A riparian proprietor exercises a valuable privilege in cutting ice, and trespass creating an obstruction

which prevents it justifies a finding of damages for this as a direct consequence of the injury. *Lorman v. Benson*, 77 D. 435.

A riparian owner on a navigable stream has no superior right to the ice formed in it opposite his land, but it belongs to the first appropriator. *Wood v. Fowler*, 40 R. 330.

A riparian owner on a navigable stream above tide-water owns the ice formed in it opposite his land to the center. *Washington Ice Co. v. Shortall*, 40 R. 196.

A street bounded on a navigable stream, above high-water mark, extends to the center of the stream, in the absence of evidence of a contrary intention, and the adjacent lot-owners are entitled to the ice formed on that portion of the stream. *Village of Brooklyn v. Smith*, 44 R. 90.

The owner of a mill-dam on an unnavigable stream, who does not own the bed of the stream above the dam, has no interest in the ice formed upon it, and where he maliciously and unnecessarily draws down the pond and destroys the ice field, he is liable in damages to the riparian owner who owns the land under the pond. *Stevens v. Kelley*, 57 R. 813.

7. Right to erect dams.—One who has acquired a prescriptive right to construct a dam on a stream must nevertheless use ordinary care and diligence in making repairs in the dam so as not to injure those below. *Lapham v. Curtis*, 26 D. 310.

One who builds a dam across a stream is bound so to construct it that it will resist not only ordinary freshets, but also such extraordinary floods as may be reasonably anticipated. *Gray v. Harris*, 9 R. 61.

While the state has the power to require fishways to be made in dams, it cannot impose the expense of making such ways in dams already constructed, as that would be a taking of private property for public use without just compensation. *Com. v. Pennsylvania Canal Co.*, 5 R. 329.

8. Right to take gravel from stream.—The soil in navigable rivers below low-water mark, as well as the use of the stream for purposes of navigation, belongs to the public, and the title is vested in the state for the use of the public, and a grant from the state to an individual, under the general land laws, which purports to include the bed of such a navigable stream, and to give the grantee the exclusive privilege of taking sand, gravel and other deposits from the bed of the stream, is to this extent void. *Goodwin v. Thompson*, 54 R. 410.

9. Sales and conveyances of water-rights.—A grant of a stream of water, or of a part thereof, by fixed boundaries, cannot be made except by a deed duly executed and recorded; but a grant will be presumed from an adverse occupation for twenty years. *Bullen v. Runnels*, 9 D. 55.

A contract to sell the privilege of water in

* Ice in streams and ponds, property in, in whom vested, see note, 32 R. 164-168.

For Index to Notes in American Decisions and American Reports, see Volume L.

the state in which it then was, is violated by a subsequent sale of a branch line from the principal line of water-pipes. *Durrett v. Simpson*, 16 D. 115.

If a vendor, owning a tract of land over which he has dug a trench to carry water to his mill on the lower part of the tract, sells the upper part without expressly reserving the water-right, the vendee has no right to obstruct the trench and cut off this water supply, but he takes the land subject to this easement of the vendor. *Seibert v. Lewan*, 49 D. 525.

Where the language used in a grant of a water privilege leaves it doubtful whether the intention was to limit the purpose for which the water is to be used, or only the quantity to be used, the latter construction will be favored. *Dewey v. Williams*, 77 D. 708.

A grant of a sufficient quantity of water for two runs of stones in a certain grist-mill limits the quantity of water to be used, and not the purpose for which it may be used. *Ib.*

A construction of a grant of water-power that will restrict the grantee to the specific use to which the water was applied when the grant was made will never be adopted, unless the language of the grant unmistakably shows that such was the intention of the parties. *Hines v. Robinson*, 99 D. 772.

The conveyance of a house and land by an ordinary warranty deed carries with it, by implication, the right which the grantor has to water running to the premises conveyed by an aqueduct from a distant spring; and a contemporaneous special deed, to the grantee, of the water privilege, containing limitations and restrictions in the use thereof, without the words "to his heirs, assigns, etc.," will not be construed to modify the estate in the water and aqueduct so as to prevent it passing by deed of the premises from such grantee to succeeding grantees, and the latter may recover damages from the original grantor for cutting off the aqueduct on adjacent land owned by him, and thus disturbing the water privilege. *Coolidge v. Hager*, 5 R. 256.

Where the owner of a water-power leases the use of a specific quantity of water, and the lessee habitually uses more, and threatens to persist, and the extent of such use is difficult to estimate, the lessee may be enjoined, without any allegation of injury to the lessor. *Lawson v. Menasha Wooden Ware Co.*, 48 R. 528.

10. Remedies for obstructions. — Equity has jurisdiction, concurrent with the remedy at law, to prevent an injury to private property by interrupting an ancient water-course flowing across one's land. *Belknap v. Belknap*, 7 D. 548.

Obstructions in an artificial channel through which there exists a prescriptive

right to flow the waters of a lake, though occasioned by natural causes, may be removed by the persons whose lands are overflowed by the rise in the lake incident to the diminished capacity of its channel of discharge, without there being any right on the part of the owner of the channel to object. *Chapman v. Thames Mfg. Co.*, 33 D. 401.

An infringement of a legal right, which, if continued for a sufficient length of time, would form the basis of a prescriptive right, will constitute a cause of action, without its being required that any other damage be shown. *Ib.*

Obstructions cannot be placed in a water-course, even if it is already so obstructed that its use is prevented. *Ib.*

The owner of land has a *prima facie* right to remove a portion of a dam built upon his land by another. *Richardson v. Emerson*, 62 D. 694.

Equity will decree the removal of an obstruction in a watercourse as well as enjoin its future obstruction. *Bart v. De Hart*, 72 D. 395.

Where a quantity of water collects at different seasons of the year on complainant's land, to such an extent as requires an outlet to some common reservoir, and if such is always the case in times of heavy rain and melting of snow, and if as far back as the memory of man runs that flow of water produced a natural channel through the defendant's land, where such accumulated surplus water has always been accustomed to run, the complainant has a right to have the water discharged in the same channel for the relief of his land, and equity will enjoin the defendant from obstructing it. *Ib.*

The surface water on the plaintiff's land ordinarily drained into a natural water-course flowing through his land and the defendant's. The plaintiff opened a quarry on his land, and in the winter the surface-water, the snow-water and the water from small streams cut off by the excavation accumulated in the excavation. In the spring the plaintiff pumped the water from the excavation into the watercourse. During this process the flow was greater than usual, but the capacity of the watercourse was sufficient to carry it all off, together with the natural body of the stream. Defendant filled up the channel and dammed the stream, thus throwing back the water on plaintiff's land. *Held*, that the plaintiff could compel the removal of such obstructions, and restrict such interference with the flow of the stream. *McCormick v. Horan*, 37 R. 479.

11. — for flowage. — The owner of a dam on a stream is liable for damages caused thereby to private property on such stream by the ordinary and expected floods of the season, but not for those occasioned by extraordinary and unexpected floods. This principle applied in the case of a stream

For Index to Notes in American Decisions and American Reports, see Volume 1.

made navigable by law. *Bell v. McOlintock*, 34 D. 507.

Keeping up a dam and flowing the lands of another for twenty years, without paying damages or being questioned, is evidence of the right to maintain such dam and flow such lands, and a bar to any action for damages in so doing. This is true under the Massachusetts statutes as well as at common law. *Williams v. Nelson*, 34 D. 45.

The abandonment of a prescriptive right to maintain a dam and flood lands is not presumed from nine years non-user. *Ib.*

The owner of a dam on a watercourse may be liable for flowing back water so as to obstruct the natural drainage of land lying near, but not bordering on the watercourse, unless such obstruction was caused by a reasonable use of his own land and privilege, and what is a reasonable use is ordinarily a mixed question of law and fact. *Bassett v. Salisbury Mfg. Co.*, 82 D. 179.

A stream flowed in a well-defined channel across a highway and through defendant's land, until a great freshet came, when it left the old channel and made a new one down the highway and flowed over plaintiff's land. Plaintiff then turned the water back to its old channel in defendant's land. Subsequently the highway surveyor, without authority, closed up the old channel and thereby caused the water to flow upon defendant's land in various places, whereupon defendant used such means to relieve his land as to cause the water to flow again in the channel formerly made by the freshet and upon plaintiff's land. Held, that this was an invasion of plaintiff's rights, for which he could maintain an action without waiting for damaging effects from the water. *Tuthill v. Scott*, 5 R. 301.

The owner of land planted a row of trees on his own land, and along the division line between his land and that of an adjoining proprietor, the effect of which was to obstruct the passage of driftwood carried upon the land of the adjoining proprietor by the overflow of a watercourse adjacent to the lands of both proprietors, to the injury of such adjacent land. Held, that no action would lie therefor. *Taylor v. Fickas*, 31 R. 114.

12. — for diverting the flow of the stream. — The owner of land may divert the water of a stream flowing through it, provided he returns the water to the same channel before it reaches the land of the proprietor below. *Norton v. Volentine*, 39 D. 220; *Blanchard v. Baker*, 23 D. 504.

The existence of an ancient channel by which water is diverted from a main stream, does not justify the deepening of the channel so as to cause a greater diversion to the injury of proprietors along the main stream. *Blanchard v. Baker*, 23 D. 504.

Unlawful diversion suffered for twenty

years ripens into a right which cannot be controverted. *Ib.*

Where one diverts into a new channel the water of a stream running through his land, and then obstructs this new channel so as to carry off the water in an entirely different direction than that in which it ran before the diversion, a right of action accrues to the proprietor below, who is injured thereby. *Norton v. Volentine*, 39 D. 220.

Whether one may acquire a right to water in the swamp lands of another, so as to maintain an action against the latter for draining and improving his lands, whereby filtration into a running stream is destroyed and the volume of water diminished, is not decided. *Thayer v. Brooks*, 49 D. 474.

A legislative grant to an incorporated company, giving them the exclusive right of conducting water to a city for a term of years, confers no right upon them to divert waters of a running stream to the injury of riparian proprietors, without making compensation therefor. *Stein v. Burden*, 60 D. 453.

Riparian proprietors are not deprived of their common-law action for damages, where the lessees of certain city water-works fail to exercise his authority, conferred by legislative enactment, in suing out a writ of *ad quod damnum*, to ascertain damages sustained by such proprietors for his diversion of the water of a running stream. *Ib.*

A municipal corporation owning land upon a watercourse acquires no right to divert water from the stream, to the injury of other riparian proprietors, in sufficient quantities to supply the domestic wants of its inhabitants residing at a distance of from three to five miles from the stream. *Ib.*

Diversion of the water of a creek in violation of the right of complainant entitles him to an injunction, even though he suffer no actual damage thereby. *Burden v. Stein*, 62 D. 758.

One who conveys water by means of artificial canals into a natural stream in which another has a water-right by prior appropriation may afterwards divert an equal amount above the latter's dam, provided he does not injure his right. *Butte C. & D. Co. v. Vaughn*, 70 D. 769.

The defendant, owning the land on one side of a river, built a breakwater to prevent the water encroaching upon his land, which had the effect to throw the current over upon and wash away the plaintiff's lands opposite. Held, that defendant was liable. *Gerrish v. Clough*, 2 R. 165.

13. Rules of pleading and evidence in actions for diversion. — Riparian proprietor's right is not limited to the mode or quantity of his previous use. Hence it is no defense to an action for diverting water from a riparian proprietor, to show that no injury would have accrued to him if he had

For Index to Notes in American Decisions and American Reports, see Volume L.

not changed the manner or extent of his use, because, independent of any particular use of or for it, he has the right to the flow of the water on his own land without diminution or alteration. *Buddington v. Bradley*, 26 D. 386.

An allegation in an action for the diversion of water, to the effect that by reason of the acts of the defendant, the plaintiff could not enjoy his land as beneficially as he otherwise might, and that he was deprived of the use and profits thereof, is sufficiently particular to admit evidence of whatever damages to his land or mill privilege the plaintiff has suffered. *Parker v. Griswold*, 42 D. 739.

The riparian owner must show actual perceptible damage by diversion of the water in a stream flowing through his land, by another riparian owner, before he can recover therefor. *Elliot v. Fitchburg R. R. Co.*, 57 D. 85.

A complaint alleging that a riparian proprietor, after diverting water, did not restore it, is good. His liability rests on the naked fact that he did not return the water; not on the reasons why he did not. *Stein v. Burden*, 65 D. 394.

No material variance exists between allegations and proofs when the complaint alleges that defendant wrongfully diverted the water and prevented its return, while the evidence shows that while the water was originally diverted by him he provided means for its return to its natural channel above plaintiff's land, and that its return was prevented by the act of another person after it left defendant's land. *Ib.*

Tenants in common may join in an action for diversion of water, since this is in the nature of a nuisance. *Parke v. Kilham*, 68 D. 310.

An action may be maintained in Massachusetts for diverting a stream in that state, and preventing it from coming to the plaintiff's mill in Rhode Island. *Mannville Company v. City of Worcester*, 52 R. 261.

A mill-owner may recover upon proof of an unlawful diversion of a stream, without proof of actual damage, in an action on the case. *Blanchard v. Baker*, 23 D. 504.

To prove damage from diversion of a water-course a plaintiff suing therefor may introduce evidence of the cost of constructing the defendant's mill on the same stream, and of the yearly rent of the mill, to show at what expense he, the plaintiff, might make the water available. *Plumleigh v. Dawson*, 41 D. 199.

Damage is presumed from a diversion of a stream. *Ib.*

Evidence of damage occasioned by diversion of water cannot be given by one uninformed as to the size of the stream, its supply of water, or the amount diverted. *Stein v. Burden*, 60 D. 453.

Evidence of actual possession, with claim

of title, enables plaintiff to sue for disturbance of riparian rights, and evidence of plaintiff's want of title is irrelevant. *Ib.*

In an action for damages for diversion of water, defendants in possession cannot prove an older and better title in third persons, unless such persons are made parties, and the facts specially set up. *Humphreys v. McCull*, 70 D. 621.

The burden of proof is on the party who conveys water into a stream above another's dam, where the latter has a water-right, and who wishes to divert such water before it reaches the dam, to show that he diverts no more than he conveyed into the stream. He must show clearly to what portion he is entitled. He can claim only such portion as is established by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled. *Butte etc. Co. v. Vaughn*, 70 D. 769.

A grant of use of water may be presumed when, in an action for the wrongful diversion of the water, the jury are satisfied from the evidence that the defendants have been in the continued, adverse, uninterrupted possession, use, and enjoyment of the water in dispute for five years preceding the commencement of the action. *Union Water Co. v. Crury*, 85 D. 145.

14. Damages recoverable for diversion. — Damages for nuisance in diverting water can only be given for injuries actually sustained prior to the commencement of the suit. *Thayer v. Brooks*, 49 D. 474.

Damages accruing subsequent to commencement of action for damages by riparian proprietors are not recoverable except in a new action, but evidence of such damages is admissible to show the consequences of the original diversion. *Stein v. Burden*, 60 D. 453.

A riparian proprietor is entitled to nominal damages for any disturbance of his right, without proof of actual damage. *Ib.*

15. Remedies for contamination or pollution. — Where tan-bark thrown into a stream by defendant is annually deposited on land of plaintiff below, no right by prescription to so deposit his tan-bark arises in favor of defendant, if such deposits have only taken place for the six years last past, though he may have thrown his bark into the stream for twenty years or more. *Crosby v. Bessey*, 77 D. 271.

The question whether the use of a stream to carry off a manufacturer's waste is reasonable or not is one of fact for the jury, depending upon the circumstances of the case, such as the size and character of the stream, the purpose of its use, the benefit to the manufacturer, and the injury to the other riparian owners. *Hayes v. Waldron*, 84 D. 105.

Evidence of usage is inadmissible upon the question of reasonable use of a stream by a

For Index to Notes in American Decisions and American Reports, see Volume L.

manufacturer in discharging waste therein. *Id.*

A mill-owner has the right, in a reasonable manner, to discharge the waste from his mill, such as sawdust, shavings, etc., into the stream, in the ordinary course of using such mill; but he has not the right wantonly and needlessly, and out of the ordinary course in such cases, and not in the service of his substantial interest and benefit in the use of his mill in a reasonable manner, to throw such waste, or permit it to go into the stream, to the injury of inferior heritors. *Jacobs v. Allard*, 1 R. 331.

If the water of a stream becomes polluted by the emptying into it of city sewers, so that a riparian proprietor cannot use it in his business as he has been before accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them. *Merrifield v. City of Worcester*, 14 R. 592.

Every owner of land through which water flows is entitled to receive the water uncorrupted in quality from riparian proprietors above him; and a court of equity will issue an injunction to prevent such corruption, upon satisfactory proof thereof. *Richmond Mfg. Co. v. Atlantic De Laine Co.*, 14 R. 658.

The plaintiff purchased a tract of land in the coal region and erected a residence upon it. A leading inducement to the purchase was a pure mountain stream of water running through the land. The plaintiff constructed a pond for fish and ice upon it, and from it supplied a cistern, a ram and a tank in the attic of his house. Subsequently defendants opened a colliery on the stream two miles above, which corrupted the water and spoiled it for plaintiff's uses, killed fish and shrubbery, corroded the pipes, and compelled plaintiff's abandonment of the water. *Held*, that plaintiff had a right of action therefor, and that a nonsuit was erroneous. *Sanderson v. Pennsylvania Coal Co.*, 27 R. 711.

In working a coal mine the defendant caused the debris to be deposited in a natural stream of water, and the same in the rainy season was carried and left on the plaintiff's land by the natural flow of the stream. *Held*, that the defendant was liable for the injury. *Robinson v. Black Diamond Coal Co.*, 40 R. 118.

The defendant, proprietor of a slaughterhouse on a stream, had for eight years been in the habit of discharging the blood and offal into the stream. Other persons, proprietors of slaughterhouses, breweries, soap factories and the like, also discharged the refuse of their establishments in like manner. The effect was to damage the plaintiff, pro-

prietor of a flour-mill which had been for thirty years established lower down the stream, by rendering the water offensive, tainting the air, and injuring the health of his operatives. *Held*, that the defendant should be enjoined. *Woodyear v. Schaefer*, 40 R. 419.

16. Subterranean watercourses; springs, wells, etc.—1. *In general.**—Prior occupancy of water percolating in the earth gives no exclusive right as against owners of adjacent land. *Roath v. Driscoll*, 52 D. 352.

In the enjoyment of one's land he may cut drains, or mine, or quarry, though in so doing he interferes with the flowage of water in hidden, unknown, underground channels. *Haldeman v. Bruckhart*, 84 D. 511.

A land-owner must not maliciously or negligently divert even an unknown subterranean stream, to the damage of a lower proprietor. *Id.*

The inferior proprietor may have rights in known and well-defined subterranean streams which the courts will protect, and he may invoke the same rules in insisting upon their uninterrupted flow as exist in the cases of watercourses upon the surface. *Id.*

Waters percolating in the soil belong to the owner of the freehold, and he may use them as he chooses, free from any usufructuary rights in others. *Hanson v. McCue*, 10 R. 299; *Wilson v. City of New Bedford*, 11 R. 352.

Where subterranean water emerges, and afterward sinks and re-emerges, if its entire exact course can be traced, the proprietor of the land at the latter point will be protected against a diversion of the water. *Saddler v. Lee*, 42 R. 62.

Where subterranean water flows in a distinct channel, an adjoining owner of land has no greater right to divert it than if it were on the surface of the earth. *Burroughs v. Saterlee*, 56 R. 350.

2. *Wells.*—Water standing or percolating in the soil is part of it, constituting one of the natural advantages of the land, which each owner is entitled to use as fully and freely as he can by sinking wells. *Roath v. Driscoll*, 52 D. 352.

Defendant digging a reservoir on his land, which lowers water in plaintiff's well, previously made on adjoining land, so that it cannot be used, there being no stream of water running into or from either excavation, and it not appearing whether the diminution of water in the plaintiff's well is produced by cutting off or diverting subterranean supplies, or by draining water from it, cannot be enjoined, there being no evidence of improper motive in the defendant's proceedings. *Id.*

* See note on percolating and subterranean waters, 64 D. 727-730.

For Index to Notes in American Decisions and American Reports, see Volume L.

Draining a well or subterranean spring of another, caused by an excavation made by a person upon his own land, is *damnum absque injuria*, for which no action lies. *New Albany etc. R. R. Co. v. Peterson*, 77 D. 60.

A land-owner dug a well for the use of his family and stock, thereby preventing the water from reaching, by percolation or underground currents, the spring or open running stream of an adjoining owner. *Held*, that this was not actionable. *Village of Delhi v. Youmans*, 6 R. 100. S. P., *Hougan v. Milwaukee etc. R. R. Co.*, 14 R. 502; *Chase v. Silverstone*, 16 R. 419; *Phelps v. Nowlen*, 28 R. 93.

3. *Springs*.—A defined subterranean flow of water amounting to a regular and constant stream cannot be diverted or destroyed by the owner of land above, through which it flows, to the injury of the owner of the land below, on which it issues in the form of a spring. *Wheatley v. Baugh*, 64 D. 721.

The destruction of a spring depending for its supply on percolation from the land above, by use of the land above for mining and other lawful purposes, will not render the owner liable in damages to the owner of the lower land whose spring is destroyed, unless the injury was occasioned by malice or negligence. *Id.*

Where one by unnecessary excavations upon his own lands, without interfering with any known watercourses, withdraws water from his neighbor's spring or well by percolation, he is liable for the injury, if his acts are in derogation of a grant between the parties, or in violation of a covenant contained therein. *Johnstown Cheese Mfg. Co. v. Veghte*, 25 R. 125.

One may not divert a spring on his land to the injury of a prior appropriator to whom the water naturally comes through a creek by percolation from the spring. *Strait v. Brown*, 40 R. 497.

One who accepts a deed with a reservation of the right to draw water from a spring, and afterward, for the sole purpose of cutting off the water percolating to the spring, digs a well on the land so conveyed, is liable to his grantor for the consequent injury. *Chesley v. King*, 43 R. 569.

Defendant was the owner of a spring supplied by percolation only and having no natural channel or outlet. There was an artificial channel which had for fifteen years conducted the water to plaintiff's land below. In an action to restrain defendant from digging on his own land so as to divert the sources of the spring, — *held*, that plaintiff had no such interest in the spring as would support the action, and that the user would not support the presumption of a grant of an easement. *Hanson v. McCue*, 10 R. 299.

A purchased land subject to the reserva-

tion of the right in B to conduct water from a spring thereon to his adjoining land. A in good faith dug a well on his own land, some forty feet from the spring, and the subterranean supply of the spring was thereby cut off. *Held*, that A should not be restrained. *Lybe's Appeal*, 51 R. 542.

WAYS.

See HIGHWAYS; PRIVATE WAYS.

WEAPONS.

Assault with deadly, see ASSAULT, 36-41.

Carrying concealed, see CONCEALED WEAPONS.

Description of, in indictment, see HOMICIDE, 23; INDICTMENT, 26.

WEARING APPAREL.

Exemption of, from attachment or execution, see ATTACHMENT, 42; EXECUTION, 153, 159.

WEIGHTS AND MEASURES.

1. Power of congress to fix standard. — The grant in the federal constitution of power to congress to regulate weights and measures does not extinguish the right of the states to deal with the same subject until congress shall have exercised its power in regard thereto. *Weaver v. Fegely*, 70 D. 151; *Harris v. Rutledge*, 87 D. 441.

2. Effect of statutory provisions. — A statute regulating weights and measures binds the parties to contracts, and local customs fixing different weights or measures cannot be set up unless mentioned in the contract. *Harris v. Rutledge*, 87 D. 441.

A contract for masonry at a specified price per perch will be construed according to the statute defining the number of cubic feet in a perch, in the absence of any expression to the contrary; no implied contract to the contrary is competent, and if both parties contemplated a perch of a different number of feet, then the contract must be corrected in a court of equity. *Id.*

3. What is a "ton." — Two thousand pounds avoirdupois weight constitute a ton in Pennsylvania. *Evans v. Meyers*, 25 Pa. St. 114; *Weaver v. Fegely*, 70 D. 151.

WELLS.

Protection of property in, see WATERCOURSES, 16.

WHARVES.

[Includes the right to erect wharves, and charge for their use by vessels; the lien for wharfage; the liabilities of wharfingers; and the rights of persons using wharves.]

Powers of cities respecting, see MUNICIPAL CORPORATIONS, 36.

Right to erect, see also RIPARIAN RIGHTS, 8.

1. Nature of wharves and property therein. — A wharf is private property when built by individuals. When built by a city under the general law, it is under the

For Index to Notes in American Decisions and American Reports, see Volume I.

jurisdiction and control of the city authorities. *Jeffersonville v. Louisville Ferry Co.*, 89 D. 495.

Flats pass by a conveyance of a wharf, both as appurtenant and as parcel, under the Massachusetts colony ordinance, where they are described as bounding on an arm of the sea and extend from the upland below high-water mark. *Ashby v. Eastern R. R. Co.*, 38 D. 426.

2. Right to erect wharves. — A third person has no right to erect a wharf on the land below high-water mark on a tide-water stream, or on a creek emptying into it, without the permission of the owner of the adjacent fast land. *Ball v. Slack*, 30 D. 278.

The legislature may authorize the erection of wharves, and reclamation of land from water, for the purpose of encouraging navigation and commerce, although the effect is to confer privileges and advantages wholly private and exclusive in their character. *Phipps v. State*, 85 D. 634.

The right to erect a wharf is founded either in the ownership of the soil or the right of eminent domain. *Jeffersonville v. Louisville Ferry Co.*, 89 D. 495.

The right to build and maintain a wharf out to a point in the stream where it is practically navigable, or even beyond that point, provided it does not obstruct navigation, is a well-established incident to riparian ownership. *Bainbridge v. Sherlock*, 95 D. 644.

The legislature may forbid the owner of land on the bank of a navigable non-tidal river to build any wharf, pier or bulkhead between high and low-water marks, without the consent of the council of the town or city, and he may be enjoined from doing so. *Ravenswood v. Flemings*, 46 R. 485.

3. Rights of wharfingers, generally. — A wharf extended below low water gives no right of possession to any adjacent land under water not actually covered by the wharf, nor any right to the exclusive use of the open space at its side. The only right of the wharf-owner over the adjacent water is that which he has in common with all others, of mooring vessels upon it, or passing and repassing with boats and vessels engaged in navigation. *Gray v. Bartlett*, 32 D. 208.

The owner of flats, covering the whole thereof with a wharf, does not thereby make such a claim of right to use the land of a coterminous proprietor to lay vessels upon, as will ripen into a prescriptive right to so use such land, although the adjacent proprietor acquiesces in the maintenance of the wharf. *Ib.*

The right to use reasonably the water space in front of a wharf for the purpose of mooring vessels landing thereat is an incident to its ownership. This space, when not actually occupied by boats, may be freely traversed by the public engaged in navigating the stream, but it cannot be used as

against the wharf proprietor, and without his consent, as mooring-ground for vessels. *Bainbridge v. Sherlock*, 95 D. 644.

4. Right to wharfage, and how enforced. — The taking of wharfage or toll on navigable streams is a franchise subject to the regulation of the legislature, and not lawfully exercisable without its permission. *Lansing v. Smith*, 21 D. 89.

Wharfage exacted of steamboats and vessels by the owner of the soil for the use of it is not a tonnage duty, repugnant to the federal constitution. *O'Conley v. City of Natchez*, 40 D. 87.

The right to collect wharfage and dockage is not within the California Revenue Act of 1851, and the naked right cannot be assessed *eo nomine* and made liable. *De Witt v. Hays*, 56 D. 352.

The right to collect wharfage or dockage is a franchise or incorporeal hereditament, an uncertain profit issuing out of realty, and is neither real estate nor personal property. *Ib.*

A wharfinger has no claim against the owner of goods for wharfage accruing after the owner has sold the goods, given the wharfinger notice thereof, and tendered him the wharfage due. *Wooster v. Blossom*, 72 D. 549.

Notice to a wharfinger of the sale of goods, to terminate the vendor's liability for future wharfage, may be given either orally or by a delivery order. *Ib.*

A wharfinger, like a common carrier, may make what contract he pleases as to his compensation. *Southern S. Co. v. Sparks*, 75 D. 793.

Where a wharfinger specifies his rates of charges, and gives notice to a customer in advance, and the latter afterwards makes use of the wharf, he thereby assents to the proposed charges, and cannot refuse to pay them on the ground that they are more than is reasonable or customary; and the same rule applies in the case of tavern-keepers and warehousemen. *Ib.*

A state statute giving a remedy for claims for wharfage by proceedings *in rem* is void. *Brookman v. Hammill*, 3 R. 731.

5. Lien for wharfage. — A wharfinger has a double remedy for his wharfage: a lien on the article and a claim against the owner personally. *Wooster v. Blossom*, 72 D. 549.

6. Liabilities of wharfingers, generally. — A wharfinger is one who keeps a wharf for the purpose of receiving goods for hire. *Rodgers v. Stophel*, 72 D. 775.

Wharfingers are liable for want of ordinary diligence only, and not as common carriers. *Blin v. Mayo*, 33 D. 175; *Cox v. O'Riley*, 58 D. 633; *Rodgers v. Stophel*, 72 D. 775.

To render a wharfinger liable, delivery to him must be proved, and a charge for wharfage, if made from the shipping list and not

For Index to Notes in American Decisions and American Reports, see Volume I.

from inspection of the goods, is not sufficient evidence to prove that fact. *Blin v. Mayo*, 33 D. 175.

Mere delivery of goods at the wharf is not necessarily a delivery to a wharf-owner as a wharfinger, and evidence of usage is admissible to show when goods landed at a wharf are to be considered as in the custody of the wharfinger. *Ib.*

In an action against a wharfinger for the value of goods received by him, and which he failed to deliver to the consignee, he must prove the property to have been lost, or to have passed out of his possession, in order to have the court determine whether it had been so lost for the want of reasonable care. *Cox v. O'Riley*, 58 D. 633.

Requesting "a lad," who does not appear to be the agent of the consignee, to notify said consignee that a box was at the wharf for him, or proof that a rumor of such fact had reached said consignee, will not excuse a wharfinger from his neglect to give direct and reasonably prompt notice thereof. *Ib.*

A wharfinger's responsibility begins when goods are delivered on his wharf, and he has received them as wharfinger, either expressly or by implication. *Rodgers v. Stophel*, 72 D. 775.

Whether a party is a wharfinger or not is a question for the jury. *Ib.*

7. — as regards safety, repairs, etc. — The lessee of a private wharf is liable for injury to a vessel which he takes to his wharf, there to be loaded by him with his cargo, occasioned while he was loading the vessel, without fault on the part of the owners, and through the insufficiency of the wharf. *Barrett v. Black*, 96 D. 497.

The owner of a wharf is liable for an injury to a vessel lawfully using it, by an obstruction in the river bottom adjoining it, known to him but not to the master of the vessel. *Barber v. Abendroth*, 55 R. 821.

A municipal ordinance required owners of wharves to maintain cap-logs. Owing to the absence of a cap-log on the defendant's wharf the plaintiff, acquainted with the premises, sustained injury. Evidence was offered by the defendant to show that cap-logs would have interfered with the loading of vessels in the course of their business. This was rejected. *Held*, error. Also, *held*, that no liability was raised by the mere non-compliance with the ordinance. *Philadelphia etc. R. R. Co. v. Ervin*, 33 R. 726.

A customs officer, searching for smugglers at a wharf where foreign vessels discharged, having no lantern, fell into the water through an opening left unguarded and unlighted in the wharf by the owner, and was injured. *Held*, that he could maintain an action therefor. *Low v. Grand Trunk R'y Co.*, 39 R. 331.

8. Rights of persons using wharves. — Vessels whose cargoes are to be discharged

at the same dock must take their turn in the order of their arrival; and the owner of such dock is not bound to make provision for an unexpected and accidental accumulation of vessels. *Wordin v. Bemis*, 85 D. 255.

A navigator who lawfully lands at a regular wharf is not justified by any public right in the river or stream in so mooring his boat that its side and stern will be carried against or lie along the wharf of an adjoining wharf-owner. *Bainbridge v. Sherlock*, 96 D. 644.

WHOM IT MAY CONCERN.

Marine policies for, see INSURANCE, 99.

WIDOW.

Articles set apart for, see EXECUTORS, etc., 33.

Competency of, as a witness, see WITNESSES, 68.

Of decedent, allowance to, see EXECUTORS, etc., 102.

Rights of, regarding the homestead, see HOMESTEAD, 13.

WIFE.

As surety for husband, see HUSBAND AND WIFE, 57.

As trustee for husband, see HUSBAND AND WIFE, 93.

Conveyances to, see HUSBAND AND WIFE, 64, 65.

Domicile of, see DOMICILE, 11.

Gifts between husband and, see GIFTS, 13; HUSBAND AND WIFE, 91, 92.

Of accused, declarations of, see EVIDENCE, 164.

Powers given to, by married-women's acts, see HUSBAND AND WIFE, 43.

Right of, to employ husband as agent, see HUSBAND AND WIFE, 96.

Rights and disabilities of, see HUSBAND AND WIFE, 23-36.

Rights of, as respects community property, see HUSBAND AND WIFE, 82.

Rights of, as survivor of husband, see HUSBAND AND WIFE, 62, 85.

Rights of, regarding the homestead, see HOMESTEAD, 12.

Rights of, under marriage settlement, see MARRIAGE AND DIVORCE, 30, 31.

Separate estate of, see HUSBAND AND WIFE, IV.

When may sue alone, see HUSBAND AND WIFE, 103.

WILD LANDS.

Right of dower in, see DOWER, 8.

WILLS.

[Includes the law relative to instruments making disposition of property to take effect at death of the maker, treating such instrument, or will, as a whole, and excluding rights and liabilities arising out of *devices, legacies, powers, and trusts*, which are separate titles in the work.]

As means of evidence, see EVIDENCE, 210.

For Index to Notes in American Decisions and American Reports, see Volume I.

Creation of implied trusts by, see TRUSTS, 12.
 Election between dower and provisions in, see DOWER, III.
 Manumission of slaves by, see SLAVERY, 8.
 Parol evidence to explain, see EVIDENCE, 127, 128.
 Power of wife to make, see also HUSBAND AND WIFE, 34; MARRIAGE AND DIVORCE, 31.
 Reformation of, in equity, see EQUITY, 40.
 Sales of land under power in, see EXECUTORS, etc., 47.

I. TESTAMENTARY CAPACITY, AND HOW EXERCISED.

1. *General Principles.*
2. *Execution, Attestation, etc.*
3. *Revocation.*

II. PROVING A WILL.

III. VALIDITY.

IV. LAW OF PLACE.

V. INTERPRETATION AND EFFECT.

1. *General Rules of Construction.*
2. *The Residuary Clause.*
3. *The Doctrine of Equitable Conversion.*

VI. CONTESTING A WILL FOR INCAPACITY OR UNDUE INFLUENCE.

VII. ACTIONS FOR CONSTRUCTION AND ESTABLISHMENT OF WILLS.

I. TESTAMENTARY CAPACITY, AND HOW EXERCISED.

1. *General Principles.*

1. *General nature of a will.* — The word "legacy" is often used in a will in relation to real as well as personal property, and its construction should be governed by the intention of the testator. Popularly the word is applied to land as well as to money; and courts should construe words according to their meaning in common parlance. *Holmes v. Mitchell*, 5 D. 527.

There is no such a thing known as a "voidable" will. *McGee v. Porter*, 55 D. 129.

One may dispose of his property by will in any manner whatever, whether he institutes an heir or only names legatees. *Ehrenberg's Succession*, 99 D. 729.

2. *What will be deemed to be a will.* — 1. *In general.* — An instrument is a will, whatever its form, if the intention of the maker to dispose of his estate after death be sufficiently manifested, and this intention be lawful in itself and the writing have the statutory formalities. *Babb v. Harrison*, 70 D. 203.

A paper duly signed and attested is a will entitled to probate, which declares that it is the maker's last will and desire respecting his property, and that he has made a previous will which is contrary to his present wishes, but which is now out of his possession, so that he cannot destroy it; revokes all former wills, and leaves the distribution of

his property under the laws of the state. *Lucas v. Parsons*, 71 D. 147.

A will disposing of property according to the laws of distribution is valid in Georgia, though not in England, and the heirs take under the will, and not by descent. *Ib.*

A will may be made on distinct papers, if they are connected by their internal sense, or by a coherence or adaptation of parts. *Witoff's Appeal*, 53 D. 597.

To make a paper the last will and testament of a decedent at the time it is written, it must appear that such person possessed the *animus testandi* at that time. *Booster v. Rogers*, 52 D. 680.

A paper may be made the last will and testament by adoption, although not such at the time it is written. *Ib.*

A paper intended as a memorandum may be made a will by act of God, happening when the scrivener has not completed the formal will from the memorandum, the intention of the testator having continued until the act of God prevented the execution of the instrument. Nor is an immediate or sudden death necessary if the jury are satisfied from the evidence that the intention was unchanged respecting the provisions of the will. *Ib.*

The remaining provisions of a will are not deprived of their testamentary character, nor the instrument rendered inadmissible to probate, from the fact that some of its provisions may have had the force of a contract, and may have become operative during the life-time of the testatrix. *Taylor v. Kelly*, 68 D. 150.

Notes made by a testator, payable at his death, folded up with his will, referred to and clearly identified therein, and remaining in his possession at his death, are a part of the will. *Fickle v. Snepp*, 49 R. 449.

A gift of land, to take effect after the death of the donor, has all the properties of a will. *Singleton v. Bremer*, 17 D. 699.

A decedent wrote and signed on the back of a business letter addressed to a man and his wife the following, addressed to the wife: "After my death you are to have \$40,000; this you are to have, will or no will; take care of this until my death." *Held*, a valid testamentary gift of personalty. *Byers v. Hoppe*, 48 R. 89.

Where the payee of a note wrote upon the back, "If I am not living at the time this note is paid, I order the contents to be paid to A. H.," and, having signed it, died before the note was paid, — *held*, that the indorsement was testamentary, and entitled to probate as a will. *Hunt v. Hunt*, 17 D. 433.

Instrument in form, substantially, "I, A, out of my love for my sister B, do agree to make her my heir if she outlives me; and I, B, out of my love for my sister A, do agree to make her my heir if she outlives me," if properly attested and otherwise regular in

For Index to Notes in American Decisions and American Reports, see Volume E.

form, is a will, and parol evidence to establish it as a will is admissible. *Evans v. Smith*, 73 D. 751.

2. *Whether an instrument is a will or a deed.**—An instrument in the form of a deed is a will, where the property that it purports to convey is an undivided interest in that of which the grantor shall die seized. *Watkins v. Dean*, 31 D. 583.

Whether an instrument is a deed or a will depends mainly upon the intention of the maker; whether he intended it to vest title before his death or after death. *Wall v. Wall*, 64 D. 147.

An instrument may be a will though in the form of a deed if it is revocable at pleasure, not to take effect until the death of the maker, and properly attested and otherwise regular in form. *Evans v. Smith*, 73 D. 751.

The rule of construction for determining whether an instrument is a will or a contract is, that if it passes a present interest, although the right to its possession and enjoyment may not accrue till some future time, it is a deed or contract; but if the instrument does not pass an interest or right till the death of the maker, it is a will or testamentary paper. *Burlington University v. Barrett*, 92 D. 376.

An instrument may be partly a deed and partly testamentary. *Ib.*

In determining whether an instrument is a testament or a contract, courts do not allow the use of language peculiar to either class of instruments, nor even the belief of the maker as to the character of the instrument, to control inflexibly their construction of it; but giving due weight to these circumstances, courts look further, and weighing all the language as well as facts and circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will effectuate the manifest intention of the maker. *Ib.*

An instrument in the form of a deed, which conveys all the property that the maker "may die possessed of," is a will, and is only admissible in evidence after due probate. *Brewer v. Baxter*, 5 R. 530.

An instrument of which the following is a copy was held to be a will, and not a deed, "Due at my death to Haney Johnson the sum of two thousand five hundred dollars, from the general fund of my estate, as a gift. The condition of the above bond or obligation is such that whereas, for the fidelity and obedience, as well as the natural love and affection that I have for my daughter, Haney Johnson, I donate, in the above manner, what I design for her at my death." Duly dated, attested and signed. *Johnson v. Yancey*, 65 D. 646.

3. *What will not be so deemed.*—A paper purporting to be a schedule of ad-

vancements made by the alleged testator to some of his children does not form part of the will, and can have no effect on the question of admitting the instrument to probate, or the proof of its execution. *Grabill v. Barr*, 47 D. 418.

A memorandum of advancements made by a deceased, no matter how strictly kept or clearly proved, nor his dying words spoken in the presence of all his family, no matter how just, unless it can be proved as a will, can receive no notice from the courts. *Sims v. Sims*, 99 D. 450.

Memoranda of advancements kept by deceased are evidence of the fact of advancement, and *prima facie* evidence of its value, but they are in no sense a will. *Ib.*

An instrument passing property in a donor's life-time, although of alleged testamentary character, being not absolutely a will, must be a deed, for there is no middle ground. *Hileman v. Bouslaugh*, 53 D. 474.

An ante-nuptial agreement is not a testamentary paper, forms no part of a will, and should not be admitted to probate. *Michael v. Baker*, 71 D. 593.

4. *Testamentary capacity.**—1. *In general.*—To make a valid will, the testator must be of sound and disposing mind and memory, capable of disposing of his property with sense and judgment with respect to the condition and value of the property and the relative claims of the objects of his bounty. *Clark v. Fisher*, 19 D. 402; *Comstock v. Hadlyme Ec. Soc.*, 20 D. 100; *Converse v. Converse*, 52 D. 53; *Kirkwood v. Gordon*, 62 D. 418.

A valid will may be executed by any one having the soundness and strength of mind necessary to make a contract. *Chandler v. Barrett*, 99 D. 701; *Davis v. Calvert*, 25 D. 282. Although at the time of executing it he was incapable of transacting business generally. *Kinne v. Kinne*, 21 D. 732; *Terry v. Buffington*, 56 D. 423; *St. Leger's Appeal*, 91 D. 735. However inferior his capacity or weak his understanding, either from natural or adventitious causes. *Tomkins v. Tomkins*, 19 D. 656.

The will itself is the strongest proof of a testatrix's capacity when made in conformity to a fixed determination, entertained and expressed for years. *Couch v. Couch*, 42 D. 602.

The reasonableness of a will is a circumstance in favor of the testator's capacity, where there is doubt as to such capacity. *Tomkins v. Tomkins*, 19 D. 656.

The capacity of a testator at the time of making his will is the sole question to be determined in deciding upon the validity of the will on that ground. *Kinne v. Kinne*, 21 D. 732; *Davis v. Calvert*, 25 D. 282.

Evidence of the testator's mental and

* Instances of instruments construed to be wills, see note, 38 R. 621, 622.

* See note on testamentary capacity, 84 D. 240-2 2.

For Index to Notes in American Decisions and American Reports, see Volume I.

physical condition, before and after executing the will, is admissible for the purpose of throwing light on his state of mind at the time of execution. *Davis v. Calvert*, 25 D. 282.

The ability to recollect minutely instructions given the day before is wholly inconsistent with the imbecility and alienation of mind that incapacitates from making a will. *Tomkins v. Tomkins*, 19 D. 656.

2. *Of persons of unsound mind.*—A will executed in a lucid interval by one who was before and afterwards a confirmed lunatic is valid. *Wright v. Lewis*, 55 D. 714.

Partial insanity does not disqualify from making a will; a will made in a lucid interval by a person habitually insane is valid, and where there is nothing unreasonable on the face of the will of one habitually insane, it will be presumed to have been made in a lucid interval. *Kingsbury v. Whitaker*, 36 R. 278.

Partial unsoundness of mind not affecting the general faculties, and not operating on the mind of a testator, in regard to testamentary disposition, is not sufficient to render him incapable of disposing of his property by will. *Pidcock v. Potter*, 8 R. 181.

A mere glimmering of reason is sufficient to sustain a will in Georgia if the testator comprehends the contents of his will, the nature of the estate he is conveying, the relations and terms upon which he stands toward his family, and his own situation and circumstances. *Terry v. Buffington*, 56 D. 423.

A person may be capable of disposing by will, and yet incapable to make a contract or to manage his estate. *Potts v. House*, 50 D. 329. For to make a contract, more than passive memory must exist; there must be sufficient active memory to collect particulars of business to be transacted and retain them until their relations are perceived, and to form some rational judgment concerning them. *Converse v. Converse*, 52 D. 58.

3. *Of very aged persons.*—A testator's extreme old age is not of itself sufficient to render him incompetent to make a will. *Kirkwood v. Gordon*, 62 D. 418; if sufficient intelligence remain. *Higgins v. Carlton*, 92 D. 666.

Great age, bodily infirmity and impaired mind do not vitiate a will made by one possessing a recollection of the property to be bequeathed and the manner of its disposition. It is not necessary that the memory should be perfect and the mind unimpaired. *Taylor v. Kelly*, 68 D. 150.

Evidence of the conduct of an aged testator after making his will, and while he was gradually failing, is entitled to little weight. *Kinne v. Kinne*, 21 D. 732.

4. *Of drunkards.*—The habitual drunkard is presumed competent when sober to make

a will or a valid gift, unless it appears that intemperance has produced a settled derangement of the faculties. *Gardner v. Gardner*, 34 D. 340.

A dissipated man, habitually indulging in strong drink may, nevertheless, make a will, unless some fixed mental disease has supervened, or his present intoxication is such as to render him not master of himself, and therefore irresponsible for his acts. *Pect v. Cary*, 84 D. 220.

A will made by one then under the influence of intoxicating liquors, is not, for that reason void; unless he was so excited by the liquor as to disorder his faculties and pervert his judgment. Under a slight degree of excitement from liquor, the memory and understanding may remain correct. *Id.*

5. *Of believers in spiritualism.**—A belief in spiritualism does not of itself incapacitate to make a valid will. *Will of Smith*, 38 R. 756. Even where the testatrix acted under supposed instructions from the spirit of her deceased brother, unless actual unsoundness of mind is found. *Brown v. Ward*, 36 R. 422.

6. *Of blind persons.*—A blind man may make a will, if other requisite perceptive faculties remain, and he be of sound mind. *Ray v. Hill*, 49 D. 647.

7. *Of felons.*—Under the common law, all the property of a felon after conviction was forfeited to the state, but by the constitution of Kentucky such forfeiture is only for the life of the offender; and therefore a convicted felon may dispose by will of all the reversionary interest in his property. *Rankin v. Rankin*, 17 D. 161.

5. *Testamentary capacity of married women.*†—A *feme covert* cannot devise real estate to her husband. *Adams v. Kellog*, 1 D. 18.

A married woman may devise lands by an instrument in the nature of a will when they are placed in the hands of trustees subject to her disposal by will. *Cutter v. Butler*, 57 D. 330.

A married woman may devise real estate under the New Hampshire statute, by a will proved in the probate court, and the power thus given extends to all lands, tenements, and hereditaments, and all rights thereto and interests therein, whether legal or equitable. *Id.*

A married woman may, in equity, bequeath like a *feme sole* whatever property she may be entitled to hold in her own right and to her own separate use, and this is enacted by a New Hampshire statute under which no trustee is necessary; but the husband can convey to his wife only through the medium of a trustee, and the equitable

* Effect of belief in spiritualism on testamentary capacity, see note, 34 R. 426-427.

† Power of married woman to make a will, see note, 57 D. 340-349.

For Index to Notes in American Decisions and American Reports, see Volume I.

estate so conveyed would be equally at the disposition of the wife by her will. *Ib.*

A married woman who purchases real estate with her separate earnings, with the consent of her husband, may dispose of the same by will, whether he give his consent or not, and her disposition of it is not affected by the fact that after her death the husband procures a change in the title to the land into his name, especially where he gave his consent to the making of the will at the time it was made. *Cavanaugh v. Ainsbacher*, 91 D. 773.

6. What is a disposing mind and memory. — The terms "sound and disposing mind and memory" stand opposed not only to idiocy and lunacy, but to all derangement of mind occasioned by melancholy, grief, sorrow, misfortune, sickness or disease; but every discomposure of the mind by these causes will not render one incapable of making a will; it must be such a discomposure as deprives him of the rational faculties common to man. *Den v. Johnson*, 8 D. 610.

7. Monomania as evidence of incapacity. — The partial insanity of a testator may invalidate a will which is proved to have been the direct result of such insanity. But where the facts of the case are sufficient to account for the motives of the testator in making the disposition of his property that he does, there is no reason for resorting to the explanation of monomania or any other form of insanity. *Trumbull v. Gibbons*, 51 D. 253.

8. What property may pass by will, generally. — The English statutes of wills were originally in force in Pennsylvania. *Girard v. Philadelphia*, 26 D. 145.

The disposable property of a testator is limited in Louisiana, under the rule of the civil law adopted in that state, in favor of his legitimate descendants or surviving parents, who are termed his forced heirs, so as to leave them a certain portion varying, according to their number, in a certain fixed ratio, and a bequest impairing that portion is, to that extent, inoperative. *Montgomery v. Millikin*, 43 D. 507.

A bequest exceeding the disposable property of a testator will be reduced in Louisiana, within the limits of his disposable estate, but is valid to that extent, if there is no disability in the legatee. *Ib.*

A bequest by a husband to a second wife in Louisiana is limited by law, if the testator has children by a former marriage still living, and she can take no more than a child's share, and in no case can a bequest to her exceed the usufruct of one-fifth of the estate. *Ib.*

A husband's bequest to a second wife exceeding the legal limit is valid in Louisiana to the extent to which she may lawfully take, and is void only as to the excess. *Ib.*

The usufruct and absolute property are

reciprocally convertible under the Louisiana law, and the rule of conversion is that the usufruct of property to a certain amount is equal to one-half the value in absolute property. *Ib.*

A husband's bequest to a second wife of a certain sum in money will be computed as equal in value to the usufruct of double that sum under the Louisiana law; and if that is more than one-fifth of the estate, it will be reduced to that sum, otherwise it is valid for the whole sum bequeathed. *Ib.*

Where P. made an assignment of personality in trust, for the benefit of his minor children, and delivered the same to the trustee, and afterwards made his will, giving his wife one-third of his personal property and her dower in his real estate, — held, that testator's wife had no right to share in the property mentioned in the trust. *Samborn v. Goodhue*, 59 D. 398.

9. Real property. — A will of "all I possess, indoors and outdoors," is sufficient to pass real estate. *Tolar v. Tolar*, 14 D. 575.

A homestead may be disposed of by will when the testator left no widow and had not lived upon the land for five or six years before his death. *Lorieux v. Keller*, 68 D. 698.

10. After-acquired property. — Real estate acquired subsequent to the execution of the will is not affected thereby; so held where the testator at the time of the execution of his will held a mortgage and subsequently acquired the fee to the land and canceled the mortgage. *Ballard v. Carter*, 16 D. 377.

All estate, right, or interest in lands acquired by a testator after making his will, and of which he died seized or possessed, passes in like manner as if owned by him at the making of the will, if such appears to be his intention. *Wynne v. Wynne*, 58 D. 66.

Lands acquired after the making of a will do not pass thereby, under the South Carolina act of 1791, unless there has been a subsequent republication of the will, but they descend to the heir-at-law. *Landrum v. Hatcher*, 70 D. 237.

A devise of all the testator's real estate to S., and the residue of his "personal estate and possessions of whatever kind or name," does not cover land in another place, many years subsequently descending to the testator. *Blaisdell v. Hight*, 31 R. 278.

11. Joint wills. — A will executed jointly by two persons is valid, where it simply professes to dispose of all the estate of the one who should first die to the survivor. *Lewis v. Scofield*, 63 D. 404.

An instrument by which a husband and wife jointly attempt to make a testamentary

* See note on Joint Wills, 68 D. 407-410.

For Index to Notes in American Decisions and American Reports, see Volume I.

disposition of the property of both, to treat it as a joint fund, jointly devising the real property of the wife, and jointly giving legacies out of the personalty of both, cannot be admitted to probate as the will of either, or of both. Such an instrument is in its nature irrevocable and contravenes the policy of the law. *Walker v. Walker*, 82 D. 474.

A joint will is unknown to the testamentary law of this country. *Ib.*

In an instrument made by a husband and wife as a joint will, in which some of the bequests are several, and some joint, the former cannot be executed and the latter rejected, as the several provisions may have been influenced by the joint, and the intention of the testator would be thus defeated. *Ib.*

Tenants in common of land, owning personal property in severalty, may make a joint will disposing of all their property severably, which will take effect on the death of all. *Betta v. Harper*, 48 R. 477.

A writing, executed by two persons, purporting to be a will, whereby, in consideration of mutual friendship, they mutually promise that, in the event of the death of either, the survivor shall pay the expenses of sickness and burial, and shall enter into the possession of the estate of the other, is not a compact, but a will, revocable by either, and is rendered inoperative by a subsequent separate will of either. *Schumaker v. Schmidt*, 4 R. 135.

A joint will, conditioned to take effect on the death of both, is invalid. *Hershey v. Clark*, 37 R. 1.

An agreement between two savings-bank depositors, that the survivor shall have the other's deposit, not being executed according to the statute of wills and each retaining control during his life, is invalid. *Towle v. Wood*, 49 R. 326.

12. Olographic wills.*—An olographic will commenced, "I, J. W., of, etc., give and bequeath [my estate] in the following manner." The property was then disposed of, and the will concluded; "In witness whereof, I have hereunto set my hand, this day of _____, 1841. Signed and acknowledged in presence of." There was no signature of testator nor witness' name at the bottom, nor were the blanks filled. *Held*, not well executed. *Waller v. Waller*, 42 D. 564.

The signature of the testator must appear to have been regarded as a signature, and the instrument complete, and the paper itself must show it. *Ib.*

An undated subsequent clause added to an olographic will which appears consistent and connected will be presumed to have been written at the same time as the original will. Both will be construed as the will of the

testator, in the absence of proof to the contrary. *Lagrange v. Merle*, 52 D. 589.

A script may be proved as an olographic will, though attested by subscribing witnesses. *Brown v. Beaver*, 67 D. 255.

An instrument will be established as an olograph will, notwithstanding the fact that it has upon it an attestation clause unwitnessed. *Hill v. Bell*, 93 D. 583.

The placing of an olograph by a testator among his valuable papers and effects satisfies the requirements of the statute on the matter of deposit. *Ib.*

An instrument entirely written, dated and signed by the testator is clothed with all the formalities of law required to constitute a valid olographic will. *Ehrenberg's Succession*, 99 D. 729.

A will consisting in a printed form with the blanks filled in the testator's handwriting is not an olographic will, and no part of it can stand. *Estate of Rand*, 44 R. 555.

A document as follows, being written, signed and dated entirely by the hand of the testator, is valid as his olographic will or codicil: "\$100,000. New Orleans, January 25, 1848. Four years from and after my death, I hereby authorize and direct (and will) my executors to pay unto Francis Penna one hundred thousand dollars. John McDonogh." *Penna v. New Orleans and Baltimore*, 71 D. 506.

13. Nuncupative wills.*—A nuncupative will is unwritten; and a signed writing intended as a will, but not duly attested, cannot be set up as a nuncupative will. *Stamper v. Hooks*, 68 D. 511.

Words spoken, to constitute a nuncupative will, must have been uttered by a person in extremis, who had at the time of uttering such words a present intent to make them his will, which intent should be distinctly indicated by calling upon some person present to take notice that he intended them as his will, or by doing some act from which it will clearly appear that the words were intended to be testamentary. *Winn v. Bob*, 23 D. 258. *S. P.*, *Sykes v. Sykes*, 20 D. 40; *Prince v. Hasleton*, 11 D. 307. If one has for a long time suffered from pulmonary consumption, and lives for nine days after the alleged nuncupation, it cannot be admitted to probate as his will. *Yarnall's Will*, 26 D. 115.

Nuncupative wills are tolerated but not favored, and their admission to probate must be preceded by proof of strict compliance with the statute in every particular. *Ib.*

It is necessary to the validity of a nuncupative will that the testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation, appear by the clearest and most indisputable testimony. *Dorsey v. Sheppard*, 37 D. 77.

* See note on Olographic Wills, 82 D. 561-563.

* Nuncupative will, what constitutes, see notes, 81 D. 280, 281; 20 D. 44-48.

For Index to Notes in American Decisions and American Reports, see Volume I.

The testamentary capacity of the maker of a nuncupative will, and the *animus testandi*, must be shown by clear and indisputable evidence. *Yarnall's Will*, 26 D. 115.

An instrument propounded as a nuncupative will must be clearly shown to contain the true substance and import of the alleged nuncupation. *Ib.*

Two witnesses to a nuncupative will are required, who must both be present at the making thereof, and hear the testator call both, or on two or more persons then present, to remember that such is his will. *Ib.*

The *rogatio testium* of a nuncupative will need not be in any set or particular form of words. *Ib.*

A testator in a nuncupative will must request those present, by signs or words, to bear witness that such is his will, in order to render it valid under the Illinois statutes. *Arnett v. Arnett*, 81 D. 227.

A nuncupative will made by interrogatories requires stricter proof of spontaneity and volition than would be required in an ordinary case. *Dorsey v. Sheppard*, 37 D. 77.

The probate of a nuncupative will made by interrogatories will be refused where facts leave a doubt as to the mental capacity of the testator, and there is not sufficient proof of spontaneity and of the *animus testandi*. *Ib.*

An imperfect, written will may have the effect of a nuncupative will, if its non-completion in legal form resulted from the act of God, or from any cause other than an actual intention to abandon it or postpone its consummation. *Offutt v. Offutt*, 38 D. 183.

The failure of the testator to dispose of his whole estate as he intended, leaving a portion undivided, contrary to his declared purpose, will not prevent his written will to that extent from having force and effect as a nuncupative will. *Ib.*

The statute of Tennessee (code, sec. 2165) concerning nuncupative wills, is sufficiently complied with, by decedent addressing himself to two witnesses, saying: "I wish to make a disposition of my effects." The language of the statute need not be used. *Baker v. Dodson*, 40 D. 650.

A nuncupative will executed before a notary and three witnesses is void, if one of the attesting witnesses did not understand the language in which the will was written sufficiently to comprehend what was said. *Breazus v. Galluseaux*, 74 D. 430.

The testimony of a notary before whom a nuncupative will was made is not admissible to supply want of capacity in an attesting witness as to what was done. *Ib.*

A nuncupative will resting upon the testimony of the notary before whom it was executed and two attesting witnesses is void, and not in compliance with the law of Louisiana. *Ib.*

A nuncupative will must, under articles 1574 and 1575, civil code of Louisiana, be dictated by the testator; or in the absence of such dictation, he must present the instrument which he has caused to be written, and declare that it contains his last intentions. The word "dictation" is used in a technical sense, and means to pronounce orally what is destined to be written at the same time by another. *Prendergast v. Prendergast*, 79 D. 575.

In a case of a nuncupative will by private act, in Louisiana, nothing can be taken by implication. If the law requires a technical dictation in such a case, there must be a strict compliance. Nor would the court be justified in presuming a compliance. *Ib.*

A nuncupative will by a private act cannot be annulled on the ground that it was written in the presence of the witnesses. It will suffice to comply with some formality in their absence, *a fortiori* in their presence. The presence of witnesses is intended as a sanction to the proceedings, and cannot invalidate them in any contingency. *Ib.*

A nuncupative will by a private act is valid, where the testator caused his will to be written by one of the subscribing witnesses, and presented it to them as his last will, declaring that it contained his last intention. *Ib.*

Slaves cannot be the subject of testamentary disposition except as provided by statute in Kentucky, which precludes their passing by nuncupative will. *Offutt v. Offutt*, 38 D. 183.

Whether slaves can be emancipated by a nuncupative will under the provision of Va. Rev. Code, c. 111, sec. 53, *quære?* *Winn v. Bob*, 23 D. 258.

A bequest of money to buy a slave is not a bequest of a slave, and may be made by a nuncupative will. *Stedd v. Carey*, 52 D. 570.

B., being in *extremis*, requests R. to write his will, which he does at B.'s dictation, and B. attempts to sign it, but cannot, and requests R. to sign it for him. While R. is complying, B. swoons, and dies without further attempt to execute the will. Three witnesses are present and hear the bequests, and sign the will as witnesses. *Held*, a good nuncupative will. *Phabe v. Bogges*, 42 D. 543.

A statute provided that a nuncupative will must be made "in the time of the last sickness" of the testator. Where one in his last illness, believing it would probably result in death, but not without hope of recovery, executed his will as required by the statute, — *held*, not invalid, because he may have had time and opportunity to reduce it to writing. *Harrington v. Stee*, 25 R. 290.

14. Codicils. — An instrument valid as a will of personal property, when there is a prior valid will of real and personal

For Index to Notes in American Decisions and American Reports, see Volume L

property, may be admitted to probate to a limited extent as a codicil, but not so as to be a charge on the real estate. *Marston v. Marston*, 43 D. 611.

Proof of a codicil establishes a will, or such portions thereof as are not revoked by the codicil, when the codicil is written on the same paper as the will, or clearly refers to and identifies the will. *Duncan v. Duncan*, 76 D. 699.

2. Execution, Attestation, etc.

15. Necessity of execution.* —

Where a will is finished with the exception of the attestation clause and the clause appointing an executor, and the draughtsman leaves and does not return till the next day, when the testator was mentally incapable of finishing it, and fills in these clauses himself, it will be admitted to probate as far as the personality is concerned, it comprising within its scope all the objects of the testator's bounty, and the instrument showing that nothing in the nature of a deduction from or charge upon the bequests would have been added. *Guthrie v. Owen*, 36 D. 311.

Where legacies are to be made from the real and personal property in such a case, they will be made from the personality as far as possible, though they will fail as to the realty. *Id.*

To the validity of a will of personality, it is only necessary that it be made by or according to the directions of the deceased, and be in writing. It is not necessary that it be witnessed, or written, or signed by the testator; if drawn up according to his directions and approved by him, it may operate as a valid will. *Couch v. Couch*, 42 D. 602.

A husband and wife each had a will drawn in favor of the other. After the husband's death it was found that each, by mistake, had signed the will of the other, to remedy which error the legislature passed a special act, authorizing the court to reform the will in case the mistake was proved. *Held*, that there was, in law, no will; that, at the death of her husband, his estate vested in his heirs; and that the subsequent legislation was invalid, the effect of it being to divest estates. *Alter's Appeal*, 5 R. 433.

16. What is a sufficient signing or execution.† — 1. *In general*. — It has never been determined that each of the several sheets of paper on which the will is written must be signed by the testator. *Pearson v. Wightman*, 12 D. 636.

Due execution of a will must be determined by the law in force when it was executed. *Jauncey v. Thorne*, 45 D. 424.

The will of a blind person, or of one so

illiterate as to be unable to read or write, need not be read over to him at the time of its execution, in the presence of the subscribing witnesses, in order to render it valid. The validity of such an instrument is for the jury to determine, and depends upon the fact whether the testator intended it as his last will and testament. *Clifton v. Murray*, 50 D. 411.

A statute intended to operate on wills already executed and consummated by the death of the testator, as well as upon future wills, prescribing what shall be deemed a sufficient signing of a will, is, so far as it is retrospective, an exercise of judicial power, and therefore unconstitutional, and must be construed exclusively prospective. *Greenough v. Greenough*, 51 D. 567.

A statute confirming wills defectively executed does not stand on the same ground as a statute confirming defective conveyances, because the devisee is a volunteer. *Id.*

A written sheet not having been signed by a testator, but connected by the sense and the dependence of it upon another sheet which has been properly signed and attested, will be considered as being a part of the will. *Martin v. Hamlin*, 53 D. 673.

A testator must know the contents of the will, but ordinarily the law will take his bare signature as proof of such knowledge. *Hughes v. Meredith*, 71 D. 127.

Where a writer of another's will takes a large benefit under it, the testator's knowledge of its contents must be shown by proof that it was read to or by him, or that he gave instructions for it, or by proof of some other fact or facts of equal force. *Id.*

A will is valid, though not read to or by a testator, where it is written in his presence and according to his dictation, and executed in accordance with the statutes. *Hess's Appeal*, 82 D. 551.

A will may be valid although written in a language not understood by the testator. *Will of Walter*, 54 R. 640.

2. *What signing is sufficient*. — A subscription by the testator after the attestation clause is "at the end of the will," and valid. *Younger v. Duffie*, 46 R. 156.

A testator must subscribe a will at the end thereof in the presence of each witness attesting it, or must acknowledge to each witness that he has so subscribed it, to render it valid under the New York statute, but he may sign by making his mark, or another may subscribe his name in his presence and by his direction. *Chaffee v. Baptist Missionary Conv.*, 40 D. 225.

The execution of a will, under the Pennsylvania statute, can only be made by the testator signing his name at the end thereof, unless the testator is prevented by the extremity of his last sickness, in which case his name may be signed by some person in his presence, and by his express direction,

* Unexecuted will, how far valid, see note, 86 D. 816-822.

† Execution, publication and attestation of wills, generally, see notes, 40 D. 231, 232; 45 D. 442, 443.

Signing and attesting, see note, 60 R. 285-287.

For Index to Notes in American Decisions and American Reports, see Volume I.

and in all cases such execution must be proved by the oaths of two or more competent witnesses. Signing by a mark is in no case sufficient. *Grabill v. Barr*, 47 D. 418.

The mark of a blind testator is equivalent to a signature, when through want of learning, or nervous debility, he is incapable of subscribing his name; and in affixing his mark, it is competent for some one to guide his hand. *Ray v. Hill*, 49 D. 647.

Where a will is signed by the request of the testator and in his presence, the subsequent addition by him of his mark to the signature so made is superfluous. And whether such mark is added before or after the witnesses subscribed the will is not material, where the whole transaction is one continuous uninterrupted act, conducted and completed within a few minutes, while all concerned in it continued present, and during the unbroken supervising attesting attention of the subscribing witnesses. *Russer v. Franklin*, 52 D. 97.

A person who signs a testator's name to a will by direction of the testator must subscribe his own name as a witness to such will, and state that he subscribed testator's name at his request, in order to render the will valid. *McGee v. Porter*, 55 D. 129.

3. *Necessity of signing in the presence of subscribing witnesses.* — A will need not be signed by a testator in the presence of the attesting witnesses. It is sufficient that he acknowledge his signature, and request them to attest as witnesses, or that he merely declare to them that the paper is his will. *Dewey v. Dewey*, 35 D. 367; *Webb v. Fleming*, 76 D. 675.

The declaration by a testator before witnesses that the paper is his will, is equivalent to an actual signature in their presence; they need not see him write his name, nor even see the name after he has written it. *Dewey v. Dewey*, 35 D. 367.

A will need not be signed in the presence of the subscribing witnesses, under the statute of Charles II, provided it was in fact signed by the testator previously to his acknowledging and publishing it in the presence of all or each of them. *Jauncey v. Thorne*, 45 D. 424.

Where a testator puts his mark to a subscription of his name to his will in the presence of two or more subscribing witnesses, this is a sufficient signing thereof, within the meaning of the statute. *Russer v. Franklin*, 52 D. 97.

A will is duly executed by a testator where he affixes his mark thereto by the assistance of one of the subscribing witnesses, by the request or with the assent of the testator, and on being asked if he acknowledges the same to be his mark, or words to that effect, assents, and being asked if he wishes the witnesses present to attest it as his last will and testament, assents, and the

witnesses attest the same by subscribing their names thereto, by his request, in his presence, and in the presence of each other, provided such testator was at the time of sound and disposing mind, and mentally capable of executing a valid deed or contract. *Higgins v. Carlton*, 92 D. 666.

The testatrix's friend, S., said to her: "These gentlemen, F. and R., have come to witness the will." She bowed her head. The will was read to her by F. in an audible voice; and on being asked if she understood it, she bowed again. She then signed the will. The witnesses, F. and R., subscribed the will at a table in the room near the foot of the bed. She was so lying that she was obliged to see them, unless she shut her eyes or turned her head away. *Held*, a valid execution. *Baldwin v. Baldwin*, 59 R. 669.

17. *What is not.* — Where a testator exhibits a will to witnesses, already signed, and putting his finger on his name, acknowledges that it is his will, and requests them to attest it, but it is not shown that he signed the will in the presence of each of them, or acknowledged to them that he had so signed, or that another had done so for him, in his presence and by his direction, the will is invalid, although the attestation clause states that the will was signed in the presence of the witnesses. *Chaffee v. Baptist Missionary Conv.*, 40 D. 225.

A testator must sign a will in presence of both witnesses, or acknowledge his signature in their presence, and if he neither signs nor acknowledges in the presence of one of them, it is fatal. *Rutherford v. Rutherford*, 43 D. 644.

The execution of a will, under the statute of April 8, 1833, can only be made by the testator signing the instrument by his own signature, if able so to do, or in case of inability, by some person, in his presence and by his express direction, signing his name for him. Signing by a mark is insufficient in any case, and so is the name of the testator, written by another, unless in accordance with the direction of the statute. *Asay v. Hoover*, 45 D. 713.

The intention of a testator must be gathered from the language of the will, and not from extrinsic evidence. *Id.*

If a negro interpreter, incapable by law of being sworn, is the only channel of communication between the testator and writer of the will, and there be no other evidence of the testator's knowledge of its contents, or his assent thereto, than that which is derived through this medium, the will cannot be executed; but if the will is written in the presence of the testator, in a language he understands, is read over to him, and his dictation and approval of the instrument are interpreted by the negro in his hearing, and in the hearing of others, and he signifies no

For Index to Notes in American Decisions and American Reports, see Volume I.

dissent thereto, but is understood to express himself satisfied, the will may be established. *Potts v. House*, 50 D. 329.

A mark is not a signature at common law, or under the Pennsylvania statute of wills of 1833. *Greenough v. Greenough*, 51 D. 567.

The testator affixing a mark to his name, written by another without his direction, is not a sufficient signing of a will under a statute requiring the will to be signed by the testator, or "by some person in his presence and by his express direction." *Ib.*

It is not a sufficient signing of an olographic will for the testator to write his name at the commencement thereof, unless it appears affirmatively from something on the face of the paper that the testator meant it as his signature. *Roy v. Roy*, 84 D. 696; *Ramsey v. Ramsey*, 70 D. 438.

Where an otherwise complete olographic will is not signed, an indorsement on the back as follows, "Roy's will," that being the testator's name, is not a signature. *Roy v. Roy*, 84 D. 696.

18. Necessity of publication.—If the due subscribing and attesting of a will be proved, it need not be shown that the testator made the usual declaration that it was his last will and testament. *Small v. Small*, 16 D. 253.

The testator need not declare to witnesses, nor need they know, that the instrument which they attest at his request is his will. It is sufficient that he knows what the instrument is. No formal publication or declaration that it is his will is required. *Osborn v. Cook*, 59 D. 155.

A will purporting to dispose of both real and personal estate may be established as a valid testamentary disposition of the personality, although it may not have been so published as to constitute a legal disposition of the realty. *Oftutt v. Oftutt*, 38 D. 183.

An instrument is not a valid will when it does not appear from the testimony that the instrument was spoken of by any present as a will, or that its character was then mentioned, but that nothing was said about it. *Gerriek v. Nason*, 39 D. 589.

A publication of a will is necessary, under New York statute of 1830, to give it validity, and to constitute such publication there must be some communication by the testator to the witnesses at the time of signing or acknowledging the will, indicating an intention to give effect to the paper as the testator's will, but no particular form of words is necessary. *Remsen v. Brinckerhoff*, 37 D. 251.

19. What is a sufficient publication.—It is not necessary for the subscribing witnesses to see a testator sign his will, nor that he should acknowledge to them his signature thereto, or even that the instrument is his will. It is sufficient if he acknowledges, in their presence, that the act

is his, with a knowledge of the contents of the instrument, and with the intention that it shall be the testamentary disposition of his property. Such acknowledgment is a ratification of the signature, whether made by himself, or by another in his presence and by his direction. *Rosser v. Franklin*, 52 D. 97.

The publication of a will may be made in any form of communication by testator to witnesses, whereby he makes known to them that he intends the instrument to take effect as his will. *Coffin v. Coffin*, 80 D. 235.

The publication of a will is sufficiently proved when the attesting clause is in proper form, and it appears from the evidence that the witnesses were called into a room where testator and the draughtsman of the will were; that the draughtsman stated that Robert (the testator) was going to sea, and was about making his will, and wished them to witness it, although the witnesses cannot remember that anything was said by the testator. *Peck v. Cary*, 84 D. 220.

The signing and acknowledging of a will by a testator in the presence of witnesses should be inferred when the attesting clause is in due form, and it is shown that the witnesses were called into the room where testator was to witness his will; that they all went to the table to witness it, and went away supposing they had done so; that the draughtsman of the will also considered that they had done so; that the testator left town, intending to go to sea, with the same impression; that the will was signed by the testator, and the attesting clause by the witnesses; and that all this was done in a brief period, and without any apparent interval. *Ib.*

Testator had his will written in the house; went out and called the two subscribing witnesses from a field; said he wanted them to come and sign a paper. They went into the house; the scrivener read over to them the attesting clause, the testator being present in the room, and after the reading the testator handed the pen to the witnesses, who signed the instrument. No words were spoken during this time. *Held*, a sufficient acknowledgment by testator that it was his will. *Allison v. Allison*, 92 D. 237.

The statute does not require that an acknowledgment that an instrument is a will be made in words, or by means of language; any act which indicates the same thing with unmistakable certainty will answer as well. *Ib.*

Where a will has been signed for the testator by another person, in his presence and by his express direction, in the absence of the attesting witnesses, the requisite acknowledgment of the fact by the testator in the hearing of the witnesses need not be in any particular form of words, nor any specified manner, but if the witnesses are made to

For Index to Notes in American Decisions and American Reports, see Volume L.

understand by signs, motions, conduct or attending circumstances, that the testator acknowledges the signature as his, and the instrument as his will, it is sufficient; it is not necessary that the testator should acknowledge to the attesting witnesses that such signing was in pursuance of his previous express authority and in his presence; and the fact of such signing and of such authority may be shown by the acknowledgment to the witnesses, or by other competent testimony, or may be presumed from the facts and circumstances. *Haynes v. Haynes*, 31 R. 579.

20. What is not sufficient. — Where a person, who was old and infirm, had submitted to him an instrument in writing, which he signed, and which was attested by three subscribing witnesses at the same time, but neither the deceased nor the witnesses gave any intimation at the time that the paper so signed was a will, — held, that there was no publication of the will. *Sweet v. Boardman*, 2 D. 16.

A declaration that an instrument is the last will of the testator, made by a third person in his presence and in that of the witnesses, if sufficient in any case, must be distinct and unequivocal, and a declaration that the instrument is the testator's "will or agreement" is too indefinite. *Rutherford v. Rutherford*, 43 D. 644.

21. Republication. — An obliteration of an exception to a general clause in a will does not restore the operation of such clause without a republication, this being considered a new devise. *Pringle v. McPherson*, 3 D. 713.

The republication of a will is not essential where the testator erases the name of one of the executors and inserts another in its place. *Wells v. Wells*, 16 D. 150.

A will cannot dispose of real estate acquired after the date of its execution, however clearly expressed the intention of the testator, unless there is a republication of the will. *Beall v. Schley*, 41 D. 415.

A republication of a will by codicil is good, though the will be not present at the time. *Wickoff's Appeal*, 53 D. 597.

A memorandum under the testator's signature does not invalidate a will on the ground that the statute prescribes the signature to be at the end of the will, when the will is afterwards republished by codicil. *Ib.*

A testator signing and publishing a codicil in the presence of witnesses republishes his will, and both together make but one will. *Harvey v. Choteau*, 55 D. 120.

An olographic or unattested will may be set up and republished by a properly attached codicil, although the latter is not physically annexed to the will. *Ib.*

A codicil draws a will down to its own date in the very terms of the will, and

makes it operate as if it had been executed in those terms. *Ib.*

A codicil republishes a will so as to pass to a residuary devisee lands purchased by testator between the times of making the will and the codicil, although purchased with the proceeds of the sale of a plantation which was otherwise disposed of by the will. *Drayton v. Rose*, 64 D. 731.

A will limited in its operations by conditions that defeat it before the death of the testator is void unless republished by the testator. *Vickery v. Hobbs*, 73 D. 238.

If a will has been defeated by its own limited conditions, its mere possession and preservation by the testator until his death does not amount to a republication. *Ib.*

A will was revoked by the subsequent birth of a child. Held, that republication could not be proved by parol evidence. *Carry v. Baughn*, 14 R. 534.

22. Necessity of attesting witnesses. — A will must have witnesses where they are required by statute. *Burlington University v. Barreti*, 92 D. 376.

The statutory requirement of witnesses to the execution of an instrument means subscribing witnesses. *Beach v. Botford*, 40 D. 45.

Real estate does not pass by a will whose execution has not been attested by witnesses. *Ellis v. Ellis*, 50 D. 132.

An express direction by a testator to a third person to sign his name to his will is a substantive part of the execution, under the Pennsylvania statute of 1833, and must be proved expressly or presumptively by the oaths or attestations of two witnesses. *Greenough v. Greenough*, 51 D. 567.

A will duly attested, giving a sum of money to a trustee to appropriate the same in such manner as the testator may by any instrument in writing under his hand direct and appoint, and an appointment by a separate instrument in writing signed by the testator, but not attested as required by the statute of wills, declaring the appropriation and naming the beneficiary, do not operate to create a valid bequest in favor of the beneficiary, and cannot be enforced as such. And where no charity is declared or indicated in the will, the fact that the legacy is appropriated by the unattested instrument to a public charity does not give to it any greater legal effect. *Thayer v. Wellington*, 85 D. 753.

23. Their competency. — The inhabitants of an incorporated society, to whom property is devised for the support of a school, are competent witnesses to attest the will. *Cornwell v. Isham*, 2 D. 50.

"Credible" means "competent" in the statute 1783, 24, relating to the attestation of wills by three credible witnesses. *Hawes v. Humphrey*, 20 D. 481.

For Index to Notes in American Decisions and American Reports, see Volume I.

At the time of the attestation the witness must be competent. *Ib.*

A witness is not incompetent to attest a will because he resides in a portion of a town to which the testator bequeathed certain property through the medium of trustees, after a life estate in the testator's wife. *Ib.*

A subscribing witness to a will should be satisfied from his own knowledge that the testator understands what he is doing, and is of sound and disposing mind and memory. *Scribner v. Crase*, 21 D. 81.

A witness' attestation certifies to his knowledge of the testator's mental capacity, and that he executed the will freely and understandingly, knowing its contents. *Ib.*

A witness not personally satisfied of these facts is incompetent to prove the due execution of the will. *Ib.*

The lands acquired by testator after the execution of his will do not pass by a general devise therein. *Meador v. Sorsby*, 36 D. 432.

An equitable estate is governed by same rules as a purely legal estate, so far as the power to pass after-acquired lands by will is concerned. *Ib.*

The term "credible witness," as applied to an attesting witness to a will, means a witness who was competent at the time of the attestation. *Higgins v. Carlton*, 92 D. 666.

A wife is not a competent witness to her husband's will. *Pease v. Allis*, 14 R. 591. Or to a will containing a devise to her husband. *Sullivan v. Sullivan*, 8 R. 356.

By statute it was provided that "all beneficial devises made in any will to a subscribing witness thereto shall be wholly void, unless there are three other competent witnesses to the same." A wife was one of the three subscribing witnesses to a will containing a devise to her husband. It was contended that the devise to her husband was a "beneficial devise" to the wife, and, therefore, void, leaving her a competent attesting witness to the rest of the will. *Held*, that the contention could not be maintained, and there not being the required number of competent witnesses required by law, the will was invalid. *Ib.*

An executor acting as such, who has no beneficial interest under the will, is a competent witness to establish the same. If he acts *bona fide* in the performance of his duties, his compensation for services is not dependent upon the will being proved; consequently he is not, for that reason, incompetent to prove the same. *Comstock v. Hudlyme, Ec. Soc.*, 20 D. 100. *S. P.*, *Meyer v. Fogg*, 68 D. 441; *Stewart v. Harriman*, 22 R. 408.

24. The requisite number of witnesses. — An amendment of the statute after the execution of a will of personality, and before the testator's death, relating to

the number of attesting witnesses required, applies to such will, and renders it void if it is not attested by the specified number. *Elcock's Will*, 17 D. 703.

25. Request that witnesses attest. — A request by a testator to subscribing witnesses to attest his will is necessary, and in an action to recover land devised by the will, if the subscribing witnesses disagree as to whether or not one of them was so requested to attest, the testimony of a third person present at the attestation, that the testator said nothing, is admissible, although there is evidence of a constructive request by another person in the testator's presence. *Rutherford v. Rutherford*, 43 D. 644.

Where a testator requests a person to sign an instrument, without stating what it is, and points out the place for his signature, above which are the words "signed, sealed, published, and declared by the above-named Ethan Button to be his last will and testament," it is proper evidence to be submitted to the jury, there being no question as to the two other witnesses, to decide whether the will was duly attested. *Hogan v. Grosvenor*, 43 D. 414.

A witness to a will need not, according to the English decisions, be informed or know that the instrument which he is requested by the testator to attest, is his will. *Jauncey v. Thorne*, 45 D. 424.

An acknowledgment of his signature by a testator, whether in his own handwriting or not, need not be formal, nor in any set form of words. It is sufficient that he produced the will, with his signature on it, and requests the witnesses to attest it. *Ib.*

No particular form of words need be used by a testator in requesting witnesses to attest his will. *Nelson v. McGiffert*, 49 D. 170.

Where one of two witnesses to a will, in the presence and hearing of the other, asked the testator, "Do you request me to sign this paper as your will, as a witness?" and the testator answered, "Yea," this was sufficient as a request to both the witnesses, and as a publication of the will. *Coffin v. Coffin*, 80 D. 235.

A testator's request to witnesses to subscribe attestation may be made through any words or acts which clearly evince that desire to them, and the publication may be incorporated with the request. *Ib.*

Where persons are requested to witness a will, in the presence and hearing of the testator, by one who had draughted such will at testator's request, and they accordingly then and there sign such will as witnesses, they must be deemed to have done so at the testator's request. *Peck v. Cary*, 84 D. 220.

The law of Maryland does not require that a testator should ask the subscribing witnesses to his will to attest it. His assent, either express or implied, is sufficient, pro-

For Index to Notes in American Decisions and American Reports, see Volume I.

vided the act be done with his knowledge, and not in a clandestine or fraudulent way. *Higgins v. Carlton*, 92 D. 666.

The maxim, *non quod dictum, sed quod factum est, inspicitur*, holds good in the execution of wills as well as of deeds. *Ib.*

A request to a witness to subscribe a will may be made by a third person, provided the testator hears and understands it, and does not dissent. *Cheatham v. Hatcher*, 32 R. 650.

26. What attestation is sufficient.*

—The signature by a testator or by some one in his presence and by his direction, and attestation in his presence by two or more witnesses, are indispensably requisite to the due execution of a will under the statute. *Rigg v. Wilton*, 54 D. 419.

The signing of a will may be proved by proof that the testator acknowledged it, although the name, or signature or handwriting was not before him, and though the paper lay at a distance on the table. *Elbeck v. Granberry*, 2 D. 624.

Where a testator acknowledges his signature to a will in the presence of the witness, it is equivalent to signing in his presence. *Burwell v. Corbin*, 10 D. 494.

A will of personalty must be executed and attested as required by the law in force at the death of the testator. *Houston v. Houston*, 15 D. 647.

A will need not be read by or to the subscribing witnesses, nor is it necessary that they should know its contents. *Higdon's Will*, 22 D. 84.

The witnesses of a will must sign in the presence of a blind testator, so that he may know and verify, by his remaining senses, that they are actually putting their signatures to the right document. *Ray v. Hill*, 49 D. 647.

When a will consists of several detached sheets, it is not necessary that each sheet should be separately attested by witnesses, as well as signed by the testator. *Martin v. Hamlin*, 53 D. 673.

Attesting witnesses to a will may testify to signing in testator's presence, where the attestation clause states only that the will was signed, sealed, etc., in the presence of the witnesses. *Lucas v. Parsons*, 71 D. 147.

In the attestation of a will, the order of signing is immaterial so long as the signing by the witnesses and testator was all done at the same moment and in the same presence. The English law is more exacting than ours, hence the decisions under it are not authoritative here. *Miller v. McNeill*, 78 D. 333.

In proving a will, a literal adherence to the words of a statute, requiring that the witnesses "shall subscribe the will with their names in the presence of the testator," is

never exacted, a substantial conformity with the spirit of the statute being all that reason and sound policy requires. *Montgomery v. Perkins*, 74 D. 419.

Witnesses attesting a will must subscribe their names within the sight of the testator as he stood and not as he might or might not stand. *Reynolds v. Reynolds*, 40 D. 599.

It is not essential that a testator should actually see the witnesses attest his will; but it is necessary that he should be in a situation to do so if he desired it. *Edelen v. Hardey*, 16 D. 292; *Dewey v. Dewey*, 35 D. 367; *Maynard v. Vinton*, 60 R. 276. As where the testator, being in ordinary health, signed his will in a piazza, and then surrendered his seat to the witnesses to sign, and stepped into the door of the adjoining room and there remained, but could see the signing if standing in or near the door or walking about the room or by taking a step or two from the place where the witnesses afterwards found him sitting, and could hear all that passed. *Wright v. Lewis*, 55 D. 714.

An attestation in the same room with the testatrix is a sufficient subscription in her presence. *Howard's Will*, 17 D. 60.

After the will was signed by the testator, who was sitting up in bed, in a small bedroom, it was taken into an adjoining room, placed on a table, and there subscribed by the witnesses, the door between the rooms being open, and the table so situated that the testator could see the witnesses subscribing, if he chose to do so, without materially changing his position. *Held*, that this was a subscription in the testator's presence. *Will of John Meurer*, 28 R. 591; *Riggs v. Riggs*, 46 R. 464.

A testatrix lay in bed, and the attesting witnesses to her will went into the next room, where they signed it, the door between the two rooms being open, but the witnesses signed the will at such a place in the next room that they could not be seen by the testatrix as she lay in bed. *Quare*, whether such signing was in the presence of the testatrix? *Russell v. Falls*, 1 D. 380.

Witnesses to a will need not attest it in the presence of each other. *Johnson v. Johnson*, 55 R. 762; *Dewey v. Dewey*, 35 D. 367; *Elbeck v. Granberry*, 2 D. 624. It is sufficient that they, at different times, in the presence of the testator, and at his request, sign their names as subscribing witnesses. *Jauncey v. Thorne*, 45 D. 424; *Webb v. Fleming*, 76 D. 675.

If the subscribing witnesses are unable to write, the writing of their names by another, marks being attached by themselves, will constitute a sufficient subscription. *Montgomery v. Perkins*, 74 D. 419; *Lord v. Lord*, 42 R. 565. The validity of such attestation depends upon the signing of the name of the witness by his authority, and in his presence, and not upon the fact of his

* Witnessing and attesting, what sufficient, see notes, 28 R. 595-598; 80 D. 242.

WILLS, I, 2, 3.

For Index to Notes in American Decisions and American Reports, see Volume I.

making a mark or doing some manual act in connection with the signature. *Jesse v. Parker*, 52 D. 102.

37. What is not.—An attestation of a will in a room adjoining that wherein the testator lay, and between which there was a plank partition, is *prima facie* evidence of the illegality of the instrument, although such attestation was at the testator's request, and was subsequently approved by him. *Edeley v. Hardey*, 16 D. 292.

Attestation of a will by witnesses in an adjoining room is not a compliance with statute requiring it to be done "in the presence of the testator," even though he might have seen them writing their names by sitting on the side of his bed. *Reynolds v. Reynolds*, 40 D. 599.

To constitute a valid attestation of a will, a testator must be so present to witnesses and they to him that he might and probably did see the attestation, and it will not suffice that he might have seen the attestation by changing his situation, or causing it to be changed, or by removing any intervening obstruction. *Reed v. Roberts*, 71 D. 210.

An attestation of a will made by a testator *in extremis*, to be in his presence, must be made so as to be within the scope of his vision without his changing his position or removing any intervening obstruction. *Id.*

It is an insufficient attestation of a will for a subscribing witness to write his name in the absence of the testator, and in anticipation of the testator's signature, although he afterwards acknowledges it in the presence of the testator and of the other subscribing witnesses. *Chase v. Kittredge*, 87 D. 687.

3. Revocation.

38. The power to revoke.—The revocation of a will cannot be made by one insane or not of sufficient capacity to understand the nature of his act. *Apperson v. Cottrell*, 29 D. 239.

Powers of appointment and revocation may be exercised at different times and over different portions of the land subject thereto. *Asay v. Hoover*, 45 D. 713.

The disposition of property to take effect after a grantor's death is testamentary, and therefore revocable. *Frederick's Appeal*, 91 D. 159.

39. What acts indicate an intent to revoke.—A jury is necessary to try the question of revocation in all cases in chancery. *Sneed v. Ewing*, 22 D. 41.

A testator, by directing several interlineations and erasures to be made in his will, with the avowed purpose of revoking it, and by delivering it in that condition to a per-

* Revocation of will, what is, see note, 12 D. 377-380.

Alterations and erasures made by testator, see note, 35 R. 35-37.

son to be used as a memorandum in draughting a new will, gives sufficient proof of his determination to revoke such will. *Bohanon v. Walcot*, 29 D. 631.

Where a testator, prior to his death, sells so great a part of his real estate as to render it impossible to carry out the provisions of his will, such sale amounts to a revocation of the will, except so far as the appointment of executors is concerned, and in such a case the court will decree that the accounts of the executors be settled in the same manner as if the testator had died intestate. *Cooper's Estate*, 45 D. 673.

The conveyance by a testator of all lands owned by him at the time of making his will operates as a revocation of the will, and those after acquired will not pass by the will. *Bowen v. Johnson*, 61 D. 110.

A revocation of a will, under the South Carolina statutes, can only be effected in three ways: by an instrument in writing, executed with the same solemnities as the will itself; by obliteration; and by burning and destroying. *Floyd v. Floyd*, 49 D. 628.

To effect a revocation of a will, an intention to revoke must appear clearly and unequivocally. *Wickoff's Appeal*, 53 D. 597.

A valid agreement or covenant to convey real estate, such as a court of equity would enforce specifically will, in equity, though perhaps not at law, operate as a revocation of the estate previously devised, as it is regarded from that time as the property of the vendee. *Donohoo v. Lea*, 55 D. 725.

A grantee in a deed absolute may bind himself by parol to devise the property to a designated beneficiary, and if in pursuance thereof he makes a will, it is irrevocable, and if he fails to execute it, it will be a fraudulent violation of his contract, against which the beneficiary may have relief in equity. *Anding v. Davis*, 77 D. 658.

A second will inconsistent with the first will, perfect in its form and execution, but incapable of operating as a will on account of some circumstances *dehors* the instrument, may nevertheless be set up as a revocation of the first. *Carpenter v. Miller*, 100 D. 744.

The rule of construction when a second will is set up to revoke the first will is, that where the words are imperative, though inoperative by reason of some incapacity in the devisee, they operate a revocation; and where the words are precatory, if the object of the language be certain and definite, the words are considered imperative, creating a trust for the purpose indicated, and operate a revocation. But whenever the prior dispositions of the property are complete, and the words are precatory, and their object uncertain and indefinite, the words will not be held to create a trust or be construed to revoke a former will. *Id.*

A will containing some twenty legacies

For Index to Notes in American Decisions and American Reports, see Volume I.

was found, with all the legacies except four erased by pen marks, but still legible. The clause appointing executors was erased in a like manner, the names being legible with more difficulty. The testator's signature was still more completely marked out in like manner. In the margin were several additions in his hand-writing, apparently designed for a new will. *Held*, that the will was revoked. *Succession of MGA*, 48 R. 242.

A will gave the residuum to the testator's son Daniel and his heirs, and in case the son "should die without lawful issue," to the testator's other children. A codicil gave a specific bequest out of the residuum to the testator's son James. Daniel survived the testator. *Held*, that Daniel took an absolute estate. *Quackenboss v. Kingland*, 55 R. 771.

30. What does not amount to a revocation. — Where a will had been made, and subsequently another executed, and the first was found in possession of the testator at the time of his death, uncancelled, and the second could not be found, — *held*, on evidence of intention, that the latter did not necessarily revoke the former. *Lawson v. Morrison*, 1 D. 288; *Peck's Appeal*, 47 R. 685.

If the revocation be ineffectual in law, or if a former will be canceled under the impression that a later will is good, which proves invalid, the first will not be revoked; and if the devisee under the later will is not legally entitled to take, the devisee under the first shall not be affected. *Pringle v. McPherson*, 3 D. 713.

The execution of a second will that is afterwards destroyed by testator cannot effect validity of will previously executed, though the second contained a clause of revocation of the former will, especially where the motive for making the second will was because the testator thought the first was lost, and, upon finding the first, destroys the second, declaring his preference for the first and directing its preservation. *Marsh v. Marsh*, 64 D. 598.

A nuncupative will cannot revoke a prior written will or testament. *McCune v. House*, 31 D. 438.

The revocation of a will of lands in Pennsylvania cannot be made by parol, but is subject to the same solemnities as a will of personal estate. *Lawson v. Morrison*, 1 D. 288.

An intention to revoke a will, unaccompanied by any of the acts of revocation mentioned in the statute, will not amount to a revocation, even if such acts be prevented by the fraud or force of the devisee, although such devisee may be considered in equity as the trustee of the parties who would have been entitled if the will had been revoked. *Gains v. Gains*, 12 D. 375.

An ineffectual attempt to alter a will does not operate as a revocation. *Greer v. McCrackin*, 14 D. 755.

A revocation of a will, so as to require a republication, does not result from the striking out of a devise, or of the name of an executor. *Wells v. Wells*, 16 D. 150.

The revocation of a will requires the concurrence of an intent to revoke and of some act of destruction or cancellation of the will; a mere intent to revoke, evidenced by the parol declarations of the deceased, is not sufficient. *Malone v. Hobbs*, 39 D. 263.

The destruction of a codicil cannot operate as a revocation of the will, though this was declared by the testator to be his intention, where the codicil and the will are on detached papers, and where, because of being in different places, the destruction of the codicil can not be intended as a destruction of the will. *Ib.*

A will cannot be corrected by evidence of a mistake so as to strike out the name of a legatee and insert that of another inadvertently omitted by the drawer or copyer; for there can be no revocation or alteration of a written will of personality without the statutory forms, and the disappointed intention has not these forms. *Yates v. Cole*, 52 D. 602.

A testator made certain erasures and interlineations in a duly executed will. After he made the alterations, at his request, two persons signed the will, as witnesses to "the erasures and interlineations made" by testator. What these interlineations, etc., were, the witnesses did not know. *Held*, 1. That the alterations did not supersede the provisions of the will; 2. That the witnessing of such alterations did not amount to an attestation of the will as altered; and, 3. That the alterations did not operate as a revocation of the original will. *Will of Penniman*, 18 R. 368.

Under a statute providing that a will may be revoked by destruction or by cancellation, with intent to revoke, witnessed in the same manner as a will, a will is not revoked by drawing a scroll through the signature so as not to render it illegible, and evidence of the declarations of the testator that he had destroyed the will is incompetent. *Gay v. Gay*, 46 R. 78.

A will was wholly written on the first page of a double sheet. On the fourth page the testator wrote in pencil, "I revoke this will," and signed and dated it. This was not attested. *Held*, not a revocation within a statute prescribing burning, tearing, canceling, obliterating, or making a new will or codicil, or some other writing signed, attested, and subscribed like a will, as the only modes of revocation. *Will of Ladd*, 50 R. 355.

Where it appears to have been the intention of the testator to convey all his estate by the will, a subsequent trust deed of the property devised, with a power of revocation, which is subsequently exercised, does

For Index to Notes in American Decisions and American Reports, see Volume L.

not work a revocation of the will. *Morey v. Sohier*, 56 R. 538.

31. Evidence of revocation.*—The declarations of a testator regarding the cancellation of a will are inadmissible if not connected with any act done or attempted by him to effect a revocation. *Dan v. Brown*, 15 D. 395.

The declarations of a testatrix that she destroyed the will are admissible, not as independent evidence of revocation, but to assist the jury in determining whether a will has been revoked, when it is found after twenty-five years, among waste papers, and in a mutilated condition. *Lawyer v. Smith*, 77 D. 460.

The execution of a subsequent will having been proved, but not its contents, the former will is not deemed revoked. *Nelson v. McGiffert*, 49 D. 170.

The revocation of a will must be shown by some overt act apparent in another writing or on the paper itself, and cannot be established by parol proof merely. *Hise v. Fincher*, 51 D. 383.

Where there is no proof tending to show a revocation of a will, and the question of revocation is left to the jury, this is not such error as can be taken advantage of by the contestant of the will. *Taylor v. Kelley*, 68 D. 150.

Where a second will is found to be invalid, with the exception of the clause of revocation, on the ground of undue influence, the clause of revocation alone is not sufficient evidence of the testator's intention to revoke a former will. The presumption is that, if the second will is found to be invalid, the testator intended that the first will should stand rather than that he should die intestate. *Rudy v. Ulrich*, 8 R. 238.

32. Presumptions relative to revocation.—A devise was made to a daughter, "during the term of her life, and immediately after unto and among all and every such child and children as she shall have lawfully begotten at the time of her death, in fee-simple, equally to be divided between them, share and share alike." *Held*, that her four children, living at the time of the devise, and at the death of the testator, took a vested remainder in fee, and that in case there had been any children born afterwards the estate would have opened for their benefit, and that therefore the children of a daughter who died in the life-time of a mother were entitled to the share of their mother, who was living at the death of the testator. *Doe v. Provost*, 4 D. 249.

Where a mutilated will is found, the testator, in the absence of proof, is presumed

to have done the act, if it was done while in his possession or is discovered among his papers canceled or defaced. *Bennett v. Sherrod*, 40 D. 410.

The presumption that a testator mutilated a will does not apply where it is found in that condition under the control of a person to be benefited by its revocation, and where such person, on being asked for it, acknowledged that there was a will, said nothing about the mutilation, refused then to deliver it up, and it was not obtained till the following day. *Ib.*

A testator's children take a vested interest in the estate devised to a wife, to be divided "amongst my children as she may think best," and on failure of appointment the children take equally at the wife's death. *Cathey v. Cathey*, 49 D. 714.

A devise was made to a testator's wife during widowhood, and whenever her death or marriage should take place the property was to be equally divided among his children which may then be alive, or who may have left legitimate heirs. Two of the children died intestate and without heirs, and the widow conveyed her interest to the only remaining child. *Held*, that the latter had an absolute title, though his mother was yet alive, and that there was no just ground to fear that a claim which might be made by his children in the event of his death before that of his mother would be available against one acquiring his title. *Manderson v. Lukens*, 62 D. 312.

33. Implied revocation, generally.*—The revocation of devises are, at common law, express or implied. The latter are termed revocations in law. *Graves v. Sheldon*, 15 D. 653.

Revocations in law resulted, at common law: 1. From a total alteration in the circumstances of the devisor; 2. From an actual or intended alteration in his estate; but in Vermont a revocation does not result from an alteration in the circumstances of the testator, nor from an intended alteration in his estate. *Ib.*

Implied revocations are, in this state, those only which result *ex necessitate rei*. *Ib.*

A will may be revoked during the testator's life by any act or fact inconsistent with it. *Sneed v. Ewing*, 22 D. 41.

A material alteration in the circumstances of a testator may, by implication, revoke a will either partially or totally, according to the nature of the case. *Ib.*

The omission to mention a codicil in the act of republication, in which other codicils made prior to that act are mentioned, implies a revocation thereof; but this may be rebutted by circumstances showing a contrary intention. *Wickoff's Appeal*, 53 D. 597.

Where a man dies, leaving two separate

* See note on Evidence of Revocation, 45 R. 342-34.

Declarations of testator to show revocation, see note, 3 D. 395, 396.

* Revocation of will, when implied, see note. 15 D. 659-661.

For Index to Notes in American Decisions and American Reports, see Volume I.

and distinct wills properly executed and attested, both relating exclusively to the same kind of property, and where by specific legacies and residuary clauses each is entirely adequate to the disposition of all the property belonging to the decedent, the latter alone shall be given effect. They cannot both stand together as constituting but one will. *In re Fisher*, 65 D. 309.

A will is not any less the subject of a revocation by operation of law because it is made by a woman under the special power contained in a marriage settlement, instead of under the general power granted by law. *Young's Appeal*, 80 D. 513.

A will is revoked by implication, if the circumstances of the testator be so altered that new moral testamentary duties have accrued to him subsequent to the date of the will, such as may be presumed to produce a change of intention. *Ib.*

An implied revocation of a will cannot be shown by the declarations of the testator, unless a material change appears in his condition, creating new moral duties and obligations. The change must be in material relations, and not in mere sentiment or feeling. *Jones v. Moseley*, 90 D. 327.

Evidence of a reconciliation to a child intentionally omitted from the will, and of the dying declaration of the testator that he wanted his children all to be equal, is not admissible to show an implied revocation of the will. *Ib.*

A will is not revoked by the death of legatees or beneficiaries; by marriage of the testator without issue; by alienation of the greater part of the estate specifically devised; by the acquisition of a much larger estate, nor by the concurrence of all these events. *Hoitt v. Hoitt*, 56 R. 530.

34. Effect of subsequent marriage.*

— A widow, having children, made her will, married again, and died without issue by her second husband. *Held*, that her will was not revoked by implication of law on her second marriage, nor by a statute passed after her marriage, which enacted that marriage should revoke a prior will. *In re Tuller*, 22 R. 164.

At common law the marriage of a *feme sole* revokes her will so far as it relates to personality; and the husband's consent to the probate of a will made before marriage does not make the will valid, but the personal property not reduced to possession by him during the wife's life-time is to be distributed among her next of kin. *In re Carey*, 24 R. 133.

A *feme sole* made her will, whereby, after certain specific legacies, she gave to a missionary association the sum of \$8,000, or, if

that should be more than half her estate, both real and personal, then "a sum equal to one-half of" her estate. All the remainder of her estate, "both real and personal," she gave to a church society. She afterward married and died without issue. The husband, who had never reduced the wife's personal estate to his possession, consented to the probate of the will. More than half of the testatrix's estate was personal property. *Held*, 1. That the will was revoked as to the personality by the marriage, and was not revived or rendered valid by the husband's consent to the probate; 2. That as the personal assets were ample to pay the bequest to the missionary association, if valid, such bequest was of personality and was revoked by the marriage; but 3. That the gift of the remainder, "both real and personal," to the church society was a devise of real estate, and was operative so far as related to such real estate. *Ib.*

Under a statute prescribing the modes of revoking a will, and recognizing revocation "implied by law from subsequent change in the condition or circumstances of the testator," a woman's will is revoked by her subsequent marriage. *Swann v. Hammond*, 52 R. 255.

Under a statute that "marriage shall be deemed a revocation of a prior will," such a will is absolutely revoked as to all persons by marriage. *McAnnally v. McAnnally*, 60 R. 552.

An ante-nuptial agreement by an intended husband that the woman should hold her property separately and independently, and that the marriage should not revoke her will previously made, nor affect her right to change it subsequently, renders such will valid. *Osgood v. Bliss*, 55 R. 488.

A woman's ante-nuptial will is not revoked by her marriage. *Fellows v. Allen*, 49 R. 323; *Noyes v. Southworth*, 54 R. 359.

35. — of birth of child.*—A father could not disinherit a legitimate child by preterition merely by the civil law, but by the common law he may; and, therefore, while the birth of a child, after the date of the will, necessarily amounted to a revocation by the civil law, it is, by the common law, only *prima facie* a revocation until the contrary is shown. *Sneed v. Ewing*, 22 D. 41.

Either marriage or birth of a child may amount to an implied revocation of a prior will; and both marriage and issue are not indispensable to such revocation. *Ib.*

The will of a married woman is revoked by subsequent birth of a child, but only so far, under the statutes of Pennsylvania, as the child would have taken without the will. *Young's Appeal*, 80 D. 513.

* Revocation of will by marriage, see notes, 80 D. 516-519; 49 R. 323-381.

Revocation of ante-nuptial will by marriage, see note, 57 D. 346, 349.

* Revocation by marriage, or birth of child, see notes, 10 D. 659-661; 26 R. 159-161.

For Index to Notes in American Decisions and American Reports, see Volume I

A testator, having two children, bequeathed all his estate to his wife; two other children were subsequently born to him. *Held*, that this revoked the will at common law. *Negus v. Negus*, 28 R. 157.

A will not providing for the children of a testator subsequently to be born is revoked in law, *pro tanto*, by the subsequent birth of a child to the testator in his life-time, despite a statute providing that it can be revoked only by cancellation, destruction, or the execution of a subsequent will. *Fallon v. Childster*, 26 R. 164.

36. Revocation by tearing, burning or other destruction of will. — Less ceremony is required in the revocation than in the execution of a will; the former may be effected by obliteration or tearing, *animo revocandi*. *Pringle v. McPherson*, 3 D. 713.

The degree of "burning, canceling, tearing, or obliterating," necessary to constitute a revocation of a will, under the statute of frauds, depends on circumstances; the slightest "burning," etc., will be sufficient, if shown to have been done *animo revocandi*, and the fact that the statute uses the word "destroying," instead of "burning, canceling, or tearing," does not change the case. Accordingly, if it is shown that the testator interlined and erased portions of the will, and tore off the seals, with the intention to revoke it, the revocation will be complete; and the fact that he intended at the time to make another will, but failed to do so, will not revive the former will. *Johnson v. Brailsford*, 10 D. 601.

The destruction of a will is not a revocation unless the testator had at the time capacity to understand the nature and effect of the act, and performed it, or directed it to be performed, voluntarily, with intent to effect revocation. *Rhodes v. Vinson*, 52 D. 685.

A will is not revoked by any act of spoliation or destruction not deliberately done, *animo revocandi*. *White v. Casten*, 59 D. 585.

Where a revocation of a will is attempted by burning, there must be a present intent on the part of the testator to revoke, and this intent must appear by some act or symbol, appearing on the script itself, so that it may not rest upon mere parol testimony, and if the script is in any part burned or singed, it is sufficient to revoke the will. *Id.*

A will is revoked by burning where the testator threw it into the fire with the intent to revoke and destroy it, and after he had turned away his wife took the paper from the fire secretly, and concealed it; and the testator up to the time of his death thought the will was destroyed, and so frequently expressed himself, the script having been burned through in three different places, the outside scorched, and the edges of the paper singed, although no word or letter of

the writing was in any manner destroyed or obliterated. *Id.*

A will is not *ipso facto* revoked by a letter of testator to his agent directing the agent to destroy the will. *Tynan v. Paschal*, 84 D. 619.

A direction by a testator that his will be destroyed, though accompanied by a belief upon his part that such direction was carried out by the person to whom it was delivered, cannot operate a revocation of a will even of personal estate. *Malone v. Hobbs*, 39 D. 263; *Hise v. Fincher*, 51 D. 333.

The cancellation or destruction of a will, to operate a revocation thereof, must be directed against the will as a whole. *Malone v. Hobbs*, 39 D. 263.

A statute provided that no will shall be revoked unless the testator shall destroy or "mutilate" the same. A testator drew pencil lines across his signature, with intent to revoke, but left the signature still legible. *Held*, a "mutilation." *Woodfill v. Patton*, 40 R. 269.

Under a statute providing that no will shall be revoked or altered except by another will, or "unless such will be burnt, torn, canceled, obliterated, or destroyed," etc., an obliteration in part is ineffectual to work a revocation. *Lovell v. Quitman*, 42 R. 254.

37. Revocation *pro tanto*. — Revocations *pro tanto* either alter the quality of the estate, or diminish the quantity of the thing devised. *Graves v. Sheldon*, 15 D. 653.

A residuary devise of "all his estate, whether real or personal," will pass a mortgage held by the testator at the time of making his will; and a foreclosure of the mortgage or a release of the equity of redemption will revoke such a devise. *Ballard v. Carter*, 16 D. 377.

Ademption or translation of a legacy may be an implied revocation *pro tanto*. *Sneed v. Ewing*, 22 D. 41.

The cancellation of a part of a will by a testator, is an equivocal act whose legal effect depends on extrinsic proof of circumstances indicating the intention with which it was done; and, although it is *prima facie* evidence of intent to revoke, parol testimony is admissible to show that the intention to cancel applied only to so much of the instrument as was actually canceled. *Brown's Will*, 35 D. 174.

A will signed by a testator on any part of it, after he had cut off a portion of the original instrument, is still valid, if it appears from the circumstances attending the cancellation and subsequent signing that it was the testator's intention that the uncanceled part should continue to be his will. *Id.*

A valid will of real and personal estate, executed according to the requirements of the statute, may be revoked as to the personal estate, or a part of it by any in-

For Index to Notes in American Decisions and American Reports, see Volume I.

strument in writing which would, if standing alone, be a good will of personal estate. *Marston v. Marston*, 43 D. 611.

A subsequent will does not revoke a former one, unless it contains a clause of revocation, or is wholly inconsistent with such former will. If partly inconsistent, it is a revocation *pro tanto* only. *Nelson v. McGiffert*, 49 D. 170.

The cancellation of a bequest, standing separately from other bequests, does not cancel the other bequests. *Wickoff's Appeal*, 53 D. 597.

An agreement revoking a will in part does not work a revocation as to the remaining property mentioned in the will but not in the agreement. *Taylor v. Kelley*, 68 D. 150.

Under a statute which provides that "no will shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence, or by his direction, or by some other will, codicil, or writing, signed, attested, and subscribed in the manner provided for making a will,"—*held*, that an erasure by a testator of certain clauses in his will, with the intention of revoking only those clauses, is a valid revocation of those clauses, but not of the whole will; and the property therein referred to passes under the residuary clause, in the absence of evidence of a contrary intention. *Bigeelow v. Gillott*, 25 R. 32.

A conveyance of part of the bequeathed property by the testator in his life-time, operates as a revocation *pro tanto*. *Hawes v. Humphrey*, 20 D. 481; *Graves v. Sheldon*, 15 D. 653.

The testator devising the use of a house for life, and afterwards leasing the property for a term extending beyond his death, and collecting rent in advance, thereby revokes the devise *pro tanto*, and the devisee can not charge his estate for the rent so collected, nor for rent not collected by the testator, which, for any cause, remains unpaid by the lessee. *Higgin v. Swett*, 39 D. 716.

38. Effect of revocation.*—A revocation of a subsequent will does not, *ipso facto*, revive a former will which had been expressly or impliedly revoked by the latter. *Bohanon v. Walcot*, 29 D. 631.

A will, when revoked, has neither a present nor a potential existence, and it requires a new testamentary act on the part of the testator to revive it. *Ib.*

The law as to the revocation of wills is the same in courts of law and equity; a will once revoked cannot become operative again without republication. *Donohoo v. Lea*, 55 D. 725.

The revocation of a will which revokes a

* Revival of one will by revocation of another, see notes, 76 D. 652-655; 45 R. 327-341.

former will does not revive such former will, nor can it be revived except by republication in writing duly attested, or by codicil duly executed. *Harwell v. Lively*, 76 D. 649. But the subsequent declarations of the testator are competent to show that he meant to revive a former and existing will. *Pickens v. Davis*, 45 R. 322.

To correct spelling in his will already executed, the testator had it copied, and undertook to execute the copy, and destroyed the original. The copy being insufficiently attested, — *held*, that the original was restored to force, and its contents were sufficiently established by the copy, with evidence of its correctness and evidence of the testator's declarations. *Wilbourn v. Shell*, 42 R. 363.

II. PROVING A WILL.

39. Necessity of probate. — The probate of a will means the proof of its formal execution. *Higgins v. Carlson*, 92 D. 666.

Before probate a will is not admissible as evidence of title to land, nor can one claiming under it prove that it was fraudulently destroyed, and give secondary evidence of its contents. *Shumway v. Holbrook*, 11 D. 153.

To establish a title to realty, a will may be proved more than twenty years after the testator's death. *Ib.*

The will of a married woman must be executed in conformity to law, and be proved in the probate court, whether it operates by virtue of a power or otherwise. *Cutter v. Butler*, 57 D. 330.

Probate will be limited to the property that a wife had power to devise. *Ib.*

A will does not require probate which was executed before statute of wills in California, the testator having died before passage of the act, the then existing laws not requiring probate of wills. *Grimes v. Norris*, 65 D. 645.

A will made in another state by one domiciled there must be filed and recorded in the proper probate court in Rhode Island, before it can be allowed to operate upon property in the latter state. *Olney v. Angell*, 73 D. 62.

Where the proceeds of land directed to be sold are devised, the devisees, before the power of sale is executed, may collectively elect to take the land instead of the proceeds, according to their respective interests, and each of them may ordinarily so elect as to his own share. *Mandlebaum v. McDonell*, 18 R. 61.

40. Time of probate. — In the absence of statutory regulation, a will may be admitted to probate at any time after the testator's death, but acts done and rights acquired under a previous grant of administration will be protected. *Rebham v. Mueller*, 55 R. 869.

A statute providing for the probate of wills before the death of the testator, leaving him at liberty to alter or revoke it, or escape the effect of any action under it by

For Index to Notes in American Decisions and American Reports, see Volume I.

removal from the jurisdiction, is illegal and void. *Lloyd v. Wayne Circuit Judge*, 56 R. 378.

41. Who may propound the will. — Wills may be presented for admission to probate by either an executor, legatee, or devisee. *Wells v. Wells*, 16 D. 150.

Whether slaves claiming to have been emancipated by a will, can be allowed to prosecute, *in forma pauperis*, a suit to have the will proved and recorded in a court of probate, under the provisions of the Rev. Code, c. 124. secs. 4, 5, p. 481, *quarrel Winn v. Bob*, 23 D. 258.

An executor cannot repropound a testament, pronounced against when first offered by him, otherwise than upon the ground of newly discovered evidence. *Redmond v. Collins*, 27 D. 208.

The executor is the proper person to prove the testament, and will, at the instance of parties interested, be summoned by the ordinary to produce it, and either prove it and take upon himself its execution, or else renounce it. *Ib.*

If the executor renounce, any party in interest may propound the testament. *Ib.*

A devisee may not repropound to the probate court, in its dual character of will and testament, an instrument before rejected by it when propounded by the executor named therein. *Ib.*

The propounder of a will for probate, whether an executor, legatee, or devisee, becomes the representative of the will for the purpose of its probate, and of all similarly interested, though they are not made formal parties to the proceeding, and may have had no notice of its pendency; and this, too, whether they are *sui juris*, or laboring under infancy, coverture, or other disability. *Schultz v. Schultz*, 60 D. 335.

42. Place of probate. — The jurisdiction for the probate of a will having once attached, is not divested by a subsequent division of the county. *Lindsay v. McCormack*, 12 D. 387.

43. Foreign probate. — A foreign will devising land in Kentucky must, in order to be effectual to pass the title, be executed conformably to the laws of this state; probate in a foreign state is not conclusive evidence that the will was so executed as to pass land here, and consequently such will must be proved as an original document on any trial involving the title to land in this state devised by it, unless there has been probate of it, or what is equivalent to probate, in the proper court here. *Sneed v. Ewing*, 22 D. 41.

Foreign wills may be admitted to record in the clerk's office of the circuit court in this state, without probate here, on a proper authentication of the foreign probate; and

* Wills admitted to probate in another state, effect of, see note, 73 D. 53-62.

when so recorded they have the same effect as if originally proved and recorded in the proper county here. *Ib.*

The right to contest a foreign will in chancery results *ipso facto* whenever it is recorded in this state. *Ib.*

The title of a devisee under a foreign will takes effect at the death of testator, and no subsequent registry in this state is necessary to perfect it. *Hall v. Ashby*, 34 D. 424.

The effect of a decree proving a will is confined to the territory, and things within the territory, of the state establishing the court by which such decree is rendered. And article 4, section 1, of the constitution of the United States, does not extend the operation of the probate of a will, as a judicial act of a state, beyond its own territory. "Full faith and credit" is given to such a decree when it is left where it is found, local in its nature and operation. *Olney v. Angell*, 73 D. 62.

Section 1 of article 4 of the constitution of the United States does not extend the operation of a decree of a probate court admitting a will to probate to things which were, at the time of the testator's death, without the territory of the state whose court has taken the probate. *Bowen v. Johnson*, 73 D. 49.

A will, when its validity is not questioned, may be allowed and recorded in one state as a foreign will, where the domicile of the testator, at the time of his death, was in a sister state. And the movable property in the state where the will is so allowed and recorded, and belonging to the testator's estate, will be disposed of under the will, according to the laws of the state in which the domicile was established. *Gilman v. Gilman*, 83 D. 502.

The probate of a will in another state is only *prima facie* evidence of its validity, upon an application to a probate court in Rhode Island to allow a copy thereof to be filed and recorded in the latter state. *Bowen v. Johnson*, 73 D. 49.

The judgment of a court of probate of another state, admitting a will to probate, has no effect upon the title to realty situate in this state. It is otherwise with respect to personalty, for that is controlled by the law of the testator's domicile. *Peck v. Cary*, 84 D. 220.

44. Powers of court, surrogate or ordinary. — 1. *In general.* — Where a testator devised certain salt-works to his wife and two near relatives during her life-time, subject to the payment of sundry legacies to a large amount, it was held that the devisees were authorized to make unlimited use of the saline mineral, and of the wood from the land of the devisor, from which fuel was supplied in his life-time, to carry on the works. *Findlay v. Smith*, 8 D. 733.

The construction and validity of clauses in a will are not to be examined on applica-

For Index to Notes in American Decisions and American Reports, see Volume I.

tion for probate of the instrument. *Hawes v. Humphrey*, 20 D. 481.

The declaration of a testator, made several years after executing a will, that he had been influenced to make it, and had not done justice to his grandchildren, is not sufficient to warrant a court in refusing probate of the will. *Nelson v. McGiffert*, 49 D. 170.

Where wills are of different dates and their provisions are conflicting, the courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the later paper, the latter containing no express clause of revocation. *Schultz v. Schultz*, 60 D. 335.

The construction of an instrument offered for probate is a question of law; and after it is proved to be a will, the court should instruct the jury of its nature as such. *Taylor v. Kelly*, 68 D. 150.

The entry of a formal judgment that a will is admitted to probate is not essential to validity of probate. A direct statement that the will is proved is sufficient, though entered in the minutes as part of and preliminary to an order directing letters to issue. *Will of Warfield*, 83 D. 49.

A proceeding in probate is in its nature distinct from an action at law or a suit in equity, notwithstanding the fact that the same court has jurisdiction in common law, chancery, and probate cases. *Lucick v. McLean*, 93 D. 376.

A paper referred to in a will, and containing directions for the disposition of the estate, but not executed or witnessed as a will, should be admitted to probate as part of the will, if it was in existence at the date of the will and is clearly identified; and when omitted by mistake at the probate of the will, it may be afterward admitted, although the time for appealing from the decree of probate has elapsed. *Newton v. Seaman's Friend Soc.*, 39 B. 433.

The register, as to the probate of a will, is judge, and the admission of a will to probate is a judicial decision. *Holliday v. Ward*, 67 D. 671.

The duty of a register of a will after evidence has been heard is, in the exercise of a legal discretion, to decide upon it, or refer the decision to a jury; and the propriety of his determination may be examined on appeal. *Wikoff's Appeal*, 53 D. 597.

2. *Probate courts.* — The probate court has jurisdiction to decide upon proof of a will of a married woman, and its decisions are conclusive upon parties and privies as to the testamentary capacity of the wife, and as to the assent of the husband to the will where such assent is necessary. *Cutter v. Butler*, 57 D. 330.

The probate court having admitted a will to probate may receive and admit another

will to probate, whether it be consistent or inconsistent with or expressly revoke the former will; and it is not necessary in such a case first to file a bill under the statute to set aside the former will. *Schultz v. Schultz*, 60 D. 335.

The probate courts of Rhode Island have exclusive jurisdiction over the probate of wills, and the supreme court has no original jurisdiction to hear proof of a will or to allow it. *Olney v. Angell*, 73 D. 62.

Probate courts may admit to probate a codicil of a will which it has already admitted to probate, though the codicil is written upon the back of the same leaf upon which the will is written, and even after the time for appealing from the decree has passed, if such codicil escaped attention, and was not passed on at the time of the probate of the original will. *Waters v. Stickney*, 90 D. 122.

If the probate court be wholly incompetent to give relief, and the party have not by his laches lost his remedy, equity has jurisdiction. *Wade v. Am. Col. Soc.*, 45 D. 324.

3. *Orphans' courts.* — Orphans' courts in Alabama have general plenary jurisdiction of all testamentary cases; and, except in peculiar cases, this jurisdiction is exclusive. *Apperson v. Cottrell*, 29 D. 239.

A jury may be impaneled in the orphans' court to try the issues joined with respect to a will which is alleged to have been duly executed and afterwards destroyed by the testator while insane. *Id.*

The orphans' court of Maryland, in admitting to probate the will of a married woman, disposing of her separate property, does not decide upon the right of disposal, but merely the *factum* of the instrument. The question of power of disposal belongs to the courts of law and equity. *Michael v. Baker*, 71 D. 593.

4. *County courts.* — County courts in England, prior to the reign of William I, had jurisdiction of testamentary causes; but the original jurisdiction of probates belongs in England to the ecclesiastical courts, and to some of the courts baron. *Apperson v. Cottrell*, 29 D. 239.

Equity has no jurisdiction of probate of wills in Tennessee. It readily holds administrators and executors to an account of the funds in their hands, and gives construction and interpretation to testamentary papers, but never exercises strictly probate jurisdiction. This belongs exclusively to the county court. *Townsend v. Townsend*, 94 D. 184.

A Tennessee county court as a court of probate is not a court of inferior jurisdiction in the technical sense of that term, as used in reference to this subject at common law. Its jurisdiction is not special or limited, but it is general, original, and exclusive. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

45. Who may be admitted to oppose.*—Probate in common form is where a will has been admitted to probate upon proceedings to which the executor alone is a party. *Redmond v. Collins*, 27 D. 208.

Probate in solemn form is where, by summons to see proceedings, the executor has called in the parties interested to witness the proceedings, and to take what part therein they see fit. *Ib.*

Parties in interest may intervene in a matter of probate, though summons to see proceedings has not issued. *Ib.*

The receipt of legacies by the next of kin does not preclude them, where the grant of probate has been in common form, from calling for probate of the will in solemn form, in order that they may be afforded an opportunity of contesting it. *Malone v. Hobbs*, 39 D. 263.

A decree dismissing a bill filed to set aside a will, because its bequests were contrary to statute, does not estop the heirs from contesting the probate of the will on the ground of defect of execution. *Mason v. Alston*, 59 D. 515.

The only persons competent to contest the will are heirs of realty, or distributees entitled to personalty. *Meyer v. Fogg*, 68 D. 441.

The proponent of a will cannot by his acts or declarations defeat its probate to the prejudice of other legatees, notwithstanding he may also be a legatee. *Taylor v. Kelly*, 68 D. 150.

Parties in interest may contest the validity of the will in the probate court, in Illinois, as well as by a bill in chancery, and in so doing may examine the witnesses who attested the will, as well as others. *Duncan v. Duncan*, 76 D. 699.

46. Filing a caveat or objection.—The register of wills is empowered but not required to direct an issue of fact to the common pleas in every case where a caveat is entered against the admission of a testamentary writing to probate. *Witkoff's Appeal*, 53 D. 597.

An issue of fact should not be so awarded when the testimony of witnesses to establish the will is not impeached, and there is no real conflict in the evidence. *Ib.*

Under a caveat charging the will to be the result of delusion against the caveator specially, the jury's attention should be particularly called to that issue. *Lucas v. Parsons*, 71 D. 147.

The nominated executor and propounder of a will is the legal party to conduct the litigation involved in a caveat to the will from the beginning to a final adjudication, in behalf of the will and those who claim under it. *Lucas v. Lucas*, 76 D. 642.

The probate of a will, when objections are

filed as soon as the paper is propounded, should not be taken until after the objections are disposed of. *Jones v. Moseley*, 90 D. 327.

47. Burden of proof on the probate.

—The statutory requisites in executing a will must be substantially complied with to render it valid, and the onus to show such compliance is on the proponent of the will. *Chapfee v. Baptist Missionary Conv.*, 40 D. 225; *Reynolds v. Reynolds*, 40 D. 599; *Hardy v. Merrill*, 22 R. 441.

The issue of sanity or testamentary capacity is also upon him; and the presumption of sanity does not shift the burden upon the opposing party. *Baldwin v. Parker*, 96 D. 697; *Williams v. Robinson*, 1 R. 359.

Not so, however, as to the absence of fraud or undue influence. *McMecken v. McMecken*, 41 R. 682.

The due execution of a will being proved, the law presumes the testator to have been acquainted with its contents, and the onus of showing the contrary rests upon the party alleging it. *Hemphill v. Hemphill*, 21 D. 331.

The will of a blind or illiterate person is not invalid because it was not read to him in the presence of the subscribing witnesses, but the fact that it was not so read may be considered by the jury in determining the testator's capacity to make a will, or whether fraud or undue influence was used to procure the execution of the instrument offered for probate. *Ib.*

The influence which a wife, by her virtues, gains over her husband's affections and conduct, whereby he is caused to make a will in her favor, is no ground for refusing to admit the will to probate. *Small v. Small*, 16 D. 253.

It is presumed that all sheets of a will written on separate sheets of paper are produced for probate, in the absence of evidence to the contrary. *Witkoff's Appeal*, 53 D. 597.

48. What proof is necessary and sufficient.*—The mode of proving a will

must be in accordance with the law in force when it is propounded for probate. *Jauncey v. Thorne*, 45 D. 424.

One witness is sufficient to prove a will, if he can testify to every fact necessary to its legal execution, although the statute may require two witnesses to attest it. *Lindsay v. McCormack*, 12 D. 387; *Jackson v. Vickory*, 19 D. 522.

The proof of the execution of a will may be made by one of the subscribing witnesses only, although the will be lost, and the witness has forgotten the name of one of the other subscribing witnesses. *Dan v. Brown*, 15 D. 395.

The evidence of a subscribing witness

* Who may oppose the probate, see note, 68 D. 447-448.

* Proving will by one witness, see note, 15 D. 127-128.

For Index to Notes in American Decisions and American Reports, see Volume I.

need not show that he recollects the time and occasion when he acted as a witness. It is sufficient that he identifies his signature, and feels assured in his own mind that he would not have affixed it without first hearing the will acknowledged. *Pearson v. Wightman*, 12 D. 636.

Where one witness to a will devising land testified that, by direction of the testator, and in her presence and that of another witness, he signed the testator's name, and subscribed his own as a witness; and the other witness testified that he heard the testator acknowledge the will, and that he subscribed it as a witness, at her request, and in her presence, the proof was held sufficient. *Welch v. Welch*, 16 D. 128.

Proof of instructions for, or the reading of, the will, is necessary where the capacity of the testator is in any degree of doubt. *Tomkins v. Tomkins*, 19 D. 656.

A testamentary instrument executed by a *feme covert* under a power is sufficiently proved when it has been admitted to probate before the proper tribunal, and in this court is admitted by the answer to be duly executed under the power given her by the marriage contract. *Leigh v. Smith*, 42 D. 182.

All the subscribing witnesses to a will living in the state, and competent to testify, ought to be sworn and examined before the surrogate when the will is sought to be proved and admitted to probate. *Jasnacey v. Thorne*, 45 D. 424.

The law does not prescribe a mode of proof of a will, nor require it to be proved as well as attested by a specified number of witnesses. *Jesse v. Parker*, 52 D. 102.

A will may be good under the Pennsylvania act of April 8, 1833, which provides that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction," where the testator has given complete directions for the drawing of such will, and it has, in accordance therewith, been put in writing in his life-time, and he is so prevented by the extremity of his last sickness from signing it himself or giving directions to another to sign it for him, if it is established in some other manner. *Showers v. Showers*, 67 D. 487.

Upon proceedings for the probate of a will, the question before the court is simply whether the writing is the last will of the deceased, and whether it was duly executed and published by him as such, and it should be tried unincumbered by any question whether the testator in his life-time has provided for any of his children omitted by his will, and whether such omission was intentional or accidental. *Lortieuz v. Keller*, 68 D. 696.

Parol evidence is admissible when its introduction is required by considerations extrinsic of the will, where it tends to establish and sustain the will, or where it consists of declarations of the testator made at the time of the execution of the will, and showing its legal quality; such evidence is part of the *res gestæ*. *Id.*

A posterior will cannot be rejected because inconsistent with a previous one, nor for inconsistency with expressed sentiments of the testator, and suspicions are not permitted to counterbalance the testimony of numerous and uncontradicted witnesses. *Pena v. New Orleans and Baltimore*, 71 D. 506.

Resort may be had to secondary evidence where direct proof of the execution of the will cannot be adduced owing to the nature of the case; but this must be sufficient to establish with reasonable certainty all the facts which must concur in the execution of a valid will. *Tynan v. Paschal*, 84 D. 619.

49. What is insufficient. — Parol testimony cannot be introduced to establish the finality or completeness of the act of making a will. *Waller v. Waller*, 42 D. 564.

Where it appeared by a special verdict that one of the witnesses to a will saw the testator's name signed to the will by a third person, in the presence and by the direction of the testator, but did not hear the testator acknowledge it as his will, and that the other witness subscribed the will on the next day, and heard the testator say it was his will, without expressly acknowledging the signature, — held, that the will was not duly proved as a will of realty. *Burnell v. Corbin*, 10 D. 494.

When the witness who is produced cannot remember whether or not the other witnesses subscribed their names in the presence of the testator, but presumes that they did so, as he would not have subscribed as a witness if the law had not been complied with, and the other witnesses are living and within the state, the proof is insufficient, because it presents secondary evidence of a fact of which better evidence is within the party's reach. *Jackson v. Vickory*, 19 D. 522.

Mere want of recollection of witnesses to the will, that the testator indicated the instrument to be his will, is not evidence *per se* of non-compliance with requisites of the New York statute of 1830, as to publication, where the attestation clause states that the testator declared the instrument to be his will. But where the witnesses testify that neither the attestation clause nor the will was read by them, and that the testator did not state the instrument to be his will, but at the time of signing merely acknowledged it to be his "hand and seal for the purpose therein mentioned," there is no proof of publication, and the will is inoperative, although the attestation clause may state that there

For Index to Notes in American Decisions and American Reports, see Volume I.

was publication. *Rensen v. Brinckerhoff*, 87 D. 281.

Where a will is signed by direction of the testator, who merely affixes his mark thereto, two witnesses are, under the Pennsylvania statute, necessary to prove that he was too infirm to be able to write his name; and where there is but one witness to that fact, proof by the subscribing witnesses that he afterwards acknowledged the paper to be his will, is not sufficient to entitle it to probate. *Cavett's Appeal*, 42 D. 262.

Subscribing witnesses must swear that they believe the testator was of sound mind before his will can be admitted to probate. Where one of them testifies that he does not know whether he was or not, — that he might have been or might not, — this is insufficient. He should be interrogated as to his belief. While he may have no positive knowledge, he undoubtedly has an opinion, which the law requires he should state. *Allison v. Allison*, 92 D. 237.

50. Effect of conflict and uncertainty in testimony of the subscribing witnesses. — The various subscribing witnesses to a will need not agree in their evidence, nor in being able to recollect all the material facts, nor need the evidence of all, or of any of them, support the will. It may be admitted to probate, even in opposition to their testimony. All that is requisite is, that from all the competent evidence adduced the court should be satisfied of the sanity of the testator and the due execution of the will. *Jauncey v. Thorne*, 45 D. 424. S. P., *Rigg v. Wilson*, 54 D. 419; *Peck v. Cary*, 84 D. 220; *Higgins v. Carlton*, 92 D. 666.

Want of recollection on the part of a witness to a will is not fatal to it, if it be properly attested and signed, and other evidence is introduced showing that at the time the testator called the paper his will, and requested the witnesses to sign it as witnesses. *Dewey v. Dewey*, 35 D. 367.

The fact that two of the subscribing witnesses do not swear to all the formalities required by law will not invalidate the will, where the other subscribing witness testifies positively to those formalities, and the certificate of attestation, signed by all of the witnesses, affirms the existence of all the facts requisite to a valid will. *Nelson v. McGuffert*, 49 D. 170.

The verdict of a jury in favor of a will, sanctioned by the court in which the trial of the issue of *debetur vel non* is tried, is conclusive as to all mere questions of fact depending upon the credit to be given to the testimony of the witnesses, and the identity of the paper offered for probate is one of the questions of fact settled by the verdict. *Jesse v. Parber*, 52 D. 102.

Where subscribing witnesses to a will are unable to identify with certainty the paper in contest as the same subscribed by them,

other competent evidence is admissible to establish that fact. *Montgomery v. Perkins*, 74 D. 419.

Testimony of a subscribing witness to a will thirty years old should be received, though he cannot recollect all the particulars attending the execution; and the jury may give it such weight as they think it is entitled to. *Lasoy v. Smith*, 77 D. 460.

A will need not be proven by two subscribing witnesses, but may be admitted to probate upon extrinsic evidence, even where one of them denies the due execution. *Cheatham v. Hatcher*, 32 R. 650.

Two witnesses came to the testator's house for the express purpose of being witnesses to his last will, and the deceased knew that they were there for that purpose. The witnesses also knew that B, who draughted the will, was there for that purpose, and saw him at work upon it. Before the will was read to the testator, they were requested by B. to come into the room where the testator was, for the purpose of witnessing his will, and both went to the door of the room, within a few feet and in plain sight of the testator, and then remained there while, according to the testimony of B. and another person present, the will was read to the testator by B., and signed by the testator; and according to the same testimony they were during that whole time so situated as to be able, if paying attention, to see and hear what was done. *Held*, that the want of memory of the attesting witnesses, as to what then took place in their sight and hearing, is not sufficient to negative the conclusion that the will was properly attested by them, they having signed the attesting clause of the will. *Will of John Meurer*, 28 R. 591.

51. Proof when subscribing witnesses are dead. — If the witness produced can testify only to his own part in the transaction, the other witnesses must be produced, if living and within the jurisdiction of the court, and if dead, or beyond the jurisdiction, their handwriting and that of the testator should be proved. *Jackson v. Vickory*, 19 D. 522; *Tynas v. Paschal*, 84 D. 619. Accordingly, where only one of the subscribing witnesses was called, who testified to his own signature and the handwriting of another witness who was dead, but could not recollect any of the facts, and did not remember the testator, and it appeared that the other subscribing witness was living and within the jurisdiction of the court, — *held*, that the proof was not sufficient. *Jackson v. Le Grange*, 10 D. 237.

All the subscribing witnesses to a will being dead, it may be left to the jury to presume that they subscribed in the testator's presence. *Jauncey v. Thorne*, 45 D. 424.

52. — or refuse, or are unable to testify. — If the witnesses to a will cannot be found, or though found, deny their signa-

For Index to Notes in American Decisions and American Reports, see Volume 1.

tures, circumstantial evidence may supply the deficiency. The handwriting of the witnesses may be proved, and the jury left to determine from all the circumstances whether the will was published with the requisite formalities. *Pearson v. Wightman*, 12 D. 636.

An attestation clause to a will, showing compliance with all legal requisites in its execution, is not absolutely necessary to its validity under the New York statute, but that fact may be proved by the witnesses, or presumed from all circumstances, if the witnesses are dead, or otherwise unable to testify. *Chaffee v. Baptist Missionary Conv.*, 40 D. 225.

The attestation clause is not conclusive evidence of the compliance with legal formalities, as therein stated, but may be contradicted by the witnesses; but it is presumptive evidence of such compliance, if the witnesses are dead, or from lapse of time do not remember the facts. *Id.*

Infirmity in the recollection of subscribing witnesses is not fatal to a will. The court, in such a case, will not require positive affirmative evidence respecting all the requisite formalities, but will draw its conclusions from all the circumstances disclosed by the evidence. *Jauncey v. Thorne*, 45 D. 424.

The attestation of the will by witnesses is sufficient proof of a compliance with the statute where, from death, defect of memory, or other cause, the testimony of the witnesses cannot be had. *Greenough v. Greenough*, 51 D. 567.

Positive testimony of one witness to a will, with the attestation of the other, who has forgotten the facts, is sufficient *prima facie* evidence of a compliance with the statute. *Id.*

53. Effect of the decree.*—A decree of a probate court admitting a will to probate is final and conclusive as to the validity thereof, if not reversed by the appellate court, and is not liable to be vacated or questioned by any other court, either incidentally or by any direct proceeding for the purpose of impeaching it. *State v. McGlynn*, 81 D. 118. S. P., *Colton v. Ross*, 22 D. 648; *Holliday v. Ward*, 57 D. 671.

The next of kin will be bound by a sentence admitting a will to probate, though not a party to the proceedings, nor summoned to "see proceedings," if, at the time of any prior contest over the probate, they had notice thereof and did not intervene. *Redmond v. Collins*, 27 D. 208.

The executor is in privity with the legatees claiming under the testament, and sentences against the testament, propounded by him, will be binding against them, even

though they were, at the time of the sentence, laboring under such disabilities as coverture or infancy, or even if at that time they were not yet in *esse*. *Id.*

The executor and devisee are not in privity at common law, nor are they made so by the statute permitting courts of probate to establish wills of real estate. *Id.*

The validity of a will is inferred by law from the register's decision itself, and not from the evidence on which the decision was based. *Holliday v. Ward*, 57 D. 671.

The validity of will, so far as it affects realty, may be contradicted and disproved in ejectment or partition, by showing that it was not legally executed, or that the testator was, at the time of making it, insane, under duress, or influenced by the fraudulent practice of some interested party. *Id.*

Where a will has been approved by the register, it is still no more than *prima facie* evidence of its validity in a subsequent ejectment for land devised by it; but no court will look into the evidence given on the trial of the issue and reject the will altogether if it appears that an interested witness had been examined. *Id.*

The judgment of a court of probate, fairly obtained upon the merits, rejecting a paper propounded as a will, is conclusive upon all claiming under it, whether it is propounded by the executor or by a devisee or legatee. *Schultz v. Schultz*, 60 D. 335.

The rejection of a paper propounded as a will by a court of probate precludes a resort to the same or any other tribunal to set up the same paper while that sentence remains in force and unreversed. *Id.*

The judgment of a probate court rejecting a will stands upon a footing analogous to a judgment *in rem*. *Id.*

A marked distinction exists between a judgment of a probate court for and against a will, where it is propounded *ex parte* for probate in the first instance. In the former case it is binding while in force, but it may be set aside by a proceeding in chancery under the Virginia statute. *Id.*

A judgment of a probate court rejecting a will from probate is upon the merits, when an objection to the jurisdiction is overruled, and evidence introduced upon the execution and validity of the will, though the precise ground upon which the decision rests is not given. *Id.*

The admission of a will to probate decides nothing but its due execution and publication, and the rights of one claiming a share of the estate on the ground that he is not mentioned in the will are not concluded by such decree. *Lorieux v. Kelley*, 68 D. 696.

The reason that a decree admitting a will to probate is conclusive as to the validity of the will upon all persons and all courts, is that the probating of a will is not a proceeding to decide a contest between parties, but

* What persons are bound by decrees and orders granting or refusing probate, see note, 60 D. 355-362.

For Index to Notes in American Decisions and American Reports, see Volume I.

a proceeding *in rem*, to determine the character and validity of an instrument affecting the title to property, and which it is necessary for the repose of society should be definitely settled by one judgment. *State v. McGlynn*, 81 D. 118.

The danger of holding a decree admitting a will to probate final and conclusive, is obviated by the right of appeal to the supreme court, and the statutory provisions permitting the contest of the decree or of the validity of the will at any time within one year, and securing the rights of persons under disabilities. *Ib.*

A will admitted to probate must be recognized and admitted in all courts to be valid so long as the probate stands. *Ib.*

The probate court acquires jurisdiction to probate a will on presentation to it of a petition stating all the necessary facts, and the publication of due and legal notice of time of proving the will, and its determination thereafter in admitting the will to probate is final, except upon a direct proceeding by appeal or otherwise to reverse it, and cannot be questioned collaterally. *Will of Warfield*, 83 D. 49.

Proceedings for the probate of a will cannot be attacked for irregularity, in a collateral proceeding, by petition to have such proceedings adjudged void on the ground of want of jurisdiction, and praying that the will be admitted anew to probate. *Ib.*

When a will has been admitted to probate in the county court, the probate must stand until revoked or vacated by that court, or reversed by the proper appellate court, as the jurisdiction of the former is general, original, and exclusive, and every intendment is made in favor of its jurisdiction and the rightful exercise thereof. *Townsend v. Townsend*, 94 D. 184.

A county court having assumed jurisdiction and admitted a will to probate, its validity cannot be collaterally attacked and set aside in equity, notwithstanding more than thirty years have elapsed since the testator's death, and before the will was offered for probate. *Ib.*

A purchaser of lands in good faith from a devisee under a will admitted to probate gets good title, although the will is subsequently annulled as a forgery. *Steele v. Renn*, 32 R. 605.

54. Review of probate proceedings.—A judgment at law will be reversed where improper evidence was admitted; as where a witness who did not attest the execution of a will, and was not qualified to speak as an expert, was permitted to testify generally that in his opinion the testator was of sound mind; but this rule has its limitations in equity. *Clapp v. Fullerton*, 90 D. 681.

On appeal from a decree of a surrogate, the review is in nature of a rehearing in

equity; and the admission of improper evidence on the original hearing before the surrogate, as where a non-expert or non-professional witness was permitted to testify as to his opinion of the testamentary capacity of the testator, furnishes no ground for reversing the decision in the supreme court, if the facts established by legal and competent testimony are plainly sufficient to uphold it. *Ib.*

The probate of a will should not be rejected simply because the testator, in other respects competent, entertained the mistaken idea that his eldest daughter was illegitimate, if such idea was not the effect of an insane delusion, but of slight and inadequate evidence acting upon a suspicious, jealous, weakened, and failing mind. *Ib.*

A paper whose validity as a will is contested, may be read to the jury on appeal from the ordinary, but such reading gives it no validity. *Lucas v. Parsons*, 71 D. 147.

The technical rules of pleading of the common law are not applicable to the statutory issues made on the trial of the validity of a will in the superior court on an appeal from probate. *St. Leger's Appeal*, 91 D. 735.

Reasons of appeal are not necessary to make issues to be tried on an appeal from probate. The real issue required by the statute to be tried and determined by the jury is the validity of the will; and every fact which shows that the will is not a valid one is material under that issue, and an element of it, and is involved in its determination. *Ib.*

Reasons of appeal serve a useful purpose as notice to the opposite party of the grounds of objection to the will which will be relied upon at the trial, and by limiting the party filing them to evidence of the objections alleged in them. But they can have no other practical effect; and it is immaterial, especially after verdict, how they are answered, or whether they are answered at all. *Ib.*

Where appellants file several distinct reasons of appeal, to which the appellees reply that they are "severally untrue, and if true, insufficient," a verdict by the jury that they "found the issue in favor of the appellees," is a good verdict, and a sufficient finding of the validity of the will. *Ib.*

A decision of a register repudiating a will, and the verdict of a jury condemning it, are conclusive only as to personal estate, and not as to the title to real estate. *Asay v. Hoover*, 45 D. 713.

Executors are not liable for costs on appeal from probate, especially if they have been cited in on the appeal, but have failed to appear and defend. *Comstock v. Hallyme Ec.* Soc. 20 D. 100.

The proponents of the will should not be charged with costs, where it is declared in-

For Index to Notes in American Decisions and American Reports, see Volume I.

valid in the court of chancery, on appeal, on account of a technical defect in its execution, and they have litigated it in good faith. *Chaffee v. Baptist Missionary Conv.*, 40 D. 225.

55. Setting aside probate.*—An *ex parte* probate of a will h.d. at common law, no conclusive effect as to land devised, and as to personalty it was revocable by the order or decree of the court that granted it, or of some other court of original jurisdiction. *Sneed v. Ewing*, 22 D. 41.

Foreign courts had not exclusive power over probates or administration, at common law, of personal property which was in Kentucky at the death of the testator or intestate. *Ib.*

A will admitted to probate in common form may be set aside upon petition filed and sufficient legal grounds shown, without an issue being awarded of *devisavit vel non* to be tried by a jury. *Wall v. Wall*, 64 D. 147.

A probate court has power to revoke the probate of a former will upon a mere application to it to prove, or to allow to be filed and recorded, a later will of the same testator, as incidental thereto, and it is not necessary to institute a preliminary and separate proceeding for the purpose of such revocation before applying for the probate of such later will. *Bowen v. Johnson*, 73 D. 49.

The English courts of chancery have deprived parties of the benefit of a fraudulent will in some cases, by decreeing that such parties shall hold the property under the will in trust for the parties who would have been entitled to it if such will had not been probated; but they have in all such cases disclaimed any power to set aside the will or the probate. *State v. McGlynn*, 81 D. 118.

The principles established in England apply to and govern cases arising under the probate law of this country. *Ib.*

A decree admitting a will to probate cannot be reviewed or set aside by a court of chancery on the ground that the will was obtained by fraud, or on any other ground. *Ib.*

Failure to make an order admitting a will to probate on the day specified in the notice, or to fix, by adjournment of the proceeding, a subsequent day for the order, is a mere irregularity, not affecting the jurisdiction, and can only be objected to in a direct proceeding to set aside the probate. *Will of Warfield*, 83 D. 49.

The time within which an original probate of a will may be revoked or set aside is not definitely settled. On a proper application made, it may perhaps be set aside at any time within twenty years after the original probate is granted and the will propounded

for re-probate, and an issue of *devisavit vel non* made up and tried in the circuit court. *Townsend v. Townsend*, 94 D. 184.

56. Establishing lost or destroyed wills.*—1. *General rules.*—A lost or destroyed will may be established and admitted to probate. *Apperson v. Cottrell*, 29 D. 239.

A will destroyed by the testator while insane, may be admitted to probate, if properly proved. *Apperson v. Cottrell*, 29 D. 239.

The whole of a lost will need not be proved; so much as is proved will be admitted to probate. *Dickey v. Malecki*, 34 D. 130.

A will destroyed before or after the death of the testator, without his knowledge, does not cease to be his will. *Dickey v. Malecki*, 34 D. 130; *Schultz v. Schultz*, 91 D. 88.

The contents of an improperly destroyed will satisfactorily proved may be established as a will. *Rhodes v. Vinson*, 62 D. 685.

If the testator was unduly influenced by fear, favor, or affection, or any other cause unduly exercised, to destroy his will, and such undue influences operated as a pressure and restraint upon the deceased, under the circumstances in which he was placed at the time, so as to take away his free and voluntary mind and will, and so continued up to his death, the will will be set up. *Batton v. Watson*, 58 D. 504.

A will destroyed by the testator himself in his lifetime, acting under fraudulent and undue influence, is a will "fraudulently destroyed," and may be admitted to probate on establishing facts showing the existence and due execution of the will, and its destruction by reason of such improper influence. *Voorhees v. Voorhees*, 100 D. 458.

2. Jurisdictional questions.—The court of chancery in Ohio has no jurisdiction to establish a lost or spoliated will. The jurisdiction in such matters belongs to the court of common pleas of the proper county. *Morningsstar v. Selby*, 45 D. 579.

Chancery has jurisdiction to set up a will which has been lost, suppressed, or destroyed. *Buchanan v. Mullock*, 47 D. 622.

Equity may set up a will where it has been lost, destroyed, or suppressed, either by accident or fraud, but it cannot set up a will regularly probated in the county court until such probate is set aside, no matter how long the will in question may have been lost, suppressed, or fraudulently concealed. *Townsend v. Townsend*, 94 D. 184.

A court of probate, unless prohibited by statute, may admit to probate a lost, suppressed, or destroyed will, or it may be established by a court of equity. *Dower v. Seeds*, 57 R. 646.

3. What evidence is admissible and suffi-

* Revocation of probate, power of courts to grant, see note, 90 D. 128-129.

* Probate of lost or destroyed wills, see note, 94 D. 628-631.

WILLS, II, III.

For Index to Notes in American Decisions and American Reports, see Volume I.

cient.*—One witness is sufficient to prove the contents of a lost will. *Dickey v. Malachi*, 34 D. 130; *Matter of Page*, 59 R. 395.

The entire contents of an improperly destroyed will must be established by the clearest, most conclusive, and satisfactory proof. *Rhodes v. Vinson*, 52 D. 685.

To prove that the destruction of a will was procured by undue influence, evidence showing what took place in the sick-room between the time the will was sent for and its return and destruction, and also showing the motive by which the party exerting the undue means was influenced, is admissible as part of the *res gesta*. *Batton v. Watson*, 58 D. 504.

In proving that the destruction of a will was procured by undue influence, those attempting to set the will up are not obliged to rely upon the testimony of the principal actor in the supposed fraud, but may show the facts by the evidence of third persons. *Id.*

The testimony of one witness to the handwriting of one subscribing witness is not sufficient to establish a lost will, when both subscribing witnesses are dead, and where, if the will had been produced, the statute would require proof by two witnesses of the handwriting of the subscribing witnesses, and of that of the testator, if he is able to write. *Tynan v. Paschal*, 84 D. 619.

The execution of a lost will must be proved by three subscribing witnesses, if in life, and within the jurisdiction, as in the case of the probate of a will in solemn form. *Kitchens v. Kitchens*, 99 D. 453.

Declarations of the testator as to the making of a will cannot be received as primary evidence of due execution of a lost will, in lieu of the evidence required by the statute; but they are admissible to rebut the presumption of a cancellation or revocation of the will, which arises from its loss or destruction previous to his death. *Tynan v. Paschal*, 84 D. 619; *Matter of Page*, 59 R. 395.

The fact that a will is lost does not dispense with proof of facts which must be established in order to give effect to the testamentary disposition, if it were produced before the court. *Tynan v. Paschal*, 84 D. 619.

The due execution of a lost will cannot be inferred, except in cases of spoliation, from proof of facts which, if the will were before the court, would in no way tend to establish it, and which are usually and reasonably consistent with the contrary conclusion. *Id.*

After the execution of a missing will has been duly proved, its destruction or loss, and the facts necessary to rebut the presumption that it had been revoked by the

testator, may be proved by such evidence as satisfies the conscience of the jury. *Kitchens v. Kitchens*, 99 D. 453.

Proof that a lost will had not been revoked by the testator must be very clear and strong. But as in all other cases where there is a conflict, the jury must determine. *Id.*

If a testator dies leaving an unrevoked will, which cannot be found after his death, parol evidence is competent to prove its contents, and as thus proved it may be admitted to probate. *Foster's Appeal*, 30 R. 340. But it is incumbent upon those who seek to establish the will to prove its due execution, and to rebut the presumption of cancellation arising from the fact that it cannot be found at the testator's death. *Tynan v. Paschal*, 84 D. 619.

A bill in equity against an executor alleging that defendant's testatrix had unlawfully destroyed the will of R., of whom she was the sole heir, and which will gave her a life estate only in R.'s property, remainder to plaintiff; that the witnesses to the said will were dead, and that by reason of the destruction plaintiff could not set out a copy of the said will. Prayer that the defendant might be decreed to hold the property in trust for plaintiff. *Held*, on demurrer, that the bill was sustainable without proof of the lost will in the probate court. *Harris v. Tiscreau*, 21 R. 242.

III. VALIDITY.

57. Effect of informality.*—An unsigned addition to a will does not invalidate it on the ground that the statute prescribes the testator's signature to be at the end of the will, if it bears neither upon the contents of the will nor on its interpretation. *Wikoff's Appeal*, 53 D. 597.

A statute provided that "every will shall be in writing. *Held*, that a will written and signed with a lead pencil was valid." *Myers v. Vanderbilt*, 24 R. 227.

58.—or uncertainty.—A will is inoperative and void where its existence is made to depend upon a contingent event, which comes to pass. *Magee v. McNiel*, 90 D. 354.

Where, under a will, a sum of money is disposed of in two parts, one of which is to be applied to a certain purpose before the remainder, as the second part, is disposed of, and the sum devoted to the prior purpose cannot be ascertained, by reason of the failure of that purpose or otherwise, the gift of the remainder is void for uncertainty in the amount. *Beekman v. Benson*, 8 D. 269.

A residuary devise and bequest to a trustee, "for any and all benevolent purposes that he may see fit" is void for uncertainty at common law, and is not within the stat-

* Proving contents of lost wills, see note, 8 D. 397, 398.

Declarations of testator, when admissible to prove contents of lost will, see note, 59 R. 395.

* Validity of will drawn up by beneficiary under it, see note. 71 D. 129-134.

For Index to Notes in American Decisions and American Reports, see Volume I.

ate authorizing grants for charitable uses. *Adye v. Smith*, 28 R. 424. S. P., *Nichols v. Allen*, 39 R. 445; *Prichard v. Thompson*, 47 R. 9; *Maughl v. Getzendanner*, 57 R. 352. But compare *Simpson v. Welcome*, 39 R. 349.

A trust for the benefit of the testator's "next of kin who may be needy" is void for uncertainty. *Fontaine v. Thompson*, 56 R. 558.

A will provided a devise and bequest to the city of Baltimore, in trust for the "McDonogh Educational Fund and Institute." There was no such corporation, but there was an organization under an ordinance of the city of Baltimore, called, "Board of Trustees of the McDonogh Educational Fund and Institute," and supported by funds from McDonogh's estate, which carried on a "School Farm," known as the "McDonogh Institute." *Held*, that the trust was sufficiently certain, and was valid. *Barnum v. Mayor etc.*, 50 R. 219.

59. What provisions are invalid or illegal. — 1. *In general*. — The rule that a devise to an heir of an estate of the same nature and quality as that to which he would by law be entitled is void, etc., does not apply to personal estate. *Lord v. Bourne*, 18 R. 234.

A bequest on condition that the beneficiary shall be educated in the Roman Catholic faith is not uncertain, impossible, against public policy, nor unconstitutional. *Magee v. O'Neill*, 45 R. 765.

A will giving property to one in consideration of personal services rendered and to be rendered to the testator is valid, and may be enforced as a contract after the testator's death. *Bolman v. Overall*, 60 R. 107.

2. *Conditions in restraint of marriage*. — A condition in a will in restraint of marriage, generally, is utterly void as against public policy, and the due economy and morality of domestic life. *Little v. Birdwell*, 73 D. 242.

Where a condition in a will is not in restraint of marriage generally, but is too rigid and restrains the choice unreasonably, it is utterly void. *Id.*

A devise to the testator's wife, "during her natural life or widowhood," with remainder, "after her death or marriage," to her children, is on condition of remaining unmarried, and is void under the statute as in restraint of marriage. *Stihwell v. Knapper*, 35 R. 240.

A testator may, by proper words of limitation, restrict the enjoyment of a bequest to the period during which his legatee shall remain unmarried. *Holtz's Estate*, 80 D. 490.

A devise to the testator's wife, "so long as she shall remain my widow," is not in re-

* Bequest to terminate on marriage of beneficiary, see note, 80 D. 498-494.

straint of marriage. *Hibbitts v. Jack*, 49 R. 478; *Pringle v. Dunkley*, 53 D. 110; *Little v. Birdwell*, 73 D. 242.

An estate devised to a son and daughter in common, upon condition that should the daughter marry or die it should belong to the son in severalty, — *held*, that the condition was in restraint of marriage, and void. *Williams v. Cowlen*, 53 D. 143.

Bequest of the interest of a certain fund, to be paid to the legatee during all the term that she shall continue the widow of the testator's son, with a disposition of the fund to others at the termination of the bequest by her marriage, is not a bequest in *terrorem*, and is valid. *Holtz's Estate*, 80 D. 490.

A testator bequeathed to his widow his personal property, "on condition that she pay \$50 a year to my daughter, Martha Fox," and if Martha should marry a second time, then "she shall not be entitled to said legacy from that time on," and "when said Martha shall have received an amount out of said personalty equal to three-fourths thereof, she shall not be entitled to any more, and the balance shall be retained by my said wife." *Held*, that the widow did not take the personal property upon a condition subsequent, but as trustee, and that the condition subsequent annexed to the gift to Martha was void, as in absolute restraint of marriage. *Crawford v. Thompson*, 46 R. 598.

3. *Condition against opposing will*. — "If any or either of my children shall enter a caveat against this my will, he or they shall pay all expenses of both sides," is a good condition in a will, without a gift over against a devisee under the will. *Holt v. Hou*, 59 R. 43.

A condition in a will, excluding from a share in the estate any heir or testator who "goes to law to break his will," is valid, both as to real and personal property. Upon a breach of such a condition the legacy forfeited will pass to the general residuary legatee. *Bradford v. Bradford*, 2 R. 419.

4. *Restraints on alienation*. — There never has been a time since the statute *quia emptores* when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law, and a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable, and void. *Mandlebaum v. McDonell*, 18 R. 61.

60. *Remoteness*. — A limitation over after death of first taker, with *ut issue*, is void for remoteness, unless there is something in the will to restrict the term "death without issue" to lives in being, and twenty-one years thereafter. *Presley v. Davis*, 62

* Conditions imposing forfeiture upon legatee for contesting will, see notes, 60 D. 113-115; 53 R. 46-48.

For Index to Notes in American Decisions and American Reports, see Volume I.

D. 396; *Brattle Square Church v. Grant*, 63 D. 725.

A contingent limitation over upon the death of all the testator's three children under twenty-two, without issue, where the estate is first limited to those children, the shares of any who should die without issue, before attaining twenty-two, to go to the survivor or survivors, is too remote, and therefore void. *Wood v. Wood*, 28 D. 451.

Where a mother by will bequeathed her property to her three children, giving a certain bequest to each and "his lawful heirs, executors and administrators," and provided, that "in case of the death of either of my children without lawful issue, their part to descend to the others, to be equally divided between them," each will take an absolute estate, the limitation over being too remote. *Shepherd v. Shepherd*, 46 D. 41.

In a bequest to two nephews and their heirs, but in case they should die without leaving issue, then over to other persons, the limitation over is not too remote. But both of the nephews dying, and one of them leaving issue, the estate is absolutely vested, and the subsequent limitation is void. The estate vested in the nephews so as to be transmissible to the heirs of the one leaving issue, and his widow is entitled to one-third of the property, and his children to the other two-third parts. *Cudworth v. Thompson*, 4 D. 617. S. P., *Kane v. Gott*, 35 D. 641.

A contingent limitation in a will, made to depend upon the dying of a person unmarried and without children, is not too remote under the Virginia statute, and cannot be regarded as a contingent limitation, made to depend on an indefinite failure of issue or children, but must be regarded as confined to the time of the death of the person, or the statutory period of ten months thereafter. *Schultz v. Schultz*, 60 D. 335.

A devise which is subject to a conditional limitation, void for remoteness, vests in the first taker an absolute estate. *Brattle Square Church v. Grant*, 63 D. 725.

A will contained a provision by which certain leasehold property was devised to S., and in the event of her death, "without leaving lawful issue or descendants," to W. Held, that the limitation over to W. was not void for remoteness; and that the words "dying without issue," in devises of estates less than freehold, signify "a dying without issue living at the death of the first taker." *Alexander v. Susan*, 3 R. 171.

61. Perpetuities. — An estate so limited that it may by possibility extend beyond the life or lives in being at the time of its commencement, and twenty-one years and a fraction of a year (to cover the period of gestation) afterwards, during which time the property would be withdrawn from the market or the power over the fee suspended, is a perpetuity, and void as against the policy

of the law, which will not permit property to be inalienable for a longer period. *Barnum v. Barnum*, 90 D. 83.

A bequest for permanently keeping burial lots in order and for maintaining religious services is void as to the former. *Coit v. Comstock*, 50 R. 29; *Lates v. Bates*, 45 R. 305.

A devise in a will of certain property of the testator to two persons named, "their heirs and assigns forever, and to the survivor of them and his heirs forever, in trust, to sell, dispose of, invest, and manage the same, and appropriate such part of the principal and interest as they may deem best, for the aid and support of those of my children and their descendants who may be destitute, and in the opinion of said trustees need such aid," is invalid. *Kent v. Dunham*, 56 R. 667.

A testatrix, desiring to leave her estate for charitable purposes, and being advised that she could not effect her design by direct testamentary provision, but only by absolute gift to individuals, in reliance upon their honor to carry out her purposes, gave the greater part of her estate to her lawyer, her doctor, and her priest, by will, absolutely as joint tenants, they promising to observe her instructions. She also signed a letter of instructions directing the bestowal of the estate on intermediate persons and charities of their selection in perpetuity. Held, 1. That the legatees took no absolute interest; 2. That the gifts to charity being repugnant to the statute against perpetuities, the estate was held in trust for the heirs and next of kin of the testatrix. *O'Hara v. Dudley*, 47 R. 53.

62. Altered wills. — If a testator directs one of the witnesses to his will to make certain alterations therein, which are accordingly made, and assented to by the testator, but not witnessed, the alterations will control regarding personal property, but cannot affect real estate. As respects real estate, the will stands as it stood before alteration. *Greer v. McCrackin*, 14 D. 755.

Interlineations in testator's handwriting are presumed to have been made at or before the execution of the will. *Wikoff's Appeal*, 53 D. 597.

Erasure, by testator, of an executor's name after execution of the will, and the insertion of another name, it not appearing when the alteration was made, is of no importance in determining when the will is to be deemed to have been made, for the purpose of ascertaining what statute governs it. *Raines v. Barker*, 67 D. 762.

A testator may not by obliterating certain words in his executed will convert a life estate into a fee simple, but the will must be effectuated as originally executed. *Neckbach v. Collins*, 48 R. 123.

A testator after execution of his will drew

For Index to Notes in American Decisions and American Reports, see Volume L.

his pen transversely across the words creating some of the legacies, and in another instance, by means of visible alterations, substituted a less sum than that originally provided; several codicils were added. After probate of the whole, and in the absence of proof that the alterations were made after the last codicil, — *held*, that the former legacies were canceled and the latter not. *Linward's Appeal*, 39 R. 753.

63. Devises or bequests to attesting witnesses. — A subscribing witness to a will, being the son of the testator and receiving but one dollar under the provisions of the will, that being much less than his interest as heir-in-law, is a competent witness to prove the will. *Smalley v. Smalley*, 35 R. 353.

A witness has no interest in the establishment of a will which constitutes him a mere trustee for one of the devisees. *Montgomery v. Perkins*, 74 D. 419.

64. Wills void in part — carrying out valid provisions. — A will void in part may nevertheless be good for the residue. *Kane v. Gott*, 35 D. 641.

An attempt by will to manumit a slave avoids that portion of the will which relates to that object, but does not affect the remainder of it. *Webb v. Fleming*, 76 D. 675.

An executor and trustee is bound to carry into effect the trusts of a will so far as they are valid and consistent with the rules of law, unless excused from literal performance by the consent of all persons interested, and by the sanction of the court of chancery where the rights of infants and married women are concerned. *Wood v. Wood*, 28 D. 451.

IV. LAW OF PLACE.

65. When the *lex rei sitae* governs. — Title to real property, and the validity or invalidity of a devise or conveyance thereof, depends upon the *lex rei sitae*. *Hawley v. James*, 32 D. 623; *Wynne v. Wynne*, 57 D. 139.

The construction of a will made in Alabama in relation to property in that state at the testator's death must be such as would be given to it by the courts of Alabama. *Sale v. Saunders*, 57 D. 157.

66. When the *lex domicilii* governs.* — The law of the domicile as to testaments and succession generally prevails, but it is through comity only, and the rule is not universal in its application. *Mahorner v. Hooe*, 48 D. 706.

The laws of the state in which testator had his domicile at the time of his death govern the construction of his will, and the disposal of his property. The probate court in such state has original jurisdiction. *Gilman v. Gilman*, 83 D. 502.

* Law of domicile controls validity of will with respect to personality, see note, 2 D. 454-456.

The validity of a will must be determined by the laws of the state in which it was made. *Burlington University v. Barrett*, 92 D. 376.

A will of personal property not executed in conformity to the law of the testator's domicile at the time of his death, will not be operative in regard to personal property in a foreign country, although executed according to the laws of that country. *Denebats v. Berquier*, 2 D. 448; *McCune v. House*, 31 D. 438.

The validity of the execution and probate of a will in another state, recognized and acted on by the proper court in the state of the testator's domicile, in accordance with its law, cannot, so far as it affects property in that state, be questioned by the courts in Mississippi. *Montgomery v. Milliken*, 43 D. 507.

The validity of provisions of a will of personality is to be determined by the law of the testator's domicile, and a bequest void by that law cannot be made valid by the law of the domicile of the legatee. *Sorrey v. Bright*, 28 D. 584; *Lowry v. Bradley*, 39 D. 142; *Montgomery v. Milliken*, 43 D. 507.

The laws of the testator's domicile govern the disposition of his personality and the proceeds of his realty there situate, and a direction to invest such proceeds in another state upon trusts forbidden by the law of the domicile cannot be sustained, though such trusts would be valid by the laws of such other state. *Wood v. Wood*, 28 D. 451.

V. INTERPRETATION AND EFFECT.

1. General Rules of Construction.

67. Interpreting the language. — Words in a testamentary disposition will be presumed to have been used in their ordinary or primary sense, unless it appears from the context of the will that they were used in some other sense; or, unless, by reference to extrinsic circumstances, the use of the words in their primary sense would render the provision of the will insensible or inoperative. *Mosall v. Carow*, 32 D. 641; *Hoope's Appeal*, 100 D. 562.

When the context of a will shows the testator to have used words in a certain sense, the court should follow this in preference to the meaning given by lexicographers, or that given in various adjudged cases. *Carnagy v. Woodcock*, 5 D. 470.

The grammatical sense of the words is not always regarded in construing wills, and words may be transposed if necessary. *Covenhoven v. Shuler*, 21 D. 73.

A bequest by a testator of all his property and the income of the same to his widow, "to be used and disposed of by her for her convenience and comfort during life," authorizes her to dispose of such property whenever her comfort and convenience may require it. *Scott v. Perkins*, 43 D. 470.

For Index to Notes in American Decisions and American Reports, see Volume I.

The clause, "still allowing my wife S. a comfortable living through life," at the conclusion of a will, subjects the whole estate of the testator to an equitable charge, which, if wrongfully withheld, a court of chancery will enforce. *Rogers v. Caswood*, 55 D. 729.

Words of survivorship relate to the period of division or enjoyment, where the period of enjoyment is postponed by interposing a life estate or other particular interest, or where a future period is by the will fixed for a division. *Presley v. Davis*, 62 D. 396.

The effect of a will depends in a great measure on its construction; and any law which changes a rule of construction that applies to and governs any of the provisions of the will does, to that extent, determine its legal effect. *Cunningham v. Cunningham*, 68 D. 718.

Words of limitation must be taken to refer to the time of the death of the first taker, in absence of expressions showing different intention. *Sims v. Conger*, 77 D. 671.

Where there is some absurdity or ambiguity on the face of a will, ascribable to something either omitted or inserted, and there is clear and satisfactory proof that the insertion or omission was not intended by the testator, the ecclesiastical court is bound to pronounce for the will; not in its actual state, but with its errors removed or corrected. *Eatherly v. Eatherly*, 78 D. 499.

Where a testator devises all his property to his wife during life or widowhood, and then provides as follows: "My wife are to have an equal portion of the property with the children; if she marries, there is to be an equal division with her and my children of the whole property; there is to be a division each time that either of my children arrives at the age of twenty-one years, with them and my wife; if she marries, she is not to share with the children in their separate division; should either of them lose their breath entirely, she is not to share with my children neither;" the wife, if she continue, *sole*, is to share equally with the children, and as each becomes of age, or marries, there is to be a division, such one taking his portion absolutely, the residue remaining in common until another like event, until at last the wife and the last remaining unmarried or infant child share equally in the residue. If the wife marries, there is then to be an equal division between her and the children, she taking her portion, leaving the residue in common among the children, to be divided as each becomes of age or marries, such one then taking his portion absolutely, and if any one of the children die before marriage or coming of age, his portion is to vest in the surviving children, the wife taking no share therein. *Frierson v. Van Buren*, 27 D. 528.

A bequest is of the estate as an aggregate fund to the children as a class in such a case, they taking as tenants in common, and if one dies before twenty-one or marriage, the estate survives to the others. *Id.*

Heirs of a child dying under age, and unmarried, other than the surviving children of the testator, are entitled to no part of the estate so devised. *Id.*

A clause, "In the utmost confidence in my beloved wife, I leave to her all my worldly goods, to sell or keep for distribution amongst our dear children, as she may think proper. My whole estate, real and personal, are left in fee simple to her, only requesting her to make an equal distribution amongst our heirs; and desiring her to do for some of my faithful servants whatever she may think will most conduce to their welfare, without regard to the interest of my heirs. Of course, I wish first of all that my debts shall be paid," was construed to mean that the widow was vested, subject to payment of his debts, with the legal title of the whole estate, with the beneficial ownership during her life, in trust at her death for the children of herself and the testator, who take a vested remainder in fee, to be enjoyed at her death, or earlier, at her election; that she has authority to make distribution of said estate amongst, or advancements to, said children, so that they ultimately receive each an equal share; that she may bestow a reasonable portion in behalf of the slaves; that she may sell any of the estate for any of the above purposes. *Harrison v. Harrison*, 44 D. 365.

Precatory words are treated as imperative, and creating a trust where the objects of the precatory words are certain, and the subjects contemplated are also certain, unless a clear discretion or choice to act or not to act be given, or the prior disposition of the property import absolute or uncontrollable beneficial ownership. *Id.*

68. Ascertaining testator's intent.—The intention of testator cannot be shown otherwise than by his will; proofs cannot be received to alter the effect of the will. *McCampbell v. McCampbell*, 15 D. 45; *Theall v. Theall*, 26 D. 501; *Kean v. Hoffecker*, 29 D. 336; *Stoner's Appeal*, 45 D. 606.

Parol evidence of a testator's intention, as gathered from the conversations of her family, before and after the execution of her will, is not admissible. *Jones v. McKee*, 45 D. 661.

Courts cannot give effect to a will contrary to the plain terms of it, upon a mere conjecture as to the intention. *Wright v. Hicks*, 56 D. 451.

Testator's meaning of ambiguous words in the will cannot be shown by the testimony of the one who drew the will. *McAllister v. Tate*, 73 D. 119.

The intention must be ascertained from

For Index to Notes in American Decisions and American Reports, see Volume L.

the whole will taken together; and no part is to be rejected which can be given an operation consistent with the testator's general intent. *Covenhoven v. Shuler*, 21 D. 73.

The court will supply proper words to effectuate the testator's intention if it is incorrectly expressed. *Id.*

Construction and interpretation should not be resorted to where the intention of the testator is clothed in unequivocal expressions. *Theall v. Theall*, 26 D. 501.

An heir may be disinherited by implication, if such implication be necessary to effect the clear intent of the testator. Necessary implication results from so strong a probability of intention, that an intention contrary to that imputed to the testator cannot be supposed. *Boissens v. Aldridges*, 27 D. 590.

An heir cannot be disinherited unless the estate is given to somebody else. *Id.*

A writing to prevent two heirs named therein from having any part of the writer's estate, but not making any disposition of his property, cannot operate to disinherit the two heirs named, and to give the estate to the other heirs; and this is true, although from bequeathing a contingent legacy, the writing is testamentary in its character, and entitled to admission to probate. *Id.*

Introductory words in a will are to be considered in order to ascertain the intention of the testator. And where a testator, who has no other real estate, in the introduction to his will uses the words, "as to such worldly estate wherewith it hath pleased God to bless me in this life, I give and dispose of the same in the following manner," and then goes on to give, devise, and bequeath unto his wife a portion of his plantation, providing that the residue of the plantation be divided among his brothers and sisters, the widow will take a fee in the land devised to her. *Schriner v. Meyer*, 57 D. 634.

The declarations of the testator are incompetent as evidence to add, to explain, or in any manner control the construction of a will. *Mages v. McNeil*, 90 D. 354; *Couch v. Eastham*, 55 R. 326.

While the court in construing a will is not to hesitate to allow testator to alter descents provided in the statute, it is not, on the other hand, to presume from the fact that he made a will that he meant its construction to be at all possible points inconsistent with the statute. *Risk's Appeal*, 91 D. 158.

69. How far the intent controls. — In construing a will, the intent of the testator is the great point to be ascertained and effectuated. *Boissens v. Aldridges*, 27 D. 590. S. P., *Baskin's Appeal*, 45 D. 641; *Wynne v. Wynne*, 57 D. 139; *Armorer v. Case*, 61 D. 209; *Eatherly v. Eatherly*, 78 D. 499. And this intention must not be defeated because he failed to clothe his ideas in tech-

nical language. *Ball County v. Alexander*, 73 D. 268.

In construing wills, the intention should guide, limited by the following rules: 1. The disposition intended to be made must not conflict with the rules of law; 2. The intention must be collected from the will itself, but this may be aided by evidence of the relative situation of the parties, and the circumstances of the testator; 3. The intention is not to prevail against settled and fixed rules of construction. *Kennon v. McRoberts*, 1 D. 428. S. P., *Covenhoven v. Shuler*, 21 D. 73; *Comfort v. Mather*, 37 D. 523; *Montgomery v. Milliken*, 43 D. 507; *Brattle Square Church v. Grant*, 63 D. 725.

The intention of a testator shall govern in the construction of a will in all cases, except where the law overrules the intention; and this is reducible to four instances: 1. Where the devise would make a perpetuity; 2. Where it would put the freehold in abeyance; 3. Where chattels are limited as inheritances; 4. And where a fee is limited on a fee. *Ruston v. Ruston*, 1 D. 283.

Where the testator has inserted directions in his will authorizing trustees to convey, the court has held it in its power to mold it so as best to answer the intent of the testator. *Telfair v. Howe*, 55 D. 637.

A disposition made by the testator, in error and in ignorance of a material fact, will not be enforced, when, if carried into effect, his manifest intention will be defeated. *Armorer v. Case*, 61 D. 209.

A disturbance of arrangements of a will is to be justified only where the testator's schemes prove impracticable, and the interests of all his legatees require a departure from the prescriptions of the will. *Drayton v. Rose*, 64 D. 731.

Where two of testator's nieces and legatees in his will, each having children, died before testator, their legacies lapse, and their shares will not go to their children, although the testator in his will said that his main purpose in making a will was to provide for his grandnieces and nephews, who would not be entitled under the statute; and that the children of a deceased niece or nephew should count one, and take the share to which their parent would have been entitled if living. *Cureton v. Massey*, 94 D. 152.

70. Carrying the intent into effect.

— Where a devise of real estate upon trust cannot be carried into effect according to the intention of the testator, and is valid by the laws of the state where the property is situated, the courts of the state where the trustees are found may direct them to carry the will of the testator into effect, although such a devise of real property, situated in that state, would not be valid. *Hawley v. James*, 32 D. 623.

A general and particular intent both appearing on the face of the will, the former,

For Index to Notes in American Decisions and American Reports, see Volume I.

though first expressed, prevails. *Chase v. Lockerman*, 35 D. 277.

Although the language of a will may make an absolute gift, yet if other appropriate expressions be used which show, with sufficient certainty, that but a qualified gift was intended, a court of equity will look to the clear intent of the testator, and raise a constructive trust when none has been expressly declared. *Lucas v. Lockhart*, 48 D. 768.

A devise to executors cannot be implied, unless such devise is necessary to give effect to the intentions of the testator. *Clendenning v. Lanus*, 56 D. 518.

When the intent of testator seems to be to limit an estate to the heirs of the life tenant, no matter how the intent is expressed, an estate of inheritance will vest in the life tenant, but when he intends to vest his estate in certain persons, though they may be the same as the heirs at law, the life estate will not be enlarged, and a power of appointment, general or special, will not change the rule. *Dodson v. Ball*, 100 D. 586.

A testator made this will: "If any accident should happen to me that I die from home, my wife, J. A. L., shall have everything I possess," etc. He died at home. *Held*, that the wife was entitled to take under it. *Liksfeld v. Liksfeld*, 56 R. 908.

71. Effect to be given to all words in will, if possible. — Every sentence and word in a will must be considered in forming a judicial opinion on it. *Turbett v. Turbett*, 2 D. 369.

In construing wills, the intention must govern. The intention must be collected from all parts of the will taken together, and not from particular parts or expressions. *Myers v. Myers*, 16 D. 648.

Words capable of a two-fold construction used in one part of a will should receive that construction which is most consistent with the testator's intention ascertained from other provisions in the will. *Covenhoven v. Shuler*, 21 D. 73.

A person cannot claim an interest under a deed or will, without giving effect to all its provisions as far as possible. *Gore v. Stevens*, 25 D. 141.

Mistakes in a will are never to be intended, if a reasonable construction can be found out; and reference to other parts of the will may be had in order to supply an omission or explain a mistake. *Eatherly v. Eatherly*, 78 D. 499.

72. Resorting to extrinsic facts. — 1. General rules. — When, from the terms of a will, the intention of the testator cannot be ascertained, recourse must be had to all circumstances which may aid in the discovery of his intention. *Ehrenberg's Succession*, 99 D. 729.

To remove a latent ambiguity, acts and declarations of a testator in respect to the

thing given are admissible; also, the relative amount of advancements, and the differences in value of portions of land devised to children, are proper subjects for consideration. *Brownfield v. Brownfield*, 51 D. 590.

Where one who has been bequeathed a certain "lot" of land by a will, brings ejectment for its recovery, it is competent for him to show by testimony derived from other parts of the will, and by extrinsic evidence, explaining the sense in which the testator used the word "lot," that it embraced a large parcel of ground, and was not intended to refer to an ordinary town lot. *Warner v. Miltenberger*, 83 D. 573.

The testator's knowledge of the contents of the will may be shown by circumstances. *Montague v. Allan*, 49 R. 384.

When a will fully describes a person or thing, whether by many or few particulars, it cannot be competent to receive evidence that another person or thing was meant, though nothing be found to answer the description in the will. *Barnes v. Simms*, 49 D. 435.

Where a testator made a specific bequest of negroes, and described two of them as "Aaron" and "Pike," but had no negroes of that name, parol evidence is inadmissible to prove that the testator meant two slaves by the names of "Lamon" and "Pite," and that the other names were inserted by mistake; and the gift as to these negroes must fail, because there is nothing for it to operate upon. *Id.*

No word or phrase can be diverted from its appropriate subject by extrinsic evidence showing that testator commonly, or on that particular occasion, used the disputed word in a sense peculiar to himself, or even in a popular sense, as distinguished from its strict and primary import. *Yundt's Appeal*, 53 D. 496.

Where the language is plain and unambiguous, such language must govern, and therefore extrinsic evidence is inadmissible to show that he meant something different from what his language imports; but any evidence is admissible which in its nature and effect simply explains what the testator has written. *Warner v. Miltenberger*, 83 D. 573.

When the court is of opinion that there is no patent ambiguity in those parts of a will affecting the property in issue before it, and no latent ambiguity is raised by proof of extrinsic circumstances, the instructions of the testator to the scrivener who drew the will are inadmissible to show that the testator intended to dispose of his property in a manner different from the direction it would take when the ordinary rules of construction are applied to the words of the will. *Hill v. Felton*, 15 R. 643.

2. Illustrations. — A testator bequeathed the residue of his estate "equally to the

For Index to Notes in American Decisions and American Reports, see Volume I.

authorized agents of the Home and Foreign Missionary Societies, to aid in propagating the holy religion of Jesus Christ." *Held*, that extrinsic evidence of the facts known to the testator at the time he executed the will, the names by which the missionary societies were called by him, and the religious society with which he worshiped, his interest in any particular missionary society, and the contributions which he made for missionary purposes, was admissible to identify the societies intended. A bequest to a missionary society, "to aid in propagating the holy religion of Jesus Christ," is valid. *Hinckley v. Thatcher*, 52 R. 719.

A testator devised land to "the four boys." *Held*, that parol evidence that he had seven sons, three of whom were adults, living in their own homes, and the other four were minors living with him, and his declarations before, at, and after the execution of the will, were competent to show that the devise was intended for the minors. *Bradley v. Rees*, 55 R. 422.

A devise of the "west half of the north-east quarter of section 23," in T. township. *Held*, that parol evidence was inadmissible to show that testator owned the east half of the southwest quarter of section 23, and no other land, and that the draughtsman of the will had erred in putting the one description for the other. *Fitzpatrick v. Fitzpatrick*, 14 R. 538.

73. Construing separate provisions.

—Interpretation of a doubtful clause in a will will be sought by considering it in connection with the other clauses, and by an examination of the main designs of the testator, as manifested by the whole instrument, when a literal construction of the clause would conflict with the intention of the testator. *Morton v. Barrett*, 39 D. 575.

The clear intention of the testator should prevail, though it would require some departure from the literal construction of one of the clauses in the will. *Id.*

The last of two inconsistent devises or legacies of the same will takes effect to the exclusion of the first. *Fraser v. Boone*, 27 D. 422. But a clear and absolute gift under one clause of a will is not limited by a subsequent clause except by the employment of clear and explicit terms. *Barksdale v. White*, 26 R. 344.

A provision giving to the widow the privilege to choose and keep during her widowhood "all such personal property as she may think proper," and directing that "all such property as may then be left" shall be sold by his executors, entitles the widow to such property without security for such articles as may be consumed or disposed of during her life or widowhood; but under such a bequest the widow is not entitled to take money in testator's possession at his

death, nor choses in action. *German v. German*, 67 D. 451.

Where a will shows upon its face what property the testator owned; that he intended to dispose of it all, and supposed that he had done so; that he had disposed of it all except one-half of his land; and that there was left in the will an incomplete clause, omitting to state the subject of any gift, but which was plainly intended to be the other moiety of the land—a court of equity will supply the omission. The omission is apparent upon the face of the paper, and extrinsic evidence is unnecessary to supply it. *Eatherly v. Eatherly*, 78 D. 490.

A clause is imperative, and entitles the beneficiary to whatever sum is necessary to his support during his life, when it provides that the executor shall provide for the wants of the beneficiary as a matter of humanity rather than legal obligation, and also provides that the interest on a certain sum shall be set apart for his support, directs its application to that purpose, and disposes of any surplus remaining unexpended at his death. *Chambers v. Davis*, 93 D. 605.

Where, after sundry devises in fee, and bequests to his children exhausting the estate, the testator added, "if any one or more happens to die without heirs, then his or their parts or shares shall be equally divided among the rest of the children,"—*held*, 1. That the devise over applied to real as well as personal property, and was not confined to the bequests of the personal estate, immediately preceding this clause; 2. That the devise over was good as an executory devise, and carried a fee, this limitation over necessarily referring to the estate before devised. *Jackson v. Staats*, 6 D. 376.

A will gave a certain trustee certain specified property for the benefit of testator's three sons during their natural lives, remainder to their children if they should have any, otherwise for each other. The same will gave to the same trustee other specified property for the use of testator's three daughters, with a like remainder. Another clause of the will gives the residue of the estate to all six of the children upon the same terms and conditions as above. One of the sons died without issue. *Held*, that his share in the estate went to the surviving brothers and sisters, and not to the surviving brothers alone. *Lipman's Appeal*, 72 D. 692.

A testator bequeathed certain property to his daughters and their heirs forever; in a subsequent clause he "loaned" the residuum of his estate to the same children for life, with remainder to their children, providing that if any of his said children should die without an heir of the body, "all the property loaned or given them" should go to his grandchildren. *Held*, that this limitation

For Index to Notes on American Decisions and American Reports, see Volume L.

applied to the residuum, and not to the previous gifts. *Barksdale v. White*, 26 R. 344.

A will was written on the first and third pages of a sheet of paper, and signed at the end of the third page. In a devise to A., on the third page, numbered "4th," certain words describing the property devised were erased, and the words, "See next page," were there interlined. On the fourth page was an unsigned clause, numbered "4th," making a bequest to A., and additional bequests to others. The draughtsman testified that the erasure and interlineation and the writing on the fourth page were made by him by testator's direction, prior to the signing, and he identified the clause on the fourth page as the subject of reference on the third page. *Held*, that the clause on the fourth page was part of the will. *Baker's Appeal*, 52 R. 478.

74. Effect of repugnancy. — If two parts of a will are wholly irreconcilable, the subsequent part is to be taken as evidence of a subsequent intention. *Covenhoven v. Shuler*, 21 D. 73; *German v. German*, 67 D. 451.

If the terms of a devise empower the devisee to dispose of the property, a limitation over is void for repugnancy. *Rona v. Meier*, 29 R. 493.

Where a testator devised "to his grandson, A. L., three hundred and fifty acres of land, being the upper part of a tract of seven hundred acres; and to his granddaughters, P. L. and J. L., the lower part of the same tract, to be equally divided between them," and the tract was found to contain in fact eleven hundred acres, — *held*, that the grandson was entitled to only three hundred and fifty acres, and the granddaughters to three hundred and seventy-five acres each. *Williams v. Lane*, 6 D. 561.

A testatrix, after bequeathing legacies to her several children, directed that "the balance of my estate be equally divided among the heirs of my body;" and closed the will with the direction that "the portion that goes to my sons I give to the heirs of their bodies, and hereby appoint each of my sons trustees, without bond, of his respective portion." *Held*, that the two clauses being in conflict, the latter must prevail, and the absolute estate devised by the former was annulled by the latter, and converted into a trust estate for the benefit of the grandchildren. *Pierce v. Ridley*, 25 R. 769.

A will gave to the testator's wife the residuum "for her benefit and support, to use and dispose of as she may think proper," and then provided that if any of the estate should be left in her possession at her death it should be equally divided between the brothers and sisters of the testator. *Held*, that the wife took an absolute estate, and that the remainder over was void for repugnancy. *Stonell v. Hastings*, 59 R. 748.

75. Technical words. — The interpreta-

tion of a technical term is established by reference to the science or art to which it is peculiar. *Ward v. Stow*, 27 D. 238.

Technical signification of words must yield to testator's intent, as manifest from the whole will. *Scott v. Nelson*, 29 D. 268.

Where technical words are used in a will, the testator is presumed to employ them in their established legal sense, unless a contrary intention is clearly indicated by the context. *Sims v. Conger*, 77 D. 671; *Keas v. Hoffecker*, 29 D. 336.

76. Interpretation and effect of codicils. — A will and codicil are to be taken and construed together as parts of one and the same instrument. *Westcott v. Cady*, 9 D. 306; *Beall v. Cunningham*, 39 D. 469; *Harvey v. Chouteau*, 55 D. 120.

A codicil, duly executed, if attached to a paper which was never signed, attested, and published as a will, will have the effect of giving force and operation to the whole as one will. *Beall v. Cunningham*, 39 D. 469.

77. When will speaks from time of testator's death. — Wills are ambulatory and have no operation until the death of the testator. *Marsh v. Marsh*, 64 D. 593; *Grimes v. Norris*, 65 D. 545; *Lorincx v. Keller*, 68 D. 696. And therefore, if a will is written and executed before the passage of a law, but the testator does not die till after the enactment of the law, the will is created after the passage of the law, and must be governed by it. *Price v. Taylor*, 70 D. 105.

The English rule is that as to lands the will speaks at its date, but as to personality, at the death of the testator. *Raines v. Barker*, 67 D. 762.

A will of personal estate is presumed to speak as of the date of the death of the testator. *Collin v. Collin*, 45 D. 420; *Elcock's Will*, 17 D. 703.

A will, as to slaves, must be understood as speaking at testator's death, and those acquired after the publication of it pass thereby. *Curling v. Curling*, 33 D. 475.

Words of survivorship in a will refer to the date of the testator's death, wherever a gift takes effect in possession immediately upon the death, unless some other time is indicated by the will. *Preseley v. Davis*, 62 D. 396.

The Virginia statute of 1849, making a will speak from death of testator, does not apply to a will previously made, so as to determine its validity or effect, though the testator died after that statute was enacted, such wills being expressly exempted from its operation. *Raines v. Barker*, 67 D. 762.

A wife devised all her property to her husband for life, and provided that if he survived her, the same should go at his death to her step-daughter. The husband died before the wife. *Held*, that the wife

* Codicil, what is, construction and effect of, see note, 56 D. 121-129.

For Index to Notes in American Decisions and American Reports, see Volume I.

was intestate. *Gibson v. Seymour*, 52 R. 688.

78. What estate or interest will pass. — 1. *In general*.^{*} — A trust estate will pass under a general clause in a will relating to the realty, unless the intention of the testator appear from the will to be otherwise. *Jackson v. Delancy*, 7 D. 403.

A testator cannot by will create an estate which, by the rules of the common law, he could not in his life-time create by deed. *Mullany v. Mullany*, 31 D. 238.

Title passes by descent, and not by purchase, the former being the worthier title, where the same quantity and quality of estate is devised that the devisee would have acquired by descent. *Gilpin v. Hollingsworth*, 56 D. 737.

Where testator uses general words conveying his whole estate, all that he has at his decease will pass thereby. *Wynne v. Wynne*, 57 D. 139.

Prima facie a gift of the product of a fund is the gift of that product in perpetuity, and consequently a gift of the fund itself. *Robert's Appeal*, 98 D. 312.

A testatrix appointed her eldest son executor, and gave him all her property, he to pay her debts and the school and college expenses of her younger son, making no other provision for the younger son. Her personal property amounted to \$20, and her real estate to \$1,500. *Held*, that the legacy was a charge on the real estate. *Thayer v. Finnegan*, 45 R. 285.

2. *Fee simple*. — One who devises a fee-simple estate parts with all the interest he had, and will not be permitted to say that such estate shall not be subject to all the restraints imposed upon it by law. *Mullany v. Mullany*, 31 D. 238.

The absolute interest in a house is devised to a daughter by a will giving and granting "to my beloved son, J. N., all my property, after the decease of my beloved wife, or marriage, he paying the legacies herein mentioned; also to my daughter, P. N., two hundred dollars, to be paid as above mentioned, the horse I now own" (describing it), "and to live and remain, so long as she is unmarried, in my house, and to have and enjoy the same privileges as she now does, and also one good cow," and testator's language is not matter of advice to the son. *Maack v. Nason*, 52 D. 41.

The rules of the common law with respect to the quantity of interest conveyed by a will do not apply in Texas, where the statute provides that where an estate in lands is created by will it will be deemed to be an estate in fee simple if a less estate be not limited by express words. *Bell County v. Alexander*, 73 D. 268.

^{*} What words pass an estate in realty, see note. 4 D. 576-578.

In a will by employing the words, "I wish the county in which I die and am buried to have and enjoy, for the benefit of public schools, two-thirds of the land in the county I am buried in," taken in connection with the words "my land," and "the land I own," used in other parts of the will, show an intention on the part of the testator to devise an estate in lands, and there being no words limiting its quantity, will be held to convey an estate in fee simple. *Id.*

At common law, an estate in lands created by will, will be enlarged to and held to be an estate in fee simple, where the land is charged with a trust which cannot be performed, or where the will directs an act to be done which cannot be accomplished, unless a greater estate than one for life be taken. *Id.*

3. *Interest vested in widow*. — A devise which contains a specific direction that all of testator's property shall remain upon his plantation, consisting of two separate tracts of land, in charge of his wife, until his youngest son shall attain full age, and then proceeds to bequeath one tract to that son and another, and one-third of the remaining tract to his wife, for her life, vests in the wife, by implication, a chattel interest in the whole of both tracts, during the son's minority. *Bradshaw v. Ellis*, 32 D. 636.

Choses in action do not pass to the wife by a bequest of "all my property to my wife," and after her death "to be sold," etc. *Pip-pin v. Ellison*, 55 D. 403.

Where a testator bequeaths negroes to his wife, to be disposed of by her, with their increase, to the whole, or any one or more, of his children, as she may think proper, at her decease, the wife takes an estate for life, with power to dispose of the property to one or more of the children as she chooses; and her power is coupled with an interest as well as a trust. *Cruse v. McKee*, 73 D. 186.

A testator by will devised to his wife certain real and personal property during her widowhood, and directed his executors to sell it thereafter, the proceeds to be divided among all his children or their heirs or assigns in equal shares; also, that the balance or residue of his real and personal estate which had not been devised for life to his wife, should be sold, the proceeds to be divided equally among his children, excepting one daughter, who was to have only the interest of one share during life. *Held*, that she took under the will an absolute and not a life estate in one share, which her administrator, after her death, was entitled to recover. *Silkknitter's Appeal*, 84 D. 494.

A testator gave his widow certain personal estate, and provided that if any remained at her decease, it should be equally divided among his children. *Held*, that an absolute power of disposal was given to the widow, and that the gift over was inconsistent with this power, and therefore void.

For Index to Notes in American Decisions and American Reports, see Volume I.

McKenzie's Appeal, 19 R. 525. Compare *Henderson v. Blackburn*, 44 R. 780.

A will provided, "To my wife the provision made for her by the statutes of this state I deem sufficient;" and after giving sundry legacies, concluded by giving to the testator's son, "all the residue of my estate after paying the above bequests, legacies, and my debts, and the expenses of settling my estate." *Held*, that the wife took such a share as if the testator had died intestate. *Kelly v. Reynolds*, 33 R. 418.

A will contained the following clause: "To my beloved wife P. (so long as she remains my widow) I give all the income of the home farm on which I now live, containing two hundred acres, more or less, with all the tenements and appurtenances belonging thereto, together with all the products arising therefrom; also, the mansion house in which I live, together with all belonging to it, and all that is in it, or about it, I give to my beloved wife P., the same to be hers and to belong to her forever." *Held*, that the widow took an estate in the realty for life and widowhood, and an absolute estate in the personal property. *Cooper v. Pogue*, 37 R. 681.

B, by will gave his wife the use and income of his homestead for life; also "every article of household furniture in or on said premises, including piano, books, minerals, shells, and curiosities, and every article of personal property in and about said homestead, or wherever found, belonging to my estate;" also "the dividends and income on all my railroad shares I may own at the time of my decease, and also the interest and income on all my government and other bonds which I may possess at the time of my decease," with residuum to others. *Held*, that the shares and bonds, and money and notes did not pass to the wife. *Benton v. Benton*, 56 R. 512.

4. *Illustrations*. — A testatrix devised real estate to her daughter and sole heir, S., for life; but "if the said S. shall have a child to cry," then to said child; and if said child should die, then over. S. and her husband conveyed the estate with warranty to P., and four months after S. had a child, W., born alive. W. recovered judgment in an action of ejectment against the grantee of P. In an action by the grantee of P. against P., on the covenant of warranty. — *Held*, 1. That the life estate of S. under the will was not merged by the descent of the fee; 2. That the remainder in fee was vested in W., he being *en ventre sa mere* at the time of the conveyance from S.; 3. That W. was not barred by the warranty of his parents. *Crisfield v. Storr*, 11 R. 480.

A testator gave all the rents and profits of his whole estate to his widow during life, or while she should be his widow, and directed that no portion of his estate should

be sold but in accordance with his will. The proceeds of such parts of his estate as should be sold were to be paid to the devisees named in the will, among whom were included all his heirs at law, according to their respective shares, by the executors. The will further provided, that certain of the real estate should remain unsold until F., one of the devisees, should be twenty-five years of age, or "until twenty-one years from the date hereof, in case of his death," and also required that each devisee should contract in writing that he would not "either dispose of, alienate, mortgage, barter, pledge, or transfer any of the real estate, or any of the proceeds thereof," before any of the proceeds of the sales directed by the will should be paid to him. There was no express authorization to the executors to sell the real estate, and no limitation over. *Held*, 1. That the testator intended to and did give to the executors a power to sell his real estate, but this was a naked power, without estate or interest; 2. That the widow took an estate during life or widowhood; 3. The devisees a remainder in fee which vested *in presenti*; 4. That the restrictions against sale were invalid, (1) as the whole estate was centered in the devisees, and no party but themselves could enforce the obligation; and (2) as being in contravention of the rule against perpetuities. *Mandlebaum v. McDonnell*, 18 R. 61.

A testator owned two parcels of land near Cropwell; one containing seventy-two and sixty-two hundredths acres, which had been conveyed to him by the heirs of his deceased wife, the other containing fourteen and seventy-three hundredths acres, which had been conveyed to him by Abel Lippencott. The two parcels adjoined each other, had long been rented and cultivated together, and his son Thomas resided on the first, but used and cultivated both. The testator devised to his son Thomas, "all that my farm and plantation near Cropwell conveyed to me by the heirs of my deceased wife, and where my son Thomas now resides, containing about eighty-five acres, more or less." The court admitted the testimony of the draughtsman of the will, that the written instructions for the will contained only the words, "my Cropwell farm, containing eighty-five acres," and that the words, "conveyed to me by the heirs of my deceased wife," were inserted by the draughtsman himself in the will, to distinguish the premises from the testator's other property. *Held*, error, and that only the parcel conveyed to the testator by the heirs of his deceased wife passed under that devise. *Griscom v. Evans*, 29 R. 251.

A testator provided as follows: "I hereby give, devise, and bequeath to my son S., and to his heirs and assigns forever, upon his attaining the age of twenty-one years,

For Index to Notes in American Decisions and American Reports, see Volume L.

all my Shot Tower property, consisting of Shot Tower, buildings, and lots of ground connected therewith . . . with all the appurtenances, machinery, fixtures, and personal property therein and thereto belonging." At the testator's death there was in the shot tower a large quantity of manufactured shot and of unmanufactured material. It was apparent from the will that the testator intended that his son should carry on the business on coming of age. *Held*, that the son was entitled to the unmanufactured shot but not to the manufactured shot. *Spark's Appeal*, 33 R. 740.

A testator bequeathed a fund as follows: in equal shares, one to his married daughter, Melinda; one to Amanda, Anna, and Clara, his minor daughters; and one to each of two other married daughters for life. *Held*, that the three minor daughters took each one equal share with the others. *Holman v. Price*, 37 R. 614.

A testator gave his entire estate in trust for his daughter. The trustees were directed to apply the whole income, if necessary, to her support and maintenance, and when she became eighteen, or was married, they could deliver to her the whole estate or not, in their discretion. In case she died before eighteen, the estate was otherwise disposed of. She never married, and died at twenty-three, the trustees still holding the fund. *Held*, that she took a vested estate at eighteen, at least, and that it passed to her devisees. *Weatherhead v. Stoddard*, 56 R. 573.

A testator devised real estate to his executors in trust for his children, the trustees to have the management and control until the children should marry; "and when any of my said children shall marry, with the consent of said executors, any worthy person, then the part or portion of property herein devised, or the proceeds thereof, *

. . . shall be and become the property of said child so marrying, and my said executors shall make the necessary conveyance thereof, so as to vest the absolute title in said legatee." *Held*, that the marrying of a child with the consent of the executors was not a condition precedent to the vesting in him or her of an interest in the estate, but only a condition for the termination of the trust as to the one so marrying; and that the children took an immediate vested interest. *Toner v. Collins*, 56 R. 346.

A testator devised and bequeathed all his property to his wife for life, and provided that at her death any and all of the property and estate so granted, "or any part of the same then left by her," should be divided among his children. He also made it "a condition that my said wife shall, out and from said property left her, provide for the maintenance and education of my children." Power to sell and convert the property was

given to the executors. *Held*, 1. That a life estate in the realty vested in the wife and a remainder in fee in the children, and so as to the personality; 2. An implied power of disposition was given to the widow of so much of the capital fund as might be reasonably necessary for her own support and the maintenance and education of the children after first applying the income thereto; 3. That the provision for the widow was in consideration that she should so provide for the children, and the income was the primary fund for her and their support. The donee for life of personal property is entitled to the possession thereof without executing security for its safe-keeping, except in cases of real danger. It is not usual or proper in practice to exact anything more in the first instances than the filing of an inventory in the proper court. *Estate of Oertle*, 57 R. 48.

A testator devised lands in fee to a trustee in trust for his daughter, with a provision that neither she nor her husband should ever dispose of them. *Held*, that the restraint was ineffectual at any time while she was single, but became operative upon and during any marriage contracted by her before disposing of them. *Robinson v. Randolph*, 58 R. 692.

79. Interpretation of the word "children."—1. Generally.—"Children" is a technical word, and is always construed a word of purchase, unless controlled by other words showing it intended as a word of limitation. *Kay v. Connor*, 49 D. 690; *Carr v. Estill*, 63 D. 548; *Coursey v. Davis*, 84 D. 519.

It is lawful to construe "children" as a word of limitation when the will necessitates such a construction. *Coursey v. Davis*, 84 D. 519.

A bequest to one for life, and "to her children forever," gives an absolute estate in personality. *Shearman v. Angel*, 23 D. 166.

A bequest to one's children generally will be construed to embrace all who are his children at the date of his decease, although the money is directed to be paid "to each of them for the use of their respective children, and by each of them so applied," although some of them have no children. *Chase v. Lockerman*, 35 D. 277.

A limitation to "my children" gives all children of testator immediate interests that are transmissible to executors. *Weeks v. Weeks*, 47 D. 358.

A devise to a woman "and her children," she being unmarried and having no children at the time, where she afterwards marries and has children, confers upon her, in Kentucky, an estate for life, with remainder to her children; though it would confer an estate-tail in England. *Carr v. Estill*, 63 D. 548.

* Children, devisees and bequests to, as a class, see note, 46 D. 666-667.

For Index to Notes in American Decisions and American Reports, see Volume 1.

A devise to "children" of the testator's son comprehends only the children living at the testator's death. *Shotts v. Poe*, 28 R. 485.

Testator bequeathed his property to his wife for life, and then as follows: "Upon the decease of my said wife, I give all my said estate to such of my children as may be living at the time of her decease, and to the issue of those who may have deceased." One of the testator's children died in his life-time, leaving a child, who died after the death of the testator, and before that of his widow. *Held*, that such child had a vested interest under the will, to which his administrator was entitled after the death of the widow. *Austin v. Bristol*, 16 R. 23.

2. When includes "grandchildren."—"Children," when used in a will, does not ordinarily include grandchildren; but grandchildren and great-grandchildren may take under this word, if necessary to accomplish the testator's intentions. *Scott v. Nelson*, 29 D. 266; *Dickinson v. Lee*, 23 D. 684; *Mowatt v. Carow*, 32 D. 641; *Phillips v. Beall*, 33 D. 518; and see *Jackson v. Staats*, 6 D. 376.

Grandchildren will be deemed comprehended in the term children: 1. Where it is necessary to give the will any meaning; 2. When other words in the will show that the testator did not use the word children in its ordinary or limited sense. *Scott v. Nelson*, 29 D. 266.

Under a devise to "children," grandchildren may take if there are no children, *Ewing v. Handley*, 14 D. 140. But not where there are children. *Presley v. Davis*, 62 D. 396.

A direction in a will to distribute among the testator's children and grandchildren does not include great-grandchildren. *Cummings v. Plummer*, 48 R. 167.

A testator bequeathed two thousand pounds "to the children and grandchildren of his brother, I. P., deceased, excepting M. F. (a grandchild of I. P.) and her children, she and they not needing it, to be equally divided among those of them who may be then living (at the death of the testator's widow), saving that his cousin, S. R., should have two shares thereof." *Held*, that the great grandchildren of I. P. took equally with the children and grandchildren; and that all who were alive at the death of the testator's widow, whether born before or after the testator's death, were entitled to take. *Pemberton v. Parke*, 6 D. 432.

B, by his last will, gave his property to his wife for life, and, at her death, to be equally divided between his children. He then stated that certain of his children had received specified advances, and that his son "Turner, in his life-time," had received one thousand four hundred dollars, and directed that these advances be accounted for before any distribution be made. *Held*, that a

grandchild, who was a son of the deceased Turner, was entitled to receive a share as one of the children. *Scott v. Nelson*, 29 D. 266.

3. *Posthumous children.*—A devise in general terms to the testator's "children," does not comprehend a posthumous child, so as to prevent it from claiming under the statute as a child pretermitted by the will. *Armistead v. Dangerfield*, 5 D. 501.

Under a residuary clause of "all my estate, real and personal, to be equally divided between my grandchildren," a posthumous grandchild, *en ventre sa mere* at the time of the testator's death, takes equally with the other grandchildren. *Smart v. King*, 33 D. 137; *Barker v. Pearce*, 72 D. 691. Compare *Biggs v. McCarty*, 44 R. 320; *Byrnes v. Stilwell*, 57 R. 760.

4. *Illegitimate children.*—The word "children" imports legitimate children in a devise, and can be explained or enlarged so as to include illegitimate children only by clear expression or necessary implication on the face of the will itself. *Shearman v. Angel*, 23 D. 166.

Under a devise to "children," without any other designation, illegitimate children cannot take along with legitimate. *Ib.*

Under a devise by an illegitimate son to his "mother," for life and to "her children," an illegitimate sister of the testator cannot take where the mother has also legitimate children, although the testator gives a bequest to his sister in another part of the will describing her as his "dear sister." *Ib.*

The illegitimate son of a woman takes equally with her legitimate children under a devise from her father to her for life, and at her death the property to be equally divided among her children. *Bennett v. Toler*, 78 D. 638.

80. *Interpretation of the terms "heirs" or "heirs of the body."*—1. *In general.*—The legal force of the word "heirs" in a will, may be controlled by the context evincing such a demonstrative intention to misapply it as cannot be mistaken; in an executed conveyance, never. *Hileman v. Bouslaugh*, 53 D. 474.

The word "heirs," in a bequest of personalty, means those who are entitled to take under the statute of distributions. *Brothers v. Cartwright*, 64 D. 563.

A limitation in a will of a life estate to testator's wife, to the effect that if she shall have an heir at the time of her death, the estate shall descend to that heir, is a limitation in favor of any child which the wife may have, either by the then existing or any subsequent marriage, the word "heir" in the connection in which used in this case evidently not being employed in its technical sense. *Ramsay v. Joyce*, 37 D. 550.

2. *When a word of limitation.*—"Heirs" is a technical word, and always construed a

For Index to Notes in American Decisions and American Reports, see Volume I.

word of limitation and not of purchase, according to the rule in *Shelley's Case*, unless controlled by other words clearly showing a contrary meaning. *Kay v. Connor*, 49 D. 690; *Maulding v. Scott*, 56 D. 298.

When terms of limitation in a will can be fairly interpreted to mean "heirs" or "heirs of the body," an estate of inheritance will be presumed to have been intended by the testator. *Dodson v. Ball*, 100 D. 588.

A testator devised: "I give and bequeath to the children of G. W. L., provided he has any, if not, to the heirs of my sister S., the land which lies between the road, etc.," and it did not appear from the will that the testator knew of his sister S. being alive. *Held*, that the word "heirs" must be taken in its legal acceptation, and not as *descriptio personarum*. *Des v. Barnes*, 6 D. 547.

3. *When a word of purchase.*—The word "heirs" is a word of purchase wherever a devise of an estate to "heirs" is not preceded by any prior estate of freehold devised to their ancestors, which may be expanded into an estate of inheritance by the estate left the "heirs." *Ward v. Stow*, 27 D. 238.

The word "heirs" is a term of purchase, and not of limitation; and the intention prevails against a strict construction to the contrary, whenever words of explanation are annexed indicating that the testator or grantor meant to use the term in a qualified sense, as a mere *descriptio personarum*, and that they and not the ancestor were to be the persons from which the succession was to emanate. *Ware v. Richardson*, 56 D. 762.

The word "heir" or "heirs" is *nomen collectivum*, not a word of purchase, and carries the land not only to the immediate heir, but to all those who descend from that devisee. *Roach v. Martin*, 27 D. 746.

Words "legal heirs" are not converted from words of limitation to words of purchase by any expressions in a deed, which, after granting a life estate, provides that "from and immediately after the death of the said E., then to, and for the use and benefit of, the legal heirs and representatives of the said E., and to and for no other intent and purpose." *Ware v. Richardson*, 56 D. 762.

4. *Devise to heirs of living person.*—A devise to M.'s "heirs" conveys no property, unless M. dies before the testator, for "no one can be an heir during the life of his ancestor." *Clark v. Mosely*, 44 D. 229.

One may take as purchaser by the description of "heir" in a will, while his ancestor is living, if such appears to have been the intent of the testator. *Heard v. Horton*, 43 D. 659.

A devise to "heirs" of a living person, not referred to in the will as living, is void; but if the ancestor is spoken of in the will as living, or is recognized as living, by a legacy being given to him or otherwise, the devise

is good, and the children or other heirs apparent of the ancestor take by purchase. *Id.*

5. *Widow or surviving husband are not "heirs."*—A widow is not the "heir" of her husband within the ordinary meaning of a will. *Dodge's Appeal*, 51 R. 519; *Lord v. Bourne*, 18 R. 234; *Ivins' Appeal*, 51 R. 516; *Wilkins v. Ordway*, 47 R. 215.

6. *Meaning of "heirs of the body."*—The words "natural heirs" and "heirs of the body" in a will, are considered as of the same legal import. *Smith v. Pendell*, 48 D. 146.

A limitation to heirs of the body, or issue, and to their heirs, constitutes them purchasers, as it shows an intention to give them an estate, not inheritable from the first taker, but an original estate inheritable from themselves as a new stock of descent. *Myers v. Anderson*, 47 D. 537.

Certain real property was conveyed to a trustee for the benefit of B., the trustee to convey the same to such person as B. by her last will should appoint, which person should take the same in fee, and in default of her appointment it should be conveyed to the children of B. B. by will gave the use of the property to H. during life, "the reversion and fee thereof to the heirs" of her body at and after her decease. *Held*, that the words, "heirs of her body," were to be taken as words of description and not of limitation, and a decree sustaining the devise was affirmed. *Butler v. Huestis*, 18 R. 539.

81. Word "and," when read "or."—*"And"* may be construed to mean "or," when it is necessary to carry out the testator's intention. *Sayward v. Sayward*, 22 D. 191.

The conversion of "or" into "and," or of "and" into "or," is allowed for the benefit of an ulterior devisee as well as for the benefit of the first devisee or his issue. *Janney v. Sprigg*, 48 D. 557.

"And" will be construed to mean "or" where a testatrix devises property to her niece with a limitation over in case she should "die unmarried and without issue;" and this expression will be held to mean "unmarried or without issue," the intention of the testatrix being apparent from the face of the will. *Id.*

"Or" will be construed to mean "and" where a testatrix devised to her niece, with the limitation that "should she die leaving children, and such child or children die before the age of twenty-one years, or without having married previous to the attainment of such age," in such a case the "or" between the words "years" and "without" will be held to mean "and," to effectuate the intention of the testatrix. *Id.*

A testator devised "all his estate, real and personal, to his six children, by name, to

* Word "and" when construed to mean "or," and vice versa, see note, 48 D. 535-374.

For Index to Notes in American Decisions and American Reports, see Volume I.

be equally divided among them, share and share alike, but if any one of them should die before arriving at full age, or without lawful issue, that then his, her, or their part should devolve upon and be equally divided among the surviving children, and their heirs and assigns forever." All the children survived the testator; four of them afterwards died, leaving issue, and the fifth, after arriving at full age, died intestate, and without lawful issue, having previously conveyed his share of the estate. Held that the word "or" was to be construed as "and," so that the devise over did not take effect, and the surviving child was not entitled to the share of the one dying without lawful issue. *Jackson v. Blanshan*, 5 D. 188.

83. Construction of other words and phrases. — 1. "Dying without issue." — In a will, the words "dying without issue," or "without children," unless a different intent otherwise appears, are to be construed, whether used with regard to real or personal estate, as referring to a dying without children living at the time of the devisee's death. *Holmes v. Williams*, 1 D. 49.

Dying without issue in testator's life-time is meant where a testator directs his estate to be equally divided among his children, and that "if any should die," etc., without issue, then their portions are to be equally divided among the remainder of the aforesaid children, otherwise the limitation over is void for remoteness. *Presley v. Davis*, 62 D. 396.

The will of E. devised and bequeathed to her daughter, Minnie, all her real and personal estate, subject to the payment of certain legacies charged thereon. In case of the death of Minnie, "without issue," the property was given to the husband and a sister of the testatrix during life, and after their deaths to four brothers. The clause ended as follows: "The devise over to my husband, sister, and brothers to depend upon the contingency of my daughter Minnie dying without issue." Minnie survived the testatrix. Held, that she took a conditional fee, defeasible by her dying without leaving issue living at the time of her death; that her children, should she leave any, would inherit from her, but a conveyance by her would be effectual against them, and carry an indefeasible title in fee, and that the contingent expectant estate, limited to the husband, sister, and brothers, would be cut off by their joining with her in the conveyance. *Matter of New York etc. Ry Co.*, 59 R. 478.

2. "Estate." — The word "estate" in a will carries everything, unless restrained by particular expressions. *Turbett v. Turbett*, 2 D. 269.

The word "estate" in a will is sufficient to

* Construction of term "dying without issue," see note 55 R. 774-782.

pass a fee in land. *Jackson v. Merrill*, 5 D. 213.

The word "estate" standing by itself carries a fee, but it is not a word of art, but of interpretation, and its meaning is affected by other clauses and dispositions in the will. *Zimmerman v. Anders*, 40 D. 552.

A devise of the remainder of testator's "estate" operates as a devise of the realty. *Palmer v. Dougherty*, 54 D. 636.

"Estate" has a broader signification than "property"; the former includes choses in action, the latter does not, and in reference to personalty is confined to goods and chattels. *Pippin v. Ellison*, 55 D. 403.

Where a testator, after bequests of negroes and other personal property to several of his children, devised as follows: "Item, the rest of my estate, negroes, stock, and house furniture, to be equally divided between my wife, M. H., my son, H. H., and my daughter, R. H." Held, that the word "estate" comprehended all the testator could dispose of, both real and personal property. *Mably v. Stainbach*, 1 D. 545.

3. "Goods or movables." — The words, "goods or movables" in a will may include bonds, unless there is something in the context of the whole will to restrain the construction. *Jackson v. Robinson*, 1 D. 293.

4. "In case." — The words, "in case," when used in a will, create a condition as clearly as where the words, "if," "upon," and the like, are used. *Roberts' Appeal*, 98 D. 312.

5. "Issue." — The word "issue" in a will is sometimes a word of limitation and sometimes of purchase, depending on the context. *Lyles v. Digges*, 14 D. 231.

"Issue" is primarily a word of limitation. *Kay v. Scates*, 78 D. 399.

A devise to "the male issue then living of testator's son," includes all male lineal descendants of that son then living, whether of the same generation or not, and whether tracing descent through males or through females. *Wistar v. Scott*, 51 R. 197.

6. "Legacy." — The word "legacy" in a subsequent item of a will covers all of several bequests in a former item, where a testator in a single item gives his wife a sum of money, various articles of personal property, and a life estate in certain realty, with the privilege of taking a sum of money in lieu of the life estate, and in a subsequent item declares that the "legacy" given to his wife was in lieu of dower. *Clayton v. Akia*, 95 D. 393.

7. "Leaving no issue of his body." — In a devise of lands, the use of the words, "leaving no issue of his body," indicates an indefinite failure of issue. *Kay v. Scates*, 78 D. 399.

8. "Money." — The testator having devised to his wife "all the rest, residue, and remainder of the moneys belonging to his es-

For Index to Notes in American Decisions and American Reports, see Volume L.

tate at the time of his decease,"—*Held*, the word "moneys" must be taken in its ordinary signification, and could not include bonds, mortgages, or other choses in action, as there was nothing in the will showing that the testator intended to use the term in any other than its ordinary sense. *Mann v. Mann*, 7 D. 418.

A testator, after giving various legacies, gave "the balance of my money" to his mother. *Held*, a gift of all the residue of his estate, both real and personal. *In re Miller*, 17 R. 422.

8. "Next of kin."—A will directed that the testator's residuary estate should be divided "among my next of kin according to the statute of the State of New York concerning the distribution of personal estate of intestates, in like manner as though I had died intestate." At the time of its execution the testator was unmarried, but he married subsequently. *Held*, that as there was nothing in the context to show a different intent, the words "next of kin" must be construed in their ordinary meaning of relatives in blood, and did not include the widow. *Kettles v. Kettles*, 28 R. 155.

A testator provided that if any of certain legatees "shall die before my decease, I give the sums, which I have given to them respectively, respectively to those persons living at the time of my decease, who shall then be next of kin respectively of those of them whom I may survive." One of these legatees died in the life-time of the testator, leaving as his nearest relatives a brother and three nephews, sons of a deceased brother, all of whom survived the testator. *Held*, that the brother of the legatee was entitled, to the exclusion of the nephews. *Swasey v. Jaques*, 59 R. 65.

10. "Reasonable and competent support."—What is a "reasonable and competent support," as provided for in a will, does not mean merely the food and clothing necessary to sustain life, but a support in the place and manner in which a party has been accustomed to live. *Ellerbe v. Ellerbe*, 40 D. 623.

A bequest for reasonable and competent support does not take effect when the party in whose favor the bequest is made has sufficient property for her own support. *Ib.*

A parent cannot claim an allowance for the support of her child when she has sufficient means to support him, although a will provides that she and her child have a reasonable and competent support out of the proceeds of the estate. *Ib.*

11. "Religious."—In a will means "Christian." *Simpson v. Welcome*, 39 R. 349.

12. "Survivors," will be construed to mean personal representatives, where a testator, unfamiliar with the use of legal terms, makes a bequest to his brother and sisters by name, or their survivors. *Stoner's Appeal*, 45 D. 608.

The term "survivors," restricts "dying without issue" to lives in being, and twenty-one years thereafter, where a benefit to persons in life not transmissible to heirs and representatives is plainly intended, but the words "remainder of the aforesaid children" are not equivalent to the term "survivors." *Presley v. Davis*, 62 D. 396.

Words of survivorship should be referred to the period for the payment or distribution of the subject-matter of the gift. *Sinton v. Boyd*, 2 R. 369.

A testator gave all his estate to his wife for life, with a direction that after her death it should be equally divided among his children or the survivors of them. One of the children died after the testator's death, but before that of the widow, leaving a child. *Held*, that no interest vested in the deceased child under the will, nor in the grandchild, she being neither one of the "children" nor "survivors." *Ib.*

2. The Residuary Clause.

83. What will fall into the residuum, generally.—The general residuary clause must include all the residue from all sources, and if the balance mentioned be confined to what is left of a particular fund, it is special only. *Mahorne v. Hove*, 48 D. 706.

Testator's intention to create different grades in his benefactions is clearly shown by his creating a residuum upon a residuum. *Gallego v. Atty-General*, 24 D. 650.

A residuary bequest generally operates upon all the personal estate of which the testator is possessed at the time of his death. *Donohoo v. Lea*, 55 D. 725.

A bequest of the "remainder of my personal estate, not hereinbefore nor hereinafter specified, etc., excepting what is herein reserved and bequeathed," carries the principal of a sum which in a previous part of the will is directed to be put at interest for the benefit of the testator's widow for life, where such principal is not otherwise disposed of, directly or by implication, and the whole tenor of the will indicates that the testator's intention was to bequeath his entire estate. *Nyce's Estate*, 40 D. 493.

The Indiana statute, that every devise of all testator's real estate shall pass all the real estate he may be entitled to devise at his death, does not apply to a residuary clause in a will where particular pieces of property are devised to particular devisees, but only to cases where the will purports to devise all the property equally or in proportions, to all the devisees named in it. *Bowen v. Johnson*, 61 D. 110.

Surplus income from testator's crops passes to the residuary legatee after the payment of the testator's debts and an annuity with which they are charged, although the will directs that after the death of the annuitant the corpus be sold and the proceeds divided

For Index to Notes in American Decisions and American Reports, see Volume I.

among other legatees. *Drayton v. Rose*, 64 D. 731.

The words, "not otherwise disposed of in this will," do not have effect of restricting the devise to a particular residue. These words do not express any other intention than that which is necessarily implied in every residuary devise, and they must be construed with reference to the well-established rule that a residuary bequest of personal estate carries not only everything not disposed of, but everything that, in the event, turns out not to be disposed of. *Cunningham v. Cunningham*, 68 D. 718.

84. What will not. — In a general devise of lands, without limitation or restriction, the reversion will not pass under a general residuary clause, but descends to the heir. *Kannon v. McRoberts*, 1 D. 428.

The statutory provision as to advancements has no just application, where the testator distributes his property with the intention of disposing of it all, but inadvertently leaves a residuum by omitting to put any residuary clause in his will. *Needles v. Needles*, 70 D. 85.

If, under the disposition of a residuum of personal estate by will in two parts, the first disposition be invalid, the sum which it was the purpose thereby to dispose of does not go to the legatees of the other part, but to the next of kin of decedent. *Beekman v. Boneor*, 80 D. 269.

Lands devised specifically to a wife and children do not come within the operation of a residuary clause in a will providing that certain tracts of land shall pass to the executor in trust to be sold, and the proceeds divided between the wife and children, and directing the executor "to keep my estate together, and not to hand over any of the devises or legacies," until the happening of a certain event. As to the land specifically devised, the words "not to hand over" have no application whatever. *Patton v. Patton*, 86 D. 448.

Where a residuary fund is given to the children, *nominatim*, by the testator, or where it is given to a certain number of the children to be equally divided between them, if one of them die before the testator, his or her share will lapse, but will not fall into the residue for the benefit of the others. Such lapsed residuary share must be distributed among the next of kin of the testator. *Winston v. Webb*, 93 D. 599.

Where there is a devise for life of land subject to a lease made by the testator, dying during the term, before any rent accrues, the rent goes to the reversioner, and is not carried by a bequest of all the testator's personalty, including notes and accounts. *Watson v. Penn*, 58 R. 28.

A testator seized of three tracts of land, and entitled to the equity of redemption in a fourth, made his will, and directed, in the

first place, that all his just debts should be paid. He then devised to his eldest son all his lands at O. and F., with some negroes and stocks. To his other son, all his lands at C., with other negroes and stocks. To his wife and daughter he gave all the rest of his estate, real and personal, saving one negro, by name given to his second son, but no words of inheritance were annexed to any of the devises. *Held*, the inheritance in the land devised to the heir descended upon him, and did not pass under the residuary clause. *Kannon v. McRoberts*, 1 D. 428.

85. Lapsed or void devises and bequests. — Where the will is so obscure that the court cannot discern the intention of the testator, the legacy fails, and the property will pass under the residuary clause. *Rothmahler v. Myers*, 6 D. 613; *Clark v. Cotton*, 24 D. 279.

A residuary legatee takes lapsed and void legacies, as where a legacy is given to one who has no existence. *Helms v. Francisus*, 20 D. 402; *Bendall v. Bendall*, 60 D. 469.

A bequest of the residue comprehends all the personalty not otherwise disposed of by the will, whether it fall in by the lapse of a legacy or from some particular gift's being illegal and void, unless a contrary intention on the part of the testator clearly appears from the will. *Sorrey v. Bright*, 28 D. 584.

An illegal bequest or devise defeats all dependent bequests subsidiary to and inseparable from it, though they might otherwise be valid. *Mahorner v. Hooe*, 48 D. 706.

Where specific legatees and residuary ones are the same persons taking under a will containing a general residuary clause, and where the specific legacies have lapsed, the rule applies that where one of several residuary legatees who are to take in common dies before the testator, his portion does not survive to his co-legatees, but goes to the next of kin according to the statute of distribution. *Bendall v. Bendall*, 60 D. 469.

Where testator bequeaths one-third of his personal estate to his wife, and the other two-thirds to residuary legatees, and the bequest to the wife lapses by her death before the death of the testator, the personal property bequeathed to the wife becomes a part of the residuum, and passes to the residuary legatees. *Cunningham v. Cunningham*, 68 D. 718.

The object of section 20, chapter 106, revised statutes of Kentucky, was to alter the legal effect of a residuary devise, so that where a legacy should lapse it should not belong, as theretofore, to the general residuary devise, but should pass as in case of intestacy. That section was not designed merely to fix a rule of construction. *Id.*

Devises of real estate and legacies of personal estate have been placed upon substantially the same footing in Massachusetts, as to the extent of the power to devise and the

For Index to Notes in American Decisions and American Reports, see Volume I.

formalities required in the execution of a testamentary instrument. And both a lapsed devise of real estate and a lapsed legacy of personal estate will pass under a general residuary clause in the will, unless a clear intention to the contrary is shown by the will. *Thayer v. Wellington*, 85 D. 753.

A testator devised all his real estate to his nephews, A, B, and C, "to be equally divided between them, to be held by them, their heirs, and assigns forever," subject to a charge. There was no other or residuary devise of real estate in the will. A was dead, and the testator knew it when the will was made. *Held*, that the devise to him was a void and not a lapsed devise, and that the one-third descended as intestate real estate to the heirs at law of the testator. *Hearn v. Cannon*, 15 R. 701.

86. Effect of omission to provide for child.*—A pretermitted child is entitled to the same share of the father's estate that he would have had if there had been no will. *Woodard v. Spiller*, 25 D. 139.

Exclusion of kin in a will will not be operative against them, unless there is a valid disposition of the property. *Blackman v. Gordon*, 44 D. 241.

Where a testator makes such an allusion to a child as to show that he had not forgotten to consider such child in the distribution of his estate, it will be sufficient to exclude such child from a distributive share in the estate of the testator, and it is not necessary that the child should have a legacy in the will. *Terry v. Foster*, 2 D. 6.

A posthumous child, unprovided for by settlement and pretermitted by will, is entitled to a share of the real estate, notwithstanding such child be a daughter, and it appears from the will that the testator intended to give all his lands to his sons. Such child is entitled to such share of the real and personal estate as it would have been entitled to if the father had died intestate; including profits of lands, hire of negroes, and interests and profits of other personal estate. *Armistead v. Dangerfield*, 5 D. 501.

The portion of such posthumous child is not to be raised by a division of the estate into equal parts, but by a proportionable contribution by the devisees and legatees and those claiming under them. *Id.*

Parol evidence that testator intentionally omitted a grandchild from his will is admissible, under the Massachusetts revised statutes, to exclude the claim of such grandchild to a share of the estate. *Wilson v. Fosket*, 39 D. 736.

A testator failing to provide for one of his children in his will, will not prevent its being approved, though it does not appear

that the omission was intentional. *Doane v. Lake*, 52 D. 654.

The remedy of a child omitted in the will is by having it modified after probate so far as may be requisite for securing it such rights as it may be able to prove. *Id.*

Rights of heirs not provided for by will are governed by the law in force at the testator's death, and not by the law in force at the time of the execution of the will. *Lorietz v. Keller*, 68 D. 696.

Declarations of testator at the time of executing his will are admissible to show that children not mentioned in the will have already been provided for, and that such omission was intentional, and not the result of accident or mistake. *Id.*

Extrinsic evidence, either written or parol, declarations of testator at the time of executing the will, or any act, circumstances, or admission of the testator which will go to show that children omitted from the will have received their portion of the estate, or that the testator intended to pass them by, is admissible for this purpose. *Id.*

A child and heir-at-law of a testator, for whom his father has by mistake failed to provide by the will, but who, being of full age, has appeared in proceedings resulting in a judgment establishing the will, cannot recover land thereby devised. *Newman v. Waterman*, 53 R. 310.

A statute provided that children of a testator, when born subsequently to the making of the will, and not provided for therein, should take as if there were no will, unless the omission to provide was intentional, and not occasioned by accident or mistake. A testatrix by ante-nuptial agreement had reserved to her sole use certain real estate and the right to dispose of it by will. Nine months after marriage she willed all her estate to her husband, making no provision for her children subsequently to be born. One month later she bore a child. *Held*, that the evidence justified a finding that the omission was intentional, and not occasioned by mistake or accident. *Peters v. Siders*, 30 R. 671.

A statute provides that a testator, leaving a child or children not "named nor provided for" in his will, shall be deemed intestate as to such child or children. A testatrix left a will not in itself expressly naming nor providing for her children, but referring to and adopting provisions in her late husband's will, which named and provided for them. *Held*, that this was equivalent to naming and providing for them in her own will. *Gerrish v. Gerrish*, 34 R. 585.

87. Rights of residuary devisees or legatees.—A testator bequeathed to his wife certain slaves during her natural life, and after specific devises of lands and slaves to his two sons, devised as follows: "All the rest of my estate I leave at the time of my

* Child or issue unintentionally omitted from will, rights of, see note, 39 D. 740-744.

For Index to Notes in American Decisions and American Reports, see Volume I.

death, I desire may be equally divided between my beloved wife and my dear sons, and their heirs forever." This residuary clause vested in the wife and sons equally the reversion in the slaves given to her for life; and, therefore, on her remarriage, her husband became entitled absolutely to one-third of those slaves, and their increase. *Read v. Payne*, 2 D. 550.

A devise of all the rest and residue of the real estate of the testator will pass the rents and profits from his death to the time the estate is vested; and whoever takes the legal estate in the meantime will be liable for the profits as well as the estate itself; for the rents and profits, as well as the estate itself, may be given by way of executory devise. *Royers v. Ross*, 8 D. 575.

An allotment of real estate, made by commissioners appointed under a will, passes to the residuary legatees the legal title to such portions of the realty as are to them respectively assigned. *Baynard v. Norris*, 46 D. 647.

The unexhausted residuum goes to the heir like undisposed-of real estate, where lands are devised upon trust for a particular purpose, and there is a balance left or the trust fails. *Mahomer v. Hooe*, 48 D. 706.

A residuary legatee was entitled to whatever personal estate fell into the residue, after the making of the will, by lapse, invalid disposition, or other accident, under the law of Kentucky as it stood before the revised statutes took effect. The law as to real estate was different. *Cunningham v. Cunningham*, 68 D. 718.

Shipping, included in a general residuary bequest to one for life, with remainder over, should be converted into money, and together with the profits of the shipping arising during the settlement of the estate, after paying the tenant for life a proper amount of interest on the sum, should be invested by the executors in permanent securities, for the benefit of the remainderman, giving the tenant for life the income arising therefrom. *Healey v. Toppan*, 86 D. 159.

An absolute power of disposal in the first taker renders a subsequent limitation repugnant and void. Thus, where the testator, after making sundry bequests, proceeds as follows: "And as to the residue of my estate after payment of my just debts, I give and bequeath the same to my beloved wife. . . . And lastly, I further direct if there be any of my said estate left after the decease of my said wife, then the said property left be equally divided between G. and T." *Held*, that the residue of his estate after the payment of his just debts and legacies vested absolutely in his wife. *Jones v. Bacon*, 28 R. 1.

A testator, by the first item of his will, devised to his wife real property exceeding in value a life estate in all his property of

that character. In the residuary clause of said will he devised as follows: "I give, devise, and bequeath all my other property of every description to my beloved wife and dear children, to be divided among them according to law." *Held*, that a farm included in such residuary clause passed to the wife and children as tenants in common of the fee, and that the wife was not limited to dower therein. *Pruden v. Paxton*, 28 R. 333.

A will created an estate for life in the residue with remainder over. Shortly before death the testator formed a partnership, to be carried on for three years, even if he should die sooner. *Held*, that the profits went to the life tenant as income. *Heighe v. Littig*, 52 R. 510.

3. The Doctrine of Equitable Conversion.

88. General rule. — Money or land is considered in equity as that species of property into which it is directed to be converted, where money is directed to be employed in the purchase of land, or land is directed to be sold and converted into money, and this in whatever manner the direction is given. *Collins v. Champ*, 61 D. 179.

A mortgagee may convert the mortgage into real estate as between his real and personal representatives, by declaring his intention so to do; and such intention is effectually manifested by devising the lands mortgaged to one and his heirs and assigns. *Chase v. Lockerman*, 35 D. 277.

Where the testator, after having devised in trust, provides as follows: "Should my views in the above first article of this will be disappointed, so that judicially or otherwise a sale should take place of said City Hotel buildings and grounds during the life of my children, it is my will and I direct that my trustees, or any court of equity, shall cause the proceeds of sale to be invested in mortgage or ground-rents, or in debt of the United States, or of the city of Baltimore; and that, subject to the payment of one-third of the income of the investment to my wife during her life, the said investment shall be for the benefit of my children during their lives, and after their death shall be the property, for the shares of the decedents, of their respective children or descendants, *per stirpes*; the children or descendants of such of my children as shall have died before the investment, taking as their absolute property, and *per stirpes*, the shares to which, if they had lived, the deceased would have been entitled,"—*held*, that as equity treats as done that which ought to be done, if upon the failure of the first article, parties became entitled to the proceeds of sale when effected, they would have a right to resort to a court of equity for a sale which would produce those proceeds; and that in substance the will is the same as if it directed a sale to take place in case the views in the first arti-

For index to Notes in American Decisions and American Reports, see Volume I.

de could not be carried out. *Barnum v. Barnum*, 90 D. 88.

89. Effect of express direction to sell. — Equitable conversion of realty into personalty occurs where a testator devises his realty to his executors in trust to sell and to apply the proceeds to certain uses, and the property becomes personalty immediately upon the testator's death, for all the purposes of the disposition, as effectually as if the testator had himself sold the land and bequeathed the proceeds in the same way. *Kane v. Gott*, 35 D. 641. S. P., *Proctor v. Ferebee*, 36 D. 34; *Tazewell v. Smith*, 10 D. 533; *Bramhall v. Ferris*, 67 D. 113.

Where a testator directs his real estate to be sold, and the money arising therefrom to be paid to particular persons, the interest of the legatees is a vested one, as much as if the land itself had been devised, although the executor may have a discretion as to the time of selling, and although the estate to be sold is only a remainder. *Tazewell v. Smith*, 10 D. 533.

The death of the devisee of such vested interest, before sale, will not defeat the interest, unless so provided in the will. *Ib.*

Where land is directed to be sold on a certain condition, it is not thereby converted into personal estate; but, if a valid sale is made, the surplus proceeds must be treated as personalty. *Evans v. Kingsberry*, 14 D. 779.

Equity considers as money lands directed in a will to be sold and converted into money; and where a testator directs his executors to sell all his real and personal property, and pay over the proceeds to his son's guardians, whom he directs to use the interest for the support and education of his son, and to pay to him the principal on his attaining his majority, such realty will be considered as having been, by the directions of the will, converted into money, although it was never sold by the executors. *Burr v. Sim*, 29 D. 48.

Said son may, on attaining his majority, elect to treat the real estate unsold as land, and the fact that he thereafter devises it as such, is proof of his determination so to reconvert it. *Ib.*

By making such election, he takes as a purchaser, and not by inheritance, and any portion of such estate undisposed of by him goes, under the act of 1794, to his heirs on the maternal as well as to those on the paternal side. *Ib.*

A devise of such real estate by him without words of inheritance passes a life estate only. *Ib.*

Land is regarded as money when devised to trustees to be sold, and the proceeds applied to the use of one for life, and afterwards distributed among certain parties in remainder, and a remainderman, before an election to take the devise as land, has no interest in the land which will enable him

to defeat the operation of the statute of limitations in favor of one in adverse possession under a conveyance from one of the trustees, and a subsequent election does not affect the purchaser. *Smilie v. Biffle*, 44 D. 156.

A devise must be treated as of money and not of land, when by the provisions of a will real estate was to be converted into money, and that money distributed among the devisees; nor does it make any difference in this respect that the legal title descended to the devisees to whom the money is to be paid when the land is sold. *Baker v. Copenbarger*, 58 D. 600.

Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted. *Rankin v. Rankin*, 87 D. 205.

90. Effect of mere discretionary power to sell. — A devise in which the testator simply directs land to be sold by his executors, and the proceeds applied to the payment of his debts, conveys to the executors a mere power to sell, and the fee passes to the heir, to become divested whenever the power is exercised. *Ware v. Murph*, 33 D. 97.

91. Time at which conversion takes effect. — Land directed by testator to be sold upon the happening of a certain event, the proceeds to be divided among his children and their heirs, becomes personal estate upon the happening of that event; the division of the proceeds is then to take place, and must be among those of his children who were then living, and the heirs of those who were then dead. *Brothers v. Cartwright*, 64 D. 563.

Land directed by will to be sold immediately, and proceeds to be then divided, is personal estate from the testator's decease. *Ib.*

VI. CONTESTING A WILL FOR INCAPACITY OR UNDUE INFLUENCE.

92. Jurisdictional questions. — Equity will not set aside a will on a suggestion of fraud or imposition on the testator in procuring him to make it. *Lyne v. Guardian*, 13 D. 509.

Chancery cannot set aside a will or codicil as to real estate on the ground of fraud or incompetency of the testator. The question should be determined in a court of law on an issue from chancery of *devisavit vel non*. *Rogers v. Rogers*, 20 D. 716.

Chancery has no jurisdiction to try the validity of a will of personalty, except upon an appeal from the surrogate. *Colton v. Ross*, 22 D. 648.

The validity of a will of realty may be decided upon in chancery, where it comes in question collaterally; but if the heir insists

For Index to Notes in American Decisions and American Reports, see Volume I.

upon its invalidity in his answer, an issue is awarded to try the question at law. *Ib.*

The heir cannot file a bill to set aside a will on the ground of the testator's incompetency, if objection is made at the proper stage of the suit. *Ib.*

If the defendant does not object to the jurisdiction in such a case, the court may award an issue *deviseavit vel non*, and upon the finding of the jury, pronounce the will invalid. *Ib.*

Courts of chancery in England have no power to determine the validity of a will of either real or personal property. Their comprehensive jurisdiction to set aside other fraudulent instruments does not extend to wills obtained by fraud. *Stato v. McGlynn*, 81 D. 118.

Surrogates, having exclusive jurisdiction of the proof of wills of personalty, must necessarily determine all questions of fraud, imposition, undue influence, and testamentary capacity, in the case of such a will. *Clark v. Fisher*, 19 D. 402.

93. Right of action.—A widow cannot maintain a suit to set aside her husband's will while retaining the personal property taken by her under the will, which was in excess of the amount to which she was entitled under the law. *Ruliff v. Baldwin*, 92 D. 330.

One who receives a legacy under a will is estopped from contesting the validity of the will, without repaying the amount of the legacy or bringing the money into court. *Holt v. Rice*, 20 R. 138.

94. The proper parties.—Proceedings establishing or annulling wills are *in rem*, and bind the whole world. All persons interested may become parties and present proofs, either for or against the establishment or annulment of the will. *Wells v. Wells*, 16 D. 150.

95. Rules of pleading and evidence, generally.*—A petition to set aside a will should contain all the grounds necessary to effect that purpose, and other points brought out on the trial by proof should not be submitted by the judge to the jury. *Vickery v. Hobbs*, 73 D. 238.

In a proceeding impeaching the validity of a will, it is improper to render final judgment on a demurrer to the answer. Whether the writing in question is the last will and testament of the party, is a question which must be tried by a jury. *Walker v. Walker*, 82 D. 474.

A canceled will, written by the testator, and found among his papers, made when his mind was sound, and he was not assailed by intrigue, may be given in evidence to show his intentions as to the disposition of his property, and also to show his manner of canceling a will which he meant to annul.

* Declarations of testator, to impeach or invalidate the will, see notes, 52 D. 167-168; 62 D. 80-81.

where a subsequent will is impeached on the ground of fraud or of the testator's incapacity. *Irish v. Smith*, 11 D. 848.

The certificate of oaths of witnesses at the probate of the will may be offered in evidence by either party, in the trial of an issue out of chancery to determine the validity and execution of a will, but it is to receive such weight only as the jury may think it deserves, in connection with the other proof in the case, for such trial is *de novo*, without regard to the fact of previous probate. *Rigg v. Wilton*, 54 D. 419.

As to sanity or capacity of testator, no particular quantum of evidence is necessary on the trial of an issue out of chancery, but the jury hear the proofs of the parties and decide the issue like any other question of fact, according to the weight of the evidence. *Ib.*

Evidence *dehors* the will, that it was made under a mistake as to the supposed death of the son of the testatrix, whose name was omitted therefrom, is inadmissible to impeach the will, but the mistake must appear on the face of the will, and it must also appear what the will would have been but for the mistake. *Gifford v. Dyer*, 57 D. 708.

In a suit to contest the validity of a will, the contestees offered in evidence the alleged will, with the order of the court admitting it to probate, and rested their case. The contestant then concluded his testimony impeaching the validity of the will, after which the contestees were permitted to introduce general evidence against the objection of the contestant, sustaining the will. *Held*, that the evidence was properly admitted. *Runyan v. Price*, 86 D. 459.

96. What constitutes incapacity.—The best form in which the question of testamentary capacity can be stated to the jury is, whether the testator's mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will; and in determining the question the competency of the mind should be judged of by the nature of the act to be done, from a consideration of all the circumstances of the case. Rules of testamentary capacity criticised. *Irish v. Newell*, 14 R. 79.

If there be partial insanity only, and the will is the direct offspring of it, it will be invalid, although the general capacity be unimpaired. *Potts v. House*, 50 D. 329; *Cotton v. Ulmer*, 6 R. 703.

A will is invalidated by delusion, where it is the result of the delusion, but not otherwise, as a general rule. *Lucas v. Parsons*, 71 D. 147.

Belief that one is tormented by witches, devils, or evil spirits, is not sufficient evidence of insanity, when the person is otherwise capable of managing his business, particularly when it appears that he was most

For Index to Notes in American Decisions and American Reports, see Volume I.

troubled with these hallucinations when he was drinking. *Lee v. Lee*, 17 D. 722.

Aversion to relations is not evidence of insanity where ill treatment is assigned as a reason for it, and there are grounds for believing it well founded. *Ib.*

Singularity should not be confounded with insanity, nor a weakened intellect mistaken for one that is lost, in determining the question of testamentary capacity. *Kinne v. Kinne*, 21 D. 732.

Eccentricity, however great, is not sufficient, of itself, to invalidate a will; neither is the greatest singularity, nor extreme old age, nor being deaf and dumb, whether so from infancy, or by misfortune superinduced by subsequent cause. *Potts v. House*, 50 D. 329; *Lee v. Lee*, 17 D. 722.

Belief in witchcraft is not of itself evidence of such insanity as disables a person to make a will. *Addington v. Wilson*, 61 D. 81.

Resentment of a testator against a son not amounting to delusion will not vitiate a will prejudicial to the son, made in accordance with previously declared intentions. *Lucas v. Parsons*, 71 D. 147.

In the contest of a will, the judge charged that "unless the jury believe from the evidence that the testator, if of sound mind, would have included C. or his children in the benefit of his will, they cannot set the will aside because he may have excluded them under an insane delusion as to C." *Held*, error, on the ground that when a will is ascertained to be the result of an insane delusion it should be declared void, without inquiring what the testator would or would not have done if he had been of sound mind. *Cotton v. Ulmer*, 6 R. 703.

W. was, by a stroke of paralysis, rendered unconscious and incapable of mental action. Four months afterwards he made a will. *Held*, not a presumption of law that his unsoundness of mind continued until after the making of the will. *Irish v. Newell*, 14 R. 79.

97. And how proved. — To impeach a will evidence may be received which goes to show that the testator had a paralytic stroke some time before its execution, by which his intellect was impaired, and so continued to the making of the will and afterwards. *Irish v. Smith*, 11 D. 648.

A statement made in the testator's presence, by his wife, "that he did not attend to business, that he was incapable," to which he said nothing, is admissible in evidence. *Ib.*

Book entries made by the testator may be evidence in favor of his sanity, but not conclusive, and the jury must determine its weight. *Ib.*

Inferences of mental infirmity from conversations with the testator cannot be drawn without disclosing to the jury the nature of the conversations. *Ib.*

Incapacity to make a will may be inferred

by the jury from facts anterior and subsequent to its execution, where there is no evidence of such infirmity at the time of execution, and the subscribing witnesses are uncontradicted. *Ib.*

The testimony of the subscribing witnesses to a will is not conclusive as to the sanity or insanity of the testator. *Howard's Will*, 17 D. 60.

To invalidate a will there must be extrinsic proof of insanity existing at its execution, or the act must be so irrational as to afford intrinsic evidence of it. *Lee v. Lee*, 17 D. 722.

The number, character, and intelligence of witnesses, and their opportunities for observation, should be taken into the account upon a question of insanity. *Ib.*

Mere decay of testatrix's faculties, occasioned by extreme age, is not sufficient evidence of the want of a disposing mind, where her mind was always rational, and, when it acted, consistent and intelligent. *Higdon's Will*, 22 D. 84.

Incapacity may be established by proof of conversation, acts, or declarations of the testator inconsistent with sanity, or by all of them taken together. *Davis v. Calvert*, 25 D. 282.

The contents and manner of execution of a will, the circumstances under which it was made, the testator's situation, the condition and relative situation of the legatees and devisees, and of the testator's connections, their claims upon him, and the terms on which he stood with them, and the nature and extent of his estate, are all proper to go before the jury in determining the question of incapacity. *Ib.*

Testator's mental condition at the time of making the will determines as to his testamentary capacity; but evidence of his condition before and afterwards may be admissible to throw light on his condition at the time of execution. *Terry v. Buffington*, 56 D. 423.

Evidence of testator's incapacity several years after making the will is, by itself, inadmissible to impeach his will; but such evidence is admissible after proof that his condition at such subsequent time was the same as at the making of the will. *Ib.*

A judgment of lunacy against testator five years after making the will is, it seems, inadmissible to impeach the will, even though there is independent proof that the testator's mental condition at the date of the inquisition was the same as at the date of the will. *Ib.*

Declarations of testatrix tending to show importunity and undue influence, made about the time of executing the will are admissible in evidence to prove the state and condition of her mind when the will was executed, but not to prove that such undue influence and importunity were exercised. *Robinson v. Hutchinson*, 60 D. 293.

For Index to Notes in American Decisions and American Reports, see Volume I.

To aid in determining whether the will resulted from excitement of existing intoxication, its disposing parts may be examined to ascertain whether they appear to be so extravagant and unreasonable that they cannot fairly be attributed to any other than a disordered mind. *Peck v. Cary*, 84 D. 220.

A testator made a will after he was found to be a lunatic with lucid intervals. *Held*, in a feigned issue on this will, that instructions given by him a short time before he was found lunatic, for another will, which was drawn accordingly, and which differed from that in dispute, were admissible in evidence on the question of testamentary capacity. *Tillou v. Tillou*, 93 D. 691.

A change of intention on part of testator in relation to his will is of no importance, if there was a sound mind unconstrained; but when the question is whether there was such a mind, such change may be adduced to aid the inquiry. *Ib.*

Frequent declarations made by testator within ten years before his death that he liked a brother better than his other relations can have no bearing on the question of the testator's sanity. *Ib.*

Declarations of a testator are admissible to show the condition of his mind; and great latitude is to be allowed in the admission of such evidence. *Robinson v. Adams*, 16 R. 473.

98. Burden of proof as to sanity. — The sanity of a testator is presumed until the contrary be shown by the party alleging mental unsoundness, but if mental derangement be proved, it is then incumbent on the devisee to show a lucid interval. *Jackson v. Van Dusen*, 4 D. 330. S. P., *Case of Cochran's Will*, 15 D. 116.

It is incumbent upon those who claim under a will to prove, not only its due execution, but that the testator was of sound and disposing mind, and such persons are entitled to open and close the case both in proof and argument. *Comstock v. Hadlyme Ec. Soc.*, 20 D. 100. S. F., *Gerrish v. Nason*, 39 D. 589.

The onus is upon a party attacking a will when its formal execution is admitted, and it has been admitted to probate, but it is sought to set it aside on the ground of incapacity in the testator. *Farrell v. Brennan*, 82 D. 137. S. P., *Trumbull v. Gibbons*, 51 D. 253; *Taylor v. Wilburn*, 64 D. 186.

Every person is presumed to be of sound mind and memory, unless the contrary is proved. The burden of proof is therefore upon the party who asserts unsoundness of mind, unless a previous state of insanity is proved, in which case the burden is shifted to him who claims under the will. *Higgins v. Carlton*, 92 D. 666. S. P., *Clark v. Fisher*, 19 D. 402; *Tillou v. Tillou*, 93 D. 691; *O'Donnell v. Rodiger*, 52 R. 322.

After probate of a will, sanity of testator

is always presumed in favor of the will, and insanity must be proved by him that alleges it. *Higgins v. Carlton*, 92 D. 666. S. P., *Lee v. Lee*, 17 D. 722.

In order to constitute an instrument a will, the jury must be satisfied from the proof that the testatrix knew, at the time of execution of the instrument, that it was her will; the legal presumption that a party knows the import of a paper signed by him, is not sufficient. *Gerrish v. Nason*, 39 D. 589.

To sustain the validity of a will attacked on the ground of the insanity of the testator, it is generally sufficient to show that he was of sane mind at the time of its execution. *Taylor v. Wilburn*, 64 D. 186.

Where a will contains a series of wise and judicious dispositions, it is for those who attack it to prove unsoundness of mind in the testator at its execution. *Chandler v. Barrett*, 99 D. 701.

Where a will contains dispositions such as would cause insanity to be presumed, although susceptible of being justified by peculiar circumstances, it is for the legatee to prove the sanity of the testator as against the terms of the will. *Ib.*

If facts occurring near the date of a will, and preceding and following it, prove an habitual state of insanity, then, notwithstanding the wisdom of the act, the supporters of the will must prove soundness of mind in the testator during the intermediate time. *Ib.*

If acts of insanity on the part of the testator were rare, and occurred at periods distant from each other, and from the date of the will, it will sustain itself, and be presumed to have been made in a lucid interval, at least if the will is not destitute of good sense, and betrays no insanity. *Ib.*

99. Effect of unjust character of will to show incapacity. — An unjust will is not necessarily an irrational act. *Lee v. Lee*, 17 D. 722.

Unreasonableness of the will is proper evidence with respect to the state of the testator's mind. *Clark v. Fisher*, 19 D. 402.

That the dispositions of a will are imprudent, and not to be accounted for, is not sufficient of itself to avoid it, but may furnish intrinsic evidence tending to show incapacity in the testator, and throwing suspicion upon the will, as where those having the strongest natural claims upon the testator's bounty are excluded without any apparent or known cause. *Davis v. Calvert*, 25 D. 282; *Higgins v. Carlton*, 92 D. 666.

A will cannot be set aside because of the court's disapprobation of the motive that actuated the testator, or of the disposition that he makes of his property, unless there is, not merely in the motives, but in the actual disposition, something which is against

For Index to Notes in American Decisions and American Reports, see Volume I.

good morals or against public policy. *Trumbull v. Gibbons*, 51 D. 253.

A person competent to make a will may disinherit his children, and his motives therefor cannot be called in question. *Addington v. Wilson*, 61 D. 81.

Disinheriting children is of no weight, further than as a circumstance to be considered with other evidence tending to show insanity or other mental defect. *Ib.*

Evidence that testator disinherited children for undutiful conduct, which he attributed to the fact of their being bewitched, is not evidence of his insanity. *Ib.*

The mere omission of a child by testator is not of itself sufficient to impeach his capacity to make a will. *Kirkwood v. Gordon*, 62 D. 418.

A person of sound mind may dispose of his property in any manner he pleases, consistent with the policy of the law, and it is not a valid objection to a will that the testator gave his property to his wife or to strangers to his blood, provided he was mentally competent and free from undue influence at the time. *Higgins v. Carlton*, 92 D. 666.

The jury have no right to reject the will because they think its provisions are unjust and injudicious, although its provisions may be considered by them in deciding the question of the testator's capacity or incapacity. *Ib.*

Neither old age, forgetfulness of family, largeness of the legacy, nor low rank of the legatee, will of themselves show insanity in the testator. *Chandler v. Barrett*, 99 D. 701.

100. What constitutes fraud or undue influence.—1. *Fraud*.—A person has a right, by fair argument and persuasion, to induce another to make a will, and even to make it in his own favor. *Miller v. Miller*, 8 D. 651.

A will induced by fraud, imposition, or undue influence, which makes a different disposition from that which the testator would otherwise have made, will be set aside in a court of equity. *Clark v. Fisher*, 19 D. 402; *Davis v. Calvert*, 25 D. 282.

Fraud and undue importunity are equally fatal to a will made under their influence, though they stand on different grounds. *Terry v. Buffington*, 56 D. 423.

But fraud or undue influence to invalidate a will must have some effect upon the testator in producing the very act of making his will. *Monroe v. Barclay*, 93 D. 620. But no direct or immediate act of fraud or undue influence exerted at that time need be shown. *Davis v. Calvert*, 25 D. 282.

Misrepresentation not producing a direct effect in influencing a bequest to the party misrepresenting will not vitiate a will. *Taylor v. Kelly*, 68 D. 150.

Where any part of a will was first suggested

by another, it must appear that its adoption by the testator was not due to mental incapacity, fraud, or undue influence. *Davis v. Calvert*, 25 D. 282.

Appeals to affection, attachment, and sense of duty and obligation, accompanied by honest intercessions and modest persuasions, will not, in the case of a testator of competent, sound mind, vitiate the execution of a will; but a person of weak mind or laboring under sickness may, by false statements, subtle insinuations, and encouraged enmities against kindred, be moved to make a will which may be set aside on the ground of fraud and undue influence. *Floyd v. Floyd*, 49 D. 626.

A fraudulent prevention of a revocation of a will, it seems, will not afford a ground for setting it aside. *Ib.*

A direction by testator that his will shall be drawn, containing the condition that it shall be valid only in the event of his death during his then sickness, and void if he should recover, must be complied with and the condition inserted, and it will be held a fraud if it is not so inserted; and no subsequent declaration by the testator that he is satisfied with the will, if thus deceived, operates to make it valid. *Vickery v. Hobbs*, 73 D. 238.

Where a will is drawn by a legatee or other beneficiary, closer scrutiny and stricter proof will be required than under ordinary circumstances that no fraud has been committed upon the testator, and that he is fully competent to make a will. *Ib.*

A testator, having several children, made a will giving all his estate to his wife, except a dollar to each child; this was because there was a large judgment against one of his sons, which the father did not wish his estate to pay; the son had, in fact, compromised the judgment, but failed to inform his father; he had also urged the making of a will, but there was no proof that he induced, or that the concealment induced, the making of the will in this form. *Held*, that there was no ground for setting aside the will. *Allmon v. Pigg*, 25 R. 303.

2. *Undue influence*.—The influence to avoid a will must be such as to destroy the freedom of the testator's will, and must be specially directed in favor of particular parties, or such as was intended to, and did, to some extent, mislead him to make a will essentially contrary to his duty. *Allmon v. Pigg*, 25 R. 303; *Floyd v. Floyd*, 49 D. 626; *Baldwin v. Parker*, 96 D. 697; *Taylor v. Kelly*, 68 D. 150. It must be more than the influence of affection or attachment, or the mere desire of gratifying the wishes of another, and there must be satisfactory proof that the will was obtained by this coercion. *Higgins v. Carlton*, 92 D. 666. But moderate and reasonable solicitation, entreaty, or persua-

For Index to Notes in American Decisions and American Reports, see Volume I.

sion, though yielded to, if done intelligently and from a conviction of duty, will not vitiate a will in other respects valid. *St. Leger's Appeal*, 91 D. 735; *Gilbert v. Gilbert*, 58 D. 268. And the burden of proof is on the party who alleges the undue influence. *Woodward v. James*, 51 D. 649.

That some of the devisees were slaves at the time of the making of the will, and therefore incapable of taking, where there is a contingent devise over to one of the caveatees, who is charged with undue influence in procuring the will, is a material subject of inquiry. *Davis v. Calvert*, 25 D. 282.

Influence acquired over a testator by kind offices, or even by persuasion, unconnected with fraud or contrivance, is not such undue influence as will invalidate a will. *Trumbull v. Gibbons*, 51 D. 253.

Where a will is impeached on the ground of undue influence, exercised over the weak intellect of the testator, the inquiry is not merely whether the testator was under restraint at the time of the execution of the will, but whether an influence had been acquired, and did operate in the disposition of his property by the testator. *Taylor v. Wilburn*, 64 D. 186.

A verdict that a will was the free and voluntary act of a testator, and not void because of undue influence alleged to have been exerted by the principal legatee, who, it was proved, wrote the will, is supported by evidence that the testator could read and write; that he manifested a deep interest in the will, and that when the subscribing witnesses came to sign the will, he, without assistance, drew it from his bed, where he had it with him. *Webb v. Fleming*, 76 D. 675.

An influence generated by lawful relations, such as legitimate family and social relations, is not such an influence upon a testator as will invalidate his testamentary disposition of his property, unless it is exerted over the very act of devising so as to prevent the will from being truly the act of the testator. If this influence arises from unlawful relations, and should be exercised, it would be an unlawful influence; if a will is made under such influence, it is proper to submit the question to the jury to determine whether or not it had unduly affected the mind of the testator while making his will. *Dean v. Negley*, 80 D. 620.

Undue influence to avoid a will is a question of fact for the jury. *Monroe v. Barclay*, 93 D. 620.

A will cannot be invalidated for undue influence in the absence of fraud, no matter by what influence a testator may be moved, so long as he is put under no restraint which overpowers his inclinations and judgment, and induces a disposition of his property contrary to his own wishes and desires. *Ib.*

A will cannot be invalidated because pro-

duced by influences springing from a lawful or unlawful marital relation, unless such influence has been unduly exerted; and to have the effect of avoiding the will, the influence must place some restraint upon and prevent the free exercise of the testator's judgment and motives in making the will. *Ib.*

Undue influence growing out of unlawful marital relations to avoid a will should be left with the other evidence for the jury to determine. *Ib.*

The line between issues of sanity and of undue influence is not easy to draw, where influence has been exerted upon a person of feeble mind, or whose faculties are impaired by age or disease. *Baldwin v. Parker*, 96 D. 697.

A belief in so-called spiritualistic communications or revelations is not, in itself, an insane delusion. These communications come under the general rule as to undue influence; if they influence the mind of a testator, but do not control it in making his will or any part of it, the will is not void on the ground of undue influence. *Robinson v. Adams*, 16 R. 473.

The fact that a draughtsman of a will was then the testator's overseer or guardian, appointed under a statute authorizing such appointment when any one was wasting his estate by reason of intemperance, debauchery, or mismanagement, and is appointed executor in such will, does not disqualify him from acting as such draughtsman, nor justify the inference that the will is the outgrowth of his undue influence over the testator. *Peck v. Cary*, 84 D. 220.

A will may be valid although the draughtsman is a beneficiary under it, but it will be carefully scrutinized. *Oheatham v. Hatcher*, 32 R. 650. S. P., *Post v. Mason*, 43 R. 639; *Montague v. Allan*, 49 R. 334; *Yardley v. Outhbertson*, 56 R. 218.

A will made under the general controlling and continuing influence of fear or dominion over the testator, by one who has put him in fear, is invalid, though such influence is not immediately exercised with respect to the will; and proof of threats or violence, at the time of making the will, is unnecessary. *Davis v. Calvert*, 25 D. 282.

3. *Importunity.**—Importunity and undue influence are not inseparably connected with fraud, but may be fraudulently exerted. *Ib.*

Not every degree of importunity will invalidate a will; honest and moderate intercession, persuasion, or flattery, unaccompanied by fraud or deceit, and where the testator is not threatened or put in fear, will not have that effect. *Ib.*

Great and overruling importunity and undue influence without fraud, may, under

* Influence or importunity sufficient to invalidate will, see note, 16 D. 257-263.

For Index to Notes in American Decisions and American Reports, see Volume I.

particular circumstances, avoid a will. *Id.*

A degree of importunity or undue influence which destroys the free agency of a testator, and renders the will not his free, unconstrained act, is sufficient to invalidate it, not only as to the person using such influence, but as to all others intended to be benefited by it. *Id.*

To invalidate a will on the ground of undue influence, the influence must be an unlawful importunity, on account of the manner or motive of its exertion, and by reason of which the testator's mind was so embarrassed and restrained in its operation that he was not master of his own opinions in respect to the disposition of his estate. *Potts v. House*, 50 D. 329.

101. Proof of fraud or undue influence.* — Where any influence has been used to induce the execution of a will, the jury shall decide whether it was by fair and reasonable means, or by unfair and fraudulent ones; in the former case they should find in favor of the will, in the latter against it. *Belbeck v. Gruberry*, 2 D. 624.

Evidence is inadmissible showing that one of the devisees had, by various discourses, intimated that he had procured the will to be made, and that it was read to him, and that he had given the reason why his brothers and sisters got so small a portion. *Miller v. Miller*, 8 D. 651.

Where a will was contested on the ground of fraud, undue influence, and incompetency of the testator, and it appeared that he was a man of deficient understanding and education and of intemperate habits, and that the writer of the will was one of the executors and principal legatees, — held, that the testator's declarations subsequent to the making of the will, showing that he thought its provisions to be different from what they were, were admissible in evidence. *Reel v. Reel*, 9 D. 632.

Declarations made by a testator a short time before the execution of his will are admissible in evidence to prove fraud in its execution. *Roberts v. Trawick*, 52 D. 164.

Declarations of a testator, tending to show that his mind and faculties were impaired, and that a will was procured by undue influence, are admissible to impeach the validity of the will. *Bates v. Bates*, 1 R. 260.

Retention of a will unrevoked, where the testator had full opportunity to revoke it, furnishes a strong presumption that he intended it to stand, though it might have been unfairly obtained at first; but no such presumption arises where the testator was taken ill and died shortly after executing the will, and where, from its execution until his death, his intellect was too weak to enable him to judge of the propriety of revoking it;

and of this the jury are to judge, where the will was originally procured by fraud and undue influence. *Irish v. Smith*, 11 D. 648.

Evidence of illicit relations between the testator and a woman to whom and her children the whole estate was given, and that she was a woman of dissolute character, and, while inducing the testator, an old and feeble man, to confide in her fidelity, was carrying on lewd intercourse with other men, is admissible, as tending to show undue influence. *Davis v. Calvert*, 25 D. 282.

Evidence that the mistress's children were not the testator's, in such a case, and that by reason of age and infirmity he was incapable of begetting children, where the will shows that he provided for them under the belief that they were his offspring, is admissible. *Id.*

The unlawful cohabitation of a testator with the mother of an illegitimate child, a legatee in the will, is not of itself sufficient evidence to justify a jury in finding undue influence on the part of the mother. *Rudy v. Ulrich*, 8 R. 238.

Undue influence is not to be presumed from the fact that a testator devises all his estate to a woman with whom he was unlawfully cohabiting, to the exclusion of his kindred. *Porschet v. Porschet*, 56 R. 880.

Convincing evidence of undue influence, fear, or constraint in the making of a will is necessary to be shown to overthrow it. *Woodward v. James*, 51 D. 649.

The fact that the testator willed his property to his son, who had great influence with him, and gave nothing to his daughter, is not of itself sufficient evidence to establish undue influence. *Id.*

To establish undue influence in the procurement of a will, it is sufficient to show that the will was executed afterwards under the control of such influence, and that by reason of it the testator was deprived of that free agency indispensable to the making of a valid testamentary disposition of his property. *Roberts v. Trawick*, 52 D. 164.

A testator's acts and declarations before and at the making of a will, showing friendly or affectionate feelings for a son or other relative excluded therefrom, are competent evidence on the question of undue influence. *Gilbert v. Gilbert*, 53 D. 268.

Acts of officious intermeddling with a testator, tending to harass him, and showing a purpose to hurry him into the execution of his will without deliberation, are evidence of undue influence. *Id.*

The testimony of the relatives of a testator that they never heard of a will until a short time before offer for probate, though they lived near the testator, is incompetent on the question of undue influence. *Id.*

The fact that a draughtsman of a will takes a legacy under it is at most only a suspicious circumstance, which may be of

*Declarations of testator to show undue influence, insanity, or imposition, see note, 3 D. 395-399.

For Index to Notes in American Decisions and American Reports, see Volume I.

more or less or no weight, according to its connection with other circumstances indicative of fraud or undue influence. *Coffin v. Coffin*, 80 D. 235.

Undue influence in respect to a legacy is presumed when the relation of attorney and client subsists between the testator and the legatee by whom the will is drawn; but this presumption is one of fact, and not of law, and may be rebutted by any proper evidence that satisfies the jury. There is no rule of law that requires the intervention of a third person. *St. Leger's Appeal*, 91 D. 735.

The preference of collateral relatives over a wife in a will does not necessarily show undue influence or fraud, nor does it, in the absence of further proof, impeach the validity of the will. *Coffin v. Coffin*, 80 D. 235.

Secrecy in the execution of his will, contrived by testator himself, is not to be regarded as in any wise impeaching its validity. *Ib.*

Undue influence in execution of a will cannot be presumed. *Baldwin v. Parker*, 96 D. 697.

Where a person, standing in a relation of confidence to a testator who was old and in extremis, prepared a will in his own favor, and procured a kinsman of his to witness the same, and caused the relatives and friends of the testator to leave the room while the will was read and executed, — *held*, that the jury had a right to infer, from these facts and circumstances, fraud or undue influence, and that the onus was on the party propounding the paper to prove that it expressed the true will of the testator. *Harvey v. Sullens*, 2 R. 491.

The condition, character, and conduct of persons around the testator are important subjects of inquiry, in reference to his situation, family, and relations, the extent and nature of his estate, the dispositions of the will, and the devisees under it, in determining whether it was obtained by undue influence and fraud. *Davis v. Calvert*, 25 D. 282.

On a trial of the validity of a will, opposed on the ground of want of mental capacity and undue influence by a second wife, it is error to exclude evidence of occurrences in the testator's family within a year before the execution of the will, showing the private history of the family and the testator's relations with his wife, and the means employed by her to wean his affections from the step-children and obtain benefits for herself. *Reynolds v. Adams*, 32 R. 15.

102. How disproved. — Where a testator has opportunity to revoke his will, subsequent to the operation of an alleged undue influence upon him, but does not, the conclusion which might have been drawn therefrom is destroyed. *Floyd v. Floyd*, 49 D. 626.

Statements made by a deceased that he intended to disinherit his two daughters, are

admissible, where he afterwards did so, to rebut evidence of undue influence. *Roberts v. Trawick*, 52 D. 164.

A subsequent ratification after a removal of undue influence destroys the effect of such undue influence as a ground for assailing the validity of a will. *Taylor v. Kelly*, 68 D. 150.

103. Burden of proof. — The burden of proving undue influence in the execution of a will is upon the party alleging it, where the separate and distinct issue is whether the execution of the will, made by a free agent and person of competent understanding, was procured by undue influence. *Baldwin v. Parker*, 96 D. 697. And he is entitled to open and conclude the case in the trial of an issue out of chancery, under Illinois revised statutes, chapter 109, section 6. *Rigg v. Wilton*, 54 D. 419.

As the burden of proof is upon him who alleges undue influence, where that is a separate and distinct issue, it does not shift to the party having the general burden of establishing the will, upon the mere introduction of evidence of a single circumstance of suspicion. *Baldwin v. Parker*, 96 D. 697.

Where it appeared that the devisee had been appointed the guardian of the testator when the latter was a child; that from the time of such appointment until his death he resided in the family of the guardian; that the latter had exclusive control and management of his estate, and his entire confidence; that just prior to arriving at age a settlement was had between them, and on the next day the ward made his will in favor of the guardian and his family, almost totally disinheriting his relatives; that at the time he was too ill to attend to business, and showed no interest in what was going on, and about a month afterwards died, — *held*, that the will was presumptively void, and the burden of proving its validity upon the beneficiaries under it. *Garvin v. Williams*, 10 J D. 314.

VII. ACTIONS FOR CONSTRUCTION AND ESTABLISHMENT OF WILLS.

104. Jurisdiction.* — The construction of a will is purely a matter of common-law jurisdiction; while the question whether it ought to be approved and allowed is one of purely probate jurisdiction. *Small v. Small*, 16 D. 253.

Where questions of title are involved, or the decision of the case brings in question the construction of a will, it is proper to invoke the jurisdiction of the district court. *Little v. Birdwell*, 73 D. 242.

Courts of equity have power to correct mistakes in a will, where they clearly appear on its face, or are made to clearly appear from a legal construction of its terms. *Eatherty v. Eatherty*, 78 D. 499.

* Reforming and correcting wills in equity, see note, 66 D. 633-67.

For Index to Notes in American Decisions and American Reports, see Volume L.

Equity cannot, on parol proofs, relieve against a mistake in a will, by reforming the will so as to conform it to the instructions alleged to have been given by the testator to the scrivener. *Avery v. Chappel*, 16 D. 53.

105. The right of action. — Vagueness and obscurity of a will furnish no ground for an application to equity; for if not absolutely unintelligible, it will be valid at law as far as understood; and if it is so far devoid of meaning as not to amount to a designation of any corpus, it follows that there is no need of relief, for the devise is ineffectual. *Hough v. Martin*, 34 D. 403.

A complaint alleged that a testator, at the time of making his will, and thereafter until his death, owned lot 10 in a certain block; that the plaintiff at those times and ever since owned, in fee simple, lot 9 in the same block; that by said will the testator devised said lot 10 to plaintiff; but that in drawing the will, lot 10 was by mistake described as lot 9; that the will contained no other mention or description of said lot 10; and that at the time of the making of said will plaintiff was, and ever since has been, in the actual possession of said lot 10. Held, on demurrer, that there was nothing in the will, as thus described, upon which to base a construction of it as devising lot 10 to plaintiff. *Sherwood v. Sherwood*, 30 R. 757.

106. Evidence. — Parol evidence is not admissible to show the intention of a testator in making his will, and thereby to obtain a construction of the will, not warranted by its express terms. *Avery v. Chappel*, 16 D. 53.

All the subscribing witnesses to a will must, according to the rule of the English court of chancery, when a bill is filed to establish a will, be called and examined by the complainant, if they are living and competent to testify, in order to give the adverse party an opportunity to cross-examine them respecting the sanity of the testator, and the circumstances attending the execution of the will. This rule also applies to the trial of an issue of *devisavit vel non* out of chancery. *Jamney v. Thorne*, 45 D. 424.

WINDING UP.

See DISSOLUTION.

WITHDRAWAL.

Of admissions or declarations, see EVIDENCE, 162.

Of evidence, see TRIAL, 52.

Of instructions, from jury, see TRIAL, 82.

Of pleadings, see PLEADING, 168.

WITNESSES.

[Includes rules relative to the taking of oral testimony on the trial of actions, civil or criminal. Rules relative to the taking of written testimony will be found under AFFIDAVITS and DEPOSITIONS.]

Attesting, to wills, see WILLS, 22-27.

Comments by judge on credibility of, see TRIAL, 86.

Continuance for non-attendance of, see TRIAL, 13, 129.

Declarations of witness who can be produced, see EVIDENCE, 130.

List of, on indictment, see INDICTMENT, 36.

New evidence to impeach, not ground for new trial, see NEW TRIAL, 40.

Oath to, on taking deposition, see DEPOSITIONS, 5.

Privilege of, from arrest, see ARREST, 11.

Recusant, see CONTEMPT, 11.

Service of list of, on accused, see TRIAL, 124.

Testimony of, on former trial, see EVIDENCE, 70, 197.

To bonds, see BONDS, 6.

I. ATTENDANCE AND COMPENSATION.

1. *Securing Attendance.*

2. *Fees.*

II. COMPETENCY.

1. *General Rules.*

2. *Parties to the Record.*

3. *Persons Interested in the Event.*

a. *General Principles.*

b. *Various Applications of the Common-law Rule.*

4. *Husband and Wife.*

5. *Attorneys; Physicians.*

III. CREDIBILITY.

1. *General Rules.*

2. *Impeaching and Contradicting.*

3. *Corroborating.*

IV. RULES OF EXAMINATION.

1. *Generally.*

2. *Examination in chief; Cross-examination; Re-examination.*

3. *Refreshing the Memory.*

4. *Privilege to Refuse to Answer.*

V. OPINIONS OF EXPERTS AND OTHERS.

I. ATTENDANCE AND COMPENSATION.

1. *Securing Attendance.*

1. *The subpoena and how served.*—

Where a defendant wishes to call plaintiff as a witness, under N. Y. stat. 1837, sec. 2, he must serve him with a subpoena, as he would any other witness. *Rapeley v. Prince*, 40 D. 267.

A party to a suit being present in the court may be called as a witness without being served with a subpoena. *Goodpastor v. Voris*, 74 D. 313.

2. *Subpoena duces tecum.*—A witness cannot refuse to produce books or papers, when required to do so by lawful authority, merely because they are private. *Burnham v. Morrissey*, 74 D. 676.

A telegraph operator, having possession of a telegraphic dispatch, may be compelled by a party to it, who is seeking to prove a contract by it, to produce it in court, although a statute forbids the operator divulging its contents to anybody but the person to whom it is addressed. *Woods v. Miller*, 39 R. 170.

For Index to Notes in American Decisions and American Reports, see Volume I.

3. Compelling attendance of witnesses for the defense in criminal cases.—The constitutional provision giving an accused the right of "having compulsory process for obtaining witnesses in his favor," simply means to say that the accused shall not be debarred the right of issuing subpoenas for his witnesses as in civil cases. *State v. Hornsby*, 41 D. 305.

Compulsory process to compel the attendance of witnesses can only be exercised when the witness resides or is found within the district. *Ib.*

4. Binding over witnesses to appear in criminal cases.—A recognizance to appear as a witness at a certain term of court imposes upon the comsee the obligation to appear, if the case is not heard at that term, at each succeeding term until the case is determined. *State v. Keyes*, 30 D. 450.

5. Witness' privilege from arrest.—A witness is privileged from arrest on civil process in another state than that of which he is an inhabitant, into which he goes for the sole purpose of attending court as such witness; and this, although he has not been summoned, and has not a writ of protection. *May v. Shumway*, 77 D. 401.

6. — and from civil process.*—Service of process upon a resident while voluntarily attending a trial as a witness is not void, but the court may set it aside, or change the venue, or grant any other appropriate relief. *Massey v. Colville*, 46 R. 754.

The service of a summons in a civil action upon a non-resident of the state, while attending as a witness in good faith the trial of an action in a court of this state, is irregular, and will be set aside. *Person v. Grier*, 23 R. 35.

A, a resident of New York, had pending in a Vermont county court, a suit in the name of another person against B, and came into Vermont for the sole purpose of testifying in said suit, and was a material witness, and as such, and as party plaintiff in interest, was in attendance at the trial. Within twenty minutes after A left the court room, B caused a summons to be served on him in a suit in B's favor against A, returnable before a Vermont justice of the peace, for substantially the same claim B had pleaded in defense to the suit against him by A. *Held*, that B was guilty of contempt of court, and an order was made committing him, unless he discontinued said suit brought by him. *In re Healey*, 38 R. 713.

2. Fees.

7. The right to fees.—A witness is entitled to pay for attendance, who attends and deposes in obedience to a subpoena which he has acknowledged by a written

indorsement. *Brown v. Moore*, 20 D. 142.

A person attending court as a witness in good faith may maintain an action to recover his legal fees for travel and attendance, if subpoenaed, whether he be examined or not, or if not subpoenaed, where he attends and is examined. *Gunnison v. Gunnison*, 77 D. 764.

A witness summoned to attend court, and remaining in attendance in good faith until the cause is tried or otherwise disposed of, no notice being given him that his attendance is no longer required, is entitled to fees for such attendance from the party summoning him, and if they be not paid, may maintain an action to recover them. *Ib.*

Who shall pay witnesses is much in the discretion of the court, and the question cannot be reviewed in the supreme court. *Brookshire v. Brookshire*, 47 D. 341.

8. Payment of fees a condition precedent to attendance.—A witness in a civil case is not bound to attend court after the time for which his fees have been paid or tendered to him. *Atwood v. Scott*, 96 D. 728.

9. Mileage.—A witness summoned and paid fees while residing in a state, if he afterwards removes to another state, is bound to attend court in pursuance of the summons, unless before removing he gives notice of his intention to leave, and is relieved from his obligation, or is subsequently released therefrom; but if he does attend in good faith, he is entitled to his fees for such attendance, and for the additional travel from the other state. *Gunnison v. Gunnison*, 77 D. 764.

10. Extra compensation to experts.*—A physician is punishable as for a contempt for refusing to testify as an expert, in a criminal case, without being paid for his testimony as for a professional opinion. *Ex parte Dement*, 25 R. 611. Contra, *Buchman v. State*, 26 R. 75.

On a criminal trial it seems that a physician, who has made a *post-mortem* examination, may be compelled to testify concerning its results, and his opinions derived therefrom. *Summers v. State*, 32 R. 573.

II. COMPETENCY.

1. General Rules.

11. Children.†—A child of any age may be a witness, if capable of distinguishing between good and evil. *State v. Whittier*, 38 D. 272.

The preliminary examination of a child is only necessary to satisfy the judge as to the propriety of admitting the child as a witness. *Ib.*

Although a child under fourteen years of age will not be presumed to have sufficient

* Professional witness, whether may be compelled to give an opinion without a professional fee, see note, 25 R. 619-625.

† Child witness, adjourning trial to instruct as to nature of an oath, see note, 38 R. 658, 659.

* Privilege of witness from service of civil process, see note, 38 R. 717-722.

For Index to Notes in American Decisions and American Reports, see Volume L.

understanding to testify, yet the law fixes no precise age when a witness shall be excluded. The admission or rejection of a witness under fourteen is discretionary, and a conviction will not be reversed because a witness six years of age was permitted to testify against the prisoner. *State v. Richie*, 28 R. 100.

A negro girl, nine years old, offered as a witness, said in answer to questions to test her competency, that "she did not know what the Bible was; had been to church but once, and that was to her mother's funeral; did not know what book it was she laid her hand on when sworn; had heard tell of God, but did not know who it was; and that if she swore to a lie she would be put in jail, but did not know she would be punished in any other way." *Held*, incompetent. *Carter v. State*, 35 R. 4.

In a criminal prosecution a child of six or seven years may be a competent witness, if the judge is satisfied of his intelligence and the jury are properly cautioned. *McGuire v. People*, 38 R. 265.

The fact that a female child of seven years of age was held incompetent to testify on a prosecution for attempt to have carnal intercourse with her, does not affect her competency on a new trial, when she is above eight years old. *Kelly v. State*, 51 R. 422.

In a criminal case the defendant objected to the oath being administered to one of the witnesses for the prosecution, a girl thirteen years old, on the ground that she was ignorant of the nature and obligation of an oath. The girl said that she understood that the oath was to tell the truth, and that she would be punished if she did not tell the truth after taking it, but that she did not know how or by whom she would be punished. The judge said he would postpone the decision of her competency, and she could be instructed, if necessary. The next day she was offered as a witness, when it appeared that after the adjournment of the court the first day she was instructed by a Christian minister, who told her that God would punish her, if after taking the oath she testified what was not true; and that she did not know this before. *Held*, that she was competent. *Com. v. Lynes*, 56 R. 709.

A boy of twelve years who habitually repeated the Lord's prayer, and had heard that the bad man caught those who lied, cursed, etc., but had never heard of a God, or the devil, or of heaven, or hell, or of the Bible, and had never heard and had no idea what became of the good or of the bad after death, is not a competent witness. *State v. Bolton*, 58 R. 245.

A prosecutrix for rape having disqualified herself upon her *voir dire* with regard to her knowledge of the nature and obligation of an oath, the state was permitted to take her

to a private office and instruct her thereupon. She was thereupon returned into court, and replying that she then understood the test, was held competent as a witness. *Held*, error. *Taylor v. State*, 58 R. 656.

A child of seven years of age, who does not understand the process of being sworn as a witness, nor the consequences of perjury in this life or after death, is not a competent witness. *Holt v. State*, 59 R. 770.

Grandchildren are not incompetent as witnesses for their grandmother, because of interest in an action by her to set aside her deed for fraud. Their interest is only contingent, and their position affects only their credibility. *Highberger v. Stiffler*, 83 D. 593.

12. *Atheists*.—No person can be a witness who does not believe in a future state of rewards and punishments, but evidence of a settled belief, not slight or casual sayings, should be produced. *State v. Cooper*, 5 D. 656. But a witness is competent, notwithstanding his religious belief, when he acknowledges the obligation of an oath, administered according to the form of his religion. *Curtiss v. Strong*, 4 D. 179.

Want of a religious belief in a witness must be established by other means than an examination of the witness himself. *Com. v. Smith*, 61 D. 478.

The opinions held by a person offered as a witness as to the obligation of an oath, may be proved by his previous declarations; and the witness himself cannot be admitted to explain or deny such declarations. *Curtiss v. Strong*, 4 D. 179.

13. *Convicts*.—"infamous" persons.—The party who would take advantage of the exception that a witness has been convicted of *crimen falsi* must have a copy of the record of conviction ready to produce in court. *People v. Herrick*, 7 D. 364.

Evidence that a witness has been indicted for perjury, etc., he not having been convicted, is not admissible to affect his competency or credibility. *Jackson v. Osborn*, 20 D. 649.

A witness is incompetent who has been convicted of receiving stolen goods knowing them to have been stolen. *Com. v. Rogers*, 41 D. 458.

Embezzlement of county funds by a tax collector is not an infamous crime, although punished as such, and does not exclude the offender as a witness, even while undergoing sentence. *Schuylkill County v. Copley*, 3 R. 441.

Under the statute disqualifying as a witness any person who "shall, upon conviction, be adjudged guilty of perjury," a person is not rendered incompetent by a verdict of guilty alone; sentence must have been pronounced. *Blayfus v. People*, 25 R. 148.

The deposition of a witness, taken after

* Religious belief, whether may be questioned concerning, see note, 85 R. 7.

For Index to Notes in American Decisions and American Reports, see Volume I.

indictment for forgery, but before trial therefor, he having been subsequently convicted thereof, is incompetent by reason of the infamy of the deponent. *Webster v. Munn*, 42 R. 688.

One convicted in another state of an infamous offense is thereby disqualified from testifying in Nevada. *State v. Foley*, 37 R. 453; *National Trust Co. v. Gleason*, 33 R. 632.

A law providing that a person convicted of a felony may still be a competent witness is not unconstitutional. *Sutton v. Fox*, 42 R. 744.

A statute prohibiting the production on *habeas corpus*, as a witness, of any person imprisoned under sentence for felony is constitutional, although such person may be a competent witness. *Ex parte Marmaduke*, 60 R. 250.

The legislature may not restore the competency of a witness rendered incompetent by reason of conviction of felony. *State v. Grant*, 49 R. 218.

14. — effect of pardon. — A pardon after expiration of the offense is effectual to restore competency as a witness. *Hunnicut v. State*, 51 R. 330.

A pardon, subject to revocation by the governor whenever he shall determine that the convict has violated any of the criminal laws of the state, does not restore his competency as a witness. *Carr v. Smith*, 53 R. 395.

D. having been convicted of criminal offenses, the governor of the state granted an executive act or proclamation, stating that, "I do hereby restore said D. to all rights of citizenship possessed by him before his conviction," etc. *Held*, that this was not a pardon such as would restore D.'s competency as a witness. *People v. Bowen*, 13 R. 148.

15. Accomplices. — An accomplice should not be permitted to be a witness without an order from the court for that purpose, and the application for the order should show: 1. That there is no other witness by whom the offense can be proved; 2. That the witness is not more guilty than the person on trial; 3. That the testimony can be substantially corroborated. *Ray v. State*, 48 D. 379.

An accomplice in the crime of larceny is a competent witness in an action of trover for the goods, and the jury may give to his testimony the same effect as that of any other witness, so far as they believe him. *Sinclair v. Jackson*, 74 D. 476.

A woman to whom medicines were administered to produce a miscarriage is a victim rather than an accomplice; even if deemed an accomplice, she is competent for the prosecution as a witness against the accused; and her testimony does not require corroboration where it establishes satisfactory proof of guilt. *Dunn v. People*, 86 D. 319.

16. Lunatics.* — The fact that a person is a lunatic does not *per se* exclude him as a witness, but he is competent if at the time of his examination he has that share of understanding which is necessary to enable him to retain in memory the events of which he has been a witness, and to give him a knowledge of right and wrong, and of such competency the court is judge. *Coleman v. Com.*, 18 R. 711.

17. Deaf mutes. — A deaf and dumb person, capable of relating facts correctly by signs, may testify through the medium of an interpreter, by signs, although such person can read and write, and communicate ideas imperfectly by writing. *State v. De Wolf*, 20 D. 90.

18. Negroes, Indians and Chinamen.† — Persons of mixed blood, from negroes or Indians down to the third generation, are not competent witnesses against white persons, under the Alabama statute, and there must have been one white ancestor of each generation for three generations before a competency to testify can be established. *Dupree v. State*, 73 D. 422. S. P., *Bowlin v. Com.*, 92 D. 463.

The congress of the United States cannot repeal or modify a law of a state on the subject of negro testimony. *Bowlin v. Com.*, 92 D. 463.

An act of a state legislature providing that "no * * * Chinese shall be permitted to give evidence in favor of, or against, any white man," is not in conflict with the fourteenth amendment of the United States Constitution. *People v. Brady*, 6 R. 604.

The state legislatures have the power to regulate the competency of witnesses and the production of evidence in state courts, notwithstanding the fourteenth amendment of the constitution of the United States. *Id.*

19. Persons who heard testimony on former trial. — The testimony of a deceased witness on a former trial is admissible only where the witness can state the substance of his whole testimony, and state the whole of the ideas communicated to the jury by his testimony. *Emery v. Fowler*, 63 D. 627.

2. Parties to the Record.

20 The common-law rule excluding them. — A party to a suit on a contract is an incompetent witness for either side, although he may be disinterested. *Swainey v. Parker*, 88 D. 549.

21. Illustrations of the rule. — A plaintiff cannot examine his co-plaintiff as a witness. *Glenn v. Wallace*, 53 D. 657.

A contestant who is a party to the suit is incompetent as a witness to defeat the es-

* That a person without memory is incompetent to be a witness, see note, 85 R. 291-292.

† Incompetency of witnesses because of race, religious belief, or previous condition, see note, 92 D. 473-475.

For Index to Notes in American Decisions and American Reports, see Volume I.

establishment of a will. *Taylor v. Kelly*, 68 D. 150.

22. Its limits and exceptions generally. — The testimony of a party to a suit, given voluntarily and against his interest, is admissible. *Cowles v. Whitman*, 25 D. 60.

One who has been made a party, but who has no interest in the contest, is a competent witness. *Ford v. Sproule*, 12 D. 439.

Parties on the record cannot be witnesses, but in chancery proceedings defendants may, if they have no interest. So at common law, an executor having no interest, or a mere trustee, may be a witness. *Comstock v. Hadlyme Mc. Soc.*, 20 D. 100.

In a court of equity a party to a suit may be a competent witness. *Glenn v. Wallace*, 53 D. 657.

A party may be a witness for himself, if his adversary consent; and his deposition read without objection may operate for himself as well as his co-defendant, especially if he be insolvent and have no real interest. *Fletcher v. Sanders*, 32 D. 96.

A merchant is competent to prove his own entries and the delivery of the goods. *Thomson v. Porter*, 53 D. 653.

In an action for personal injuries, the plaintiff may testify to his pain and internal condition, perceptible to his senses. *Wright v. City of Fort Howard*, 50 R. 350.

23. Proving contents of lost instruments. — A party to a suit is a competent witness to prove diligent search for, and loss of, a will, deed, or other paper, for the purpose of authorizing the reception of secondary evidence. *Apperson v. Cottrell*, 29 D. 239. But not where he has designedly destroyed it. *Blade v. Noland*, 27 D. 128.

24. — or lost trunk or baggage. — A husband and wife may testify as to the contents of their trunks lost while in the custody of a common carrier. *McGill v. Rowand*, 45 D. 654; *Dibble v. Brown*, 56 D. 460. But not as to the value thereof. *Ill. Cent. R. R. Co. v. Copeland*, 76 D. 749; *Dill v. South Carolina R. R. Co.*, 62 D. 407; *Davis v. Mich. South. etc. R. R. Co.*, 74 D. 151.

A plaintiff may prove the contents and value of lost baggage by his own oath, in an action against a railroad company, as a common carrier, to recover damages for the loss of his baggage. *Dougllass v. Montgomery etc. R. R. Co.*, 79 D. 76.

A passenger's testimony as to baggage lost should be received with caution, and should be discarded if there be a shade upon it. *Davis v. Mich. South. etc. R. R. Co.*, 74 D. 151.

An interested party may testify in his own behalf when no other evidence is reasonably to be expected; and when a guest sues an innkeeper to recover the value of articles stolen from his trunk, its contents may be proved, in the absence of other proof,

by the testimony of the guest, as, from the necessity of the case and nature of the subject, no proof can otherwise be expected. *Pettigrew v. Barnum*, 69 D. 212.

25. Defendant, when competent for co-defendant. — A party defendant is not competent as a witness for his co-defendant, where he is properly joined, and is clearly liable for costs; as in the case of a trustee for a married woman joined with her as defendant in a suit to enforce a mortgage of her separate estate executed by him conjointly with her and her deceased husband. *Chambers v. Chalmers*, 23 D. 572.

A plaintiff does not waive his objection to the competency of such witness by agreeing that he may be examined before a justice, with the same effect as if his deposition were taken regularly under a commission on the chancellor's order. *Id.*

A sheriff is not a competent witness for his co-defendants, on a joint trial as to all of defendants, in an action to set aside a sheriff's sale on ground of fraud, where the sheriff is made a defendant and charged with being a party to such fraud. *Teas v. McDonald*, 65 D. 65.

A complainant may have a decree on the testimony of a co-defendant, who stands indifferently liable to both parties to the suit, and is an indispensable party himself to the bill. *Montandon v. Deas*, 48 D. 84.

A defendant is a competent witness for his co-defendant, under the Indiana statute, where, in an action to recover possession of a chattel alleged to have been wrongfully taken and detained, their interests are antagonistic to the extent that one of them is not liable at all events in the absence of a demand, he being a *bona fide* purchaser. *Wood v. Cohen*, 63 D. 389.

A judgment in an action on a joint contract in favor of one defendant discharges a defaulted co-defendant, if the former goes to trial on a defense common to both defendants, but not if the defense is personal to himself. The defaulted defendant is therefore not incompetent on account of interest as a witness for the plaintiff, if the co-defendant goes to trial on a defense common to both, but he is incompetent as being a party to the record. *Swansey v. Parker*, 83 D. 549.

26. — in criminal cases. — A co-defendant is not entitled to an acquittal so as to be made a witness for other defendants, unless there is a total failure of evidence against him. *Hartfield v. Roper*, 34 D. 273.

A party charged in an indictment with a defendant with the same offense, who has not been tried and acquitted or convicted, is not a competent witness for the defendant. *Moss v. State*, 65 D. 433.

Where by statute an indicted person may testify on his own behalf on the trial of the indictment, one of two jointly indicted may testify against his co-defendant on his sepa-

For Index to Notes in American Decisions and American Reports, see Volume I.

rate trial, although the indictment against himself is still pending, and he has pleaded not guilty. *State v. Barrows*, 49 R. 629.

27. Actions by or against representatives of deceased persons.—In a statute which provides that no person shall be allowed to testify in an action where the adverse party, or the party for whose immediate benefit the action is prosecuted or defended, is the representative of a deceased person, where the facts to be proved transpired before the death of such deceased person, the word "representative" not only includes the executor or administrator of a deceased person, but also any one who has succeeded to the right of such deceased, whether by purchase, or descent, or operation of law. *Davis v. Davis*, 85 D. 157.

A widow who is a party plaintiff, and derives her claim of title to property in controversy through the will of her deceased husband, is incompetent to testify as to matters transpiring before his death, being a "representative of a deceased person," within section 232 of the California practice act. *Kisling v. Shaw*, 91 D. 644.

A statute, prohibiting a party from testifying where the adverse party is an executor, applies to proceedings for the probate of a will. *Welch v. Adams*, 56 R. 521.

Under a statute excluding a party from testifying in his own favor, where the other "original party to the contract or cause of action" is dead, a devisee of land whose testator held under a deed from the defendant is incompetent to testify in an action of ejectment brought by him as to the non-delivery of such deed. *Chapman v. Dougherty*, 56 R. 469.

A creditor of a testator, whose debt has been paid out of the proceeds of a sale of the decedent's land, which sale is afterwards disaffirmed, is a competent witness to prove the amount of his debt, where he entered into no covenants for the sufficiency of the title, is not chargeable with any fraud, nor in any way liable to the purchaser, the executor, or the devisees. *Hudgin v. Hudgin*, 52 D. 124.

A defendant is a competent witness, under the Vermont general statutes, chapter 36, section 24, which excludes a party from testifying when the other party to the contract in issue is dead, where the issue between the parties is whether or not the plaintiff agreed to pay the defendant for certain articles of clothing which the defendant had bought for his daughter, who had died before the action was brought, prior to her marriage with the plaintiff, with the understanding that she was to pay for them; the issue being upon the plaintiff's agreement with the defendant, and not upon the deceased wife's agreement, although the latter was a material fact bearing on the plaintiff's

liability and the defendant's right of recovery. *Cole v. Shurtleff*, 98 D. 587.

A statute prohibiting a party to an action against an executor or administrator from being a witness as to any fact occurring before the death of the deceased, does not prevent the plaintiff in such an action from testifying to the correctness of books of account which had been wholly kept by him, preparatory to their introduction in evidence, and such books cannot be proved by a third person who had no personal knowledge of their correctness. *Roche v. Ware*, 60 R. 539.

28. Examination of party at instance of adverse party.—A party to the record may be a witness on behalf of the opposite party, if such witness does not claim his exemption. *Prussell v. Marsh*, 21 D. 645.

Defendant may, if willing, be examined as a witness for plaintiff in an action of *indebitatus assumpsit*. *Savings Fund Soc. v. Savings Bank*, 78 D. 390. But a party who calls his adversary as witness, under the statute permitting this, makes him a competent witness in his own behalf. For a party by putting an incompetent witness on the stand makes him competent in the cause for either party. *Seip v. Storch*, 91 D. 145.

A party to the record cannot be compelled against his consent to become a witness. *Tenney v. Evans*, 40 D. 194.

A defendant in equity may be examined by the plaintiff, without his consent, on any point in which he is not interested, and even against his interest, if he consent, notwithstanding the objection of his co-defendants. *Farr v. Sims*, 24 D. 396.

A defendant cannot examine plaintiff as a witness, but must file his bill of discovery. *Glenn v. Wallace*, 53 D. 657.

If the examination of parties as witnesses is intended, a statement in writing of the points upon which it is proposed to examine them should be submitted, that the court may perceive whether the witness is interested or not. *Id.*

If one co-defendant, being a proper party to an action, cease, during the progress of the pleading and before he is offered as a witness, to be adverse to plaintiff, such defendant cannot be examined as a witness on the plaintiff's behalf, under the statutes of Indiana, where, as to the matters put in issue by the pleadings, the real controversy is between the two defendants. Though a party in his complaint name himself plaintiff and other persons defendants, it does not follow that all the defendants named will necessarily continue their adverse relations to him throughout the action. *Swift v. Ellsworth*, 71 D. 316.

3. Persons Interested in the Event.

a. General Principles.

29. The common-law rule excluding

For index to Notes in American Decisions and American Reports, see Volume L

them. — A witness is incompetent to testify if he have a clear and distinct interest in the event of the suit. *Slaughter v. Cunningham*, 60 D. 463.

30 Its scope and extent. — The person whose instrument is alleged to have been forged is not a competent witness to prove the forgery, unless the instrument said to have been forged is produced at the trial. *Com. v. Hutchinson*, 2 D. 1.

A person in whom an outstanding title to the land in controversy is alleged to exist is not a competent witness for the defendant in an action of ejectment. *Lodge v. Patterson*, 27 D. 335.

If several have agreed in the event of recovery to share the proceeds, neither is competent as a witness. *Mackinley v. McGregor*, 31 D. 522.

He is interested and an incompetent witness who has covenanted with the defendant to pay certain notes set off against the plaintiff, nor will the witness's releases to plaintiff and defendant make him competent. *Newton v. Booth*, 37 D. 596.

A witness is incompetent if the testimony he is expected to give would create a fund for his own benefit. *Brown v. O'Brien*, 44 D. 254.

A witness is incompetent to prove a fact, which, if it operate at all, must operate to his own discharge in the suit, as well as that of another defendant, who is his surety. *Jones v. Hays*, 44 D. 78.

A witness interested in the result of a suit is incompetent, even though it is his opinion that it cannot affect him. *Cochran v. Cunningham*, 50 D. 186.

An interest which will render a witness incompetent to testify must be some legal, certain, immediate interest in the result of the suit itself, or in the record thereof as an instrument of evidence to support his own claims, or to protect him from an admitted liability. If the interest be remote or contingent, and not certain and immediate, the witness is competent to testify, and such remote or contingent interest will go to his credibility, but not to his competency. *Poe v. Dorrah*, 56 D. 198.

In detinue against a bailee of property, his bailor is not a competent witness for him without release; and evidence of a small consideration does not affect the principle. *Nelson v. Iverson*, 60 D. 442.

The owner of a flat-boat is not a competent witness for the owner of goods in an action against a steamboat for colliding with said flat-boat, and damaging plaintiff's goods. *Steamboat Farmer v. McCraw*, 62 D. 718.

A witness is not disqualified by an interest in the question at issue, but only by an interest in the action. *Lincoln v. Wright*, 62 D. 316.

31. Its limits and exceptions. — To render a witness incompetent on account of

interest, it must be an interest, not in the question, but in the result, of the suit. *Masters v. Varner*, 50 D. 114. S. P., *Elliot v. Porter*, 30 D. 689.

A witness is not disqualified by incidental and contingent interest in the result of a suit arising from the fact that he is liable to a similar controversy with one of the parties. *Riddle v. Dixon*, 44 D. 207.

The interest of a witness being of doubtful nature, he is not incompetent to testify, as the objection goes to his credit, and not to his competency. *Andre v. Bodman*, 71 D. 628.

A person is not incompetent to be a witness in a particular case on the ground of interest, unless his rights will be affected by the determination therein; and the fact that he has an interest like that of the party offering him does not render him incompetent. *Woodard v. Spiller*, 25 D. 139.

A witness is not incompetent because he has a similar cause of action against the same parties, if he is not directly interested in the issue under trial, and is not a party to the action in which he is called to testify. *Jennings v. Crider*, 92 D. 487.

A person whose name appears upon forged paper, and who is interested in setting the instrument aside, is not permitted in England and some of the American states to give evidence to prove the forgery, but he is competent to prove all collateral matters. This rule does not extend, however, to cases where the witness has no real interest in the conviction, as where he is the cashier or other agent of the bank, the note of which has been forged. *Hess v. State*, 22 D. 767.

A person whose name is forged is a competent witness for the state in a prosecution for forgery. *State v. Phelps*, 34 D. 672.

A pilot is a competent witness for a carrier, in an action for the loss of goods jettisoned from a grounded vessel, where justification of the jettison is claimed. *Bentley v. Bustard*, 63 D. 561.

A pilot in charge of a boat at the time of an accident is a competent witness for the carrier in an action against him for damages to goods, unless it is affirmatively shown that the act of negligence that caused the injury to the goods rendered the pilot liable to the carrier. *Johnson v. Lightsey*, 73 D. 450.

A promise by a third person to indemnify an officer for neglect of duty is founded on an illegal consideration, and is, therefore, void; and such promise does not disqualify the promisor from being a witness for the promisee in an action against the latter for such neglect. *Hodsdon v. Wilkins*, 20 D. 347.

The competency of a witness is not affected by mere solicitude for the success of one of the parties, arising from friendship, honorary obligation, or voluntary intention to divide

See Index to Notes in American Decisions, and American Reports, see Volume I.

the burden of a failure in the suit, or from a hope of participating in the advantages of success. *Elliot v. Porter*, 30 D. 689.

A party is not beneficially interested in an action for fraudulent representations whereby the plaintiffs were induced to purchase certain property, although he has purchased the share of one of the plaintiffs in the property, if he has made no agreement for an interest in the judgment, and he is therefore a competent witness for the plaintiffs. *Medbury v. Watson*, 39 D. 726.

A witness' interest in the subject-matter, and not in the event, of a suit, goes to his credibility, not to his competency. *Rowley v. Bigelow*, 33 D. 607.

An exposure to a possibility of action is a contingent interest, which goes only to the credibility of a witness. *Scott v. Wells*, 40 D. 568.

A riparian proprietor is a competent witness in an action between other riparian proprietors on the same stream, as his interest is not in the event of the suit, but only in the questions involved. *Parker v. Griswold*, 42 D. 739.

A witness is not disqualified by having contributed funds for the hiring of additional counsel to prosecute an indictment for nuisance where he has no interest in the result. *People v. Cunningham*, 43 D. 709.

Parties and persons interested are recognized as competent witnesses in respect to the facts and circumstances necessary to lay a foundation for secondary evidence of a writing, as that a search has been made and it cannot be found. *Juzan v. Toulmin*, 44 D. 448.

A witness incompetent with respect to one issue in a cause, on account of his interest in such issue, is competent to testify upon other issues in which he is not interested. *Bank of Utica v. Mercereau*, 49 D. 189.

A witness is competent to prove a boundary of land in controversy, although he holds land under a patent which calls for land adjoining the land embraced in the patent under which demandant claims, and although, if the land is located according to demandant's pretensions, it will not include any of the land of the witness, but would cover a portion of his land if located according to the pretensions of the other party to the suit. *Masters v. Varner*, 50 D. 114.

Where a party collects money from a garnishee, he is not so interested as to incapacitate him from giving testimony, in a subsequent suit against the garnishee, as to the payment of the judgment. *Gunn v. Howell*, 73 D. 484.

If a person being tried on an indictment for giving medicine to produce a miscarriage tries to show that another was the father of the child of which the prosecutrix was enceinte, the prosecution may call the latter to

prove that he had no intercourse with the woman. *Dunn v. People*, 86 D. 319.

32. Witness whose interest is balanced. — A witness equally interested on both sides is competent. *Brown v. O'Brien*, 44 D. 254. S. P., *Andre v. Bodman*, 71 D. 628; *Cassidy v. McKenzie*, 39 D. 76.

A witness is not incompetent on the ground of interest, when he is not benefited or injured by the decision, either way it turns. *Bell v. W. M. & F. I. Co.*, 39 D. 542.

A contractor is a competent witness in an action by a workman against the owner of the property for services, to prove their value, although he was originally hired by the contractor, where the contract has been abandoned, and the owner agreed to pay the workmen if they would go on with the work. *Andre v. Bodman*, 71 D. 628.

An interest which excludes a witness must be a certain interest in the event of the suit, and not a remote or contingent one. *Hatch v. Bartle*, 84 D. 484.

33. — or who would testify against interest. — A witness interested in the event of the suit is competent when called by the party whose interest is adverse to his. *Doe v. Jackson*, 40 D. 107.

A witness called to testify against his interest is legally competent, notwithstanding his physical and moral infirmities, where his testimony has been referred to the jury with all proper cautions and instructions. *Hagerstown Bank v. Adams Exp. Co.*, 84 D. 499.

In an action of trespass against a sheriff for selling one person's goods on an execution against another, the latter is a competent witness to prove that the goods belonged to the former. In such action, the sheriff may show, in mitigation of damages, that the goods were bought in for the owner at an undervalue; for the measure of damages in such a case is the amount that it cost the plaintiff to redeem, with interest thereon. *Forsyth v. Palmer*, 53 D. 519.

34. Witness liable for costs. — A surety on a cost bond may be a witness for a party to the suit, upon the filing of a new and sufficient bond. *Hoye v. Tuttle*, 46 D. 309.

A proponent of a will, whether executor or not, is an incompetent witness to support it, being liable for costs. *Gilbert v. Gilbert*, 58 D. 263.

A complainant in a chancery suit is not a competent witness in favor of other complainants to whom he has assigned his interest, he being liable for costs in the event that the suit does not succeed, and therefore interested in the result. *Walker v. McKnight*, 61 D. 190.

35. Abrogation of the rule as to parties and persons interested in civil actions, by statute. — Parties to actions

For Index to Notes in American Decisions and American Reports, see Volume X.

may now testify in civil suits like other witnesses. *Covles v. Bacon*, 56 D. 371; *McDaniels v. Robinson*, 62 D. 574.

The provision of California practice act, section 422, allowing a party to an action to be examined as a witness on own behalf, construed. *Wilkins v. Stidger*, 83 D. 64.

The defendant is a competent witness in his own behalf, under section 310, Ohio code, in a proceeding by a railroad company to appropriate his land to the use of the company. *Atlantic etc. R. R. Co. v. Campbell*, 64 D. 607.

A party to a suit cannot be sworn and examined as a witness in his own behalf under the Wisconsin laws, without notice of his intended examination having been given. *Milwaukee G. L. Co. v. Gameroch*, 99 D. 138.

In a suit between the state and the individual, the defendant is a competent witness, under section 2704 of the Alabama code. *Patton v. Gilmer*, 94 D. 665.

36. Objections to competency, when and how to be made. — Where the interest of a witness can be released, if the party suffers him to be examined without objection, and waits until after the rule to close the proofs has been entered, it will be then too late to make the objection. *Town v. Needham*, 24 D. 246.

The allegations of an answer are never sufficient to exclude witnesses offered by the plaintiff, as being disqualified through interest. *Henderson v. Western M. F. I. Co.*, 43 D. 176.

The objection to the competency of a witness on account of his interest must be taken at the time of his testifying, if the fact of interest was known, or if, by evidence afterwards offered in the case, the interest of the witness should be apparent, the court should be asked to rule the evidence out; otherwise, the objection would not be available on appeal. *Inglebright v. Hammond*, 53 D. 430.

A party objecting to the competency of a witness must prove the existence of the interest which he claims to render the witness incompetent. *Hamilton v. Summers*, 54 D. 509.

An objection to the competency of a witness on grounds of public policy or interest is waived, where the deposition of such witness is taken, on notice to the attorney of the adverse party, who, with knowledge of the incompetency, attended the examination, and cross-examined the witness without objection. *Brice v. Lide*, 68 D. 148.

The testimony of a witness should be excepted to, as a general rule, as soon as a party is made aware of the witness's incompetency; and where the counsel at the trial has in his possession the proof of his interest, he ought not to allow the case to proceed without disclosing the objection. This rule does not prevail in its strictness where the examina-

tion commenced under a reservation of the right to object. *Andre v. Bodman*, 71 D. 628.

37. Hearing and deciding objections. — The testimony of a witness, whose competency is a question reserved, cannot be considered in determining the competency. *Mott v. Hicks*, 18 D. 550.

The objection to defendant's testimony will not be sustained where the complainants have made him a witness by seeking a discovery. *Jones v. Perry*, 30 D. 430.

Evidence that an attorney was employed by the plaintiff of record, and not by a witness, may be given after verdict. *Stevenson v. Mudgett*, 34 D. 155.

The competency as witnesses of persons not parties to the record is presumed until the contrary appears, and the onus is upon the objector to show the incompetency. It is not enough that a mere probability of incompetency should be raised; the facts upon which it depends must be fairly established. *Johnson v. Lightsey*, 73 D. 450.

A party who has given to the jury the whole of evidence taken under commission cannot afterwards object, on the ground of interest, to the competency of one of the witnesses whose testimony was so taken. *Walters v. Monroe*, 77 D. 328.

The relation of a witness to a party in a cause, whether of peculiar friendship or hostility, is a fact material to the issue, and may be shown either by the testimony of the witness himself, or by other evidence. *Jacobs v. Shorey*, 97 D. 586.

A refusal to strike out the evidence of an interested witness is not error if the testimony was received without objection. Correction should be made through a request to charge the jury to disregard the evidence. *Simons v. Vulcan Oil etc. Co.*, 100 D. 628.

38. Examination on the voir dire. — A witness's declaration out of court is incompetent to prove his interest; but to exclude him his interest should be established by his oath on his voir dire, or by other competent evidence. *Jones v. Tevis*, 14 D. 98.

A witness is competent who swears that he has no interest in the result of the suit. *Hempstead v. Johnston*, 65 D. 458.

A witness having charged himself as interested, on his voir dire, may in the same way discharge or balance his interest, and restore his competency. *Tarleton v. Johnson*, 60 D. 515.

For the purpose of determining the competency of a witness, he may be examined upon the voir dire as to documents not produced on the trial. *Miller v. Mariner's Church*, 20 D. 341.

A witness who appears to be interested in a suit cannot be made competent by his own testimony. *Stevenson v. Mudgett*, 34 D. 155.

A witness's belief that he is interested, if

For Index to Notes in American Decisions and American Reports, see Volume I.

he is not in fact, does not affect his competency. *Cassiday v. McKenzie*, 39 D. 76.

A statute providing that where a party will make oath that he has no other evidence than his own oath to establish a material fact, he may testify himself touching such fact, contemplates that the party proposing to testify in his own case shall, in his preliminary examination touching his right to do so, state the fact or facts to which he proposes to testify. *Orasier v. Kirker*, 51 D. 724.

39. Transfer or release of interest.—Though a release operates only on present rights, yet where a surety, being sued alone, releases his principal from liability over, for the purpose of making him a witness, it is possible that the release may operate, because as the surety's right to indemnity arises when the contract is made, it may be regarded as a present right to take effect in future. *Bank of Limestone v. Penick*, 15 D. 136.

Whether such release be an absolute discharge or not, if it be accompanied by a covenant not to resort to the principal, the surety will be estopped from demanding remuneration from the principal in case the action goes against him, and the principal is, therefore, a competent witness. *Id.*

A town may render its treasurer a competent witness in an action against a tax collector and his sureties, where the question is, whether the collector has paid to the treasurer certain moneys collected, by releasing such treasurer by vote from personal liability. *Ford v. Clough*, 23 D. 513.

A reconsideration of a vote releasing the treasurer of a town from liability, to render him competent as a witness against a tax collector and his sureties for not paying over money collected, cannot affect the vested rights of the treasurer under such vote, and is wholly unavailing. *Id.*

Persons who have released their interest, or removed from the neighborhood, are competent witnesses to prove an agreement by parol by an owner of land, to give land enough for a school, if the neighbors will build a school-house, where the house has been built accordingly. *Martin v. McCord*, 30 D. 342.

Where a person offered as a witness had given a bond of indemnity to the party calling him, which the latter delivered up before the trial, in order to qualify such person to testify, he will be a competent witness. *Beecher v. Buckingham*, 44 D. 580.

A witness's liability to an estate having been released by one of several joint administrators, he is no longer disqualified on the ground of interest. *Saw v. Berry*, 53 D. 702.

A witness liable to defendant on a covenant is competent to testify for him after

being released by him. *Wilson v. Wilson*, 61 D. 227.

The fact that a witness transferred his interest for the purpose of becoming a witness does not disqualify him, however it may affect his credit. *Nat. Fire Ins. Co. v. Crane*, 77 D. 289.

One of the two joint obligors not summoned is not a competent witness for the other who is summoned, to prove, under notice of set-off, a debt due from the plaintiff to the witness, though the witness is released by the defendant. *Henderson v. Lewis*, 11 D. 733.

A defendant cannot, by giving a release of his interest to his co-defendants, *pendente lite*, become a competent witness for them, when the plaintiff must get a decree against him if he gets any at all; his liability for costs would be a sufficient objection to his competency. *Falle v. Carpenter*, 23 D. 592.

The release of a witness who appears to be the real plaintiff, of all interest in the suit, which he delivers to the attorney of the plaintiff of record, is a delivery to himself, and consequently unavailing. *Stevens v. Mudgett*, 34 D. 155.

The delivery of a release by a witness to an attorney in a cause, is a delivery to the party who employed him. *Id.*

A colorable assignment of a chose in action, for the purpose of allowing a legal plaintiff to testify, does not divest his interest. *Phinney v. Tracey*, 44 D. 116.

The release executed at the trial of one of the necessary parties plaintiff does not make him a competent witness for his co-plaintiff. *Scott v. Brown*, 67 D. 256.

A release, to qualify a witness, must be given before the testimony is closed, or it comes too late. But if the trial is not over, the court will permit the witness to be re-examined after he is released, and it will generally be sufficient to ask him if his testimony already given is true, the circumstances under which it has been given going only to the credibility. *Nat. Fire I. Co. v. Crane*, 77 D. 289.

The release to a witness to render him competent where his interest or incompetency has not been disclosed by his evidence, can not be proved by himself nor by *ex parte* affidavits of others. *Bank of Utica v. Mercers*, 49 D. 189.

A. Various Applications of the Common-law Rule.

40. Assignor and Assignee.—The assignor of a chose in action, although the plaintiff on the record, may testify when it appears that the assignment was made in the usual course of business, and without any intention, either express or understood, of supporting the claim by the oath of the assignor. *Phinney v. Tracey*, 44 D. 116.

In an action by a landlord against his

For Index to Notes in American Decisions and American Reports, see Volume L.

lessees on their covenants, an assignee of the lease who has performed all he was bound to by the contract of assignment, and does not appear to be responsible to either of the parties, is competent to be a witness. *Fisher v. Milliken*, 49 D. 497.

The assignee of third persons who is admitted to appear and defend an action on the supposition that the interests of his assignors might in some way be affected by the action, and who afterwards withdraws his appearance by the leave of the court, is not a party to the action nor privy to the judgment, and is not incompetent as a witness in the action. *Swanecot Machine Co. v. Walker*, 55 D. 172.

In a suit by an assignee of unassignable legal choses, the assignor is not a competent witness for him. *Hopkins v. Hopkins*, 53 D. 663.

The assignor of a certificate of deposit not negotiable is not a competent witness to support it in an action by the transferee. *Savings Fund Society v. Savings Bank*, 78 D. 390.

41. Debtor and creditor.—Money paid voluntarily, with full knowledge of the facts, cannot be recovered back; and, therefore, a person to whom such a payment has been made, is a competent witness for the party who made the payment to him. *Beecher v. Buckingham*, 44 D. 530.

The fact that a witness is a stockholder in a company to which plaintiff is indebted does not render him incompetent. A creditor may be a witness for his debtor. *Simons v. Fulcan Oil etc. Co.*, 100 D. 628.

An execution defendant is not a competent witness to prove the value of the goods seized on execution in an action between two of his creditors, who both claim the goods, where the plaintiff claimed them under an attachment made subject to the defendant's claim, as he would have a direct interest to prove the value of the goods to be more than sufficient to pay defendant's debt. *Edgerly v. Emerson*, 55 D. 207.

42. Heirs, devisees, legatees, etc.—A devisee who releases all interest under a will is a competent witness for the trustee appointed by it. *Cook v. Grant*, 16 D. 564.

An heir is a competent witness in a suit by an executor, when he has transferred all his interest in the estate. *Sylvester v. Dossner*, 49 D. 786.

The heirs of a deceased person are competent witnesses to disprove a will by which they would take a greater share than under the statute of distributions, but they would be incompetent to support it. *Roberts v. Trausick*, 52 D. 164.

A devise of property is presumed to have been accepted; but proof that the devisee refused or disclaimed, though informally, shows that the estate never vested in him, and prevents the devise from giving him an

interest which should disqualify him from testifying in support of the will. *Burritt v. Sullivan*, 64 D. 532.

The legatee in a will is a competent witness to sustain it in probate proceedings. He is not a party to the suit, nor is the suit prosecuted wholly or in part in his immediate and undivided behalf, within the meaning of the statute. *Lawyer v. Smith*, 77 D. 460.

A legatee under a prior will is a competent witness against a subsequent will in contest. *Tillow v. Tillow*, 93 D. 691.

A warranty of title is implied in a partition deed between tenants in common taking by descent in Pennsylvania, and one of such tenants is not a competent witness for another in ejectment thereafter brought by the latter to recover his share of the land. *Patterson v. Lanning*, 36 D. 154.

The heirs at law of a deceased testator are not competent witnesses in a feigned issue to try the title to certain lands between an alleged devisee and another heir, although they have conveyed their interest in the land to the party of record. *Asay v. Hoover*, 45 D. 713.

43. Inhabitants of town or county, party to the suit.—The inhabitants of towns are competent witnesses for the towns in which they reside, without a release. *Congregational Soc. v. Perry*, 25 D. 455.

The remote and contingent interest of a corporator in a mere municipal corporation is not sufficient to exclude him as a witness in behalf of the corporation. *Watertown v. Cowen*, 27 D. 80.

44. Judicial officers.—Where an appeal is taken from a decree of a probate judge, on the ground that he is interested in the estate, and has therefore no jurisdiction to enter such decree, he is a competent witness to prove that he is not interested. *Sigourney v. Sibley*, 32 D. 248.

A justice of the peace who tried a cause is a competent witness to prove the grounds upon which it was decided. *Taylor v. Larkin*, 49 D. 119.

Justices of the peace, who have certified to an execution and acknowledgment of a deed, shall not be permitted, as witnesses, to contradict what they have certified as magistrates. *Highberger v. Stiffler*, 83 D. 593.

A justice of the peace, who has certified to an execution and acknowledgment of a deed, may testify to facts which do not contradict his official certificate, although they may incidentally operate on the legal effect of the instrument acknowledged before him; such as the age and health of the grantor, the payment or non-payment of the consideration, the reading or non-reading of the instrument, or other collateral facts not conflicting with what he had certified. *Id.*

45. Jurors.*—A juror whose conduct

* Testimony of grand jurors to impeach indictment, see note, 16 D. 231-235.

For Index to Notes in American Decisions and American Reports, see Volume I.

is impeached by a motion in arrest cannot be a witness. *Dana v. Roberts*, 1 D. 38.

To defeat a plea of a former adjudication, the testimony of one of the jury on the former trial, that the matter in the pending issue was not passed upon by the jury on the former trial, — held, incompetent, it appearing from the judgment record in the former action that the matter in question was in issue in that action. *Underwood v. French*, 25 R. 500.

A grand juror before whom an indictment was presented is competent to prove that the defendant appeared before the grand jury to prosecute the indictment. *White v. Fox*, 4 D. 643.

Grand jurors may be examined as witnesses to show whether the necessary number concurred in finding an indictment. *Low's Case*, 16 D. 271.

A witness may be impeached on the trial of an indictment by proof that he testified differently before the grand jury, and the testimony of grand jurors is admissible therefor. *Com. v. Mead*, 71 D. 741. S. P., *Gordon v. Com.*, 37 R. 672.

The oath of grand jurors to the secrecy of their proceedings does not prevent them from being witnesses on the trial of a person for perjury, committed while a witness before them. *State v. Broughton*, 45 D. 507.

The competency of grand jurors to testify is peculiarly a matter of discretion with the court to discriminate as to it; and in an action of slander grand jurors are competent to testify to the uttering of the supposed slanderous words before them, while officiating as grand jurors. *Saunders v. Robison*, 51 D. 132.

43. Landlord and tenant. — A lessor of an easement is a competent witness for the lessee in an action by the latter for a disturbance thereof. *Bird v. Smith*, 34 D. 483.

A refusal to permit a discontinuance as to a tenant in possession, where his landlord has been admitted to defend in an action of ejectment, for the purpose of making him a witness against his landlord, is not error, because a discontinuance as to the tenant is a discontinuance of the whole action. *Peters v. Allison*, 36 D. 574.

A land-owner is an incompetent witness for an officer, in trover by an occupant for a share of the products of a farm sold by the officer on execution against the land-owner. *White v. Morton*, 52 D. 75.

47. Master and crew. — A master and the mariners are competent witnesses for the insured, in an action on a policy of marine insurance. *American Ins. Co. v. Insley*, 47 D. 509.

48. Mortgagor and mortgagee. — A mortgagor is not a competent witness for the mortgagee, in an ejectment brought against one to whom the mortgagor has

quitclaimed the land. *Jackson v. McChesney*, 17 D. 521.

The mortgagor is a competent witness for the mortgagee in a suit to foreclose a mortgage against an attaching creditor. *Carter v. Champion*, 21 D. 695.

The mortgagor is a competent witness to prove that an assignor of the mortgage had notice that the whole of the land did not belong to the mortgagor, but was, by mistake, included in the description, where the assignee sues a stranger in ejectment. *Mott v. Clark*, 49 D. 566.

The mortgagor who has conveyed mortgaged premises is a competent witness for his grantee, to show payment of the mortgage, in an action by the latter to procure its discharge, or leave to redeem. *Beach v. Cooke*, 36 D. 260.

Where a mortgagor has assigned all his interests in the mortgaged property, he is a competent witness for the assignee to show the true amount due on the mortgage. *Banks v. McOlellan*, 87 D. 594.

49. Notaries. — A notary may be permitted to testify as to his usual course of proceeding and customary habits of business. *Union Bank v. Stone*, 79 D. 631.

A notary who certifies to an acknowledgment is a competent witness to establish the due execution of a conveyance, as against the denial of the person by whom his certificate states it to have been acknowledged. *Jansen v. McCahill*, 83 D. 84.

50. Officers, generally. — A treasurer of a town is a competent witness in an action by the town against a tax collector to recover the amount of taxes collected by him, to prove that the witness in his office of treasurer gave the defendant a receipt for more than the sum which he had actually paid in or accounted for as collector. *Town of Grafton v. Follansbee*, 41 D. 736.

The testimony of a public officer is admissible in a suit in which he is not a party, to show that he acted in that capacity. *State v. McNally*, 56 D. 650.

One of the commissioners who sell land for partition, by order of the probate court, is a competent witness, under the Alabama statute, for the owner of such land, in an action brought by him to recover of a purchaser who has failed to comply with his contract, the excess in amount bid by him at the first sale over the amount realized at a resale of the same land. *Hutton v. Williams*, 76 D. 297.

51. Officers and stockholders in corporations. — A stockholder is not competent to be a witness for the corporation. *Lynch v. Postlethwaite*, 12 D. 495. S. P., *Watson v. Lisbon Bridge*, 31 D. 49. But he may be called and examined by the opposite party in a suit against the corporation. *Hart v. New Orleans, etc. R. R. Co.*, 36 D. 689.

A stockholder who is called and examined

For Index to Notes in American Decisions and American Reports, see Volume I.

as a witness on behalf of the plaintiff in a suit against the corporation, may be cross-examined, and testify in favor as well as against his interests upon the matters in reference to which he is called. *Id.*

The president of a corporation owning stock therein is incompetent, on the ground of interest, to testify concerning his acts as agent of the corporation. The exception to the general rule, so far as the members of a corporation are concerned, seems to be confined to keepers and depositaries of corporate documents. *Blen v. Water and Mining Co.*, 81 D. 132.

The president and secretary of an insurance company, who are not stockholders therein, are competent witnesses for the company in an action against it. *National L. Ins. Co. v. Crane*, 77 D. 289.

An agent of a corporation defendant, who is also a stockholder therein, is not a competent witness for it in an action on a contract made by him as its agent; for he has a direct interest in the result of such action, independently of his acts as agent. *Pa. etc. Nat. Co. v. Dandridge*, 29 D. 543.

A clerk of the bank who is supposed to have made a mistake, through which a depositor was enabled to overdraw, is not, on that account, incompetent to be a witness for the bank in an action against the depositor. *Union Bank v. Knapp*, 15 D. 182.

A cashier is a competent witness for a bank, to show that a promissory note, payable "— months after date" was intended to be payable at twelve months. *Union Bank v. Meeker*, 50 D. 559.

A member of a corporation is not an incompetent witness for it simply because he is its surety for the payment of a debt which is not in controversy in the suit on trial. *Müller v. Mariner's Church*, 20 D. 341.

52. Parties to negotiable paper, generally. — The payee of a note is a competent witness, in an action by an indorsee against one whose name is written on the back of the note, charging him as maker. *Good v. Martin*, 91 D. 706.

53. — Indorsers. * — The indorser of a promissory note is not a competent witness in a suit against the maker, to prove that though drawn as an ordinary note of business and so discounted by the holder, it was in fact executed for the indorser's accommodation, especially if the maker received a bond of indemnity from the indorser at the time the note was drawn. *Bank of Montgomery v. Walker*, 11 D. 709.

The indorser of a negotiable instrument is not a competent witness to impeach its consideration. *Devey v. Harriner*, 22 R. 91.

A special indorser, or one indorsing as agent, is a competent witness on behalf of

his indorsee against the maker, or against one who has guaranteed the payment of the note to the indorsee on behalf of the maker. *Mott v. Hicks*, 13 D. 550.

One who indorses a note without recourse is a competent witness for a subsequent holder in an action to enforce payment of the note. *Bisbing v. Graham*, 53 D. 510; *Edgerly v. Shaw*, 57 D. 349.

In a suit against an accommodation indorser by an innocent holder, the indorser is competent to prove a material alteration. *Jones v. Matthews*, 41 R. 633.

54. — makers of notes. — One whose name is forged to a note is a competent witness in an action by the transferee of the note against the transferor on the original liability. *Pope v. Nance*, 18 D. 60.

Where one maker signs the name of the other maker, at the latter's request, to a joint and several promissory note, the maker thus signing is a competent witness to prove the signature of the other in a suit against the latter by the holder. *Morse v. Green*, 38 D. 471.

The drawer of a note, in whose favor an award unappealed from was made, is not a competent witness in a suit thereon, although at the time his testimony is offered he is a certified bankrupt, and without any interest in the event of the suit. *Wolf v. Fink*, 44 D. 141.

The drawer of a note may be a witness if he has been released from all liability and is without interest in the suit. *Bank v. Fedyce*, 49 D. 561.

The maker of a note is a competent witness, as between the assignor and assignee of a promissory note, for all purposes except to impeach its validity or to prove its payment; his interest is equally balanced between the parties. Thus, where an assignee seeks to recover against his assignor upon the ground that the maker was insolvent, and a suit against him would have been unavailing, the fact of his insolvency may be proved by the maker himself. *Corgan v. Fress*, 89 D. 286.

The maker is a competent witness on behalf of the plaintiff in an action by the indorsee against the indorser of a promissory note, judgment having been recovered against the maker on such note. *Bank of Columbia v. Magruder*, 14 D. 371.

In an action upon a promissory note by a *bona fide* holder, the maker is a competent witness to prove that he was induced to sign it by fraudulent representations that it was another and different instrument. *Abbott v. Rose*, 16 R. 427.

55. Partners. — Where, on the dissolution of a firm, a debtor gives each partner a note for his share of the indebtedness, one partner is a competent witness for the other in a suit by the latter on his note. *Morse v. Green*, 38 D. 471.

* Indorser of negotiable instrument, whether competent to impeach its validity, see note, 22 R.

For Index to Notes in American Decisions and American Reports, see Volume I.

A release, to render a partner competent as a witness, must release from liability all members of the firm. *Bank of Utica v. Mercers*, 49 D. 189.

A co-partner or executor of a deceased partner is a competent witness against the firm. *White v. Tudor*, 76 D. 126.

A partner is not a competent witness for a co-partner in an action by the latter alone for an injury to firm property, since he is entitled to his share of the recovery, if any, though he refused to join as plaintiff and was made a defendant. *Nightingale v. Scannell*, 65 D. 525.

A partner not served with process is not a competent witness on the part of the plaintiff to prove that defendant is a co-partner with the witness. *Dixon v. Hood*, 38 D. 461.

56. Personal representatives.—Where the guardian of the heir intermarried with the administratrix of the decedent, and thereby came into the possession of the personality of the estate, in an action on the guardian's bond, after the rendition of the final account of the administration,—*held*, that the administratrix and her securities were, by such rendition, released and discharged, and, therefore, competent witnesses in the action. *Segare v. State*, 14 D. 265.

The administrator is a competent witness in a suit between third parties to prove that a conveyance made by his intestate, and which purports to be an absolute sale, was a conveyance in trust to reimburse both contending parties for money paid by them as sureties of the intestate. *Miller v. Thatcher*, 60 D. 172.

57. Persons occupying one of the personal relations.—A mother is incompetent as a witness for or against her daughter, but is competent to testify in favor of her son-in-law; her credibility as affected by him is a proper subject for the consideration of the jury. *Groves v. Steel*, 46 D. 551.

The fact that a witness is related by consanguinity, or any other domestic or social relation, to either of the parties to the action, does not necessarily affix a legal discredit to his testimony. It may (not must) go to its credibility. *Potts v. House*, 50 D. 329.

A minor child of the testator, to whom goods are furnished upon a promise by the executor to pay for them, is not, on the ground of interest, an incompetent witness for the creditor. *Sanford v. Howard*, 68 D. 101.

58. Principal and agent—servants.—An agent or servant may be a witness for his principal. *Wainwright v. Straus*, 40 D. 675. Except in cases where the principal is sued on account of the negligence of the agent. *McDowell v. Simpson*, 27 D. 338; *Struthers v. Kendall*, 80 D. 610.

An agent is incompetent to testify for his

principal unless the latter has released him. *Otis v. Thom*, 58 D. 303.

An agent may be a witness to prove his own authority. *McDowell v. Simpson*, 27 D. 338. As where the claim of the principal or master is founded on the act of the witness done according to his duty and his undertaking. *Moses v. B. & M. R. R.*, 55 D. 222.

An agent commencing and carrying on a suit is a competent witness for the plaintiffs, where they have ratified his acts and have agreed to become responsible for the costs. *Medbury v. Watson*, 39 D. 726.

An agent to sell a chattel may be a witness for the owner in an action for the price thereof, unless it be proved that he is liable for negligence or misfeasance, and without such proof the law presumes against his negligence or misfeasance. *Scott v. Wells*, 40 D. 568.

A servant intrusted with the management and disposition of a team is a competent witness, in an action by the owner thereof, to prove the forcible taking of one of the horses by the defendant. *Moore v. Shenk*, 45 D. 618.

The testimony of an agent, detailing the representations made to the purchaser by him, as agent, is admissible, but not his testimony containing a statement of what induced the agent himself to share in the purchase. *Hammatt v. Emerson*, 46 D. 598.

An agent interested in the event of a suit, to the extent of a reasonable compensation for his services as agent, is rendered competent by an assignment of his interest to the plaintiff for a proper consideration. *Bailey v. Shaw*, 55 D. 241.

A common carrier is a competent witness in favor of the person employing, to show that he was employed to transport the goods, and that he left them with the defendants. *Id.*

A cartman is a competent witness to prove the delivery of goods to a common carrier, in an action against the carrier for the loss of the goods; and his competency is not affected by an offer of the defendants to prove to the court that the loss happened by the misconduct of the witness. *Moses v. B. & M. R. R.*, 55 D. 222.

An agent is a competent witness for the principal in an action of replevin brought by him to recover property which the agent sold contrary to his instructions. *Towle v. Leavitt*, 55 D. 195.

Sub-contractors are competent witnesses to prove a purchase and delivery of lumber to be used on a building, in a proceeding by *ecire facias* on a claim for the lumber furnished the sub-contractors for the erection of the building. *Odd Fellows' Hall v. Masser*, 64 D. 675.

A clerk who is to be paid by a share in

For Index to Notes in American Decisions and American Reports, see Volume 2.

the profits of a business conducted by parties against whom a material-man's lien for lumber furnished to erect a building is sought to be enforced, is a competent witness for such parties in the proceeding to enforce the lien. *Hunter v. Blanchard*, 68 D. 547.

An agent of the assured is not rendered incompetent as a witness in an action on a policy taken out by him on account of his principal, in which he is named as agent, by the fact that in his sworn statement of loss he describes it as "his" loss, and that the answer charges that he is the real plaintiff. *Henderson v. W. M. & F. I. Co.*, 43 D. 176.

If an insurance agent fills up an application of an applicant for insurance to the company for which the agent is soliciting insurance, and is also a stockholder in such company, the agent becomes thereby the agent of the person seeking to be insured, for that purpose, and is a competent witness on behalf of the company to prove what happened between the agent and applicant at that time. *Mut. F. Ins. Co. v. Deale*, 79 D. 673.

A clerk is a competent witness to prove the non-delivery of a package, as having no interest in the event of the suit, where the suit is brought by his employer against an express company for the loss of a package of money, the clerk having receipted for the package without receiving it, supposing that he was receipting for other articles, and the clerk's father afterwards voluntarily paid to the employer the amount of the loss. *American Express Co. v. Haggard*, 87 D. 257.

59. Principal and surety. — The principal is a competent witness for the surety to prove an agreement by which the liability of the latter is discharged. *Steele v. Boyd*, 29 D. 218.

A principal is incompetent as a witness, on the ground of interest, in an action on a bond brought against his surety alone, although the principal has been discharged in bankruptcy. *Pogue v. Joyner*, 42 D. 693.

A surety on a forfeited forthcoming bond is a competent witness in an action against the sheriff for neglect to make the money on an execution. *Poe v. Dorrah*, 56 D. 196.

The testimony of a competent witness in one of several actions tried together must be admitted, though such witness is not competent in the other action by reason of being surety in a replevin bond for one of the parties, and the court cannot require the party to procure other sureties, so as to render the witness competent in all the actions, but the jury should be directed to confine such testimony to the case in which the witness is competent. *Kimball v. Thompson*, 50 D. 799.

In an action to recover back money paid on a note signed by the plaintiff and

by several others as sureties, one of such sureties is a competent witness for the plaintiff, notwithstanding he may have agreed to indemnify another surety against the note. *Nichols v. Bellows*, 54 D. 85.

A surety on an administrator's bond is not incompetent as a witness for the administrator because of a breach of a covenant in the administrator's deed of the decedent's realty. *Merrill v. Harris*, 57 D. 359.

The surety of an administrator is not competent as a witness to prove an item of credit upon the final accounting. *Henderson v. Simmons*, 70 D. 590.

60. Sheriffs and constables. — A sheriff is a competent witness to prove that he had not given notice of the time and place of sale, as required by statute. *Valentine v. Cooley*, 33 D. 166.

A sheriff is a competent witness to prove a sale of property levied on. *Owen v. Barkedale*, 47 D. 348.

A sheriff who acquires an interest in the land he sells is an incompetent witness to prove the levy of the *fi fa*. *McCullum v. Hubbert*, 48 D. 56.

The testimony of a sheriff is competent to disclose what transpires in the jury-room. *Wilson v. Berryman*, 63 D. 78.

In an action of trover by a purchaser at a constable's sale for an article sold, but which the defendant refused to deliver, the constable to whom the execution was directed, and the deputy who made the levy, are competent witnesses for the plaintiff, notwithstanding the pendency of an action of trespass against them by the defendant in the execution for, levying upon and selling the goods for which the action of trover was brought. *Hatch v. Bartle*, 84 D. 484.

61. Trustee and cestui que trust. — A mere naked trustee named in a deed is a competent witness in a suit to set aside such deed. *Harvey v. Alexander*, 10 D. 519.

62. Vendor and purchaser of lands. — A grantor who has made no covenants, and has no interest in a suit relating to the land, is a competent witness. *Herbert v. Herbert*, 12 D. 192.

One conveying land with a special warranty under a decree, having previously given a bond to convey the same, is a competent witness between the purchaser under the decree and the heirs of the original vendee. *Porter v. Robinson*, 13 D. 153.

A grantor with a warranty is a competent witness for the grantee in an action brought by him to recover the land, though it would be otherwise if the action were against the grantee. *Jackson v. Rice*, 20 D. 683.

That a witness's testimony may impair a title which he has conveyed by deed is not a valid objection. *Hadduck v. Wilmarth*, 20 D. 570.

A grantee who loses his title by a failure to register his deed cannot hold his grantor

For Index to Notes in American Decisions and American Reports, see Volume I.

liable on the warranty therein, and therefore such grantor is not disqualified, by reason of interest, from testifying in a suit against such grantee. *Adams v. Ouddy*, 25 D. 330.

The testimony of a person in possession of land claiming for himself and others is competent to show that he and the others were the owners of the land. *Mussey v. Holt*, 55 D. 234.

A grantor is a competent witness to prove fraud in a deed to his deceased grantee, under the Ohio code, in a suit by his judgment creditor against him and the heirs of his grantee. *Bomberger v. Turner*, 82 D. 438.

A covenantor in a warranty which does not run with the land is a competent witness without a release in favor of the grantee of the covenantor's grantee against an adverse claimant; and if the covenant does run with the land, or if the plaintiff has an equitable right to enforce it, a proper release will render the covenantor a competent witness in behalf of the plaintiff. *Ayres v. Duprey*, 86 D. 657.

In ejectment, one who has delivered possession to the defendant under his parol agreement to purchase, cannot be a witness for the defendant. *Jackson v. Stackhouse*, 13 D. 514.

Where land is attached, and afterwards conveyed to another by deed of warranty, the grantee in such a deed is not a competent witness against the attaching creditors in the suit in which the attachment issued. *Beach v. Packard*, 33 D. 185. S. P., *Kendall v. Field*, 30 D. 728.

A warrantor of title to lands, having a direct interest in a suit affecting the title which he has warranted, is not a competent witness for the warrantor, or one deriving title through him. *McKelway v. Armour*, 64 D. 445.

63. — of chattels. — One who parts with all his interest in the subject-matter of a conditional sale is a competent witness for the plaintiff in an action of replevin by his co-vendor against attaching creditors of the vendee. *Smith v. Dennie*, 17 D. 368.

A vendor of personal property, through whom both parties claim title thereto, is a competent witness for the plaintiff in an action against the sheriff for seizing and selling the property under an execution against the vendor. *Graham v. McCreary*, 80 D. 591.

4. Husband and Wife.

64. The common-law rule excluding them. — The mother of a child born in wedlock, though begotten before, is incompetent to prove that the child was not begotten by the man who became her husband before its birth. *Dennison v. Page*, 72 D. 644.

At common law neither the husband nor the wife is allowed to prove the fact of access or non-access; and as such rule is

founded "upon decency, morality, and public policy," it is not changed by a statute allowing parties to testify in their own behalf. *Boykin v. Boykin*, 16 R. 776; *Egbert v. Greenwall*, 38 R. 260; *Mink v. State*, 50 R. 386; *Dennison v. Page*, 72 D. 644.

A woman is incompetent as a witness against a man to whom she was married four years after separation from her first husband, from whom she had heard nothing for sixteen years since the second marriage. The presumption of the wife's innocence in marrying again will overcome any presumption that a man not heard from for four years before her second marriage and sixteen years afterwards, was alive and her lawful husband when she married the second time. *Kelly v. Drew*, 90 D. 138.

A husband is an incompetent witness for his wife in a civil suit in which she is a party. *Cramer v. Reford*, 90 D. 594.

65. Limits and exceptions to the rule.* — A wife is a competent witness to prove that her husband destroyed the will of his father. *Wilmot v. Talbot*, 1 D. 374.

The wife is a competent witness wherever the husband would be. *Bell v. Coiel*, 27 D. 448.

When a husband and wife are by statute excluded as witnesses "for or against each other," in an action against them for slanderous words spoken by the wife, she is a competent witness in her own behalf, and he is a competent witness in his own behalf. *Mousler v. Harding*, 5 R. 195.

The testimony of a husband which may tend to criminate his wife, or the testimony of a wife which may tend to criminate her husband, is admissible in a collateral proceeding, provided that no use can afterward accrue therefrom in any direct proceeding against either of them. But a husband or wife objecting to give such testimony will be entitled to the protection of the court. *State v. Briggs*, 11 R. 270.

66. Changes effected by statutes. — A wife is a competent witness for her husband, on the trial of a civil action, under the Connecticut statute. *Merriam v. Hartford etc. R. R. Co.*, 52 D. 344.

In an action between the husband and wife, either party is a competent witness against the other, in general, under the New York law of 1857, though inadmissible to prove the particular fact of non-intercourse. *Chamberlain v. People*, 80 D. 255.

A husband is a competent witness, under the Wisconsin revised statutes, in an action by the husband and wife for an injury to the wife. *Barnes v. Martin*, 82 D. 670.

A statute removing the disability of witnesses on the ground of interest does not render a husband and wife competent wit-

* Competency of husband or wife to testify to the other's adultery, see note, 85 R. 741.

For Index to Notes in American Decisions and American Reports, see Volume L.

nesses, the one for or against the other, even as to matters not confidential. *Ges v. Scott*, 26 R. 331.

67. Competency in criminal cases.*

-- The incompetency of a husband to testify against the wife is not restricted to testimony the sole object of which is to convict her of crime, but the prohibition extends to and includes whatever may have a direct tendency to criminate and degrade. *State v. Jolly*, 32 D. 656.

The wife of an accomplice is a competent witness in a criminal prosecution, and the weight of her testimony is for the jury. *State v. Moore*, 95 D. 776.

Under a statute providing that "husband and wife may be witnesses for each other in all criminal cases, but they shall not be required to testify against each other, as witnesses for the prosecution," neither is a competent voluntary witness against the other. *Byrd v. State*, 34 R. 440.

Under a statute permitting a husband or wife to testify, the one against the other, in a criminal prosecution for an offense committed by one against the other, the wife is not competent against the husband on a prosecution against him for incest with her daughter, his step-daughter. *Compton v. State*, 44 R. 703.

On an indictment of a husband for perjury, after divorce, his wife is a competent witness to prove that she has had no sexual intercourse with any other person. *Chamberlain v. People*, 80 D. 255.

On an indictment for bigamy, the second wife is admissible as a witness, either for or against the prisoner. *State v. Patterson*, 38 D. 699.

Upon an indictment for fornication and bastardy, a married woman is a competent witness to prove the criminal connection with her. *Commonwealth v. Shepherd*, 6 D. 449.

The husband of a woman with whom the crime of adultery is alleged to have been committed, is not a competent witness to prove the offense. *State v. Welch*, 45 D. 94. Nor as to matters transpiring during the existence of the marriage relation between them, although, before the trial in which he is called to testify, the parties had been divorced. *State v. Jolly*, 32 D. 656.

The husband of a woman is not competent as a witness against a person jointly indicted with her for adultery, as to acts committed during the subsistence of the marriage relation. *Id.*

On the trial of an indictment for adultery, the husband of the *particeps criminis* is a competent witness to prove circumstances which do not directly, but tend to, criminate her. *State v. Bridgman*, 24 R. 124.

Under a statute permitting a husband and wife to testify against one another on a

criminal prosecution for an offense committed by one against the other, the one may testify against the other on an indictment of the other for adultery. *Roland v. State*, 35 R. 743.

In a prosecution of a wife for an assault upon her husband, he is a competent witness for the state. *Whipp v. State*, 32 R. 359.

The wife is a competent witness against the husband, on his trial for a personal outrage committed by him upon her. *State v. Boyd*, 27 D. 376; *State v. Davis*, 5 D. 529. And she may be compelled to testify against him. *Turner v. State*, 45 R. 412; *Bramlette v. State*, 57 R. 622.

Where three parties are jointly indicted for an assault and battery, and two of them are granted a separate trial, the wife of the other is a competent witness in their favor, as her husband has no interest in the event of their trial. *Moffit v. State*, 36 D. 301.

68. Competency of widow.—A widow of an intestate may be sworn as a witness in an action brought by the administrator of her deceased husband, to prove any fact to which she may testify without violating the confidence existing between her and her husband while the marriage relation existed. *Babcock v. Booth*, 38 D. 578.

The widow is not a competent witness to facts disclosed to her by her husband in speaking of his affairs. Such disclosures are regarded as matters of trust and confidence between husband and wife. *Smith v. Potter*, 65 D. 198.

The divorce of a wife, or the death of a husband, does not remove her incompetency to testify concerning disclosures made to her by her husband during the continuance of the marriage relation. *Babcock v. Booth*, 38 D. 578.

A widow of one who, while living, was interested in a controversy, is a competent witness as to all matters in regard to any transaction affecting her deceased husband's interests, unless her testimony involves the disclosure of matters of confidence between herself and husband, or affects his character. *Smith v. Potter*, 65 D. 198.

The testimony of a widow, after her husband's death, is competent, so far as it consists of facts to which she deposes of her own knowledge, and which are not derived from communications made to her by him, if such testimony tends only to show that a conveyance made by him was fraudulent as to his creditors, but does not tend to diminish the liability of his estate to the creditor to whom such conveyance was made. *Short v. Tinsley*, 71 D. 482.

69. — of divorced wife.—A husband and wife, though divorced, cannot testify against each other as to any matters occurring during the marriage. *Dickerman v. Graves*, 53 D. 41; *Owen v. State*, 56 R. 40.

A divorced wife is a competent witness in

* Admission of evidence of husband or wife to criminate the other, see note, 27 D. 377-381.

For Index to Notes in American Decisions and American Reports, see Volume I.

an action for criminal conversation, brought by her husband, to prove criminal intercourse with her during the marriage. *Id.* Contra, *Rea v. Tucker*, 99 D. 539.

5. Attorneys; Physicians.

70. Attorneys. — An attorney or counsel may testify to a collateral fact which he has ascertained, without being intrusted with it by his client; as, for instance, to the handwriting of his client, though he became acquainted with it after the suit commenced, but not by communication with the client. *Johnson v. Davenport*, 10 D. 198.

An attorney is a competent witness, in an action for malicious attachment, where he consulted with counsel upon the case in which the attachment issued, and may testify as to what opinion was given to the plaintiff in the attachment suit by such counsel. *Alexander v. Harrison*, 90 D. 431.

An attorney-at-law cannot be called upon to testify respecting the condition and appearance of a deed of trust and trust notes, at the time of his employment to bring a suit of foreclosure upon them. That the communications to the attorney were made in the form of deeds or notes does not exclude them from the protection of the statute and the general principle affecting privileged communications. *Gray v. Fox*, 97 D. 416.

An attorney who has opened a case and examined witnesses is a competent witness for his client. *Follansbee v. Walker*, 13 R. 671.

When an attorney becomes a witness for his client in a suit which he is conducting for him, it is competent to show that he has an agreement with his client, entitling him to a retainer and a certain portion of the amount to be recovered. *Moats v. Rymer*, 41 R. 703.

71. Physicians. — In an action of assault and battery, the attending physician of the plaintiff may testify as to the plaintiff's complaints and statement of symptoms made to him for the purpose of medical treatment and advice, and also as to his own observation of his indications of suffering. *Fay v. Harlan*, 35 R. 372.

On a trial for murder, by poison, a physician is not prohibited from testifying to the results of his examination of the deceased, and to the statements of the deceased during such examination, while attending him in his last illness. *Pierson v. People*, 35 R. 524.

A physician may not testify, to the injury of his patient or his representatives, to facts which he learned concerning the patient's ailments either by the patient's statements or by his own examination and observation. *Masonic Mut. Ben. Assoc. v. Beck*, 40 R. 295.

Under the statute, the testimony of an attending physician, if offered by the patient

or his representative, is competent, but not otherwise. *Groll v. Tower*, 55 R. 358.

Where a statute prohibits a physician from testifying to information acquired by him while attending a patient unless the patient waives the privilege, the death of the patient makes the prohibition conclusive. *Westover v. Aetna Life Ins. Co.*, 52 R. 1.

Where a physician attends a sick person in consultation with the patient's physician, he comes within the provision of the statute prohibiting physicians from disclosing information acquired in attending patients in a professional capacity and necessary to enable them to act in that capacity. *Rennihan v. Demin*, 57 R. 770.

The prohibition also applies in proceedings for the probate of wills. *Id.*

III. CREDIBILITY.

1. General Rules.

72. Credibility as dependent upon character of witness. — The jury has the sole right to respond to the question how far the want of chastity would impair the credibility of a witness. *Jones v. State*, 62 D. 550.

73. — or his bias. — The testimony of witnesses who swear positively, and are otherwise unimpeached, should not be discredited merely because they are related to the party in whose behalf they testify, although this is a circumstance to be weighed in a doubtful case. *Estate of Gangwere*, 53 D. 554.

An instruction is erroneous which denies to the jury the right to consider the direct interest of a witness as a party to the suit, in determining the weight to which his testimony was fairly entitled, they being instructed that to disregard his testimony there must be something in his manner or conduct in giving it, or in the testimony of other witnesses, sufficient to satisfy their minds that what the witness stated was false. *N. O. etc. R. R. Co. v. Albritton*, 75 D. 98.

74. Rules for weighing testimony, generally.* — The jury must determine what witnesses are entitled to most influence when the testimony is conflicting; and this they may do from various considerations: the manner, expression, and intelligence, and who are likely to be best informed, from their situation and intelligence. The proposition that if the witnesses before the jury are equal in credibility the greater number must prevail, is unsound. *Jones v. State*, 62 D. 550.

The jury cannot lawfully, from mere caprice, disregard the testimony of an unimpeached witness, although they are the judges of the credibility of witnesses. They must exercise their judgment, and not their

* Credibility of witnesses, rules concerning, see note, 68 D. 328-331.

For Index to Notes in American Decisions and American Reports, see Volume I.

will, when passing upon the credibility of a witness. *Robertson v. Dodge*, 81 D. 267.

The evidence of attesting witnesses impeaching instruments to which their signatures have given credit, is to be received with much jealousy, but the rules of evidence excluding it have been relaxed and abandoned. *Higberger v. Stiffler*, 83 D. 593.

A witness need not be impeached by evidence of bad character to justify the jury in refusing to give credit to his testimony; they may take into consideration his relationship to the parties, his manner and appearance on the stand, and his evident bias in favor of one of the parties. *Corgan v. Frew*, 89 D. 286.

A witness may be contradicted by circumstances as well as by other witnesses. Courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached. *Ekwood v. Western U. Tel. Co.*, 6 R. 140.

75. The question one for the jury. — The credibility of witnesses and the weight of evidence are questions for the determination of the jury. *Baker v. Young*, 92 D. 149; *White v. Fox*, 4 D. 643; *Flemming v. Marine Ins. Co.*, 33 D. 33; *Taylor v. Kelly*, 68 D. 150. And the court will not interfere with their decision under such circumstances. *Illinois Cent. R. R. Co. v. Adams*, 92 D. 85.

76. Conflicting testimony. — A seeming conflict of evidence should be strongly scrutinized, with the view to reconciliation. Witnesses will be considered to have spoken the truth where one statement is not wholly inconsistent with another. *Woodcock v. Bennet*, 13 D. 568.

Where two witnesses directly contradict each other, and the veracity of neither is impeached, the presumption of truth is in favor of the witness who swears affirmatively. *Hepburn v. Citizens' Bank*, 46 D. 564.

Where a witness is examined twice, first by one party and then by the other, and his answers are contradictory, those first in point of time are entitled to the most credit, as being nearer the transaction. *Parke v. Foster*, 71 D. 221.

Where the verdict depends upon the credibility of witnesses, it is the peculiar province of the jury to judge of that credibility, and to attach such weight to the testimony of each as may seem to be proper, after a due consideration of all the circumstances in the particular case. *Graham v. Anderson*, 92 D. 89.

It is error to charge that if witnesses are equally credible, the greater number are entitled to the greater weight. *Bierbach v. Goodyear Rubber Co.*, 41 R. 19.

77. Positive and negative testimony. — No general rule can be made concerning the relative value of positive and negative testimony. It depends upon the opportunity of the witnesses for knowing and the attention which they have directed to the matter, etc. *Denham v. Holman*, 71 D. 198.

The testimony of neighbors that an adverse claimant did not occupy land is as good as that of others that he did; for the question of notorious possession depends upon facts capable of being equally well known to each set of witnesses. *Id.*

Positive evidence preponderates over negative in weighing contradictory testimony, other things being equal; but the jury's attention, in the application of this rule, should be directed to the facts and circumstances of the case, to prevent its unjust operation. *Farmers' etc. Bank v. Champion T. Co.*, 56 D. 68.

It is a general rule that affirmative testimony should outweigh that which is negative; but held not to apply where the matter in dispute was whether or not a testator could measure wheat, compute interest, and attend to the ordinary affairs of life, and some of the witnesses swore he could, and others that he could not. There was no difference in the character of those statements. *Potts v. House*, 50 D. 329.

The testimony by a joint maker of a note that there has been no demand, evidence having been introduced of a demand upon the other maker, though evidence of the feeblest kind, is admissible. *Persons v. McKibben*, 61 D. 85.

The testimony of witnesses having an opportunity of knowing that a certain individual did not strike a blow is not negative proof, but is entitled to equal weight with affirmative testimony of others who state that they saw such person strike the blow. *Coughlin v. People*, 68 D. 541.

78. The maxim falsus in uno, falsus in omnibus. — A witness who willfully contradicts himself in a material part of his testimony, for the purpose of concealing the truth, is unworthy of belief, except so far only as he is supported by other evidence in the case; but if a contradiction occurs through inadvertence, or in reference to some matter immaterial to the issue, such a contradiction will not of itself render his evidence unworthy of credit. *Crabtree v. Hagenbaugh*, 79 D. 324.

The jury should not be directed to reject altogether the evidence of a witness, if he has testified willfully false as to any fact. Such an instruction is too broad. If he so testifies to a material fact, and there is no circumstance in the case tending to corroborate his evidence, the jury have the right to reject all of his evidence as unworthy of credit; but they should not reject such por-

For Index to Notes in American Decisions and American Reports, see Volume I.

tions of it as may be corroborated by other unobjectionable evidence in the cause. *Id.*

When clearly shown that a witness has committed perjury in one material point the testimony must be wholly rejected, and cannot be relied upon for any purpose whatever, in accordance with the maxim, *Falsus in uno, falsus in omnibus*. *Stoffer v. State*, 86 D. 470.

Where a witness has sworn differently upon the same point on a former occasion, his testimony should remain in the case, to be considered by the jury in connection with the other evidence, under such prudential instructions as may be given by the court, and subject to the determination of the court having jurisdiction to grant new trials in cases of verdicts against evidence. The judge is not to pronounce the witness incompetent, and order his testimony stricken out and wholly excluded from consideration, as though he had been convicted of a crime rendering him incompetent to testify as a witness. *Dumas v. People*, 86 D. 319.

Self-contradiction by a witness, of evidence in a former trial goes to discredit him, but the jury may consider his evidence for what they think it is worth. *Id.*

79. Credibility of accused persons.

—The statement of a prisoner in a criminal case is for the consideration of the jury, who may give it such credit, in whole or in part, as under all the circumstances they may deem it entitled to. *Maher v. People*, 81 D. 781.

The prisoner, on a criminal trial, being entitled by statute to make a statement on his own behalf, not under oath, its weight and credibility are matters for the jury, and he is not entitled to an instruction that no less credence is to be given to the statement because it is not under oath. *Blackburn v. State*, 46 R. 323.

80. —of accomplices.* —In a case where all the evidence against the prisoner was the uncorroborated testimony of accomplices, an instruction that such evidence is unsafe, on account of its suspicious source, and that the jury had better acquit, but that the jury had the power to convict on such testimony, and if from the whole evidence they were convinced beyond a reasonable doubt of the guilt of the defendant, their verdict should be guilty, is unexceptionable. *Com. v. Price*, 71 D. 668.

The testimony of an accomplice is of a suspicious character and calls for scrutiny on the part of the jury, and for a particular caution to the jury on the part of the judge in his charge; and the neglect to give such a caution is a clear omission of judicial duty. *State v. Stebbins*, 79 D. 233.

* See notes on the evidence of an accomplice, 61 R. 322-325; 34 R. 408-411.

2. Impeaching and Contradicting.

81. The right to impeach or contradict a witness.* —A witness may be impeached by showing that at the time the facts sworn to occurred he was intoxicated. But the intoxication must be proved by direct evidence, or by the acts and conduct of the witness, and not by the quantity of spirituous liquor he had previously drank. *Tuttle v. Russell*, 2 D. 89.

Witnesses to a prisoner's identity cannot be collaterally impeached by a witness who testifies that he had experimented in company with another individual, at a time corresponding to the time of the night when the homicide took place, and on a similar evening, and had satisfied himself that objects could not be distinctly discerned at the distance the witnesses were situated from the parties. *Sealy v. State*, 44 D. 641.

Evidence which goes to the merits of a case, if admitted to contradict a witness, should be admitted as principal testimony. *Reed v. Vancleve*, 72 D. 369.

For the purpose of impeachment, a witness will not be allowed to state in general terms that he had been intimately acquainted with the party for a number of years, and had never heard him utter a declaration proved by another witness. *Lasson v. Hicks*, 81 D. 49.

Evidence impeaching the veracity of a party to a cause, who has been sworn as a witness, may be offered by the opposite party without first giving notice of his intention so to do. *Knight v. House*, 96 D. 515.

One of two indicted persons, testifying on behalf of his co-defendant, is subject to impeachment like any other witness. *State v. Hardin*, 26 R. 174.

A prisoner testifying on his own behalf is subject to impeachment like other witnesses. *State v. Clinton*, 29 R. 596.

Evidence is competent to show that the mind and memory of a witness have become impaired by disease and are in a feeble condition. *Alleman v. Stepp*, 35 R. 238.

An impeaching witness may himself be impeached. *Phillips v. Thorn*, 43 R. 85.

82. Impeachment by proof of character.† —The credit of a witness must be impeached or sustained by evidence of his general character, and not of his conduct in particular cases. *Allen v. Young*, 17 D. 130. *S. P.*, *Evans v. Smith*, 17 D. 74; *Blue v. Kibby*, 15 D. 95; *Douglass v. Touzey*, 20 D. 616; *Hart v. Reed*, 35 D. 179.

The inquiry in impeaching a witness involves his whole moral character, and is not

* See monographic note on impeachment of witnesses, 78 D. 762-777.

When and by whom may be impeached, see note, 15 D. 96-100.

† See notes on impeachment by proof of character, 73 D. 771-775; 17 D. 76, 77.

WITNESSES, III, 2.

For Index to Notes in American Decisions and American Reports, see Volume I.

restricted merely to his general reputation for truth and veracity. *Gilliam v. State*, 73 D. 161; *State v. Shields*, 53 D. 147. Contra, *Ayres v. Duprey*, 86 D. 657; *Phillips v. Kingfield*, 36 D. 760; *Crane v. Thayer*, 46 D. 142. But the character of a witness cannot be impeached by proof of a single act of immorality. *Long v. Morrison*, 77 D. 72.

His general character for truth may be proved as a fact, and the jury are then to form their own opinion respecting the witness's credibility. *Phillips v. Kingfield*, 36 D. 760.

Where a prisoner testifies in his own behalf on the trial of an indictment, his character for truth may be impeached. *State v. Beal*, 34 R. 263. But he cannot be impeached as to his general moral character. *Fletcher v. State*, 19 R. 673.

In impeaching the character of a witness, an inquiry as to her general character, not limited to truth and veracity, is proper. *Holland v. Barnes*, 25 R. 595. But evidence of her general character for chastity is inadmissible to impeach her credibility. *Gilchrist v. McKee*, 28 D. 721; *Commonwealth v. Murphy*, 14 Mass. 387; *Commonwealth v. Churchill*, 45 D. 229. Contra, *State v. Shields*, 53 D. 147.

The character of the prosecutrix for chastity may be impeached, not only by general evidence of her reputation in this respect, but she may be asked whether she has not had previous criminal connection with the accused; and if she is examined as a witness for the prosecution, she may be inquired of, on cross-examination, whether she had not, at certain specified times and places, had sexual intercourse with other persons besides the accused. These questions go to repelling the allegation of force. *Watry v. Ferber*, 86 D. 789.

In supporting or attacking the character of a witness sought to be impeached, the proper mode is to ask the witnesses called on that point, whether they are acquainted with the general character of such witness for truth and veracity, and whether, from that general character, they would believe him on oath. *Chess v. Chess*, 21 D. 350; *People v. Mather*, 21 D. 122; *Gilliam v. State*, 73 D. 161; *Knight v. House*, 96 D. 515; *Holbert v. State*, 35 R. 738.

The form of the interrogatory in impeaching a witness, may be whether the person testifying knows the general character of the witness, and if so, what is his general reputation for truth, and it is not allowable to ask further, if he would believe the witness under oath. *Phillips v. Kingfield*, 36 D. 760.

One who testifies that he knows the general character of a witness, but nothing of his character for truth and veracity, may be asked whether, from his knowledge of such general character, he would believe the wit-

ness under oath. *Jackson v. People*, 38 D. 624.

The testimony, as to the character, of a witness sent into the neighborhood where a party formerly lived, to learn his character, is not admissible. *Douglass v. Touzey*, 20 D. 616.

A witness's neighborhood is co-extensive with his intercourse with his fellow-citizens, and may include an entire county. *Chess v. Chess*, 21 D. 350.

The cross-examination in such case may extend to the opportunity for knowing the witness's character, for how long and how generally unfavorable reports prevailed, and from whom they were heard. *Phillips v. Kingfield*, 36 D. 760. S. P., *Weeks v. Hull*, 50 D. 249.

A deposition that a witness's reputation for truth is "not very good" cannot be excluded because deponent stated on cross-examination that such reputation was founded on his not fulfilling his agreements. *Hapgood v. Fisher*, 56 D. 663.

An impeaching witness may be asked if he is acquainted with the general reputation for truth and veracity of the party sought to be impeached; and it is erroneous to refuse to permit him to answer such question, unless he first states that he has heard a majority of all his neighbors speak of his character for truth and veracity. *Orabres v. Hagenbaugh*, 79 D. 324.

A witness is incompetent to testify as to the character of another witness for truth and veracity when his belief is based upon his individual opinions and feelings, and not upon his knowledge of the reputation of the witness for veracity in the community in which he lives. *Ayres v. Duprey*, 86 D. 657.

After a witness has proved the loss of a deed, and evidence of its contents has been given without objection, it is too late to impeach the character of the witness to the loss. *Jackson v. Rowland*, 22 D. 557.

The question cannot be raised for the first time on the argument or charge. *Holbert v. State*, 35 R. 738.

Where, in a criminal prosecution, the defendant introduces witnesses to impeach certain witnesses sworn by the state, by attacking their general character, the state may in turn introduce witnesses to attack the character of the impeaching witnesses of the defense, *semble*. At all events, objection to the admissibility of such evidence must be made before it is admitted, and cannot be made afterwards. *State v. Moore*, 95 D. 776.

83. Impeachment by proof of contradictory or inconsistent statements.*—A witness's credit may be impeached by proof that he has made representations inconsistent with his present testimony. *State v. Patterson*, 38 D. 699.

* See note on prior contradictory statements, 73 D. 762-771.

For Index to Notes in American Decisions and American Reports, see Volume I.

A written report made by a witness may be read in evidence to show a discrepancy between his testimony and his prior statements. *Lynch v. Postlethwaite*, 12 D. 495. S. P., *De Sobry v. De Laitre*, 3 D. 535.

A party cannot introduce his own statements under color of impeaching a witness, by asking the witness whether at a certain time certain declarations were not made to him by such party, to which he made a certain reply, respecting the fact in controversy, although the interrogatory is accompanied with a declaration of a purpose to contradict the answer. *Whiteford v. Burckmeyer*, 39 D. 640.

A witness cannot be impeached by a statement which he made before a magistrate on a previous occasion, when a hearing of *habeas corpus*, involving the same matter, took place, unless such statement was read to the witness and signed by him. *Nelms v. State*, 53 D. 94.

A witness may be discredited by evidence that he has made a different statement on a former occasion, although the precise words used on that occasion cannot be proved; nor need he be first asked whether he has ever testified differently. But the previous statement cannot be used to prove the fact to be as then stated by him. *Gould v. Norfolk Lead Co.*, 57 D. 50.

A witness may be impeached by evidence that a different statement was made by him to others from that he made upon oath, where he acted as interpreter and attorney for the grantor and defendant, in executing a deed, and testified for the plaintiff, from whom he received a subsequent deed for part of the land, in an action involving the amount of land conveyed, in regard to his reading over the deed to the grantor, and to the grantor's admission of the quantity of land he had agreed to convey. *McDaniel v. Baca*, 56 D. 339.

The testimony of one partner may be contradicted by a written agreement, by which such partner sold his interest in the partnership property to his co-partner, where, in an action by the latter against a sheriff for selling the partnership property on an execution against the former alone, the former testified for the defendant that he owned the property at the time of the levy, and had never perfected the sale to his co-partner. *Deal v. Boyce*, 57 D. 702.

A witness may be asked, for the purpose of contradicting another witness, whether the latter has made a different statement on another occasion, when a proper foundation has been laid by a preliminary question as to the time, place, and person involved in the supposed contradiction, and the matter inquired of is relevant to the issues in the case. *Galena etc. R. R. Co. v. Fay*, 63 D. 323.

The exclusion of evidence offered by a defendant for the purpose of contradicting a

witness who, on his cross-examination, testified that he had never expressed any hostile feelings towards the defendant, that the witness in a conversation with a third person about a note which had just been signed by him and the defendant, said that the defendant had never paid him for certain services, and that he was worth nothing himself, and that he had taken this course to get even with the defendant, is no ground of exception. *Starks v. Sikes*, 69 D. 270.

The testimony of a witness may be impeached by proving declarations of a party, whose witness he was, that the witness had made a statement contradictory to that made by him upon the stand. *Allen v. Harrison*, 73 D. 302.

On a criminal trial the accused testified in his own behalf. On a new trial he did not testify, but evidence was admitted to show that the testimony of his witnesses was inconsistent with his testimony on the first trial. *Held*, error. *Kirby v. Com.*, 46 R. 747.

Where the testimony of a deceased witness is reproduced, it is not competent to show that he had confessed that his evidence was false. *Craft v. Com.*, 50 R. 160.

The record of a will, together with the affidavit of the subscribing witnesses made at the time of probate, being offered in evidence, — *held*, competent to show statements made out of court by one of such witnesses, in order to contradict the statements of the affidavit as to the due execution of the will. *Otterson v. Hofford*, 13 R. 429.

84. Contradictory statements not admissible unless witness is first asked if he made them. — The credibility of a witness may be impeached by showing that he made prior statements inconsistent with his present testimony; but, before this can be done, he must be asked the question and given an opportunity of explaining what might otherwise seem contradictory. *Franklin Bank v. Pa. etc. Co.*, 23 D. 687; *Doe v. Reagan*, 33 D. 466; *State v. Marler*, 36 D. 398; *State v. Patterson*, 38 D. 699; *McIntire v. Young*, 39 D. 443; *Whiteford v. Burckmeyer*, 39 D. 640; *Sealy v. State*, 44 D. 641; *Moore v. Bettis*, 53 D. 771; *Wright v. Hicks*, 60 D. 687; *Bobo v. Bryson*, 76 D. 406; *Rungas v. Price*, 86 D. 459; *Ayres v. Duprey*, 86 D. 657; *Smith v. Cooke*, 100 D. 58.

The credit of a witness who has testified orally, or has given a deposition, may be impeached by showing that he has made a different statement out of court, either before or after he has given his testimony; nor is it necessary that the witness should first be asked as to such different statement, or that he be present when his credit is to be impeached. *Tucker v. Welch*, 9 D. 137. S. P., *Hedge v. Clapp*, 58 D. 424.

The English rule first recognized in *Queen's Case*, 2 Brod. & R. 301, that a witness cannot

For Index to Notes in American Decisions and American Reports, see Volume I.

be impeached by proving that he has made contradictory statements out of court, unless he has been first inquired of touching such contradictory statements, has never been adopted in Connecticut, either by legislative enactment or judicial decision. Although this rule is a safe and conservative one, calculated to protect the just rights of witnesses and to elicit the truth, and one to which it is very proper to adhere, subject to such exceptions as a sound discretion may suggest, yet a failure to apply it will not be ground for reversal of the judgment, particularly in a case where the witness was still within the reach and subject to the control of the party calling him, after the impeaching testimony had been given, and where he might have been called for the purpose of explanation. *Hedge v. Clapp*, 58 D. 424.

Whether a witness may be contradicted without having been first given an opportunity to explain the evidence which is relied on for that purpose, is a question which is left to the discretion of the trial courts. *Sharp v. Emmet*, 24 D. 554.

To impeach a witness by his prior contradictory statements, it is sufficient to direct his attention with reasonable certainty to the subject of previous declarations. It is immaterial that there is a slight difference between the date to which his attention was directed and that at which the contradictory statement is shown to have been made. *Nelson v. Iverson*, 60 D. 442. But it is not sufficient to merely direct his attention to dates, names, and other attendant circumstances; he must also be asked whether or not he has said or declared that which is intended to be proved. *Higgins v. Carlton*, 92 D. 666.

Inquiries on irrelevant topics to discredit a witness may be permitted on trial, in the discretion of the judge; but such inquiries may be excluded without infringing any legal right of the parties. *Turnpike Road Co. v. Loomis*, 88 D. 311.

85. Collateral matters elicited on cross-examination not foundation for impeachment.* — A witness cannot be impeached by showing the falsity of his testimony concerning facts collateral to the issue. *Stevens v. Beach*, 36 D. 359; *Combs v. Winchester*, 75 D. 203; *Goodall v. State*, 80 D. 396; *Turnpike Road Co. v. Loomis*, 88 D. 311; *Fletcher v. Boston etc. R. R. Co.*, 79 D. 695.

The answer to a question admissible only on cross-examination, and which is merely collateral, cannot be contradicted. *Combs v. Winchester*, 75 D. 203.

The cross-examination of an agent of defendant as to acts and declarations which there was no proof he had authority to make re-

* Discrediting by inquiries concerning collateral or irrelevant matter, see note, 88 D. 821-824.

lates to collateral matters, and the answers of the witness are therefore conclusive upon the plaintiff. *Fletcher v. Boston etc. R. R.*, 79 D. 695.

The declarations of a witness as to the place of his residence are not always immaterial touching his credibility. *Bersch v. State*, 74 D. 283.

It is not error to refuse to allow a witness to be questioned as to whether he had not passed a counterfeit bill as a genuine one, and what he had sworn about it on a former occasion, for the purpose of impeaching him; but the court might, in its discretion, allow the question to go to the witness under proper advice. *Id.*

The testimony of a witness that "he had not said" that he knew a certain fact is immaterial, irrelevant, and inadmissible, although elicited for the purpose of contradicting him in case he denied it. *Combs v. Winchester*, 75 D. 203.

If it is proposed to contradict the answer to a question asked a witness, the question must be such as would be admissible if proposed by the party calling him. *Id.*

On a murder trial T. was a material witness for the accused, and on cross-examination for the purpose of impairing her credibility, she was asked whether she had not taken things which did not belong to her when she left M., her employer. The prosecution was then allowed to contradict T., in this collateral matter, by the testimony of M. *Held*, error. *Stokes v. People*, 13 R. 492.

86. Showing conviction of crime.* — To impeach a witness's credibility, it is competent to produce the record of his conviction in another state for shop-breaking, with intent to steal. *Com. v. Knapp*, 20 D. 491.

A statute enacted that no person should be disqualified as a witness by reason of criminal conviction, but the conviction might be shown to affect his credibility, and that any defendant in a criminal case might at his option be a competent witness. The statute also specified certain crimes, conviction of which rendered the party infamous. *Held*, that to impeach a defendant in a criminal case for infamy, the judgment of the former conviction must be shown, and mere evidence that he has been a convict in a state prison is inadequate. *Bartholomew v. People*, 44 R. 97.

87. Impeachment of prosecuting witnesses. — Evidence of an offer by the prosecutor to leave court without testifying in a criminal cause, if the prisoner would settle, is inadmissible to contradict or impeach his testimony. *People v. Gensung*, 25 D. 594.

In an action for seduction, the general character for chastity of the person seduced

* See note on right to show conviction of crime, 78 D. 775-776.

For Index to Notes in American Decisions and American Reports, see Volume I.

is in issue, and may be impeached or supported by general evidence; but the witness cannot be asked whether she had not been previously criminal with other men, though other persons may be called to testify as to their own criminal intercourse with her, and the time and place. *Shattuck v. Myers*, 74 D. 236.

88. Impeaching one's own witness.* — A party calling a witness interested against him is estopped from objecting to his competency and credibility only so far as that trial is concerned. *Cravy v. Sprague*, 27 D. 110.

The objection of incompetency as a witness is waived, where the party who might have made the objection calls the witness in support of his own case. *Stockton v. Demuth*, 32 D. 735.

A party cannot attack the credibility of his own witness by evidence of general reputation. *Olmstead v. Winsted Bank*, 55 D. 280.

A party introducing a witness does not thereby indorse his credibility although he cannot impeach him. *Jarnigan v. Fleming*, 5 R. 514.

A party cannot directly impeach his own witness; but this rule does not prevent him from showing that the facts testified to are incorrectly stated by the witness; and the party calling a witness is not precluded from proving the truth of any particular fact by any other competent testimony in direct contradiction to what such witness may have testified. *Swanescot Machine Co. v. Walker*, 55 D. 172. *S. P., Franklin Bank v. Pennsylvania etc. Co.*, 33 D. 687; *Burkhalter v. Edwards*, 60 D. 744; *Stockton v. Demuth*, 32 D. 735; *Sealy v. State*, 44 D. 641; *Champ v. Com.*, 74 D. 388; *Olmstead v. Winsted Bank*, 55 D. 280; *Cox v. Baynes*, 45 R. 583.

To enable a party to contradict his own witness, "by showing that he has made statements different from his present testimony," it is not required to prove in addition that his testimony is untrue. *Champ v. Com.*, 74 D. 388.

The state may impeach the credibility of its own witness, by proving that on former occasions he had given a different account of the transaction from that which he swears to in court. *State v. Norris*, 1 D. 564.

The subscribing witness to a deed must be produced, if possible, to prove it; but the party desiring to prove the deed may impeach the witness, though called by himself. *Williams v. Walker*, 46 D. 53.

A party taking a deposition, but not reading it, may impeach the witness, by proof of contradictory statements, where the adverse

party reads the deposition. *Cudworth v. S. U. Ins. Co.*, 55 D. 692.

A party to a suit is not bound by, or held to admit as true, every statement made by his witnesses during the trial of a cause, because he does not deny or contradict them at the time. *Wilkins v. Stidger*, 83 D. 64.

On trial of an indictment for bigamy, where the second wife as a witness for the state testified that she was not married to the defendant, she may be asked by the state if she had not previously made contrary statements. This is not inconsistent with the rule that a person cannot impeach his own witness. *State v. Johnson*, 93 D. 241.

On an issue of fraud by an assignor, in the making of an assignment, defendant called the assignor as a witness. A portion of his testimony showed that he had provided for fictitious debts. This was followed by an explanation which, if true, showed that he did in fact owe such debts. The trial court ruled that as the explanation stood uncontradicted by any other witness, defendant was bound by what the assignor had testified to, for the reason that he could not discredit or impeach him. *Held*, error, that the evidence should have been submitted to the jury for them to pass upon its credibility. *Becker v. Koch*, 58 R. 515.

89. Competency of impeaching witness. — A witness who is ignorant of the general character of another witness cannot be permitted to testify as to his own belief of his credibility. *Stanton v. Parker*, 39 D. 523.

A person may testify as to the general character for truth of a witness, from his knowledge derived from common report. *Kimmel v. Kimmel*, 8 D. 655.

Acquaintance with a prisoner for eight or ten years qualifies one to testify as to his character. *Dupres v. State*, 73 D. 422.

Residence in the immediate vicinity of a person whose character is subject of investigation is not an indispensable qualification of a witness to testify as to character. *Id.*

The testimony of an impeaching witness will not be excluded solely because his knowledge has been acquired and is exclusively founded upon matters arising since the commencement of the action. *Fisher v. Conaway*, 30 R. 412.

2. Corroborating.

90. In general. — The testimony of a single witness, unsupported by corroborating circumstances, is insufficient to establish a trust in land. *Miller v. Thatcher*, 60 D. 172.

The defective memory of a witness may be corroborated by proof of what was his habit under similar circumstances. It is persuasive and legitimate "supporting" evidence. *Eureka Ins. Co. v. Robinson*, 94 D. 65.

* When a party may impeach his own witness, see note, 60 D. 749-752.

Contradicting party's own witness by showing that he made prior inconsistent statements, see note, 74 D. 393-400.

For Index to Notes in American Decisions and American Reports, see Volume L.

91. Sustaining the character of the witness. — Greater latitude is allowed in supporting the character of a witness than in attacking it. *Chees v. Chees*, 21 D. 350.

On an indictment for adultery, evidence of previous improper familiarity between the parties is admissible to corroborate a witness who has testified to a specific act of adultery, but whose character for truth has been impeached. *Com. v. Merriam*, 25 D. 420.

Evidence of a witness's good character for truth, where he has not been impeached, though generally incompetent, is admissible to corroborate him where he is a stranger residing in another state; but evidence of his general good character in other respects is not admissible. *Merriam v. Hartford etc. R. R. Co.*, 52 D. 344.

Evidence of a witness's reputation for truth and integrity is not made admissible by a cross-examination which shows that he has been tried for a crime and acquitted, as his character was untouched thereby. *Harvington v. Inhabitants of Lincoln*, 64 D. 95.

The fact that the testimony of a witness is contradicted does not authorize a party calling him to offer evidence that his general reputation for truth is good. Such evidence is admissible only when the opposite side has attempted to impeach his general reputation. *Atwood v. Dearborn*, 79 D. 755.

Where the character of a witness for truth and veracity has been impeached, a person, well acquainted with the witness in the community in which he lives, but who has never heard the character of the witness as to veracity called in question or spoken of, is, nevertheless, competent to testify in favor of the witness. *Lemons v. The State*, 6 R. 293.

Whenever the truthfulness of a witness is assailed either directly, or by cross-examination, or by evidence of inconsistent acts or statements, or by contrary evidence as to the matters testified to by him, his reputation for truth may be sustained by direct evidence adduced for that purpose. *George v. Picher*, 26 R. 380.

To rebut evidence of a witness's conviction of crime, his present character and reputation for truth may be shown, but not his innocence of the crime. *Gertz v. Fitchburg R. R. Co.*, 50 R. 235.

92. Proving previous consistent statements.* — Prior statements of a witness out of court are inadmissible to corroborate his testimony. *Munson v. Hastings*, 36 D. 345; *State v. Vincent*, 95 D. 753.

The testimony of one witness that he had been told of facts testified to by another as having occurred on a certain day is inadmissible, although offered for the purpose of

fixing the date, since it not only does not prove the date, but its only force is to corroborate the statement of a witness in court by proving that he made the same statement out of court. *Brown v. People*, 97 D. 195.

When a witness is sought to be impeached by proof of former statements, inconsistent with his testimony on the trial, it is competent for the party or prosecutor who has introduced him to prove other consistent statements for the purpose of corroborating him; and as soon as the intention to introduce the discrediting testimony is announced, it becomes proper to bring forward the confirmatory evidence. *State v. George*, 49 D. 392; *Johanson v. Patterson*, 11 D. 755; *Henderson v. Jones*, 13 D. 676; *Lohman v. People*, 49 D. 340; *State v. Vincent*, 95 D. 753.

A witness can testify to his own former declarations, consistent with his testimony given on the trial, when an intention of impeaching him by former contradictory statements is announced. *State v. George*, 49 D. 392.

93. Necessity of corroborating accomplices.* — A conviction may be supported upon the uncorroborated testimony of an accomplice. *State v. Holland*, 35 R. 587; *Dunn v. People*, 86 D. 319; *Cross v. People*, 95 D. 474; *State v. Stebbins*, 79 D. 223. Contra, *Ray v. State*, 48 D. 379. Although the court may, in its discretion, advise the jury not to convict unless the accomplice is corroborated. *Collins v. People*, 35 R. 105. But if the evidence introduced under objection for the purpose of corroboration does not tend to connect the defendant with the crime, but it is left to the jury to say whether the principal evidence is corroborated, and they are instructed that if they are satisfied of the defendant's guilt upon the whole testimony, they should convict, this is error. *Commonwealth v. Holmes*, 34 R. 391.

In incest the woman is an accomplice, and on the trial of a prosecution therefor her testimony is subject to the rule respecting accomplice testimony. *Freeman v. State*, 40 R. 787.

94. Sufficiency of such corroboration. — Testimony as to a fact which is in itself relevant and connected with the accused by the testimony of an accomplice, is admissible as direct evidence, even though it might not be admissible for the purpose of corroborating the testimony of the accomplice. *State v. Stebbins*, 79 D. 223.

Where the testimony of an accomplice is corroborated by other evidence, the judge is not required to advise the jury to acquit, and an instruction advising them of the suspicious character of his testimony, and that it

* Conviction, when may be sustained on uncorroborated evidence of accomplices, see note, 71 D. 671-678.

See important note on the corroboration of accomplices, 71 D. 673-678.

* Corroborative statements made by witness out of court, when admissible, see note, 11 D. 787-790.

For Index to Notes in American Decisions and American Reports, see Volume I.

was not safe to convict unless it was corroborated in some portion material to the issue, affords no ground of exception. *Commonwealth v. Scott*, 25 R. 81.

Where an accomplice is allowed to testify, he may be sufficiently corroborated by his wife. *Woods v. State*, 52 R. 314.

IV. RULES OF EXAMINATION.

1. Generally.

95. Controlling power of the court.

—The court does not give undue weight to the testimony of a witness by calling the attention of the jury to what has occurred before them in the examination of the witness. Thus, where a witness testifies without objection to an opinion or belief, and on cross-examination negatives the possession of certain specified grounds for such belief, whereupon the court, upon objection, erroneously refuses to permit the party producing him to draw out his real reasons for his belief, giving, however, to the cross-examiner the privilege of ascertaining from the witness those reasons, and the cross-examiner declines this permission, but in his address to the jury comments upon the testimony as weak, in that the witness could assign no reason for his belief, — in such case the court is justified in calling the attention of the jury to the fact that he had given the cross-examiner permission to call for the reasons of the witness's belief, and he had declined to do so. *State v. Whit*, 72 D. 533.

The court may withdraw permission to recall, as a witness of the state, a witness introduced by the state, when it appears that an unfair advantage over the state was sought to be obtained thereby. *Id.*

The mode of examination of a witness allowed by the lower court will not be criticised or reviewed unless it is apparent that some gross injustice resulted therefrom. *Tapley v. Tapley*, 88 D. 76.

96. What witnesses may, or must be called. — The testimony of a single witness is sufficient to prove an open account in excess of five hundred dollars, if corroborated by a mortgage given by defendant to secure all the engagements and liabilities of plaintiff on his account. *Allain v. Lazarus*, 33 D. 583.

To prove that an attachment was made on a writ which is lost, a person who saw the officer sign his return thereon is a competent witness, and it is not necessary that the officer himself should be called, although he is within the process of the court. *Nelson v. Boynton*, 37 D. 148.

A party to an action is not required to give notice what witnesses he will produce or rely on at the trial, but he may bring such witnesses as he can to sustain the issue made by him. *Thurmond v. Trammell*, 91 D. 321.

97. Swearing the witness. — Any mode of swearing a witness which he believes binding on his conscience is good at common

law, and it seems that, under the Illinois statute, if he swears by the uplifted hand, and not on the gospels, he will be presumed to have elected to do so. *McKinney v. People*, 43 D. 65.

98. Limiting the number of witnesses. — The number of witnesses who may be called to prove the value of property is not limited, where that is the issue in the case, either by the power of the court, or by a statute providing that the costs of four witnesses only shall be taxed against the unsuccessful party, unless the court certifies that a greater number is necessary. A party may call a larger number if he is willing to risk the liability to pay their fees. Witnesses may differ materially upon the question of such value, and it is error for the court to refuse to permit a party to call more than four witnesses to prove it; but it may, of course, exercise a sound discretion whether it will certify to the necessity of more than four witnesses, and if so, to what number. *White v. Hermann*, 99 D. 543.

When a party is by law a competent witness in his own suit, his right to testify cannot be defeated by limiting the number of witnesses. *Fisher v. Conaway*, 30 R. 419.

The plaintiff having sued the defendant in slander for charging him with dishonesty, the latter, to mitigate damages, offered evidence of the plaintiff's bad reputation in that respect. The court restricted him to ten witnesses. *Held, error. Ward v. Dick*, 29 R. 677.

99. Sequestration of witnesses. — All witnesses may be excluded from the court-room, on motion, in capital cases, except the one under examination. *Com. v. Knapp*, 20 D. 491.

Expert witnesses, as well as others, may be excluded from the court-room, except when testifying, in the discretion of the court. *Leache v. State*, 58 R. 638.

A statute providing that during a trial the judge may exclude from the court-room any witness of the adverse party not at the time under examination, does not authorize the exclusion of a party to the cause. *Schneider v. Haas*, 58 R. 296.

The exclusion of witnesses from the court-room is discretionary with the court, and where the defendant, before examining his witnesses, moves to exclude the plaintiff's witnesses, who have not yet testified, but does not include his own witnesses, a denial of such motion is not improper. *Sanders v. Johnson*, 36 D. 564.

A witness unintentionally disobeying the order of the court excluding witnesses from the court-room should not be incapacitated from testifying, where neither the party to be benefited by his testimony nor his counsel was privy to the disobedience. *Keith v. Wilson*, 35 D. 443. S. P., *State v. Thomas*, 60 R. 720.

For Index to Notes in American Decisions and American Reports, see Volume I.

The testimony of a witness who has remained in the court-room after an order directing all witnesses to withdraw from the room may be received at the discretion of the trial judge. *Laughlin v. State*, 51 D. 444.

On trial for receiving stolen goods, on motion of the attorney for the commonwealth, without objection by the prisoner's counsel, the court directed the witnesses to leave the court-room; and they all left but one, who was in the prisoner's box, held on a requisition for larceny of the same goods. The attorney for the commonwealth offered that man as a witness. *Held*, not disqualified by reason of his remaining in the court-room, after the order of the court. *Hey v. Com.*, 34 R. 799.

100. Employment of interpreters.

—The testimony of a witness may be communicated to the jury by an officer of the court, in the presence and hearing of the witness, when the witness is unable from physical weakness to speak loud enough to be heard by the jury. *Conner v. State*, 71 D. 184.

A witness, who was a foreigner, testified that he never made a certain statement to anyone. To impeach the witness in respect to the statement, L. was called, to whom the witness had conversed only through an interpreter. *Held*, that L. could not testify as to the fact of witness having made the statement, but that the interpreter who had communicated the statement to him must be produced and sworn. *State v. Noyes*, 4 R. 57.

2. Examination-in-chief; Cross-examination; Re-examination.

101. What questions are proper. —

Upon the trial of the question whether a certain manufacturer was at a given time insolvent, and known by plaintiff so to be, the defendant, after showing that such manufacturer was engaged in the manufacture of *mousselines de laine*, and that plaintiff had business with him, may ask whether it was a fact known to the community that the printing of *mousselines de laine* was a business ruinous to those engaged therein. *Denny v. Dana*, 48 D. 655.

The following are proper questions to a witness in a case of homicide, to establish the general character of the deceased for violence in a particular place: "Are you acquainted with the general character of the deceased for violence in the particular place where the difficulty occurred?" and, "What was the character of the deceased for violence in that particular place?" *Keener v. State*, 63 D. 269.

In a criminal case, it is the duty of the presiding judge to question reluctant witnesses, if necessary to elicit the truth. *Varndoe v. State*, 58 R. 465.

102. What questions are improper

—A question is properly excluded when the answer to it could not have been material. *Eastman v. Amoskeag Mfg. Co.*, 52 D. 201.

A witness cannot testify as to a matter of law, and an interrogatory necessarily involving a question of law is improper. *Tomlin v. Hilyard*, 92 D. 118.

A witness called by a defendant cannot, upon his examination in chief, for the purpose of sustaining the defense, give the statements and declarations of the defendant made out of the presence and hearing of the plaintiff. *Knight v. House*, 96 D. 515.

A witness cannot be asked a question so framed as indirectly to call upon him to testify to a private conversation between him and his wife. *Baldwin v. Parker*, 96 D. 697.

A witness, in the same business in another place, and where the conditions are unlike, cannot be asked the proportion between his stock and sales, to raise a presumption of fraudulent statement by the plaintiff. *Jones v. Mechanics' Fire Ins. Co.*, 13 R. 405.

103. Leading questions.*—A leading question is not always capable of being fully answered by *yes* or *no*; for, though not answerable by either of these monosyllables, it is leading if it suggests the response which the questioner desires. *People v. Mather*, 21 D. 122; *Snyder v. Snyder*, 6 D. 493; *Stringfellow v. State*, 59 D. 247. Or if it assume a fact to be proved which is not proved, or if, embodying a material fact, it admits of an answer by a simple negative or affirmative. *Turney v. State*, 47 D. 74. But where questions merely call the attention of the witness to the subject-matter, they are not to be considered leading. *Donnell v. Jones et al.*, 48 D. 59.

Questions asking a witness whether or not he is acquainted with signatures to certain deeds, and whether or not they are genuine, or what he knows in reference to the execution of an inclosed paper, are not leading. *Wells v. Jackson Iron Mfg. Co.*, 90 D. 575.

An objection to an interrogatory as "leading," being to form and manner in which the question was put, should be made before the commissioner by whom the evidence is taken. *Smith v. Cooke*, 100 D. 58.

Whether a leading question shall be permitted rests in the sound discretion of the court in which the trial is had, and decisions with respect to them are not the subject of exception. *Barton v. Kane*, 84 D. 728. Yet, if an established rule of law has been violated and leading questions permitted in a case which did not justify them, the appellate court will grant a new trial. *Turney v. State*, 47 D. 74.

A leading question may, in the discretion of the court, be permitted on cross-examina-

* Leading questions, definition of and when permissible, see note, 47 D. 81-85.

For Index to Notes in American Decisions and American Reports, see Volume I.

tion, although it relates to matters not inquired of upon the direct examination. *Moody v. Rosell*, 28 D. 317.

The rule concerning leading questions is as stringent respecting witnesses called to impeach witnesses as it is respecting other witnesses. *Allen v. State*, 73 D. 760.

Where a question leading in form is asked which merely relates to the subject-matter, it should be allowed. *Stringfellow v. State*, 59 D. 247.

When the witness appears to be in the interest of the adverse party, the court may properly permit the direct examination to approach or assume the form of a cross-examination. *People v. Mather*, 21 D. 122.

Questions relating to introductory matter, and designed to bring the mind of the witness to some point material to the issue, may be put in the leading form. *Ib.*

Exceptions to the rule forbidding leading questions to be put to a witness on his direct examination exist when he is manifestly hostile to the interest of the party calling him, or when he has exhausted his memory without stating the particular required, where it is a proper name or other fact which cannot be arrived at by a general inquiry, or when the witness is a child of tender years, whose attention cannot be otherwise called to the subject-matter. *Turney v. State*, 47 D. 74.

On a trial of a prisoner for rape, who was the guardian of the person outraged, the latter, being a witness for the prosecution, and having testified that the outrage was committed about seven months before, when she was just sixteen, was asked: "Did the prisoner then, or at any subsequent time, say anything to you in relation to this matter, to dissuade you from disclosing it? State when, where, and what he said." *Held*, improper, because leading. *Ib.*

On the trial of a prisoner for rape, the person upon whom it was committed, being a witness for the prosecution, and having testified that the prisoner was her step-father, and also guardian, with whom she had lived from the time she was eight or nine till her sixteenth birthday, when the outrage was committed, during which time he was very affectionate, was asked: "If in any of his antecedent conversations the prisoner offered property, or any other advancement to you, in order to attach you to him, say so." *Held*, improper, because leading. *Ib.*

Under the above circumstances, the same witness was asked, "If, at any time subsequent to the transaction [outrage], the prisoner said anything about what punishment the laws of the state of Mississippi would inflict on him, or you, or both—state it all." *Held*, improper, because leading. *Ib.*

The words "whether or not," preceding a leading question, do not relieve it of its ob-

jectionable form or character. *People v. Mather*, 21 D. 122.

104. Necessity and sufficiency of objections to testimony. — Where, in order to sustain an objection to a question asked a witness, the court would have to assume a fact about which there was a conflict of evidence, the objection must be overruled. *Adams v. Capron*, 83 D. 566.

Where the grounds of objection to a question asked a witness are not pointed out or urged to the judge at the trial, they will not be considered by the appellate court. *Rawls v. Am. M. L. Ins. Co.*, 84 D. 280.

Objection to the first of a series of successive questions, if improperly overruled, may be regarded as going, not merely to the first question, but to the others which sprang naturally from it, and the party will be allowed the benefit of his exception as to the whole. *Barton v. Kane*, 84 D. 723.

Strictly speaking, there is no case in which a witness is at liberty to object to a question. That is the office of the party or the court. The right of the witness is to decline an answer if the court sustains his claim of privilege. When the question is relevant, it cannot be excluded on the objection of the party, and the witness is free to assert or to waive his privilege; but when the question is irrelevant, the objection properly proceeds from the party, and the witness has no concern in the matter, unless it is overruled by the judge. *Turnpike Road Co. v. Loomis*, 88 D. 311.

A general objection to a statement of a witness as to his authority as agent, made after he has testified without objection to his acts as such agent, is properly overruled, as the court cannot know judicially that his action was not accepted and followed by his principal, and if so, it is immaterial whether he had or had not any original authority. *Edwards v. Chandler*, 90 D. 249.

105. Extent of the right to cross-examine. * — A party electing to call a witness who is interested adversely to him, for examination upon a particular point, admits his credibility, and the other party may examine him generally. *Varick v. Jackson*, 19 D. 571.

The cross-examination of a witness sworn to impeach another may be sufficiently searching and comprehensive to show the opportunities which the former had of knowing the character of the latter, and when, and from what persons, the injurious reports were heard, and whether the imputed bad reputation is real, or has been created for a special purpose. *People v. Mather*, 21 D. 122.

The cross-examination of witnesses cannot be made available by a party to prove an affirmative before he has opened his case. *Mackinley v. McGregor*, 31 D. 522.

* Defendant in criminal prosecution, cross-examination of, see note, 19 K. 342-343.

For Index to Notes in American Decisions and American Reports, see Volume 1.

Evidence, even on cross-examination, foreign to the issue, may be rejected. *State v. Whittier*, 38 D. 272.

Cross-examination as to new matter, when it is part of the *res gesta*, is allowable. *Bank v. Fordyce*, 49 D. 561.

A merchant plaintiff proving entries may be cross-examined as to the circumstances under which the entries were made. *Thomson v. Porter*, 53 D. 653.

A defendant has no right to cross-examine plaintiff's witness as to matters of defense which have no dependence upon or necessary connection with his direct testimony, but the defendant must make the witness his own witness as to such testimony. *Mitchell v. Welch*, 55 D. 557.

A party has a right to cross-examine an adverse witness, who has been examined in chief, fully as to his knowledge touching any and all facts material to the case. *Fralick v. Presley*, 65 D. 413.

Regularly, a cross-examination should immediately follow a direct examination, but the former may be postponed by the court; not, however, to the injury of one having the right to cross-examine. *Id.*

The cross-examination of plaintiff's witness cannot be postponed by court, against defendant's wishes, until after plaintiff has made out a *prima facie* case, and closed, without trenching upon the right of cross-examination. *Id.*

A witness may always be questioned concerning his relationship to parties, and the state of his feelings toward them, with a view that the jury may judge of the impartiality of his testimony. *Berech v. State*, 74 D. 263.

Where, in an action against an express company for the loss of a package of money, the company proves by its agent the custom of its drivers in regard to the delivery of parcels and taking of receipts, evidence is admissible on cross-examination that the driver who had the package had stolen packages of money, and that some time after the loss of the package the company arrested the driver and made him surrender some money and jewelry, and that he escaped from the officer and ran away. *American Express Co. v. Haggard*, 87 D. 257.

Witnesses may be cross-examined, not only upon the facts involved in the issue, but also upon such collateral matters as may enable the jury to appreciate their fairness and reliability. It is within the discretion of the court how far this inquiry may go, but within this discretion a witness may be asked concerning all antecedents which are really significant. *Wilbur v. Flood*, 93 D. 203.

On a criminal trial the state had introduced evidence impeaching the general moral character of the defendant's witness, Lee. The defendant introduced a witness, Stapp, who swore that Lee's reputation for truth

and veracity was good. *Held*, that the state might on cross-examination of Stapp show that Lee had been reputed to have been arrested for felony. *Wachstetter v. State*, 50 R. 94.

106. What questions may be asked on cross-examination. — A question may be proposed to a witness for the purpose of discrediting him, either by calling others to contradict him, or by having him contradict himself, when the matter about which the question is asked is a legitimate subject of inquiry. *Fries v. Brugler*, 21 D. 52.

A witness to the general character of the plaintiff, in a slander suit, testifying that he had never before heard plaintiff's character attacked, may be properly questioned on behalf of defendant, as to whether or not he knew of its being impeached on certain specified occasions. *Martin v. Miller*, 28 D. 342.

Questions may be asked upon cross-examination to test the accuracy or veracity of a witness. *Stevens v. Beach*, 36 D. 359.

Where a scrivener has stated in his examination that the testator furnished him with the matter for the will, it is admissible to ask the witness on cross-examination what those instructions were, in cases where the will has been attacked on the ground of imbecility and undue influence, but solely with a view to these points. *Iddings v. Iddings*, 10 D. 450.

On cross-examination a witness called to impeach a will on account of the mental imbecility of the testator, may be asked whether he has not accepted a devise under it. *Irish v. Smith*, 11 D. 648.

A witness to a note may be asked at the trial of an action thereon, "whether the said defendant was not in a state of complete intoxication at the time the note was signed by him, and whether he was not, at that time, wholly unfit for the transaction of any kind of business in consequence of such intoxication?" *Burroughs v. Richman*, 23 D. 717.

A witness, offered to prove a license, may be asked whether or not it was understood by the parties that it was conditional. *Mumford v. Whitney*, 30 D. 60.

A witness interrogated as to the possession of property alleged to have been wrongfully taken, with a view to show a *prima facie* ownership, may be asked on cross-examination whether he knew who owned the property; but the refusal of the court to allow the question is not a ground for refusal, where the court offered to permit a recall of the witness by the defendant, as the adoption of this course is a matter within the sound discretion of the court. *Davis v. Stemma*, 81 D. 462.

In an action by an unmarried woman for her own seduction, it is improper to ask her on cross-examination, for the purpose of im-

For Index to Notes in American Decisions and American Reports, see Volume I.

peaching her character, if she had not had sexual intercourse with other men; but if a child had been born as the result of the alleged seduction, the inquiry is proper on the question of paternity, in order to mitigate damages. *Smith v. Varyan*, 35 R. 232.

On an indictment for selling lottery tickets, the prisoner, on cross-examination, may be asked whether he had been in that business, and had been convicted of mailing lottery circulars. *People v. Noelke*, 46 R. 123.

Where a plaintiff has testified in his own behalf in a suit for personal injury by a defective sidewalk, it is discretionary to allow him to be asked, on cross-examination, whether he had not combined with others, several years before, to defraud an insurance company, he not claiming his privilege. *South Bend v. Hardy*, 49 R. 792.

It is proper to ask a witness in a trial for murder how he was employed during the few minutes that passed after he and the defendant came out of a house to where the deceased and others were standing, and before the fight took place in which the killing occurred, where the witness had testified as to what happened during that time on his direct examination. *Stewart v. State*, 53 D. 426.

The conduct of a prisoner before the killing is vitally important to the determination of the case, on a trial for murder in the second degree; it is therefore proper to ask a witness what the employment of the prisoner was from the time that he and the prisoner came out of a house to where the deceased, with others, was standing, till the time the fight began in which the killing occurred. *Id.*

The intent with which deceased and others went to a prisoner's house on the night of the killing is important; and to ascertain it, it is proper to ask one of the persons who accompanied him as to the conversation that took place amongst them, while they were together, in relation to the subject-matter in dispute, and their purpose in going to the house. *Id.*

On trial for murder a witness was asked, under objection, if he had ever been confined in jail. The court instructed the witness that he was not bound to answer, and he refused to answer. *Held*, that there was no error in allowing the question to be put. *Smith v. State*, 54 R. 752.

A witness may be asked, on cross-examination, if he has ever been confined in state prison. It is not necessary to produce the record of the conviction. *Wilbur v. Flood*, 93 D. 203.

107. What may not be. — A question which assumes, as proved, an unproved fact, is not permissible even on cross-examination. *People v. Mather*, 21 D. 122.

The prisoner on a trial for murder, having given testimony on his own behalf, may not

be asked on cross-examination if he did not "belong to the Jesse James gang." *Clark v. State*, 56 R. 45.

A question which it is alike degrading to answer, or to decline to answer, should never be put, unless, in the judgment of the court, it is likely to promote the ends of justice. *Turnpike Road Co. v. Loomis*, 83 D. 311.

In practice, the asking of questions to degrade a witness is regulated by the discretion of the judge in each particular case. *Id.*

The court before which a cause is tried is authorized, in the exercise of sound discretion, to exclude disparaging inquiries as to particular transactions irrelevant to the issue, tending to degrade the witness, or put for the avowed purpose of discrediting him; and this may be done upon the objection of the party without putting the witness to his election. *Id.*

Disparaging questions, not relevant to the issue, and put for the express purpose of discrediting a witness, or otherwise degrading him, should be allowed, in the court's exercise of a wise discretion, when they will promote the ends of justice, but excluded when they seem unjust to the witness and uncalled for by the circumstances of the case. *Id.*

Courts have the power to protect witnesses from irrelevant assault and inquisition. *Id.*

On the trial of a criminal information, the prisoner having testified on his own behalf, cannot, on cross-examination, be required to disclose communications between himself and counsel, in respect to which he did not testify on his direct examination. *State v. White*, 27 R. 137.

On a trial for burglary it is incompetent to ask the prisoner on cross-examination if he had not been arrested for bigamy, as such evidence does not legitimately tend to impair his credibility. *People v. Crapo*, 32 R. 302.

108. Sufficiency and effect of witness's answer. — In the cross-examination of a witness, a party has a right to stop him if his answer relates to matters which the party who calls the witness has no right to introduce in evidence; and the latter cannot insist on his fully answering. *Gruder v. Bowles*, 2 D. 665.

Testimony is not incompetent as containing a conclusion of the law, when a witness swears that he never heard any other person than plaintiff claim the property while plaintiff had possession and exercised ownership; and such testimony is introduced merely to negative the existence of an adverse claim while plaintiff was in possession. *Maxwell v. Harrison*, 52 D. 385.

The testimony of a witness is sufficiently definite to be submitted to the jury, where, after testifying cautiously and hesitatingly as to sending notices of protest, he said on

For Index to Notes in American Decisions and American Reports, see Volume I.

cross-examination that while he had no doubt that he did mail the notices, he could not say that he distinctly remembered the precise fact. *Fulton v. Maccracken*, 81 D. 620.

Where a witness answers that he cannot tell, but "presumes" the existence or non-existence of facts, his testimony is not admissible as evidence. *Hovey v. Chase*, 83 D. 514.

A positive answer of a witness to a question in chief does not preclude the adverse party, upon cross-examination, from requiring the witness to reaffirm or deny his previous statement, and to give a detail of the circumstances surrounding the fact to which he has testified, and tending to disprove its existence. *Phillips v. Howell*, 84 D. 373.

Where a witness testifies to an admission made by a party to the suit, but says, "he only heard a part of the conversation," the court will not, in the absence of proof, infer that there was further conversation relating to the subject-matter of the suit, but will allow the statement of the witness to go to the jury. *Williams v. Keyser*, 89 D. 244.

What a witness hears of a conversation in relation to the subject-matter of the suit is the whole of the conversation, so far as his testimony is concerned; and if there was conversation with other persons at the same time, in relation to the same matter, and explanatory of that heard and that not heard, it is incumbent on the party objecting to show what it was. *Id.*

A party asking a witness a question cannot object to his answer if it be responsive to the question. *Higgins v. Carlton*, 92 D. 666.

Where the party sought to be charged with notice, testifies first that he never received the notice, and on cross-examination that he did not remember receiving it, and thought that if he had seen it he should have remembered it, — *held*, that the question of notice was properly submitted to the jury. *Austin v. Holland*, 25 R. 246.

Where a witness, called on to testify to the previous testimony of a deceased witness, cannot recollect the very words, he may state in his own language the facts detailed, as impressed on his mind at the time. *Hepler v. Mt. Carmel Savings Bank*, 39 R. 813.

109. Correcting answer. — The testimony taken down as required by law in felony cases should be read over to a witness, and corrected if wrong; if a disagreement as to his testimony takes place in the course of the trial, and the witness cannot be recalled, his testimony may be read, but if possible he must be recalled to repeat his testimony; the non-observance of these rules is not ordinarily a good ground for a new trial—each case resting upon its own peculiar circumstances. *Cowser v. State*, 71 D. 184.

A witness was permitted to correct his

testimony by stating, after having testified that a paper produced by him was a copy of a notice of protest sent to an indorser, that in respect to the direction, it was not a copy. *Moses v. Ela*, 82 D. 175.

110. Re-direct examination. — On the re-direct examination of a witness after cross-examination, he may be examined, in the discretion of the judge, upon new matters. *Clark v. Verce*, 30 D. 53.

On the re-direct examination of a witness he cannot be questioned in reference to matters not inquired into on his cross-examination. *Dutton v. Woodman*, 57 D. 46.

111. Recalling and re-examining. — Permitting the re-examination of a witness is an exercise of discretion which the appellate court will not review. *People v. Mather*, 21 D. 122. When the object of recalling the witness is to lay the foundation for proving his declarations out of court, it must always be allowed; and if refused, and if proof of the witness's declarations be rejected because he had no previous opportunity of explanation, it is error. *Cowanhook v. Hart*, 60 D. 57.

It is not error to allow a witness to be recalled and examined with the view of laying a foundation for impeaching his testimony in chief by proof of contradictory statements. *Scott v. Com.*, 83 D. 461.

Caveators are entitled to offer rebutting evidence only, after the caveatees have closed their case, and it is not error for the court to then refuse to admit testimony which was properly admissible upon the examination in chief of the witness. *Higgins v. Carlton*, 92 D. 666.

3. Refreshing the Memory.

112. The right to refer to memoranda. — A witness may use a memorandum to refresh his memory. *Holladay v. Marsh*, 20 D. 678; *Henderson v. Riley*, 49 D. 41; *Riordan v. Davis*, 29 D. 442. And such evidence is better than unaided recollection. *Pearson v. Wightman*, 12 D. 636.

Testimony based on a witness's own writing will be received, if, knowing the writing to be genuine, his mind is so convinced that he is, on that ground, enabled to swear positively to the fact therein stated; and this though he may not recognise the instrument as one he had seen before, or remember anything contained in it. *Martin v. Good*, 74 D. 545.

Employees in a hospital testified, in a capital case, to certain matters as within their recollection, refreshed by referring to the contemporaneous records of the hospital. The records were not produced in court, and the entries were not made by any of the witnesses. *Held*, no error. *State v. Collins*, 40 R. 697.

* Memoranda, use of, to refresh memory, see notes, 98 D. 619-622; 86 R. 54, 57.

For Index to Notes in American Decisions and American Reports, see Volume I.

A disinterested witness who made the entries in a merchant's books may be examined on commission to prove an account, referring to the entries as memoranda to refresh his memory, but the merchant himself cannot be so examined, but must produce his books in court. *Nicholson v. Withers*, 13 D. 739.

In such a case it is not necessary that the entries should recall to the witness's memory the actual delivery of each specific article; it is sufficient if they enable him to say that he made them, and, therefore, that he delivered the articles at the time. *Id.*

An adverse party is entitled, for purpose of cross-examination, to examine a memorandum referred to by witness to refresh his memory; and the witness cannot refuse its production and examination, unless, perhaps, it appears to the court that he had a reasonable ground of belief that he would thereby subject himself to personal injury. *State v. Bacon*, 98 D. 616.

113. What writings or memoranda may be used.—The plaintiff's books of account cannot be used to refresh the memory of a witness unless the entries used for that purpose were made by the witness. *Pargond v. Guice*, 25 D. 202.

A witness in testifying as to the contents of a lost writing may use any memorandum, even though it be but a copy of a copy of the original writing, in order to refresh his memory. *Dunlap v. Berry*, 39 D. 413.

As an item of evidence, a blotter may be referred to by a witness, a salesman of a firm, to show that he had sent a bill copied therefrom to defendant, and to ascertain, by referring thereto, of what the bill consisted. *Atwell v. Miller*, 61 D. 294.

To allow a witness to refresh his memory by looking at a memorandum, it must have been made at the moment of the occurrence or recently after it; but if made weeks or months thereafter, he will not be allowed to do so. *Spring Garden Mut. Ins. Co. v. Evans*, 74 D. 555.

A witness will not be permitted to refresh his memory by looking at a memorandum made at the recommendation of one of the parties. *Id.*

A witness will not be permitted to testify to his belief of the correctness of facts set forth in an affidavit which he recognizes to be in his handwriting, but which was made nearly five months after the transaction, and at the request of the party producing him. *Id.*

A witness may use a memorandum not made by herself to refresh her memory, if, after seeing the memorandum, she is able to recall the facts and testify to them as matters of recollection. *Hill v. State*, 86 D. 736.

Entries upon the books of third persons of their daily transactions, made by persons whose duty it was to make them, and who testify to their correctness when made, but

who have no remembrance of the transactions, are competent to be read in evidence; and it is no objection to their admission that they were first entered upon a slate by two persons during the day, and at night copied by one of them into the books, provided the original entries and copying are verified by the parties making them. *State v. Skinborn*, 88 D. 224.

A witness may refresh his memory by examining a memorandum made by himself, or known and recognized by him as stating the facts truly, when after such examination he can testify to the facts as matter of independent recollection; but the memorandum itself is not thereby made evidence. If the memory of the witness is not refreshed by an examination of the memorandum, so that he can testify to the facts as matter of independent recollection, but he can nevertheless testify that, at or about the time the memorandum was made, he knew its contents, and he knew them to be true, his testimony and the memorandum are both competent evidence; but if he did not know the contents of the memorandum to be true when it was made, although he saw it made, the memorandum is not admissible evidence. *Acklen v. Hickman*, 35 R. 54.

A newspaper reporter, called as a witness, may refresh his recollection as to an occurrence in his presence, by referring to the report of it printed from his statement made at the time. *Coss v. Ford*, 39 R. 428.

Where a railroad freight agent is required to testify as to the quantity of certain freight, and the times of receiving it, and testifies that he has no knowledge except that obtained from the way-bills in the office, he may testify from copies of such way-bills made by himself. *Erie Preserving Co. v. Miller*, 52 R. 607.

Where a witness swears that he made an entry of certain payments in dispute in a book, at the time, he may refresh his memory by a copy thereof recently made by himself. *Calloway v. Varner*, 54 R. 78.

4. Privilege to Refuse to Answer.

114. In what cases a witness may refuse to answer.—A witness in a criminal trial is not bound to disclose the names of the persons from whom he obtained information which led to the arrest of the accused. *State v. Soper*, 33 D. 865.

If the direct answer to a question will disgrace the witness, and fix a stain of infamy upon his character, he will be excused from responding to it, whether it be material or not to the merits of the cause. It is not sufficient that the answer may tend to expose him to infamy; it must be such as will directly show such infamy. *People v. Mather*, 21 D. 122.

On the trial of an indictment, the prisoner, who had testified for himself, was asked on

For Index to Notes in American Decisions and American Reports, see Volume I.

cross-examination how many times he had been arrested. This was objected to by his counsel, as incompetent to affect his credibility, and as tending to degrade him, and it was claimed by counsel that he was privileged from answering. The objection was overruled. *Held*, error; that the prisoner's privilege was properly claimed for him by counsel, and the exception availed the prisoner as a party; and that the prisoner was privileged from answering. *People v. Brown*, 28 R. 183.

The privilege of a witness to refuse to give answers which will disgrace extends to a case where a woman, called to prove an attempt to produce an abortion upon her person, is asked questions tending to show that just previous to her becoming pregnant she had sexual intercourse with more men than one. *Lokman v. People*, 49 D. 340.

In an action for seduction the person seduced may refuse to testify as to criminal connection with others than the defendant, and witnesses may decline to testify as to their having had such criminal connection. *Vaughn v. Perine*, 4 D. 411.

In an action for falsely and maliciously representing to the treasury department of the United States that the plaintiff was intending to defraud the revenue, the plaintiff filed interrogatories requiring the defendant to answer whether he did not inform the department that he knew or believed that plaintiff was intending to commit a fraud upon the revenue. *Held*, that any communications of the kind to the department were privileged in the sense that their disclosure will not be compelled or permitted without the assent of the government, and that defendant would not be compelled to answer the interrogatories. *Worthington v. Scribner*, 12 R. 738.

Where the accused in a criminal trial becomes a witness in his own behalf, he cannot be compelled, on cross-examination, to disclose the confidential communications between himself and his attorney, nor can such disclosures be required of the attorney without the consent of the accused. *Duttenhofer v. State*, 32 R. 362. This rule applies, not only to judicial proceedings which have been contemplated or commenced, but to those which may by possibility become the subject of judicial inquiry. *Bobo v. Bryson*, 76 D. 406.

115. What matters he may be compelled to disclose.*—A witness upon an issue between other parties, and in which he has no interest, is bound to answer questions touching the issue in that cause, although the answer thereto may expose him to a civil action. *Taney v. Kemp*, 7 D. 673; *Planters' Bank v. George*, 12 D. 487.

A witness must answer questions, though

* Witness must answer question intended to discredit, see note, 57 R. 16-19.

the answers have a tendency to his disparagement or disgrace. *State v. Patterson*, 33 D. 699.

A witness summoned to give evidence before the grand jury may be compelled to answer questions propounded to him in reference to offenses committed in the county, unless the answers to such questions would criminate, or tend to criminate, himself. *Ward v. The State*, 22 D. 449.

A horse-race is a game, within the meaning of the Indiana statute compelling parties concerned in the transaction to testify against one indicted for gaming. *Cheesum v. State*, 44 D. 711.

Where two persons are engaged in a common criminal enterprise of uttering and publishing counterfeit bills, one of them may be questioned touching the part taken by the other in the passing or redemption of the bills. *May v. State*, 45 D. 543.

An accomplice becoming a witness for the people is not allowed the benefit of privileged communications, for in entering the witness-box to escape punishment himself, he contracts to give a full and complete statement of all that he and his associates may have done or said relative to the crime charged, no matter where or when done, or to whom said. *Alderman v. People*, 60 D. 321.

Where a party offers himself as a witness, he cannot refuse to answer questions on cross-examination as to any conversations with his counsel. *Inhab. of Woburn v. Henshaw*, 3 R. 333.

Fornication not being a penal offense, the plaintiff, examined as a witness on her own behalf in an action for her own seduction, may be required to testify concerning previous alleged acts of unchastity with others. *Love v. Masoner*, 32 R. 622.

Subject to the discretion of the court and to the witness's right to claim his privilege, he may be compelled to answer on cross-examination whether he had not been arrested for robbery. *State v. Bacon*, 57 R. 8.

116. Privilege as to self-criminating testimony.*—A witness either on the *voir dire* or on cross-examination is not bound to answer any question which would subject him to punishment, or render him infamous or disgraced. *People v. Herrick*, 7 D. 364; *Ward v. State*, 22 D. 449; *Chamberlain v. Willson*, 36 D. 356; *State v. Staples*, 90 D. 565; *Ford v. State*, 95 D. 653.

In an action for seduction, a female cannot, in Tennessee, be interrogated as to acts of unchastity with others, since in this state this would subject her to criminal punishment, though her general character for chastity is involved in the issue, and may be impeached by general evidence, and persons

* Privilege, as to self-criminating testimony, see note, 21 D. 55-62.

Cross-examination, involving crimination of witness, see note 97 R. 140-144.

For Index to Notes in American Decisions and American Reports, see Volume I.

who have had criminal intercourse with her may be called to testify to the fact. *Reed v. Williams*, 73 D. 157.

A witness for the defense, in a prosecution for bastardy, cannot be compelled to testify whether he has ever had sexual intercourse with the prosecutrix, if he objects that the answer might tend to criminate him; nor can he be compelled to answer other questions tending to show that his claim of privilege was not well founded. *Ford v. State*, 96 D. 658.

A question that criminate, or tends to criminate, a witness, is one the answer to which will show, or tend to show, him guilty of a crime for which he is yet liable to be punished. *People v. Mather*, 21 D. 122.

If a witness discloses part of a transaction in which he was criminally concerned, without claiming his privilege as a witness, he is then bound to go forward and state the whole, especially where the facts disclosed are in favor of the party calling him. *State v. Foster*, 55 D. 191; *Foster v. Pierce*, 59 D. 152; *Com. v. Price*, 71 D. 663.

Where a witness has refused to answer a question upon the ground that his answer would tend to criminate himself, defendant may show by other and independent evidence that his answer would not or could not have that effect; and the witness will then be compelled to testify. *Ford v. State*, 96 D. 658.

An erroneous claim of a privilege from answering questions by a witness, in which he is sustained by the court, is cured by the subsequent offer of the witness to answer the questions. *Com. v. Price*, 71 D. 663.

The defendant in a criminal prosecution became a witness at his own request. *Held*, 1. That he thereby waived the constitutional provision that an accused person shall not be compelled to give evidence against himself; 2. That he could not refuse to answer questions put on cross-examination to discredit his direct evidence on the ground that answering would criminate himself; and 3. That the privilege from answering questions on the ground that they tend to criminate the witness is the privilege of the witness and not of his counsel. *State v. Wentworth*, 80 R. 688; *State v. Ober*, 13 R. 88; *Com. v. Nichols*, 19 R. 346.

Where the sale of liquor is made a criminal offense by the statute, the purchaser of the same is not guilty of a criminal act, and hence is not excused from testifying as to the purchase, on the ground that it would tend to criminate him. *State v. Rand*, 12 R. 127; *Wakeman v. Chambers*, 58 R. 218.

The provision in the declaration of rights, that no person shall "be compelled to accuse or furnish evidence against himself," applies to investigations before a legislative body, and protects a person from being compelled

to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained; nor is such protection withdrawn by any statute which fails to secure such person from future liability and exposure to be prejudiced in any criminal proceeding against him as fully and extensively as he would be secured by availing himself of the privilege accorded by the constitutional provision. *Emery's Case*, 9 R. 22.

117. Privilege personal, and may be waived. — A witness may be asked a question, although the answer to it would tend to criminate or disgrace him, and he may refuse to answer such question; but his right to refuse is merely a privilege which he may waive. *Fries v. Brugler*, 21 D. 52. If he waive the privilege he must submit to a full cross-examination. *Chamberlain v. Willson*, 36 D. 356.

The privilege of a witness to refuse to answer a criminating question is exclusively personal, and where he is called as a witness against persons jointly indicted with himself for a crime, and does not object to testifying, the court is not required, upon objection by his co-defendants, to inform him that he is not bound to criminate himself. *Com. v. Shaw*, 50 D. 813.

One on trial for murder, testifying for himself, was asked on cross-examination if he had not been arrested for assault with intent to kill. The question was objected to, but the objection was overruled, and the prisoner answered without claiming his privilege. *Held*, no error. *Hanoff v. State*, 41 R. 496.

118. Whether court or witness shall decide tendency of answer to criminate. — It is for the witness and not the court to judge whether his answer to a question will tend to criminate him; if it will form one link in the chain of testimony against him, he is not bound to answer; and the court should so instruct him as to enable him to decide understandingly. *State v. Edwards*, 10 D. 557.

A statement by a witness, under oath, that he cannot testify without criminating himself, is sufficient proof of the same, unless the court is satisfied that the witness is mistaken, or acts in bad faith. *Chamberlain v. Willson*, 36 D. 356.

It is for the court to determine whether or not any direct answer to a question will furnish evidence against a witness. *Ward v. The State*, 22 D. 449; *People v. Mather*, 21 D. 122.

When a witness asks to be excused from answering, the court must determine whether the answer he may give can directly or indirectly criminate him, by furnishing evidence of his guilt, or by establishing one of several facts, which, together, form an ample chain

For Index to Notes in American Decisions and American Reports, see Volume I.

of testimony to warrant his conviction, though this one fact could not of itself produce that result. *People v. Mather*, 21 D. 122.

If the answer may criminate the witness in the judgment of the court, then his privilege must be allowed without requiring him to explain how it will criminate him. *Id.*

119. Witness not privileged when protected by statute. — A witness cannot refuse, on the ground of self-crimination, to answer a question relating to an offense already barred by the statute of limitations. *Culhoun v. Thompson*, 28 R. 754.

V. OPINIONS OF EXPERTS AND OTHERS.

120. Opinions of ordinary witnesses not admissible, generally. — Opinions of witnesses are never received as evidence where all the facts on which they are founded can be ascertained and made intelligible to the court or jury. *Clark v. Fisher*, 19 D. 402; *Donnell v. Jones*, 48 D. 59; *Otis v. Thom*, 58 D. 303.

The opinion of a person not of the medical profession is not evidence, unless the facts upon which it is based have come under his observation, and unless also he states those facts to the jury. *Dee v. Reagan*, 33 D. 468.

An objection to a question by which a witness was asked whether, from his knowledge of said dog, he did or did not consider said dog a nuisance, is properly sustained. *Parber v. Mies*, 62 D. 776.

Insolvency is a legal conclusion; and a witness, although well acquainted with the affairs of an individual, cannot be permitted to testify that such individual was insolvent at a given time. *Brice v. Lide*, 68 D. 148.

Opinion of a witness as to "physical capacity" of testator to hold conversations, testified to by another witness as having taken place at a time when the witness whose opinion is asked was not present, is not competent evidence. *Higgins v. Carlton*, 92 D. 666.

121. Illustrations of the rule. — A witness cannot testify to his ownership of property as to an ultimate fact; he should state the facts upon which his claim of ownership depends. *Dunlap v. Berry*, 39 D. 413.

A witness having testified to a conversation, cannot testify as to what he understood to be meant by the language used. *Hibbard v. Russell*, 41 D. 733.

A witness cannot be examined as to the meaning of a plain word in a contract, for that is a question of law, determinable by the court. *Collins v. Benbury*, 42 D. 155.

It is a conclusion of law, and not a fact to be sworn to by a witness, that a person "unjustly and unlawfully" refuses to apply his property to the payment of his debts. *Ex parte Clark*, 45 D. 394.

The testimony of a witness as to what would be considered a good township is not admissible, it being a matter of opinion. *Hammatt v. Emerson*, 46 D. 598.

A witness, in an action for slander, having testified as to the words spoken by defendant, cannot state what meaning he understood the defendant to convey by the words. *Snell v. Snow*, 46 D. 730.

An opinion of a witness that parties are living in adultery is inadmissible; the witness must testify to facts. *Cameron v. State*, 48 D. 111.

An opinion of a witness as to whether a letter was written with a certain instrument found in a party's possession is inadmissible. *Com. v. Webster*, 52 D. 711.

When the precise words of a dying man are stated and offered in evidence, the impressions made on the mind of the witness, who was present and heard the statements made by the deceased, cannot be inquired into. *Nelson v. State*, 53 D. 94.

A witness's understanding as to what land a conversation referred to, where he testifies to hearing the plaintiff say that he had received pay "for the land," the question not being limited to his understanding from the conversation itself, the whole of which is given, is inadmissible. *Marcy v. Stone*, 54 D. 736.

Opinions of persons that a slave sold as sound was suffering from syphilis is not competent where such persons were not physicians. *Lusk v. McDaniel*, 57 D. 566.

A statement of a witness "that he thought if the steamboat had returned to the assistance of the flat-boat when the call for assistance was made the stage could have been saved," is mere matter of opinion, and therefore inadmissible. *Otis v. Thom*, 58 D. 303.

Witnesses cannot give their opinion as to whether the defendant, being tried for murder, would be caused to look for difficulty from the manner, language, and tone of voice of the deceased just previous to the homicide. They must testify what the manner, language, and tone of voice were. *Keener v. State*, 63 D. 269.

A witness cannot be asked whether he believed the deceased intended to kill the accused, from the conduct, countenance, and language of the deceased immediately preceding the homicide, in order to reduce the crime to manslaughter. *Hastings v. State*, 71 D. 166.

A witness may testify whether an agreement was entered into between himself and another, but cannot be permitted to give his opinion as to whether what was said and done on a particular occasion amounted to an agreement. *Odlin v. Goss*, 77 D. 773.

Where a plaintiff attempts to prove that a flagman employed by a railroad company was an intemperate and incompetent person,

For Index to Notes in American Decisions and American Reports, see Volume L.

the company may show that he was careful, attentive, and temperate, and this may be proved by witnesses who had seen his conduct, and it is not necessary that they be experts. *Gahagan v. Boston etc. R. R. Co.*, 79 D. 724.

Opinions of witnesses relative to the duty of a tender of a draw-bridge are inadmissible in an action against him for injuries caused by the improper discharge of his duties. *Nowell v. Wright*, 80 D. 62.

On a trial for murder, the comparative strength of deceased and defendant is better proved by facts in detail of what occurred at the time of the homicide, as the grapple, scuffle, and the like, than by the opinion of the witness. *Wise v. State*, 85 D. 595.

The opinion of a witness as to the state of a party's title is not admissible in evidence. *Winter v. Stock*, 89 D. 57.

A question whether a witness could form an opinion from the appearance as to the capacity of an engine to draw a train is properly overruled where the witness is not claimed or shown to be an expert. *Sisson v. Cleveland etc. R. R. Co.*, 90 D. 252.

In a trial for burglary the owner of the premises had described certain footprints to a witness. The witness was permitted to testify that the shoes of the defendant, produced on the trial, would have made such tracks. *Held*, error. *Blauitt v. State*, 41 R. 666.

On a murder trial, evidence of experiments on targets by non-professional witnesses is incompetent to show that the deceased was killed by the close discharge of a gun. *State v. Justus*, 50 R. 470.

A witness may not give his opinion whether a shooting was accidental. *State v. Vines*, 53 R. 486.

On the question of the sufficiency of a fence to turn stock, non-expert witnesses may not give their opinion. *Railroad Co. v. Shultz*, 54 R. 305.

It is not competent, in an action of libel, to aid an innuendo by mere opinions of witnesses. *Pittsburgh etc. Pass. R'y Co. v. McCurdy*, 60 R. 363.

192. Limits and exceptions to the rule. — A witness may be asked whether she knew whether or not the testator's eyesight was good enough to enable him, if his mind was right, to recognize her when near him. And a witness may testify that when he visited the testator, the latter would "look at him with a vacant stare," and that "his countenance and appearance indicated childishness." *Iriah v. Smith*, 11 D. 648.

Opinions of witnesses are admissible in an action for a breach of a marriage contract, if founded upon observation, to show whether

the plaintiff was attached to the defendant. *McKee v. Nelson*, 15 D. 384.

A master's testimony that a voyage was fair and lawful, and that the vessel was not engaged in illicit trade, states a matter of fact and not of law. *Ocean Ins. Co. v. Francis*, 19 D. 549.

The testimony of persons unlearned in the law that prior to 1791 it was customary for protestant settlers in the Spanish colony of Mississippi to be married by a justice of the peace, under a regulation to that effect adopted by the governor or superintendent, is admissible to uphold a marriage so celebrated, unless the party objecting thereto shows that better evidence is attainable. *Phillips v. Gregg*, 36 D. 158.

Opinions of witnesses are not evidence as a general rule; the rule, however, is not universal, and a witness on a trial for murder may be asked whether, when the deceased rushed upon the prisoner, there was time enough for the prisoner to escape and get out of the way or not. *Stewart v. State*, 53 D. 426.

A witness may testify as to the dangerous character of an excavation into which a party fell and was injured, although he was not present when the accident happened. The testimony of such a witness is not the assertion of a mere abstract opinion, but rather the assertion of a fact dependent in some measure upon opinion. *Beatty v. Gilmore*, 55 D. 514.

The testimony of a witness as to the apparent age of a child at a certain period is sufficient evidence, it seems, to prevent a non-suit depending on the question of such child's age. *Robinson v. Blakely*, 55 D. 708.

A witness may testify to the fact of ownership. *Nelson v. Iverson*, 60 D. 442.

Where, in a case of collision, the position of vessels and the character of the night are in evidence, it is proper to ask a witness whether a vessel, on such a night and in such a place, could be seen at a considerable distance from a vessel approaching the shore; and if so, how far. *Ianis v. Steamer Senator*, 60 D. 577.

A witness should be permitted to testify as to "his understanding" of what he heard certain parties say in relation to an agreement between them. *Printup v. Mitchell*, 63 D. 258.

The general rule that a witness must state facts, and not his inference from them, seems to have an exception in cases of libel and slander, as the injury done in such cases depends upon the effect the words produced in the minds of hearers; and the way to determine this effect is to find out how the words were understood by hearers. *Hawks v. Patton*, 63 D. 266.

In an action for damages for injuries, a person not a physician may testify whether it was necessary for a party to receive med-

* Opinions, when admissible as evidence, see notes, 48 D. 735; 59 R. 176-186.

Opinion of non-expert, when admissible, see note, 19 R. 410-412.

For Index to Notes in American Decisions and American Reports, see Volume L.

cal assistance, and the length of time such assistance was necessary. *Chicago etc. R. R. Co. v. George*, 71 D. 239.

That a witness may be unable to testify without an implied expression of opinion is no objection to his testimony upon questions relating to heights and distances, and as to the number, quantity, and dimensions of things. *Eastman v. Amoskeag Mfg. Co.*, 82 D. 201.

A witness may legally testify as a matter of fact, that a seizure of property by an officer without lawful authority "was made in an offensive and insulting manner." *Raisler v. Springer*, 82 D. 738.

This question is proper in attacking a sale as being in fraud of creditors: "Did you see any difference in the appearance or management of things after the sale from that before the sale of the stage and horses to the plaintiff?" It does not call for the opinion of the witness. *Gallagher v. Williamson*, 83 D. 114.

The knowledge, belief, or intention of a witness may be given in evidence when it is a material fact, giving to the opposite party a liberal scope in the cross-examination; but in such a case the court should state to the jury that in judging of the knowledge, belief, or intention of the witness, they should consider all the facts and circumstances, and that the statement of the witness in that respect is not conclusive. *Watson v. Chesire*, 87 D. 382.

A witness may testify that a carriage appeared to start from a particular point, on knowledge derived from the sense of hearing, although the carriage was not seen by the witness. *State v. Shinborn*, 88 D. 224.

The opinions of witnesses, not experts, are sometimes admissible from necessity, and to prevent the failure of justice, as in questions of identity of person, handwriting, sounds, size, distance, and the like. But when the facts upon which the opinion is formed can be stated and described, they must be, and the jury be left to form their own opinion. *Whittier v. Town of Franklin*, 88 D. 185.

The testimony of a witness that a horse at the time of the accident did not appear to be frightened, but sulky, is admissible within the rule which admits opinions from necessity. *Id.*

Questions as to quantity, distance, or size, where there has been no measurement, always involve an estimate, and to that extent an opinion; but there is no legal objection to asking a witness who is acquainted with the position of two objects how far one is from the other, or to his answering that it is about half a mile, because he has never measured the distance. *Baldwin v. Parker*, 96 D. 698.

Any witness may testify as to the facts of which he has the means of knowledge, though his testimony may to some extent be

an opinion or involve an estimate. Thus, where a will made in favor of the testator's second wife and her children was contested, upon the ground of undue influence and of insanity, by the children of the first wife, the second wife may testify as to the amount of her deceased husband's property, or of his debts, at the time of their marriage, and as to her kind treatment of her step-children. *Id.*

Plaintiff may testify that he understood defendant was personally liable upon a contract, although the contract was made by the defendant with the plaintiff's wife, as the plaintiff's servant or agent. *Delano v. Goodwin*, 97 D. 601.

Common observers, having a special opportunity for observation, may testify to their opinions as conclusions of fact although they are not experts, if the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time, and the facts upon which the witness is called to express his opinion are such as men in general are capable of comprehending and understanding. *Com. v. Sturtevant*, 19 R. 401.

Whether a witness, not an expert, is qualified to express his opinion as a conclusion of fact, is to be decided by the judge presiding at the trial; and his finding is not open to revision in this court, unless, upon a report of all the evidence, it is shown to be without foundation, or is based on some erroneous application of legal principles. *Id.*

On the trial of an indictment for murder, a witness, familiar with blood, who had examined with a lens a blood stain on a coat, when it was fresh, and who testified to its appearance at the time he examined it, and that it was not in the same condition at the trial, was permitted to testify that its appearance, when he examined it, indicated the direction from which it came, and that it came from below, upward, although he had never experimented with blood or other fluid in this respect. *Held*, that the admission of the testimony afforded no ground of exception. *Id.*

At the trial of an indictment for murder, a witness who, soon after the homicide, had taken a pair of shoes from the defendant's house, one of which, as the government contended, fitted a track supposed to have been made by the murderer, was permitted to testify that the shoes appeared as if they had recently been washed. *Held*, that the admission of this testimony afforded no ground of exception. *Id.*

Where the intention of a person becomes material, such person, being otherwise competent as a witness, may testify to that intention, unless prevented by some controlling principle of law applicable to the particular case. *Moore v. Davis*, 6 R. 480; *Kerrains v. People*, 19 R. 158.

For Index to Notes in American Decisions and American Reports, see Volume I.

On the trial of an indictment for assault with a deadly weapon with intent to kill, defendant was asked as to his intent in procuring the weapon. *Held*, competent. *Kerrains v. People*, 19 R. 153.

The disposition of a person may be proved as a fact by a witness who knows what the disposition in question is, from his own personal observation. *State v. Lee*, 21 R. 769.

A non-expert witness is competent to testify that certain stains were blood. *Greenfield v. People*, 39 R. 636.

In a proceeding to establish a public ditch, a non-expert witness, having stated the number of acres in the vicinity of the ditch, and given its size and location, may state how many acres would be benefited by its construction, and what effect, if any, the drainage would have upon the public health. *Bennett v. Meehan*, 43 R. 73.

Witnesses who saw a woman thrown down by the starting of a street-car after she had alighted from it, may give their opinion as to whether she had time to get clear of it. *Ward v. Charleston City Ry Co.*, 45 R. 794.

Non-expert opinions as to the health and physical condition of another, based upon personal knowledge, are competent. *Carthage Turnpike Co. v. Andrews*, 52 R. 653.

On a question of footprints and an alleged peculiar structure of the defendant's feet, evidence on the part of the defendant, by witnesses who had recently or immediately before examined his feet, is competent. *Lipes v. State*, 54 R. 402.

123. Opinions as to foreign laws.*

— In proof of the laws of a foreign country, the testimony of any person, whether a professed lawyer or not, who appears to be well informed on this point, is competent. *Hall v. Costello*, 2 R. 207.

A person offered as a witness and expert in foreign law may state the written law without producing it, and he may produce a copy of the statutes or code of the foreign country, and refer to the same, for the purpose of refreshing his recollection as to the law. *Barrows v. Downs*, 11 R. 283.

A Spanish lawyer, who had practiced law in Cuba, was allowed to testify from a printed copy of the Spanish code of commerce as to the laws regulating special partnerships in Cuba. *Id.*

124. Admissibility of opinions on questions of value. — A witness may be asked his opinion of the value of certain mortgaged land at the time of the entry of judgment on the bond. *Kellogg v. Krauser*, 16 D. 480.

Persons who have owned, commanded, and repaired vessels are, although not ship-carpenters, competent to testify as to the difference between the value of a vessel repaired in a certain way, and her value had she been

repaired in the manner called for by the contract under which the repairs were made. *Sikes v. Paine*, 51 D. 389.

The value of articles of baggage lost by a carrier may be proved by a dealer in such articles from a description given; or the jurors may have a proper measure of damages in their own knowledge of values. *Ill. Cent. R. R. Co. v. Copeland*, 76 D. 749.

The opinion of a witness as to the value of property seized on execution is inadmissible in an action against a sheriff for making an insufficient levy; the amount brought at the sheriff's sale of the property is ordinarily the best evidence of its value in such an action. *French v. Snyder*, 83 D. 193.

The opinion of a witness as to the value of land in a controversy is properly excluded, where the only evidence of his being qualified to express an opinion is his own statement that he knew the value, and was competent to state it. *Flint v. Flint*, 83 D. 615.

A witness may be asked to state the difference in value between a horse as represented and as actually existing, where the witness knew the horse, and is skilled in judging of the value of horses. *Haskell v. Mitchell*, 89 D. 711.

In an action to recover damages for the breach of a contract to convey lands, where it is sought to prove their value by showing the worth of adjacent lands, either of the same or of a different quality, any person knowing the property and its value may testify upon that question. The proof of value need not be confined to persons only who are engaged in buying and selling real estate. Such knowledge is not scientific, and is not confined to a few experts. *White v. Hermann*, 99 D. 543.

A witness who is purchasing wheat with reference to a particular market, is buying and selling in that market, and is kept informed as to the prices by circulars and correspondence, is competent to testify as to the value of wheat in that market. *Brackett v. Edgerton*, 100 D. 211.

A non-expert witness, familiar with the facts, may testify as to the relative value of services and commodities entering into a mutual account. *Johnson v. Thompson*, 37 R. 152.

A witness is incompetent to testify in North Carolina to market values at Boston, Mass., when his knowledge is exclusively derived from market reports in a newspaper published in North Carolina. *Fairley v. Smith*, 42 R. 522.

A witness may not give an opinion as to the public utility of a ditch, nor as to the amount of damage it will cause to a party's land, but he may give his opinion as to the value of the land with and without the ditch. *Yost v. Conroy*, 47 R. 156.

In an action against a carrier for the loss of a ring, the plaintiff, a woman, whose hus-

* Proof of laws by expert testimony, see note, 66 D. 233, 234.

For Index to Notes in American Decisions and American Reports, see Volume I.

band had given her the ring, and who did not know its cost or value, nor the value of pearls, was allowed to point out a pearl of corresponding size, color, and general appearance, and an expert was then allowed to state the value of the pearl pointed out. *Held*, competent. *Barney v. Dinmore*, 55 R. 445.

Any person of ordinary intelligence is competent to testify to the value of a seal-skin coat, although he may never have seen one bought or sold. *State v. Finch*, 59 R. 443.

On a prosecution for theft of a seal-skin cloak, which the owner had worn, she may testify to its value, having priced similar articles. *Prints v. People*, 36 R. 437.

125. — or genuineness. — Persons other than the officers of a bank are competent witnesses to prove that a bill, which purports to have been issued by such bank, is a counterfeit. *State v. Tutt*, 21 D. 508.

The opinion of a witness that a bill is counterfeit is admissible in evidence, although such witness has never seen the officers of the bank write, and recognizes their signatures only from his general acquaintance with the bills of such bank. *Id.*

A witness is not competent to testify to the genuineness of a bank note who has never seen a genuine note of that bank, but whose knowledge of its notes is derived from facsimiles engraved or descriptions printed in a bank reporter or directory. *State v. Brown*, 70 D. 168.

A witness skilled in the marks and characteristics of a genuine bank bill, from long experience, and from having studied the modes by which counterfeit bank bills can be detected, is competent to testify as to the genuineness of a bank bill shown to and examined by him, although he does not know the signatures of the president or cashier of the bank. *Jones v. Finch*, 75 D. 73.

126. — or amount of damage. — The opinion of a witness as to the amount of damages is not admissible. He must state facts, and let the jury assess the damages. *Fisk v. Dodge*, 47 D. 254.

Witnesses who are not experts, in a prosecution for a nuisance in erecting and maintaining a mill-dam, cannot testify as to what effect an overflow caused thereby had upon the public health in that vicinity. *Luning v. State*, 52 D. 153.

A witness cannot give his opinion as to the amount of damages which a land-holder will sustain by reason of a railroad passing over his land, in an action by a railroad company to condemn and appropriate the same. *Atlantic etc. R. R. Co. v. Campbell*, 64 D. 607.

The opinions of witnesses who testify that they are acquainted with the effect which privies and sties have upon the air about them, that they have examined the premises as to their nature and condition, are competent evidence as to whether or not such privies and sties are nuisances, and

whether they must or would make plaintiff's house uncomfortable. *Kearney v. Farrell*, 73 D. 677.

In an action on an attachment bond, a witness may testify to the extent of a merchant's business, and the rate or average of his net profits, if within his knowledge, but may not give his opinion as to the loss he will suffer by the breaking up of his business; nor is it competent to show that by reason of the stopping of his business he lost advances that he had made, and possible profits on shipments of merchandise. *Pollock v. Gantt*, 44 R. 519.

In an action of breach of promise of marriage, the plaintiff's neighbors and intimate friends may testify as to their opinion of the amount of damage she had sustained. *Jones v. Fuller*, 45 R. 761.

127. — on questions of sanity.* —

1. *Generally.* — The opinion of a non-professional witness, on a question of insanity, may be given in evidence, in connection with the facts upon which it is founded, and as derived from them, although an opinion founded upon facts proved by other witnesses is inadmissible. *Mores v. Crawford*, 44 D. 349; *Grant v. Thompson*, 10 D. 119; *Doe v. Reagan*, 33 D. 466; *Clark v. State*, 40 D. 481; *Maxwell v. Harrison*, 52 D. 335.

The opinions of witnesses as to what is undue and unnatural excitement in time of battle cannot generally afford ground for safe conclusions as to a person's mental condition years afterwards, and are therefore inadmissible, unless it appears that the excitement actually mastered the intellect and deprived the person of accountability. *People v. Garbutt*, 97 D. 162.

Witnesses who are not experts cannot give their opinion on the question of sanity. *State v. Pike*, 6 R. 533.

2. *Sanity of a testator.* — The opinions of witnesses, other than physicians and the subscribing witnesses to a will, considered merely as opinions, are not evidence, but such witnesses, having stated the appearance, conduct, conversation, and other particular facts from which the state of the testator's mind may be inferred, are always at liberty to state their inferences, conclusion, or opinion, as the result of these facts. *Potts v. House*, 60 D. 329; *Rambler v. Tryon*, 10 D. 444; *Kinne v. Kinne*, 21 D. 732; *Clapp v. Fullerton*, 90 D. 691; *Fidcock v. Potter*, 8 R. 181; *Hardy v. Merrill*, 22 R. 441.

After a non-professional witness has stated the facts upon which his opinion is founded, he may be permitted to state his opinion as to the sanity or insanity of a testator. *Fidcock v. Potter*, 8 R. 181.

It is not necessary to lay a foundation for the admission of the testimony of witnesses to a will, as to their opinion of the testator's

* Opinion of non-expert on question of insanity, see notes, 8 R. 184-195; 6 D. 59-61.

For Index to Notes in American Decisions and American Reports, see Volume I.

sanity, by proving all the facts from which the opinion is formed. *Robinson v. Adams*, 16 R. 473.

Subscribing witnesses to a will may testify to the opinion they formed of the testator's mind at the time of executing the will, the law placing them around the testator to try, judge, and determine whether he is *compos* to execute it. *Potts v. House*, 50 D. 329; *Clapp v. Fullerton*, 90 D. 681. And they may do so without having previously testified to any facts as the ground of it, but other witnesses may not. *Tillow v. Tillow*, 93 D. 691.

Although the opinion of a witness as to the sanity of a testator is admissible, the question, "From your knowledge of him, would you think his mind sound enough to make a will?" is objectionable, as it involves a question of law for the court to determine, and not the witness, as to the *quantum* of mental capacity necessary to enable a party to make a legal disposition of his estate. *Turrell v. Brennan*, 82 D. 137.

The opinion of a witness as to the sanity of a testator must relate to the time of his examination, and his opinion at a period anterior cannot be called for upon the direct examination. *Ruysen v. Price*, 86 D. 459.

A witness cannot be asked his opinion as to the capacity of a testator to make a will. Such inquiry involves a matter of law, and also assumes that the witness knows the degree of capacity required to perform the act in issue. *Id.*

128. — or identity. — The opinions of witnesses that a libel refers to the plaintiff, though it does not name him, are admissible. *Miller v. Butler*, 52 D. 768.

129. — or handwriting. — The "handwriting" of a party includes whatever he has written with his hand, though not in his usual or ordinary chirography. *Com. v. Webster*, 52 D. 711.

An opinion as to whether anonymous letters are in defendant's handwriting, though disguised, from a witness who knows his handwriting, is competent. *Id.*

A witness may give reasons for his opinions as to handwriting in a paper exhibited to him as being that of the prisoner. *Id.*

The rule requires that a witness called to prove handwriting shall testify from having seen the person write, or from a knowledge of his hand acquired from writings acknowledged by the party. *Bruce v. Crews*, 99 D. 467; *Pope v. Askew*, 35 D. 729; *People v. Spooner*, 43 D. 672; *U. S. v. Simpson*, 24 D. 331; *Johnson v. Davenport*, 10 D. 198. Independent of any skill in penmanship, or in judging of it, on the witness's part. *Commonwealth v. Webster*, 52 D. 711. And the fact that such witness had seen the party write but once does not go to the competency or admissibility of his evidence, but only to the weight which should be given to it by the jury. *Cross v. People*, 95 D. 474. And

the rule is the same in this respect in criminal as in civil cases. *Hammond's Case*, 11 D. 39.

If a witness has previous knowledge of handwriting from having seen the party write, or from authentic papers, derived in the course of business, he may, in corroboration of his testimony, compare the writing in question with other signatures known to be genuine. *Clark v. Wyatt*, 77 D. 90.

In a prosecution for fraudulently passing a counterfeit bank note, proof of the handwriting of the person, whose signature is alleged to have been forged, may be made by one who has seen him write, or who has received letters, in the course of correspondence, of such a nature as to make it highly probable that he wrote them, or who has inspected ancient genuine documents bearing his signature; but one who has no knowledge on the subject except what he has derived from receiving and passing other bank notes, purporting to have been signed by such person, believing them to be genuine, is not a competent witness. *State v. Allen*, 9 D. 616.

The handwriting of a surveyor long deceased, in a particular plat of survey, may be proved by a witness who has acquired his knowledge by examining many plats of surveys, purporting to have been made by the same surveyor. *Jones v. Huggins*, 17 D. 567.

In Ohio the evidence of the person whose name it is alleged has been forged is admissible to prove that the name appearing upon the instrument is not his genuine signature. *Hess v. State*, 22 D. 767.

The testimony of a witness as to the contents of a letter is inadmissible, where it appears that the witness had never seen the alleged author of the letter write, and had no knowledge of his handwriting. *Dorsey v. Dorsey*, 6 D. 506.

A witness who had never seen the defendant write, and had no means of judging of the character of his handwriting, further than that he had once received a letter purporting to have been written by the defendant, which letter the defendant denied writing, is not a competent witness as to the defendant's handwriting. *Pope v. Askew*, 35 D. 729.

No one is competent to testify as to the genuineness of a signature who is not acquainted with the signer's handwriting from seeing him write, or from frequently seeing specimens of it, or from a comparison before the jury of the questionable handwriting with specimens of it, produced, admitted, or clearly proved to be not only genuine, but not got up for the occasion. *State v. Brown*, 70 D. 168.

A witness is incompetent to testify to genuineness of handwriting who is acquainted with it only from printed descriptions and fac-similes. *Id.*

For Index to Notes in American Decisions and American Reports, see Volume I.

A witness called to prove a person's handwriting, who has never seen the party write, and whose knowledge of his hand was derived from having read letters which came to a business house in which he was a clerk, purporting to come from the party, but which letters were not in reply to any letters witness had written or seen written, is incompetent. His knowledge is simply hearsay. *Bruce v. Crews*, 99 D. 467.

A witness cannot be allowed to give his opinion on a question of disputed handwriting, when his knowledge was acquired in the proceedings in the suit, and was based solely on comparison and admissions. *Hynes v. McDermott*, 37 R. 538.

180. Comparison of handwriting.—Witnesses having a knowledge of a party's handwriting are competent to testify as to its genuineness, but not to make a comparison of hands, for that is the province of the jury. *Travis v. Brown*, 82 D. 540.

An opinion of a witness formed from the mere comparison of hands as to whether two signatures were written by the same person, is inadmissible. *People v. Spooner*, 43 D. 672. S. P., *Tomep. Parkersburg R. R. Co.*, 17 R. 540.

The most satisfactory mode of proving handwriting, where the writer is incompetent to testify, is by a witness who saw the writing executed and is able to identify it; and next to this is the testimony of persons who have seen the party write or have had access to or possession of his writings. And this latter mode, though it involves a comparison, is not subject to the objection that it is proof by comparison of hands. *Hanley v. Gandy*, 91 D. 315.

Proof of a writing by comparison of hands consists of placing before a witness, who has had no previous acquaintance with the handwriting of the party, a writing which is admitted or proved to be genuine, and the writing in question, and calling upon him to state from the comparison whether the writings were executed by the same person. *Id.*

A witness called to prove a copy of a lost letter claimed to have been in the handwriting of a certain person cannot be shown letters already proven to have been written by such person, and testify whether the lost letter was in the same hand. This is not the case of an expert testifying from a comparison of papers all before the court, but a case of educating the witness up to the point of competency. *Bruce v. Crews*, 99 D. 467.

Comparison is competent as a means of ascertaining the genuineness of handwriting, when introduced in aid of doubtful original proof or when the evidence is conflicting, and the witnesses making the comparison need not be expert. *Benedict v. Flanagan*, 44 R. 583.

A witness, who had sworn that a signature in question was not in the defendant's hand-

writing, was shown, on cross-examination, a letter admitted to be in the defendant's writing, and on a subject foreign to the case, for the sole purpose of refreshing his memory. Held, that the plaintiff's counsel was entitled to ask him if he was still of the same opinion. *Nat. Bank of Chester Co. v. Armstrong*, 59 R. 156.

On the issue as to the genuineness of a signature, it is not competent, on cross-examination, to submit to the witness simulated signatures and require his opinion as to their genuineness. *Ross v. First Nat. Bank*, 60 R. 258.

181. What may be proved by expert testimony.—1. What are subjects of such testimony.—The admissibility of opinions of skilled witnesses is confined, in general, to cases where, from the nature of the subject, facts disconnected from such opinions cannot be so presented to the jury as to enable them to pass upon the question with the requisite knowledge and judgment. *Newmark v. L. & L. F. & L. I. Co.*, 77 D. 603.

The opinions of witnesses are admissible if the connection between the fact and its experienced consequences lies within the limits of some art or science, and the witnesses are skilled in such art or science. *Hartford P. I. Co. v. Harmer*, 59 D. 684.

The opinions of witnesses experienced in river navigation as to whether or not the situation of a vessel which had run aground was such as to preclude any reasonable expectation or chance of relieving her by the use of spars and anchors, and to justify the master in not resorting to such means, are competent evidence in an action for loss of goods jettisoned to relieve a vessel so situated. *Bentley v. Bustard*, 63 D. 561.

In an action against a railroad company to recover for injuries sustained by a passenger,—Held, 1. That evidence of the attending physician was admissible as to what effect the injuries would have upon the future condition of plaintiff, and as to how the injuries had affected his mind, although there was no declaration that the injuries had been willful; 2. That the phrase "extraordinary care," in the charge to the jury, was equivalent to "greatest care," "utmost care," the "highest degree of care," that being the degree of care legally required in his case. *Toledo etc. R. R. Co. v. Baddeley*, 5 R. 71.

Experts may be allowed to give their opinions as to the value of dogs, the opinions being based either on actual sales, or their general observations and experience. *Cantling v. Hannibal etc. R. R. Co.*, 14 R. 476.

In an action involving a breach of warranty that a cotton-gin was "equal in all respects to the best saw-gin then in use," the

* Opinions of experts, when admissible, see note, 59 R. 176-183.

Opinion as to probable effect if parties had acted in different manner, see note, 71 D. 532-533.

For Index to Notes in American Decisions and American Reports, see Volume I.

opinions of competent and experienced men are admissible on the question whether the cotton-gin was as warranted. *Scattergood v. Wood*, 25 R. 515.

Expert testimony may be admitted to prove.—A reasonable compensation for the services of an attorney. *Bodfish v. Fox*, 39 D. 611.

That the costs taxed in a suit in favor of the successful party are by particular custom regarded as belonging to the attorney. *Id.*

Whether a horse died of fright or of disease. *Piollet v. Simmers*, 51 R. 496.

The safety of a highway. *Baltimore and L. Turnpike Co. v. Cassell*, 59 R. 175.

2. *What are not.*—The opinions of witnesses engaged in an insurance business, that the fact that a building insured had shortly before the risk was taken been on fire, was material to the risk, and would have influenced the judgment of a prudent underwriter, are inadmissible in an action upon the policy. *Hartford P. I. Co. v. Harmer*, 59 D. 634.

The opinion of a physician with whom another physician studied his profession, as to whether he possessed "more than ordinary skill of members of his profession, judging from his acquaintance with them," is not competent evidence. *Leighton v. Sargent*, 64 D. 323.

Expert evidence is incompetent if the facts proposed to be proved are within the common experience of mankind; as to show that the failure to occupy buildings insured increased the risk. *Mulry v. Mohawk Valley Ins. Co.*, 66 D. 380.

A witness cannot testify as an expert, nor at all, as to whether certain specified facts would increase the rates of insurance upon property insured, as the question involved is not one relating to matters of science or skill, but calls for the opinion of the witness upon the influence which certain facts would have upon others, and whether they would be induced thereby to charge higher rates of premium. *Joyce v. Maine Ins. Co.*, 71 D. 536.

It requires no special skill or experience to answer whether the master of a vessel would "probably know that his foremast was sprang, his tryail split, and his standing rigging in such condition as to need replacing," and a question to that effect to an expert is consequently inadmissible. *Perkins v. Augusta Ins. & B. Co.*, 71 D. 654.

The testimony of experts in real estate values that the stoppage of defendant's works would materially diminish the value of plaintiff's property, in an action against the owners of a large mill for maintaining a nuisance by operating their works, is inadmissible, although plaintiff has introduced evidence to the effect that the operation of their works has reduced the rental value of her property. *Wesson v. Washburn Iron Co.*, 90 D. 181.

The opinion of a broker is not admissible

as to the certainty that stock could have been purchased at the quotation prices, at a certain time, in an action against a telegraph company for its failure to transmit a message to brokers, ordering the purchase of certain stocks. *U. S. Telegraph Co. v. Wenger*, 93 D. 751.

The words "original owners," in a prospectus of a corporation to be formed, importing that no profits would be added to prices paid for their lands on account of any intermediate party between it and the precedent owners, and excluding the idea of purchase at speculative prices, are not terms of art, science, or trade, requiring the aid of experts to explain. *Simons v. Vulcan Oil and M. Co.*, 100 D. 628.

A policy of fire insurance on a dwelling-house provided that any increase of the risk, by the act, or with the knowledge or consent of the assured, avoided the policy. The assured allowed the dwelling-house to remain unoccupied for some time, when a loss by fire occurred. *Held*, that the opinions of experts as to whether leaving a dwelling-house unoccupied for a considerable length of time was an increase of risk was inadmissible, the question being within common knowledge; also, that the testimony of the company's agent that it was their custom to charge extra premiums upon such unoccupied dwelling-houses was inadmissible, although the testimony of witnesses having the requisite knowledge and experience, that it was the custom of insurance companies generally to charge extra premiums upon unoccupied dwelling-houses, was admissible. *Luce v. Dorchester Mut. Ins. Co.*, 7 R. 522.

An expert witness, who has made a study of human hair, on being shown hair from the head of the victim of a murder, and hair found with blood on it on a wheelbarrow belonging to the accused, may not be permitted to give his opinion, founded only on the ordinary appearance of the hair, that the two were from the same head. *Knoll v. State*, 42 R. 704.

The following have been held not to be subjects of expert opinion: The proper time to burn a fallow. *Ferguson v. Huddell*, 49 R. 544.

The opinion of a fire marshal as to the cause of a fire. *Cook v. Johnson*, 55 R. 703.

Whether it is negligent not to put out a plank for passengers to embark on a steamboat, and to try to embark without a plank. *Clinton v. Root*, 55 R. 671.

Whether leaving a horse unhitched in a mill-yard is careful and prudent. *Stowe v. Bishop*, 56 R. 569.

132. *Competency and qualifications of experts, generally.**—Persons of skill are permitted to give their opinions in evidence on questions of art, science, or

*See monographic note on who are, and competency of experts, generally, 6: D. 223-246.

For Index to Notes in American Decisions and American Reports, see Volume I.

trade, on the ground that they are conversant with the business to which they are called to testify, and have, therefore, peculiar knowledge concerning it. *Sibes v. Paine*, 51 D. 385; *Jones v. Finch*, 75 D. 73.

A witness is not qualified to testify as an expert as to the expectation of life at a certain age, where he has had but an experience of six months as a life insurance agent. *Donaldson v. Miss. etc. R. Co.*, 87 D. 391.

A Roman Catholic priest, regularly educated and officiating as such, and required by the duties of his office to pass his judgment upon the mental condition of invalids and dying persons, to the end that he may administer the sacraments only to those whose minds are in a proper state to reason or act of their own volition, is an expert as to the sanity of a person whom he so attends. *Estate of Toomes*, 35 R. 83.

In proving a foreign written law, it is safer to require production of such law itself as a guide, when, if difficulties arise in expounding it, testimony may be called in for the purpose of making the exposition. But the witness called for such purpose must be an expert. A witness who merely testifies that he had been a policeman and constable in another state, and that, on account of a difficulty which he had had with his wife, he had looked into the laws of that state, is not competent either to prove what that law is or to expound it. *People v. Lambert*, 72 D. 49.

133. — of experts as to handwriting. — Persons skilled in a knowledge of handwriting may give their opinions in evidence formed from a comparison of hands, as to whether the writing in question is genuine or not, although they never saw the party write whose signature is in controversy. *Moody v. Rowell*, 28 D. 317. S. P., *Hess v. State*, 22 D. 767; *May v. State*, 45 D. 543; *Miles v. Loomis*, 31 R. 470.

So the opinions of such persons are admissible as evidence, formed merely from an inspection of the contested signature, as to whether it is a free, natural, and genuine hand, or a stiff, artificial, and imitated one. *Moody v. Rowell*, 28 D. 317.

The testimony of experts in handwriting as to the genuineness of a signature from a mere inspection of the writing, without previous knowledge of the party's handwriting, has been sometimes admitted, but the weight of authority is against it. *People v. Spooner*, 43 D. 672.

A clerk in chancery is not necessarily an expert in handwriting, whose opinions as to the genuineness of a signature are admissible in evidence, though he testifies that he has been accustomed to examine signatures as to their genuineness. *Id.*

Expert testimony is admissible as corrob-

* Expert testimony as to handwriting, see note, 65 D. 240-242.

orative of direct testimony to prove that the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time. *Fulton v. Hood*, 75 D. 664.

A photographer is qualified to give an opinion as an expert, concerning the genuineness of a disputed signature, where he has been accustomed to examine handwriting in connection with his business, with a view to detect forgeries; and this, though his opinion be based in part on enlarged photographic copies, made by himself, of the disputed signature and of admitted genuine signatures of the same person, which he testifies are accurate copies except as to size and color. *Marcy v. Barnes*, 77 D. 405.

Experts may be examined to prove forged or simulated writings, and to give conclusions of skill, but not to make comparisons with other authenticated papers, and express opinions from the comparisons. *Travis v. Brown*, 82 D. 540.

An expert may testify that entries in a hotel register, seen and examined by him, were in the handwriting of the person who wrote certain other signatures produced and proved or admitted to be the defendant's, although such entries were not before the jury, having been destroyed by the defendant himself, in order to suppress the evidence. *State v. Shinborn*, 83 D. 224.

The testimony of an expert may be received to prove a signature by comparison, although there has been no evidence from any person acquainted with such signature. *Id.*

The genuineness of the signature to a lost instrument may be testified to by an expert who had examined the signature, and who testifies from his recollection of the signature as compared with genuine signatures in evidence. *Abbott v. Coleman*, 31 R. 186.

An expert who has no knowledge of a handwriting in dispute, except from having seen the alleged penman write several times, and that only for the purpose of testifying, is incompetent to give an opinion thereof. *Reese v. Reese*, 35 R. 634.

On the question of the genuineness of the signature of a note in suit, an expert witness, who has never seen the defendant write, may not testify to his opinion founded on a comparison with the defendant's signature on the plea in the suit. *Springer v. Hall*, 53 R. 598.

A witness cannot be allowed to give his opinion as an expert on a question of disputed handwriting, founded on a comparison of the disputed signature with photographic copies of other writings not in evidence, and the accuracy of which is not shown by extrinsic testimony. *Hynes v. McDermott*, 37 R. 533.

The age of a writing is not a proper subject of expert opinion. *Cheney v. Dunlap*, 57 R. 823.

For Index to Notes in American Decisions and American Reports, see Volume I.

134. — of physicians and surgeons.* — Physicians are allowed to give their opinion as to the sanity of a testator, from the symptoms and circumstances which came within their own observation, or as testified to by others. *Potts v. House*, 50 D. 329.

Men of medical skill who have no personal knowledge of the facts may be asked their opinions whether certain appearances detailed by other witnesses are symptoms of insanity. *Dos v. Reagan*, 33 D. 466; *Cem. v. Rogers*, 41 D. 458.

Evidence by a medical expert as to his opinion of sanity or insanity of a prisoner, founded upon his appearance while on trial, should be admitted. *McAllister v. State*, 52 D. 180.

A medical witness may be allowed to express an opinion, from an examination made in July, whether the accused was insane in the preceding March. *Freeman v. People*, 47 D. 216.

A physician may testify as an expert to the pregnancy of a deceased, and may give his reasons for his belief, after having made a *post-mortem* examination of the body, on the trial of an indictment for murder caused by an attempt to procure an abortion. *State v. Smith*, 54 D. 578.

A physician may give his opinion of the cause of a decedent's death, after having made a *post-mortem* examination of the body, on the trial of an indictment for murder caused by an attempt to procure an abortion. *Id.*

A practicing physician is a competent witness as a medical expert, even though he is not a graduate of any medical college or institution, and has no license to practice medicine. *New Orleans etc. R. R. Co. v. Albritton*, 75 D. 98.

A physician cannot testify as an expert in relation to the effects upon the health of breathing illuminating gas, if he has had no experience of such effects, although he may have been in practice for several years. *Emerson v. Lowell Gas Light Co.*, 83 D. 621.

The testimony of medical men as to the permanency of a personal injury is not incompetent in an action for damages for negligently causing such injury. *Buel v. New York Central R. R. Co.*, 88 D. 271.

The opinions of physicians as to the nature of an affection complained of, its cause, and the probability of its being cured, are admissible, though based upon the facts as proved by other witnesses, in an action for causing personal injuries. *Mattison v. New York Central R. R. Co.*, 91 D. 67.

A physician asked to give his opinion as to the cause of a patient's condition at a particular time must necessarily be guided to

some extent in forming his opinion by what the sick person may have told him in detailing his pains and sufferings, and his opinion founded in part upon such data may be received in evidence; and he may even state what his patient said in describing his bodily condition, if it be said under such circumstances as free it from all suspicion of being spoken with reference to future litigation and give it the character of *res gestæ*. *Ill. Cent. R. R. Co. v. Sutton*, 92 D. 81.

The testimony of physicians that it would be impossible for any one to identify a human head after preservation for a certain time in alcohol is not admissible, for it is a conclusion from facts which can be drawn by the jury alone. It would be competent, however, for the witnesses to state the character and nature of the change produced by death, and to explain or illustrate to what extent these changes had operated upon the head in question. *State v. Vincent*, 95 D. 753.

A physician not an expert on the subject of insanity may testify as to the mental condition of a patient when he has had adequate opportunity to form an opinion, but cannot qualify himself to testify by a single examination. *Inhab. of Fayette v. Inhab. of Chester-ville*, 52 R. 741.

135. — and other scientific men.* — A surveyor who testifies as to his knowledge of marks made by a former surveyor, does not testify as an expert, but merely as a witness to facts within his knowledge, and his testimony is to be received by the jury only so far as they believe that he is able, from his personal knowledge, to identify such marks. *Barren v. Cobleigh*, 35 D. 505.

A surveyor's opinion as to that of a man of skill and science may be admitted in evidence for the purpose of showing that marks on a tree, claimed as a corner, were corner or line marks, but not to show that this was the corner or line between adjoining tracts of land. *Clegg v. Fields*, 75 D. 450.

A millwright and civil engineer is competent as an expert to give an opinion as to the effect upon the water in the factory flume and upon the machinery in the factory by opening and shutting gates conducting water therefrom, where he has been employed for many years in the construction of mills and factories. *Hammond v. Woodman*, 66 D. 219.

136. — of mechanics.† — A practical brick-mason, who had been engaged in the construction of a wall between plaintiff's land and the street, is competent to give his opinion as an expert upon the capacity of the wall to withstand the flow of rain-water on the inner side of the wall upon the plaintiff's land, in an action against a city for the undermin-

* Expert testimony as to medical questions, see note, 66 D. 234-238.

* Surveyors and civil engineers, as experts, see note, 66 D. 242.

† Mechanics as experts, see note, 66 D. 244.

For Index to Notes in American Decisions and American Reports, see Volume I.

ing of the wall by the flow of surface water against the outer side of the wall. *City Council v. Gihmer*, 70 D. 562.

137. — and persons skilled in a particular trade or vocation. — The opinions of underwriters, who had no particular knowledge in regard to the erection of steam saw-mills, are not admissible to prove that the inclosure of the boiler in a particular manner materially increased the risk. *Jefferson Ins. Co. v. Cothcal*, 22 D. 567.

Persons of skill may give their opinions in evidence when, from the nature of the case, facts disconnected from such opinions cannot be given to the jury to enable them to pass upon the question with the requisite knowledge and judgment. *Id.*

The opinions of merchants as to the liability of banks taking notes for collection, however general, cannot vary the legal liability of such banks, but are admissible to show the common understanding as to the meaning of such contracts, and to prove a usage. *Allen v. Merchants' Bank*, 34 D. 239.

The testimony that a bill is a counterfeit, from merchants who have been in the habit of receiving and paying away genuine bills on the same bank, is competent. *Watson v. Oresap*, 36 D. 572.

A witness may give an opinion as to the capacity of a person as a millwright, founded on work done by such person, where the witness is a mill-owner of twenty-five or thirty years' experience. *Doster v. Brown*, 71 D. 153.

In an action by a railroad company against an officer for storage of cars attached by him, and left on his premises, freight agents of other railroads are competent to testify as to the proper charge for such storage, though not experts in a technical sense. *Fitchburg R. R. Co. v. Freeman*, 74 D. 600.

A witness of a long railroad experience cannot be allowed to give his opinion whether the loud and sudden sounding of a steam-whistle was, under all the circumstances of the particular case, reasonable and prudent, or otherwise; nor is it competent to ask him whether or not similar signals were given by other railroad companies. *Hill v. Portland etc. R. R. Co.*, 92 D. 601.

In an action against a town for injury to a horse by a defect in a highway in the winter, the defense was that the horse was improperly shod. The shoes were exhibited to the jury, and a witness, a blacksmith, was allowed to give his opinion that they were put on for summer use and were too dull for winter use. *Held*, no error. *Beards v. Middlebury*, 38 R. 707.

138. Rules for the examination of experts. — A witness testifying as an expert may refer to his testimony on a former trial,

for the purpose of reviving his recollection of the facts of the case. *Riordon v. Davis*, 29 D. 442.

A medical expert having testified in general to his belief in a prisoner's insanity, may be asked, on cross-examination, whether he believed that the prisoner was able to distinguish right from wrong, and that it was wrong to commit murder, arson, rape, or burglary. *Clark v. State*, 40 D. 431.

Where in an action for damages for injury sustained by plaintiff's garden and nursery from smoke, heat, and gas from defendant's brick-kiln, two witnesses, being experienced gardeners, had testified to the injury that such smoke, heat, and gas had caused, they were asked, "what was the amount of damage" by the injury of which they had before testified, and it was held a proper question. *Vandine v. Burpee*, 46 D. 733.

An insurance expert may be asked whether a risk was increased by a partition in the basement of the insured building, and the necessity for another cask of water was thereby created, if there were openings in the partition of sufficient size to permit a cask to be easily rolled through, where water-casks were represented to be in each room, but were in fact only in each story. *Daniels v. H. R. F. I. Co.*, 59 D. 192.

An insurance expert may be questioned by plaintiff concerning his examination of the insured building for the insurance company and the objects the building then contained, in an action on a policy, for the purpose of proving the existence of the objects described in the application, and of showing his relation to the parties, and his means of observation and recollection. *Id.*

The opinion of experts on questions of art or science, to be admissible, must always be predicated upon and relate to the facts established by the proofs in the case. *Champ v. Com.*, 74 D. 383.

An expert may not only testify to opinions, but also state general facts, which are the result of scientific knowledge or professional skill. *Emerson v. Lowell Gaslight Co.*, 83 D. 621.

In an action on a policy of life insurance, the physician of the party insured cannot be asked whether, if he had known that the applicant for insurance habitually indulged in intoxicating drink, he would have regarded that practice as impairing his constitution; nor can the examining physician of the company be asked whether, if he had known at the time he made the examination of the applicant that he was in the habit of using intoxicating liquors to excess, he would have regarded his life healthy and the risk good. They may give their opinion on matters of science connected with their profession, but they cannot be permitted to state their views of the manner in which others would probably be influenced, if certain specified facts

* Railroad employees as experts, see note, 66 D. 243, 244.

For Index to Notes in American Decisions and American Reports, see Volume I.

existed. *Rauis v. Amer. M. L. Ins. Co.*, 84 D. 280.

The form of questions to experts is not regulated by any exclusive formula. Any question is proper which will elicit their opinions as to matters of science or skill which are in controversy, and at the same time exclude their opinion as to the effect of the evidence in establishing controverted facts. But if it requires the witness to draw a conclusion of fact, it should be excluded. *Hunt v. Lowell Gas Light Co.*, 85 D. 697.

A witness who testifies to the impaired condition of bolting-cloths at one point of time during the lease of a grist-mill, on the trial of an action for the breach of a covenant to repair, cannot be asked as to the effect of the impaired condition of the cloths upon the value of the flour manufactured in the mill during the lease, as he can speak only of the value of the flour manufactured at the time he examined the cloths. *Cooks v. England*, 92 D. 618.

Where the secretary of an insurance company testifies that neither he nor the company, so far as he knows, had notice of a subsequent insurance, he cannot be asked: "As the executive officer of the Eureka Insurance Company, would you have consented to an additional insurance in the Monongahela or other insurance company, and if not, why?" *Eureka Ins. Co. v. Robinson etc.*, 94 D. 65.

In an action of damages for personal injuries by negligence, the plaintiff having at the defendant's request submitted to a physical examination by surgeons, — *held*, 1. That testimony that, judging from the examination, including what she said at the time, and her indications of suffering, the injury complained of existed, was admissible, although the witness swore he could discover no external evidence of it; 2. One of the surgeons, plaintiff's witness, having testified that from such examination he could not discover the injury complained of, was asked by plaintiff's counsel, under objection, whether it might not have existed without his being able to discover it, and answered that it was possible, but not probable, — *held*, no error. *Quaife v. Chicago etc. Ry Co.*, 33 R. 821.

Where the evidence is voluminous or contradictory, it is error to permit an expert to give his opinion as to what "the facts as sworn to by the several witnesses indicate." *Bennett v. State*, 46 R. 28.

139. When facts on which opinion is based must be given. — Experts may give opinions, and those of physicians are received upon questions of professional skill, but they must state the facts upon which the opinions are based, and they must be weighed as other evidence, and are not conclusive. *Chandler v. Barrett*, 99 D. 701.

On the question of the sanity of a testatrix

at the time of making her will, when physicians are asked whether, from the circumstances of the patient and the symptoms they observed, they could form an opinion as to her sanity, and if so, whether they concluded her mind was sound or unsound, they should in either case be required to state what the circumstances or symptoms were from which their conclusions were drawn. *Hathorn v. King*, 5 D. 106.

The opinions of physicians concerning the insanity of defendant in slander, but stating no facts on which such opinions are based, are not admissible in evidence. *Dickinson v. Barber*, 6 D. 58.

140. Hypothetical questions.* — Witnesses giving their opinion as to the capacity of a testator, founded on facts known to them, cannot on cross-examination be asked what their opinion would be on a different state of facts. *Rambler v. Tryon*, 10 D. 444.

Professional witnesses are not to judge of the truth of testimony upon which their opinions on a question of insanity are based. *Com. v. Rogers*, 41 D. 458.

A proper question to put to a medical expert, whose opinion is sought on a question of insanity, is to ask him, if the symptoms and indications, testified to by other witnesses, are proved to the satisfaction of the jury, whether in his opinion the party was insane, and what was the nature of his insanity; what state of mind the symptoms indicate, and what the witness would expect the party's conduct to be if the party would be in any supposed circumstances. *Id.*

A medical expert may give his opinion upon the facts of a case, hypothetically stated, but cannot be asked to state his opinion upon all the evidence given on a trial and heard by him. *Luning v. State*, 52 D. 153.

On the trial of an action on a policy of life insurance where the assured had committed suicide, a medical witness was asked, "Assuming that a person had that form of insanity which you denominate melancholia, and had committed suicide, would you attribute that suicide to the disease?" *Held*, that the question was improper, as calling for no information peculiarly within the knowledge of an expert, but for an inference which the jury were capable of drawing, if justified by the facts, without being influenced by the opinion of the witness. *Van Zant v. Mut. Ben. Life Ins. Co.*, 14 R. 215.

In putting a hypothetical question to an expert the party may assume as proved all that the evidence tends to prove, although the court may not regard it as proved. *Quinn v. Higgins*, 53 R. 305.

An expert may be asked his opinion, based upon a particular portion, though not the whole, of the testimony, the truth of which

* Hypothetical questions, when may be put to experts, see note, 53 R. 307-309.

For Index to Notes in American Decisions and American Reports, see Volume L.
is assumed. *Yardley v. Outhbertson*, 56 R. 218.

141. Weight of expert testimony.—The weight of opinions of witnesses as evidence, when necessarily received, depends not so much on the number of the witnesses as upon their capacity and opportunities for information, the unprejudiced state of their minds, and the nature of the facts. *Clark v. Fisher*, 19 D. 402.

The opinion of a single witness that a grantor was too much intoxicated to transact business when he executed the deed, is not sufficient, of itself, to avoid the deed. *Harbison v. Lemon*, 23 D. 376.

Medical testimony should be given with great care and received with the utmost caution, and unless sustained by reasons drawn from facts, is entitled to little weight. *Clark v. State*, 40 D. 481.

Expert testimony is of no weight when the witnesses, whose opinions are taken, have no learning in the scientific principles of which they speak. *Carr v. Northern Liberties*, 78 D. 342.

Assumed facts upon which experts base their opinion must be established by proof, or their judgment will be worth nothing, and should not be weighed by the jury. *Hovey v. Chase*, 83 D. 514.

An opinion as to the state of a title is not conclusive of the party's rights in the premises. *Winter v. Stock*, 39 D. 57.

An instruction that while the jury should consider the opinions of medical experts in connection with all the other evidence, they were not bound to act thereon to the entire exclusion of other testimony, but should determine the question of sanity from all the evidence; and that such an opinion, "based upon a hypothesis" which is "wholly incorrectly assumed, or incorrect in its material facts to such an extent as to impair the value of the opinion, is of little or no weight,"—held, correct. *Guetig v. State*, 32 R. 99.

In an ordinary case it is error to instruct the jury that expert medical testimony should be received and weighed with caution. *Atchison etc. R. R. Co. v. Thal*, 49 R. 484.

WORDS AND PHRASES.

Construction of, in policies of insurance, see INSURANCE, 8, 100.

Construction of, in statutes, see STATUTES, 61.

Construction of, in wills, see WILLS, 71, 79-82.

How defined, see DEFINITIONS.

Ordinary meaning of, to be adopted, see STATUTES, 34.

What are actionable, see SLANDER, I.

What import contract of sale, see SALES, 1.

WORKS OF NECESSITY.

What are, see SABBATH BREAKING, 3.

WOUND.

Description of, in indictment for murder, see HOMICIDE, 24.

WRECK.

Right to, when cast ashore, see RIPARIAN RIGHTS, 16.

WRITING.

Necessity of, to constitute a deed, see DEEDS, 2.

Necessity of, to make a valid assignment, see ASSIGNMENT, 13.

Parol evidence, when admissible though writing exists, see EVIDENCE, 44.

Reducing deposition to, see DEPOSITIONS, 8.

Referring to, by witness, see WITNESSES, 112, 113.

Showing part of contract not reduced to, see EVIDENCE, 95.

What deemed to be a will, see WILLS, 2, 3.

What may be the subject of forgery, see FORGERY, 4.

When agent's authority must be in, see AGENCY, 3.

When contract to be enforced must be in, see SPECIFIC PERFORMANCE, 17.

When implies consideration, see CONTRACTS, 30.

When instructions to jury must be in, see TRIAL, 80.

When must express a consideration, see GUARANTY, 7-9.

Words in, when control printed matter, see INSURANCE, 91.

WRITS.

Form and contents of, generally, see PROCESS, 8.

In detinue, see DETINUE, 6.

Of assistance, see EJECTMENT, 48.

Of attachment, see ATTACHMENT, 48-51.

Of certiorari, see CERTIORARI.

Of dower, see DOWER, 47.

Of *elegit*, see EXECUTION, 141.

Of entry, see ENTRY.

Of error, see ERROR.

Of execution, see EXECUTION.

Of inquiry, see DAMAGES, 49.

Of replevin, see REPLEVIN, 18.

Of restitution, see EJECTMENT, 48.

Of *scire facias*, see SCIRE FACIAS.

Variance between declaration and, see PLEADING, 20.

1. De homine replegiando. — A writ *de homine replegiando* was a common-law remedy for trying title to a feudal villein, and this was the writ used in this country in slave cases. *Williamson's Case*, 67 D. 374.

2. Recordari.* — *Recordari* may be used as a writ of false judgment. *Bailey v. Bryan*, 67 D. 246.

3. Reparatione facienda. — The repair of a house or mill held by co-tenants might,

* Writ of *recordari facias loquendum*, see note, 67 D. 247-249.

For Index to Notes in American Decisions and American Reports, see Volume I.

at common law, be compelled by either of them by the aid of the writ *de reparatione faciende*. *Calvert v. Aldrich*, 96 D. 693.

A writ *de reparatione faciende* was brought by a co-tenant before repairs were made, to compel them to be made under order of the court. *Id.*

WRITTEN INSTRUMENTS.

Description of, in indictment, see **INDICTMENT**, 27.

Parol evidence to vary or explain, see **EVIDENCE**, II.

Presumptions, relative to, see **EVIDENCE**, 23.

WRONGS.

Liability of cities for, see **MUNICIPAL CORPORATIONS**, 64-78.

Liability of corporations for, see **CORPORATIONS**, 127-134.

Liability of infants for, see **INFANTS**, 25-37.

Liability of lunatics for, see **INSANE PERSONS**, 6.

Liability of officers for, see **OFFICERS**, 32.

Measure of damages in actions for, see **DAMAGES**, 31-41.

Of one partner, when bind firm, see **PARTNERSHIP**, 53.

Of servant, liability of master for, see **MASTER AND SERVANT**, 10.

Of wife, liability of husband for, see **HUSBAND AND WIFE**, 21, 22.

See also **TORTS**.

YEAR.

Contracts not to be performed within a year, see **CONTRACTS**, 40-43.

Estates for years, see **ESTATES**, 2.

Terms for years, when subject to execution, see **EXECUTION**, 37.

.

.

.

.

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.

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A TABLE

SHOWING THE VOLUMES AND PAGES OF THE ORIGINAL REPORTS FROM
WHICH THE CASES IN AMERICAN DECISIONS WERE SELECTED.

[Having a reference to the volume and page of American Decisions, this table will show
in what state, volume, and page the case was originally reported.]

1 Am. Dec.	1 Am. Dec.	1 Am. Dec.	1 Am. Dec.	2 Am. Dec.		
1 Quincy 99	92 1 Johns. Cas. 22	265	2 Dallas 187	455 1 Wash. Va. 248	610	1 Bay 245
2 179 98		51 270	144 460		266 612	256
3 298 97		99 276	180 468		296 615	278
4 Kirby 8 100		114 277	196 465		326 617	294
10 12 102		116 278	199 470	2 Wash. Va. 94	618	291
11 22 106		127 288	243 479		167 620	324
12 77 107		129 288	256 482		219 621	354
17 155 108		145 298	1 Yates 101	488	282 622	369
18 196 110		276 296	209 497	1 Oall	18 624	453
20 264 113		281 298	Addison 156	502	62 625	504
22 298 117		314 306	1 Yates 372	509	88 628	2 Bay 11
24 398 121		436 308	424 514		280 632	101
26 407 141	2 Johns. Cas. 1	812	464 519		301 633	126
28 1 Root 43 142		8 316	535 538		362 635	145
29 89 154		29 326	2 Yates 24	534	2 Oall 49	637
35 103 158		97 328	82 535		110 638	166
37 124 162		200 340	210 540		358 640	204
38 180 164		281 341	281 545	1 Mart. N.C. 78	643	211
39 194 166		260 345	368 546	1 Haywood 30	645	220
40 202 168		300 350	389 548		106 647	282
41 233 177		438 362	464 551		132 650	330
42 246 180		450 364	Addison 131	552	117 652	410
43 248 186	Come	56 370	2 H. & McH. 19	555	193 653	457
44 263 192		77 372	120 556		200 656	1 Decenn. 273
45 291 193		78 374	3 H. & McH. 2	557	248 664	267
46 318 195		144 375	136 559		386 671	382
47 335 202		235 377	433 560		417 677	409
48 362 206		261 378	437 563		478 687	432
49 1 Root 1 207		318 379	451 564		429 689	439
50 26 208		418 380	457 574	Taylor	1 694	Chap. N. 83
51 90 211		424 387	4 H. & McH. 41	576	27 696	44
52 119 216		439 389	43 581		56 699	1 Chip. D. 96
53 139 222	1 Dallas	8 395	72 582		75 704	110
54 150 223		49 396	219 583		93	
55 185 226		119 398	252 583		95	2 Am. Dec.
56 191 229		127 407	281 589		98 1	1 Mass. 7
57 252 233		147 409	350 590		122 8	62
58 279 235		193 410	346 591		125 4	129
59 300 236		194 411	429 594	1 Bay	8 6	146
60 328 239		210 422	1 Wash. Va. 14	596	58 10	191
61 359 246		319 425	19 598		90 11	206
62 374 252		424 428	96 599		116 16	258
63 407 258	2 Dallas	58 446	150 601		120 21	297
64 444 260		60 449	156 607		173 27	306
65 532 263		70 452	177 609		177 34	464

3 Am. Dec.	3 Am. Dec.	3 Am. Dec.	3 Am. Dec.	4 Am. Dec.				
36 1 Mass.	401 375	3 Yeates 375	656 1 Brevard	169 236	4 Mass.	522 568	6 Call	5
48 1 Day	23 381	407 660	173 243	178 243		566 576		187
50	85 388	441 660	239 246	239 246		627 583	1 Hen. & M.	33
53	93 392	508 662	252 249	252 249		637 602		70
57	130 393	518 664	260 253	260 253		661 603		306
59	139 396	95 665	266 255	266 255	3 Day	37 605		563
61	142 400	115 667	269 260	269 260		74 612	2 Hen. & M.	80
62	148 402	267 669	297 263	297 263		145 615		139
63	156 407	278 671	423 265	423 265		166 620		164
71	180 408	295 676	441 269	441 269		272 625		289
73	250 411	345 680	452 273	452 273		356 632		380
82	28 412	423 682	495 274	495 274		491 637		400
86	142 415	507 684	503 277	503 277	1 Johnson	1 639	3 Hen. & M.	1
89	201 417	110 686	170 293	170 293		34 657		396
91	205 425	175 692	225 296	225 296		78 672	1 Murph.	58
95	218 426	178 696	552 304	552 304		139 678		97
97	338 433	194 698	562 307	562 307		181 678		116
105	331 436	216 703	12 310	12 310		215 680		136
109	418 438	240 706	46 319	46 319		249 681		141
113	442 441	273 708	76 326	76 326		267 682		156
115	457 448	336 708	98 329	98 329		274 683		162
119	474 455	450 711	136 330	136 330		290 687		219
121	496 459	463 713	166 333	166 333		307 691		275
123	504 463	470 714	236 336	236 336		355 696		287
126 3 Johns. Cas.	5 469	488 716	252 339	252 339		413 694		291
130	10 474	502 720	315 340	315 340		440 695		323
134	29 483	537 721	335 345	335 345		471 700	2 Brevard	64
139	39 493	592 725	330 353	330 353		529 701		71
144	70 497	601	379	379	2 Johnson	1 702		129
145	198 502	1 Har. & J.	14 383	14 383		10 704		166
149	206 510	156 17	2 Mass.	14 386		24 706		190
154	259 519	239 24	56 390	56 390		31 713		279
160	297 520	250 25	84 399	84 399		52 722	Hardin	31
162 1 Quines	43 527	408 29	143 401	143 401		109 723		41
164	92 529	447 41	159 404	159 404		115 725		55
173	196 530	527 43	203 406	203 406		124 727		175
180	217 534	551 45	217 410	217 410		235 729		301
187	292 539	574 49	269 415	269 415		248 733		413
191	347 543	201 54	339 422	339 422		300 740		531
193	356 546	207 59	390 427	390 427		313 745		603
197	402 550	225 61	433 431	433 431		336 752	1 Overton	174
201	573 552	309 63	447 433	447 433		342 755		230
209	1 556	446 71	493 437	493 437		346 757		314
213	25 560	109 75	509 439	509 439		357 762		436
215	43 564	253 77	3 Mass.	87 442		418		418
222	121 570	416 95	71 444	71 444		448	4 Am. Dec.	448
228	188 574	441 96	133 446	133 446		455 17	5 Mass.	11
235	244 580	472 98	138 450	138 450		550 32		67
236	263 583	1 105	160 457	160 457	2 Johnson	44 39		39
239	304 590	236 122	189 459	189 459		56 41		144
241	3 Quines 16	433 124	201 467	201 467		68 47		170
247	43 593	463 129	225 469	225 469		157 50		230
250	43 606	543 131	230 473	230 473		180 52		233
251	73 612	2 Haywood 5	238 475	238 475		210 54		263
254	111 614	80 141	331 478	331 478		216 57		286
259	154 616	81 151	352 482	352 482		233 61		299
260	155 617	45 154	364 485	364 485		292 63		344
264	175 620	49 171	403 490	403 490		321 67		355
268	182 621	55 173	514 495	514 495		352 68		358
270	307 622	151 179	481 500	481 500		375 71		509
281 1 Quines Cas.	1 623	162 182	523 504	523 504		388 75		543
291 2 Quines Cas.	1 624	232 185	546 509	546 509		399 76	6 Mass.	24
316	66 626	233 189	1 515	1 515		481 80		60
323	87 626	328 206	45 517	45 517		484 84		46
330	123 626	352 210	135 526	135 526		506 87		58
333 1 Pen. N. J.	20 627	17 212	163 530	163 530	2 Har. & J.	64 83		76
343	163 629	33 213	266 532	266 532		167 90		85
354	407 634	115 217	330 535	330 535		191 92		102
358	13 638	146 222	349 545	349 545		230 105		142
360	84 642	357 224	405 550	405 550		263 107		169
366	128 645	1 Brevard 32	414 553	414 553		363 115		197
368	186 646	43 227	416 554	416 554		396 120		229
369	187 648	124 230	502 557	502 557		402 122		245
373	318 654	151 232	570 563	570 563		474 125		277

4 Am. Dec.	5 Am. Dec.	5 Am. Dec.	5 Am. Dec.	6 Am. Dec.
142 6 Mass.	844 506 4 Hen. & M.	118 27 7 Mass.	58 327 8 Johnson	86 619 2 Bibb
145 358 510		146 28	123 328	137 622
151 422 512		161 34	153 331	163 626
155 435 517		315 35	169 332	189 629
159 453 528		363 45	297 335	290 631
162 460 531	1 Munford	98 47	319 339	307 633
163 479 541		134 50	365 344	347 635
168 487 549		407 59	381 346	432 638
170 506 550		487 62	449 348	446 642
173 514 555	1 Murph.	343 63	453 352	69 645
175 524 559		339 66	8 355	139 648
177 30 562		417 77	51 368	192 650
179 51 564		426 79	121 372	302 654
182 57 571		452 81	138 375	394 656
185 66 576		488 83	162 380	515 656
187 146 579	2 Brevard	804 102	223 383	520 659
204 179 581		334 106	273 385	81 661
206 228 583		338 108	371 398	127 663
211 244 588		360 107	411 400	150 665
215 257 599		363 111	472 404	244 668
218 265 595		394 113	491 410	375 670
221 284 598		446 114	536 412	487 680
225 295 597		453 123	1 417 3 Har. & J.	83 684
229 4 Johnson	1 604 3 Decaus.	74 130	140 419	71 686
244 52 608		149 132	175 421	84 691
246 54 609		190 136	181 423	89 696
249 61 613		242 143	260 424	109 698
253 72 617		256 149	275 427	147 702
255 81 623	1 Bibb	149 157	316 433	159 705
258 150 626		165 162	329 434	194 708
262 202 627		178 166	368 435	216 710
267 230 631		244 167	439 437	324 712
270 240 633		247 174	492 439	339 726
273 251 637		325 184	6 Johnson	89 445 2 Munford
289 377 640		334 186	46 453	105 729
292 426 643		369 188	54 463	129 730
300 450 647		379 191	68 470	234 733
305 536 655		449 192	69 472	363 735
321 5 Johnson	37 659	503 194	82 481	407 736
323 49 661		609 195	110 486	424 739
326 68 663	2 Bibb	4 196	121 497	442 742
329 85 668		12 197	144 501	3 Munford
330 144 668		21 200	160 504	68 22
337 188 670		40 204	168 505	126 25
339 211 677		47 206	170 508	232 28
354 268 680		67 210	181 509	434 29
356 272 686		78 213	185 512	1 Va. Cas.
359 310 687		129 218	197 514	164 40
364 335 689		163 222	226 515	175 45
368 348 691		171 229	290 517	2 Murph.
372 375 694		186 237	296 518	41 49
374 395 695		200 245	70 521	84 52
382 2 Pen. N. J.	419 697	207 246	99 522	111 55
384 438 699		215 249	117 523	119 56
387 567 701		262 250	140 525	133 58
389 578 703	1 Chariton	145 252	161 526	178 62
392 583 706		163 254	189 527	223 63
407 672 708		235 256	301 529	3 Brevard
408 697 711		268 258	227 530	9 65
409 702 715		286 264	254 531	81 66
411 723 720	1 Tyler	60 266	258 533	38 67
414 754 722		247 267	260 533	54 71
417 2 Binney		250 269	264 542	63 72
430 146 724		295 273	273 547	94 86
433 174 724		350 275	332 548	97 88
448 332 726		387 281	358 551	3 Decaus.
451 360 728	2 Tyler	129 282	385 557	273 94
453 441 738		304 283	412 563	417 97
457 455 740		364 287	426 602	514 99
463 475		289	473 603	269 100
477 506	5 Am. Dec.	291	477 608	273 103
480 574 19	7 Mass.	6 316 8 Johnson	23 609	286 105
488 4 Hen. & M.	475 21	84 317	29 610	309 109
508 101 23		86 326	72 616	321 119
				341 124

6 Am. Dec.	6 Am. Dec.	7 Am. Dec.	7 Am. Dec.	8 Am. Dec.
129 10 Mass. 837	6 Binney 402	109 719 1 Chip. D. 182	306 12 Johnson 209	638 2 Serg. & R. 208
132 847	406	129 728	227 309	223 643
137 864	411	285 729	287 311	282 652
139 884	417	296 732	257 315	242 654
143 897	420	340 735	298 317	274 660
146 456	424	408 739	315 319	276 665
148 518	428	573 743	331 324	306 669
150 27	432	601	327	408 670
156 67	436	102	328	409 672
158 76	439	159 25	6 330	436 678
160 97	443	179 26	26 334	444 674
162 113	449	283 31	54 339	468 679
167 147	452	292 35	89 340	513 681
169 309	456	321 38	115 348	536 684
174 396	458	338 44	187 364	52 685
179 436	466	353 46	157 367	94 688
182 504	482	435 53	169 369	174 690
185 32	486	450 55	190 372	224 692
200 40	490	478 57	220 374	275 693
206 79	493	483 66	237 375	285 698
216 108	499	367 72	273 376	286 700
223 244	502	383 74	300 377	297 703
241 854	506	410 76	347 381	307 708
244 367	510	215 81	390 383	325 704
250 382	511	241 85	403 384	359 705
253 45	513	273 87	474 388	390 708
259 55	518	303 91	513 390	395 708
263 71	519	332 99	537 392	434 715
264 96	526	351 106	1 395	450 718
267 121	529	444 119	113 396	489 726
267 163	531	1 Car. L. R. 55	138 398	513 731
271 201	542	475 132	146 399	518 732
273 217	546	482 134	237 408	536 735
275 253	547	484 137	248 416	1 737
276 270	553	519 143	267 427	15 739
277 295	554	522 145	272 442	114 741
279 310	555	527 151	286 445	134 746
280 334	557	634 154	356 447	170
281 337	558	1 Car. L. R. 90	371 448	175
288 387	561	266 160	420 458	178 27
290 395	562	271 162	443 459	238 29
306 10 Johnson	1 564	274 169	515 462	294 31
311 23	566	415 172	520 466	318 32
314 30	567	617 175	1 467	338 36
316 102	569	178 182	31 469	426 38
318 115	572	183 188	49 471	1 Johns. Ch. 13
319 133	576	264 194	57 475	27 43
321 148	589	458 198	116 478	119 47
324 154	594	545 201	172 484	370 50
326 156	596	19 203	227 494	409 52
328 185	597	65 209	245 499	425 58
332 203	606	126 213	264 504	508 71
335 220	613	215 215	281 507	630 77
337 242	619	578 216	340 513	2 Johns. Ch. 1
338 244	630	591 223	352 526	161 53
339 263	634	9 225	434 535	418 56
341 336	635	46 229	457 539	443 54
343 377	638	105 235	487 548	463 57
346 447	641	173 237	525 554	519 58
349 457	646	192 240	69 559	535 59
353 11 Johnson	40 649	209 251	126 570	1 South. 61
355 91	654	248 256	175 574	74 106
359 114	656	317 264	196 576	156 105
361 146	660	324 268	243 579	165 110
363 201	663	365 271	252 582	193 112
371 221	666	502 274	302 592	231 115
373 231	675	530 277	347 603	230 118
374 315	690	676 280	12 Johnson	77 611
376 337	701	39 286	102 617	1 Serg. & R. 42
383 409	702	203 290	107 620	327 126
386 464	705	458 294	146 624	334 128
392 625	708	409 299	165 626	464 131
393 534	713	546 303	178 629	2 Serg. & R. 59
395 5 Binney	16 717	1 Chip. D. 159	305	91 123

9 Am. Dec.	9 Am. Dec.	9 Am. Dec.	10 Am. Dec.	10 Am. Dec.
144 16 Mass.	406 561 4 Johns. Ch.	400 196 18 Johnson	174 646 1 Hawk	394 198 19 Johnson
146 461 698	415 208	490 210	187 658	420 200
149 8 Conn.	9 606	455 221	287 655	442 204
152 81 610 2 South.	460 224	408 660	457 208	497 211
154 58 615	491 225	441 663 1 N. & McC.	45 218	162
157 126 618	570 227	459 676	104 215	181
160 123 620	584 235	513 680	173 219	223
164 126 622	738 246	544 683	197 223	259
168 171 623	815 256 5 Johns. Ch.	1 684	237 227	290
175 186 626	29 265	29 687	278 228	294
176 214 628 3 Serg. & R.	54 268	54 691	296 230	319
182 253 641	187 274	101 700	518 232	345
187 299 644	265 283	122 702	334 234	381
189 225 647	266 295	169 707	247 237	386
190 433 651	327 298	283 712	387 239	391
202 463 658	336 306	334 718	409 273	456
205 15 Johnson	33 655	490 312	441 720	517 286
211 39 658	509 318	482 726	556 310 6 Johns. Ch.	33
219 44 663	543 327 5 Serg. & R.	19 729	592 312	36
225 121 672	6 336	107 736 3 Haywood	147 316	166
231 159 675 4 Serg. & R.	112 339	117 740	159 328	268
233 213 679	151 344	223 745	224 333	313
236 300 682	213 346	275 743 4 Haywood	1 335	347
239 332 688	241 358	269 751	112 340	353
241 349 696	249 364	296 754	128 343	398
243 353 700	272 368	309 758	205 353	497
244 427 713	317 372	323 763	223 356	1 Habit.
248 453 718	401 376	363 767 5 Haywood	139 390	111
252 483 723	456 385	437 780	165 392	123
253 554 729 6 Mansford	6 397	492 787	271 396	126
257 16 Johnson	14 730	110 402 6 Serg. & R.	12	413 7 Serg. & R.
258 34 733	134 407	29	431	43
259 126 742	233 411	49	25 1 Greenl.	30 423
262 152 746	358 415	146 34	79 444	94
263 197 749	418 418	166 36	111 450	111
266 210 751	473 423	176 38	117 453	209
271 213	426	242 45	120 458	247
272 233 9 Am. Dec.	427	306 48	135 465	260
273 296 25 2 N. H.	13 433	324 50	163 468	438
274 327 39	42 440	386 51	167 472	451
275 332 35	56 444	429 54	172 475	459
276 315 39	66 450	466 60	219 482	491
277 17 Johnson	75 453	484 65	231 485	505
278 92 46	175 465	577 70	243 488	1 Band.
279 116 50	202 496 5 Haz. & J.	27 73	252 491	76
280 142 55	255 490	69 78	276 494	131
281 197 61	268 492	117 86	261 519	219
282 169 73	298 495	122 91	3 528	258
283 196 75	319 497	120 97	47 530	306
284 217 77	340 500	147 98	50 533	313
285 294 79	349 508	195 100	60 538	328
286 245 82	352 512	211 103	107 550	408
287 306 85	369 514	213 108	119 554 2 N. & McC.	9
288 351 92	380 516	224 108	158 557	13
289 384 104	412 522	245 110	166 560	38
290 449 108	413 534	317 112	172 570	60
291 511 111	1 572	332 115	182 573	70
292 549 119	110 589	16 119	203 576	90
293 55 123	122 594	174 121	209 578	114
294 129 137	160 599	98 140	259 580	118
295 190 141	182 602	241 143	276 582	168
296 229 145	289 604	273 147	336 586	186
297 282 148	303 605	318 149	378 588	207
298 351 154	400 608	327 151	380 591	233
299 481 157	413 611	463 156	408 597	267
300 65 159	435 615	470 162	428 601	272
301 106 161	443 616 1 Hawk	6 166	450 604	312
302 123 165	449 619	96 169	495 609	343
303 136 168	479 620	194 179	517 611	347
304 287 124 16 Johnson	48 623	248 186	535 614	437
305 309 127	58 636	274 189 10 Johnson	39 615	453
306 324 121	145 640	320 193	60 618	456
307 336 128	157 643	349 196	69 621	479

11 Am. Dec.	11 Am. Dec.	12 Am. Dec.	12 Am. Dec.	13 Am. Dec.
688 2 N. & McC. 498	189 1 Pick.	177 688 9 Serg. & R.	128 208 1 Blackf.	91 485 6 Martin
689	511 161	180 686	142 213	122 486
690	524 168	215 691	156 217	150 487
691	581 170	296 699	198 223	189 489
641 1 McCord	1 173	318 704	212 225	210 494 7 Martin
644	41 183	328 709	229 228	220 495
650	67 185	337 717	252 234	267 505
654	100 188	351 724	268 243	311 506
658	106 198	357 730	285 245	324 508
663	199 202	389 733	379 245	330 512
666	220 209	401 738	33 248	342 514
671	227 218	435 741	98 249	356 516
674	228 223	443 742	110 251	360 519
675	350 229	476 744	145 257	405 521
677	370 231	505 750	155 258	416 527
679	375 237 20 Johnson	28 758	179 265	444 537
681	425 238	29 756	183 269	29 541
683	449 244	64 760	209 269	77 543
685	509 247	76 762	246 273	81 550
687	525 249	90 763	309 275	84 553
691	532 253	130 773	377 276	91 568
693	541 259	146 774	411 285	118 570
696	578 262	168 779	441 287	153 571
698	580 266	196 786	576 290	171 572
702	584 269	229 787	590 295	184 576
705 1 Mar. A. K.	8 284	290 793	605 296	304 577
707	60 286	338 795	623 298	318 583
709	76 288	365	301	251 584
714	86 289	430 12 Am. Dec.	302	256 587
715	159 297	442 25 Minor	46 304	296 588
719	181 302	465 31	52 308	320 591
721	192 307	503 32	71 314	366 596
723	203 333	576 35	81 318	395 609
724	208 342	637 37	93 325	411 611
727	225 351	668 46	170 326	429 616
731	246 380 7 Johns. Ch.	1 47	173 331	447 623
733	300 383	17 49	286 333	453 627
737	343 389	45 51	299 337	489 632
740	365 396	57 54	321 340	497 634
743	372 401	65 56	331 342	505 636
744	389 403	69 60	363 345	510 642
746	397 417	90 61	407 350 2 Mar. A. K.	10 645
747	436 441	150 64 1 Del. Ch.	1 354	18 649
750	465 449	194 70	35 359	50 652
753	496 456	268 76	93 362	125 656
763	576 471	292 86	149 366	137 659
11 Am. Dec.	472	297 91	226 367	145 661
26 2 Greenl.	484	315 92	261 374	152 662
30	14 508	6 97	298 375	190 663
30	22 520	85 104	349 380	200 665
33	33 529	113 106	359 383	208 669
43	37 535	130 109	416 387	229 677
46	102 541	142 121	435 391	255 679
49	121 546	175 133	39 393	268 681
54	157 549	193 141	74 395	270 681
57	186 551	352 144	94 396	296 682
59	191 556 8 Serg. & R.	17 145	98 401	335 684
62	207 563	36 147	126 409	372 685
63	242 572	43 149	133 411	375 687
72	261 575	73 151	143 412	388 688
76	266 582	110 157	145 417	396 690 1 Chas. D.
79	275 590	159 161	154 422	435 691
99	305 593	219 168	174 427	480 694
101	322 610	268 170	213 431	488 696
111	358 624	357 172	221 439	528 701
114 1 Pick.	1 627	402 174	289 451	566 704
123	21 630	420 176	295 453	587 716
128	50 632	533 177	340 466	6
139	62 648	573 187	343 468	13 Am. Dec.
146	71 658 9 Serg. & R.	26 192	354 475	83 57 8 Conn.
149	81 664	39 197	385 479	459 41
151	102 667	94 201	401 482	673 44
153	114 675	115 205	19 483	417 49
156	124 679	125 207	33 483	649 52
				71
				76
				106
				149
				176

13 Am. Dec.	13 Am. Dec.	14 Am. Dec.	14 Am. Dec.	15 Am. Dec.
57 5 Conn. 263	584 10 Martin 456	684 1 Ohio 469	222 8 Greenl. 141	597 6 Hawks 544
80 291	888	479 639	488 225	147 603 548
72 442	839	568 640	519 234	207 607 11 Serg. & R. 48
79 451	842	577 612	535 237	260 610 61
90 476	845	643 649 10 Serg. & R. 63	243	458 614 73
92 528	847 11 Martin 26	660	114 247	463 617 110
94 550	850	297 666	170 254 6 Har. & J. 47	628 267
100 560	852	331 672	261 259	95 633 828
109 574	858	602 676	322 261	128 636 877
119 595	860	607 678	334 265	162 642 422
124 3 Mar. A. K. 7	866 12 Martin 76	682	412 268	166 665 12 Serg. & R. 37
133 56	872	177 684	419 271	172 669 181
134 68	878	358 691	450 275	252 676 171
136 77	877	402 697 2 McCord 6	279	293 679 237
141 177	879	425 698	89 281	364 680 252
149 184	881	659 701	47 289	408 681 256
151 225	884	688 702	152 298 1 Mo. 432	688 269
153 253	885	699 707	173 300	508 691 301
161 290	888 2 Pick. 1	711	208 304	517 696 1 Harp. Bq. 65
165 298	898	20 713	227 305	561 698 72
167 322	898	64 717	252 310	598 709 102
172 360	400	104 721	268 313	640 712 145
181 364	406	184 722	285 316	664 719 202
183 365	420	214 724	310 317	704 722 1 Peck 1
187 380	426	267 728	318 318	726 741 146
190 412	431	310 732	331 321	754 743 196
193 432	434	362 734	336 324 3 H. H. 9	745 261
195 468	437	368 736	371 325	23 751 270
199 522	445	460 738	377 331	76 753 274
203 564	445	466 739	428 333	88 755 301
205 609	449	512 741	445 342	96 761 321
208 618	452	521 748	478 346	190 766 2 Hand. 98
214 1 Littell 45	457	579 751	495 348	204 779 120
216 50	458	581 757	508 352	210 783 303
220 63	461	612	369	304 786 324
222 66	463	615 14 Am. Dec. 371		333 792 404
225 82	464 1 Mo. 67	41	10 373	382 796 514
228 176	468	81 45	52 375	415 15 Am. Dec. 1
230 279	470	123 54	118 384	478 5 Littell 8
232 216	474	164 56	163 393	603 33 5 Littell 1
234 290	484	186 66	177 399	54 35 8
235 299	494	197 68	260 400	140 39 23
238 302	496	254 72	358 417	172 41 43
246 350	497	288 76	390 418	175 44 74
251 2 Littell 90	500	312 81	399 419	262 43 92
255 109	502	815 84	423 427	336 64 185
261 127	503	398 86	457 431 2 Cowen 139	66 281
263 217	506	410 93 4 Littell 25	472 458	195 71 249
265 227	509	75 101	165 515	246 77 1 Mon. 10
268 296	512 1 Cowen 78	106	187 519	408 78 16
271 306	513	122 115	210 520	518 83 39
279 3 Martin 90	514	156 117	220 521	522 86 91
281 95	517	243 122	292 522	605 89 94
283 213	519	249 124	244 526	638 92 121
285 220	520	260 133	809 531	770 95 195
287 309	522	276 135	817 543	59 100 206
288 318	525	290 140	846 545	213 104 215
291 402	533	322 159	891 546	283 109 231
294 422	539	437 172	412 547	337 110 241
296 433	546	513 179 1 Mart. N. S. 147	550	347 113 245
298 436	550	543 181	165 552	365 115 252
300 730	564	711 188	321 554	436 116 264
304 3 Martin 47	568	286 190	444 557	478 118 2 Mon. 12
305 295	588	124 192	608 563	496 121 56
306 326	599	232 193 2 Mart. N. S. 13	569	557 122 65
309 350	605	236 196	410 572	44 126 82
311 394	608	259 201	574 575	66 129 89
313 465	615	275 204	612 578	74 134 91
316 500	618	281 206 3 Greenl. 22	594	119 136 95
320 526	621	318 211	84 585	184 140 109
326 588	627	368 213	44 588	232 142 125
328 16 Martin 285	629	375 214	85 594	328 148 139
330 339	630	413 216	110 595	378 150 143
333 396	639			452 154 3 Mart. N. S. 22

15 Am. Dec.	16 Am. Dec.	16 Am. Dec.	16 Am. Dec.	17 Am. Dec.
156 8 Mar. N. S. 286	547 2 Ohio 288	108 8 Mon. 359	454 6 Cowen 682	761 5 Rand. 577
157 308 547	287 112	422 458	665 776	627
159 318 553	305 115	517 460	673 780	636
161 339 555	327 125	4 Mon. 29 471	701 783	697
163 423 557	383 130	54 475	757	
167 559 559	495 136	78 478 14 Serg. & R. 118	17 Am. Dec.	
172 607 575	504 143	91 480	33 5 Mon. 19	
173 615 578 18 Serg. & R. 60	150	152 484	159 35	43
175 8 Pick. 20 581	157 153	291 486	173 42	89
180 80 589	199 160	379 488	185 44	94
181 96 593	210 163	526 491	214 46	150
196 149 596	224 165	4 Mart. N. S. 91 494	258 50	159
204 188 601	304 166	116 497	267 53	184
207 201 603	318 169	192 506	307 60	199
208 269 604	356 171	256 508	333 65	232
209 291 606	386 173	292 513 16 Serg. & R. 28	67	280
210 299 612 3 McCord	6 175	484 516	72 69	288
214 304 614	22 185	487 520	84 74	263
226 363 615	121 186	5 Mart. N. S. 98 531	127 77	297
228 379 622	131 188	149 536	162 81	413
233 420 625	162 189	409 537	165 84	426
235 446 627	227 199	464 543 16 Serg. & R. 18	96	526
236 8 Cowen 39 631	249 212	569 546	85 98	531
242 75 632	280 233	4 Greenl. 88 548	68 111	6 Mon. 13
256 120 633	298 237	100 554	133 115	40
259 166 634	337 238	102 556	147 118	91
264 206 640	394 249	175 558	157 127	110
268 303 645	458 253	220 564	198 130	126
269 339 647	491 263	264 569	257 132	145
270 445 648	506 266	337 571	261 136	192
304 612 650	552 268	407 578	282 137	234
308 623 652 2 Chip. D.	68 271	439 576	345 139	437
322 683 653	71 285	479 577	361 161	531
331 4 Cowen 17 661	128 290	7 Har. & J. 14 582	368 166	561
332 26 664	43 292	61 585	414 168	609
340 82 669	67 294	92 587	425 175 6 Mart. N. S. 51	
341 156 670	158 300	275 595 1M'Coord Ch. 53	179	69
347 163 673	174 302	279 597	197 189	296
354 207 676	264 312	331 602	213 184	334
360 282 679	282 317	417 606	304 187	431
374 292 681	306 325	43 610	333 195	541
379 345 691	314 326	98 617	443 196	616
383 351 692	321 329	131 623	524 199	640
394 355 696	350 333	145 628 2M'Coord Ch. 23	201 5 Greenl. 24	
396 417 698	369 335	258 629	27 203	69
397 432 700	390 338	264 632	36 206	81
394 452 704 3 Rand.	44 342	268 635	43 209	120
396 483 706	136 347	336 639	126 211	140
401 508 712	361 349	339 641	143 214	147
402 559 721	504 353	395 643	207 218	213
405 599 726 4 Rand.	58 355	449 648	214 221	237
412 662 731	74 358	507 664	410 223	261
451 5 Cowen 63 754	272 365	5 667	455 231	266
453 74 756	282 367	7 672 3 Aiken	9 233	266
451 123 779	427 369	11 675	33 236	309
463 165 781	662 372	20 678	54 238	319
464 188	377	112 684	79 243	331
468 237 16 Am. Dec.	383	139 686	115 251	435
473 269 83 6 Conn.	49 386	199 689	150 253	471
474 380 85	111 391	217 691	167 257 1 Rand.	136
475 475 46	223 394	259 696	184 275	206
477 547 53	270 407	303 696	304 277	306
507 4 Hawks 64 58	293 409	312 702	249 306	353
510 73 68	415 415	435 705	255 311	370
512 116 70	464 417	437 710	266 347 6 Pick.	36
519 279 73	547 419	496 715	284 349	114
523 358 76	559 423	18 720	233 351	137
526 384 83 3 Mon.	52 429	23 725	300 356	232
529 83 87	106 432	108 729	407 368	232
533 55 90	126 433	110 733	459 372	256
534 89 93	189 437	173 738	126 385	335
539 95 101	270 440	475 741	198 397	437
542 215 103	284 443	504 755	336 397	474
546 221 107	348 447	518 759	543 409 4 N. H.	15

17 Am. Dec.	18 Am. Dec.	18 Am. Dec.	19 Am. Dec.	19 Am. Dec.
403 4 N. H.	107 703 4 McCord	16 180 7 Mon.	394 663 Harper	503 253 2 Gill & J.
404	116 708	89 190	396 666	567 255
406	166 707	76 194	439 670	18 258
407	171 710	96 203	534 672	25 262
408	182 722	183 211	542 675	91 264
410	191 731	206 213	552 676	168 266
412	198 734	239 216	597 678	238 268
414	221 735	241 219	612 680	303 282
419	229 740	246 232 7 Mar. N. B.	1 684	367 284
421	259 742	286 241	41 691	385 286
423	285 744	294 246	331 695	457 289
428	380 756	357 248	586 699	470 290
431	397 758	476 250 1 Har. & G.	11 701	485 292
437	415 762	519 271	96 708	78 298
438	434 770 1 Mart. & Y.	1 283	175 708	165 303
439	469 782	48 288	295 710	176 306
444	512 788	122 295 2 Har. & G.	433 715	188 311
446	533 795	143 297	295 719	457 319
449 4 Halst.	26 798	302 302	305 726	473 322
455	110 802	309 309	337 748	556 326
462	115 809	361 313	382 751	605 329
464	144 813	378 316	473 757	613 330
468	189 817	383 317	495 771	721 332
473	322 819	426 327	1 Bland	443
479	352	344	479 19 Am. Dec.	340
483	357 18 Am. Dec.	350	569 33 2 Stew.	21 343
496 7 Cowen	22 33 1 Stewt.	11 371	5 Halst.	47 345
498	53 34	19 389	87 44	111 347
502	88 35	29 404	163 46	133 348
514	297 36	51 417	217 49	211 350
517	323 38	66 423	8 Cowen	27 52 1 Mar. J. J.
521	360 39	201 427	71 54	76 353
526	366 42	229 432	178 55	84 363
528	402 43	244 441	195 59	169 368
529	453 45	262 443	320 61	206 369
532	662 46	318 445	377 70	222 386
533	705 48	320 451	297 71	236 388
549	739 60	354 454	387 92	285 392
555 1 Dev.	25 67	475 463	589 103	366 395
562	137 68	490 491	9 Cowen	153 104
563	139 70	500 497	169 116	484 402
565	208 73	517 501	230 120	500 409
567	223 76	576 503	266 122 2 Mar. J. J.	44 411
569	315 79 7 Conn.	57 508	420 126	155 413
571	357 86	125 516	437 128	192 431
573	519 89	143 543	687 131	303 433
576 3 Ohio	24 92	172 561	2 Dev.	2 135
577	42 90	214 564	126 139	429 436
579	49 108	266 567	130 152	540 440
580	51 108	301 570	247 157 3 Mar. J. J.	50 442
581	70 111	307 573 1 Dev. Eq.	93 162	61 444
582	73 116	319 577	103 164	94 446
585	211 118	452 580	151 166	122 449
590	230 120	558 586	185 175 3 Mar. N. B.	124 452
591	232 123 2 Blackf.	87 587	276 176	159 454
594	285 131	94 591	377 177	214 459
596	307 133	96 595	443 184	267 461
597	321 136	112 598	460 185	336 462
601	327 138	133 602	121 187	341 463
603	337 149	137 604	155 189	9 469
607	370 153	178 608	163 191	72 473
609	553 157	194 625	231 194	89 477
635 17 Serg. & R.	64 158	228 633	295 197	112 480
638	70 159	258 638	262 200	140 493
644	88 161	54 642	33 201	154 502
643	94 164	195 643	65 206	200 508
650	126 167	209 647	135 210	207 515
654	130 172	241 649	263 211	220 522
658	319 176	270 650	269 213 1 Gill & J.	1 529
663	354 178	314 652	287 225	216 535
677	363 181	341 654	300 235	430 537
680	413 183	344 656	430 237	463 549
686	433 186	381 660	452 243	480 561
699 4 McCord	12 187	386 661	484 250 2 Gill & J.	24 563

20 Am. Dec.	20 Am. Dec.	21 Am. Dec.	21 Am. Dec.	22 Am. Dec.
571 2 Wend.	166 143 3 Mar. J. J.	310 538 10 Pick.	460 217 5 Wend.	231 632 3 Stew.
581 4 Ohio	72 145	363 534	477 223	293 638
585	77 153	428 545	522 232	404 641
586	88 156	440 547	535 241	558 645 1 Stew. & P.
588	129 158	492 554	33 245	9 646
591	135 175	525 557	38 256	77 649
595	175 179	600 562	71 262	103 657
612	205 189	644 566	99 306	213 661
615 2 Rawle	23 199	658 570	181 316	228 674
616	83 203	33 573	203 323	234 680
627	118 205	64 575	216 328	291 686
629	123 209	97 578	259 331	291 689
632	163 211	159 580	280 335	341 691
633	199 213	202 583	197 336	343 695
640	222 216	206 589	327 340	354 703
643 1 R. I.	1 218	298 593	370 344	372 707
645 1 Bailey	7 223	488 607	319 346	473 712
651	56 226	491 612	345 347	517 718
653	84 229	529 616	352 350	1 Pen. & W.
656	92 230	572 621	375 361	49 737
660	126 232	578 623	385 363	96 745
661	136 237	597 627	399 370	198 752
663	146 241	6 Mar. J. J.	419 374	207
664	158 248	104 635	446 382	285
668	179 251	185 639	459 387	338
672	221 255	242 644	497 394	402 37
675	230 260	3 Mar. H. S.	515 404	471 41
679	283 262	599 649	555 407	2 Pen. & W.
686	312 266	644 652	587 410	63 74
690 2 Vi.	9 277	1 La.	596 426	82 75
695	36 279	248 664	94 432	115 82
697	120 284	489 667	104 437	211 84
703	151 285	527 670	112 445	274 86
707	168 286	528 678	135 447	287 88
711	209 294	3 La.	142 454	351 92
714	270 297	63 683	180 458	392 95
718	342 299	112 686	202 466	423 100
720	374 300	114 688	219 469	348 102
722 1 Leigh	42 304	6 Greenl.	233 476	449 103
730	86 309	296 692	236 480	467 113
743	140 316	421 695	280 482	533 116
748	280 320	427 699	337 483	575 120
750	297 322	452 702	350 492	611 126
755	430 324	462 706	395 499	651 127
757	531 337	7 Greenl.	446 508	44 129
20 Am. Dec.	341	51 711	459 513	51 136
33 2 Stew.	346	61 716	503 515	56 141
40	259 347	113 733	538 518	85 151
49	364 349	126 763	552 522	107 156
56	401 352	184	526	113 163
58	466 356	150	530	141 165
60 3 Stew.	492 357	175	538	149 167
64	31 360	209 41	157 543	404 179
66	50 381	461 52	79 554	453 184
74	123 402	544 62	114 557	456 191
80	201 424	3 Gill & J.	35 560	480 199
82 3 Conn.	240 434	318 70	79 566	495 208
84	11 438	326 78	122 568	536 206
86	45 443	432 81	147 571	53 213
90	47 452	493 84	191 573	82 216
95	53 463	3 Gill & J.	287 576	99 218
97	101 471	9 Pick.	9 579	133 220
100	117 475	298 103	113 581	143 223
110	254 479	347 115	188 585	173 225
115 2 Blackf.	263 481	360 122	229 588	302 228
118	301 489	441 155	394 589	353 233
119	336 491	496 158	403 594	11 236
123	367 506	551 161	525 597	70 279
131 3 Mar. J. J.	377 507	40 168	613 599	74 293
137	153 518	228 169	607 601	149 302
140	260 521	249 172	148 604	165 322
142	290 524	295 181	170 606	178 329
143	306 526	391 209	187 608	200 337
145	308 531	423 213	231 631	334 350
				504

22 Am. Dec.	23 Am. Dec.	23 Am. Dec.	24 Am. Dec.	24 Am. Dec.
353 11 Pick. 1 708	3 Dev. 3 280	3 Leigh 365 632	12 Pick. 486 296	5 Ohio 387
359 26 711	108 298 1 Stew. & P. 249	651	567 299	391
366 79 714	149 295	472 654	1 801	396
370 302 717	221 299 2 Stew. & P. 83	659	50 314	464
372 304 719	241 304	151 662	94 315	509
375 811 722	275 307	199 670	116 320 3 Pen. & W. 374	
377 350 723	2 Dev. Eq. 42 319 3 Stew. & P. 49	674	165 325	387
379 400 729	69 324	9 Conn. 140 678	255 326	406
386 466 732	115 338	209 683	294 331	437
389 519 738	178 386	267 685	382 334	447
393 24 745	4 Ohio 253 339	286 688	388 339	496
397 40 757	231 342	314 691	402 342	505
400 89 759	400 353	330 693	3 Mo. 127 345	3 Rawls 312
410 120 762	446 361	374 698	183 351	341
414 126 764	500 364	401 701	9 356	351
415 129 767	5 Ohio 5 369 1 Har. Del. 48	703	14 359	361
416 141 777	154 378	3 Blackf. 89 704	15 390	473
418 163 785	162 376	51 705	17 396 Rich. Eq. C. 122	
421 184	379	54 706	30 409	146
425 270	23 Am. Dec. 390	72 708	63 417	239
433 13	33 2 Pen. & W. 412	383	68 419	321
435 39	459 387 7 Mar. J. J. 188	717	235 422	459
437 45 58	466 398	149 720	263 427	1 Yeager 3
440 69 60	478 396	183 722	1 Saxt. Oh. 534 436	36
442 95	33 3 Pen. & W. 67 401	232 728	541 439	60
444 116 64	83 404	255 743	685 441	76
449 120 71	185 407	318 756	694 444	110
454 166 78	245 409	268 773	3 Paige 117 448	149
456 21 81	262 411	401 778	139 450	233
458 40 84	291 417	443 781	167 451	291
462 88	3 Rawls 23 431	478 790	207 454	503
466 364 103	84 439	599	455	2 Yeager 6
468 398 111	168 446	626	458	24
469 415 113	199 449	648 33	3 Wend. 396 463	31
472 440 117	66 453	3 La. 224 34	442 467	60
476 520 131	157 458	266 37	445 479	198
478 533 134	217 463	510 39	452 485	249
479 553 135	298 466	530 46	462 489	346
480 570 139	320 467	546 51	480 492	394
483 175 140	324 470	36 60	492 496	467
485 182 143	389 471	51 62	494 502	524
489 13 145	401 477	97 66	506 511	554
496 23 146	431 478	138 88	547 515	581
503 1 Saxt. Oh. 259 149	458 483	223 90	562 517	599
519 246 150	516 484	234 96	573 546	3 Yeager 40
526 369 153	581 486	374 105	584 550	137
537 390 155	623 488	466 106	610 553	171
539 488 163 1 Bail. Eq. 351 490	547 113	9 Wend. 17 556		201
545 522 170	360 494	181 116	35 559	278
546 597 180	387 497	187 117	36 570	283
551 603 183	479 499	213 121	63 580	366
556 649 186	482 504	253 129	85 583	392
557 666 191 Rich. Eq. C. 26 513	334 137	334 137	129 583	403
563 47 194	77 521	362 143	268 585	411
567 72 193	207 522	400 160	315 587	475
574 152 208	233 526	406 162	333 590	481
578 193 208	244 529	9 Greenl. 12 165	571 594	492
582 364 207	279 531	42 198	9 598	235
586 380 209	281 537	54 212	3 Paige 222 604	278
590 446 212	344 545	85 213	254 607	291
592 449 215	420 547	187 223	296 609	313
596 560 217	425 549	140 230	421 610	354
603 9 219	431 553	282 236	517 616	363
622 85 223	521 563	305 246	545 625	456
635 183 230	530 569	332 256	308 627	491
644 385 234	542 573	420 264	380 628	504
646 387 245	11 581	509 266	398 631	513
648 396 246	58 589	5 Gill & J. 1 266	428 634	549
652 419 251	3 Leigh 78 596	52 263	473 640	537
655 423 255	98 597	54 273	3 Dev. Eq. 234 645	609
659 567 253	140 607	307 274	292 648	629
661 586 261	250 614	378 279	301 650	3 Leigh 450
669 606 264	255 619	425 281	293 680	561
679 3 Paige 45 266	273 622	467 293	349 683	597

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895 3 Leigh 780	242 10 Maine 874	552 10 Wend. 180	184 1 Hill, S. O. 304	422 3 Blackf. 876
895 786 248	891 555	260 187	317 424	387
704 4 Leigh 80	414 558	271 190	363 426	403
707 37 254	429 563	298 192	1 Hill Ch. 113	428
716 3 Stew. & P. 185	28 564	300 194	146 430	433
744 212 260	54 566	349 196	190 433	457
745 4 Stew. & P. 72	58 568	367 199	252 436	52
750 222 265	89 569	370 203	288 437	102
751 231 272	5 Gill & J. 102	478 208	311 440	158
753 237 276	110 578	568 213	4 Yarger 1	161
763 387 282	269 580	589 214	29 446	170
763 441 303	432 582	639 215	48 459	408
765 5 Stew. & P. 82	483 590	675 217	187 466	480
769 91 317	500 594	18 220	174 467	476
772 119 322	6 Gill & J. 49	25 221	202 478	6 La. 315
774 150 325	54 598	31 225	218 481	443
25 Am. Dec.	13 Pick. 460	44 232	270 482	463
33 9 Conn. 430	601 465	65 236	323 485	607
36 486 344	518 604	80 239	452 491	680
43 466 350	523 617	85 240	456 493	740
46 527 355	1 618	149 242	541 496	7 La. 52
47 10 Conn. 1	13 624	187 247	576 498	134
52 1 558	55 656	442 249	16 501	236
53 30 363	141 677	1 251	41 505	379
55 69 372	181 706	220 254	63 507	440
60 121 378	198 708	223 257	104 511	534
64 1 Har. Del. 131	217 710	261 258	154 515	11 Maine 113
65 142 393	315 711	290 262	195 521	267
68 304 398	356 714	360 263	199 525	378
71 1 Scam. 87	374 718	372 265	261 530	398
79 113 411	408 721	420 267	300 532	371
84 3 Blackf. 170	414 729	470 268	301 540	381
86 202 415	416 736	80 268	320 542	396
99 219 420	518 741	101 270	369 547	414
102 241 423	40 743	103 276	456 552	468
105 245 430	99 745	125 278	459 557	6 Gill & J. 73
108 267 432	147	250	463 559	94
111 293 435	3 Mo. 230	283	84 561	205
112 324 437	252 33	54 284	101 576	268
114 1 Dana 1	264 37	66 286	116 576	298
118 7 442	283 49	149 288	149 579	323
121 68 445	99 52	163 293	161 587	507
124 92 451	104 61	219 296	215 594	7 Gill & J 13
136 152 452	107 69	300 299	223 598	15 Pick. 255
138 177 453	147 70	307 301	236 600	276
139 180 454	159 72	370 303	317 611	409
141 201 455	164 75	385 306	333 616	500
143 250 457	210 79	425 310	371 620	543
149 359 458	213 83	533 313	500 626	16 Pick 28
155 421 459	247 91	17 315	114 629	64
160 440 461	289 95	23 317	132 631	87
163 479 462	364 103	66 322	333 645	107
165 578 464	370 107	104 326	484 654	175
167 604 467	399 109	111 333	493 655	198
173 5 La. 46	413 111	9 337	645 657	227
175 121 470	430 115	46 339	667 672	3 Mo. 318
178 263 472	432 122	120 340	674 678	408
178 281 473	454 128	141 341	689 682	447
180 835 476	326 127	234 342	694 684	472
181 836 490	361 130	259 344	264 690	1 How. 43
187 397 497	36 131	273 350	383 695	64
191 424 499	90 145	323 357	33 696	108
197 431 509	178 154	1 Hill, S. O. 27	192 701	156
200 461 513	186 155	89 355	215 704	6 N. H 469
202 75 516	64 158	69 370	222 711	477
204 84 524	169 163	167 379	265 713	481
205 10 Maine 80	523 166	184 382	10 Conn. 137	7 N. H 9
213 185 532	264 168	197 386	213 726	157
214 156 536	75 170	239 390	243 730	196
216 170 539	80 174	246 396	318 732	202
221 178 545	102 177	260 399	1 Har. Del. 383	215
223 224 546	110 179	267 401	401 737	280
226 263 548	128 180	289 414	1 Scam. 127	277
228 274 551	165 181	299 417	148 741	248

27 Am. Dec.	27 Am. Dec.	28 Am. Dec.	28 Am. Dec.	29 Am. Dec.
746 7 N. H. 368	376 2 Hill, S. C. 283	682 10 Conn. 384	296 17 Pick. 246	657 5 Rawle 191
27 Am. Dec.	381 298 689	390 297	332 667	286
83 2 Green 222	357 307 696	514 300	357 675	342
63 355 393	363 700	522 306	361 676	21
68 4 Paige 355 395	395 707 11 Conn. 51	309	404 681	80
72 399 397	397 713	112 311	436 684	82
75 432 401	488 721	160 313	441 685	85
80 510 404	506 728	177 314	444 689	95
84 516 406	528 732 1 Har. Del. 532	317	490 691	121
88 537 410	607 746	548 325 1 How. Miss. 183	695	124
91 628 412	612 764 1 Scam. 187	333	230 698	212
95 11 Wend. 539 417	619 767	213 336	4 Mo. 41	700
100 548 422 1 Hill Ch. 360	28 Am. Dec. 342	47 708	287	317
104 604 429	465 33 4 Blackf. 9	348	59 711	380
110 12 Wend. 41 441 2 Hill Ch. 19	36 26 353	7 N. H. 397	723	390
117 57 445	46 45	94 354	436 725	396
120 127 448	108 52 3 Dana 28	359	452 729	424
122 142 452 6 Yerger 20	55 51 360	457	29 Am. Dec. 485	33 1 Whart. 82
124 145 455	75 57	91 363	5 N. H. 81	39 86
126 173 458	185 61	138 372	114 42	113
130 356 460	220 65	146 381	146 44	179
132 418 462	280 69	157 383	174 48	252
137 439 467	334 70	247 389	45 67	323
142 473 469	360 74	321 391	155 63 2 Hill Ch. 167	200
150 504 480	364 86	398 394	54 67	204
152 525 488	483 94	503 400	114 68	277
156 545 489	497 114	588 411 5 Paige 1	137 72	335
158 566 492 7 Yerger 82	117 168 125	50 417	235 89	33
167 13 Wend. 9 494	222 129	65 425	268 101 8 Yerger 88	59
174 95 496	277 132	130 430	493 104	111
179 101 504	305 135	143 437	509 106	134
192 133 505	319 137	234 442	554 108	153
197 159 508	340 140	506 443	596 112	175
204 240 515	477 141	540 451	261 114	179
208 4 Dev. 430 519	490 142	554 461 13 Wend. 2	267 116	387
226 1 Dev. & B. 76 522	519 145	11 464	460 122	485
230 94 525	529 147	24 468	465 125	476
238 2 Dev. Eq. 509 526	606 150	44 471	518 126	484
248 551 528	9 159	67 476	570 130	507
250 1 D. & B. E. 32 532 6 Va. 83	162	142 482	611 137	27
255 6 Ohio 298 535	151 167	183 488	644 139 7 Va. 82	76
258 310 538	251 170	190 492	649 145	154
260 358 545	276 173	243 495	9 150	241
263 380 550	355 176	262 501	20 152	465
266 442 554	442 182	293 513	123 154	175
267 445 570	489 186	346 516	250 213	478
270 518 574	507 188	403 518	257 216	580
271 531 578	628 191	460 521	546 218	547
274 4 Rawle 376 579	52 195 7 Gill & J. 120	523	619 226	588
277 404 582	83 202	132 525	1 Dev. & B. 241 236	615
280 452 586	146 207	170 527	321 239 3 Port. 51	115
289 143 589	222 219	293 530	352 249	221
295 159 590	414 226	421 550	377 255	389
297 165 607	512 233	468 565 1 D. & B. E. 1	425 256	401
301 228 613	583 236	494 567	155 261	442
308 323 618	695 245 16 Pick. 303	269	237 268	452
313 327 622	273 253	392 572	21 274 4 Port. 65	170
319 381 626	313 255	453 579	132 277	223
321 443 628	377 258	502 584 1 D. & B. E. 1	161 280	213
323 451 635	423 259	504 590	180 282 11 Conn. 213	382
328 486 638	475 265	533 592	194 299	386
330 20 641	33 266	567 616	198 302	381
335 74 643 2 Port. 143	268	1 623	217 321	582
338 129 645	177 271	14 625	111 330 5 Rawle 119	336 2 Har. Del. 108
345 188 648	199 276	41 626	151 351 2 Del. Ch. 12	179 354 1 Scam. 273
348 213 650	280 281	78 632		
353 238 651	296 282	140 633		
356 280 655	376 284	150 641		
358 331 659	480 286	159 645		
359 376 665	530 288	182 648		
367 471 667	550 290	192 650		
371 2 Hill, S. C. 282	675 10 Conn. 375	293		

29 Am. Dec.	30 Am. Dec.	30 Am. Dec.	31 Am. Dec.	31 Am. Dec.				
358 1 Scam.	296 650	30 N. H.	233 347 3 Hill, S. O.	15 685	5 Dana	358 283	17 Wend.	71
364 4 Blackf.	171 658		238 348	41 688		298 285		119
	238 664		307 354	77 689		399 296		179
	263 679		408 360	170 694		461 297		306
	267 684	3 Green	244 364	227 696		501 308		351
372 4 Dana	7 687		314 366	331 699		589 306		496
	154 691		337 368	448 706	11 La.	14 810		562
396	191 692		371 380	558 708		41 818	18 Wend.	9
401	251 694	2 Green Ch.	84 386	584 710		83 876		175
407	309 703		181 389	622 714		142 882		407
417	354 707		220 391	11 715		199 897	1 D. & B. E.	458
431	698 716		350 393	93 718		286 899		524
433	27 721		435 396	172 720		419 412	2 Dev. & B.	231
433	80 723		474 400	209 723		582 416		365
437	119 730		504 417	333 724		587 420		381
439	163 738	6 Paige	19 420	388 728	14 Mo.	30 422		492
442	239 741		35 422	424 729		44 426		527
444	258 748		88 423	486 731		66 429	3 Ohio	73
447	314 755		133 425	10 735		432 435		87
448	397 757		430 430	59 735	31 Am. Dec.	77 438		126
452	428 758	30 Am. Dec.	446 446	30 735	14 Maine	116 441		144
453	506 83	15 Wend.	113 450	57 735		154 442		214
456	1 53		193 456	85 40		180 447	6 Watts	14
461	186 55		248 459	172 45		201 449		29
463	417 60		380 465	194 49		244 450		60
465	543 72		522 467	252 52		303 452		87
466	568 75		545 469	287 56		390 458		182
468	583 77		631 470	294 59		407 460		231
470	592 82		656 472	325 61		414 465		278
475 13 Maine	14 90	16 Wend.	385 475	352 63		439 468		304
480	25 103		400 476	404 64		468 473		379
485	51 118		481 479	407 68		493 478		396
489	93 124		514 482	424 70	2 Gill & J.	365 482		453
497	168 130		586 485	485 72		439 484		463
499	193 143	1 Dev. & B.	540 487	509 113		29 490		495
501	198 155	2 Dev. & B.	188 492	98 117	19 Pick.	51 492		509
508	229 170	1 D. & B. E.	325 493	115 119		147 498		519
508	265 172		366 495	154 123		214 495	3 Whart.	21
508	357 174		425 498	165 135		275 498		62
508	363 182		455 502	227 137		333 502		267
510	391 185	7 Ohio	81 504	231 140		364 509		309
512	417 194		110 506	301 143		405 513		357
514	439 195		111 510	632 145		445 522		369
517	466 202		127 513	720 150		470 536		457
520	474 203		129 525	233 154	4 Port.	476 542		486
524 2 Gill & J.	50 207	1 Whart.	399 530	374 156		511 546	Dud. S. C.	16
528	93 212		410 538	467 157		520 548		86
534	150 226		461 549	54 161	5 Port.	564 549		147
536	190 230	2 Whart.	11 551	73 163		539 552		159
539	218 241		211 552	94 167	1 How. Miss.	536 556		309
543	248 247		233 557	236 189	4 Mo.	553 561		329
559	349 251		253 561	245 191		40 563	Dud. Bq.	14
561	479 258		302 564	279 194	5 Mo.	441 569		123
564	53 263		309 572	435 198	3 N. H.	465 573	10 Yerger	241
567	83 268		332 574	109 200		500 576		263
576	145 269		387 578	123 202		512 581		290
582	229 271		395 584	166 207		523 583		320
584	260 274		427 591	1 209		15 585		417
586	278 278		508 596	69 213	9 N. H.	31 590		431
591	328 287	5 Watts	22 609	129 215		54 591		532
608	414 291		43 611	219 217		126 599	9 Vt.	23
602	427 293		68 622	376 224		85 605		37
608	434 295		141 635	235 228	1 Har. N. J.	119 607		110
612	440 300		159 653	335 229		202 612		126
614	523 304		229 657	445 233		16 614		126
621	537 311		262 658	309 248	3 Green Ch.	42 617		174
623	566 313		279 661	387 252	6 Paige	355 619		233
627 1 How. Miss.	277 322		303 662	425 257		521 623		262
630	308 327		351 664	445 261		627 626		276
631	336 334		432 666	18 264		18 629		299
636	303 335		456 669	157 271	7 Paige	22 633		310
640	343 338		468 677	173 274		25 637	3 Leigh	1
646	303 342		493 690	217 280				
648	220 348		543 693					

32 Am. Dec.	32 Am. Dec.	32 Am. Dec.	32 Am. Dec.	32 Am. Dec.
640 8 Leigh	114 238	21 Pick.	25 627 7 Paige	289 168 Meigs
642 271 241	42 688		259 172	10 Vt. 33 466
658 400 248	75 635		816 175	56 469
665 454 248	101 641		828 177	71 478 8 Dana
668 510 252	162 651 3 Dev. & B.		9 185	96 475
671 608 254	195 656		110 188	141 479
673 623 256	205 661		130 193	185 481
677 6 Port.	219 259		62 197	208 495
694 361 261	292 678		110 199	261 497
696 432 265	325 675		113 201	293 518 9 Dana
704 41 266	341 677		146 208	382 519
707 133 269	367 680		169 205	393 521
712 238 271	456 683		173 210	453 522
715 454 280	486 686 2 D. & B. E.		20 211	482 528
720 508 284	509 689		81 213	506 531
722 529 290	542 695		90 216	526 533
727 1 Ark.	81 301 2 How. Miss.		190 217	582 536
737 99 304	776 707	8 Ohio	257 219	587 541
745 12 Conn.	410 307		298 221	9 Leigh 18 546
752 441 310 3 How. Miss.	60 722		328 225	101 551 13 La.
760 491 311	66 723		372 227	119 553
766 2 Har. Del.	417 314 5 Mo.		521 243	181 555
	317		543 246	381 556
33 Am. Dec.	319		280 735 7 Watts	397 561
33 1 Scam.	490 320		296 738	446 563
35 492 324	835 740		86 253	548 567
36 499 325	364 745		107 261	623 568
37 530 338	476 750		152 263	633 570
40 4 Blackf.	460 341 9 W. H.		227 264	678 573 14 La.
43 463 346	178 758		231 267	9 575
46 476 348	197 760		300 281	155 576
49 5 Blackf.	18 350		302 289	263 578
52 35 357	259 765		384 291	297 581
54 6 Dana	17 359		349 293	449 583
68 87 362	309 772		382 294	461 585
70 276 380	436 776		434 297	497 593
76 284 382	454 779		460 299	559 595
78 426 387	502 783		545 300	104 602 15 Maine
86 7 Dana	190 392		304	181 604
92 307 395	10 N. H.	33 Am. Dec.	306	151 606
96 345 397 1 Har. N. J.	380 33	4 Whart.	59 309	174 614
107 375 404	464 38		68 310	201 617
111 428 412 1 Green Ch.	57 46		105 313	236 626
114 98 417	139 50		150 317	336 628
116 184 423	19 Wend.		204 320	390 630 16 Maine
117 290 429	37 60		252 324	434 631
118 362 437	159 64		301 325	577 633
120 501 439	175 74	Rice Eq.	40 338	313 635
128 15 Maine	14 445		275 346	570 645
132 45 448	207 84		373 368	73 650
134 73 453	231 90	Rice	1 378	13 Conn. 75 652
137 125 470	251 97		54 384	136 656
141 181 497	343 98		162 389	165 663
143 147 512	386 106		215 393	185 666
148 173 514	425 107		239 396	202 671
152 10 Gill & J.	116 518		245 401	269 673
156 149 521	20 Wend.		248 405	303 674
158 226 525	184 115		310 407	334 681
167 316 527	192 119		316 411 2 Har. Del.	614 684 11 Gill & J.
172 358 530	205 125	Meigs	17 423	662 687
177 383 532	223 126		52 426	669 693
180 404 538	227 130		76 430	577 700 22 Pick.
191 499 534	241 132		99 432	588 711
194 20 Pick.	15 541		149 435	18 715
197 53 555	321 138		156 437	22 724
204 62 570	365 140		181 441	67 727
206 116 590	555 143		265 443	187 733
208 186 593	570 147		342 445	189 741
213 275 603	609 153		390 452 5 Blackf.	69 745
216 304 606	618 154		421 454	100 747
220 389 611	60 157	7 Paige	494 457	115 749
226 451 613	77 161		502 458	125 752
228 480 620	179 164		581 460	146 757
231 545 623	213 166		613 463	149 762
				807

34 Am. Dec.	34 Am. Dec.	35 Am. Dec.	35 Am. Dec.	35 Am. Dec.
764 22 Pick. 559	376 4 Dev. & B. 199	608 Cheves Eq. 167	119 2 Scam. 590	884 2 Met. 28
34 Am. Dec.	378	613 1 Humph. 23	122 5 Blackf. 817	887 58
33 23 Pick. 24	379	823 816	43 124	823 889
41 120 383	382	859 618	54 126	358 891
45 141 387	385 619	80 126	861 898	135
51 184 388	384 622	113 128	865 895	163
53 224 390	481 625	156 129	417 898	190
56 283 392	483 644	228 131	441 401 4 How. Miss. 308	435
59 830 395	484 646	282 133	257 403	436
61 834 396	487 648	294 136	300 408	567
69 418 402 2 D. & B. E. 358	491 650	800 138	817 412	647
74 3 How. Miss. 161	496 652	825 140	331 415	684
77 192 407	379 655	899 141	858 419 5 How. Miss. 43	43
78 219 410	885 657	403 143	872 422	71
81 240 415	895 659	443 155	403 425	165
86 814 418	15 664	491 159	513 428	200
96 332 420	28 663	22 171	13 436	296
98 333 422	81 669	96 174	56 438	264
106 4 How. Miss. 42	80 671	101 177	63 440	273
108 59 427	96 672	116 178	159 443	435
110 86 429	117 675	141 179	166 449	583
112 180 432	126 678	148 186	129 456	624
116 163 434	189 680	156 188	162 466	19
121 237 438	178 682	190 189	169 472	58
124 6 Mo. 37 442	203 684	221 202	225 490	201
130 177 445	9 685	226 204	278 498	256
140 10 N. H. 92 449	153 688	286 205	414 495	271
142 108 453	192 690	273 206	461 497	868
145 123 460	203 693	328 210	552 501	326
146 184 461	212 695	357 212	20 503	418
148 220 465	215 696	447 214	213 505	557
150 247 469	282 700	510 217	474 512 1 Green Oh. 384	384
152 266 474	355 702	516 219	490 518	480
155 338 477	374 704	598 223	539 516	530
162 347 480	398 707	578 227	34 521 2 Har. N. J. 478	478
166 380 483	427 711	587 229	38 523 3 Har. N. J. 3	3
174 436 489	434 712	592 231	86 525	14
176 470 492	489 713	595 232	118 526	46
178 489 494	517 714	643 234	123 528	105
182 3 Har. N. J. 78 497	28 717	683 239	131 530	108
184 129 508	55 719	6 243	147 543 28 Wend. 43	43
195 1 Green Oh. 145 507	87 725	172 245	162 546	71
200 214 509	119 731	251 248	193 551	198
204 277 514	339 737	317 248	244 562	306
209 21 Wend. 32 517	360 739	394 250	287 566	311
211 36 521	382 745	536 253	303 569	343
213 83 523	422 755	18 261	338 572	350
216 90 525	489 757	28 262	344 575	446
219 108 530	500 762	34 263	372 582	606
220 119 533	89 768	129 266	455 587	623
220 139 535	112 771	197 268	462 595	70
223 178 537	117 772	219 272	11 GHI & J. 173 598	74
228 211 539	128 773	241 277	185 600	76
236 281 542	131 777	295 292	24 Pick. 49 605	102
238 319 546	188	296	89 607	169
250 342 549	150	302	102 617	258
258 367 554	170 83	359 305	106 618	260
262 457 558	268 38	449 312	146 622	276
267 502 561	325 39	496 319	261 624	337
273 615 565	371 42	527 322	270 627	358
281 643 566	427 44	612 326	359 628	369
285 121 569	480 52	181 339	1 633	429
289 215 571	472 54	229 343	16 634	431
317 348 572	503 72	291 345	49 637	451
330 410 574	524 83	376 355	117 641	641
340 538 581	530 88	445 358	193 653	64
355 465 584	1 92	533 364	271 669	252
360 509 586	17 96	1 365	276 676	154
368 544 590	22 105	245 367	349 682	197
366 663 593	186 107	267 370	378 683	277
368 24 599 Cheves Eq. 33	220 108	283 374	515 685	285
371 75 602	33 110	309 377	520 683	328
374 4 Dev. & B. 189 605	62 112	437 380	542 690	339
	143 116	444 382	560 713	351

36 Am. Dec.	36 Am. Dec.	37 Am. Dec.	37 Am. Dec.	37 Am. Dec.
717 8 Paige 383	300 2 Humph. 71	583 1 Mon. B. 358	68 20 Maine 462	417 6 Whart. 331
720 417 301	503 303	99 586 2 Mon. B. 19	70 11 Gill & J. 418	420 418
722 503 303	102 587	32 72	450 430	483
725 559 305	112 589	41 74	457 434	505
729 1 Ired. 16	807	84 77 12 Gill & J. 192	438	571
732 80 309	166 592	132 81	260 440 1 Watts & B. 90	
734 34 311	202 594	177 85	234 441	92
735 125 322	283 600	210 89	258 450	112
738 265 324	12 Vt. 22	42 95	283 455	126
742 354 327	28 606	82 98	388 456	158
757 484 329	56 608	118 100	457 459	208
760 585 330	125 613	812 115	608 461	265
36 Am. Dec. 331	165 621	560 117	3 Met. 76 464	285
33 1 Ired. Eq. 65	334	178 624	122 121	91 467
34 143 342	219 658	339 126	121 469	240
40 187 345	265 660	553 130	175 472	488
43 190 347	346 662	585 135	275 477	509
46 229 352	331 665	28 139	328 481	548
48 358 354	443 667	42 140	332 483 2 Watts & B. 56	
56 423 356	464 671	216 145	352 484	70
61 10 Ohio 1	491 673	237 148	396 486	108
63 11 359	538 677	334 154	412 490	116
78 111 361	585 681	41 156	486 495	129
82 159 363	619 683	57 162 5 How. Miss. 397	500	156
85 230 364	625 684	66 164	460 505	216
87 305 366	643 686	145 169	548 508	225
90 317 368	653 689	178 170	587 509	294
96 412 372	681 693	28 172	636 511	377
97 433 374	692 696	42 173	665 517	390
103 469 385	42 701	109 175	689 519	392
106 172 391	354 704	125 179	55 523	450
116 273 398	414 708	146 180	81 525	568
127 382 411	43 710	166 183	94 528 2 Watts & B. 21	
130 436 415	102 713	231 185	238 534	56
132 458 420	256 717	249 187	241 542	99
136 508 421	339 718	255 190	12 N. H. 9 545 2 McMull. 44	
139 565 423	565 719	277 194	145 548 1 McM. Eq. 87	
141 10 Watts 63	682 721	286 197	194 550	236
145 82 431	676 723	306 203	205 556 2 Humph. 327	
148 107 432	703 726	337 219	362 559	350
151 124 435	712 727	361 225	454 560	395
154 135 436	37 728	433 227	549 561	409
158 158 440	53 730	9 233 8 Har. N. J. 200	563	423
166 185 441	104 732	42 239 25 Wend. 370	564	490
171 222 443	137 734	56 240	389 566	500
176 269 456	18 735	62 243	434 572	524
180 313 458	227 737	92 246	26 Wend. 43 575	548
182 329 460	409 738	102 251	325 582	81
185 351 463	570 740	123 260	425 583	104
188 397 473	585 742	155 271	455 586	129
200 453 477	141 751	235 278	563 587	161
202 6 Whart. 25	146 755	335 286	21 588	165
211 146 492	219 757	353 287	33 589	183
214 176 499	437 759	355 297	94 592	231
216 220 502	487 760	375 299	130 594	215
224 284 511	565 763	440 309	234 596	320
228 294 515	41 767	461 323	311 600	395
231 311 534	76 769	467 328	377 602	447
233 30 536	113	366	532 604	477
242 147 538	135	372	47 607	504
245 199 541	179 33	20 Maine 9 374	59 611	522
250 1 McMull. 9	207 36	21 379	132 612	552
251 16 551	238 38	41 381	137 615	558
254 174 556	339 39	83 388	168 618	631
256 209 557	555 42	125 390	200 621 11 Leigh 512	
257 236 561	576 45	164 393	255 625	559
264 267 564	579 48	228 396	310 633	667
267 292 570	60 49	260 400	332 638	681
268 335 572	1 Mon. B. 187	275 402	20 642 12 Leigh 166	
280 1 McM. Eq. 27	195 54	332 404	32 644	204
283 60 575	232 56	353 406	42 654	264
286 2 Humph. 27	283 59	391 408	57 659	316
288 37 580	290 60	393 411	68 671	391
	310 66	453 414	109 677	479

38 Am. Dec.	38 Am. Dec.	38 Am. Dec.	38 Am. Dec.	38 Am. Dec.
680 12 Leigh	550 207 2 Rob. Ia.	148 551 9 Paige	372 73 4 Watts & S.	340 368 5 Ark.
687	622 209	254 559	448 76	282 378
689 3 Ala.	261 213	331 561	496 92	328 378
691	812 218	457 567	575 99	445 384
692	816 222	479 569	598 102	514 391
695	892 226	556 574	641 104	546 398
698	401 228 3 Rob. Ia.	17 578	181 106 5 Watts & S.	21 407 4 Scam.
701	444 238	201 584	226 110	87 408
705	481 237	261 584	260 115	100 418
707	557 239	265 588	288 117	123 417
714	581 243	457 593	367 119 2 McMull.	158 418
718	590 248 21 Maine	14 594	478 122	184 430
721	728 250	29 598	566 128	270 436 6 Blackf.
725 4 Ala.	21 253	111 600	582 125	306 437
739	180 255	188 602	587 128	313 439
741	223 259	280 616	26 182	365 441
742	279 264	314 618	72 185	439 442
744	333 273	341 620	128 142 1 Spear Eq.	1 443
745	374 276	499 623	147 149 3 Humph.	11 448 7 Blackf.
749	402 277	519 624	178 150	19 458
753	534 278	567 625	183 153	56 457 1 Morris
757 4 Ark.	10 281 22 Maine	9 628	215 156	167 458
761	44 282	80 633	228 158	171 460
769	76 284	88 637	330 161	177 461
773	110 290	125 639	333 163	213 466 3 Mon. B.
777	164 291	188 644	399 165	267 469
38 Am. Dec.	307	164 663	435 176	333 473
38 4 Ark.	309	238 669	531 180	437 477
37	220 310 12 Gill & J.	306 679 2 Ired. Eq.	182 185	442 479
39	286 317	399 681	249 187	450 485
42	467 329 3 Met.	495 683	350 189	453 487
45	506 339 4 Met.	49 685	360 195	538 493 4 Mon. B.
48	523 346	111 689	420 197	561 497
53 15 Conn.	537 362	230 691	220 199	616 499
56	1 368	306 692	263 203	25 501
57	19 376	281 694	290 204	28 508
61	89 390	413 697	326 205	33 509 4 Rob. Ia.
64	124 381	580 699	346 209	44 512
79	225 394 5 Met.	15 707	27 211	107 517
85 3 Scam.	372 394	111 708	102 220	239 526
90	389 397	192 710	106 224	238 528 5 Rob. Ia.
91	437 400	253 713	152 225	300 528
100	483 404	306 714	186 226	340 530
106	492 426	368 720	200 228	405 532
112	510 431 6 How. Miss.	52 722	277 231	428 535
120	13 433	143 728	147 235	447 536
124	117 438	320 731	223 236	494 540
132 6 Blackf.	120 441	362 735	364 240	532 542
135	147 447	580 737	408 242 1 Rob. Va.	12 550
138	206 450	554 739	444 246	94 552 6 Rob. Ia.
139	225 456	609 744	480 250	123 553
141	255 461 7 Mo.	414 747 3 Watts & S.	144 263	346 556
143	312 463	421 752	182 275	61 574 22 Maine
146	335 465	440 754	225 277	91 578
148 3 Mon. B.	235 468	569 758	272 279	124 582
152	281 471 13 N. H.	32 760	276 281	137 585
153	313 475	72 764	314 296	174 587
161	345 478	99 768	345 299	226 589
164	453 483	226 771	370 301	513 592
170	507 485	286 774	403 307	592 595
173 3 Mon. B.	25 493	343	314	643 597 23 Maine
177	31 499	385	317	700 600
178	58 501	420 333 Watts & S.	416 322	179 601
179	90 508	459 35	429 323	229 611
183	162 508	494 39	520 326	264 614
185	223 512	532 47	544 327	363 618
186	263 514 3 Green Ch.	212 50	580 330	407 623
190 1 Rob. Ia.	463 519	261 53	563 335	430 628
192	581 521 3 Har. N. J.	377	56 4 Watts & S.	20 636
195 3 Rob. Ia.	103 525	490 60	96 339	536 640
197	112 531 4 Har. N. J.	36 64	118 342	604 656
201	117 536	61 65	141 344	787 658
204	128 540	160 68	177 359	41 692
206	131 547 1 Spencer	56 71	188 363	72 694

40 Am. Dec.	40 Am. Dec.	41 Am. Dec.	41 Am. Dec.	41 Am. Dec.
697 5 Met.	562 244 10 Paige	290 594 1 Spear	235 79 6 Ala.	765 391 24 Maine
705 6 Met.	1 250	326 599	253 85	809 394
707	7 258 4 Hill	9 602	272 86	142 400
711	68 259	92 603	321 92	157 406
716	194 267	119 606	379 96	877 408 2 Gill
724	243 271	129 608	408 100	395 410
726	246 274	140 613 1 Spear Eq.	215 102	431 415
734	208 283	345 618	289 103	506 421
736	400 288	420 620	303 105	536 426
744	415 292	437 622	328 109	595 434
750	546 296	559 626 4 Humph.	66 121	71 436
754 7 Met.	83 299	625 628	95 123	106 439
757	40 305	630 630	99 136	192 442 7 Met.
759	57 310 5 Hill	37 632	131 141	253 444
762	86 314	63 635	174 143	276 448
768	164 337	121 638	177 148	368 455
770	212 345	183 642	179 156	505 458
772	240 351	232 645	244 158	549 464
778	276 354	363 648	319 161 1 Gilman	39 465
782	318 360	395 650	342 166	116 486 3 Met.
	364	433 651	356 184	173 487
40 Am. Dec.	368	493 653	362 190	397 489
83 1 Doug.	1 369	588 655	433 193	470 497
45	199 373	83 657	444 196	498 500
517 How. Miss.	80 382	88 658	451 199	544 503
55	106 387	47 660	500 204	636 505
59	176 389	93 663 15 Va.	51 212 7 Blackf.	83 507
60	271 408	300 667	82 214	102 509
63	294 410 3 Ired.	303 668	119 217	142 515
66	328 411	376 671	155 219	218 518
70	386 413	385 674	170 224	249 525
76	437 416	418 675	215 226	265 532
80	443 419	435 678	258 230 Morris	312 532
82	537 421	538 682	302 232	321 541
83	648 427 4 Ired.	83 683	336 234	341 549 1 Doug.
85 1 S. & M.	17 431	165 686	404 237 4 Mon. B.	380 575
87	81 435 2 Ired. Eq.	456 689	454 240	391 584
89	185 437	518 691	471 241	438 587
92	261 442	553 694	506 244	530 589
96	279 444 3 Ired. Eq.	81 695	607 250	605 592
100	393 447	91 698	685 253 5 Mon. B.	8 601
102	423 456	117 701	700 256	86 607
107	494 461	81 705	745 260	129 609
111	584 469	132 710 1 Rob. Va.	615 262	233 614 3 S. & M.
115 6 Mo.	8 475	220 717	696 269 6 Rob. Ia.	349 616
118	11 477	253 725 2 Rob. Va.	33 271	441 626
120	53 481	483 726	56 274	504 628
123	99 489 5 Watts & S.	141 740	209 275 7 Rob. Ia.	76 633
125	120 493	171 752	292 278	170 636
131	143 496	210 755	340 279	201 644 3 Mo.
135	235 498	254 759	474 290	418 650
140	286 519	315 761	622 294 3 Rob. Ia.	112 661
142	336 525	433 764	664 296	140 675 15 N. H.
146 13 N. H.	321 527	461 773 1 Pinney	313 299	172 684
156	360 531	517 782	370 301	545 685
166	462 534	548	305	554 690
169	475 538 6 Watts & S.	44 41 Am. Dec.	314	583 694
171 14 N. H.	19 540	67 33 6 Ala.	12 321 9 Rob. Ia.	59 706
173	33 542	80 36	60 323	122 714
175	122 546	128 38	63 326	224 716
179	133 550	165 40	123 328	308 717
184	157 552	218 41	141 333	324 720
186	272 554	227 44	160 341	438 722
188	341 560	300 45	187 349 23 Maine	350 726
194	343 565	319 47	204 357	498 728
198	441 568	357 52	305 364 24 Maine	9 729
204	540 573	386 54	351 370	18 732
207 3 Green Ch.	310 575	465 56	390 371	73 733
213 1 Spencer	86 579	485 58	501 374	82 736
217	129 581	495 60	518 379	214 739 3 Green Ch.
220	214 586	527 66	532 382	232 740
225 10 Paige	85 587 1 Spear	26 72	639 385	274 744 6 Hill
232	170 589	32 76	690 387	339 748
241	206 592	212 78	727 389	363 750
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42 Am. Dec.	43 Am. Dec.	43 Am. Dec.	43 Am. Dec.	44 Am. Dec.
752 6 Hill	405 2978 Watts & S. 811	551 1 Gratt.	234 204 11 Rob. La.	290 609 17 N. H.
753	425 302	287 561	359 214	495 611
754	443 305	405 564	454 224 12 Rob. La.	175 614
755	461 309	436 574 1 Pinney	390 226	231 618 3 Green Ch.
757	466 312 9 Watts & S. 9	579 579	438 230	324 621 1 Hallet. Ch.
759	476 315	27 588	235 239	674 624
762	518 317	66 592	281 247	16 626
765	522 319	108 600	448 249	39 630
767	586 323	131 602	519 255	66 633 1 Spencer
771	592 326	189 604	574 256	136 636
42 Am. Dec.	332 1 Spear Eq.	569 605	652 259	176 644 1 Denio
38 7 Hill	336	579 610	724 265	208 646
36	30 345 1 Rich. Eq.	71 612	800 268	267 649
38	47 349	99 617	906 288	409 651
51	61 356	9 628	73 289	419 655
59	95 360	34 634	194 292	434 659
60	126 362	116 640	298 294	545 663
61	177 364	197 643	353 300	96 665
64	250 368	308 644	370 306	138 667
68	361 371	344 646	493 321	198 670
82	416 376	424 649	590 340	276 672
87	497 380	436 656	635 341	459 676
94 10 Paige	549 384	495 659	713 346	1 681
101 11 Paige	107 387	599 666	767 367	83 685
103	118 388	613 669	920 373	93 704
109	185 390	628 676	9 396	263 706
112	240 391	649 680	59 399	395 709
114	292 395	692 685	92 405	511 719
117	377 397	747 689	169 409	547 726
120	387 404	30 690	182 411	553 730
122	291 405	34 693	241 414	54 749
140	305 406	135 695	276 417	132 751
142	355 411	161 696	317 420	160 754
148	409 417	15 716 17 Conn.	40 423	176 758
153 5 Ired.	12 420	66 729	154 425	192 763
155	118 422	117 735	201 428	211 766 11 Paige
161	199 424	133 739	288 432	269 768
163 3 Ired. Eq.	209 427	290 753 4 Har. Del.	270 435	303 773 1 Barb. Ch.
165	237 431	313	436	309 778
168	246 432	329 43 Am. Dec.	441	363
169	338 434	332 41 2 Gilman	91 442	371
175	347 437	363 47	151 444	472 41 5 Ired.
182	442 438	386 58	327 450	506 42
188 13 Ohio	48 439	411 58	355 451	594 45
191	120 441	417 62	419 455	73 47
198	148 443	419 65	540 457	124 49
194	167 444	443 83	725 465	184 58
197	209 447	529 93 7 Blackf.	344 470	75 59
201	260 468	554 96	385 472	99 63
203	298 471	619 98	410 476	118 64 6 Ired.
204	368 476	40 100	497 480	165 67
206	523 478	54 102	501 483	261 68
210	543 481	97 106	536 486	602 70
214 7 Watts & S. 9	484	128 107	618 499	713 73
216	83 487	26 109	391 502	180 75
220	104 489	43 111	407 507	151 78 3 Ired. Eq.
224	134 491	52 115	482 520	373 88
227	201 498	105 122	5 Mon. B. 814 521	410 92 4 Ired. Eq.
229	233 500	138 126	320 523	470 94
230	238 504	169 132	362 528	508 102
236	253 508	206 139	506 532	23 106
240	335 512	300 145	6 Mon. B. 60 536	58 109 1 Pa. St.
246	367 517	309 147	67 540	182 111
249	383 519	390 153	86 547	378 112
251	403 521	500 158	119 550	473 114
254	466 528	522 160	128 562	462 116
260 8 Watts & S. 9	529	608 164	289 565	469 117
262	21 531	649 168 10 Rob. La.	61 573	516 121
265	40 532	653 171	99 584	9 125
267	49 534	663 175	115 590	84 126
271	102 537	688 178	164 593	75 129
275	127 540	4 180	202 597	235 133
282	143 543	129 199 11 Rob. La.	24 603	298 137
288	207 544	211 202	97 606	413 138

44 Am. Dec.	44 Am. Dec.	45 Am. Dec.	45 Am. Dec.	46 Am. Dec.
189 1 Pa. St. 806	409 1 Pinney 526	778 6 Mon. B. 484	810 7 S. & M. 409	608 2 Pa. St. 428
141 485 412	584 780	488 814	492 610	470
145 445 425	674 785	608 815	476 612	473
147 470 429	99	817	498 615	495
152 2 Pa. St. 34 431	137	819	609 618	13
156 52 435	169 41 7 Mon. B. 5 324	668 621	780 635	21
159 80 438	234 47	80 331	722 637	136
179 114 441	325 60	126 338	10 Mo. 639	224
181 122 444	463 61	162 342	10 Mo. 6	264
186 163 448	662 70 1 La. An. 5 353	18 355	103 640	275
188 175 463	887 72	148 361	117 641	304
190 200 469	908 76	244 368	102 642	319
191 254 473	82 87	430 365	115 645	346
198 261 478	197 90	80 367	151 647	349
195 271 481	231 94 26 Maine	84 371	159 649	357
201 335 483	245 96	107 382	240 650	368
205 355 485	260 98	128 385	391 651	399
207 372 488	348 100	181 388	460 654	451
211 394 491	355 101	185 394	556 656	470
213 1 Rich. Eq. 222 495	632 103	224 399 1 Halst. Oh. 454	648 661	496
229 396 508	751 107	271 401	633 668	32
234 2 Rich. Eq. 4 505	755 108	341 406	642 671	52
241 43 514	961 110	55 412 1 Barb. Oh. 480	678	56
244 115 519	381 115	115 416	69 675	88
247 1 Rich. 199 521	412 117	270 420	680 681	126
252 249 524	451 126	801 424 2 Barb. Oh. 40	682	132
254 268 525	531 130	325 444	33 684	153
257 369 526	28 133	406 448	72 686	201
260 397 530	59 138	425 449	101 688	244
263 444 531	132 145	437 451	135 691	254
267 501 534	158 171	478 457	145 697	274
271 27 536	197 176	44 468	190 700	353
277 67 539	201 180	64 474	306 701	375
279 113 540	207 185	84 481	406 710	430
283 143 546	224 187	121 494	512 713	456
288 26 550	345 190	186 494	281 720	21
289 53 556	454 199	261 497	358 732	41
294 70 562	500 208	304 499	388 739	2 Rich. 266
296 113 574	585 207	312 500	476 741	317
298 186 580	110 210	356 502	1 745	418
300 195 586	222 214	397 504	5 749	481
303 215 593	4 Har. Del. 389	411 506	70 750	580
306 261 621	10 212	448 507	96 752	590
308 270 627	25 220	498 512	151 756	3 Rich. 4
312 309 636	36 226	534 514	228 761	27
315 368 638	200 227	538 520	396 762	99
318 458 641	213 229	559 522	68 764	125
321 487 649	294 230	563 525	107 766	133
325 165 655	319 233	24 526	109 768	307
329 193 656	324 236	53 529	118 771	311
331 242 665	418 238	188 529	147 774	331
332 244 677	495 240	175 536	222 775	362
335 280 678	511 248	197 539	285 778	413
340 302 680	574 246	344 542	295 783	418
344 337 689	197 257	545 546	307	434
345 419 693	233 267	702 548	461 46 Am. Dec.	
349 499 699	282 269	41 552	502 41 2 Rich. Eq. 142	
351 508 702	358 272	111 558	555 43	273
353 563 708	435 273	189 559	72 51	283
356 563 715	518 274	212 562	84 53	291
358 9 723	539 278	218 565	158 56	317
361 50 732	10 280	255 571	242 58	355
362 67 736	82 287	420 574	248 65	404
365 1 738	112 289	464 576	300 68 7 Hamph. 72	
379 167 740	113 290	641 577	319 69	80
381 178 743	138 293	53 579	345 71	106
384 198 769	140 295	111 583	401 73	152
386 212 762	175 296	125 585	435 75	185
388 372 763	240 299	192 590	568 76	224
393 471 766	284 300	244 593	625 79	303
398 532 769	317 302	256 596	659 81	310
399 544 771	352 303	325 601	717 86	465
403 567 772	6 Mon. B. 334	363 605	726 89	548
406 1 Pinney 479 776	414 308			

46 Am. Dec.	46 Am. Dec.	47 Am. Dec.	47 Am. Dec.	48 Am. Dec.
91 7 Humph. 578	406 3 Ga. 5	41 2 Doug. 433	408 5 Pa. St. 316	735 9 Ark. 123
98 1 Texas 9	415 178	74 8 S. & M. 104	418 418	739 185
95 87 423	226 85	805 418	438 744	212
97 89 427	239 90	328 418	441	
100 250 434	422 92	357 422	452	43 Am. Dec.
108 328 440	449 93	401 425	518 41	13 Ala. 50
121 621 443	25 102	77 428	13 47	190
135 70 447	221 108	122 431	86 49	198
138 96 462	336 111	144 441	147 53	206
140 123 474	536 116	10 Mo. 388	164 56	262
142 162 481	345 118	352 458	210 59	490
145 186 486	417 120	368 466	332 73	776
148 224 489	509 125	538 470	371 76	793
150 252 497	1 Greene, G. 64	559 474	379 82	14 Ala. 23
154 284 499	78 136	634 478	472 84	33
157 379 506	7 Mon. B. 250	32 480	507 92	169
161 425 517	277 141	59 501	89 94	194
163 440 519	357 142	118 503	100 97	249
165 466 523	458 145	142 505	175 103	260
167 504 526	538 148	188 509	223 105	476
170 574 528	556 151	207 513	251 111	546
171 9 537	8 Mon. B. 52	153 547	411 118	648
174 31 540	122 156	183 518	415 120	696
177 59 545	2 La. An. 314	162 292	523 122	753
181 74 548	335 160	391 527	108 129	15 Ala. 62
183 19 549	441 172	632 532	295 133	19 Conn. 63
188 205 551	480 175	665 537	344 146	107
190 243 554	524 182	683 539	347 149	154
193 265 556	537 190	714 541	387 158	233
196 594 558	537 211	2 Halst. Oh. 548	5 160	319
211 191 560	965 213	613 547	47 167	5 Har. Del. 74
216 295 561	974 216	4 Denio 9 548	110 173	2 Fla. 32
228 574 564	1007 239	56 550	220 176	92
230 885 568	884 242	118 554	299 178	102
232 889 573	486 244	133 557	347 194	207
234 933 583	9 247	159 560	396 210	4 Ga. 115
238 1058 587	182 248	327 563	468 216	148
242 71 593	225 252	295 565	514 221	175
246 124 595	287 254	311 578	525 226	306
249 141 598	308 258	349 585	6 235	423
251 199 612	427 260	414 588	12 247	5 Ga. 166
253 280 617	470 264	446 589	77 248	194
261 513 619	509 265	448 591	207 279	274
264 520 623	5 Gill 132	464 597	1 293	423
269 617 630	383 272	518 599	69 300	497
272 630 637	426 273	5 Denio 9 601	159 321	5 Gilman 45
276 764 647	468 281	2 Barb. Oh. 101	209 330	196
278 772 650	28 299	119 608	256 336	206
280 823 655	68 306	165 618	363 359	361
283 840 660	97 320	221 622	390 349	1 Ind. 21
285 305 664	177 324	201 632	563 353	58
291 323 667	200 326	237 639	115 355	130
292 376 672	12 Met. 235	262 654	420 359	247
293 391 675	279 329	387 655	422 361	261
295 394 676	311 331	408 657	424 363	1 Greene, G. 131
298 452 679	329 333	422 659	478 367	160
298 580 680	383 335	491 661	541 370	164
301 83 687	363 338	70 676	116 370	199
309 124 690	371 341	74 679	151 375	236
311 213 694	415 348	81 682	202 379	316
315 257 698	482 350	163 687	292 387	406
323 306 701	551 353	4 Ired. Eq. 433	353 394	3 Mon. B. 359
325 342 702	553 355	5 Ired. Eq. 111	463 397	397
328 410 704	559 365	16 Ohio 111	485 400	419
332 500 706	13 Met. 17	368	551 401	453
337 543 719	99 373	125 708	609 406	566
339 233 725	125 375	271 715	81 409	9 Mon. B. 20
346 301 726	132 377	373 717	88 412	25
368 1 728	177 382	458 720	151 415	48
380 57 730	278 346	509 727	266 416	72
382 151 733	288 387	599 728	380 420	192
385 248 736	372 399	5 Pa. St. 18	20 423	196
389 275 739	389 401	118 731	39 425	204
393 349 743	407 404	145 733	112 440	3 La. An. 48

49 Am. Dec.	49 Am. Dec.	50 Am. Dec.	50 Am. Dec.	50 Am. Dec.
444 3 La. An. 168	57 11 S. & M. 249	478 17 Ohio 500	44 20 Vt. 415	414 7 Ga. 589
447 186 63	337 484	7 Pa. St. 440	52 469	416 5 Gilman 425
449 385 65	361 486	470 54	479 420	470 470
452 402 66	431 489	580 53	582 422	573 573
454 409 68	458 492	540 68	21 Vt. 9 486	11 Ill. 123
462 474 71	594 498	3 Pa. St. 51	4 Graff. 267	445 167
465 708 74	278 497	111 78	407 455	211 211
470 25 Maine 22	299 501	157 88	482 460	300 300
474 51 88	314 503	189 94	5 Graff. 6	470 I Ind. 363
478 97 92	382 509	240 95	24 478	397 397
487 160 94	513 516	288 105	81 475	484 484
489 188 98	572 518	312 108	110 480	540 540
492 355 100	585 525	338 114	168 481	570 570
501 424 112	3 530	481 119	273 491	3 Greene, G. 65
504 497 119	108 533	479 123	141 510	360 360
507 554 121	137 538	9 Pa. St. 14	127 225	518 9 Mon. B. 367
514 29 Maine 97	169 541	82 183	296 515	388 388
521 143 131	268 545	74 186	346 517	393 393
525 196 135	272 548	117 140	549 519	452 452
531 288 139	9 551	147 143	558 522	486 486
540 381 147	118 552	178 145	578 525	496 496
546 85 149	122 554	186 147	587 528	540 540
557 197 152	196 557	254 180	596 540	10 Mon. B. 72
575 354 154	290 561	275 184	619 543	130 130
580 488 158	801 565	382 156	696 545	144 144
587 23 160	3 Barb. Ch. 46	566 399	550 700	4 La. An. 15
590 29 164	52 572	10 Pa. St. 39	181 807	551 19
591 77 170	158 578	56 182	53 555	141 141
593 184 175	293 578	78 183	73 559	189 189
594 168 178	320 582	98 189	177 561	196 196
596 189 184	375 586	114 175	211 563	264 264
610 480 189	528 590	129 177	214 573	310 310
618 453 284	154 592	250 181	383 577	457 457
616 475 289	255 596	257 183	414 579	563 563
642 490 278	364 604	457 186	448 586	29 Maine 232
648 586 275	370 606	471 190	501 589	307 307
652 3 Osh. 63	434 608	508 197	689 591	337 337
655 160 287	47 623	3 Strob. 27	714 598	361 361
660 199 310	113 626	44 208	786 601	419 419
666 309 313	261 638	108 209	269 602	484 484
669 337 340	379 637	177 218	354 607	508 508
671 347 348	515 640	190 221	497 610	30 Maine 28
677 486 350	519 643	284 224	533 611	58 58
679 562 352	587 647	297 226	559 612	79 79
683 19 359	550 651	2 Strob. Eq. 24	238 9	614 63
692 30 364	9 654	40 238	28 617	121 121
696 92 369	86 660	145 242	211 625	173 173
699 187 376	221 664	148 249	376 627	237 237
704 316 379	280 667	281 253	421 630	310 310
706 247 390	292 671	285 261	507 632	431 431
716 375 392	324 674	343 264	548 633	462 462
719 394 396	330 690	3 Humph. 624	272 87	634 467
724 521 402	484 692	647 274	117 635	491 491
727 544 404	492 697	9 Humph. 43	277 189	637 539
732 31 406	498 706	208 281	2 Ph. 408	641 9
734 85 408	42 709	246 285	445 649	57 57
742 159 410	69 712	369 293	508 653	134 134
751 308 413	73 714	470 301	534 657	184 184
758 323 421	244 717	561 306	21 659	228 228
764 376 425	5 Ired. Eq. 103	612 318	109 666	314 314
769 394 428	284 723	3 Texas 119	327 202	669 155
760 404 432	369 733	192 329	824 681	92 92
763 440 436	392 742	261 361	509 685	192 192
766 466 442	52 748	360 365	563 688	239 239
770 549 444	66 751	406 375	64 702	381 381
773 552 448	105 760	462 385	104 705	445 445
775 615 451	154 764	118 386	144 709	107 107
49 Am. Dec. 453	171 768	29 Vt. 172	889 163	719 145
41 11. S. & M. 9	289 775	205 394	191 723	163 163
46 87 463	371 782	315 400	200 727	181 181
49 186 467	402 786	355 408	228 732	212 212
51 206 471	439	406	482 738	300 300
53 219 474	445	50 Am. Dec. 407	559 741	376 376
	489	41 20 Vt. 402	564 744	439 439

61 Am. Dec.	61 Am. Dec.	62 Am. Dec.	62 Am. Dec.	63 Am. Dec.
747 8 Oush.	545 299 2 N. Y.	362 606 12 Pa. St.	528 176 17 Ala.	862 563 11 Mon. B.
750 4 Oush.	37 308	364 611	350 180	484 567
754	33 307	443 624 1 R. I.	224 185	557 570
760	114 315	479 630 8 Strob.	3-4 190	653 572
765	210 319	512 634	448 194	689 577 5 La. An.
766	273 322	523 637	465 199	714 579
775	277 333 2 N. Y.	19 646	542 203	797 583
788	299 345	78 649	552 209	42 585
785	302 352	93 653 4 Strob.	50 212	50 589
788	361 364	429 659	87 221	182 593
791	371 369	440 663 8 Strob. Eq.	55 224	254 594
794	400 376 10 Ired.	87 665	66 225	353 597
796	425 377	63 671	105 230	479 599
799	441 379	72 675	131 232	519 603
805	456 390	110 678	268 235	279 606
807	453 393	159 682 9 Humph.	620 239	398 608
811	513 396	193 685	726 244	423 610
813	594 397	259 688	746 248	516 615
61 Am. Dec.	389	280 690 10 Humph.	9 258	23 618 21 Maine
41 5 Oush.	391	353 694	81 262	212 621
44	31 393	381 696	134 274	411 625
46	60 395	402 697	155 282	475 628
48	53 398	428 698	176 286	42 634 22 Maine
51	86 400	490 701	308 288	51 640
54	137 404	530 702	247 291	119 642
59	158 406	12 707	301 295	143 643
75 1 Mich.	216 412 11 Ired.	26 709	337 308	221 648
95	333 413 10 Ired. Eq.	30 712	61 312	232 649
103 12 R. & M.	9 415	115 717	75 326 22 Conn.	245 654
115	299 418	169 722	143 338	271 654
117	362 419	209 724	252 344	354 655
118	398 422	321 728	391 350	481 670 9 Galt
123	535 426	349 735	431 352	533 680
124	595 428	463 746 5 Texas	23 358	19 685
128	599 433	520 760	195 364	124 688
130	679 442 12 Ohio	81 769	390 367	175 690
132	704 444	99	379	292 694
135 12 R. & M.	11 448	116	385	61 709 5 Oush.
140	76 450	131 41	115 390	143 711
143	93 453	229 46	129 393	301 739
147	103 458	428 58	168 399	236 740
151	131 459	469 60	271 407	295 742
159	233 466	523 67	378 412	496 745
168	361 467 12 Mo.	532 71	539 427	86 748 6 Oush.
167	365 469	569 73	580 435	164 750
168	381 472 10 Pa. St.	187 75	15 443	467 761
172	453 473	266 77	35 456	497 761
174	531 486	320 79	88 459	552 768
175	549 488	348 84	114 461	600 771
184	337 489	350 94 5 Gratt.	414 463	624 777
189	403 492	394 97 6 Gratt.	1 474	24 779
192	427 495	461 100	50 476	29 783
206	534 496	462 102	57 479	38
210	140 499 20 N. H.	490 105	107 487	282 53 Am. Dec.
217	246 499	527 111	154 498	248 41 6 Oush.
219	299 506 11 Pa. St.	19 119	189 490	273 44
222	323 513	141 124	320 494	91 53
231	404 515	150 128	398 500	142 55
235	411 534	196 139	427 501	171 57
238	427 536	212 133	509 504	184 69 1 Mich.
240	533 540	233 139	21 508	241 73
242	547 547	252 141	66 510	309 73
244	561 551	300 144	88 516	385 83 12 R. & M.
248	52 555 2 Zab.	364 145	99 526 2 Greene, G.	427 85
253	117 556	381 148	129 533	462 88
262	185 559	419 149	166 535	505 90
265 3 Habit. Ch.	38 567	439 153	215 537	582 94
267	629 576 12 Pa. St.	33 156	243 541 10 Mon. B.	257 103
272	451 580	49 159	248 543	266 106
275	135 584 2 N. Y.	56 162	10 548	347 110 14 R. & M.
279	159 590	126 164	55 552	446 112
284	163 595	164 169	179 557 11 Mon. B.	30 126
286	193 598	222 170	250 559	67 128 12 Mo.
294	299 601	229 173	290 561	74 124

53 Am. Dec.	54 Am. Dec.	54 Am. Dec.	55 Am. Dec.	55 Am. Dec.
137 13 Mo.	91 507 13 Pa. St.	636 85 22 Vt.	581 4923 Greene, G. 128	91 14 Mo.
138	146 510 14 Pa. St.	14 88	624 496	178 97
143	211 518	84 90	14 498	261 106
145	234 517	65 120	76 503	327 108
147	236 519	96 126	112 506	344 110
148	300 522	100 134	177 509 12 Mon. R.	11 112
151	487 526	112 138	379 513	63 113
153	488 533	211 147	449 515	191 119
155	487 534	241 148	457 522	212 120
157	497 538	260 150	513 539	348 129
162	539 547	275 152	531 547	465 131
164	52 551	282 158	107 551	484 133
168	60 554	417 168	529 555	59 137
169	116 561	446 170	561 557	71 142
179	166 564	479 172	659 558	95 143
185	224 568	510 177	716 561	359 145
188	262 570	18 179	798 562	410 147
202	282 572	90 181	815 564	467 151
208	312 573	101 184	15 565	495 153
212	359 575	166 186	29 573	563 160
216	440 581	172 188	130 576	740 163
228	528 586	177 190	319 578	869 172
228 23 H. H.	10 589	188 192	358 582	404 177
231	71 594	268 194	430 597	418 191
234	109 597	281 198	590 599	494 195
236	118 603	462 200	596 602	508 205
241	172 605	468 203	647 605	553 207
248	252 607	488 207	656 607	48 222
252	311 612	507 209	680 614	114 234
254	383 618	528 212	504 620	196 241
258	424 621	372 217	619 621	283 246
263	690 624	312 245	658 623	370 247
270	49 652	398 245	705 630	414 250
280	203 653	58 250	43 633	483 260
290	216 657	149 253	50 636	502 266
301	312 660	155 271	218 639	558 290
307	379 663	207 297	1 Cal.	413 644
316	463 670	168 299	415 649	185 304
322	494 673	188 300	429 657	403 321
325	511 676	238 305	459 668	525 330
338	88 678	296 309	19 683	1 345
350	71 680	481 321	41 700	15 347
357	195 684	15 338	180 716	125 350
370	249 686	26 340	4 Fla.	192 719
374	270 689	58 346	9 Ga.	398 721
379	338 694	108 347	425 723	322 370
384	349 699	147 351	440 728	406 376
389 7 Ired. Eq.	1 703	196 353	467 734	576 385
391	47 709	35 361	510 736	4 387
393	111 711	46 369	47 742	82 401
401	160 715	63 379	190 744	145 403
403	166 727	146 393	353 749	195 405
406	174 732	208 395	389 753	230 407
412	266 736	10 Humph.	465 755	264 408
414	288 737	545 405	12 Ill.	358 757
416	391 742	11 Humph.	381 764	347 416
419	424 771	67 412	420 769	404 417
421	616 778	104 419	13 Ill.	477 420
426	302 779	108 423	22 790	505 426
430	337	427	95	427
436	406	432	287	55 Am. Dec.
438	448 41 11 Humph.	369 434	398 41	9 Oush.
441	38 45	406 439	432 45	24 431
443	79 49	455 449	486 49	89 434
446	98 51	478 456	474 53	145 439
450	133 55	536 458	543 56	102 442
474	344 58	599 460	556 59	130 445
481	376 61	170 463	558 66	259 448
487	409 64	181 467	586 71	54 456
491	515 66	199 470	59 74	81 459
493	541 67	213 481	236 79	88 464
496	575 75	231 483	37 83	124 472
502	617 80	341 489	76 87	158 479
503	622 83	433 491	97 89	167 481
				20 485
				14 Mo.
				104
				138
				170
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				63
				185
				304
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				401
				546
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				67
				129

56 Am. Dec.	56 Am. Dec.	56 Am. Dec.	57 Am. Dec.	57 Am. Dec.					
487 16 Pa. St.	180 48	7 Texas	240 390	22 Conn.	74 737	3 Md.	190 409	3 Zab.	510
490	175 59	23 Va.	133 397		213 740		303 418		568
492	200 61		160 404	4 Fla.	474 742		341 420		590
494	241 68		186 410	11 Ga.	58 755		409 435	6 N. Y.	179
499	256 85		355 419		151 762		505 442		236
506	393 88		466 421		324		453		342
512	399 94		538 423		337	57 Am. Dec.	455		397
514	463 96		558 430		423 41	9 Oush.	215 464		413
519	469 98		581 436		636 43		242 467		449
527	532 109	7 Gratt.	294 443	12 Ga.	12 46		255 470		467
533 17 Pa. St.	48 112		300 444		61 50		338 499		510
536	51 116		352 451		155 56		390 506	7 N. Y.	141
540	91 121		641 460		217 62		484 509		171
542	126 123		651 471	13 Ill.	548 64		490 512		186
546	263 127	8 Gratt.	16 474		604 65		497 515		210
550	262 129		54 476		610 68		553 520		274
555	386 130		83 481		682 74	10 Oush.	6 523		298
557	339 134		134 483		747 80		46 524		349
560	353 137		174 487	14 Ill.	26 82		109 527		382
565	373 139		241 488		51 85		191 530		428
569	412 143		248 491		65 92		262 534		458
571	429 151		442 493		74 105		267 538		472
573	449 155		486 494		85 108		291 543		476
578	491 158		628 497		163 111		256 550		493
581	509 160		708 501		193 120		458 555	19 Ired.	244
583 13 Pa. St.	13 162		712 505	3 Ind.	316 123		501 557		258
585	20 164	3 Pinney	123 509		331 124		563 558		261
587	40 182	20 Ala.	65 510		353 130	2 Mich.	330 563		294
592	79 190		175 512		387 136		425 566		486
611	180 193		212 513		392 139	23 Miss.	251 569	Bush.	1
614	170 198		288 518		441 144		383 571		74
616	179 200		364 522		481 149		496 573		78
631	15 202	2 R. L.	412 537		574 152		544 574		91
637 3 Rich. Eq.	1 206		548 541	3 Greene, G.	349 154		550 577		105
634	132 223		578 547		427 157	24 Miss.	24 581	3 Ired. Eq.	217
637	235 227		629 549		489 162		62 583	Bush. Eq.	1
642	257 236	21 Ala.	56 557	13 Mon. B.	163 168		278 586		26
643	423 237		60 561		172 189		638 590		93
646	543 240		106 563		219 191	25 Miss.	66 596		127
653	555 244		179 573		411 197		119 596		130
654 4 Rich. Eq.	46 252		437 581		505 198		160 599	13 Pa. St.	199
663 4 Rich.	238 255		488 585		559 200		177 602		224
673	329 257		501 591	7 La. An.	11 203		245 606		233
683	356 266		504 601		170 207	15 Mo.	387 613		367
687	376 268		705 603		279 212		416 622		426
692	416 267	12 Ark.	622 610		385 218		613 628		465
696	521 288		657 619		684 219		640 631	19 Pa. St.	38
703	586 294	13 Ark.	24 632	34 Maine	20 223	16 Mo.	48 634		87
706	590 296		69 635		63 229		173 641		100
708	145 298		88 638		102 232		258 654		298
710	178 303		129 640		107 235		409 659		375
714	212 311	2 Cal.	64 647		153 236		411 661		396
718	1 313		74 650		210 240		416 663		471
724	54 318		99 655		256 242		508 671		485
725	119 319		107 657		324 247		543 677		516
729	142 322		138 662		349 251	17 Mo.	13 680	20 Pa. St.	85
734	213 326		145 663		407 257		71 693		134
737	309 329		159 666		411 265		143 695		171
741	497 331		243 671		545 267		234 702		228
743	512 332		251 673		547 269		379 706	2 R. L.	99
756	1 337		810 676		554 287	24 N. H.	364 709		129
757	45 339		826 679		560 294		440 711		211
762	102 342		387 681	35 Maine	41 300		550 715		218
772	208 248		409 688		73 307	25 N. H.	41 727	4 Rich. Eq.	262
774	242 350		413 690		90 310		67 730		301
775	273 352		463 694		153 320		229 733		447
776	294 356		485 696		161 330		343 737	5 Rich. Eq.	155
782	322 360		489 703	2 Md.	25 349		514 743	5 Rich.	237
784	356 363		571 706		63 355	26 N. H.	76 744		280
791	457 366		590 711		137 359		142 747		352
	369		597 714		261 365	1 Stock. Ch.	36 750		405
56 Am. Dec.	371	21 Conn.	451 717		271 371		82 768		462
41 7 Texas	6 378		531 723		429 382	3 Zab.	311 770		541
45	210 385		577 733	3 Md.	1 400		402 775	6 Rich.	35

58 Am. Dec.	58 Am. Dec.	58 Am. Dec.	58 Am. Dec.	58 Am. Dec.
777 6 Rich.	44 412	8 Cal.	343 761	36 Maine 455 329
779 1 Swan	375 414		363 765	501 331
782	437 415		458 767	562 333
58 Am. Dec.	420 420	22 Conn.	235 771	11 338
49 2 Swan	424 424		262 778	59 341
54	8 429		379 775	124 345
55	87 433		485 777	180 353
59	138 439		530 782	156 354
63	321 448	5 Fla.	110 786	165 359
66	355 464		215	364
73	405 476	12 Ga.	371	378
78	515 481		440 49	230 376
83	538 484		464 53	354 350
85	598 485		500 56	414 387
94	603 488	13 Ga.	1 57	472 388
95	10 504		63 67	72 398
100	23 507		201 72	242 401
102	62 513		217 81	306 408
108	66 517		322 85	450 416
108	235 518		389 88	465 418
110	239 523		443 92	498 423
112	243 528	14 Ga.	8 101	102 431
117	327 549		173 104	141 438
119	397 553		207 107	186 447
124	427 559		554 115	256 451
128	13 564	14 Ill.	263 131	1 473
134	106 571		297 135	8 476
136	129 575		304 137	51 478
145	313 589	15 Ill.	20 140	117 482
150	114 600		108 142	258 497
153	131 604		159 145	265 499
156	149 610		236 147	318 502
171	278 612	4 Ind.	79 148	366 506
174	338 628		95 150	417 515
178	351 627		234 152	437 516
181	465 628		264 154	431 519
191	467 630		301 155	532 526
200	19 638		368 159	563 530
212	1 638		546 163	566 532
218	59 641		627 165	19 536
217	220 643		628 171	112 550
234	9 645	14 Mon. B.	18 172	144 552
250	89 647		75 176	190 554
254	207 654		127 178	193 559
260	365 659		184 187	281 563
262	396 665	3 La. An.	1 188	360 566
268	529 674		136 192	416 581
272	621 676		136 203	443 585
274	659 678		290 206	594 590
278	760 682		318 209	519 594
282	28 689		369 220	84 596
289	240 695	35 Maine	205 225	378 600
296	346 697		221 229	549 602
303	469 699		271 231	591 604
305	548 700		276 234	883 607
310	659 702		279 243	41 610
312	726 704		300 244	84 615
315	762 706		315 247	157 619
317	764 708		368 254	206 623
321	198 712		405 257	309 631
332	401 714		414 264	437 634
336	503 718		447 267	505 658
338	543 727		489 270	599 663
363	9 729		547 275	529 667
370	203 734	36 Maine	54 281	544 671
374	286 736		95 285	71 677
383	59 738		113 286	74 684
385	69 740		176 293	147 708
386	108 742		201 298	191 718
389	115 745		270 299	262 728
398	167 746		298 318	277 731
407	241 751		309 314	383 740
408	249 757		366 320	580 741
411	260 758		448 327	86 744
58 Am. Dec.				
78 746	20 Pa. St.	497		
84 749	21 Pa. St.	50		
152 752		76		
193 759		147		
249 760	Am. Dec.			
280				
422 49	21 Pa. St.	228		
448 51		367		
87 57		495		
86 63	22 Pa. St.	43		
223 65		54		
289 73		116		
412 75		156		
448 79		211		
460 81		245		
48 85		300		
128 87		334		
71 91		390		
93 93	3 R. L.	401		
507 94		454		
572 96		474		
565 102	5 Rich. Eq.	519		
9 107	6 Rich. Eq.	13		
87 115		96		
67 122	6 Rich.	146		
110 123		266		
175 127		298		
271 130		329		
299 132		387		
340 135	1 Sneed	63		
388 137		67		
402 140		106		
483 143		176		
28 144		178		
73 146		205		
142 154		243		
163 157		280		
205 160		290		
213 162		543		
263 167	9 Texas	325		
221 172		432		
308 176		495		
314 179		517		
343 181		615		
457 186		622		
566 188	10 Texas	2		
185 200		130		
197 205		246		
164 213	Busb. Eq.	462		
196 216		508		
267 219		548		
15 223	1 Jones Eq.	560		
110 230		154		
121 234		211		
26 238	1 Ohio St.	257		
54 246		260		
160 253		310		
233 258		320		
244 264		373		
327 272		351		
511 276		437		
26 279	2 Ohio St.	450		
208 283		465		
235 290		550		
296 291		578		
326 294		620		
452 296		678		
260 299	20 Pa. St.	88		
268 301		112		
384 303		154		
387 311	9 Gratt.	633		
422 313		704		
448 314		737		
458 323	10 Gratt.	1		

60 Am. Dec.	61 Am. Dec.	61 Am. Dec.	62 Am. Dec.	63 Am. Dec.
831 10 Gratt.	252 782 16 Ga.	898 875 7 Md.	537 49 11 N. Y.	25 487 11 Texas
833	255 788	424 881 1 Gray	1 56	85 490
835	858 744	598 410	61 68	123 506
863 1 Wis.	131 753 15 Ill.	894 414	105 71	187 512 12 Texas
868	151 756	407 417	195 81	170 518
870	159 761	453 428	263 95	176 518
879	250 769	492 438	605 103	281 520
881	286 778	588 436	621 118	368 521
890	447	487	72 120	392 524
893	457 81 Am. Dec.	438	190 125	485 530
899 2 Wis.	1 49 16 Ill.	17 443	129 130 12 N. Y.	40 531
404	42 58	21 444	137 137	74 534
407	153 62	108 448	161 142	99 539
422	864 64	169 454	361 152	156 545 13 Texas
426	421 65	198 468	394 160	202 546
439	494 73 5 Ind.	22 470	410 168 1 Jones N. O.	299 550
442	9 74	23 478	424 170	308 564 26 Va.
450	67 81	137 476	501 171	386 567
453	180 85	261 478	516 173	406 574
459	189 90	280 480	104 177 8 Mich.	479 582
461	235 96	322 491	238 188	539 585
468	260 101	339 494 1 Minn.	186 190 2 Jones N. C.	41 605
469	295 110 6 Ind.	110 500	52 194 27 Miss.	124 614
478	381 112 4 Greene, G.	26 508	94 200 1 Jones Eq.	377 617 27 Va.
481	438 117	76 508	209 202	328 622
482	446 118	240 520	362 205 2 Jones Eq.	16 625
485	489 120	302 522	498 208	63 640 11 Gratt.
488	510 122	317 524	560 211	106 648
489	622 124	352 527	628 214 8 Ohio St.	105 653
494 25 Ala.	79 131	378 528	657 248	172 659
495	136 134	455 530	704 271 4 Ohio St.	21 666
498	139 138	551 538	747 281	241 690 8 Wis.
506	161 141	555 540 26 Miss.	118 285	362 694
515	300 147 14 Mon. B.	395 542	152 295	464 696
521	320 164	474 544	267 297 1 Or.	47 703
527	408 166	529 553	361 299	86 705 26 Ala.
530	445 170	556 559 19 Mo.	320 301	147 711
533	625 172	638 560	362 303 22 Pa. St.	471 714
540	694 177 15 Mon. B.	80 563	369 307	507 718
544 14 Ark.	309 179	118 566	454 308 23 Pa. St.	12 723
549	396 181	218 574	490 312	31 7 3
551	628 184	236 576	551 316	76 732
560	118 188	325 580	613 323	147 739
569	235 190	467 584 20 Mo.	75 328	186 742
577	5 198	504 593	108 330	189 745
578	23 202 9 Ia. An.	152 596	143 332	254 747
579	37 204	235 599	155 336	308 749
581	46 205	273 603	212 336	321 752 27 Ala.
585	6 209	286 605	138 341	424 758
597	7 214	441 611	176 347	440 765
599	94 218	461 614	324 352	489 767
604	188 221	597 617	379 354 24 Pa. St.	14 768
605	213 227 38 Maine	18 622	473 359	62 771
606	268 229	47 629	543 365	105 773
615	278 234	55 631	9 369	148 776
616	289 237	171 642	106 372	169 778
618	365 239	174 648	385 377	88 785
620	376 243	219 652	459 390 6 Rich. Eq.	284
625 23 Conn.	56 245	283 658 4 Zab.	366 392	364 63 Am. Dec.
630	167 248	302 671	485 396 7 Rich. Eq.	105 49 15 Ark.
632	117 256	379 678	524 402	509 54 16 Ark.
636	189 276	314 683	435 407 7 Rich.	158 62
650 5 Har. Del.	462 283	389 700	456 409	190 66
655 14 Ga.	521 294 6 Md.	10 706	502 411	201 72
660	589 300	201 716	551 418	474 76 5 Cal.
664 15 Ga.	97 305	319 721	13 422 8 Rich.	24 78
682	103 318	418 731	68 424 1 Sneed	637 80
687	160 327	509 739	108 457 2 Sneed	73 82
698	34 331	151 743	252 458	192 84
705	483 346	273 746	241 468	285 86
708	491 350	342 749	278 472	520 87
712	545 353	352 751	402 475 11 Texas	264 110
717	102 364	368 756	489 478	324 113
726	141 371	408 762	570 480	335 116

63 Am. Dec.	64 Am. Dec.	64 Am. Dec.	65 Am. Dec.	65 Am. Dec.
117 5 Cal.	186 477 2 Iowa	126 125 28 Miss.	802 502 12 N. Y.	286 65 13 Texas
121	244 487	165 126	21 506	266 73
125	252 521 15 Mon. B.	631 136	189 508	381 79
128	260 522 16 Mon. B.	4 143	247 512	575 84
130	288 526	201 145	27 515	622 95 14 Texas
132	325 529	284 147	91 517 13 N. Y.	9 99
134	334 548	809 154	122 529	81 109
135	360 551	825 158	231 532	93 117
139	418 558	482 159	246 535	108 118
140	445 559	572 163	361 538	151 127
141	480 561	643 166	389 545	232 129
143 26 Conn.	457 586 10 La. An.	33 169	472 550	290 131
151 24 Conn.	1 590	83 175	653 551	322 132
154	40 592	101 178	222 563 2 Jones Eq.	113 136
161	267 594	299 183	244 566	141 140 15 Texas
163	290 597	689 186	306 574 2 Jones N.C.	142 145
173	338 600	789 189	322 577	170 146
177	514 605 39 Maine	98 190	415 580	199 147
180	624 609	132 194	447 582	247 152
187 1 Honst.	100 611	155 198	457 585	323 154
193 6 Fla.	142 612	200 197	461 587	360 164
214	368 614	205 203	523 590 3 Jones N. C.	24 169
217	430 618	253 205	546 593	49 174
226 17 Ga.	65 621	273 209	577 596	74 176
228	99 625	819 214	25 598	77 179
230	123 627	826 218	97 600	135 187 27 Va.
233	177 633	834 222	127 603 4 Ohio St.	508 190
235	267 635	415 225	227 607	583 192
246	361 643	489 229	257 610	628 194
248	430 645	508 231	303 632 5 Ohio St.	13 198
252	547 651 40 Maine	24 234	813 635	122 201
258	558 654	172 242	874 637	124 206
266 18 Ga.	52 658	176 245	510 649 24 Pa. St.	207 210
269	194 661	247 247	531 652	217 212
289	273 685	348 250	573 655	246 214
290	476 670	383 254	85 657 22 Mo.	298 216 28 Va.
298 19 Ga.	89 672	415 259	150 661	347 220
301	139 676	481 260	154 667	378 222
302	190 686	40 262	202 672	465 226
304 16 Ill.	257 683	55 265	291 675	507 234 12 Gratt.
306	277 692	95 276	9 680 25 Pa. St.	23 240
312	313 699	169 281	78 685	89 247
316	364 705	399 290	256 687	161 254
317	502 708	427 297	318 691	193 264
320	548 714	530 300	390 692	218 283 4 Wn.
323 17 Ill.	558 718	72 309	531 694	226 295
334	40 725	142 316	70 695	268 303
340	136 741	309 323	119 696	270 309
345	143 743	349 329	226 698	282 314
357	154 758	372 333	352 703	354 324
362	212 760	412 342	442 710	366 330
366	278 762	434 347	501 713	449 334 23 Ala.
369	302 763	468 352	87 715	503 341
373 8 Ind.	128 778	502 355	90 717	509 344
380	200	358	133 721	528 349
385	324 64 Am. Dec.	362	147 731 7 Rich. Eq.	328 362
389	455 49 4 Gray	41 370	295 739 8 Rich. Eq.	46 364
391	501 50	83 375	313 747 8 Rich.	158 366
410	21 56	99 378	452 750	198 369
414	81 61	105 381	523 753	240 372
416	107 62	194 394	697 755	301 374
418	178 64	250 412 4 Zab.	67 753 1 Dutch.	407 380
420	308 76	297 415	255 760	55 383 29 Ala.
424	356 77	441 423 1 Stockt. Ch.	667 763	84 387
428	1 80	457 445 2 Stockt. Ch.	115 772 2 Sneed	482 394
434	150 83	465 448	128 775	596 401
437	204 87	504 456	401	403
440	232 92	518 460	437 65 Am. Dec.	405
451	404 95	563 464	469 49 3 Sneed	82 407
457	435 99 3 Mich.	436 467	480 52	231 413
464	438 105	506 469	535 56	268 419 17 Ark.
466	538 114 26 Miss.	674 472 3 Stockt. Ch.	16 58	305 425
471	59 118	772 478 3 Stockt. Ch.	39 61 13 Texas	241 433
474	101 121	792 496 12 N. Y.	215 63	293 437

65 Am. Dec.	66 Am. Dec.	66 Am. Dec.	67 Am. Dec.	68 Am. Dec.
442 17 Ark.	546 761 8 Ind.	815 406 5 Gray	64 49 1 Dutch.	356 496 3 R. L.
452	561 764	352 410	169 62 18 N. Y.	509 498
458 18 Ark.	123 768	392 414	279 75	560 500 4 R. L.
475 6 Cal.	47 772	524 421	425 83	577 505
481	71 774 3 Iowa	423 423	535 89	587 510
489	94 780	487 424	536 106 14 N. Y.	9 541
490	99 786	500 427	539 113	41 548 9 Rich.
491	113 789	504 431	544 120	143 551
493	119	443	570 132	162 553
496	126	445	572 155	218 557
498	149 49 3 Iowa	93 450 7 Gray	8 160	890 560
501	195 52	114 453	18 186	506 569 10 Rich.
503	207 71	244 455	36 205	570 572
506	221 77	274 457	53 218 2 Jones Eq.	322 576 3 Sneed
509	224 92	345 459	55 222	411 579
511	259 93	463 462	61 224	414 582
515	295 96	502 464	100 227 3 Jones Eq.	4 587 4 Sneed
517	316 107 4 Iowa	1 467	148 230	33 597
518	359 116	13 470	158 231	126 599
519	376 122	77 473	217 242 3 Jones N.C.	285 601
521	419 137	321 477	283 243	335 604
523	452 144 17 Mon. R.	73 479	301 246	357 607 16 Texas
525	506 148	173 487	348 249	375 609
526	528 153	249 490	393 250	433 612
528	548 165	412 502	473 253	489 622
534	577 184	522 515	479 255	516 630
535	590 186	722 518	499 256	541 640
543	617 193 11 La. An.	27 524 4 Mich.	140 258 4 Jones N.C.	1 642 17 Texas
545	621 194	187 534	230 261	86 646
547	632 198	206 539	355 263	71 654
550 25 Conn.	1 203	525 541 1 Minn.	270 266	146 656
553	51 206	559 543	301 269	157 658
557	171 208 41 Maine	633 547 31 Miss.	17 271	175 665
560	188 211	9 549	107 283	216 670
565	207 214	65 552	156 286	226 675
571	265 217	159 575	301 289 5 Ohio St.	243 686
579	591 219	177 579	567 298	307 688 18 Texas
591	261 246	321 581	706 303	488 689
592	331 248	340 588 32 Miss.	17 305	508 693
602	416 250	360 606	170 312	541 699 20 Vt.
607	497 252	368 609	212 328 6 Ohio St.	1 718
608	513 255	507 615	389 334	71 714
611	583 257	512 623 22 Mo.	373 339	200 720
614	170 264	582 627	384 342	295 723
621	210 266	585 630	518 346	448 728
623	312 267 42 Maine	141 637	525 353	516 730
623	467 271	197 639	550 355	547 733
634	574 274	204 642	566 360	580 735
639	689 277	229 651 23 Mo.	40 368	607 741
641	702 281	248 656	50 374 20 Pa. St.	9 742
646	707 285	414 658	72 396	74 745
647	732 290	429 661	151 400	95 748 20 Vt.
649	735 297	450 671	342 402	99 754
651	828 298	552 673	553 404	111 762 13 Gratt.
651	854 305	572 687	553 413	223 767
659	423 308 9 Md.	1 694	31 418	340 775
672	426 316	118 698	69 419	342 787
679	450 326	160 699	117 425	365
682	509 332	462 705 33 N. H.	18 432	375 68 Am. Dec.
691	522 339	500 711	96 437	407 49 5 Wis.
699	52 345 5 Gray	3 715	171 442 27 Pa. St.	22 55
701	133 348	45 720	239 445	46 57
705	187 350	83 723	329 447	75 65
726	167 352	89 726	345 451	116 70
730	194 354	91 729	361 454	160 73 20 Ala.
735	200 356	121 739	507 456	196 69
738	289 358	306 742	520 458	199 101 20 Ala.
740	442 369	328 743	530 459	244 108 25 Ala.
745	470 374	403 745	553 462	268 111
746	525 376	497 752 34 N. H.	29 464	303 113
750	1 380	541 759	179 471	339 116
754	84 384	561 765	230 485	473 117
756	195 390	567 773 2 Stockt. Ch.	332 487	486 120
758	197 394 6 Gray	25 790 3 Stockt. Ch.	204 489	504 126 376

68 Am. Dec.	69 Am. Dec.	69 Am. Dec.	69 Am. Dec.	70 Am. Dec.		
131 30 Ala.	396 511	22 Ga.	603 83	44 Maine 51 351	33 Miss. 356	768 5 Jones N. O. 9
134	482 512		623 85		423 770	16
143	540 514	23 Ga.	182 87	147 358	455 773	22
145	608 518		201 91	154 362	566 775	107
148	647 521		237 94	167 375	653 777	163
150	59 523		249 99	322 381	669	
159	108 527		289 103	362 385	34 Miss. 56	70 Am. Dec.
164	230 529		383 107	416 387	72 49	7 Ohio St. 65
167	266 535		431 111	433 389	227 55	81
171	320 539	13 Ill.	249 113	442 397	472 57	99
182	414 541		266 115	469 399	486 62	134
187	441 544		297 118	491 401	571 72	264
190	23 547		318 123	27 406	597 75	386
202	102 549		343 126	98 408	697 78	387
214	214 553		349 129	149 412	708 85	432
229	105 560		420 133	173 420	167 98	8 Ohio St. 196
231	118 563		460 135	282 422	170 100	301
233	148 574		483 140	378 427	199 103	28 Pa. St. 9
235	171 578		519 145	397 430	219 105	95
237	215 582	19 Ill.	80 166	431 432	371 115	124
257	261 583		61 170	466 433	381 122	195
260	292 584		146 173	500 435	402 124	379
262	317 586		156 174	517 441	541 128	329
274	503 587		226 181	81 444	600 134	355
280	535 591		229 184	128 446	24 137	419
287	21 596		291 190	173 448	47 142	440
290	52 597		295 195	186 450	94 145	447
300	62 604	6 Ind.	16 206	348 460	165 149	29 Pa. St. 9
304	66 607		30 212	434 462	197 151	27
310	77 611		126 226	525 467	291 154	66
318	152 615		169 233	123 469	315 160	4 R. I. 507
318	260 618		184 239	135 471	318 163	516
323	271 620		273 243	152 475	505 167	525
323	297 624		290 244	182 483	108 168	528
325	327 633		323 245	255 484	116 176	5 R. I. 60
331	406 650		467 248	375 489	351 192	8 Rich. Eq. 155
333	443 653		488 252	386 505	454 196	286
340	461 655	10 Ind.	16 253	397 516	523 200	9 Rich. Eq. 42
345	469 658		28 262	441 520	52 203	111
360	514 663	4 Iowa	368 264	489 536	257 207	262
362	444 669		472 266	515 546	271 210	311
367	477 672	5 Iowa	482 267	517 551	421 216	355
371	530 678		15 270	609 560	569 219	10 Rich. 227
375	565 696		196 272	20 565	148 223	271
377	1 702		232 274	36 580	368 226	332
379	159 708		389 276	84 584	594 231	382
382	172 715		478 278	121 591	3 Stookt. Ch. 302	234 543
386	226 718	13 Mon. R.	19 279	159 595	403 237	11 Rich. 54
392	249 723		230 281	206 598	423 240	109
398	368 729		481 281	244 606	337 246	165
402	392 735		693 282	245 609	345 250	364
404	452 750		800 284	248 619	405 254	405
410	585 755		816 285	262 623	444 258	468
413	591 765	12 La. An.	126 288	269 629	524 262	543
422	382 766		154 289	304 632	601 265	672
426	23 767		219 290	309 643	58 269	683
431	207 770		255 291	337 651	97 275	5 Sneed 57
441	292 772		545 294	365 665	112 281	15 Texas 275
449	46 773		736 295	397 678	125 282	317
452	80 783		733 297	401 694	255 292	413
455	183	69 Am. Dec.	299	404 696	297 295	510
457	217		301	447 707	354 298	585
459	363 49	43 Maine	144 303	61 713	469 302	682
461	370 54		158 305	72 718	489 309	753
464	401 56		226 306	78 728	3 Jones Eq. 177	314 893
465	447 59		258 308	131 734	221 319	19 Texas 70
468	528 62		287 315	252 740	294 323	128
481	31 65	23 Ga.	343 317	274 744	4 Jones N. O. 249	323 142
482	75 66		381 320	282 750	272 326	154
486	107 69		406 321	413 751	315 327	171
487	131 74		445 333	557 756	386 330	213
496	211 77		463 338	609 757	337 331	257
502	269 80		501 343	852 760	459 333	260
506	402 81	44 Maine	49 349	33 Miss. 310 763	488 341	371

70 Am. Dec.	71 Am. Dec.	71 Am. Dec.	72 Am. Dec.	73 Am. Dec.
853 19 Texas	890 740 10 Cal.	880 291 20 Ill.	623 635 13 Md.	314 208 26 Mo.
858 488 742	404 288 21 Ill.	20 645 20	494 212	494 212
868 522 746	528 305 10 Ind.	146 664 10 Gray	812 214	812 214
871 4 748	547 309	174 662	409 218	409 218
872 24 754	49 316	205 666	170 220	170 220
875 89 769	148 323	212 668	472 228	472 228
880 171 774	200 327	325 678	496 247	496 247
882 247 778	288 331	355 681	582 251	582 251
885 303 779	281 335	409 687	17 257	17 257
891 383 787	343 337	499 689	87 259	87 259
894 389 791	393 341	22 690	102 263	102 263
400 465	348	70 693	125 266	125 266
402 172	864	286 696	168 270	168 270
404 215 49	84 355	837 698	170 273	170 273
406 230 56	221 358	865 700	179 276	179 276
414 248 59	229 360	443 703	197 281	197 281
415 305 63	274 363	497 707	211 283	211 283
422 401 66	282 370	557 708	217 287	217 287
424 421 71	332 382	19 711	256 295	256 295
429 465 72	355 388	78 713	278 302	278 302
432 513 78	398 389	79 715	369 314	369 314
435 639 89	641 392	97 723	390 317	390 317
438 664 96	546 399	117 725	423 319	423 319
443 757 101	61 404	216 726	489 324	489 324
458 127 105	144 406	319 728	502 332	502 332
458 167 112	52 409	379 732	506 336	506 336
465 819 117	245 421	331 734	49 341	49 341
467 328 119	257 428	89 736	55 347	55 347
463 361 121	278 431	60 739	107 353	107 353
469 422 127	325 439	167 739	141 360	141 360
471 490 135	338 444	242 741	167 364	167 364
478 527 138	346 445	320 743	201 369	201 369
479 539 142	494 447	339 745	211 373	211 373
489 645 147	640 453	411 753	244 379	244 379
494 323 153	24 455	1 758	273 381	273 381
499 412 156	61 458	65 763	1 386	1 386
505 469 163	132 461	164 769	10 388	10 388
511 612 164	141 474	197 776	151 396	151 396
516 667 168	207 480	368 779	204 495	204 495
523 80 168	244 482	397	408	408
529 75 178	316 489	444	406	406
540 358 181	396 491	550 49	349 416	349 416
544 363 184	515 494	628 58	505 420	505 420
548 433 190	566 499	652 62	520 437	520 437
549 433 193	594 504	13 La. An.	183 442	183 442
552 617 194	622 506	86 69	168 455	168 455
556 57 196	652 509	269 74	61 461	61 461
562 116 198	182 511	388 79	78 465	78 465
570 210 204	293 515	401 84	189 469	189 469
586 249 206	241 519	519 89	190 474	190 474
590 291 210	291 521	587 97	277 480	277 480
596 297 216	362 526	41 102	350 484	350 484
603 420 219	423 527	50 117	116 493	116 493
606 477 221	465 529	104 119	147 495	147 495
610 623 225	481 530	133 121	174 498	174 498
617 1 227	617 536	168 122	223 503	223 503
621 59 230	406 539	220 123	244 515	244 515
636 81 236	499 543	270 124	366 526	366 526
642 137 239	510 547	331 125	389 529	389 529
643 181 244	623 555	367 127	428 533	428 533
647 204 247	46 559	507 137	490 549	490 549
650 251 249	48 567	590 143	618 551	618 551
655 365 250	107 572	141 149	672 552	672 552
676 584 252	115 579	303 153	696 555	696 555
678 662 257	137 582	9 154	700 556	700 556
689 9 260	198 588	124 157	60 559	60 559
691 17 263	235 593	158 163	96 563	96 563
692 22 267	282 596	322 169	273 566	273 566
698 71 268	304 600	383 190	389 568	389 568
703 110 271	325 607	491 195	531 570	531 570
711 212 274	338 611	20 202	178 574	178 574
714 239 278	375 622	58 203	190 577	190 577
717 243 283	385 625	91 204	226 582	226 582
726 317 286	407 628	241 207	233 580	233 580

78 Am. Dec.	78 Am. Dec.	74 Am. Dec.	74 Am. Dec.	74 Am. Dec.
600 8 Ohio St. 449	157 5 Sneed	580 528 12 Cal.	128 96 21 Ill.	188 388 2 Met. Ky. 17
606 548 159	583 529	168 98	215 400	215 400 98
610 646 161	1 Head 38	531 200 100	244 406	244 406 146
618 9 Ohio St. 43	108 533	216 102	247 413	247 413 433
619 29 Pa. St. 128	160 538	247 105	464 419	464 419 443
620 184 175	219 548	363 108	470 421	470 421 474
622 198 177	328 550	414 115	511 424	511 424 14 La. An. 8
625 242 179	897 555	433 119	588 427	588 427 80
627 257 182	456 561	535 121	605 428	605 428 211
629 260 184	533 562	555 124	9 430	9 430 239
633 288 186	1 565	18 Cal.	24 134	63 431 206
635 342 191	80 569	62 137	100 433	100 433 306
639 387 196	143 574	168 138	212 434	212 434 391
641 401 204	688 575	306 140	238 435	238 435 429
644 420 207	706 584	335 151	278 438	278 438 458
654 495 211	767 589	422 155	320 442	320 442 481
664 30 Pa. St. 9 213	782 593	494 157	330 446	330 446 554
685 42 218	798 600	514 159	377 455	377 455 46 Maine 357
691 173 221	21 Texas 22	608 526 161	429 457	429 457 362
692 180 223	133 605	626 163	446 459	446 459 394
694 185 228	231 610	47 165	502 463	502 463 400
698 284 236	453 615	76 169	610 469	610 469 541
703 242 238	570 631	101 179	43 472	43 472 47 Maine 9
705 311 242	597 632	117 187	193 476	193 476 102
708 344 250	650 634	184 190	197 478	197 478 112
710 375 253	114 639	188 195	3 482	3 482 161
718 454 255	173 645	171 200	37 484	37 484 275
721 31 Pa. St. 44 257	230 647	202 205	238 487	238 487 320
724 73 261	261 651	256 207	252 490	252 490 355
726 78 264	270 656	337 209	266 491	266 491 370
728 128 268	360 658	424 215	306 494	306 494 408
730 175 277	479 662	127 218	376 500	376 500 500
732 225 288	81 667	183 221	477 501	477 501 515
745 271 295	123 670	274 222	515 503	515 503 543
747 358 299	191 677	317 229	670 507	670 507 573
757 461 302	219 680	411 233	675 513	675 513 14 Md. 24
760 476 305	221 683	433 236	47 515	47 515 99
768 510 306	307 688	566 246	99 519	99 519 121
770 22 Pa. St. 22 309	314 693	582 250	103 522	103 522 184
778 75 312	377 699	2 Houst. 99 251	260 536	260 536 271
775 111 316	436 709	2 Del. Ch. 191 254	325 541	325 541 360
779 160 319	476 713	8 Fla. 370 259	366 545	366 545 398
782 302 323	538 724	27 Ga. 86 263	434 550	434 550 444
783 341 326	610 726	167 266	484 555	484 555 15 Md. 54
787 292 329	638 729	193 268	551 559	551 559 156
789 315 332	728 730	221 276	488 563	488 563 199
792 334 334	731 731	228 278	501 566	501 566 285
73 Am. Dec.	337 734	243 279	512 572	512 572 376
49 5 R. I. 112 352	268 736	438 283	1 596	1 596 330
62 198 355	328 739	507 291	17 597	17 597 335
66 299 367	229 741	535 298	106 598	106 598 388
73 343 381	422 746	637 300	239 600	239 600 401
77 402 403	1 748	46 302	277 602	277 602 443
79 472 410	236 751	98 305	298 604	298 604 465
83 515 422	306 755	242 312	331 605	331 605 469
89 10 Rich. Eq. 202 426	380 757	353 313	334 608	334 608 482
92 320 429	434 760	395 316	394 609	394 609 501
93 323 431	494 773	398 317	428 619	428 619 13 Gray 53
94 333 439	534 786	494 320	511 622	511 622 70
96 411 443	578 789	560 321	525 624	525 624 124
99 551 450	147 74 Am. Dec.	528 323	140 627	140 627 154
102 573 455	169 29 Ga.	336 324	163 629	163 629 188
105 193 457	198 49	127 342	188 631	188 631 207
106 217 461	393 52	142 346	213 632	213 632 304
116 283 467	430 58	152 348	253 633	253 633 309
119 509 470	500 59	273 353	317 634	317 634 356
122 569 474	544 61	285 354	407 636	407 636 381
127 638 484	694 64	298 358	451 639	451 639 408
129 322 491	144 68	374 367	540 641	540 641 468
131 406 494	312 73	80 370	39 645	39 645 481
134 455 497	190 77	85 375	72 648	72 648 513
149 524 518	381 79	110 378	112 650	112 650 519
153 547 522	76 83	137 381	157 652	157 652 591
	92 86	171 384	193 655	193 655 607

75 Am. Dec.	75 Am. Dec.	75 Am. Dec.	76 Am. Dec.	77 Am. Dec.
662 14 Gray	62 269 18 N. Y.	588 643 34 Pa. St.	201 176 32 Vt.	268 574 17 Cal.
665	87 272 19 N. Y.	20 653	286 179	341 581 29 Conn.
668	119 278	68 656	263 189	83 590
670	141 305	127 661	275 203	168 598
673	150 311	170 664	265 209	829 596
675	220 326	227 678	478 219	329 599
676	226 331	272 375 6 R. L.	37 225	442 602
682	249 334	330 678	56 228	523 607
696	217 344	341 681	64 230	566 617
690	329 347	369 688	154 233	141 624
699	69 361	518 701	282 235	252 630
703	161 363 20 N. Y.	15 714 12 Rich.	18 237	255 634
716	294 371	89 725	82 238	471 637
722	410 379	48 729	172 244	9 Wis.
729	482 375	65 731	284 252	70 638
736	35 384	191 732	387 265	135 642
740	86 388	197 736 11 Rich. Eq.	23 269	166 647
743	109 393	210 740 2 Head	314 281	328 649
747	222 398	259 744	488 283	540 656
749	240 404	287 747	505 294	559 657
753	297 408	331 748	558 297	76 662
762	360 414	407 749	571 307	35 Ala.
764	364 418	492 753	593 309	503 673
774	423 420	495 755	609 315	570 675
785	36 Miss.	424 4 Jones Eq.	3 Head	688 677
		427 5 Jones Eq.	51 316	725 680
75 Am. Dec.		430	87 318	9 681
49 37 Miss.	17 434	57 763	194 320	73 685
61	327 437	211 767	238 325	109 687
70	448 441	258 771	299 328	240 692
72	461 444 7 Jones N. O.	276 774	455 332	504 694
76	509 445	6 777	491 335	546 695
78	579 450	14 778	523 338	551 699
88	682 458	37 779	542 343	627 702
90	17 456	64 781	557 344	652 704
94	100 459	114 788	562 346	685 709
96	242 461	169 784	638 347	60 711
107	32 463	210 789	667 348	74 719
109	65 468 9 Ohio St.	290 793	657 351	98 733
112	82 478	357 794	681 353	62 735
115	162 477	443 808	708 361	77 736
118	168 479	467	868	160 740
121	193 482	506 76 Am. Dec.	402	268 742
123	243 486	534 49 20 Texas	9 408	336 746
126	296 488	554 53	86 406	370 749
129	383 490 10 Ohio St.	595 58	210 409	387 755
131	415 498	65 67	252 418	592 760
133	525 502	88 68	465 421	72 777
135	556 509	136 72	474 428	118 780
137	567 512	188 72	561 432	217 786
139	574 518	339 76	585 440	400 789
141	428 532 1 Or.	372 81	598 444	506 790
144	512 554	188 89 24 Texas	17 449	519 793
151	519 555	191 94	46 459	612
154	536 561 32 Pa. St.	207 99	157 468	687 77 Am. Dec.
156	539 564	351 101	174 472	152 49 14 Ind.
158	14 568	414 106	224 480	161 60
163	127 574 33 Pa. St.	529 106	305 481	266 68
178	208 577	33 109	345 489	287 67
182	287 579	45 115	484 490	321 69
195	429 581	68 117	526 492	322 72
200	451 584	102 124	607 499	411 78
203	18 589 30 N. H.	124 126	639 500	499 79
207	53 592	189 128	450 505	503 88
218	110 598	251 131	512 507	152 49 14 Ind.
219	223 612	301 134	570 508	140 92
229	410 616	426 140	582 516	145 96
232	557 622	495 145	617 518	181 96
237	564 624	522 148	1 521	195 99
241	592 628 34 Pa. St.	530 151	79 538	332 101
243	13 631	9 154	110 540	372 108
250	28 634	36 156	114 551	461 108
254	18 N. Y.	42 167	179 561	473 113
258	584 641	96 171	224 567	559 117
		126 174	232 571	37 120
				87 123
				298

77 Am. Dec.	77 Am. Dec.	78 Am. Dec.	78 Am. Dec.	79 Am. Dec.
125 10 Iowa	465 387	557 728	453 872	36 Pa. St. 166 730
127	470 389	560 732	548 875	247 731
132 11 Iowa	49 391	582 752	9 379	813 733
135	104 394	74 753	24 382	360 737
137	151 396	77 764	121 388	407 752
139	174 401	86 769	381 390	498 754
142	283 405	161 773	465 399	81 757
145	310 409	213 790	503 411	147 762
148	329 414	359 789	49 N. H. 78 414	201 769
150 3 Met. Ky.	28 416	598	78 Am. Dec. 418	205 771
152	34 419	448	421	210
161	48 422	501 49	4 Dutch. 208 423	293
168	65 426	545 51	224 429	353 49
167	146 430	594 65	511 436	427 53
169	198 433	14 69	2 300. 62 440	486 62
172	235 435	18 90	101 441	508 67
174	287 444	66 94	121 444	508 69
176	352 446	263 95	220 446	407 73
183 15 Ia. An.	108 450	267 102	397 452	434 76
185	242 453	395 105	400 454	543 79
187	245 460	411 108	439 457	11 Rich. Eq. 259 82
189	335 462	450 122	23 458	344 88
190	436 467	529 126	150 461	536 102
194	497 468	9 131	200 463	12 Rich. Eq. 124 104
196	502 491	111 137	319 467	12 Rich. 445 109
198	573 499	47 145	343 468	518 111
199	681 502	126 160	481 476	675 114
203 48 Maine	9 507	204 163	552 478	1 116
212	113 515	217 176	188 487	120 123
225	244 519	313 178	209 488	167 139
227	279 522	391 186	249 490	233 142
229	316 534	412 191	309 495	307 147
231	360 539	78 192	327 499	461 151
233	373 543	61 213	438 506	611 162
236	451 550	72 216	450 516	1 174
240	501 557	152 229	5 Jones Eq. 344 520	33 176
244	558 565	223 231	370 530	313 184
246	9 569	250 236	6 Jones Eq. 34 534	460 187
249	108 572	371 239	70 538	557 193
254	131 575	368 241	83 541	586 196
259	260 579	429 244	7 Jones N.O. 415 543	667 204
261	309 583	456 246	433 552	728 206
263	353 586	459 248	446 556	740 212
265	360 586	508 260	481 558	769 215
266	421 593	28 261	506 561	25 Tex. Sup. 180 218
269	432 598	72 263	555 565	233 219
271	539 606	160 265	562 571	261 223
272	580 611	263 267	609 578	323 229
275	588 614	272 269	8 Jones N.O. 105 574	354 233
279 16 Md.	35 623	420 272	136 582	430 236
284	122 625	561 275	179 584	456 244
289	260 627	578 277	235 586	442 250
295	317 631	29 280	10 Ohio St. 523 597	460 255
303	397 632	75 285	548 605	569 263
311	456 638	136 290	11 Ohio St. 48 609	607 278
323	49 640	183 296	153 612	798 284
328	154 644	224 303	203 617	36 Vt. 144 296
333 14 Gray	576 646	369 308	283 620	173 298
335	394 651	476 312	449 622	190 300
336	415 653	574 316	490 627	311 303
340	500 658	221 322	35 Pa. St. 60 632	457 305
343	504 671	231 323	107 635	513 307
347 15 Gray	20 679	368 329	128 638	588 314
350	52 684	392 330	164 649	21 317
352	64 685	442 333	217 669	16 Gratt. 230 320
353	74 687	477 334	239 673	10 Wis. 303 324
355	178 689	548 335	269 687	513 328
360	249 693	9 336	384 689	14 330
364	296 700	34 338	298 691	119 333
366	323 706	197 342	324 699	160 334
373	441 708	222 347	420 706	289 336
377	485 712	249 349	463 709	334 342
378	499 715	282 354	523 719	430 346
381	547 721	333 359	36 Pa. St. 29 721	470 348
				12 Wis. 174
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				79 Am. Dec.
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79 Am. Dec.	80 Am. Dec.	80 Am. Dec.	81 Am. Dec.	81 Am. Dec.
850 26 Ill.	610 629 50 Maine	568 182 48 N. H.	89 542 39 Pa. St.	586 118 20 Cal.
854 26 Ill.	9 681	595 186	161 545 40 Pa. St.	9 182
861	41 636	602 144	171 551	37 187
864	179 646	195 149	220 555	57 140
867	195 649	212 154	224 566	140 146
869	205 656	331 163	282 567	186 149
871	225 659	379 173	363 570	237 151
874	255 661	452 184	475 578	269 153
877	300 665	460 189	508 579	359 157
878	320 667	525 192	561 582	396 161
879	358 669	1 137	621 584	399 169
881	396 673	26 202	647 589	417 175
883	421 681	180 207	5 590	453 185
885	447 686	254 215	393 591	515 194
889	504 693	7 220	468 594	39 202
891	27 695	9 226	514 596	42 209
893	37 700	30 229	14 N. J. Eq.	106 598
894	55 705	47 235	23 N. Y.	9 601
896	64 707	109 243	38 604	185 217
403 16 Ind.	37 717	183 255	85 610	195 219
406	46 721	172 259	204 615	214 224
411	107 724	187 269	206 617	273 226
414	125 727	198 286	248 620	291 227
418	172 729	267 290	366 624	312 231
428	253 730	294 316	502 627	319 233
430	275 733	297 320	24 N. Y.	878 234
439	428 737	301 327	28 636	87 235
440	429 740	305 331	8 Jones N. C.	96 239
444	441 744	308 333	375 641	57 242
447	505 746	311 334	385 646	181 245
448	6 748	378 337	12 Ohio St.	157 248
453	29 750	448 340	146 655	593 249
457	104 752	477 347	312 668	60 254
463	120 755	483 355	446 670	104 259
468	169 758	494 375	584 675	121 263
477	245 759	514 388	624 677	166 267
483	323 762	67 390	647 680	274 270
486	391 765	71 396	1 Or.	326 272
489	479 767	118 401	2 Or.	333 275
490	572 771	131 407	5 Minn.	371 282
497	410 776	144 410	223 699	526 284
503	465 781	227 424	323 702	586 287
509	504 782	324 429	333 706	280 292
511	533 784	361 433	6 Minn.	264 296
513	572 796	395 441	177 718	10 299
516	55 797	443 446	273 735	87 301
518	61 799	524 448	354 738	172 302
519	66	456	420 741	193 305
524	119 80 Am. Dec.	461	496 746	276 306
529	208 49	38 Pa. St.	98 752	432 307
537	282 53	74 467	104 754	496 310
539	371 55	76 471	133 758	585 311
548	549 59	163 472	147 762	629 326
556 3 Met. Ky.	456 62	166 473	151 766	5 328
559	503 66	238 474	190 769	35 336
565	524 69	258 478	231 774	202 338
568 16 La. An.	108 72	264 481	265 783	226 341
571	130 76	162 486	334 785	291 344
573	158 74	165 489	344 789	487 349
575	219 83	241 490	422 791	493 351
578	222 85	321 494	446 795	609 353
581	316 87	350 502	491 797	683 358
582	345 88	353 504	89 Pa. St.	700 359
586	404 90	371 507	92	362
592 50 Maine	36 95	39 Miss.	115 49	363
597	74 97	779 519	243 56	279 364
605	94 101	784 521	263 59	359 367
606	197 105	81 Mo.	289 60	14 370
609	214 107	375 526	337 77	44 374
311	219 111	42 N. H.	397 90	539 376
612	231 120	326 531	427 91	623 382
616	325 123	478 533	429 93	626 383
621	442 127	547 534	509 96	56 385
623	455 130	43 N. H.	513 108	90 403
		86 539		150 406
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				213
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81 Am. Dec.	82 Am. Dec.	82 Am. Dec.	83 Am. Dec.	83 Am. Dec.
408 19 Ind.	421 745 5 Allen	304 302 24 N. Y.	353 670 15 Wis.	240 249 32 Ill.
415	463 747	306 308	367 679	318 265
420 12 Iowa	28 748	308 311	394 689	424 258
423	157 750	340 315	410 696	543 261
430	253 755	332 321	538 698	558 264
432	256 758	454 326	123 703	604 269
433	292 762	495 331	143 705	87 274
435	371 765	586 337	170 707	102 278
438	445 767	591 346	299 710	114 296
441	496 769	599 349	272 713	185 298
444	579 772	42 355	306 719	241 295
451 14 Iowa	49 778	145 360	364 724	527 299
455	59 781	212 364	390 729	566 303
456	69 792	349 369	442 731	593 306
460	128 795	357 380	595 736	708 308
462	154	395	26 N. Y.	291 315
465	196	401	102 747	326 316
480	240 49	422 404	146 749	458 319
485	269 51	479 415	6 Jones Eq.	448 322
487	377 55	525 418	312 754	495 325
489	387 57	526 421	372 758	555 327
493	438 59	20 426 8 Jones N.O.	436 765	609 329
499 1 Kan.	42 63	88 430 18 Ohio St.	1	394 31 Ind.
503	178 65	18 434	66	339
506	254 73	104 438	263 49	51 343
510	259 79	184 444	332 59	187 346
521 4 Met. Ky.	9 91	310 448	446 61	224 348
530	33 97	337 454	502 64	231 350
541	199 101	363 465	14 Ohio St.	336 351
553 51 Maine	14 105	426 468	64 74	378 356
556	78 108	465 474	157 76	430 358
562	110 112	513 486	41 Pa. St.	481 78
564	140 118	13 487	493 82	534 367
569	256 122	47 491	42 Pa. St.	49 84
573	264 124	110 498	97 86	667 390
588	503 126	186 496	102 87	179 396
591	556 128	225 498	147 89	185 399
593	594 129	240 501	188 96	198 401
597 12 Md.	305 137	323 504	235 111	226 412
603	320 140	463 506	293 112	257 417
607	341 141	471 517	330 114	331 418
618	479 143	501 520	365 118	359 423
620	528 144	532 526	446 123	393 425
626 19 Md.	72 143	13 530	453 130	495 427
632	296 155	126 537	493 132	514 437
639	351 157	183 540	43 Pa. St.	9 135
643	472 159	211 551	73 143	31 Conn.
653	576 160	212 552	83 146	296 431
656 3 Allen	298 163	415 554	104 151	303 437
659	331 163	475 556	212 154	447 461
662	382 172	508 561	219 159	479 465
665	387 175	557 563	308 163	559 471
670	407 179	569 570	342 172	436 475
672	496 189	36 574	413 176	533 481
677	594 191	115 576	441 179	30 Ill.
680	41 194	122 580	453 181	103 484
689	116 201	143 583	512 184	172 486
690	125 213	253 589	7 R. I.	198 500
694	138 223	321 592	217 189	251 502
696	226 228	419 593	289 191	276 509
701	277 233	220 605	26 Tex.	328 514
706	308 237	505 608	209 193	339 524
707	336 244	213 613	225 199	347 527
710	444 249	291 617	320 201	459 535
712	481 251	315 619	35 Va.	835 202
715	494 254	376 621	44 205	44 205
718	520 258	430 625	52 206	52 206
724 5 Allen	19 262	436 634	156 215	156 215
727	29 269	103 639	179 219	179 219
731	43 273	112 644	317 224	317 224
732	60 276	162 646	427 227	427 227
734	134 279	478 652	457 231	457 231
738	169 282	196 659	1 240	1 240
742	187 295	261 668	144 244	144 244
			193 246	193 246
				538 605
				6 Allen

84 Am. Dec.	84 Am. Dec.	85 Am. Dec.	85 Am. Dec.	85 Am. Dec.
615 6 Allen 84	164 16 N. J. Eq. 391	606 27 Texas 28	298 84 Ill. 100	658 22 Md. 468
617 76 169	411 607	78 801	159 671	8 Allen 1
618 118 175	26 N. Y. 190	611 120 804	170 681	24
621 146 177	208 614	189 306	313 683	97
624 221 183	217 619	286 309	328 685	108
625 236 189	279 631	804 316	422 690	127
626 246 193	356 641	496 318	436 693	157
632 241 213	480 646	605 327	476 695	144
639 406 220	27 N. Y. 9	639 82 332	522 697	169
641 423 242	45 664	108 336	1 700	227
646 486 275	244 676	199 342	58 707	273
651 549 280	282 680	248 347	102 710	287
653 591 292	393 684	254 348	121 714	398
656 29 298	546 690	350 364	305 720	441
665 54 314	611 696	16 Gratt. 418	424 732	567
668 78 324	26 N. Y. 45	16 Wis. 443	440 735	9 Allen 17
670 125 330	72 711	460 873	487 739	62
676 196 333	217 714	528 882	58 741	80
679 207 338	226 720	616 385	65 745	114
681 232 343	261 726	672 388	114 747	151
683 274 346	344 728	88 397	150 749	171
686 329 348	360 733	95 402	243 751	231
688 364 351	396 734	140 406	265 753	263
695 408 355	1 Winst. 106	197 407	275 764	387
699 456 367	114 739	237 409	26 770	396
701 463 369	144 741	280 418	88 778	455
704 469 382	14 Ohio St. 89	314 421	259 777	478
705 541 370	182 745	337 423	362 779	492
712 548 378	240 747	351 430	399 786	540
728 118 378	298 754	378 445	4	86 Am. Dec.
731 139 383	349 755	428 449	56	12 Mich. 216
737 248 385	396 758	487 452	179 49	292
738 249 405	414 763	550 456	265 52	328
740 347 409	61 768	586 463	377 54	339
743 358 414	44 Pa. St. 55	45 466	397 57	369
745 362 419	99 777	164 471	433 64	390
754 393 421	105 782	247 475	540 70	508
756 501 422	128 788	353 477	553 75	18 Mich. 68
762 52 425	200	485	36 78	9 Minn. 13
766 94 431	210	502	41 84	133
770 113 437	241 49	98 504	68 98	194
772 236 439	274 58	157 507	149 100	262
778 243 442	313 58	182 513	234 104	303
783 381 448	326 62	241 516	284 109	344
787 403 457	375 65	322 526	397 112	364
790 407 461	413 69	367 527	491 114	390
84 Am. Dec.	464	408 531	555 116	420
49 36 Mo. 337	470 45 Pa. St. 9	411 539	1 117	482
51 347 434	151 84	609 545	64 118	496
52 391 437	166 94	38 546	109 121	531
54 412 490	181 108	122 553	176 124	542
57 461 494	208 125	214 564	297 126	578
61 497 497	365 132	291 568	358 128	36 Mo. 13
66 19 499	368 133	367 572	503 134	29
68 34 505	419 145	504 577	4 146	198
69 41 511	455 151	533 582	108 149	212
71 63 513	514 157	23 588	286 153	45 N. H. 183
74 101 519	535 172	79 590	374 159	243
76 188 527	25 178	316 593	401 178	313
78 285 542	112 187	479 595	419 183	533
82 303 549	192 211	11 601	6 183	1 Vroom 368
85 44 N. H. 448	303 549	66 603	63 193	2 Vroom 52
90 474 557	380 240	21 610	92 199	72
92 512 564	358 251	98 618	143 206	170
97 531 569	408 255	268 623	232 210	317
105 580 573	427 260	278 624	295 213	321
111 37 578	470 265	175 629	329 216	351
114 52 582	589 270	244 634	394 219	461
134 16 N. J. Eq. 13	26 Texas 475	339 636	401 226	531
142 97 596	629 280	372 639	50 240	575
147 213 598	635 282	416 643	170 247	2 Gr. C. H. 51
151 224 603	708 289	464 647	219 252	75
155 265 604	732 292	510 650	239 260	26 N. Y. 508
	27 Texas 3	296 34 Ill. 68	260 268	574

86 Am. Dec.	87 Am. Dec.	87 Am. Dec.	88 Am. Dec.	88 Am. Dec.
273 28 N. Y. 641	711 87 Vt.	380 304	882 630 10 Allen	146 248 81 N. Y. 164
283 29 N. Y. 106	716	377 814	455 632	211 271 814
292 116 722 16 Gratt.	507 819	94 635	233 276	233 276 856
297 252 750 17 Wis.	635 821	96 641	223 282	223 282 406
305 358 736	675 824	202 644	368 287	368 287 441
314 400 741 18 Wis.	28 827	222 653	378 291	378 291 507
319 523 743	85 829	325 660	385 298	385 298 21
332 554 751	155 835	355 668	387 311	387 311 127
341 591 755	163 841	447 669	403 324	403 324 197
348 30 N. Y. 9 757	196 846	14 673	448 332	448 332 333
351 83 761	234 853	42 678	532 337	532 337 405
355 89 765	287 854	140 682	535 349	535 349 571
362 13 769	331 858	177 685	23 353	23 353 597
372 253 773	345 862	278 687	49 361	49 361 33 N. Y. 43
375 263 778	397 864	336 700	65 368	65 368 55
385 83 779	406 867	434 706	101 372	101 372 139
394 458 783	441 872	479 709	196 377	196 377 269
406 519 786	481 875	503 711	264 386	264 386 297
415 561 789	500 882	202 713	300 392	300 392 369
426 630 798	560 891	280 714	304 393	304 393 409
434 1 Winet. 238	401	372 717	812 396	812 396 423
436 266 87 Am. Dec.	411	474 723	377 405	377 405 571
439 2 Winet. 45 49 39 Ala.	551 414	549 726	426 409	426 409 607
442 56 52 24 Ark.	161 418	26 730	500 412	500 412 573
448 Winet. Eq. 20 66 27 Cal.	228 420	109 733	548 416	548 416 610
450 46 75	255 423	199 736	77 418	77 418 24 N. Y. 9
451 52 76	322 441	383 738	124 423	124 423 118
454 87 81	329 447	461 741	195 426	195 426 16 Ohio St. 67
456 109 87	425 451	521 755	239 445	239 445 236
459 15 Ohio St. 1 90	433 454	561 759	380 452	380 452 385
470 47 95	507 458	123 774	427 458	427 458 332
478 337 102	611 468	221	468	468 2 Or. 97
482 355 105 23 Cal.	37 471	250	465	465 49 Pa. St. 101
487 412 107	102 476	372 49 10 Minn.	50 468	50 468 49 Pa. St. 491
491 559 110	166 479	1 56	59 472	59 472 497
502 46 Pa. St. 392 111	175 482	87 59	62 475	62 475 514
513 485 115	281 483	108 63	163 477	163 477 49 Pa. St. 14
518 47 Pa. St. 76 121	288 486	114 70	223 482	223 482 60
521 154 128	340 493	163 76	444 485	444 485 88
523 166 130	406 495	256 81 11 Minn.	220 491	220 491 101
532 194 135	484 498	281 83	296 497	296 497 118
535 214 139	561 499	323 88	384 500	384 500 249
538 239 142	632 503	496 95	438 501	438 501 232
541 244 145 29 Cal.	19 505	502 100	515 503	515 503 322
544 300 164	147 510	562 122	487 507	487 507 337
552 465 170	292 513	15 126	520 510	520 510 494
553 43 Pa. St. 73 176 33 Conn.	356 517	97 129	35 515	35 515 519
559 96 178	358 523	185 135	85 518	85 518 50 Pa. St. 9
574 107 181	378 525	252 138	150 525	150 525 75
577 178 186	493 527	261 141	227 534	227 534 91
582 218 191	546 533	52 145	320 539	320 539 181
588 261 194 33 Conn.	57 535	89 143	437 544	437 544 239
592 275 197	118 544	160 150	475 549	475 549 441
603 382 200	157 547	206 152	507 556	507 556 495
606 497 205 36 Ill.	293 548	238 156	526 560	526 560 513
610 25 217	313 552	369 161	575 562	575 562 51 Pa. St. 51
614 47 224	376 555	11 171	596 566	596 566 90
615 125 227	433 558	53 174	50 569	50 569 134
620 27 Texas 440 230	504 563	137 179	16 574	16 574 190
622 450 233	19 569	263 185	23 579	23 579 223
626 457 238	73 571	318 189	49 581	49 581 255
643 491 240	82 575	402 192	59 584	59 584 363
654 547 243	150 578	471 194	78 588	78 588 2 Cold. 25
657 593 247	230 584	513 195	130 591	130 591 104
671 554 250	331 591	1 199	213 593	213 593 212
675 565 251	334 594	62 208	261 596	261 596 233
679 593 254	438 600	84 212	266 598	266 598 319
688 690 257	405 603	310 219	435 601	435 601 369
690 94 260	484 611	418 223	490 604	490 604 474
693 99 267 36 Ill.	9 616	25 224	497 618	497 618 501
697 105 282	44 618	27 231 2 Gr. C. E.	216 622	216 622 599
700 189 293	98 622	90 233	259 630	259 630 617
703 219 298	316 625	106 236	9 633	9 633 25
707 230 301	354 628	133 242	103 639	103 639 52

89 Am. Dec.	89 Am. Dec.	90 Am. Dec.	90 Am. Dec.	91 Am. Dec.
645 88 Vt. 115 312	89 Ill. 872 632	1 Bush 404 320	40 Miss. 161 49	85 N. Y. 210
652 248 319	483 637	463 322	164 56	274
659 811 322	521 639	511 327	261 58	464
664 1 W. Va. 87 330	590 643	10 332	374 64	482
667 153 335	61 648	134 344	462 66	485
670 19 Wis. 40 337	98 650	222 351	519 67	487
672 76 340	131 651	305 354	17 72	520
675 126 346	264 656	497 358	119 88	647
678 129 348	278 658	631 371	212 88	668
681 207 350	320 669	656 375	87 Mo. 169 92	Phil. N. C. 18
684 253 361	514 706	451 378	207 95	16 Ohio St. 493
689 304 366	31 711	468 382	240 96	509
692 262 375	65 713	508 390	250 108	548
696 454 381	207 716	24 394	480 110	552
701 567 386	344 718	28 395	472 115	17 Ohio St. 11
705 601 388	385 720	46 399	537 122	130
707 615 389	482 722	95 407	60 125	150
711 624 392	502 743	224 412	154 127	51 Pa. St. 429
726 689 401	18 748	276 416	170 129	432
730 20 Wis. 21 412	143 760	563 431	253 132	459
735 165 415	148 773	153 438	483 135	52 Pa. St. 109
740 174 417	150 779	242 441	545 139	125
749 30 Ala. 698 418	169 780	443 443	561 146	206
752 40 Ala. 32 422	174 781	455 455	122 148	210
757 155 426	228 49	373 457	152 150	225
761 184 436	288 67	420 458	184 153	243
766 253 445	311 69	424 462	229 156	269
769 216 448	15 78	480 466	277 159	288
773 337 450	17 77	541 470	346 163	289
780 496 453	104 84	8 476	161 166	279
89 Am. Dec. 460	220 88	119 484	188 168	322
49 29 Cal. 859 467	294 106	239 498	380 177	498
57 407 471	370 118	580 508	497 183	53 Pa. St. 81
61 508 477	424 118	521 510	539 186	122
64 567 493	4 122	1 512	47 198	133
70 127 495	52 133	107 517	109 203	206
85 202 498	100 141	138 520	128 207	211
88 229 501	260 144	243 526	168 209	271
98 253 503	298 149	316 537	274 214	348
116 290 507	327 151	381 542	285 217	353
124 402 508	368 152	382 546	289 221	467
129 455 511	373 155	410 550	345 224	512
131 539 514	25 157	439 555	11 229	3 R. L. 282
134 586 517	55 161	459 565	118 235	349
141 17 520	121 164	498 569	219 237	375
147 46 525	161 166	531 573	224 240	12 Rich. Eq. 337
164 118 540	219 169	573 575	235 245	18 Rich. 498
167 180 543	363 171	580 594	17 N. J. Eq. 367	14 Rich. 129
172 273 545	376 172	16 601	497 270	2 Cold. 606
198 395 550	431 174	48 607	18 N. J. Eq. 33	3 Cold. 85
196 440 557	523 177	60 613	124 276	186
205 455 561	97 181	95 617	178 281	267
208 280 563	140 183	182 631	459 283	339
211 380 573	160 191	186 634	518 291	414
217 497 574	265 194	211 647	32 N. J. L. 13	294
221 532 579	271 196	353 649	161 296	472
230 288 584	338 203	370 655	249 299	554
237 11 Fla. 111 587	346 207	417 659	328 309	26 Texas 203
243 234 590	488 210	433 665	334 315	211
252 24 Ga. 253 592	494 216	445 668	393 321	372
255 355 594	588 220	12 671	403 323	473
263 511 598	390 225	91 675	407 334	546
273 40 602	515 230	109 681	34 N. Y. 190	336
276 94 604	94 243	170 691	247 349	38 Vt. 434
278 139 605	11 245	458 696	307 364	432
280 176 610	84 249	471 710	363 366	444
282 218 616	66 252	489 713	389 370	39 Vt. 9
284 28 620	139 262	75 733	508 375	17 Gratt. 115
286 31 624	211 266	94 736	548 378	1 W. Va. 205
290 110 626	263 278	41 741	622 383	256
294 195 628	275 284	108 753	684 386	20 Wis. 203
303 256 630	292 287	145 761	30 N. Y. 131	217
307 272 631	359 301	232 787	397	230
	387 311	40 Miss. 29		

91 Am. Dec.	92 Am. Dec.	93 Am. Dec.	93 Am. Dec.	93 Am. Dec.
404 20 Wis.	300 767 86 Ga.	846 400 22 Iowa	487 781 14 Allen	1 833 1 Neb.
405	820 771	402 404	568 786	7 387
408	826 772	447 405 28 Iowa	9 738	107 358
425	408 778	800 410	81 741	186 373 3 Nov.
428	462 781	584 418	104 744	145 376
432	503 788	685 417	154 748	211 397
436	523	423	229 765	236 403
442	531 92 Am. Dec.	426	286 768	290 409
444	533 49 37 Ga.	428	333 777	376 419
446	584 53	108 432	359 780	433 425 47 N. H.
451	689 56	124 440	527 788	489 488
452	21 69	251 442	559 785	462 488
456	89 70	265 444 24 Iowa	85 790	487 444
458	44 78	377 460	118 795	516 449
460	80 81 43 Ill.	438 465	181	451 496
464	130 84	457 468	5 93 Am. Dec.	455 479
468	197 85	474 475	70 49 97 Mass.	1 459
472	241 89	514 481	168 54	41 467
474	280 93	12 481	228 57	46 474
477 49 Ala.	334 99	40 488	296 61	97 479 26 N. Y.
484	451 103	176 487	322 64	107 490
492	553 109	219 489	398 68	124 495
494	596 112	231 495	407 73	144 498
496	680 118	300 497	442 75	188 502
498	26 123	351 500	453 80	208 511
508	103 133	364 505	468 91	253 517
516	344 138	430 509	480 93	303 520
519 24 Ark.	511 142	424 521 19 La. An.	17 95	327 528
523	536 146	447 526	210 98	330 540
529	67 149	42 529	214 99	361 544
538	120 153	113 532	264 106	459 546
542	585 154	114 535	300 113	489 549 37 N. Y.
546	619 159	142 537	328 117	508 551
554 33 Cal.	26 182	225 541	392 125	583 560
560	98 186	360 545	461 126 28 Mass.	12 578
566	111 189	416 548	464 132	39 578
571	168 190	491 549	365 137	77 580 Phill. N. C.
578	219 193	57 551	372 140	83 583
577	241 196	90 552	376 142	139 585
589	239 204	183 555	447 144	169 586
595	477 206	197 558	454 151	194 587
598	634 221	367 561	487 154	211 588
602	639 225	444 565 55 Maine	24 155	216 592
607	11 227	454 568	42 157	282 598
617	45 232	460 572	107 162	289 599 Phill. Eq.
623	185 234	13 573	113 168	348 600
637	220 237	61 574	114 179	164 602
644	425 240	99 576	189 184	206 605
653	515 243	156 581	147 194	361 606
655	525 246	169 583	230 196	447 610
657	557 248	230 587	238 203	40 612 17 Ohio St.
670 34 Cal.	36 257	271 589	252 208	79 615
672	48 263	435 592	290 231	158 617
681	63 269	513 598	361 234	235 620
685	109 276	1 601	438 239	465 623
692	231 282	28 606	462 241	476 631
695	302 287	37 610	477 258	370 638
698	343 306	103 613	520 264	435 653
702	75 308	133 615	538 267	480 656 54 Pa. St.
703	161 311	225 618	14 270	602 675
706	165 313	287 632	175 274	696 677
711	176 322	441 637	368 281	369 679
713 34 Conn.	27 329	468 641	420 285	433 682
718	136 330	16 646	452 289	13 686
725	303 332	21 648	502 293	33 691
728	329 336	82 658	675 299	91 697
732	334 341	95 666	115 303	449 700
735	434 345	139 681	210 309	473 708
742	466 347	226 683	276 311	482 714
744	546 350	11 688	287 315	491 718
747	26 378	60 698	497 321	557 720 55 Pa. St.
753 36 Ga.	45 389	166 708	565 325	11 722
760	91 393	230 713	607 327	50 730
761	184 395	380 724	635 331	103 732

89 Am. Dec.	89 Am. Dec.	89 Am. Dec.	89 Am. Dec.	89 Am. Dec.	91 Am. Dec.				
645 38 Va.	115 812	39 Ill.	372 632	1 Bush	404 320	40 Miss.	161 49	35 N. Y.	210
652	248 319		483 637		463 323		164 56		274
659	311 322		521 639		511 327		261 58		454
664 1 W. Va.	87 330		590 643	18 La. An.	10 332		374 64		482
667	153 335	40 Ill.	61 648		124 344		462 66		485
670	40 337		98 650		222 351		519 67		487
672	76 340		131 651		305 354	41 Miss.	17 72		520
675	126 346		264 654		497 358		119 83		647
678	129 348		278 656		631 371		212 88		653
681	207 350		320 659		656 375	37 Mo.	169 92	Phil. N. O.	18
684	253 361		514 705	33 Maine	451 378		207 95	16 Ohio R.	493
689	304 366	41 Ill.	31 711		463 382		240 98		509
692	362 375		65 713		508 390		350 103		548
696	454 381		207 716	54 Maine	24 394		480 110		582
701	567 386		344 718		28 395		472 115	17 Ohio St.	11
705	601 388		395 720		46 399		537 122		130
707	615 389		482 722		95 407	33 Mo.	60 125		150
711	624 392		502 743		224 412		154 127	31 Pa. St.	429
726	689 401	42 Ill.	18 748		276 416		170 129		432
730	20 Wis.		21 412	24 Md.	563 431		253 132		459
735	165 415		148 773	25 Md.	153 438		433 135	52 Pa. St.	109
740	174 417		150 779		242 441		545 139		125
749	39 Ala.		698 418		443		561 146		206
752	40 Ala.		32 422	40 Am. Dec.	455	39 Mo.	122 148		210
757	155 426		223 49	25 Md.	373 457		152 150		225
761	184 436		238 67		420 459		184 153		243
766	253 445		311 69		424 462		229 156		269
769	216 448	26 Ind.	15 73		480 466		277 159		283
773	337 450		17 77	26 Md.	541 470	1 Nev.	345 163		289
780	496 453		104 84		8 476		161 166		279
89 Am. Dec.	460		220 88		119 484		183 168		322
49 20 Cal.	359 467		294 106		239 498		380 177		493
57	407 471		370 113		380 508		497 188	53 Pa. St.	81
61	508 477	27 Ind.	424 118		521 510	2 Nev.	539 196		132
64	567 483		4 122	12 Allen	1 512		47 198		123
70	127 495		52 133		107 517		103 203		206
85	202 498		100 141		138 520		128 207		211
88	229 501		260 144		243 526		168 209		271
98	253 503		298 149		316 537		274 214		348
116	290 507		327 151		381 542		285 217		353
124	402 508		368 152		382 546		289 221		467
129	455 511	20 Iowa	373 155		410 550		345 224		513
131	539 514		25 157		439 555	47 N. H.	11 229	3 R. L.	232
134	536 517		55 161		459 565		113 235		249
141	31 Cal.		121 164		498 569		219 237		275
147	46 525		161 166		531 573		224 240	12 Rich. Eq.	337
164	118 540		219 169		573 575		235 245	13 Rich.	493
167	180 543		363 171	13 Allen	16 601		497 270	14 Rich.	129
172	273 545		376 172		48 607	18 N. J. Eq.	33 272	2 Cold.	606
193	395 550		431 174		60 613		124 276	3 Cold.	85
195	440 557		523 177		95 617		178 281		186
205	455 561	21 Iowa	97 181		182 631		459 283		267
206	260 563		140 183		186 634		513 291		239
211	380 572		160 191		211 647	32 N. J. L.	13 294		414
217	497 574		265 194		353 649		151 296		463
221	532 579		271 196		370 655		249 299		472
230	288 584		338 203		417 659		328 309	28 Texas	554
237	11 Fla.		346 207		433 665		334 315		203
243	234 590		488 210		445 668		390 321		211
252	253 592		494 216		12 671		403 323		272
256	355 594		558 220	14 Mich.	91 675		407 334		473
263	511 598	3 Kan.	390 225		109 681	34 N. Y.	190 336		546
273	40 602		515 230		170 691		247 349		733
276	94 604	4 Kan.	94 243		458 696		307 364	33 Vt.	432
278	139 605	1 Bush	84 249		471 710		363 366		444
280	176 610		66 252		489 713		380 370	39 Vt.	9
282	218 616		66 252		489 713		508 375	17 Gratt.	15
286	31 624		139 262	15 Mich.	75 733		548 378	1 W. Va.	205
290	110 626		211 266	12 Minn.	41 741		622 383		256
294	195 628		263 278		108 753		634 386	20 Wis.	205
303	256 630		275 284		145 761	35 N. Y.	9 388		217
307	272 631		292 287		232 787		131 390		230
			359 301				397		230
			387 311	40 Miss.	29				

91 Am. Dec.	92 Am. Dec.	92 Am. Dec.	93 Am. Dec.	93 Am. Dec.
404 20 Wis.	300 767 86 Ga.	846 400 22 Iowa	487 781 14 Allen	1 833 1 Neb.
405	820 771	402 404	568 786	7 337
408	826 772	447 405	9 738	107 358
425	408 778	500 410	81 741	186 378
428	462 781	584 418	104 744	145 376
452	503 788	685 417	154 748	211 397
436	823	422	229 765	236 403
442	531 92 Am. Dec.	426	286 768	290 409
444	533 49 87 Ga.	80 428	833 777	376 419
446	564 53	103 432	859 780	433 425
451	639 56	124 440	527 788	439 438
452	21 69	251 442	559 785	462 438
456	39 70	265 444	85 790	487 444
458	44 78	277 460	118 795	516 449
460	80 81	438 465	181	451
464	130 84	457 468	5 93 Am. Dec.	455
468	197 85	474 475	70 49 97 Mass.	1 459
472	241 89	511 481	168 54	41 467
474	280 93	12 481	228 57	46 474
477	334 99	40 483	296 61	97 479
484	451 103	176 487	322 64	107 490
492	553 109	219 489	398 68	124 495
494	596 112	231 495	407 73	144 498
496	630 118	300 497	442 75	189 502
498	26 123	351 500	453 80	208 511
508	103 133	364 505	468 91	258 517
516	344 135	420 509	480 98	303 520
519	511 142	424 521 19 La. An.	17 95	327 528
528	586 148	447 526	210 98	330 540
529	67 149	42 529	214 99	361 544
538	120 153	113 532	264 106	459 546
542	585 154	114 535	300 113	489 549
546	619 159	142 537	328 117	508 551
554	26 182	225 541	392 125	583 560
560	93 186	360 545	461 126	12 573
566	111 189	416 548	464 132	39 578
571	168 190	491 549	365 137	77 580
578	219 193	57 551	372 140	83 583
577	241 196	90 553	376 142	139 585
589	239 204	183 555	447 144	169 586
595	477 208	197 558	484 151	194 587
598	634 221	367 561	487 154	211 588
602	639 225	444 565	24 155	216 592
607	11 227	454 568	42 157	232 598
617	45 232	460 572	107 162	289 599
623	163 234	18 573	113 168	248 600
637	230 237	61 574	114 179	164 602
644	425 240	99 576	189 184	206 605
653	515 243	156 581	147 184	361 606
655	525 246	169 583	230 196	447 610
657	557 248	230 587	238 203	40 612 17 Ohio St.
670	36 257	271 589	252 208	79 615
672	48 263	435 592	290 231	158 617
681	63 269	513 598	361 234	335 620
685	109 276	1 601	488 239	465 628
692	231 282	28 606	462 241	476 631
695	302 287	37 610	477 258	370 638
696	346 306	103 613	520 264	435 653
702	75 308	133 615	588 267	490 656
703	161 311	225 618	14 270	602 675
706	165 313	287 632	175 274	696 677
711	178 322	441 637	368 281	369 679
713	27 329	468 641	420 285	433 683
718	136 330	16 646	452 289	18 686
725	305 332	21 648	502 293	33 691
728	329 336	82 653	675 299	91 697
732	354 341	95 656	115 303	449 700
735	434 345	139 681	210 309	473 708
742	466 347	226 683	276 311	482 714
744	546 350	11 688	287 315	491 718
747	26 376	60 698	497 321	557 720
753	45 389	166 708	565 325	11 722
760	91 393	24 713	607 327	50 730
761	184 395	380 724	635 331	108 732

94 Am. Dec.	94 Am. Dec.	95 Am. Dec.	96 Am. Dec.	96 Am. Dec.					
789 55 Pa. St.	176 392	40 Vt.	233 107	85 Cal.	365 554	48 Ill.	350 192	3 Bush	25
744	209 395		800 111		892 557		423 196		111
751	264 398		826 115		416 560		451 201		135
755	311 404		847 125		470 561		475 205		155
769	361 408		863 129		558 565		511 207		194
762	869 413		899 139		576 568	49 Ill.	17 211		227
766	419 425		478 152		634 572		53 216		244
789	437 439		532 162	36 Cal.	105 577		78 219		266
775 56 Pa. St.	19 436		567 166		147 579		153 239		328
778	46 440		576 170		180 583		182 243		416
783	76 445	17 Gratt.	280 175		208 590		241 252		458
789	82 455		280 181		393 595		831 256		581
	461		375 186		342 614		377 258		594
94 Am. Dec.	468		472 194		447 621		416 259		592
49 56 Pa. St.	103 478		503 199		455 627		484 262		619
51	166 498		565 205		585 630	29 Ind.	249 272		648
55	210 501	2 W. Va.	13 209		571 636		260 274		663
60	281 507		192 213		585 640		360 277		686
62	250 526		264 216	35 Conn.	25 644		364 278		702
65	256 532		274 218		57 654		465 279	4 Bush	1
75	270 541	21 Wis.	302 222		121 656		498 283		77
84	325 543		340 225		131 658		541 285		98
92	431 547		368 237		279 660	30 Ind.	11 297		205
97	445 548		372 241		328 671		112 299		261
107	475 552		410 246		343 673		129 304		268
115 8 R. I.	415 555		451 263		374 674		142 309		442
123	521 557		474 270		402 676		154 311		464
126	536 560		580 278		437 685		228 317		581
130	169 562		586 284		450 689		244 320	5 Bush	1
132	215 564		554 286	2 Del. Oh.	386 691		250 327		41
139	63 566		582 291	3 Houst.	474 694		258 331		66
141	66 571		621 314	12 Fla.	728 695		259 345		160
148	158 581	22 Wis.	21 845		673 696		263 350		230
152 13 Rich. Eq.	104 583		74 360	37 Ga.	532 699		832 358		380
160	172 588		114 365		574 703		889 360		401
162	190 594		153 367		600 705		476 369		535
164	232 598		266 369		611 710		514 372		619
184	70 600		273 371		614 720	24 Iowa	185 373		672
194	205 604		372 374		678 722		192 379	20 La. An.	60
200	315 607	41 Ala.	486 379	38 Ga.	18 727		281 382		95
206	608 614		541 384		126 729		283 385		141
210	626 616		649 386		199 740		397 388		165
214	1 630	42 Ala.	82 388		259 748		494 390		172
220	146 633		125 389		304 753		570 392		163
246	223 634		145 393		320 761	25 Iowa	28 393		188
251	44 635		168 396		334 763		35 396		241
256	47 637		171 400		391 769		60 399		263
260	74 642		212 406		512 774		87 403		329
264	107 646		255 408		608 775		97 411		383
270	135 651		322 415	46 Ill.	344 776		128 415		424
274	204 654		356 417		707 788		249 417		495
282	299 665		548 418		398 790		336 420		531
290	394 671		601 442		462 794		395 425		538
296	4 678	43 Ala.	204 446		476 797		403 426		568
299	188 684		816 455		487	96 Am. Dec.	429	56 Maine	15
301	238 686		360 457	47 Ill.	25		435		60
304	257 689		364 462		47 49	25 Iowa	412 438		126
313	361 694		385 467		86 56		464 440		150
317	367 696		434 468		142 65		507 443		187
322	375 703		488 474		152 73		520 447		231
324	260 717	25 Ark.	209 454		188 83	26 Iowa	9 449		234
327	345 719		238 467		211 114		124 456		265
331	359 722	34 Cal.	365 489		298 125		156 464		324
334	400 742		391 495		384 136		170 470		345
337	417 770		601 502		425 140		205 472		417
338	447	95 Am. Dec.	501		497 146		815 475		427
345	477		514	48 Ill.	36 158		407 486		458
350	525 49	35 Cal.	49 516		61 164		488 497		498
358	579 76		52 519		87 169	4 Kan.	250 500	20 Md.	54
363	16 90		118 523		142 172		332 503		76
370	25 93		195 529		172 175		379 508		164
378	81 95		264 539		221 180		445 510		194
387	121 98		274 543		313 183		453 515		234
349	229 102		302 551		345 190		511 519		271

97 Am. Dec.	97 Am. Dec.	98 Am. Dec.	98 Am. Dec.	99 Am. Dec.
528 29 Md.	252 141 16 Mich.	288 575 48 N. H.	57 298 58 Pa. St.	419 646 18 Gratt.
533 287 158	878 588	100 302	448 692	819
539 898 162	17 Mich.	9 592	188 308	485 695
542 415 179	67 597	157 312	59 Pa. St.	70 698
545 420 182	205 601	203 315	79 737	785
554 11 186	246 605	211 317	129 749	801
568 82 191	882 615	294 323	144 762	909
571 120 195	429 626	428 328	178 765	988
577 294 200	465 638	475 332	227 770	2 W. Va.
582 801 203	511 644 19 N. J. Eq.	128 336	289 774	458
591 486 205	518 650	176 346	259 777	470
597 464 208	1 654	294 350	876 779	491
613 500 221	30 666	816 351	893 781	502
617 512 226	127 668	420 356	420 787	511
638 522 228	165 671	462 360	481 791	579
645 414 232	264 679	587 364	9 R. I.	11 799 3 W. Va.
650 431 236	886 687	568 367	53	99 Am. Dec.
664 452 239	407 636	83 N. J. L.	76	90 49 22 Wis.
670 538 243	501 707	102 370	90	402
671 545 245	63 718	223 373	128 53	415
676 560 268	184 722	494 377	182 55	433
682 567 278	400 728	463 382	15 Rich.	284 58
685 577 281	425 737	518 397	1 S. O.	80 68
687 29 283	484 747	87 N. Y.	5 Cold.	263 81
689 61 288	503 752	555 404	826 85	628
691 68 291	88 755	591 421	362 90	646
693 74 295	45 761	637 426	431 91	675
697 79 318	74 764	667 429	447 96	23 Wis.
706 101 320	88 768	88 N. Y.	471 102	55
713 141 325	126 770	68 435	589 105	57
715 146 329	156 773	80 442	580 109	68
717 148 332	397 774	85 445	6 Cold.	113 111
720 154 336	439 777	96 450	199 114	126
725 164 349	450 780	181 452	810 138	144
728 177 351	474 785	165 454	868 141	152
730 187 355	545 791	248 459	891 145	160
732 198 369	594 795	364 465	424 148	164
738 200 367	43 Mo.	471	593 153	176
742 220 369	86	98 Am. Dec.	646 158	186
747 267 375	99 49	88 N. Y.	529 165	207
759 281 378	105 54	433 492	633 169	276
762 308 381	119 58	440 494	689 173	301
765 425 383	143 61	445 512	81 Texas	42 177
767 428 386	206 66	455 514	45 179	336
769 431 389	216 73	463 516	77 181	365
772 498 392	322 76	Phill. N. O.	421 524	169 183
97 Am. Dec.	402	880 78	453 525	190 187
49 99 Mass.	406	421 83	558 526	239 189
51 505 412	496 84	590 529	265 193	437
52 584 414	565 87 1 Phill. Eq.	334 534	834 195	452
53 546 416	570 88	841 540	862 198	468
56 582 419	722 93 18 Ohio St.	126 545	395 201	483
58 594 425	1 95	169 547	586 203	506
59 605 429	18 103	190 550	571 205	538
63 630 436	56 114	221 551	638 214	590
65 1 443	135 118	246 553	677 223	35 Ark.
70 18 449	194 121	866 556	688 226	315
74 31 456	210 175	399 560	15 228	327
76 63 465	334 186	515 562	24 233	350
80 87 472	429 191	57 Pa. St.	54 564	365
82 136 475	444 202	105 568	66 237	37 Cal.
91 160 478	607 206	120 570	122 248	15
92 174 501	795 209	142 573	134 251	96
95 206 510	40 213	161 577	145 256	113
96 208 513	95 215	202 581	161 271	121
99 301 516	138 221	274 584	205 278	328
95 376 523	218 229	339 587	271 282	249
97 382 531	254 235	426 592	811 290	400
15 444 540	361 237	433 595	880 290	424
16 472 546	455 242	58 Pa. St.	886 338	543
17 505 550	534 248	119 600	436 340	630
21 512 561	48 N. H.	155 612	486 344	39 Cal.
23 518 569	9 255	163 616	526 347	24
24 561 572	23 272	338 623	541 352	44
	41 297	410 631	18 Gratt.	85
			13 354	111

99 Am. Dec.	99 Am. Dec.	100 Am. Dec.	100 Am. Dec.	100 Am. Dec.
358 38 Cal.	188 542 51 Ill.	231 769 57 Maine	278 238 14 Minn.	371 493 40 N. Y.
360 145 548	243 772	324 244	520 516	391
363 230 547	352 779	358 247	13 523	456
365 300 551	857 780	391 252	25 527	491
384 335 556	882 782	442 255	71 528	504
399 340 562	415 787	447 260	132 535	543
404 372 568	482 788	543 265	154 538	60 Pa. St.
413 383 571	500	275	169 541	16
415 385 577	1 100 Am. Dec.	282	263 546	109
421 426 582	20 49 31 Ind.	12 287	286 557	124
423 514 587	92 58 31 Md.	38 290	313 560	156
427 528 610	106 58	174 298	356 562	182
435 590 615	174 61	254 304	444 564	220
438 631 628	211 63	336 314	465 566	333
441 649 631	265 66	350 324	542 570	339
449 31 634	485 69	357 328	596 574	367
450 108 641	19 73	396 336	33 578	374
453 163 643	96 78	543 337	52 584	408
456 223 645	181 88	562 343	70 586	453
458 310 648	217 87	574 347	89 595	492
459 324 652	51 89 101 Mass.	1 352	94 597	61 Pa. St.
462 376 656	65 110	111 361	142 609	19
464 381 658	97 118	162 363	145 613	21
467 544 662	111 120	281 366	171 618	52
470 559 663	183 123	360 369	212 621	58
472 563 676	174 124	363 376	234 625	69
473 617 680	401 127	540 378	365 628	107
482 655 683	429 129	542 381	401 637	168
484 664 684	457 133	18 Mich.	444 642	202
486 725 688	463 146	60 348	513 645	294
489 79 690	574 152	81 391	545 651	302
492 111 695	639 154	186 397	593 654	382
497 120 699	21 La. An.	233 400	45 658	427
504 151 701	58 165	306 403	53 670	497
506 186 709	67 173	314 405	61 679	28
509 210 719	118 181	354 413	129 710	354
511 222 723	224 188	14 Minn.	220 735	393
514 226 725	268 190	27 435	325 733	592
516 304 729	280 194	77 440	358 741	149
520 319 731	286 199	81 448	381 744	167
521 337 734	332 205	145 452	441 747	172
525 370 738	342 211	174 454	463 752	171
530 453 740	355 213	265 463	59 761	215
533 481 749	679 219	268 469	181 766	341
537 521 752	1 222 57 Maine	289 476	248 777	495
539 110 758	143 227	340 482	283 779	507
541 184 765	174 229	345 485	287	567

A TABLE

SHOWING THE VOLUMES AND PAGES OF THE ORIGINAL REPORTS FROM
WHICH THE CASES IN AMERICAN REPORTS WERE SELECTED.

[Having a reference to the volume and page of American Reports, this table will show
in what state, volume, and page the case was originally reported.]

1 Am. Rep.	1 Am. Rep.	2 Am. Rep.	3 Am. Rep.	3 Am. Rep.	3 Am. Rep.
11 31 Md. 7 197	24 Wis. 492 431	62 Pa. St. 353 109	15 Minn. 136 395	19 Ohio St. 260	
14 71 199	518 439	457 116	221 397	306	
22 87 202	549 441	472 122	270 405	400	
28 99 203	551 446	41 N. Y. 544 130	390 408	419	
31 126 207	566 461	581 142	416 411	430	
34 158 209	27 Iowa 19 480	42 N. Y. 1 147	440 418	462	
40 181 212	22 487	22 150	461 415	502	
45 219 215	28 490	54 154	519 419	546	
49 250 238	30 Iowa 9 498	118 165	48 N. H. 9 422	549	
50 279 254	27 Iowa 90 508	161 168	41 427	58	
60 320 256	99 506	167 172	50 430	151	
66 507 260	110 512	212 174	57 432	189	
71 100 Mass. 18 262	203 514	243 185	83 449	283	
76 81 265	234 516	246 189	111 451	345	
78 26 268	251 521	316 202	133 456	360	
82 58 271	273 524	322 207	176 462	412	
85 63 278	303 527	326 210	183 473	493	
89 117 280	341 532	334 218	294 476	501	
92 87 282	420 543	351 229	304 478	536	
94 136 285	433 548	443 242	339 479	559	
101 174 299	460 561	474 267	455 481	58	
103 249 302	494 569	484 278	51 Ill. 17 485	57	
105 301 309	534 573	490 290	206 488	140	
109 327 313	42 Vt. 121 576	493 295	266 491	147	
111 365 316	200 601	613 301	286 497	163	
115 382 325	263	303	302 504	211	
125 409 331	303	3 Am. Rep. 306	333 509	239	
126 455 334	350 11	57 Maine 55 810	458 513	264	
129 472 339	375 14	63 815	32 Ind. 1 515	265	
131 505 350	441 19	69 323	11 517	353	
135 509 353	566 22	91 327	27 520	399	
137 515 355	579 26	138 330	37 525	460	
139 518 359	658 30	181 334	202 529	467	
142 561 365	700 31	188 341	24 533	472	
167 24 Wis. 28 372	62 Pa. St. 28 39	202 348	828 541	532	
161 89 377	55 55	392 351	332 553	591	
164 157 382	78 56	423 356	486 555	48 Ga. 1	
166 165 382	81 58	425 362	19 Ohio St. 1 560	76	
180 256 387	83 59	481 368	19 563	98	
183 270 390	92 66	19 Mich. 17 369	30 567	135	
185 293 393	242 76	39 373	110 570	181	
188 336 399	286 81	186 379	135 573	206	
187 24 Wis. 350 414	308 82	259 382	162 576	267	
191 417 420	340 95	451 388	184 577	330	
196 461 422	343 102	15 Minn. 49 391	221 581	356	

3 Am. Rep.	3 Am. Rep.	4 Am. Rep.	4 Am. Rep.	5 Am. Rep.
586 42 Min. 1 827	101 Mass. 145 690	43 N. Y. 171 326	47 Mo. 885 25	2 Hoisk. 68
590 56 331	188 694	254 328	419 27	174
595 71 333	193 701	264 332	425 35	254
598 135 338	240 706	273 337	435 38	53 Ill. 151
601 405 339	243 711	389 345	504 45	227
606 444 346	251 718	452 353	567 48	336
608 555 349	255 721	502 364	105 51	401
625 651 352	257 724	516 377	156 52	428
640 711 353	291 727	537 382	178 57	447
643 715 359	303 728	539 388	254 60	510
649 724 364	329 731	554 392	292 64	516
653 749 368	344 740	566 395	425 71	54 Id. 19
669 792 368	366	398	438 75	48
671 795 373	370	400	452 83	58
678 1 Hoisk. 44 377	398	422	1 92	82
690 128 387	428 23	25 Ark. 120 430	24 98	110
700 280 390	455 26	315 450	84 109	133
706 368 396	467 29	39 465	162 115	164
712 22 La. An. 1 398	531 35	56 466	165 118	196
718 131 401	551 37	80 483	246 122	403
719 158 404	558 39	88 487	275 125	439
721 219 407	575 41	116 490	373 146	482
727 227 418	102 Mass. 24 49	182 497	415 149	499
728 300 435	60 52	165 504	577 155	504
731 388 439	65 55	183 509	10 157	507
	132 58	242 513	78 162	513
3 Am. Rep. 445	177 63	255 518	120 168	96 Ind. 36
23 25 Wis. 99 458	227 74	270 521	184 177	54
26 143 460	230 77	287 524	188 184	94
30 167 469	329 80	325 528	194 185	107
50 233 471	362 89	432 532	219 189	137
56 241 475	365 95	466 539	233 191	129
73 268 483	427 98	503 543	238 193	135
76 291 485	472 106	48 547	244 195	176
85 300 491	489 118	101 548	245 199	240
101 424 494	503 121	124 555	254 201	235
105 551 502	533 124	134 559	316 216	268
112 32 Md. 87 508	552 128	171 560	356 221	379
115 78 515	572 132	209 563	360 224	403
121 108 518	63 Pa. St. 14 135	464 567	401 230	531
125 169 522	46 140	468 573	408 234	32 Texas 43
132 225 531	51 147	616 575	558 242	208
139 227 533	87 151	37 576	572 244	276
143 411 541	108 159	88 579	577 245	334
149 421 544	187 174	241 582	63 249	458
161 471 549	253 177	267 587	81 251	579
164 561 555	290 180	545 590	123 254	664
171 33 Md. 11 558	327 181	14 593	183 258	43 Vt. 9
174 288 565	465 194	53 597	241 260	78
177 344 573	481 195	69 603	256 265	125
183 401 578	74 196	73 606	260 267	169
190 412 581	106 205	145 612	268 270	183
204 487 585	225 209	253 616	401 276	256
211 558 588	256 211	390 618	442 281	314
218 30 Gratt. 614 596	352 214	356 624	518 284	375
237 6 Nev. 27 601	366 236	496 631	27 289	410
240 83 605	414 238	498 641	42 292	439
245 224 608	445 244	501 645	94 295	446
256 34 N. J. L. 496 612	486 248	56 650	146 297	497
265 513 615	499 251	106 652	166 301	525
269 532 625	146 252	139 655	172 304	536
286 23 628	262 258	176 664	204 308	574
288 66 638	269 267	187 673	263 311	662
290 179 650	399 274	199 675	276 315	676
297 16 654	451 279	207 681	305 318	66 Pa. St. 9
301 81 657	23 286	217 688	367 323	23
306 563 660	84 290	254 690	332 326	27
309 667 663	52 292	390 698	335 329	41
314 273 669	75 296	439 700	437 344	78
316 344 673	93 306	508 706	478 351	84
320 101 Mass. 86 678	123 311	54 709	505 355	141
322 57 680	147 318	99 715	538 360	164
325 109 684	159 320	130 718	597 364	192
	164 322	232 721	661 368	218

6 Am. Rep.	6 Am. Rep.	7 Am. Rep.	7 Am. Rep.	8 Am. Rep.
371 66 Pa. St. 345	82 45 N. Y. 291	526 49 N. H. 387	225 34 Ind. 251	568 6 Kan. 456
373 388 90	306 583	399 229	448 575	500
377 411 98	327 588	483 233	13 Fla. 55 581	46 Ala. 11
385 429 96	344 595	40 Cal. 14 239	393 583	53
389 464 100	362 600	111 253	538 586	63
394 481 101	387 604	198 261	33 Texas 297 592	89
396 67 Pa. St. 54 105	398 617	240 268	394 593	381
402 59 112	406 621	251 270	745 595	26 Ark. 3
412 82 115	422 623	532 279	815 600	74
415 188 124	514 624	547 281	34 Texas 126 607	251
420 169 132	535 639	593 283	442 611	260
424 211 140	549 642	76 287	46 N. Y. 1 620	276
427 217 146	606 643	78 293	23 623	398
433 341 152	622 649	94 299	30 623	586
436 373 157	671 657	119 302	57 633	22 Mich. 146
438 390 160	785 663	131 310	77 633	311
441 396 165	744 664	183 314	82 661	427
445 391 173	792 673	205 322	189 670	467
447 421 177	797 682	420 327	271 675	479
450 479 181	104 Mass. 1 685	526 333	291 686	44 Minn. 352
470 43 Minn. 31 183	52 689	45 Ala. 30 335	310 695	441
478 52 191	59 691	43 341	325 699	466
478 111 194	75 693	89 352	249 707	513
484 360 196	87 698	108 355	384 723	330
486 288 200	117 703	378 360	427 728	45 Minn. 183
496 437 202	122 707	587 369	456 732	499
508 486 207	152 710	621 373	511 737	581
514 710 210	156 722	696 380	526 745	703
524 41 Ga. 65 213	159 735	65 N. C. 34 385	546	8 Am. Rep.
526 162 216	173 739	175 390	578	1 3 Hoisk. 53
530 212 220	222 741	194 397	637	8 165
532 331 222	228 744	815 402	47 N. Y. 36 8	24 21 Ohio St. 14
535 338 227	239 746	491 405	29 24 21 Ohio St. 14	14
540 449 232	245 749	555 410	52 40	86
543 43 Ga. 37 235	259 752	525 415	62 45	158
544 528 238	319 754	603 418	122 48	163
547 8 R. I. 47 240	336	423	143 52	176
549 133 247	446	7 Am. Rep. 423	167 55	212
556 170 261	510 28	1 S. C. 80 435	176 58	243
564 192 268	4 W. Va. 4 26	383 440	233 63	281
572 224 270	138 33	441 443	374 66	466
575 310 281	234 39	56 450	317 71	486
578 349 293	755 44	145 455	439 73	499
582 375 300	34 Md. 1 48	163 457	443 78	513
586 389 307	73 52	181 461	449 80	547
597 453 310	79 69	223 466	467 85	43 Mo. 32
615 485 314	128 81	295 469	475 87	167
621 536 321	197 84	412 478	519 100	201
624 554 325	224 87	428 480	532 104	325
627 20 Ohio St. 89 332	265 91	488 489	570 108	390
630 110 337	280 96	588 494	18 112	456
633 137 340	407 100	637 497	81 119	49 Mo. 17
642 175 345	532 107	663 499	49 126	167
645 208 350	35 Md. 15 112	31 Iowa 69 500	82 129	231
648 224 360	89 117	131 503	108 132	329
655 269 372	126 120	176 505	141 136	433
664 431 385	163 122	216 507	163 138	474
669 337 389	208 129	260 511	216 141	490
675 371 397	224 137	344 513	219 150	578
6 Am. Rep. 402	238 143	356 516	258 153	63 Pa. St. 15
23 45 N. Y. 411	262 147	397 519	295 157	72
26 34 425	396 156	444 522	297 159	173
31 45 434	414 160	464 526	325 169	204
33 58 456	49 N. H. 9 168	527 528	342 172	237
35 86 460	36 171	80 531	376 176	243
43 113 469	45 176	106 536	391 178	302
47 119 474	114 180	209 538	396 181	342
52 129 480	145 183	223 539	403 195	370
58 162 486	155 193	302 545	447 202	404
61 184 499	176 197	317 518	477 206	60 Pa. St. 30
66 191 503	187 200	324 551	504 212	43
70 234 513	199 208	409 554	560 219	98
80 265 524	240 214	36 556	588 229	122
	310 215	115 558	5 Kan. 498 236	156

3 Am. Rep.	3 Am. Rep.	4 Am. Rep.	4 Am. Rep.	5 Am. Rep.
586 42 Miss. 1 327	101 Mass. 145 690	43 N. Y. 171 326	47 Mo. 885 25	2 Heisk. 68
590 56 331	188 694	254 328	419 27	174
595 71 338	193 701	264 332	425 35	254
598 135 338	240 706	273 337	435 38	53 Ill. 151
601 405 339	243 711	389 345	504 45	227
606 444 348	251 718	462 353	567 48	338
608 555 349	255 721	502 364	105 51	401
628 651 352	257 724	516 377	156 52	428
640 711 353	291 727	537 382	176 57	447
643 715 359	303 728	539 388	254 60	510
649 724 364	329 731	554 392	292 64	516
653 749 368	344 740	566 395	425 71	54 Ill. 19
669 792 368	366	398	433 75	48
671 795 373	370	400	452 83	53
678 44 377	398	422	1 92	88
690 128 387	428 23	25 Ark. 120 430	24 98	110
700 280 390	455 26	315 450	84 109	133
706 368 396	467 29	39 465	162 115	164
712 22 La. An. 1 398	531 35	56 466	165 118	196
718 131 401	551 37	80 483	246 123	403
719 158 404	558 39	88 487	275 125	439
721 219 407	575 41	116 490	373 146	452
727 227 418	24 49	182 497	415 149	499
728 300 435	60 52	165 504	577 155	504
731 388 439	65 55	182 509	10 157	507
	132 58	242 513	73 162	513
3 Am. Rep. 445	177 63	255 518	120 168	30 Ind. 36
23 25 Wis. 451	227 74	270 521	184 177	54
26 99 458	230 77	287 524	188 184	94
80 143 460	329 80	325 528	194 185	107
80 167 469	362 89	432 532	219 189	137
80 223 471	365 95	466 539	233 191	129
86 241 475	427 98	503 543	238 193	136
73 288 483	472 106	48 547	244 195	176
76 291 485	489 118	101 548	245 199	240
85 300 491	503 121	124 555	254 201	335
101 424 494	538 124	134 559	316 216	368
105 551 502	552 128	171 560	356 221	379
112 37 506	572 132	209 563	380 224	402
115 78 515	63 Pa. St. 14 135	464 567	401 230	531
121 108 518	46 140	468 573	408 234	32 Texas 43
125 169 522	51 147	616 575	558 242	208
132 225 531	87 151	37 576	572 244	276
139 327 533	108 159	88 579	577 245	334
143 411 541	187 174	241 582	63 249	458
149 421 544	253 177	267 587	81 251	379
161 471 549	290 180	545 590	123 254	664
164 561 555	327 181	14 593	183 256	43 Vt. 9
171 11 558	465 194	53 597	241 260	78
174 288 565	481 195	68 608	256 265	125
177 344 573	74 196	78 606	260 267	169
183 401 578	106 205	145 612	268 270	183
190 412 581	225 209	268 616	401 276	256
204 487 585	256 211	390 618	442 281	314
211 568 588	352 214	356 624	518 284	375
218 30 Gratt. 614 596	366 226	496 631	27 289	410
237 6 Nev. 27 601	414 238	496 641	42 292	439
240 83 605	445 244	501 645	94 295	446
245 224 608	486 248	56 650	146 297	487
256 34 N. J. L. 496 612	499 251	106 652	166 301	525
265 518 615	65 Pa. St. 146 252	139 655	172 304	536
269 532 625	262 258	176 664	204 308	574
286 23 628	269 267	187 673	263 311	662
288 66 636	389 274	199 675	276 315	676
290 179 650	451 279	207 681	305 318	68 Pa. St. 9
297 16 654	23 286	217 688	367 323	22
301 81 657	34 290	254 690	332 326	27
306 563 660	52 292	390 693	395 329	41
309 667 663	75 296	439 700	437 344	73
314 273 669	93 305	508 706	478 351	84
316 344 673	123 311	54 709	506 355	141
320 101 Mass. 86 678	147 318	99 715	538 360	164
322 57 680	159 320	130 718	567 364	192
325 109 684	161 322	332 721	661 368	218

6 Am. Rep.	6 Am. Rep.	7 Am. Rep.	7 Am. Rep.	8 Am. Rep.
371 66 Pa. St. 345	82 45 N. Y.	291 526 49 N. H.	387 225 34 Ind.	251 568 6 Kan.
373 388 90		306 533	399 229	448 575
377 411 98		327 588	483 238	55 581 45 Ala.
385 429 96		344 595	14 239	393 583
389 464 100		362 600	111 253	538 586
394 481 101		387 604	198 261	297 592
396 67 Pa. St. 54	105	398 617	240 268	384 598
402 59 112		405 621	251 270	745 595 26 Ark.
412 82 115		422 625	552 279	815 600
415 138 124		514 624	547 281	126 607
420 169 132		535 639	593 283	442 611
424 211 140		549 642	76 287	1 620
427 217 146		606 648	78 293	23 623
433 241 152		622 649	94 299	30 628
436 273 157		671 657	119 302	57 638 23 Mich.
438 280 160		735 663	131 310	77 653
441 286 165		744 664	133 314	82 661
445 291 173		792 673	206 322	188 670
447 421 177		797 682	420 327	271 675
450 479 181	104 Mass.	1 685	536 333	291 686 44 Miss.
470 48 Minn.	81 188	54 689	30 335	310 695
476 52 191		59 691	43 341	325 699
478 111 194		75 693	89 352	349 707
484 260 196		87 698	108 355	384 723
488 268 200		117 703	378 360	427 728 45 Miss.
496 487 202		124 707	587 369	456 732
508 486 207		152 710	621 373	511 737
514 710 210		156 722	696 380	526 745
524 41 Ga.	65 213	159 735	34 385	546
526 162 216		173 739	176 390	578 8 Am. Rep.
530 212 220		222 741	194 397	637 1 3 Heisk.
532 281 222		228 744	315 402	36 8
535 338 227		239 746	491 406	29 24 21 Ohio St.
540 449 232		245 749	555 410	52 40
543 42 Ga.	87 235	259 752	525 415	62 45
544 528 238		319 754	603 418	122 48
547 8 R. I.	47 240	386	423	143 52
549 133 247		446 7 Am. Rep.	428	167 55
556 170 261		510 26 1 S. C.	80 435	176 58
564 192 263	4 W. Va.	4 26	383 440	238 63
572 224 270		138 33	441 443	274 66
575 210 281		234 39	56 450	317 71
578 249 293		755 44	145 455	439 73
582 375 300	34 Md.	1 48	163 457	443 78
586 389 307		73 52	181 461	449 80
597 453 310		79 69	223 466	467 85 48 Mo.
615 485 314		128 81	293 469	475 87
621 536 321		197 84	412 478	519 100
624 554 325		224 87	428 480	532 104
627 20 Ohio St. 89	352	265 91	488 489	570 108
630 110 337		280 96	588 494	18 112
633 137 340		407 100	637 497	31 119 49 Mo.
642 175 345		532 107	663 499	49 126
645 208 350	36 Md.	15 112	69 500	82 129
648 234 360		89 117	131 503	106 132
655 259 372		126 120	176 505	141 136
664 481 385		163 122	216 507	163 138
669 337 389		208 129	260 511	216 141
676 371 397		224 137	344 513	219 150
6 Am. Rep.		238 143	356 516	258 153 63 Pa. St.
23 45 N. Y.	18 411	262 147	397 519	295 157
28 84 425		396 156	444 522	297 159
31 45 434	49 N. H.	414 160	464 526	325 169
33 58 436		9 166	527 528	342 172
35 86 460		36 171	80 531	376 176
43 113 469		45 176	106 536	391 178
47 119 474		114 180	209 538	396 181
52 129 480		145 183	223 539	403 195
56 162 486		155 193	302 545	447 202
61 184 499		176 197	317 518	477 208 69 Pa. St.
66 191 508		187 200	324 551	504 212
70 224 513		199 208	409 554	560 219
80 265 524		240 214	56 556	588 229
		310 215	115 558	498 236

8 Am. Rep.	9 Am. Rep.	9 Am. Rep.	10 Am. Rep.	11 Am. Rep.
238 69 Pa. St.	177 553	48 N. Y.	874 179	50 N. H.
246	204 556		144 760	35 Ind.
251	210 559		234	
255	352 561		235	10 Am. Rep.
264	374 564		245	1
268	394 568		253	36 Ind.
272	420 571		267	55 496
275	462 575		269	60 502
283	482 578		272	90 508
287	1 583	25 La. An.	277	259 517
296	29 585		280	280 522
298	143 590		282	288 535
300	146 591		283	338 545
305	153 595		284	339 551
311	180 597		285	463 559
318	194 600		286	267 562
322	201 602		287	1 566
327	276 605		288	57 572
329	300 609		289	67 575
330	318 616		290	175 581
332	334 621		291	448 583
336	339 626		292	89 595
339	356 631		293	116 603
343	400 641		294	294 609
346	435 645		295	451 616
349	441 652		296	512 622
354	458 656		297	90 633
356	474 661		298	299 641
360	561 665		299	338 646
363	49 674		300	426 654
366	116 681		301	472 659
368	285 683		302	153 664
372	336 690		303	209 669
383	356 701		304	239 676
389	413 705		305	497 681
391	508 707		306	324 684
394	546 709		307	406 694
396	597 713		308	17 696
398	648		309	85 708
406	50 Maine		310	167 711
409	172 1		311	227 719
415	183 6		312	285 726
418	191 10		313	338 729
420	296 11		314	400 732
422	298 13		315	409 735
426	322 14		316	517 746
428	457 23		317	85 751
430	520 30		318	96 266
439	561 33		319	204 269
442	568 41		320	464 272
451	147 45		321	472 279
456	220 49		322	517 282
462	277 61		323	637 296
465	463 63		324	694 299
471	472 65		325	21 303
474	481 70		326	45 313
480	508 74		327	194 318
488	59 78		328	209 327
494	70 80		329	278 335
500	172 89		330	296 342
506	214 94		331	307 346
508	494 103		332	400 355
511	6 119		333	444 361
517	17 122		334	454 364
518	34 124		335	482 366
522	125 130		336	581 379
526	132 131		337	611 382
532	154 136		338	664 389
537	201 156		339	103 398
539	204 164		340	124 402
541	209 167		341	170 407
543	212 170		342	181 417
546	225 172		343	198 431
549	247 176		344	285 438
			345	311 438
			346	323 449
			347	429 457
			348	435 460

11 Am. Rep.	12 Am. Rep.	13 Am. Rep.	13 Am. Rep.	13 Am. Rep.				
122 83 Iowa	270 463	51 Mo.	191 45 Vt.	154 682 109 Mass.	158 853 42 Ind.	1		
125	325 469	36 Md.	102 194	255 685	237 857	237		
132	376 480		129 197	289 687	258 864	227		
135	67 484		181 200	308 689	277 866	278		
138	71 486		196 214	419 694	315 869	420		
141	286 491		301 218	53 699	323 877	565		
147	300 495		336 233	99 714	345 882	43 Ind.	103	
149	437 505		447 243	214 716	374 884	105		
152	440 509		567 260	247 720	398 886	146		
154	496 514		590 275	329 725	431 895	167		
156	9 518	37 Md.	1 283	356 731	457 899	455		
169	37 523		64 291	476 736	487 905	36 N. J. L.	29	
172	58 534		140 297	51 742	494 917	44		
181	88 538		390 302	106 744	569 922	72		
185	124 542		435 306	249	429	129		
200	165 546	30 Wis.	55 311	418	432	138		
204	209 550		110 314	298	1 4 Heisk.	458	225	
209	410 559		129 319	618	5 5 Heisk.	353 438	262	
210	528 567		216 329	165 12	52 N. H.	120 448	315	
213	578 572		361 338	266 19		205 454	359	
219	76 575		428 342	686 23		267 457	407	
222	88 580		496 356	112 43		355 463	449	
224	99 587		534 367	147 55		401 464	478	
237	132 592		644 372	247 72		480 467	60 N. Y.	11
231	168 599	31 Wis.	61 375	661 88		459 470	44	
243	194 602		120 383	140 93		507 474	111	
245	218 605		252 386	270 97		596 476	123	
249	224 608		306 390	326 109	24 La. An.	88 450	128	
259	290 613		538 393	362 111		97 492	164	
263	308 623		607 396	376 115		119 507	211	
270	361 630		619 401	460 120		165 519	225	
274	419 643		678 414	462 124		220 523	298	
283	446 650	53 N. Y.	82 418	176 126		351 529	339	
291	518 657		40 423	426 129		591 537	377	
295	528 667		96 425	479 131	25 La. An.	119 543	521	
301 108 Mass.	7 683		146 466	228 133		235 545	549	
304	30 697		191 469	232 136	43 Cal.	43 550	34 N. Y.	1
306	54 706		304 475	506 143		331 556	35	
307	56 708		350 480	525 148		439 562	43	
310	78 711		368 491	201 151	44 Cal.	36 563	214	
313	91 715		399 494	235 157		173 570	230	
320	111 719		416 503	562 160		187 573	234	
323	116 724		437 507	266 165		320 578	245	
328	150 731		437 526	466 167		475 581	276	
331	155 734		478 539	484 169		641 583	288	
335	176 741		502 553	623 172	45 Cal.	152 586	314	
349	219 747		521 563	789 176		293 607	416	
352	261 751		530 574	104 178	45 Ga.	306 611	444	
357	347 757	3 Houst.	369 576	152 181		365 615	472	
360	351 763	47 Ala.	163 577	238 190		406 617	512	
363	366 771		603 579	294 204		467 620	569	
367	371 777	27 Ark.	26 582	381 209	46 Cal.	176 623	599	
371	376 783		137 585	43 213		348 629	5 W. Va.	1
373	428 784		229 588	412 217		560 636	74	
375	426		590	487 220		589 640	85	
380	436	12 Am. Rep.	597	9 228	23 Ohio St.	85 649	73 Pa. St.	60
383	454 1	51 N. H.	9 600	40 233		211 655	82	
386	502 41		40 603	63 231		294 659	106	
390	520 45		56 611	376 253		339 663	115	
393	590 48		63 616	1 255		523 665	124	
401	22 55		94 624	17 264		532 671	228	
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405	104 76		167 633	186 276		632 681	336	
412	155 80		217 637	259 280	39 Ind.	371 684	347	
413	272 106		247 641	29 281		463 687	376	
415	317 111		287 642	89 283	40 Ind.	131 697	427	
420	461 127		361 645	214 285		173 699	450	
426	496 134		388 647	396 295		444 711	471	
432	69 140		436 655	449 297	30 Wis.	496 716	491	
440	122 143		496 657	464 302	41 Ind.	35 726	73 Pa. St.	39
443	190 147		504 661	36 313		116 731	137	
445	245 152		577 663	53 318		158 733	140	
450	303 157	45 Vt.	4 665	73 322		228 737	198	
454	350 159		90 671	130 343		372 740	321	

14 Am. Rep.	14 Am. Rep.	15 Am. Rep.	16 Am. Rep.	17 Am. Rep.
747 73 Pa. St.	370 424 52 Mo.	878 775 33 Wis.	558 470 57 N. Y.	119 404 62 Maine
751 488 437		424 782	600 475	209 410
758 504 430		474 489	489 236	414 165
		534 496	496 253	419 175
14 Am. Rep.	53 Mo.	15 Am. Rep.	53 501	851 427
1 38 444		1 111 Mass.	67 508	875 437
8 123 446		290 9	72 513	382 449
13 849 457		317 18	125 522	479 456
25 41 460		306 19	142 530	567 459
27 124 465		516 24	185 534	578 462
32 171 471	54 Mo.	17 28	250 542	13 473
35 211 476		385 33	373 545	173 490
38 421 481		526 39	454 548	311 492
53 59 487		598 63	508 553	391 503
57 184 490	35 Iowa	129 66	512 559	445 513
60 343 494		174 72	36 563	39 516
67 426 498		419 76	86 568	108 528
71 449 499		495 80	204 587	141 550
73 482 502		558 92	219 591	347 554
75 107 505	36 Iowa	125 97	244 599	467 557
79 196 514		131 106	304 604	166 561
86 231 521		244 110	413 612	345 564
93 242 525		310 112	450 621	474 565
99 268 530		343 119	458 627	565 569
106 483 534		540 121	461 638	631 576
109 26 538		674 138	539 643	455 578
111 41 550	61 Maine	108 148	547 655	560 587
113 99 552		114 151	560 656	165 591
114 151 553		140 153	27 Mich.	15 660
117 181 556		227 162	191 664	192 597
120 321 560		244 185	244 669	19 599
123 403 565		391 189	293 674	70 611
124 480 568		400 195	406 677	255 615
130 235 572		426 202	228 678	355 618
139 464 576	110 Mass.	26 217	277 682	462 620
147 509 578		42 219	336 684	585 624
153 600 579		70 223	527 686	108 629
164 985 580		137 232	214 690	128 632
168 24 584		147 235	290 692	327 643
173 41 589		155 239	401 694	546 647
181 68 591		157 245	509 701	20 659
186 93 592		216 258	78 707	181 681
190 108 598		240 261	180 711	318 690
196 124 608		320 262	429 715	393 697
202 150 609		389 270	523 725	455 716
215 169 613		474 278	576 728	572 721
224 200 615	48 Vt.	84 285	159 731	609 729
232 211 618		151 291	166 740	645 732
239 222 620		200 295	488 745	668 737
249 240 626		332 323	552 747	679 750
254 265 628		389 345	814 752	326 762
259 325 631		466 348	406 766	769 769
271 343 634		580 353	461 771	44 771
285 421 640		773 355	480 776	48 776
289 456 654	10 R. I.	35 357	602 780	26 780
296 495 658		106 362	354 787	72 787
304 505 663		218 372	56 N. Y.	34 14
309 515 667		227 375	44 17	75 75
312 525 683		270 379	83 18	111 17 Am. Rep.
322 533 686		304 387	124 23	190 1 71 N. C.
342 565 691		393 391	129 33	238 3 85
352 621 695		434 401	137 37	332 5 88
356 523 698		443 407	187 40	349 8 311
363 185 701		477 415	257 46	382 11 341
370 249 710		567 419	15 69	512 16 469
374 472 716	32 Wis.	85 424	354 74	552 23 539
380 542 725		177 427	363 82	9 31 43 Ab.
382 394 726		569 430	366 192	276 34 115
389 75 735	33 Wis.	41 435	394 270	342 36 161
391 78 748		121 438	398 539	398 40 665
394 81 755		176 441	435 572	442 52 694
400 181 760		314 449	553 588	503 53 112 Mass.
414 218 763		445 453	57 N. Y.	1 392 573 65 1
418 253 766		488 464	68 595	62 Maine 63 69 71

17 Am. Rep.	18 Am. Rep.	18 Am. Rep.	19 Am. Rep.	19 Am. Rep.
72 112 Mass.	136 540	39 Md.	86 273	64 Maine 458 610
77	165 562		299 279	563 648
82	234 568		329 281	4 Or. 163 652
86	271 578		472 287	818 661
92	315 586	40 Md.	141 291	25 Ohio St. 217 663
106	334 591		212 293	255 681
111	368 601		269 299	860 686
114	409 603		312 306	413 694
117	422 617		461 313	490 699
119	467 620		540 321	588 711
122	477 634		572 330	19 Minn. 108 716
128	524 643	55 Mo.	63 334	182 723
133	42 645		119 340	376 729
141	125 653		315 345	413 736
146	155 660		456 355	20 Minn. 81 741
153	181 663	56 Mo.	94 360	125 754
159	198 671		151 368	245
162	377 676	57 Mo.	172 376	535 19 Am. Rep.
169	440 678	58 Mo.	82 380	80 1 49 Miss. 17 362
171	529 692	47 Ind.	105 385	85 4
176	539 699		376 389	167 12 50 Miss. 315 367
178	58 N. Y. 1 702		407 393	207 15
201	61 709		423 398	308 29 38 Texas 112 371
206	67 719		471 404	76 Pa. St. 66 80
208	78 731	49 Ind.	52 407	157 31 39 Texas 365 377
218	106 735		174 412	389 32 40 Texas 451 381
221	126 738		327 416	398 33 41 Texas 172 383
233	228 763		562 420	414 40 42 Texas 1 384
244	272	18 Am. Rep.	424	510 44
250	282		428	77 Pa. St. 81 47
255	292	37 Iowa	20 432	109 50
258	416 6		181 435	118 56
265	430 8		214 438	143 61
270	437 14		529 445	238 63
273	442 18		613 449	328 67
281	541 22	38 Iowa	120 452	437 74
291	59 N. Y. 21 27		166 455	103 76
295	28 34		304 459	133 78
306	67 39	39 Iowa	9 463	186 80
315	80 44		192 466	198 84
317	110 46		575 467	200 93
322	171 58	29 Mich.	9 469	210 96
325	356 61		78 470	218 99
333	331 84		166 478	255 107
337	176 89		320 480	291 111
349	374 96		553 485	299 118
359	468 102		420 493	312 121
369	517 107		451 495	320 122
372	557 119	30 Mich.	223 498	348 129
384	574 122		237 500	376 132
394	611 127		259 502	400 136
401	47 Cal. 113 136		296 509	458 140
405	48 Cal. 36 142	31 Mich.	43 522	481 144
418	147 156		76 527	495 151
423	165 164		128 534	548 154
425	279 169		136 538	99 158
436	323 171		150 541	25 164
441	259 178		185 547	67 168
446	450 184		336 553	240 171
448	453 192		373 556	394 174
452	471 197		421 560	421 176
461	579 200	63 Maine	105 564	471 181
463	608 208		269 570	478 193
471	59 220		298 578	545 194
476	675 224		340 584	570 202
479	67 227		350 589	594 204
482	154 231		364 596	62 207
484	213 234		368 601	111 211
494	295 239	64 Maine	51 607	214 244
495	450 242		108 618	285 247
504	657 246		163 621	440 252
516	59 Md. 128 251		195 626	461 267
521	588 253		254 631	658 272
525	59 Md. 1 269		430 634	666 278
				202 285 24 Gratt. 443 293
				497 300
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				1 310 114 Mass. 268 312
				331 315
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				251 431 118 Mass. 589 433
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20 Am. Rep.	20 Am. Rep.	21 Am. Rep.	21 Am. Rep.	21 Am. Rep.
631 8 Neb. 44	157 54 N. H.	504 504 63 N. Y.	62 55 79 Pa. St.	242 417 62 Mo.
634 404 160	589 510	104 62	834 425	829
638 808 184	55 613	114 66	854 430	66 Mo. 33
641 537 171	65 619	181 75	870 436	131
645 290 175	130 522	186 78	408 440	212
647 50 Cal. 43	185 141 528	245 80	478 451	73 N. C. 55
655 837 191	175 538	281 83	508 454	178
656 383 134	179 541	311 89	13 455	201
669 49 Ind. 56	208 287 544	361 93	81 457	292
673 124 215	575 547	399 97	182 459	73 N. C. 93
677 156 230	418 552	449 100	879 461	133
679 850 227	548 555	440 105	418 468	198
683 373 232	75 Ill. 125 567	568 107	480 470	394
687 378 237	185 581	40 Iowa 469 112	505 472	527
691 544 238	289 585	551 116	518 479	546
695 578 241	309 586	41 Iowa 200 120	127 484	74 N. C. 5
699 135 243	231 589	247 128	201 487	98
703 141 251	77 Ill. 351 592	297 125	230 489	250
706 145 254	644 602	316 130	412 493	646
709 267 259	78 Ill. 55 605	458 133	444 495	425
711 378 261	222 609	550 152	508 499	130 Mass. 81
713 303 266	394 612	574 154	31 502	118
718 341 269	49 Ala. 30 616	42 Iowa 128 165	579 507	139
719 437 272	219 613	288 170	30 Ark. 56 510	190
722 24 275	242 622	308 175	53 Ind. 261 514	306
727 181 282	260 631	689 179	347 517	317
732 272 288	362 633	33 Mich. 1 182	462 519	340
735 268 286	465 637	182 189	58 Ind. 21 522	398
738 411 288	468 647	318 192	294 524	408
739 413 290	50 Ala. 113 654	406 197	331 529	432
742 553 291	149 658	33 Mich. 49 200	454 533	447
747 31 297	427 670	61 205	34 535	457
751 43 299	1 671	72 209	180 538	490
754 108 311	38 673	65 Maine 34 214	285 541	550
757 285 315	66 677	87 220	311 544	26 La. An. 69
765 879 317	121 681	120 223	587 546	108
772 449 324	269 683	172 225	679 549	404
777 625 325	342 687	195 232	51 Ga. 158 551	568
781 655 328	350 688	234 234	205 553	671
30 Am. Rep.	831	412 695	391 554	27 La. An. 257
1 38 Wis. 43	333	426 698	639 561	393
6 390 338	465 701	368 242	58 Ga. 153 563	417
12 428 341	498 708	385 249	183 567	465
18 449 347	500 709	402 255	83 569	681
25 511 349	513 711	426 265	73 573	64 N. Y. 5
28 651 353	502 718	542 266	229 582	41
30 96 356	596 722	547 269	448 586	91
35 111 362	5 729	583 273	108 597	129
39 188 367	82 734	68 276	391 604	209
42 282 372	176 737	313 278	55 Ga. 192 606	231
46 290 376	140 741	328 279	262 609	294
50 390 380	148 746	375 281	521 612	316
55 509 386	190 752	2 285	336 617	357
57 553 388	225 756	59 289	515 621	395
60 570 390	228 759	75 292	379 625	397
63 643 394	247 762	317 296	424 629	432
66 41 Md. 158 399	339 767	393 303	26 Gratt. 354 634	43 Conn. 56
69 446 404	383 772	400 317	442 638	129
74 593 409	430 774	510 320	721 641	153
76 633 421	441 778	664 323	752 643	231
83 42 Md. 71 425	457	330	963 647	244
90 384 431	496	338	144 650	257
95 581 438	6 W. Va. 486	1 78 Pa. St. 19 648	291 653	289
106 97 442	62 N. Y. 5 2	25 356	408 665	489
111 404 451	35 7	185 365	1025 669	514
115 54 N. H. 84 464	47 9	196 371	59 Mo. 27 677	51 Cal. 15
119 109 468	117 17	228 379	204 697	64
123 125 475	160 20	334 385	495 708	101
131 187 480	171 24	407 393	598 704	243
134 327 483	180 35	507 395	60 Mo. 249 713	345
138 398 489	229 39	54 397	61 Mo. 24 718	620
143 475 495	427 42	71 402	408 721	176
151 490 503	462 46	79 407	17 738	208
	560 49	106 411	183 745	209

22 Am. Rep.	23 Am. Rep.	23 Am. Rep.	24 Am. Rep.	24 Am. Rep.
754 11 Nev.	255 328 27 Ohio St.	484 30 66 N. Y.	82 440 11 R. L.	259 31 67 Maine
757	850 840	600 85	124 447	266 39
764 22 Minn.	41 362 28 Ohio St.	124 37	181 453	272 45
765	812 370	181 43	206 458	811 50
769	407 378	231 48	271 460	821 52
	887	819 53	295 468	864 54
23 Am. Rep.	893	883 55	813 472	881 56
1 6 S. O.	108 397	602 60	852 476	890 59
6	151 408	25 65	441 481	895 66
12	156 416	38 69	454 496	439 69
14	893 432	155 73	459 502	456 97
26	11 187	184 76	464 509	464 100
35	47 441	227 80	518 518	476 102
44	303 464	291 86	569 518	482 114
47	849 475	456 90	67 N. Y.	520 117
52	429 491	466 94	108 525	565 124
57	617 504	508 99	162 528	588 138
63	109 507	125 111	260 531	609 142
70	166 512	170 115	301 538	688 144
71	191 522	212 117	301 545	688 144
77	815 529	283 123	322 552	805 154
80	677 531	339 129	458 555	402 158
83	20 538	884 134	500 559	87 161
85	91 544	439 138	541 565	165 164
89	106 547	19 144	68 N. Y.	231 172
91	198 548	62 149	23 567	231 172
94	148 551	90 157	62 575	808 176
98	209 552	142 168	130 578	606 183
100	250 557	192 175	274 590	182 187
104	439 562	209 184	283 593	44 Texas
112	500 564	212 190	522 600	180 189
117	579 569	307 198	538 602	497 191
122	592 571	337 203	58 608	76 198
128	636 581	410 213	89 608	812 201
131	21 585	432 214	122 613	202 204
133	50 588	432 214	133 619	689 208
141	63 590	517 229	299 623	731 227
144	282 600	523 234	469 627	8 W. Va.
146	354 608	54 239	476 639	500 230
149	545 612	111 249	697 641	164 236
154	556 619	814 255	47 650	270 242
158	45 635	852 257	54 655	428 248
164	99 644	855 258	57 661	471 258
171	846 656	459 261	93 668	501 263
175	493 666	499 270	178 672	397 268
177	515 669	123 272	259 676	433 273
180	35 671	249 277	809 678	104 279
185	212 675	103 279	371 680	178 285
187	333 678	231 283	393 682	180 289
192	342 683	242 286	457 683	198 296
194	404 685	251 289	528 690	347 300
199	446 692	131 292	79 694	404 308
211	26 702	175 299	100 697	479 327
215	49 712	828 305	156 703	485 331
236	188 714	100 308	168 706	51 339
239	187 719	105 312	191 713	110 344
243	223 723	271 312	199 718	263 360
245	228 731	630 326	235 721	321 367
249	849 733	88 332	817 724	354 376
255	878 738	44 368	344 727	62 383
257	519 741	80 370	389 729	126 396
261	524 743	154 372	428 731	184 395
264	228 750	235 374	431 733	186 399
268	259 754	59 378	445 741	264 415
272	595 758	113 381	498 751	864 417
275	102 760	806 391	505 758	419 421
280	176 768	860 397	553 762	457 427
282	195 769	382 401	555 769	617 438
287	355	406 409	566	437
294 27 Ohio St.	23 Am. Rep.	11 R. L.	24 Am. Rep.	77 N. O.
303	292 1	412	1 67 Maine	46 447
307	298 9	418	92 10	93 449
312	355 18	11 420	98 15	140 455
321	426 22	14 424	103 19	163 460
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		69 434	141 27	304 467
				6 S. O.

25 Am. Rep.	25 Am. Rep.	25 Am. Rep.	25 Am. Rep.	25 Am. Rep.
471 6 S. O.	297 37 123 Mass.	110 327	351 639	53 Ala.
476 7 S. O.	283 40	129 328	379 643	467 129 28 Ia. An.
479	209 47	141 333	432 646	491 131 43 Iowa
482 57 Ga.	277 49	148 334	450 650	495 135
495	407 52	165 339	505 652	523 138
497 58 Ga.	268 60	190 341	584 656	519 145
504 45 Md.	60 61	194 342	627 660	527 150
506	337 67	196 346	25 662	115 155
511	361 79	220 349	33 665	127 157
517 46 Md.	257 81	222 359	56 671	131 161
522	315 87	239 369	171 678	150 163
526	604 90	311 378	204 679	277 164
529 35 Mich.	42 93	324 381	247 684	319 169
535	155 96	380 383	273 688	363 174
541	194 108	390 386	302 703	393 179
545	265 109	422 392	324 711	414 182
552	296 116	430 397	341 718	378 185
558	310 120	440 403	360 730	510 189
564	333 121	441 407	440 734	639 192
575	371 123	570 410	479 737	644 194
585	400 125	16 412	535 740	183 197
590 36 Mich.	150 128	24 415	589 742	359 201
593	320 136	61 416	20 744	239 205
599	436 141	87 423	36 752	517 211
601	474 143	101 424	39 755	320 222
605	487 143	107 427	54 757	605 242
610	494 152	133 429	82 760	280 254
615 51 Miss.	18 153	148 433	87 764	332 260
617	21 162	158 434	104 769	87 263
622	27 165	166 438	121 772	145 267
624	50 168	191 442	174 775	337 272
626	222 171	195 446	195 780	256 279
632	311 173	212 451	239 783	352 286
640	396 175	230 457	279	469 289
644	699 181	245 461	303	294
658	718 183	256 466	524 1	298
661 52 Miss.	53 188	271 470	136 10	56 Ind.
668	281 195	280 475	174 15	42 304
674	457 199	343 478	178 18	65 311
677	555 203	348 479	223 19	96 315
682	653 206	370 484	242 21	165 321
689	200 208	382 487	261 34	182 323
699	331 212	396 488	295 37	263 331
703	410 213	440 491	363 40	284 335
708	439 221	470 497	494 44	451 344
715	715 231	502 500	66 45	533 350
719 44 Iowa	57 233	558 504	106 48	584 357
733	101 235	557 506	125 52	84 364
735	159 246	571 510	158 57	48 373
740	259 250	594 513	231 58	20 380
745	304 253	597 518	254 61	341 384
748	314 255	19 522	267 64	360 387
754	402 260	56 524	272 68	378 391
759	505 264	64 527	323 71	412 396
760 45 Iowa	99 269	76 531	378 74	576 401
763	221 270	180 537	382 75	176 405
769	248 273	172 541	405 76	442 420
773	338 276	186 547	50 81	1 424
784	377 278	300 549	108 84	78 430
788	395 282	321 553	203 87	180 431
792	652 285	330 556	455 90	416 433
85 Am. Rep.	288	498 564	494 92	479 436
1 123 Mass.	1 290	26 576	518 96	578 439
6	20 295	50 584	597 100	189 442
7	26 299	67 592	626 102	230 446
9	28 301	73 595	83 104	327 447
12	47 303	147 598	89 106	332 452
14	55 305	149 605	132 107	709 469
17	58 308	170 607	205 110	736 479
19	60 311	198 609	208 114	765 483
24	71 313	215 611	339 115	865 496
27	88 316	236 625	398 119	905 491
33	02 321	246 627	403 123	921 493
		337 634	411 126	925 495
				933 497

27 Am. Rep.	27 Am. Rep.	28 Am. Rep.	28 Am. Rep.	28 Am. Rep.
499 87 Mich.	111 80 71 N. Y.	498 492 30 Ohio St.	569 36 68 Maine	204 382 54 Miss.
503	181 86	508 496 31 Ohio St.	72 40	215 385
506	189 87	561 501	162 42	220 388
512	195 98	127 506	219 45	235 392
514	209 101	234 510	287 50	295 396 1 Tex. App.
520	332 118	260 514	359 58	318 399
531	342 117	330 521	457 59	326 402
536	468 120	382 523	521 66	334 405
538	554 125	388 524	529 75	371 409
540	590 127	417 529	611 77	390 414
544 70 N. Y.	19 187	445 533	628 80	489 416
550	119 145	451 535	79 82	572 419
555	126 149	458 548	162 84	582 423
557	180 159	517 552	170 88	1 424
573	202 161	578 558	237 93	29 425
577	212 166	230 562	522 104	50 429 2 Tex. App.
583	239 171	298 566	171 113	90 432
589	253 175	430 571	470 116	117 435
602	280 183	440 582	507 120	141 439
605	295 189	551 593	546 125	196 442
608	410 193	599 598	560 129	217 446
612	419 197	670 603	332 150	279 448
616	440 204	709 606	745 155	312 453
624	497 206	89 622	54 159	472 454
627	553 214	167 626	66 166	499 455
631 124 Mass.	1 215	197 628	91 171	508 481
645	57 218	205 630	99 180	523 483
647	61 226	218 633	170 183	571 485
650	132 244	355 642	247 186	590 488
658	205 250	408 650	289 190	595 490
659	254 253	415 653	293 194	1 493
667	284 255	464 657	299 199	50 496
668	327 261	105 660	391 200	54 501
671	418 265	138 662	412 203	68 503
673	421 271	218 667	433 206	79 511
677	431 273	241 683	54 207	83 514
680	472 276	250 684	74 209	68 517
687	481 287	335 689	92 214	90 519
690	567 291	374 693	139 216	157 522
694	571 298	539 699	153 218	161 527
700	147 295	607 705	297 220	208 535
703	304 299	620 707	386 224	223 539
709	339 302	670 711	401 228	274 542
721	423 310	682 718	427 230	311 549
731	623 314	51 723	486 235	333 552
742	46 321	63 726	512 241	374 553
747	72 329	181 733	629 250	400 567
754	78 337	266 737	105 254	410 571
761	98 343	286 742	206 257	496 576
765	104 351	313 744	614 259	503 579
772	340 354	346 747	7 264	515 582
774	371 359	391 750	499 272	590 591
779	433 378	554 755	684 275	71 599
784	481 382	675 759	167 284	244 601
788	529 387	684 760	352 288	273 606
27 Am. Rep.	390	168 761	440 294	290 607
1 71 N. Y.	393	513 769	401 302	106 610
5	14 394	535 771	360 309	122 613
7	26 396	544 774	454 315	253 615
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47	309 424	184 9	43 348	235 651
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66	405 470	491 22	87 360	450 658
70	485 478	542 29	164 372	520 659
75	443 485	555 34	195 378	540 673

29 Am. Rep.	29 Am. Rep.	30 Am. Rep.	30 Am. Rep.	30 Am. Rep.
675 61 Ind.	862 262	435 591	246 166 4 Tex. App.	545 496
677	457 266	550 605	541 169	595 492
680	473 271	568 612	558 172	261 496
682	539 282	581 616	581 183	291 500
683 55 Ala.	123 293	157 618	268 185	301 502
685	129 308	369 621	291 197	365 504
688	187 316	38 626	578 199	485 508
704	282 328	283 628	583 203	562 510
723	305 330	326 635	44 206	587 514
729	387 332	345 642	61 211	198 521
740	413 335	356 648	103 214	285 530
751 56 Ala.	19 339	430 658	126 217	344 537
754	166 343	551 674	144 224	367 541
758	99 345	651 677	235 226	412 543
771	246 349	791 679	284 229	415 545
776	566 353	1 683	323 234	468 551
781 12 Nov.	195 356	87 687	462 238	552 554
794	263 363	120 688	467 250	576 558
802	401 365	419 693	480 260	53 562
29 Am. Rep.	369	536 703	650 264	63 566
1 32 Ark.	371	4 707	40 268	88 568
8	893 377	21 710	43 271	116 572
11	742 380	134 712	61 277	125 577
14 56 Ill.	102 382	201 719	175 283	145 584
17	106 383	1 722	379 289	183 593
20	110 402	31 727	62 298	196 601
25	153 404	214 729	153 302	329 607
28	239 407	218 739	190 304	356 610
33	246 412	425 745	238 307	387 614
35	336 413	490 748	303 311	409 620
37	402 416	538 754	376 315	428 624
43	431 418	555 767	406 319	467 629
47 57 Ill.	455 429	625 768	425 323	509 639
48	89 435	698 770	476 337	526 642
53	189 442	769 779	502 340	67 645
55	281 445	12 W. Va.	343	87 646
58	303 452	116	349	95 647
60	438 455	350 1	20 352	173 652
63	450 458	82 18	61 357	243 654
66	481 464	112 20	80 361	362 661
69	513 468	145 23	325 364	365 666
76	545 470	188 26	344 367	385 667
77	587 476	229 37	110 371	405 671
80 78 N. Y.	12 479	247 46	133 374	419 672
97	38 482	262 50	247 376	433 674
106	73 484	264 58	452 378	468 680
111	127 487	439 69	569 380	518 683
115	161 489	456 72	619 383	518 684
119	167 492	501 75	154 385	26 686
123	195 493	607 77	286 387	43 689
130	211 496	647 80	300 388	99 692
134	238 499	128 84	316 390	133 695
142	269 501	168 86	351 398	336 697
149	310 506	380 88	367 403	530 703
153	329 512	395 90	377 407	578 706
157	335 515	537 94	479 408	583 710
163	351 518	715 98	81 412	611 712
169	365 528	46 101	88 414	652 717
171	399 530	322 112	691 419	18 721
175	424 534	333 116	748 421	26 738
180	447 536	337 122	767 425	217 740
184	452 537	353 124	3 Tex. App.	350 744
197	498 539	367 126	116 433	412 746
200	516 541	375 128	156 436	450 752
208 11 Vroom	23 544	399 131	283 441	621 757
210	123 545	401 143	323 447	536 763
214	128 547	478 144	329 451	28 771
219	195 553	517 146	408 455	168 773
224	207 553	555 148	429 456	171 776
230	215 560	581 153	489 458	272 780
233	252 562	592 157	4 Tex. App.	391 782
237	288 565	41 160	54 472	411 785
242	383 578	53 162	219 476	427 788
251	402 582	169 165	310 431	494 795
				293

31 Am. Rep.	31 Am. Rep.	32 Am. Rep.	32 Am. Rep.	33 Am. Rep.
799 68 Mo. 340	248 60 Maine 101	561 33 Ohio St. 511	138 50 Iowa 571	513 12 S. O. 567
802 482	251 105	571 581	143 581	516 576
807 601	258 116	579 598	146 41 Mich. 131	518 586
811 3 Neb. 10	255 118	586 78	148 2 Lea 153	522 6 Bart. 24
814 66	257 163	591 133	149 169	529 297
819 124	262 173	593 169	152 191	530 415
827 174	268 200	598 213	156 267	532 553
830 379	273 212	602 239	160 318	539 567
	278 273	607 251	168 590	546 614
31 Am. Rep.	278 306	609 257	170 625	549 7 Bart. 12
1 50 Ala. 1	281 310	612 281	172 655	551 57
13 164	284 357	616 333	174 15	555 96
15 392	296 339	623 661	180 48	561 112
20 441	299 425	626 720	186 193	562 312
23 581	301 33 Mich. 46	629 40	193 203	565 345
28 60 Ala. 10	306 62	630 75	198 208	568 524
31 39	314 92	631 101	201 281	571 5 Tex. App. 215
34 89	316 239	633 215	210 322	573 365
38 281	319 263	637 260	219 332	575 333
42 313	321 537	639 292	225 403	577 625
46 486	323 548	642 302	237 448	580 6 Tex. App. 319
52 582	328 639	645 469	243 454	586 398
59 53 Cal. 284	331 744	652 527	247 562	591 429
62 466	332 765	655 626	259 23	593 565
65 56	341 24 Minn. 140	660 710	262 50	595 7 Tex. App. 245
67 78	344 247	663 729	267 55	599 545
70 123	346 815	666 4	271 60	602 50 Texas 212
71 134	349 501	669 20	274 78	605 467
74 212	353 506	673 79	282 92	609 495
76 221	357 217	679 102	286 108	613 614
79 233	360 269	682 227	290 216	621 638
83 270	369 383	688 253	293 220	627 51 Texas 480
91 331	375 408	690 287	302 288	632 503
93 412	379 638	692 473	306 301	637 632
104 545	382 694	694 481	309 316	640 60 Gratt. 24
105 556	385 766	695 495	315 365	650 56
110 64 Ind. 13	389 808	698 501	321 376	661 302
114 167	394 1	716 105	325 402	668 255
121 197	396 6	722 149	330 415	673 266
123 345	399 16	726 271	335 426	682 672
131 511	406 96	732 862	337 558	690 858
135 553	409 304	742 571	342 16	700 46 Wis. 123
140 49 Iowa 25	412 316	746 646	345 64	703 138
143 73	415 390	750 812	359 87	710 250
145 144	418 75 N. Y. 45	757 158	362 91	715 391
149 260	424 78	768 392	364 142	716 415
150 369	428 91	775 833	367 326	719 434
153 402	437 103		372 394	722 464
155 581	446 134	32 Am. Rep. 376		723 481
158 577	455 150	1 61 Ala. 158	380 450	735 550
163 650	459 192	3 303	390 572	739 602
171 22 Kan. 127	463 244	8 554	395 617	749 692
186 157	467 280	12 117	397 621	751 47 Wis. 89
188 250	470 288	15 134	408 638	757 113
190 286	478 446	22 174	413 35	762 406
194 405	482 484	27 250	417 42	778 551
198 556	484 516	31 420	429 137	781 573
200 594	488 535	35 525	438 157	789 602
203 686	491 574	54 573	445 189	788 615
213 692	494 579	57 153	451 243	793 623
216 763	499 250	63 188	458 288	796 634
218 30 La. An. 190	503 340	69 282	455 309	
221 220	506 488	73 398	457 384	33 Am. Rep. 884
224 259	512 446	78 549	462 462	1 46 Conn. 24
226 361	517 527	86 582	469 450	10 30
228 541	518 600	94 43	472 520	14 79
229 585	527 33 Ohio St. 63	99 94	476 333	18 90
232 876	530 77	109 319	479 396	21 276
234 991	533 246	114 547	483 429	24 315
236 1249	535 271	118 106	495 452	27 349
238 1280	539 296	119 120	500 551	34 529
240 1368	543 384	128 145	506 29	36 558
243 1386	546 405	134 189	508 180	39 561
246 60 Maine 90	555 459	136 271	511 564	44 91 Ill. 30

33 Am. Rep.	33 Am. Rep.	34 Am. Rep.	34 Am. Rep.	35 Am. Rep.					
47 91 Ill.	92 851	39 Mich.	49 705	7 Or.	110 213	94 Ill.	120 575	8 Or.	60
51	195 355		62 708		228 229		319 578		247
54	298 356		137 710		374 236		357 581		303
57	474 359		147 717		473 241		456 585		351
60	518 362		150 721	89 Pa. St.	81 242		464 587		367
64	561 367		163 726		71 245		598 590		394
70	613 370		182 731		114 247	68 Ind.	54 592	12 R. I.	464
73	45 372		187 740		148 250		202 597		19
76	86 374		300 745		155 254		245 598		75
79	246 375		211 748		186 256		254 600		79
86	267 380		236 753		231 263		345 603		82
89	270 384		323 757		261 265		332 612		92
96	306 390		337 767		308 269		405 615		112
98	408 396		345 769		324 273		427 626		149
102	500 403		376 771		419 277		586 628		166
104	567 409		431 778		497 286	51 Md.	34 631		233
107	583 414		451 784		503 291		47 635		265
110	588 419		464 787		522 298		72 638		270
114	50 421	51 Iowa	484 793	48 Wis.	54 300		128 640		272
116	70 423		492 804		79 304		138 646		319
117	77 430		581 809		250 307		256 648		329
119	88 433		606 811		265 311		290 652		343
121	129 439		626 815		420 316		327 668		353
124	184 440		661 817		468 323		512 670		392
129	264 444		671 821		513 325		562 675		411
139	343 447		710 830		535 335	137 Mass.	37 690		447
140	397 450	25 Minn.	1 833		601 337		41 694		462
143	457 455		66 841		628 338		50 702		485
146	553 458		222	34 Am. Rep.	345		75 704		492
148	578 462		248		349		86 707		501
152	625 467		299	1 62 Ala.	3 351		107 713		518
154	687 470		331 2		141 353		125 716		544
156	217 476	23 Kan.	13 4		180 355		165 722	8 Tex. App.	550
163	338 484		82 15		284 358		183 732		40
167	347 491		102 22		334 361		191 736		62
167	391 493		125 24		340 367		293 737		218
169	408 498		306 30		464 368		298 746		264
171	443 499		309 35		529 373		306 751		416
175	456 504		341 39	33 Ark.	156 376		322 759	33 Gratt.	18
179	474 506		401 44		350 381		329 765		203
183	482 508		469 49		545 384		346 773		518
188	488 517		539 52		557 389		381 780		595
191	513 523	14 Nov.	17 55		816 391		424 791		696
196	534 526		72 62	4 Colo.	25 411		459 799		946
199	551 530		79 66		65 423		481 803	1 Wash.	263
203	585 548		175 68		90 425		491 808		339
211	621 559		202 72		133 428		592 816		422
215	728 563		439 76		176 432	57 Miss.	18		
217	205 566	77 N. Y.	51 80		223 434		45	35 Am. Rep.	
222	434 570		76 89		344 435		51 1	33 Ala.	49
224	663 574		83 94	61 Ga.	30 440		243 4		53
229	719 579		101 95		48 444		286 8		135
232	809 589		114 97		215 446		308 9		143
239	217 601		138 99		275 449		331 13		219
246	233 607		235 102		417 451		378 17		243
249	257 613		226 103		505 476		474 20		307
258	366 618		320 104		556 483		598 40		356
264	389 626		391 106	92 Ill.	64 484		638 45		419
266	402 632		400 112		97 491		746 54		494
271	450 641		427 116		103 494		759 57		547
277	460 648		472 122		145 500	78 N. Y.	33 67	54 Cal.	51
280	549 651		483 128		245 507		68 69		151
286	572 655		498 130		305 512		74 72		156
293	4 659		503 134		334 518		104 77		442
298	73 664		546 136		515 522		114 80		339
304	138 671		573 151		612 532		269 83		509
317	214 682	82 N. C.	241 155	93 Ill.	30 536		310 89	17 Fla.	111
320	231 685		405 160		61 539		371 93		169
325	516 688		415 163		265 544		393 96		307
328	591 692		420 168		302 550		462 107		783
340	1 694	39 Mich.	561 187		475 555		492 110		871
344	22 696	7 Or.	89 191		523 561		568 115	62 Ga.	16
346	44 698		49 199	94 Ill.	11 567		588 122		247
348	47 703		83 206		105 572	8 Or.	17 128		347

35 Am. Rep.	35 Am. Rep.	35 Am. Rep.	35 Am. Rep.	35 Am. Rep.
128 62 Ga.	449 431 70 Mo.	359 736 9 Tex. App.	179 243 58 Iowa	595 556 33 N. J. Eq.
132 685 437		466 738	219 246	627 570 30 N. Y.
137 95 Ill.	124 438	610 743	277 248	706 573
144 134 444		672 745	619 250	712 575
151 143 450	8 Mont.	90 748	14 W. Va.	38 579
160 190 458		146 760	411 254	140 582
163 268 462		231 772	89 257	189 595
166 267 466	10 Neb.	115 776	281 259	384 600
173 533 468		172 779	254 261	387 608
182 593 471		228 782	384 262	598 612
202 83 477		293 785	535 264	600 615
205 61 479		323 786	555 267	260 617
210 95 480		338 788	605 272	335 624
212 163 487		492 796	661 274	1017 627
214 261 488		556	276	1049 634
216 295 496		615	278	1055 643
220 353 496	79 N. Y.	1	36 Am. Rep.	1066 654
222 375 505		154 5	84 Ark.	118 659
227 406 511		183 6		31 Pa. St.
232 445 515		263 8		227 662
236 479 517		302 13		267 668
240 558 524		424 15		270 671
255 56 531	53 Iowa	437 17		309 675
257 59 536		454 24		316 676
258 85 540		470 30	55 Cal.	318 678
261 88 543		490 32		361 687
262 158 550		602 40		374 694
263 161 556	38 N. C.	44 43		432 700
266 193 558		59 47		448 716
267 241 564		75 50		506 725
272 307 566		148 51	47 Conn.	514 727
275 329 571		158 54		540 730
278 343 574		307 64		555 734
280 373 579		449 67		78 746
285 503 582		454 70		154 751
286 508 586		605 75		211 754
288 626 586		624 79		217 757
293 50 587	70 Maine	634 79		242 762
297 60 589	95 Ohio St.	85 86		270 767
299 65 592		52 89		310 769
306 74 596		78 98		628 771
308 86 598		85 104	8 MoAr.	18 783
310 100 601		189 106		110 788
314 164 604		194 110		151 793
318 236 608		277 113		245 795
323 254 611		296 117	63 Ga.	251 797
325 288 617		514 120		376 803
327 290 620		541 126		376 803
335 452 623		608 128		448 820
346 473 633	90 Pa. St.	85 129		100 825
353 545 634		89 132	96 Ill.	144 830
356 46 636		99 135		267 840
357 53 641		113 143		346 845
359 104 644		122 147		389 848
363 131 651		136 151		549 850
365 159 654		250 157		554 856
370 221 656		277 162	70 Ind.	66 862
373 244 659		281 166		149 866
375 245 662		359 178		164
376 289 664		377 182		173
378 315 666		384 186		183
381 336 670		397 188		237
383 330 683		422 193	71 Ind.	387 9
387 410 686	8 Bari.	38 196		808 11
391 415 691		101 198		845 22
397 477 696		211 202		628 27
398 530 700		228 206		25 37
399 504 704		324 216	53 Iowa	28 44
402 508 705		341 218		139 48
404 18 711	70 Mo.	420 221		308 59
410 27 713		490 222		364 55
416 133 716		530 226		421 60
420 152 719	9 Tex. App.	57 230		451 67
425 228 726		124 236		467 63
427 355 732		151 240		579 70
				511 542 53 N. J. Eq.
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				592
				37 Am. Rep.
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87 Am. Rep.	37 Am. Rep.	38 Am. Rep.	38 Am. Rep.	38 Am. Rep.					
75 64 Ga.	812 399	26 Minn.	222 692	92 Pa. St.	372 159	43 Mich.	1 407	38 N. Y.	178
76	874 404		243 694		379 167		150 418		192
80	524 407		248 699		431 176		220 418		265
92	544 410		278 702		447 178		267 421		318
93	704 410		336 705		450 180		272 434		358
95	11 412		389 707		475 181		273 441		378
99	66 415		826 714	14 S. O.	20 182		303 452		408
102	118 417	72 Mo.	13 720		25 185		337 456		478
106	214 423		62 724		112 187		330 460		413
109	270 426		83 728		154 189		342 462		462
111	338 438		179 731		355 192		365 464		464
123	375 438		214 733		444 193		361 474		505
129	537 440		451 737		578 195		378 478	64 N. Y.	26
139	91 446		535 744	53 Texas	46 197		376 479		81
144	113 447		574 750		61 199		394 491		48
150	134 449		597 753		289 201		407 495		72
152	167 454	15 Nev.	27 756		318 204		435 496		83
156	220 458		64 758		330 206		480 501		209
162	315 466		146 760		581 212		433 505		215
168	425 468	31 N. Y.	21 763	16 W. Va.	282 213		534 510		247
170	442 471		38 779		402 218		635 518		263
174	455 475		57 789		428 222	44 Mich.	7 518		267
177	533 479		86 794		625 227		37 528		303
183	41 481		101 800		658 228		55 533		455
185	59 488		184 808	51 Wn.	46 232		86 537		523
185	74 491		206 814		81 235		123 544		549
189	81 494		218 815		138 240		154 547	36 Ohio St.	26
190	86 501		273 817		204 242		169 550		37
192	104 503		341 827		234 245		180 552		79
194	308 508		335 830		233 246		229 553		86
198	223 515		454 833		326 260		245 561		107
202	301 521		516 839		416 265		256 564		120
206	311 527		550 841		531 267		299 568		126
209	380 533		566 845		615 270		313 569		146
212	399 536	38 N. Y.	27 849		678 272		332 572		184
213	425 538		41 851	38 Am. Rep.	276 276		431 573		201
216	463 546		65 855		278 278		519 582		227
229	591 555		103 1	64 Ala.	1 280		529 583		294
229	609 558		161 6		277 282		617 589		338
237	166 564		318 8		299 285	27 Minn.	162 594		360
241	214 568		324 13		410 288		166 597		418
249	249 569		400 15		438 289		198 599		433
253	281 572		405 22	26 Ark.	36 293		301 602		506
255	308 574		413 24		58 295		308 607		517
259	510 583		443 29		67 296		364 616		524
265	538 587		436 30		145 298		430 613		536
274	625 589		519 34		155 304		466 617		647
277	674 594		543 39		293 310	53 Miss.	5 620	64 Texas	73
284	751 602	64 N. O.	8 40		406 313		120 622		201
295	33 604		24 48	54 Cal.	65 323		226 625		220
297	52 607		37 52		131 324		266 627		219
302	67 612		51 54		307 327		210 629		238
303	78 614		98 59		338 330		421 631		454
305	82 618		275 65		476 336		478 632		615
316	182 620		309 67		513 338		438 640	10 Tex. App.	16
317	240 624		320 73		533 339		612 641		418
321	243 627		479 75	96 Ill.	27 340		614 643		455
343	268 630		602 78		53 344		787 648		520
351	279 632		671 83		58 348		806 649		551
356	301 634		690 87		124 356	11 Neb.	87 654		655
360	314 639		696 89		305 361		147 659	33 Va.	74
362	325 643		812 97		415 364		157 661		115
366	358 647	92 Pa. St.	15 105		534 366		309 663		149
368	367 651		21 108		633 368		376 665		177
369	383 661		53 111	73 Ind.	80 370		448 668		206
371	425 669		134 115		112 373		452 671		2 9
376	438 670		202 117		185 375		537 677		315
378	474 672		218 129		219 378	34 N. J. Eq.	255 682		402
382	500 675		227 134		261 385		370 684		536
387	534 677		241 139		278 389	38 N. Y.	81 687		418
387	580 681		254 145		312 392		40 694		442
393	592 684		276 147		335 396		74 696		463
394	594 687		289 152		518 398		92 697		469
395	26 Minn.		335 155		597 402		100 699		471

39 Am. Rep.	39 Am. Rep.	40 Am. Rep.	40 Am. Rep.	40 Am. Rep.
702 58 Va.	507 227 78 Ky.	204 535 78 Mo.	655 20 4 Lea	439 306 36 Kan.
703	589 231	264 587	665 28 5 Lea	105 310
706	592 234	332 541	677 26	204 313
707	629 244	343 547 14 Vroom	113 31	232 316
709	660 246	390 551	128 28	352 320
710	600 248	427 553	203 27	286 320
713	694 251	481 578	257 29	303 321
723	110 258	517 580	279 41	343 330
726	120 262	604 581	288 47	411 336
733	211 265 33 La. An.	170 584	300 50	508 342 78 Maine
735	256 272	222 592	311 53	571 345
737	272 273	481 600	359 55	134 348
737	320 277	577 603	459 60	173 352
745	388 279	647 606	488 64	410 356
748	430 284	843 610	555 66	492 360
753	526 286	946 610	640 68	704 366
756	543 290	1308 617 35 N. Y.	80 71	45 369
756	572 294	1353 621	43 81	53 377
763	612 297 72 Maine	40 627	61 84	168 386
775	650 303	92 636	75 89	223 388
781	660 307	115 644	162 90	250 395
785	820 308	140 649	185 90	261 403 54 Md.
787	876 311	145 652	207 92	290 409
791	887 319	226 657	278 93	389 416
792	438 331	313 660	317 97	409 419 37 Md.
793	499 337	377 663	345 99	509 426
797	518 340	388 669	394 103	445 430
801	649 343	410 674	413 105	519 440
39 Am. Rep.	846	481 674	516 107	57 Cal.
1 65 Ala.	819	496 678 35 N. O.	51 110	78 453
5	343 353 54 Md.	82 684	62 112	83 457
14	417 356	188 689	81 115	251 461
17	479 361	148 692	151 118	412 465
21	610 363	176 694	184 120	520 476
28	196 374 99 Ill.	187 702	352 125	604 477
30	368 384	233 704	358 133	30 479
31	489 390	278 708	429 139	71 485
34	493 393	350 711	508 142	185 488
38	501 397	491 713	523 146	9 495
39	242 402 100 Ill.	527 719 93 Pa. St.	38 152	101 497
44	254 406	679 726	79 154	116 503
47	379 409 55 Md.	5 728	107 157	141 505
61	427 414	11 729	116 162	160 519
61	447 417	284 732	129 165	250 525
63	537 419	566 736	142 167	258 531
69	611 423 130 Mass.	61 741	165 170	267 540
76	25 426	64 750	227 170	306 543
79	378 429 74 Ind.	78 753	313 174	314 548
88	438 433	91 756	367 177	347 551
93	449 437	102 758	376 182	387 554
98	520 442	153 762	418 187	492 556
101	529 443	158 766 94 Pa. St.	48 189	525 571
113	571 445	211 770	113 193	11 573
124	84 454 75 Ind.	293 771	121 196	46 577
127	156 456	366 774	132 196	308 581
131	177 457	374 777	147 205	325 588
135	241 459	380 785	302 209	391 592
147	298 463	414 787	351 212	429 595
150	318 465	422 792	394 218	595 598
155	431 468	443 794 97 Pa. St.	47 224	142 606
160	14 470 55 Iowa	481 796	55 230	166 608
167	75 474	519 797	120 239	223 617
167	104 478	581 802	147 245	310 624
170	168 481 73 Mo.	74 805	228 250	362 625 35 N. J. Ho.
174	323 484	105 808	397 254	488 629 95 Pa. St.
175	473 489	145 813	420 258	512 632
179	571 492	172 816	424 261	561 634
187	628 497	201 818	493 269	575 637
191	674 503	219 821	543 275	594 643
194	15 515 70 Ky.	284	279	1 646
198	42 517	364	287	65 649
208	86 519	389 1 4 Lea	39 289	96 653
213	183 526	516 5	293 295	203 657
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				279
				287
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				345

41 Am. Rep.	41 Am. Rep.	41 Am. Rep.	42 Am. Rep.	42 Am. Rep.
662 95 Pa. St.	348 141 46 Mich.	38 397 87 N. Y.	561 715 47 Mich.	115 163 23 Kan.
664	398 144	62 402	590 720	449 167
670	461 146	70 405 27 Kan.	83 723	489 169
672	474 148	103 408	319 728	576 173
674	508 151	131 414	333 734	598 180
675 15 R. O.	1 154	160 418	442 737	607 182
680	82 159	183 422	532 742	20 195
684	110 161	258 424	581 744	40 203 79 Ky.
690	124 165	311 429	664 749	167 204
694	210 166	408 434	707 752	402 208
697	373 169	439 440	51 756	559 208
703	440 170	447 443 36 N. O.	88 761	125 215
706	531 174	457 444	91 763	138 220
720	239 178	485 448	116 763	215 227
727	309 177	498 450	136 767	545 231
731	356 177	504 453	139 772	596 237
734	499 178	542 455	198 779	631 238 33 N. Y.
738	516 178	596 458	295 782	20 240
740	594 183	623 461	331 791	80 244
743	780 185 131 Mass.	23 464	376 794	245 248
750	885 188	51 467	559 806	260 250
754 33 Wis.	23 191	67 472	650 812	281 254
756	36 193	77 478	658 815	338 259
759	196 196	85 481 37 Ohio St.	10 821	478 263
765	250 199	93 485	23 828	1 269
770	260 215	138 487	80 835	105 271 33 N. Y.
775	298 216	156 490	108 837	155 277
780	455 219	169 493	126 841	182 285
781	599 221	258 496	178 843	211 286
787 11 Tex. App.	92 239	376 500	301 846	248 290
790	403 247	455 507	317 849	423 294
795	509 248	577 509	321 852	441 297
799 55 Texas	83 251 33 Cal.	126 517	339 855	464 301
805	281 257	190 519	356 857	581 308
806	308 258	218 523	372 858	623 311
808	323 265	229 528	396	319
812	373 266	431 532	487 43 Am. Rep.	322 33 Md.
814	412 269 23 Minn.	66 537	502 1	278 327
818	485 271	86 540	676 3 33 Ark.	564 329
		205 545	68 5	606 332
41 Am. Rep.	277	208 552	77 10 103 Ill.	367 338
1 54 Wis.	72 281	276 555	100 14	378 340
12	107 285	291 558	169 26	460 343
17	140 290	373 561	261 29	485 350
19	208 296	426 567	292 33	546 351
23	234 298	13 572	323 39	15 353
29	242 303	41 577	332 41	208 360
31	257 305	147 580	373 42	307 363
41	342 309	159 584	423 45	344 365
53	491 312	195 587	445 47	386 367
60	528 314	292 593	521 50	555 370
63	610 316	315 599	9 53 79 Ind.	573 373
66	659 318	364 604	80 59	591 379
77 59 Iowa	11 321	385 612	308 62	45 381 63 Ga.
81	56 322	413 614	393 65	217 385
83	96 325	490 618	491 72	338 388
85	104 330	528 627	547 75	438 393
88	114 333	553 630	67 81	485 395
90	128 337	25 633 37 N. Y.	84 88	505 397
93	166 343	33 637	413 90	26 402
99	224 345	63 640	438 95	55 406
101	331 349	69 647	518 99	90 409
103	349 352	84 656	531 101	106 413
107	386 355	88 662	547 104	139 418
110	434 357	110 666 12 Tex. App.	39 107	229 421 133 Mass.
117	452 358	122 667	105 112	580 423
118	473 361	287 670 17 W. Va.	276 113	588 424
118	565 365	311 682	683 124	214 432
119	571 371	327 688 18 W. Va.	212 127	319 438
121	588 379	377 692	274 135	327 440
123	597 381	422 696	361 143	438 444
127	664 384	471 703	642 152	60 446 23 Kan.
131	679 386	493 706	22 153	213 450
134	696 392	535 711	94 163	235 453 46 Mich.

42 Am. Rep.	43 Am. Rep.	43 Am. Rep.	44 Am. Rep.	44 Am. Rep.
465 46 Mich. 118	801 9 Or. 260	264 39 Ark. 17	604 74 Maine 540	158 76 Va. 149
470 206	43 Am. Rep.	270	825 607 17 S. C.	411 185 299
474 421	1 13 R. L.	275	853 614	487 171 517
477 483	8	15 277	408 618	481 177 575
479 620	10	27 280	468 624	499 182 30 Minn. 64
481 622	11	23 290	1 639	558 185 96
485 68 Ind. 147	11	38 294	124 634	31 N. Y. 32 187 150
494 175	13	91 301	184 640	43 191 186
496 278	13	117 307	258 648	57 194 249
505 421	17	139 309	268 655	67 199 343
508 426	19	141 317	741 655	74 205 49 Conn. 113
514 57 N. C. 149	21	189 323	818 657	137 210 124
518 527	24	211 327	602 661	148 218 184
520 179	30	299 332	698 663	203 217 141
522 367	32	347 338	823 668	303 225 191
527 96 Pa. St. 24	35	454 341	74 669	315 234 342
530 65	39	480 343	83 675	331 237 352
532 112	42	512 347	105 677	451 243 390
534 116	45	572 353	181 686	478 246 483
542 246	51	601 365	220 689	539 249 492
543 391	53	651 369	269 699	105 255 38 Ind. 34
549 449	61	86 373	804 703	123 268 87
554 508	64	124 380	331 706	195 274 111
555 5 N. H. 5	66	223 392	430 719	462 280 172
558 7	67	266 394	441 725	471 285 196
563 30	71	392 397	455 728	502 292 208
572 52	76	463 402	605 729	45 306 327
580 83	78	566 406	638 732	83 320 352
584 104	80	31 412	654 736	123 332 476
586 257	85	84 413	11 740	129 334 496
589 306	86	325 417	18 743	227 338 531
592 430	91	347 419	41 745	526 343 538
598 462	95	375 421	141 749	536 349 32 N. Y. 10
604 473	100	544 425	275 754	23 357 146
608 569	102	474 428	448 756	72 361 152
608 68 Pa. St. 1	111	72 433	461 762	238 370 219
610 13	112	102 436	543 765	446 372 274
614 170	116	184 442	587 768	565 377 289
618 384	118	409 447	110 780	624 380 311
624 389	120	450 456	157 787	18 393 463
624 587	122	469 456	164 790	571 406 490
627 600	125	579 464	249 799	713 408 521
632 13 S. C. 73	129	676 474	384	413 34 La. An. 80
635 334	131	4 478	617	419 139
641 445	135	12 480	1 55 Ind. 130	426 186
650 602	138	16 480	32 10	240 436 381
654 88	141	77 495	16 13	276 438 482
657 128	146	116 502	161 16	294 444 777
663 180	146	122 504	170 29	318 448 919
673 218	161	227 509	248 42	529 451 970
676 359	163	257 514	270 46	565 456 1123
680 601	168	272 519	239 52	2 461 1146
684 609	170	293 527	381 55	74 463 60 Ky. 55
688 119	173	326 528	471 58	383 468 143
689 149	176	333 532	508 61	467 471 208
691 647	179	430 535	531 70	581 475 291
695 23	182	435 537	31 81	35 480 300
701 96	185	538 540	63 87	100 483 353
704 249	189	602 542	123 90	429 484 391
708 300	192	95 548	231 94	573 490 539
712 319	199	160 554	239 97	601 499 598
719 364	201	250 557	374 101	30 Pa. St. 196 501 60 Ala. 25
722 427	203	254 560	403 106	301 505 106
731 496	204	309 564	568 109	306 509 111
740 515	211	298 567	28 112	344 513 231
744 531	212	336 569	164 114	370 515 242
753 19 Neb. 103	216	347 573	214 116	434 519 373
756 195	223	385 581	225 120	492 522 403
767 415	228	411 584	236 124	555 526 549
771 19 W. Va. 49	231	6 586	268 128	58 528 555
776 312	239	28 589	286 134	66 539 573
780 323	242	119 591	315 138	267 542 61 Cal. 92
794 9 Or. 66	245	154 596	332 147	230 549 164
799 166	257	243 600	452 152	76 Va. 123 553 346

45 Am. Rep.	45 Am. Rep.	45 Am. Rep.	45 Am. Rep.	45 Am. Rep.
554 61 Cal.	486 54	518 894 100 Pa. St.	568 735	60 Md.
555 468 57	565 897	578 783	239 289	50 Texas
558 18 S. C.	81 62	628 400	296 278	568
564 88 68	629 402	586 739	340 284	628
569 175 67	8 405	624 741	404 291	640
573 262 70	60 Miss.	89 750	584 303	71 Ala.
579 860 72	18 410	890 754	20 305	145
583 508 76	23 412	851 761	66 309	215
586 57 Texas	75 414	400 765	71 314	248
589 126 82	174 416	460 765	170 318	299
598 288 86	361 418	509 777	297 328	319
598 354 88	484 420	663 785	412 336	439
601 58 Texas	607 422	819 794	521 333	486
604 80 98	14 Neb.	876 796	563 342	481
610 141 98	84 424	981	347	499
614 170 100	110 427	1008	46 Am. Rep.	75 Mo.
614 176 108	158 428	87 1	77 Mo.	55
620 394 108	198 438	172 4	88 357	69
626 109 108	265 437	209 6	47 361	136
628 186 111	327 442	104 9	91 364	225
630 169 117	340 447	83 Ind.	166 373	306
634 252 121	369 449	122 13	634 386	329
642 292 126	521 454	149 17	57 Wm.	373
646 811 129	81 462	169 28	56 397	397
659 466 134	139 464	881 82	69 400	468
668 657 138	145 467	478 85	118 406	469
672 50 Iowa	349 474	65 Ga.	172 416	497
679 251 146	371 476	82 89	258 419	562
686 348 156	68 N. Y.	119 41	472 421	570
686 357 160	1 480	299 46	600 423	1
687 428 169	17 500	431 53	649 423	34
688 444 176	59 501	653 63	68 Iowa	41
692 551 178	75 505	668 65	184 433	118
696 561 178	118 508	780 70	280 439	116
699 18 Tex. App.	201 512	6 Colo.	289 445	150
701 88 198	259 520	1 78	415 447	201
708 185 204	278 524	102 82	438 450	209
708 271 217	318 526	156 86	68 Kan.	238
706 388 229	331 531	453 90	106 454	278
708 443 232	438 549	559 92	156 456	280
717 76 230	458 555	108 100	268 458	296
720 284 268	524 563	115 104	401 464	380
724 480 268	582 570	301 108	645 467	396
731 546 272	124 Mass.	783 112	712 471	407
735 561 274	1 579	55 Vt.	1 476	53
739 618 276	26 583	8 122	27 481	154
743 653 278	24 124	84 126	86 485	530
747 1 282	88 590	154 128	90 502	554
756 168 285	48 598	187 131	137 506	606
759 245 289	56 602	259 137	145 520	779
763 269 297	62 612	269 137	221 527	1
770 334 301	69 614	286 141	268 550	23
773 522 305	77 618	311 143	278 567	124
776 598 307	95 621	391 143	374 574	202
778 600 310	110 624	404 153	381 580	221
780 227 314	123 628	484 156	535 586	266
785 158 316	140 632	492 160	583 607	334
788 207 319	169 637	506 164	458 613	451
791 364 323	175 639	570 169	526 618	13
799 388 344	215 644	586 173	538 621	89
808 445 347	252 651	120 175	572 625	144
812 474 348	357 654	125 178	583 621	296
819 596 353	507 659	182 185	572 625	461
45 Am. Rep.	593 663	618 192	90 Ind.	493
1 19 Fla.	28 667 37 N. J. Eq.	560 195	83 637	539
5 42 361	91 670	600 199	192 647	555
12 106 364	100 673	23 205	205 652	638
19 117 365	106 677	183 210	222 657	646
24 148 366	119 679	291 216	229 665	11
28 670 370	123 687	311 222	268 687	222
30 70 373	144 696	377 224	333 683	306
35 163 379	169 698	475 229	515 688	396
38 179 380	182 700	585 230	545 696	534
37 209 382	206 703	15 234	596 702	66
47 384 387	295 706	26 237 14 Tex. App.	444 709	173
51 434 388	368 711	83 241	474 715	376
53 489 391	434 715	158 247	64 740	689
	538 717	185 261		
	561 722	215 265		

47 Am. Rep.	47 Am. Rep.	48 Am. Rep.	48 Am. Rep.	49 Am. Rep.
747 77 Va.	681 305	515 685	562 128	478 548
750 16 Vroom	18 307	528 690	1 134	619 557
754	119 312	583 696	36 140	49 560
757	219 319	63 699	57 146	96 565
772	810 326	121 701	204 151	292 572
776	326 331	146 704	215 155	319 574
778	347 338	282 706	258 162	384 582
781	368 341	149 710	273 167	408 585
782	379 346	174 714	304 171	426 588
789	681 355	356 718	311 175	443 595
792	543 358	389 722	348 179	474 598
	364	1 727	363 185	535 601
47 Am. Rep.	367	81 738	380 193	102 Pa. St. 42 607
1 95 N. Y.	17 369	164 737	507 196	131 609
9	76 374	423 739	616 199	212 612
14	115 378	452 743	36 204	230 616
20	181 388	476 750	137 205	262 622
29	196 390	523 754	206 209	335 628
36	267 394	570 757	354 211	378 632
41	274 403	112 760	409 213	474 635
58	403 405	254 764	447 216	55 La. An. 60 640
64	428 408	262 766	666 232	119 646
75	562 412	277 771	11 239	233 652
85	575 418	332 776	17 242	394 658
89	632 422	411 781	85 251	389 664
92	77 425	44 785	248 258	1091 669
95	128 431	113 789	297 256	1132 673
99	195 434	334 793	351 260	168 676
107	212 437	349 796	364 264	308 681
112	320 445	429 798	468 268	545 685
118	528 453	507 802	64 272	173 687
126	584 458	517 805	83 278	177 689
131	644 467	540 808	166 280	345 692
135	82 478	681 810	198 297	437 700
140	240 479	81 818	326 301	492 704
145	306 482	99 816	423 305	452 713
149	371 486	151 820	441 308	33 N. J. Eq. 219 719
153	444 497	180 822	629 319	250 727
156	464 501	478 827	116 327	604 730
163	521 507	511 833	123 334	20 733
167	543 516	101 840	363 339	256 738
171	1 521	282 842	419 342	279 742
176	7 523	320 845	430 344	330 749
179	120 526	382 853	574 349	459 754
181	122 529	412	354	478 758
183	128 534	437	361	509 762
184	154 538	629 1	28 364	26 770
188	158 541	724 5	117 376	187 781
192	201 544	749 10	298 383	258 791
194	218 549	95 17	432 398	338 793
196	242 551	105 19	45 418	29 799
199	256 555	137 38	242 421	68 801
202	288 557	203 41	295 426	87 808
205	298 566	236 43	410 429	236 811
209	354 569	253 46	526 431	273 814
215	378 577	253 49	46 438	231 818
217	417 582	363 55	131 454	324 821
220	541 590	469 61	236 457	333 826
224	551 592	493 65	465 459	340
227	564 594	541 68	473 462	377
231	578 596	601 74	8 474	584
234	24 599	9 76	102 477	639
238	180 603	46 78	112 480	123
243	279 618	66 80	125 483	127
247	498 622	89 84	593 487	172
262	127 625	131 88	29 499	260
266	137 632	199 88	53 511	309
268	502 636	223 89	206 516	316
277	72 642	278 96	266 520	352
279	98 648	321 101	276 528	393
284	264 653	433 106	297 532	433
286	372 663	472 110	339 538	540
291	382 669	501 114	400 541	59
296	452 677	529 117	436 545	64
				64 59

49 Am. Rep.	49 Am. Rep.	50 Am. Rep.	50 Am. Rep.	51 Am. Rep.
63 75 Ala.	503 441	191 816	317 807	298 659
71	517 449	289 819	449 810	329 677
78 68 Cal.	86 458	886 821 16 Tex. App.	1 816	351 688
88	129 462	421 824	6 818	392 685
92	355 469	478 826	478 823	424 689
94	875 478	570	325	471 693
96	445 484	255 50 Am. Rep.	328	516 699
98	467 489	409 1 51 Conn.	17 834	554 705
100	586 491	489 8	80 840	564 716
107	598 496	485 12	143 845	87 724
118 108 Pa. St.	32 505	668 16	266 850	119 727
116	44 508	1 20	811 852	141 730
117	110 513	44 24	842 855	187 733
118	126 515	102 29	852 856	206 737
119	134 517	149 38	405 859	296 741
121	177 522	181 47	524 878	406 743
126	309 525	308 55	577 881	511 746
130	492 531	384 71	16 886	583 750
131	496 533	472 82	190 888	587 752
136 33 Iowa	26 536	485 94	290 897	46 N. J. L.
138	96 540	494 99	489 400	16 756
141	139 544	507 102	519 403	87 758
146	345 556	530 109	531 407	231 759
148	537 561	565 120 17 Tex. App.	84 417	244 760
152	157 567	58 122	178 421	255 763
156	179 570	74 128	226 424	276 769
161	333 575	265 129	598 423	328 774
168	845 580	306 131	20 442	380 779
185	461 586	408 135	44 445	448 783
188 18 Tex. App.	202 590	500 137	255 451	614 786
194	258 592	595 141	325 456	89 788
200	304 596	76 141	435 462	58 798
207	378 598	138 143	450 465	67 805
212	22 601	148 145	464 470	143 830
218	113 606	158 148	469 475	178
228	250 609	197 149	481 477	277
235	421 611	282 151	491 481	406 1 36 La. An.
239	433 615	306 154	536 486	431 5
246 24 W. Va.	119 620	331 157	623 495	456 7
252	411 622	357 160	250 499	469 14
257	416 629	401 168	293 503	175 17 39 N. J. Rq.
277	493 634	539 167	377 505	289 29
283	615 637	69 172	425 510	310 37
290	783 639	98 181	577 512	504 45
302 60 N. H.	20 641	293 186	624 517	558 51
304	80 647	506 193	638 519	118 59
305	59 652	550 199	25 521	172 65
307	100 655	1 204	281 525	201 81
311	201 660	134 211	264 529	258 86
318	294 663	491 219	375 532	280 88
321	377 666	507 223	300 536	442 91
324	422 679	14 226	880 539	511 95
326	434 684	29 229	422 542	518 105
328	439 686	134 233	479 550	642 111
331	479 700	157 237	588 560	1 116
333	493 705	339 240	84 562	135 128
334	528 710	99 243	40 564	171 131
339	13 716	189 247	117 567	176 134
344	58 718	254 253	835 575	308 161
347	167 721	433 256	872 579	324 166 105 Pa. St.
351	237 724	578 259	402 583	385 181
358	384 731	1 262	495 585	394 184
366	541 736	73 265	462 590	404 191
377	39 739	184 268	499 601	412 194
381	584 746	288 270	577 605	20 197
384	592 752	358 274	606 610	185 201
388	645 764	334 282	38 617	302 205
394	709 770	391 285	77 619	444 207
401	745 780	552 287	123 621	537 219
416	1 792	577 289	171 627	565 222
427	66 800	85 295	197 632	611 225
430	97 804	90 296	231 636	25 229
434	141 809	99 304	243 649	98 234
437	163 813	232 306	250 657	198 236
				217 239

51 Am. Rep.	52 Am. Rep.	53 Am. Rep.	53 Am. Rep.	53 Am. Rep.
243 51 Mo. 508 598	44 Ark. 323 118	57 Vt. 1 460	64 Iowa 531 783	77 Maine 485
251 569 606	349 115	36 483	589 790	54 Mich. 55
254 595 614	423 118	164 465	741 800	132
256 100 618	20 Fla. 558 121	205 468	107 Pa. St. 8 802	134
259 224 625	656 129	252 478	297 806	199
263 272 628	742 132	442 478	287 811	215
266 400 631	843 134	486 478	381 817	249
269 506 634	987 149	21 478	530 822	496
274 518 637	33 Texas 77 154	51 479	590 828	514
277 559 639	166 167	92 496	68 Md. 20 831	583
281 692 642	381 169	253 501	149	
284 710 646	890 173	632 505	158	53 Am. Rep.
288 720 650	407 177	637 510	301 1	33 Minn. 12
293 13 Tex. App. 53 655	458 181	63 513	846 5	40
295 184 661	475 183	255 519	533 9	66
298 174 666	489 186	263 523	1 12	102
303 179 668	492 188	296 523	83 14	130
309 270 676	110 Ill. 18 190	369 526	202 16	136
317 344 678	219 191	565 529	264 20	144
319 444 683	294 193	607 533	395 22	175
323 474 686	333 205	682 539	433 23	198
330 498 691	350 209	772 543	543 31	269
336 1 693	400 211	119 547	621 35	311
340 89 706	627 217	404 553	12 47	323
341 68 715	62 Wis. 112 219	486 554	53 56	430
344 100 718	178 227	622 560	78 59	26 W. Va. 36
344 102 722	207 235	716 567	147 66	90
344 109 725	642 242	138 Mass. 14 571	181 79	432
344 113 732	18 Nev. 49 245	24 579	190 89	447
349 153 737	155 255	45 582	205 94	488
372 222 742	101 Ind. 129 258	55 587	264 113	554
375 249 749	200 259	67 590	285 116	644
382 272 754	426 261	89 599	311 121	787
386 314 759	500 264	165 602	398 139	829
392 366 761	522 271	228 607	444 150	100 N. Y. 81
397 371 768	564 277	375 608	447 152	50
400 388 772	3 Mackey 177 279	387 610	512 157	102
410 398 776	276 284	437 613	522 161	236
413 402 780	360 286	466 616	73 166	287
419 618 788	42 Ohio St. 18 295	65 Cal. 133 620	180 184	328
422 21 791	28 308	434 626	196 194	395
424 91 794	30 305	456 634	374 197	411
429 121 801	41 310	596 637	642 202	417
435 168 809	128 314	76 Ala. 35 640	660 208	426
446 188 814	275 316	183 645	76 221	446
454 394 833	437 319	199 653	188 224	471
463 510 839	468 322	222 657	146 231	539
476 516 842	474 325	251 662	233 236	590
479 582 851	617 332	339 675	399 242	63 Wis. 4
483 578 857	625 334	357 680	443 247	20
489 596	339	388 683	478 253	58
496 106 Pa. St. 95	53 Am. Rep. 344	441 688	485 268	91
505 116	1 99 N. Y. 56 349	492 695	529 267	93
508 125	6	572 698	3 271	100
516 176	9	110 700	63 273	130
519 216	12	215 702	205 279	238
521 221	19	221 705	238 282	284
523 268	23	276 708	304 285	285
526 358	25	444 710	332 292	307
529 460	34	498 715	411 299	513
532 463	41	584 716	426 305	664
534 477	49	558 719	477 310	612
536 531	63	90 728	508 320	12 Or. 22
540 574	67 41 Ohio St. 87 404	126 733	580 323	98
542 626	71	260 739	77 Maine 25 327	124
550 42	74	341 741	28 331	182
560 77	74	548 744	62 342	221
563 307	80	647 747	114 353	271
565 353	84	48 750	151 360	280
572 504	86	220 751	212 364	392
584 529	90	229 759	275 374	481
587 42	94	387 763	297 378	507
589 184	99	425 779	378 383	19 Tex. App. 52
594 301 108	691 449	429 781	423 385	453

53 Am. Rep.	54 Am. Rep.	54 Am. Rep.	55 Am. Rep.	55 Am. Rep.
387 19 Tex. App. 521	747 64 Texas	161 204 112 Ill.	86 550 8 Colo.	176 32 28 S. C.
389	547 758	202 209	91 558	320 44
395	685 754	220 218	123 558	499 53 58 Conn.
402 92 N. C.	72 756	251 222	154 573	26 65 76
410	99 758	274 231	192 576	35 78 102
416	253 764	316 235	242 581	78 78 121
419	437 767	331 238	295 583	84 88 184
423	493 771	371 243	384 588	111 101 221
428	552 775 40 N. J. Eq.	189 251 4 Mackay	19 600	159 105 299
432	536 783	643 256	70 608	173 115 371
436	672 791 18 Neb.	57 258	82 607	198 122 390
442	805 806	180 262	180 610	265 140 407
446 98 N. C.	81 809	215 269	138 616	316 143 415
450	42 814	236 275	285 619	362 149 485
454	73 820	395 278	339 631	415 152 489
458	327 824	593 284	396 634	447 155 536
460	418 827	664 293	489 640	487 169 29
462	442 832 73 Ga.	74 296	180 644	531 177 62
466	493 835	164 298	183 649	616 180 81
469	511 838	217 304	173 653	58 189 109
471	545 840	261 309	227 657	63 192 212
472	585 842	292 312	264 661	123 197 221
474 108 Ind.	1 845	367 316	278 661	126 201 250
482	55 847	517 319	293 664	136 211 289
491	96	332	321 672	146 218 469
495	105	334	526 676	205 222 523
500	121 1 65 Iowa	91 343	548 686	234 230 543
504	196 1	136 348	57 691	245 233 8
509	203 5	224 354	141 696	254 237 57
512	262 7	230 359	173 699	267 240 96
514	288 9	245 361	187 708	277 242 158
519	468 11	417 363	201 709	287 249 334
540	515 16	461 367	218 718	391 253 502
545	509 19	488 372	224 722	520 256 740
550	582 26	505 377	278 730	526 261 63
558 98 Mo.	112 30	593 379	288 737	554 263 205
565	123 36	665 383	428 743	563 270 219
571	210 39	727 386	563 752	25 278 257
576	244 43 77 Ala.	47 398	1 755	52 275 305
581	271 46	63 400	14 759	68 277 417
590	366 50	168 402	125 760	85 279 606
594	560 55	190 404	129 766	217 286 708
598	603 58	194 407	160 769	230 292 32
602 111 Ill.	27 60	357 410	165 770	248 304 285
605	124 65	422 410	209 772	426 315 843
613	167 69	429 415	300 775	439 327 644
616	203 72	448 423	348 775	460 336 681
622	278 78	541 425	465 782	595 346 796
625	291 80	591 427	697 788 48 Ohio St.	38 355 173
628	351 84 84 Mo.	108 434	1 800	58 358 249
634	421 87	112 436	18 802	91 361 263
638	487 91	168 437	18 803	224 373 298
640	532 97	263 442	36 805	270 380 415
643	581 101	304 445	38 813	346 387 465
656 21 S. C.	35 105	679 449	79 819	462 390 629
661	212 109 47 N. J. L.	18 453	102 823	473 392 654
669	226 114	36 456	112 829	537 396 84
677	295 114	59 459	250 832	548 398 63
681	318 117	64 462	261 846	571 402 123
684	335 121	113 465	308 847	59 405 137
688	403 123	137 468	329 870	209 409 186
691	541 125	157 473	351 874	229 414 228
702	590 126	161 483	390 877	286 422 327
706 22 S. C.	108 148	189 485	473 879	400 424 365
711	139 148	192 488	528 883	472 427 390
713	339 157	265 493	532 885	609 434 475
717	367 159	290 507	562	439 441 1
720	372 162	334 511 20 Tex. App.	139 55 Am. Rep.	23 S. C.
724	446 170	349 516	210 1	25 443 37
730	476 175	397 529	387 6	57 445 42
735 84 Texas	7 178	457 530	578 15	238 446 45
739	80 183	479 535	609 20	274 448 102
744	94 190	498 537	1 26	339 453 203
745	121 197	513 544	79 28	526 463 218

55 Am. Rep.	56 Am. Rep.	56 Am. Rep.	56 Am. Rep.	57 Am. Rep.
465 141 Mass.	225 807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
471 231 815	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
474 292 818	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
479 329 821	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
484 432 824	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
487 451 830	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
489 474 832	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
491 495 835	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
492 561 837	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
494 582 839	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
500 57 La. An.	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
504 562 857	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
508 630 860	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
514 648 866	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
517 650 869	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
521 814 871	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
528 968 875	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
531 67 879	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
540 121 883	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
544 177	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
555 347	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
558 368	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
560 410	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
567 46 Ark.	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
571 167	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
576 207	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
577 210	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
580 222	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
584 275	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
589 296	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
594 37 45	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
597 187	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
601 274	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
607 286	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
618 487	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
621 625	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
628 641	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
630 648	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
633 675	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
638 709	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
647 890	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
650 913	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
653 940	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
655 56 Mich.	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
660 41	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
666 124	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
666 156	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
671 182	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
675 213	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
687 367	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
693 381	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
697 385	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
708 487	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
706 452	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
708 574	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
713 649	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
719 106 Ind.	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
723 96	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
724 175	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
727 195	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
734 219	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
736 279	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
742 296	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
746 310	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
753 364	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
756 386	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
762 475	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
764 513	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
769 102 N. Y.	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
771 128	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
782 185	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
787 143	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
798 167	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
796 176	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.
804 219	807 102 N. Y.	266 274 111 Pa. St.	404 567 56 Va.	492 1 13 Or.

57 Am. Rep.	58 Am. Rep.	58 Am. Rep.	59 Am. Rep.	59 Am. Rep.
416 38 Mo. 325	832 20 Neb. 284	259 24 S. C. 278	659 22 Tex. App. 548	184 9 Colo. 11
424 418 835	492 263	489 662	604 144	295
433 498 848	557 268	461 665	21 Fla. 359	146
442 118 Pa. St. 88	620 273	559 667	874 152	482
444 119 852	80 281	14 Or. 82	670 408	156 56 Md. 70
445 126 855	100 296	174 678	413 156	113
446 162 858	118 299	188 676	431 159	149
448 204 862	208 307	243 692	629 159	325
464 242 867	244 815	268 697	669 162	339
469 810 869	294 821	519 708	109 Pa. St. 57	167
471 412 875	399 827	60 715	188 175	419
479 458 876	493 829	62 720	291 186	444
479 490 880	590 838	83 722	296 190	488
488 544	58 Am. Rep. 344	135 726	359 194	59
511 591	352	146 728	422 199	301
516 48 N. J. L. 1	68 357	158 733	432 209	325
534 22 5	135 361	322 738	443 211	328
538 44 8	225 363	362 740	572 216	358
543 55 12	294 369	392 743	583 225	542
548 80 17	466 372	403 747	621 233	35 N. C. 174
552 129 22	7 375	109 Ind. 1	752 175	235
561 390 26	21 382	81 756	344 238	245
566 410 30	81 387	179 758	367 240	309
586 495 35	183 400	278 763	378 242	331
589 18 40	365 405	315 768	476 247	436
598 215 49	419 414	411 775	519 250	484
602 274 53	472 417	457 781	19 263	532
606 577 61	500 425	476 785	33 282	588
609 21 Tex. App. 61	530 435	233 789	80 287	633
612 222 71	573 438	416 796	92 294	693
617 406 82	44 443	516 800	142 297	35 Minn. 63
618 505 85	81 445	520 806	156 303	112
622 611 97	192 447	555 814	184 313	131
623 620 108	208 458	669 821	226 321	146
633 1 111	233 463	787 829	441 326	294
646 113 117	240 465	181 833	471 329	296
659 210 120	650 467	228 839	490 331	425
664 233 126	1 468	316 843	504 333	452
667 601 128	136 472	419 848	46 335	471
695 610 131	210 476	444 848	75 337	481
701 10 135	267 479	471 858	135 340	522
701 47 135	277 480	614 863	174 341	203
701 115 137	295 484	58 866	343 369	250
705 143 138	301 490	108 869	422 374	374
709 211 148	521 494	125 875	495 379	437
717 284 149	592 498	229 877	512 383	524
728 812 155	38 La. An. 1 502	306 881	616 390	534
729 341 158	43 508	344	395	576
741 388 162	111 512	362 59 Am. Rep. 400		632
758 408 168	119 515	394 1 30 Mo. 13	404	169
760 437 171	161 522	434 4	37 416	390
760 453 174	164 530	481 9	177 423	408
766 487 177	185 537	491 13	251 428	417
768 533 181	331 545	32 16	284 432	632
770 578 184	397 556	155 28	377 435	21
778 581 197	485 558	217 31	608 439	206
775 621 201	618 562	533 43 N. J. Eq. 388	443	316
780 17 202	942 568	593 49	403 444	472
783 32 207	15 574	625 52	651 446	481
784 61 210	81 580	79 Ala. 112	53 144 Mass. 1	449
788 118 213	71 585	148 61	88 456	565
790 160 215	157 590	201 65	135 459	642
792 187 218	169 593	377 68	198 461	697
794 200 220	199 596	428 80	229 472	12
796 244 223	269 601	452 83	258 478	89
802 260 227	450 615	465 84	281 483	123
807 268 230	504 620	550 86	341 483	146
810 321 231	562 623	589 95	365 488	171
818 445 234	705 630 22 Tex. App. 36	99	393 492	208
816 482 237	18 633	194 101	440 496	234
818 509 241	150 635	227 102	491 502	263
822 548 245	185 638	279 105	497 506	294
825 20 Neb. 283	228 647	354 113	523 509	404
828 265 253	254 656	529 119	546 516	525

59 Am. Rep.	60 Am. Rep.	60 Am. Rep.	60 Am. Rep.	60 Am. Rep.	60 Am. Rep.				
519 105 N. Y.	601 789	119 Ill.	83 145	81 Ala.	185 416	86 N. C.	387 666	49 N. J. L.	636
529 86 Kan.	78 795		200 152		200 420		358 668		635
537	146 799		329 158		279 423	106 N. Y.	74 673	111 Ind.	59
541	246 807		407 162		320 429		97 677		75
546	253 810		474 171		483 433		136 683		90
550	271 823		554 175		530 437		137 696		195
556	297 830		579 198		577 440		195 701		348
571	350 835	21 Neb.	36 226	91 Mo.	45 443		221 703		462
575	617 838		413 236		138 449		283 709		472
578	628 844		452 239		196 452		293 720		515
584	636 849		559 245		217 456		423 722		578
596	655 852		621 250		228 464		473 731	82 Ala.	42
604	735 859		647 253		399 473		535 733		85
607	760 867		671 262		404 478	25 S. C.	1 736		153
609	769		265		547 481		68 738		334
613	103 80 Am. Rep.		267		622 496		175 743		402
617	872 1	67 Texas	69 270		647 502		288 748		452
623	580 7		89 276	59 Mich.	139 505		348 750		581
632	608 15		160 287		157 512		394 756		512
634	628 20		190 291		185 516		446 761		527
639	732 24		325 301		366 520		481 769		596
645	25 29		331 307		467 527	71 Cal.	159 776	71 Iowa	63
648	44 32		473 315	61 N. H.	9 529		163 780		87
654	188 38		507 317		40 534		197 781		119
666	240 44	64 Minn.	1 320		131 539		375 783		124
669	405 46		77 322		345 543		481 786		226
676	553 47		141 325		428 549	120 Ill.	21 789		270
694	636 49		171 332		611 552		26 795		310
699	108 58		329 334		589 558		121 799		318
702	120 62		483 337		624 568		350 806		410
706	266 67		545 341	114 Pa. St.	82 563		433 814		490
710	273 68		614 346		238 572		469 816		532
731	301 68		631 350		265 575		509 823		735
737	443 70		644 350		353 580		567 827	68 Wis.	16
742	477 76		661 353		405 584	49 N. J. L.	68 831		34
748	494 85	80 Ala.	78 354		422 592		94 838		73
750	490 92		159 360		523 596		115 848		165
753	527 98		190 363		554 602		163 854		271
755	548 99		278 367		643 606		256 858		322
757	581 107		451 370	5 Mackey	113 611		266 858		344
758	585 112		467 373		304 615		292 867		400
761	602 112		489 381		460 619		303 870		416
770 23 Tex. App.	1 119		505 396		534 622		417 873		436
773	357 124		547 401	96 N. C.	64 642		508 876		465
776	386 130		579 404		71 648		540 878		469
777	477 133	81 Ala.	1 408		149 652		548 884		567
793	662 140		123 411		265 656		571		
784 119 Ill.	63 142		153 413		317 661		587		

TABLE OF CASES

Re-reported in the 160 Volumes of

AMERICAN DECISIONS

AND

AMERICAN REPORTS.

The arrangement of cases is as follows: Cases entitled "Appeal of," "Application of," "Case of," "Ex parte," "In matter of," "In re," "Petition of," will be found under the name of the party; "Will of," under name of decedent; "Borough of," "City of," "County of," "Town of," "Village of," are under the name of the county, town, etc. "Dec *en rei*," "Dec *en dem*," etc., appear also under name of real party.

"Bank," "Insurance Co.," and "Railroad Co.," are arranged under the first important word of title, familiar names being in some cases duplicated.

Supplementary words, such as *Executor*, *Administrator*, have been omitted, or the cases arranged without reference to these words. Thus, "Jones' Executor v. Smith," will be found indexed as "Jones v. Smith."

Cases consisting of a single name, as "Brown's Case," "Williams' Petition," "Thompson, Ex parte," etc., precede the cases of the same name in which the names of both parties are given. Thus, "Brown's Case" precedes Brown v. Adams.

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Aaron v. Brodus, 64 Texas, 314.....	53, 764	Abbott v. Reeves, 49 Penn. State, 494.....	lxxxviii, 618
Aaron v. Mendel, 78 Kentucky, 427.....	39, 348	Abbott v. Rose, 63 Maine, 194.....	16, 437
Aaron ada. State, 1 Southard, 231.....	vii, 502	Abbott v. Sebor, 3 Johnson's Ca. 29.....	ii, 139
Abel v. Eton, 9 Martin, 465.....	xiii, 313	Abby v. Billups, 35 Mississippi, 618.....	lxviii, 143
Abbey v. Commercial Bank, 34 Mississippi, 571.....	lxix, 401	Abel v. Radcliff, 13 Johnson, 297.....	vii, 277
Abbey ada. State, 29 Vermont, 60.....	lxvii, 764	Abel v. Alexander, 48 Indiana, 323.....	15, 270
Abbott v. Abbott, 67 Maine, 304.....	34, 37	Abel v. Delaware etc. Co. 103 New York, 561.....	57, 773
Abbott v. Allen, 3 Johns. Ch. 519.....	vii, 554	Abel v. President etc. Co., 103 New York, 561.....	57, 773
Abbott v. Broome, 1 Calnes, 202.....	ii, 187	Abelas v. Cochran, 23 Kansas, 406.....	31, 194
Abbott v. Coburn, 26 Vermont, 653.....	lxviii, 735	Abell v. Coons, 7 California, 106.....	lxviii, 229
Abbott v. Coleman, 23 Kansas, 380.....	31, 126	Abell v. Munson, 18 Michigan, 304.....	c, 195
Abbott v. Commonwealth, 3 Watts, 517.....	xxiv, 492	Abend v. Terre Haute & I. R. R. Co., 111 Ill. 203.....	53, 616
Abbott v. Cottage City, 143 Massachusetts, 521.....	56, 143	Aber v. Clark, 5 Halstead's L. 217.....	lxviii, 417
Abbott v. Cromartie, 72 North Carolina, 252.....	21, 457	Abercrombie v. Butts, 73 Georgia, 74.....	53, 823
Abbott v. Dutton, 44 Vermont, 546.....	8, 394	Abercrombie v. Knox, 3 Alabama, 728.....	xxvii, 721
Abbott v. Gatch, 13 Maryland, 314.....	lxci, 635	Abernashy v. Boasman, 24 Alabama, 199.....	ix, 459
Abbott v. Hutchins, 14 Maine, 380.....	xxxi, 59	Able v. Chandler, 12 Texas, 86.....	lxii, 518
Abbott v. Johnston etc. R. Co., 80 N. Y. 27.....	36, 572	Ables v. Miller, 12 Texas, 108.....	lxii, 526
Abbott v. Kansas etc. R. R. Co., 85 Missouri, 271.....	53, 581	Abney v. Kingland, 10 Alabama, 355.....	xliv, 461
Abbott v. Kimball, 19 Vermont, 551.....	xlvii, 708	Abraham v. Mitchell, 112 Pennsylvania St. 230.....	54, 212
Abbott v. Mills, 3 Vermont, 521.....	xxiii, 222	Abraham v. Plestoro, 3 Wendell, 538.....	xx, 728
Abbott ada. People, 53 California, 284.....	31, 59	Abrahams v. Kidney, 104 Massachusetts, 222.....	6, 289

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Abrahams v. Krautler, 24 Missouri, 69.....lxvi, 696
 Abrahams v. Southwestern R. R. Bk., 1 S. C. 441, 7, 33
 Abrahams ada. State, 8 Iowa, 117.....lxvi, 399
 Abrahams v. Swann, 18 West Virginia, 274.....41, 682
 Abrams v. Foshee, 3 Iowa, 274.....lxvi, 77
 Acer v. Westcott, 46 New York, 264.....7, 335
 Acheson v. Miller, 2 Ohio State, 203.....lx, 663
 Achtenhagen v. City of Watertown, 18 Wis. 251.....lxixvi, 769
 Ackerman v. Hunsicker, 85 New York, 43.....39, 621
 Acklen v. Hickman, 63 Alabama, 494.....35, 54
 Ackley v. Chamberlain, 16 California, 161.....lxixvi, 816
 Ackley v. Parmenter, 86 New York, 426.....56, 693
 Adair v. Adair, 5 Michigan, 204.....lxix, 779
 Adair v. McDaniel, 1 Bailey's Law, 158.....xix, 694
 Adams Ex parte, 25 Mississippi, 563.....lix, 234
 Adams v. Adams, 100 Massachusetts, 265.....1, 111
 Adams v. Adams, 51 New Hampshire, 298.....12, 134
 Adams v. Adams, 20 New Hampshire, 299.....M, 219
 Adams v. Adams, 91 New York, 261.....43, 675
 Adams v. Beadle, 47 Iowa, 439.....29, 487
 Adams v. Bean, 13 Massachusetts, 137.....vii, 44
 Adams v. Betts, 1 Watts, 425.....xxvi, 79
 Adams v. Blankenstein, 2 California, 412.....lvi, 350
 Adams v. Blithen, 66 Maine, 19.....37, 547
 Adams v. Blodgett, 47 New Hamp. 219.....xo, 569
 Adams v. Capron & Co., 21 Maryland, 126.....lxixiii, 595
 Adams v. Clark, 9 Cushing, 215.....lvii, 41
 Adams v. Clem, 41 Georgia, 66.....5, 324
 Adams ada. Commonwealth, 114 Mass. 223.....19, 362
 Adams v. Conover, 67 New York, 422.....41, 381
 Adams v. Cost, 68 Maryland, 264.....56, 211
 Adams v. Cuddy, 13 Pickering, 460.....xxv, 330
 Adams v. Darby, 26 Missouri, 163.....lxix, 115
 Adams v. Dickson, 19 Georgia, 513.....lxv, 608
 Adams v. Dyer, 8 Johnson, 347.....v, 244
 Adams v. Essex, 1 Hibb, 149.....iv, 623
 Adams v. Filer, 7 Wisconsin, 306.....lxixiii, 410
 Adams v. Freeman, 12 Johnson, 406.....vii, 327
 Adams v. Frothingham, 3 Massachusetts, 263.....iii, 151
 Adams v. Gray, 8 Connecticut, 11.....xx, 69
 Adams v. Guerdard, 29 Georgia, 651.....lxixvi, 624
 Adams v. Hackensack I. Co., 15 Vroom, 636.....43, 406
 Adams v. Hackett, 27 New Hampshire, 269.....lix, 376
 Adams v. Hall, 2 Vermont, 9.....xix, 690
 Adams v. Hamell, 2 Douglas, 73.....xiii, 455
 Adams v. Hannibal etc. R. R. Co., 74 Mo. 553.....41, 333
 Adams v. Haskell, 6 California, 113.....lxv, 491
 Adams v. Haskell, 6 California, 516.....lxv, 517
 Adams v. Hastings, 6 California, 126.....lxv, 496
 Adams v. Holcombe, 1 Harper's Eq. 202.....xiv, 719
 Adams v. Homoyer, 45 Missouri, 545.....c, 361
 Adams v. Howe, 14 Massachusetts, 240.....vii, 216
 Adams v. Hudson County Bank, 2 Stockton's Ch. 536.....lxixv, 469
 Adams v. Jeffries, 12 Ohio, 263.....xi, 477
 Adams v. Kable, 6 E. Monroe, 264.....xliv, 773
 Adams v. Kellogg, Kirby, 106.....1, 18
 Adams v. King, 16 Illinois, 169.....lxii, 64
 Adams v. Lawson, 17 Grattan, 260.....xlv, 686
 Adams v. Leher, 3 Blackford, 241.....xxv, 102
 Adams v. Marshall, 126 Massachusetts, 226.....52, 271
 Adams v. McKesson, 63 Penn. St. 61.....xvi, 183
 Adams v. Michael, 38 Maryland, 123.....17, 516
 Adams v. Morrison, 4 New Hampshire, 196.....xvii, 406
 Adams v. Nichols, 19 Pickering, 275.....lxixi, 137
 Adams v. O'Connor, 100 Massachusetts, 515.....1, 137
 Adams v. Park Fire Ins. Co., 12 Allen, 261.....xo, 151
 Adams v. Pearson, 7 Pickering, 341.....xix, 290
 Adams ada. People, 3 Denio, 170.....xiv, 463
 Adams v. People, 109 Illinois, 444.....56, 617
 Adams v. Pittsburgh I. Co., 25 Penn. Stat. 348.....46, 662
 Adams v. Reeves, 68 North Carolina, 124.....17, 627
 Adams v. Ross, 1 Vroom, 506.....lxixii, 237
 Adams v. Rowe, 11 Maine, 89.....xxv, 266
 Adams v. Seales, 1 Bart. 337.....25, 773
 Adams ada. State, 45 Iowa, 99.....24, 769
 Adams v. Suffolk F. Ins. Co., 12 Allen, 251.....xc, 151
 Adams v. Thornton, 78 Alabama, 489.....56, 49
 Adams v. Waggoner, 33 Indiana, 631.....5, 230
 Adams v. Walker, 24 Connecticut, 466.....xvi, 742
 Adams v. Wiggins Ferry Co., 27 Missouri, 96.....lxixii, 247
 Adams v. Wilson, 12 Metcalf, 136.....xiv, 240
 Adams v. Wisconsin Bank, 1 Greenleaf, 261.....x, 58
 Adams v. Woods, 8 California, 153.....lxviii, 313
 Adams v. Young, 44 Ohio State, 80.....58, 789
 Adams Express v. Egbert, 36 Penn. St. 360.....lxixviii, 362
 Adams Express Co. v. Darnell, 31 Indiana, 20.....xcix, 593
 Adams Express Co. v. Nock, 2 Duval, 562.....lxixvii, 510
 Adams Express Co. v. Stettaners, 61 Illinois, 184.14, 57
 Adams Express Co. v. Reagan, 29 Indiana, 21.....xvi, 332
 Adamson v. Smith, 2 Mill, 269.....xii, 665
 Adley v. Echols, 18 Alabama, 263.....28, 226
 Adden v. White Mountains R. R. Co., 55 New Hampshire, 413.....29, 220
 Addington v. Benton, 17 Wisconsin, 257.....lxixiv, 748
 Addington ada. State, 2 Bailey, 616.....lxixii, 159
 Addington v. Wilson, 8 Indiana, 137.....lxii, 81
 Addison v. Hack, 2 Gill, 221.....xii, 421
 Addy ada. State, 14 Vroom, 113.....29, 547
 Adkins v. Brewer, 3 Cowen, 206.....xv, 264
 Adkins v. Columbia I. Ins. Co., 70 Missouri, 27.....25, 419
 Adkinson v. State, 5 Bart. 662.....29, 69
 Adler v. State, 25 Arkansas, 817.....37, 48
 Adlum v. Yard, 1 Rawle, 163.....lxviii, 606
 Adriance v. Lagrave, 69 New York, 219.....17, 217
 Adair v. Adair, 2 Johns. Ch. 446.....vii, 539
 Adair v. Brady, 4 Hill (N. Y.), 630.....xi, 305
 Adye v. Hanna, 47 Iowa, 264.....29, 494
 Adye v. Smith, 44 Connecticut, 60.....29, 424
 Aetna Fire Ins. Co. v. Tyler, 16 Wendell, 265.....xxx, 90
 Aetna I. Co. v. Alton City Bank, 25 Ill. 242.....lxixi, 336
 Aetna Ins. Co. v. Johnson, 11 Bush, 557.....21, 223
 Aetna Ins. Co. v. Neesen, 84 Indiana, 267.....43, 91
 Aetna Insurance Co. v. Phelps, 27 Ill. 71.....lxixi, 217
 Aetna Ins. Co. v. Reah, 44 Michigan, 66.....28, 226
 Aetna Insurance Co. v. Stivers, 47 Illinois, 66.....xv, 467
 Aetna Live Stock v. Olmstead, 21 Michigan, 246.....4, 463
 Aetna Nat. Bank v. Fourth Nat. Bk., 46 N. Y. 62, 7, 314
 Agnew v. Charlotte, etc. R. R. Co., 24 S. C. 12.....58, 237
 Agnew v. Corunna, 55 Michigan, 426.....54, 582
 Agnew v. Dorr, 5 Wharton, 131.....lxixiv, 539
 Agnew v. Fetterman, 4 Penn. State, 66.....xiv, 671
 Agnew v. Johnson, 17 Penn. State, 273.....lv, 565
 Agnew v. Johnson, 23 Penn. State, 471.....lxix, 303
 Agnew v. McElroy, 10 Smodes & M. 562.....lxixii, 773
 Agnew v. Steamer Contra Costa, 27 Cal. 468.....lxixvii, 87
 Agricultural Bank v. Fallon, 8 Smodes & M. 267.....xixv, 62
 Agricultural Bank v. Robinson, 24 Maine, 274.....xi, 289
 Agricultural Ins. Co. v. Montague, 26 Mich. 548.....31, 226
 Aguirre v. Packard, 14 California, 171.....lxixii, 645
 Ah Chew ada. State, 16 Nevada, 59.....49, 463
 Ah Cheuy ada. State, 14 Nevada, 79.....23, 529
 Ah Ngow ada. People, 54 California, 121.....25, 69
 Ahrend v. Odiorne, 118 Massachusetts, 261.....19, 449
 Ahrend v. Odiorne, 125 Massachusetts, 69.....23, 199
 Ah Sam ada. State, 15 Nevada, 27.....37, 454
 Aicardi v. Robbins, 41 Alabama, 541.....xlv, 614
 Aiken v. Barkley, 2 Speer's Law, 747.....xii, 327
 Aiken v. Cathcart, 3 Richardson's Law, 123.....xiv, 764
 Aiken v. Peay, 5 Strobhart's Law, 14.....28, 694

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Aiken v. Western Union Tel. Co., 69 Iowa, 31.....	210	Alexander v. Kerr, 2 Rawle, 83.....	xix, 618
Ainsworth v. Greenlee, 3 Murphy, 470.....	lx, 615	Alexander v. Lively, 5 T. B. Monroe, 189.....	xvii, 59
Ainslie v. Wilson, 7 Cowen, 663.....	xvii, 533	Alexander v. Mayor, etc., 5 Gill, 383.....	xvii, 630
Ake v. State, 6 Tex. Ct. App. 398.....	39, 586	Alexander v. Miller's Executors, 18 Texas, 863.....	lxx, 514
Akerly v. Vilas, 24 Wisconsin, 163.....	1, 166	Alexander v. Morse, 14 Rhode Island, 153.....	51, 369
Akerly v. Vilas, 23 Wisconsin, 207.....	xcix, 165	Alexander sda. State, 76 North Carolina, 231.....	32, 678
Akers v. Akers, 16 Lea, 7.....	57, 207	Alexander v. State, 21 Tex. Ct. App., 406.....	57, 617
Akers v. Hite, 94 Penn. State, 394.....	39, 792	Alexander v. Swackhamer, 105 Indiana, 81.....	55, 180
Akron v. Chamberlain Co., 34 Ohio State, 338.....	32, 367	Alexander v. Walter, 8 Gill, 239.....	1, 698
Akron v. McComb, 18 Ohio, 229.....	11, 453	Alexander's Heirs v. Maverick, 18 Texas, 179.....	lxvii, 693
Alabama, Ex parte, 62 Alabama, 231.....	23, 567	Alexandria & F. R. Co. v. Alex. & W. R. Co. 75	
Alabama C. I. Ins. Co. v. Johnston, 80 Ala. 467.....	60, 112	Virginia, 780.....	40, 748
Alabama G. S. R. R. Co. v. Hawk, 73 Ala. 112.....	47, 403	Alexandria Overseers v. Overseers Bethlehem, 1	
Alabama State Bk v. Omega, 17 Ala. 772.....	xlvi, 378	Harr. (16 N. J.) 119.....	xxxi, 229
Albany and V. R. R. Co. sda. People, 24 New		Alexandria W. & K. F. Co. v. Wisch, 73 Mo. 655.39, 538	
York, 261.....	xxvii, 296	Alfale v. Wright, 17 Ohio St. 238.....	xxvii, 615
Albany City Bk v. Schermerhorn, 9 Paige, 373.....	xxviii, 551	Alford v. Burke, 21 Georgia, 46.....	lxviii, 449
Albany Street, Master of, 11 Wendell, 142.....	xxv, 618	Alford v. State, 33 Georgia, 203.....	lxxxi, 209
Albee sda. State, 61 New Hampshire, 423.....	60, 325	Alger v. Kennedy, 49 Vermont, 109.....	34, 117
Albers v. Commercial Bk, 85 Missouri, 173.....	55, 365	Alger v. Thacher, 19 Pickering, 51.....	xxxi, 119
Albert v. Albert, 5 Mont. 577.....	51, 86	Alken v. Bolan, 1 Breward, 239.....	11, 699
Albert v. State, 66 Maryland, 335.....	59, 159	Allain v. Lazarus, 14 Louisiana, 327.....	xxviii, 563
Albertson, Douglas & Co. v. Goldsby, 23 Ala. 711.....	lxv, 380	Allaire v. Hartshorne, 1 Zabriskie, 663.....	lxvii, 178
Albion v. Hetrick, 90 Indiana, 545.....	46, 230	Alleghany County v. Cleveland & P. R. R. Co.,	
Albin v. Presby, 8 New Hampshire, 408.....	xxix, 679	51 Penn. State, 238.....	lxxviii, 699
Albrecht v. State, 8 Tex. Ct. App. 216.....	34, 737	Alleghany Co. v. Gibson, 90 Penn. St. 397.....	35, 679
Albright v. Lapp, 26 Penn. State, 99.....	lxvii, 402	Allegheny v. Campbell, 107 Penn. St. 533.....	52, 478
Albrittin v. Mayor etc., 60 Alabama, 486.....	31, 46	Allegheny Co. v. Zimmerman, 86 Penn. St. 367.....	40, 649
Albro sda. Commonwealth, 1 Gray, 1.....	lxi, 381	Allegre v. Md. Ins. Co., 6 Harris & J. 408.....	xiv, 289
Albro v. Jaquith, 4 Gray, 99.....	lxiv, 56	Allegre v. Md. Ins. Co., 2 Gill & J. 138.....	xx, 424
Alcott v. Lakin, 23 New Hampshire, 507.....	lxvi, 739	Allegre v. Md. Ins. Co., 8 Gill & J. 190.....	xxix, 436
Alden v. Carver, 13 Iowa, 253.....	lxxxi, 430	Alleman v. Stepp, 53 Iowa, 696.....	35, 298
Alden v. N. Y. Cent. R. R. Co., 26 N. Y. 102.....	lxxvii, 401	Allemania F. Ins. Co. v. Hurd, 37 Michigan, 11.....	26, 491
Alderman v. Finley, 10 Arkansas, 423.....	111, 244	Allen's Appeal, 99 Pennsylvania State, 196.....	44, 101
Alderman v. French, 1 Pickering, 1.....	xi, 114	Allen v. Allen, 6 Robinson (La.), 104.....	xxix, 553
Alderman v. People, 4 Michigan, 414.....	lxix, 321	Allen v. Allen, 13 South Carolina, 512.....	34, 716
Aldrich v. Albee, 1 Greenleaf, 120.....	x, 45	Allen v. Anderson, 3 Humphreys, 581.....	xxix, 197
Aldrich v. Aldrich, 56 Vermont, 334.....	48, 791	Allen v. Baker, 86 North Carolina, 91.....	41, 444
Aldrich v. Bennett, 63 New Hampshire, 415.....	50, 829	Allen v. Beal, 3 A. K. Marshall, 554.....	lxii, 208
Aldrich v. Boston & W. R. R. Co., 100 Mass. 21.....	1, 76	Allen v. Berryhill, 27 Iowa, 534.....	1, 308
Aldrich v. Boston etc. R. R. Co., 100 Mass. 21.....	lxvii, 74	Allen v. Booker, 2 Stewart, 21.....	xix, 23
Aldrich v. Cheshire R. R. Co., 21 New Hamp. 359.111, 213		Allen v. Bradford, 3 Alabama, 281.....	xxvii, 699
Aldrich v. Drury, 8 Rhode Island, 554.....	5, 624	Allen v. Bryson, 67 Iowa, 591.....	56, 368
Aldrich v. Harvey, 50 Vermont, 162.....	28, 501	Allen v. Camp, 1 T. B. Monroe, 231.....	xv, 109
Aldrich v. Howard, 7 Rhode Island, 87.....	lxxx, 636	Allen v. Center Val. Co., 21 Connecticut, 130.....	lv, 333
Aldrich v. Howard, 8 Rhode Island, 125.....	lxxvii, 615	Allen v. Chippewa Falls, 59 Wisconsin, 430.....	33, 748
Aldrich v. Jewell, 12 Vermont, 125.....	lxxvi, 330	Allen v. Cole, 1 Stockton's Ch. 236.....	lxix, 416
Aldrich v. Kinney, 4 Connecticut, 380.....	x, 151	Allen v. Cowan, 23 New York, 502.....	lxxx, 216
Aldrich v. Nimmons, 2 Richardson's Eq. 291.....	xvi, 53	Allen v. Clayton, 63 Iowa, 11.....	56, 716
Aldrich v. Press Printing Co., 9 Minn. 123.....	lxxvii, 84	Allen v. Collins, 70 Missouri, 138.....	35, 416
Aldrich v. Smith, 37 Michigan, 468.....	26, 636	Allen sda. Commonwealth, 128 Mass. 46.....	35, 368
Aldrich v. Tripp, 11 Rhode Island, 141.....	23, 434	Allen v. Craft, 109 Indiana, 478.....	58, 428
Aldrich v. Wallace, 8 Dana, 287.....	xxviii, 496	Allen v. Cray, 10 Wendell, 349.....	xxv, 596
Aldrich v. Wright, 53 New Hampshire, 308.....	16, 339	Allen v. Orofoot, 2 Wendell, 615.....	xx, 647
Aldridge v. Birney, 7 T. B. Monroe, 344.....	lxviii, 183	Allen v. Decatur City of, 23 Illinois, 323.....	lxxvi, 692
Aldridge v. Dunn, 7 Blackford, 249.....	lxii, 294	Allen v. Delano, 55 Maine, 113.....	xvii, 573
Aldridge v. Tuscombia R. Co., 2 Stew. & P. 199.....	xxiii, 307	Allen v. Deming, 14 New Hampshire, 123.....	xi, 179
Aldridge v. Weeks, 2 Gill & J. 36.....	xix, 250	Allen v. Dodd, 4 Humphreys, 151.....	lx, 632
Alexander, Petition of, 59 Missouri, 506.....	21, 263	Allen v. Duffie, 43 Michigan, 1.....	38, 189
Alexander v. Adams, 1 Strobhart's Law, 47.....	lxvii, 547	Allen v. Dunn, 15 Maine, 292.....	xxviii, 614
Alexander v. Berensford, 27 Mississippi, 747.....	lxii, 538	Allen v. Fox, 51 New York, 562.....	10, 641
Alexander v. Dennis, 9 Porter, 174.....	lxxviii, 309	Allen v. Furbish, 4 Gray, 504.....	lxiv, 67
Alexander v. Dorsey, 12 Georgia, 12.....	lv, 443	Allen v. Gault, 27 Penn. State, 473.....	lxvii, 488
Alexander v. Continental Ins. Co., 67 Wis. 423.....	56, 869	Allen v. Hall, 3 Nutt & McCord, 114.....	x, 578
Alexander v. Fox, 2 Jones' Equity, 106.....	lxii, 211	Allen v. Harlan, 6 Leigh, 42.....	xxix, 206
Alexander v. Germania F. Ins. Co., 66 N. Y. 464.23, 76		Allen v. Hawley, 6 Florida, 142.....	lxviii, 196
Alexander v. Greenup, 1 Munford, 134.....	lv, 541	Allen v. Holden, 9 Massachusetts, 153.....	vi, 46
Alexander v. Harrison, 26 Missouri, 258.....	xc, 431	Allen v. Huntington, 2 Atkins, 249.....	xvi, 702
Alexander v. Hickox, 24 Missouri, 496.....	lxxvii, 118	Allen v. Inhabitants of Jay, 60 Maine, 124.....	11, 128
Alexander v. Kennedy, 19 Texas, 498.....	lxx, 368	Allen v. Jay, 60 Maine, 124.....	11, 128

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [89] to American Reports.

Allen v. Lee, 1 Ind. 58; S. C., Smith, 12.....xiviii, 232	Altow v. Shiley, 30 Minnesota, 186.....44, 191
Allen v. Macdellan, 12 Penn. State, 338.....ii, 608	Alton, City of, v. Illinois Tr. Co., 12 Illinois, 38.....iii, 479
Allen v. Marney, 65 Indiana, 398.....33, 73	Alton R. R. v. Delta, 80 Illinois, 210.....xxix, 509
Allen v. Martin, 10 Wendell, 300.....xxv, 564	Altos v. Lots, 114 Pennsylvania State, 338.....60, 346
Allen v. McCalla, 25 Iowa, 464.....xxvi, 56	Alvarez v. Brannan, 7 California, 803.....lxviii, 274
Allen v. McCullough, 2 Hialek, 174.....5, 27	Alverson v. Jones & Bogardus, 10 California, 9.....lxx, 609
Allen v. Mercantile Mut. Ins. Co., 44 N. Y. 437... 4, 700	Alvis v. Morrison, 63 Illinois, 181.....14, 117
Allen v. Merchants' Bk., 22 Wendell, 215.....xxiv, 269	Amazon Ins. Co. v. Wall, 31 Ohio State, 638.....27, 539
Allen v. Merchants' Mut. Ins. Co., 30 Louisiana	Amble v. State Bank, 13 Rich. L. 518.....lxviii, 468
An. 1886.....31, 243	Ambrase v. Root, 11 Illinois, 497.....ii, 484
Allen v. Patterson, 7 N. Y. (3 Selden), 476.....lvii, 542	American Asylum v. Phoenix Bank, 4 Conn. 172.....x, 113
Allen v. Ransom, 44 Missouri, 263.....c, 283	American Bank v. Snow, 9 Rhode Island, 11.....xviii, 304
Allen v. Rightmire, 20 Johnson, 365.....xi, 288	American Bible Soc'y v. Wells, 68 Maine, 872.....28, 80
Allen v. Randle, 80 Connecticut, 9.....47, 599	American Central Ins. Co. v. McCrea, 8 La., 513.41, 647
Allen v. Sayward, 5 Greenleaf, 227.....xvii, 221	American Contract Co. v. Cross, 8 Bush, 473.....8, 471
Allen v. Scott, 21 Pickering, 25.....xxiii, 238	American Express Co. v. Baldwin, 26 Ill. 504.....lxix, 393
Allen v. Scurry, 1 Yeager, 36.....xxiv, 436	American Express Co. v. Haggard, 37 Ill. 468.lxxxvii, 287
Allen v. Sharpe, 37 Indiana, 67.....16, 80	American Express Co. v. Haire, 21 Ind. 4.....lxixiii, 334
Allen v. Shelby Railroad Co., 16 B. Monroe, 4.....lxiii, 623	American Express Co. v. Hookett, 30 Ind. 260.....xv, 681
Allen v. State, 40 Alabama, 234.....xci, 476	American Ex. Co. v. Second Nat. Bank, 60 Penn-
Allen ada. State ex rel. Cornwell, 21 Ind. 516.lxxxiii, 367	sylvania State, 394.....3, 269
Allen v. State, 21 Georgia, 217.....lxviii, 457	American Ex. Co. v. Smith, 23 Ohio State, 511.....31, 361
Allen v. State, 28 Georgia, 396.....lxixii, 780	American Ins. Co. v. Barnett, 73 Missouri, 364.....39, 517
Allen ada. State, 1 Hawin, 6.....ix, 616	American Ins. Co. v. Bryan, 26 Wendell, 563.lxxxvii, 278
Allen v. State, 61 Ind. 268.....28, 673	American Ins. Co. v. Day, 10 Vroom, 89.....23, 126
Allen ada. State, 1 McCord, 526.....x, 687	American Ins. Co. v. Foster, 22 Illinois, 334.....34, 134
Allen v. Suydam, 20 Wendell, 321.....xxxi, 555	American Ins. Co. v. Insley, 7 Penn. State, 223.xlvii, 509
Allen v. Taylor, 3 Green Ch. 433.....xxix, 721	American Ins. Co. v. Oakley, 9 Paige, 494.....xxxviii, 561
Allen v. Thomas, 3 Met. (Ky.) 196.....lxvii, 169	American National Bank v. Bangs, 43 Mo. 480.xviii, 369
Allen v. Thompson, 11 Humphreys, 636.....lv, 45	American Print Works v. Lawrence, 3 Zab. 260.....lvii, 439
Allen v. Trimble, 4 Bibb, 21.....vii, 726	American R. F. Co. v. Haven, 101 Mass. 398.....3, 377
Allen v. Vanderve, 15 B. Monroe, 236.....lxi, 184	American R. Tel. Co. v. Connecticut Tel. Co., 49
Allen v. Wells, 22 Pickering, 450.....xxiii, 757	Connecticut, 323.....44, 337
Allen v. Woodard, 125 Massachusetts, 400.....28, 250	American S. Co. v. Landreth, 103 Penn. St. 131.....48, 196
Alia. v. Wyckoff, 48 New Jersey Law, 90.....57, 548	American S. Co. v. Young, 89 Penn. State, 126.....33, 748
Allen v. Young, 6 T. B. Monroe, 136.....xviii, 130	American T. Soc'y v. Atwater, 30 Ohio St. 77.....27, 423
Allen, Adams & Co. v. Harrison, 30 Va. 219.....lxixii, 303	American U. Ex. Co. v. St. Joseph, 66 Mo. 673.....27, 323
Allender v. Susan, 33 Maryland, 11.....3, 171	American U. Tel. Co. v. Western U. Tel. Co., 67
Allers v. Forbes, 69 Maryland, 374.....43, 557	Alabama, 26.....42, 80
Alley v. Carleton, 29 Texas, 74.....xxiv, 260	America, Mayor etc. of, 64 Georgia, 524.....37, 89
Alley v. Winn, 134 Massachusetts, 77.....45, 297	Ames v. Colburn, 11 Gray, 350.....lxix, 723
Allice M. Ins. Co. v. La. St. Ins. Co., 8 La. 1.xviii, 117	Ames v. Foster, 106 Massachusetts, 400.....3, 343
Allin v. Shadburne's Ex'r, 1 Dana, 69.....xxv, 121	Ames v. Jordan, 71 Maine, 540.....20, 328
Alling v. Boston & A. R. Co., 126 Mass. 121.....36, 667	Ames v. Martin, 6 Wisconsin, 321.....lxx, 468
Allis v. Billings, 6 Metcalf, 415.....xxxix, 744	Ames v. N. J. Franklins Co., 1 Beasley's Ch. .06 lxixii, 325
Allison v. Allison, 46 Illinois, 61.....xcii, 237	Ames v. Norman, 4 Sneed, 663.....lxx, 269
Allison v. Armstrong, 23 Minnesota, 376.....41, 261	Ames v. Palmer, 42 Maine, 197.....lxvi, 271
Allison v. Barrow, 3 Cold. 414.....xci, 291	Ames ada. People, 35 New York, 452.....xci, 64
Allison v. McCune, 15 Ohio, 736.....xiv, 605	Ames v. Port Huron L. D. B. Co., 11 Mich. 129.....lxixiii, 731
Allison v. Rheam, 3 Serg. & R. 137.....viii, 644	Ames v. Union E'y Co., 117 Massachusetts, 541.....19, 439
Allison v. Shilling, 27 Texas, 450.....lxxxvi, 623	Ames Iron Works v. Warren, 76 Indiana, 612.....40, 230
Allison v. Taylor, 6 Dana, 87.....xxvii, 68	Amherst Academy v. Cowie, 6 Pick. 427.....xvii, 387
Allisons v. Noble, 1 Littel, 379.....xiii, 230	Amick v. Butler, 111 Indiana, 678.....60, 729
Allmon v. Pigg, 83 Illinois, 149.....25, 303	Amick v. Sharp, 13 Cretan, 564.....lxvii, 717
Alfred v. Bray, 41 Missouri, 484.....xxvii, 283	Amidown v. Osgood, 24 Vermont, 378.....lxviii, 171
Allhouse v. Ramsey, 6 Wharton, 331.....xxxvii, 417	Amidown v. Freeland, 101 Massachusetts, 303... 3, 269
Almond v. Almond, 4 Randolph, 663.....xv, 781	Amis v. Kyle, 2 Yeager, 31.....xxiv, 462
Almond v. Nugent, 34 Iowa, 300.....11, 147	Amman v. Turnpike Road, 13 Serg. & R. 210.....xv, 593
Almy v. Grinnell, 12 Metcalf, 53.....xiv, 238	Amory v. Flynn, 10 Johnson, 103.....vi, 316
Alonzo v. State, 15 Texas Ct. App. 378.....49, 207	Amory v. Kamnoffsky, 117 Massachusetts, 351.....19, 416
Alred v. Montague, 26 Texas, 732.....lxxxiv, 803	Amory v. McGregor, 15 Johnson, 23.....lxviii, 206
Alsberry v. Hawkins, 9 Dana, 177.....xxxiii, 546	Amoskeag Bank v. Moore, 37 New Hamp. 539... lxxxv, 156
Alsop v. Mather, 8 Connecticut, 584.....xci, 703	Amstein v. Gardner, 132 Massachusetts, 26.....43, 621
Alston v. Durand, 2 Strobhart's Law, 257.....xlx, 696	Anacosta Tribe, v. Murbach, 13 Md. 91.....lxix, 626
Altamas v. Campbell, 9 Watta, 28.....lxxxiv, 494	Anders v. Meredith, 4 Dev. & Bst. Law, 190.....lxxxiv, 376
Altamas v. Long, 4 Penn. State, 254.....xiv, 698	Anderson v. State, 43 Connecticut, 514.....21, 999
Alter's Appeal, 67 Pennsylvania State, 341.....5, 433	Anderson v. Anderson, 66 Georgia, 101.....28, 797
Altes v. Hinkler, 33 Illinois, 265.....lxxxv, 406	Anderson v. Anderson, 4 Greenleaf, 518.....xvi, 237
Altes v. Hinkler and Abbott, 26 Illinois, 275.....lxxxv, 407	Anderson v. Anderson's Estate, 4 Vermont, 380.. 1, 384
Althof v. Coehelst, 33 California, 230.....xxix, 363	Anderson v. Baughman, 7 Michigan, 69.....lxxxiv, 696

Roman letters (xlix) refer to volumes of American Decisions, and Arabic figures (48) to American Reports.

- Anderson v. Balcher, 1 Hill's L. (S. C.), 268.....xxvi, 174
 Anderson v. Burnett, 5 Howard (Miss.), 168.....xxv, 428
 Anderson v. Caldwell, 51 Indiana, 451.....46, 413
 Anderson v. Cary, 26 Ohio State, 805.....33, 602
 Anderson v. Commonwealth, 5 Randolph, 637.....xvi, 776
 Anderson v. Critcher, 11 Gill & J. 450.....xxvii, 73
 Anderson v. Davis, 9 Vermont, 136.....xxxi, 612
 Anderson v. Drake, 14 Johnson, 114.....viii, 443
 Anderson v. Estate of Anderson, 4 Vermont, 260. 1, 334
 Anderson v. Fuller, 1 McMullan's Eq. 27.....xxvii, 230
 Anderson v. Green, 7 J. J. Marshall, 446.....xxiii, 417
 Anderson v. Hammond, 3 Lea, 231.....31, 612
 Anderson v. Hagler, 34 Illinois, 436.....lxxxv, 313
 Anderson v. Hill, 12 Smedes & M. 679.....11, 130
 Anderson v. Hubble, 33 Indiana, 570.....47, 394
 Anderson v. Jackson, 15 Johnson, 323.....viii, 330
 Anderson v. Kears D. Co., 14 Indiana, 199.....lxxvii, 63
 Anderson v. Newcastle & E. R. Co., 13 Ind. 376.lxxiv, 218
 Anderson v. Norton, 13 Lea, 14.....54, 400
 Anderson v. Pearce, 26 Arkansas, 293.....38, 39
 Anderson ada. People, 14 Johnson, 294.....vii, 423
 Anderson v. Read, 3 Overton, 205.....v, 661
 Anderson v. Roberts, 13 Johnson, 513.....ix, 235
 Anderson v. Soward, 40 Ohio S. state, 235.....48, 687
 Anderson v. Spence, 73 Indiana, 315.....37, 163
 Anderson v. State, 48 Alabama, 668.....17, 36
 Anderson v. State, 43 Connecticut, 514.....31, 663
 Anderson v. Taylor, 56 California, 131.....58, 32
 Anderson ada. State, Conn, 315.....1, 307
 Anderson v. State, 3 Head, 435.....lxxv, 774
 Anderson ada. State, 25 Minnesota, 65.....33, 455
 Anderson ada. State, 3 Overton, 6.....v, 642
 Anderson v. Taylor, 3 Ireland's Eq. 420.....xxviii, 639
 Anderson v. Tydings, 6 Maryland, 437.....lxiii, 708
 Anderson v. Warner, 5 Howard (Miss.), 587.....xxviii, 170
 Anderson v. Warner, 71 Illinois, 20.....22, 83
 Anderson v. Whitlock, 3 Bush, 368.....xvii, 429
 Anding v. Davis, 26 Miss. 574.....lxxvii, 638
 Anding v. Levy, 87 Mississippi, 51.....34, 435
 Andover & M. T. Co. v. Gould, 6 Massachusetts, 40.iv, 80
 Andrus v. Haseltine, 35 Wisconsin, 265.....46, 635
 Andrus v. Bodman, 13 Maryland, 241.....lxix, 623
 Andrus v. State, 5 Iowa, 260.....lxxviii, 706
 Andrus v. Koppenshafer, 3 Serg. & R. 265.....viii, 647
 Andrus v. Wallis, 7 Johnson, 299.....v, 267
 Andrews v. Avery, 14 Grattan, 229.....lxviii, 353
 Andrews v. Bagg, Minor, 173.....xii, 47
 Andrews v. Brown, 21 Alabama, 437.....lvi, 253
 Andrews v. Capitol etc. R. Co., 3 Mackay, 137.....47, 236
 Andrews ada. Commonwealth, 2 Mass. 14.....xi, 17
 Andrews v. Cox, 42 Arkansas, 473.....48, 68
 Andrews v. Davison, 17 New Hampshire, 413.....xlili, 606
 Andrews v. Denison, 16 New Hampshire, 469.....xlili, 565
 Andrews v. Doe ex dem. Wilkes, 6 Howard (Miss.)
 554.....xxviii, 430
 Andrews v. Durant, 11 N. Y. (1 Kernan) 35.....lxii, 55
 Andrews v. Eastman, 41 Vermont, 134.....xviii, 570
 Andrews v. Estes, 11 Maine, 267.....xxvi, 631
 Andrews v. German Nat. Bank, 9 Halek. 211.....24, 300
 Andrews v. Kibbee, 13 Michigan, 94.....lxxviii, 786
 Andrews v. McCoy, 3 Alabama, 620.....xlvi, 669
 Andrews v. Mich. Cen. R. R. Co., 25 Mass. 334, xvii, 51
 Andrews v. Montgomery, 19 Johnson, 163.....x, 213
 Andrews v. Morris, 13 Connecticut, 444.....xxxi, 723
 Andrews v. Planters' Bank, 7 Smedes & M. 123.....xiv, 300
 Andrews v. Bosch, 3 Alabama, 690.....lxxxvi, 718
 Andrews ada. State, 29 Connecticut, 100.....lxxvi, 593
 Andrews v. State, 3 Halek, 165.....8, 8
 Andrews v. Sullivan, 3 Gilman, 327.....xlili, 53
 Andrus v. Coleman, 22 Illinois, 26.....23, 239
 Andrus v. Howard, 26 Vermont, 246.....lxxxiv, 699
 Angel v. McLellan, 16 Mass. 28.....viii, 118
 Angel v. Hartford Fire Ins. Co., 69 N. Y. 171.....17, 322
 Angel v. Johnson, 51 Iowa, 625.....33, 123
 Angel v. State, 26 Texas, 542.....14, 260
 Angelo v. People, 26 Illinois, 209.....36, 123
 Angler v. Agnew, 26 Pennsylvania State, 587.....43, 624
 Angler v. Schleffelin, 73 Pennsylvania St. 105.....13, 639
 Angler v. Taunton Paper Mfg. Co., 1 Gray, 621.....lx, 436
 Angler v. Webber, 14 Allen, 211.....xvii, 748
 Angle v. Hanna, 23 Illinois, 429.....lxxxiv, 161
 Angus v. Radin, 2 Southard, 515.....viii, 626
 Angus v. Robinson, 59 Vermont, 585.....59, 738
 Ankeny v. Pierce, Breese, 269.....xii, 174
 Ankstet v. Converse, 17 Ohio St. 11.....xvi, 118
 Annan v. Howek, 4 Gill, 335.....xiv, 129
 Annapolis etc. R. R. Co. v. Baldwin, 40 Md. 98.....45, 711
 Annapolis etc. R. R. Co. v. Baltimore F. Ins.
 Co. 22 Maryland, 37.....2, 119
 Annes v. Milwaukee & N. E. Co., 67 Wis. 46.....58, 649
 Anne Arundel County v. Duckett, 20 Md. 468.lxxviii, 687
 Anne Arundel Co. Commn. v. Duvall, 24 Mary-
 land, 260.....39, 268
 Annville Nat. Bk. v. Kettering, 106 Pennsylvania
 State, 531.....51, 396
 Anonymous, 24 Alabama, 430.....lxxviii, 461
 Anonymous, Minor, 82.....xii, 31
 Anonymous, 60 New York, 262.....19, 174
 Anslay v. Baker, 14 Texas, 607.....lxv, 126
 Anslay v. State, 26 Arkansas, 27.....38, 39
 Anson v. Anson, 29 Iowa, 55.....lxxxix, 514
 Ansonia R. & C. Co. v. New L. C. Co., 68 N. Y. 123.13, 478
 Anthony v. Estabrook, 1 Colorado, 75.....xvi, 708
 Anthony v. State, Meigs, 265.....xxviii, 163
 Anthony v. Stephens, 1 Missouri, 254.....xlii, 697
 Anthony St., Matter of, 20 Wendell, 618.....xxvii, 608
 Antidel v. Chicago & N. E'y Co., 26 Wis. 146.....7, 44
 Antomarchi v. Russell, 63 Alabama, 398.....38, 46
 Antonidas v. Walling, 3 Green's Ch. 42.....xxxi, 248
 Antrobus v. Sherman, 65 Iowa, 260.....54, 7
 Apalachicola v. Apalachicola, L. Co., 9 Fla. 249.....lxxxix, 264
 App v. Dreisbach, 2 Rawie, 287.....xvi, 447
 Appeal of —, See name of appellant.
 Apperson v. Moore, 20 Arkansas, 56.....31, 179
 Apperson v. Cottrell, 3 Porter, 51.....lxix, 326
 Apple v. Crawford, 105 Penn. St. 242.....51, 208
 Applegate v. Ernst, 3 Bush, 648.....xvii, 273
 Appleton Bank v. McGilvray, 4 Gray, 513.....lxiv, 92
 Appleton ada. People, 105 Illinois, 474.....44, 613
 Appleton v. Phoenix M. Life Ins. Co., 69 New
 Hampshire, 541.....47, 229
 Appling ada. State, 25 Missouri, 215.....lxix, 469
 Apthorp v. Backus, Kirby, 407.....1, 36
 Apthorp v. Shepard, Quincy, 236.....1, 6
 Arayo v. Currel, 1 Louisiana, 622.....xx, 298
 Aransamendi v. Louisiana Ins. Co., 3 La. 423.....xii, 136
 Arberry v. Beavers, 6 Texas, 457.....iv, 791
 Artintrode v. State, 67 Indiana, 267.....33, 98
 Arcade Hotel Co. v. Wiatt, 44 Ohio St. 29.....58, 738
 Archibald ada. State, 29 Vermont, 548.....59, 758
 Arctic Fire Ins. Co. v. Austin, 69 N. Y. 479.....25, 221
 Arensburg ada. People, 103 New York, 268.....57, 741
 Arensburg ada. People, 105 New York, 123.....59, 662
 Argall v. Jacobs, 57 New York, 110.....41, 327
 Argus Co. v. Albany, 55 New York, 426.....14, 294
 Ariens v. Brickley, 65 Wisconsin, 26.....56, 611
 Arkell v. Commerce Ins. Co., 69 N. Y. 191.....23, 168
 Arlington v. Hinds, 1 D. Chipman, 431.....xii, 704
 Armenia Ins. Co. v. Paul, 91 Penn. St. 330.....26, 676
 Armfield ada. State, 2 Hawke, 246.....xi, 759

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Armington v. Town of Barnet, 15 Vermont, 745.....xl, 708
 Armington v. Gaslight & B. Co. 15 Ia. 414.....xxv, 305
 Armington v. Houston, 38 Vermont, 448.....xci, 368
 Armistead v. Commonwealth, 11 Leigh, 687.....xxvii, 633
 Armistead v. Dangerfield, 3 Munford, 20.....v, 501
 Armistead v. Bowden, 5 Louisiana, 263.....xxv, 178
 Armistead v. Lieberman, 33 Ohio St. 77.....31, 539
 Armorer v. Case, 9 Louisiana An. 233.....lxi, 309
 Armour v. Mich. Cent. R. R. Co., 65 N. Y. 111.....32, 603
 Arms v. Burt, 1 Vermont, 303.....xviii, 680
 Armstrong v. Armstrong, 1 Oregon, 307.....lxv, 558
 Armstrong v. Campbell, 3 Yerger, 301.....xxiv, 556
 Armstrong v. City of Lancaster, 5 Watts, 63.....xxx, 293
 Armstrong v. Gibson, 21 Wisconsin, 61.....11, 699
 Armstrong v. Harshman, 61 Indiana, 52.....58, 665
 Armstrong v. Jackson, 1 Blackford, 210.....xii, 325
 Armstrong v. Keith, 3 J. J. Marshall, 153.....xx, 131
 Armstrong v. Kleinhans, 62 Kentucky, 303.....54, 694
 Armstrong v. McCoy, 8 Ohio, 123.....xxxi, 435
 Armstrong v. Mudd, 10 B. Monroe, 144.....1, 545
 Armstrong v. Prewitt, 5 Missouri, 476.....xxxi, 338
 Armstrong v. Risteau, 5 Maryland, 256.....lix, 115
 Armstrong v. St. Louis, 69 Missouri, 309.....33, 499
 Armstrong v. Tait, 8 Alabama, 635.....xlii, 656
 Armstrong v. Vroman, 11 Minnesota, 220.....lxviii, 61
 Armstrong Co. v. Clarion Co., 66 Penn. St. 218.....5, 368
 Armsworthy v. Obashire, 2 Devereux Eq. 234.....xxiv, 273
 Arnett v. Arnett, 27 Illinois, 247.....lxxxi, 227
 Arnold v. Arnold, 13 Iredell's Law, 174.....iv, 434
 Arnold v. Brown, 24 Pickering, 89.....xxv, 296
 Arnold v. Camp, 12 Johnson, 409.....vii, 238
 Arnold v. Commonwealth, 80 Kentucky, 300.....44, 480
 Arnold v. Cost, 3 Gill & Johnson, 219.....xxii, 302
 Arnold v. Crowder, 61 Illinois, 55.....25, 260
 Arnold v. Delano, 4 Oshing, 33.....1, 754
 Arnold v. Illinois Cent. R. R. Co., 83 Ill. 273.....25, 296
 Arnold v. Jones, 26 Texas, 335.....lxxii, 617
 Arnold v. Lyman, 17 Massachusetts, 400.....ix, 154
 Arnold v. Mundy, 1 Halsted, 1.....x, 356
 Arnold ada. People, 43 Michigan, 303.....38, 182
 Arnold v. Scott, 2 Missouri, 13.....xxii, 433
 Arnold v. Shields, 5 Dana, 18.....xxx, 669
 Arnold v. State, 62 Indiana, 281.....21, 178
 Arnold v. Stevens, 24 Pickering, 104.....xxv, 305
 Arnold v. Wainwright, 6 Minnesota, 358.....lxxx, 448
 Arnold v. Waltz, 53 Iowa, 706.....34, 348
 Arnot v. Alexander, 44 Missouri, 25.....c, 222
 Arnot v. Pittston etc. Coal Co., 68 N. Y. 528.....23, 190
 Arnot v. Symonds, 25 Penn. St. 99.....27, 630
 Arnous v. Lesasser, 10 Louisiana, 692.....xxix, 470
 Aro ada. People, 6 California, 307.....lxv, 503
 Arques v. Wason, 51 California, 630.....21, 718
 Arrian v. Mann, 32 New York, 197.....lxxxviii, 294
 Arrington v. Liscom, 34 California, 268.....xciv, 722
 Arrington v. Screws, 9 Iredell's Law, 42.....xlx, 408
 Arrington v. Wilmington & W. R. R. Co., 6 Jones' Law, 68.....lxxii, 559
 Arrison ada. Commonwealth, 15 Serg. & R. 127.....xvi, 631
 Arthur v. Broadnax, 3 Alabama, 587.....xxvii, 707
 Arthur v. Cole, 56 Maryland, 100.....40, 408
 Arthur v. Com. & R. Bank, 9 Smedes & M. 394.....xlvi, 719
 Arthur v. Craig, 48 Iowa, 264.....30, 396
 Arthur v. Homestead Fire Ins. Co., 78 N. Y. 462.....34, 550
 Asay v. Hoover, 5 Penn. State, 21.....xiv, 713
 Asbury Life Ins. Co. v. Warren, 66 Maine, 523.....22, 590
 Ash v. Guie, 97 Penn. St. 493.....39, 618
 Ash v. People, 11 Michigan, 347.....lxxxiii, 740
 Ashbrook v. Comm., 1 Bush, 139.....lxxxix, 618
 Ashbrook v. Hite, 9 Ohio State, 357.....lxxv, 468
 Ashbrook v. Ryan, 2 Bush, 238.....xcii, 481
 Ashbury v. Sanders, 8 California, 62.....lxviii, 300
 Ashby v. Eastern R. R. Co., 5 Metcalf, 368.....lxxviii, 426
 Ashby v. Johnston, 23 Arkansas, 163.....lxxix, 102
 Ashcom v. Smith, 2 Fenrose & Watts, 211.....xci, 437
 Ashcroft v. Eastern R. R. Co., 126 Mass. 198.....30, 673
 Ashe v. De Rossett, 5 Jones' Law, 399.....lxxdi, 552
 Asher, Ex parte, 23 Texas Ct. App. 663.....59, 783
 Ashland Co. v. Richland Inf., 7 Ohio St. 65.....lx, 49
 Ashley v. Bird, 1 Missouri, 640.....xiv, 313
 Ashley v. Dixon, 48 New York, 450.....8, 559
 Ashley v. Holman, 25 South Carolina, 204.....60, 512
 Ashley v. Hyde, 6 Arkansas, 52.....xlii, 685
 Ashley v. Laird, 14 Indiana, 222.....lxxvii, 67
 Ashley v. Fort Huron, 26 Michigan, 298.....24, 563
 Ashley v. Vischer, 24 California, 533.....lxxxv, 65
 Ashley's Adm'r v. Robinson, 29 Alabama, 112.....lxv, 357
 Ashton v. Ingle, 20 Kansas, 870.....27, 197
 Ashworth v. Builders' Mut. F. Ins. Co., 113 Massachusetts, 422.....17, 117
 Ashworth v. Kithridge, 13 Oshing, 193.....lix, 178
 Askew v. Hale County, 54 Alabama, 630.....25, 730
 Askew v. La Cygne Ex. E., 63 Missouri, 306.....53, 690
 Aspinwall v. Ohio etc. R. R. Co., 30 Ind. 492.....lxxiii, 329
 Aston v. City of Newton, 134 Massachusetts, 507.....45, 347
 Aston v. Morgan, 2 Martin, 336.....v, 733
 Astor v. Turner, 11 Paige, 436.....xlxi, 766
 Atcheson v. Mallon, 43 New York, 147.....3, 673
 Atcheson v. Robertson, 3 Richardson's Eq. 122.....iv, 634
 Atcheson v. Lindsey, 6 B. Monroe, 86.....xliii, 153
 Atchison & N. R. Co. v. Bely, 6 Nebraska, 37.....29, 326
 Atchison, T. & S. F. R. R. Co. v. Burlingame, 26 Kansas, 628.....59, 578
 Atchison T. & S. F. R. Co. v. Hammer, 23 Kansas, 763.....31, 216
 Atchison, T. & S. F. R. Co. v. Johns, 26 Kansas, 769.....59, 609
 Atchison, T. & S. F. R. R. Co. v. Roach, 26 Kansas, 740.....57, 139
 Atchison ada. State, 3 Lea, 739.....31, 663
 Atchison, T. & S. F. R. R. Co. v. Stanford, 12 Kansas, 264.....15, 368
 Atchison, T. & S. F. R. R. Co. v. Thal, 29 Kansas, 466.....44, 609
 Atchison, T. & S. F. R. R. Co. v. Thal, 33 Kansas, 255.....49, 494
 Atchison, T. & S. F. R. R. Co. v. Weber, 33 Kansas, 543.....52, 543
 Atherton v. Newhall, 123 Massachusetts, 141.....25, 47
 Atherton ada. State, 50 Iowa, 129.....32, 134
 Atkins v. Bordman, 2 Metcalf (Mass.), 457.....xxvii, 100
 Atkins v. Bostwick, 20 Wendell, 241.....xxxi, 634
 Atkins v. Boylston etc. Ins. Co., 5 Metcalf, 439.....xxix, 693
 Atkins v. Cogwood, 20 Wendell, 241.....xxxi, 634
 Atkins v. Gamble, 42 California, 86.....10, 263
 Atkins v. Johnson, 43 Vermont, 73.....5, 380
 Atkins v. Kinman, 30 Wendell, 241.....xxxi, 634
 Atkins v. Sawyer, 1 Pickering, 351.....xi, 126
 Atkinson v. Allen, 12 Vermont, 612.....xxvi, 361
 Atkinson v. Atkinson, 40 New Hamp. 349.....lxvii, 713
 Atkinson v. Brooks, 26 Vermont, 609.....lxii, 562
 Atkinson v. Dance, 9 Yerger, 434.....xxx, 423
 Atkinson v. Goodrich Trans. Co., 60 Wis. 141.....50, 368
 Atkinson v. Jordan, 5 Ohio, 233.....xxiv, 281
 Atlanta v. Wilson, 59 Georgia, 544.....27, 336
 Atlanta C. F. Co. v. Speer, 69 Georgia, 137.....47, 730
 Atlanta Nat. Bank v. Douglas, 51 Georgia, 205.....21, 234
 Atlanta & W. Point R. R. Co. v. Speer, 32 Ga. 559.....lxxx, 306
 Atlantic & G. W. R. R. Co. v. Campbell, 4 Ohio State, 583.....lxiv, 607
 Atlantic & G. W. R. Co. v. Dunn, 19 Ohio St. 162.....2, 398

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Atlantic M. F. Ins. Co. v. Young, 38 N. H. 451.....lxv, 300
 Atlantic & Pac. Tel. Co. v. Barnes, 64 N. Y. 395.....xi, 681
 Atlantic Dock Co. v. Leavitt, 54 N. Y. 35.....13, 556
 Atlas Bank v. Brownell, 9 Rhode Island, 146.....11, 331
 Atlas Bank v. Doyle, 9 Rhode Island, 76.....11, 319
 Atlas Bank v. Doyle, 9 Rhode Island, 76.....xviii, 388
 Atlas Engine Works v. Randall, 100 Indiana, 238, 549, 798
 Attala Co. v. Grant, 9 Smedes & M. 77.....xvii, 103
 Atlee v. Fink, 78 Missouri, 100.....49, 388
 Atteberry v. Powell, 29 Missouri, 429.....lxvii, 579
 Attorney-General v. Bay State M'g Co., 60 Mass.
 148.....xvii, 717
 Attorney-General v. Coboss Co., 6 Paige's Ch. 133.....xix, 705
 Attorney-General v. Continental L. I. Co., 71
 New York, 235.....27, 55
 Attorney-General v. Detroit Board, etc., 58 Mich. 55, 675
 Attorney-Gen. v. Foote, 11 Wisconsin, 14.....lxviii, 689
 Attorney-General v. Lorman, 59 Michigan, 127.....68, 287
 Attorney-General v. Love, 10 Vroom, 476.....23, 234
 Attorney-General v. Metropolitan R. Co., 125 Mas-
 sachusetts, 515.....28, 284
 Attorney-General v. North America L. Ins. Co.,
 91 New York, 67.....43, 648
 Attorney-General v. Stevens, 1 Saxton's Ch. 369.....xiii, 526
 Attorney-General v. Tudor Ice Co., 104 Mass. 239, 6, 237
 Attorney-General v. Williams, 140 Mass. 329.....54, 468
 Attorney-General v. Woods, 106 Mass. 436.....11, 330
 Atwood v. Fricot, 17 California, 37.....lxvii, 567
 Atwater v. Hough, 29 Connecticut, 508.....lxix, 239
 Atwater v. Sawyer, 78 Maine, 538.....49, 634
 Atwater v. Townsend, 4 Connecticut, 47.....2, 97
 Atwater v. Tupper, 45 Connecticut, 144.....79, 674
 Atwater v. Woodbridge, 6 Connecticut, 223.....xvi, 46
 Atwell v. Miller, 6 Maryland, 10.....lxii, 294
 Atwell v. Miller, 11 Maryland, 348.....lxix, 206
 Atwood v. Chapman, 68 Maine, 38.....26, 5
 Atwood v. Cobb, 16 Pickering, 227.....xxvi, 657
 Atwood v. Cornwall, 28 Michigan, 336.....15, 219
 Atwood v. Dearborn, 1 Allen, 483.....lxix, 755
 Atwood v. Flak, 101 Massachusetts, 363.....c, 124
 Atwood v. Holcomb, 39 Connecticut, 270.....12, 386
 Atwood v. Lucas, 63 Maine, 508.....lxix, 713
 Atwood v. Reliance Trans. Co. 9 Watts, 87.....xxiv, 503
 Atwood v. Scott, 99 Mass. 177.....xvi, 728
 Aubuchon v. McKnight, 1 Missouri, 312.....xiii, 502
 Auchampagne v. Schmidt, 7 Iowa, 644.....59, 459
 Audenreid's Appeal, 89 Pennsylvania State, 114.....33, 731
 Audenreid v. Betteley, 5 Allen, 363.....lxix, 755
 Audenreid v. Mercantile M. I. Co., 60 N. Y. 462.....19, 304
 Audenreid v. Phila. & R. R. Co., 68 Penn. 84, 270, 8, 195
 Auditor v. Atchison, T. & S. F. R. R. Co., 6 Kan-
 sas, 500.....7, 575
 Auditor v. Ballard, 9 Bush, 573.....15, 728
 Auditor v. Benoit, 30 Michigan, 176.....4, 362
 Auditor v. Woodruff, 2 Arkansas, 73.....xxiii, 386
 Aulick v. Colvin, 6 R. Monroe, 289.....xiii, 164
 Auer v. Penn., 99 Penn. 84, 370.....44, 114
 Auerbach v. Le Sueur Mill Company, 28 Minn. 261, 411, 285
 Auerbach v. N. Y. & Hudson R. Co., 89 N. Y. 261, 42, 290
 Augusta v. Hagers, 61 Georgia, 48.....24, 96
 Augusta v. North, 57 Maine, 302.....2, 55
 Augusta v. Sweeney, 44 Georgia, 463.....9, 173
 Augusta Factory v. Barnes, 72 Georgia, 217.....53, 638
 Aulman v. Aulman, 71 Iowa, 124.....66, 783
 Aulman v. Mallory, 5 Nebraska, 178.....25, 473
 Aurora v. Reed, 57 Illinois, 29.....11, 1
 Aurora v. West, 22 Indiana, 28.....lxix, 413
 Ausman v. Veal, 10 Indiana, 358.....lxix, 331
 Austin, Case of, 5 Rawle, 191.....xxviii, 657
 Austin v. Austin, 50 Maine, 74.....lxix, 397
 Austin v. Bailey, 37 Vermont, 219.....lxixvi, 708
 Austin v. Bell, 20 Johnson, 442.....xi, 297
 Austin v. Botwick, 9 Connecticut, 496.....xv, 42
 Austin v. Bristol, 40 Connecticut, 130.....16, 23
 Austin v. Burbank, 2 Day, 474.....11, 119
 Austin v. Coggeshall, 15 Rhode Island, 339.....24, 648
 Austin v. Charlestown Female Seminary, 8
 Metcalf, 196.....xii, 497
 Austin v. Hall, 13 Johnson, 286.....vii, 376
 Austin v. Holland, 60 New York, 671.....25, 246
 Austin v. Huntsville Coal and Mining Company,
 72 Mo. 535.....37, 446
 Austin v. New Jersey S. Co., 43 N. Y. 75.....3, 663
 Austin v. Richardson, 3 Call, 201.....11, 543
 Austin v. Rodman, 1 Hawks, 194.....ix, 630
 Austin v. Searing, 16 New York, 112.....lxix, 665
 Austin v. Underwood, 27 Illinois, 436.....lxixvii, 254
 Austin v. Whitlock, 1 Munford, 487.....iv, 550
 Austin v. Wilson, 4 Oshing, 273.....1, 766
 Austin v. Winston, 1 Henning & M. 33.....11, 563
 Avegno v. Hart, 25 La. Ann. 236.....13, 133
 Avert v. Read, 2 Porter, 480.....xxvii, 663
 Averett's Adm'r v. Booker, 15 Gratian, 163.....lxixvi, 203
 Averill v. Williams & Sage, 4 Denio, 295.....xvii, 252
 Avery v. Avery, 33 Kansas, 1.....52, 623
 Avery v. Avery, 12 Texas, 54.....lxii, 513
 Avery v. Bowman, 40 New Hamp. 453.....lxixvii, 728
 Avery ada. Commonwealth, 14 Bush, 635.....79, 429
 Avery v. Chappel, 6 Connecticut, 270.....xvi, 53
 Avery v. Clemons, 18 Connecticut, 306.....xvi, 323
 Avery v. Dougherty, 103 Indiana, 443.....52, 699
 Avery v. Lewis, 10 Vermont, 333.....xxviii, 208
 Avery v. Moore, 1 Haywood, 362.....1, 560
 Avery ada. State, 7 Connecticut, 266.....xviii, 105
 Avery v. Stewart, 2 Connecticut, 69.....vii, 340
 Avery v. Tyringham, 3 Massachusetts, 160.....11, 105
 Avery v. Wilson, 81 New York, 241.....37, 508
 Axford v. Matthews, 43 Michigan, 227.....58, 126
 Axson v. Blakely, 2 McCord, 6.....xiii, 697
 Aycock v. Martin, 37 Georgia, 124.....xvii, 56
 Ayer v. Ashmead, 31 Connecticut, 447.....lxixvii, 154
 Ayer v. Hay, 2 Mill, 365.....xii, 261
 Ayer v. Hutchins, 4 Massachusetts, 370.....11, 233
 Ayer v. Norwich, 39 Connecticut, 376.....12, 368
 Ayer v. Tilden, 15 Gray, 178.....lxixvii, 368
 Ayer v. Wilson, 2 Mill, 319.....xii, 677
 Ayers v. Burns, 67 Indiana, 245.....44, 759
 Ayers v. Milroy, 63 Missouri, 516.....14, 465
 Aymer v. Beers, 7 Cowen, 705.....xvii, 533
 Aymer v. Sheldon, 12 Wendell, 439.....xxvii, 137
 Ayot v. Smith, 40 Vermont, 532.....xvii, 429
 Ayrault v. Pacific Bank, 47 New York, 670.....7, 499
 Ayres v. Campbell, 9 Iowa, 213.....lxixiv, 346
 Ayres v. Dupuy, 27 Texas, 593.....lxixvii, 657
 Ayres v. Farmers & M. B'k, 79 Missouri, 421.....49, 235
 Ayres v. Harness, 1 Ohio, 368.....xiii, 622
 Ayres v. Hartford Fire Ins. Co., 17 Iowa, 176.....lxixv, 593
 Ayres v. Hubbard, 67 Michigan, 323.....58, 361
 Ayres v. Penn. R. R. Co., 48 New Jersey L. 44.....57, 538
 B—— v. I——, 22 Wisconsin, 272.....xiv, 604
 Baber ada. State, 74 Missouri, 322.....41, 314
 Babb v. Clemons, 10 Serg. & R. 419.....xiii, 684
 Babb v. Harrison, 9 Richardson's Eq. 111.....lxix, 203
 Babb v. Reed, 5 Rawle, 151.....lxixvii, 656
 Babcock v. Booth, 2 Hill (N. Y.), 181.....lxixviii, 873
 Babcock v. Brown, 25 Vermont, 550.....lx, 290
 Babcock v. Case, 61 Pennsylvania State, 427.....c, 654
 Babcock v. Herbert, 3 Alabama, 393.....lxixvii, 695
 Babcock v. Kennedy, 1 Vermont, 457.....xviii, 696
 Babcock ada. People, 7 Johnson, 201.....v, 254

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [40] to American Reports.

Babcock v. Thompson, 3 Pickering, 446.....	xv, 235	Bailey v. Ragatz, 80 Wisconsin, 554.....	34, 863
Babcock v. Trice, 18 Illinois, 420.....	lxviii, 560	Bailey v. Robinsons, 1 Grattan, 4.....	xlii, 540
Babcock v. Western R. R. Co., 9 Metcalf, 553.....	xliii, 411	Bailey v. Shaw, 24 New Hampshire, 297.....	iv, 241
Babcock v. Wilson, 17 Maine, 372.....	xxxv, 263	Bailey v. Simonds, 6 New Hampshire, 159.....	xv, 454
Baca v. Ramos, 10 Louisiana, 417.....	xxix, 463	Bailey v. Smith, 14 Ohio State, 306.....	lxixiv, 338
Baccigalupo v. Commonwealth, 33 Gratt. 807.....	34, 798	Bailey v. State, 83 Indiana, 462.....	81, 182
Bachelder ada. State, 5 Minnesota, 223.....	lxxx, 410	Bailey ada. State, 16 Indiana, 46.....	lxxxix, 408
Bachman v. Crawford, 3 Humphreys, 213.....	lxxxix, 163	Bailey v. Stewart, 3 Watts & Serg. 560.....	xxix, 40
Bachman v. Roller, 9 Bart. 409.....	40, 97	Bailey v. Strohecker, 28 Georgia, 259.....	xv, 338
Bachmestoss v. Stahler, 33 Penn. State, 261.....	lxrv, 592	Bailey v. Taylor, 8 Martin, N. S., 134.....	xix, 175
Backman v. Wright, 27 Vermont, 187.....	lxv, 187	Bailey v. Taylor, 11 Connecticut, 531.....	lxix, 321
Backus v. Clark, 1 Kansas, 303.....	lxxxiii, 437	Bailey v. Town of Goshen, 33 Conn. 548.....	lxxxvii, 121
Backus v. Detroit, 49 Michigan, 110.....	43, 447	Bailey v. Troy & B. R. Co., 87 Vermont, 228.....	53, 129
Backus v. Lebanon, 11 New Hampshire, 19.....	xxxv, 466	Bailey v. Wells, 8 Wisconsin, 141.....	lxxxvi, 533
Backus v. McCoy, 3 Ohio, 211.....	xvii, 585	Bailey v. Wiggins, 5 Harrington, 463.....	lx, 638
Backus v. Murphy, 39 Penn. State, 397.....	lxxx, 531	Bally v. Gentry, 1 Missouri, 164.....	xlii, 494
Bacon v. Bronson, 7 Johns. Ch. 194.....	xi, 449	Bainbridge v. Sherlock, 29 Indiana, 364.....	xv, 644
Bacon v. Brown, 1 Bibb, 334.....	iv, 640	Bair v. Robinson, 106 Pennsylvania St. 247.....	50, 128
Bacon ada. Commonwealth, 13 Bush, 210.....	36, 189	Baird v. Baird's Heirs, 1 Dev. & Bat. Eq., 524.....	xxxii, 309
Bacon v. Friddle, 80 New York, 394.....	36, 627	Baird v. Daly, 57 New York, 236.....	15, 498
Bacon v. Lincoln, 4 Cushing, 210.....	1, 765	Baird v. Rice, 1 Call, 18.....	1, 497
Bacon v. Mich. Cent. R. R. Co., 55 Michigan, 224, 54, 373		Baird v. Tolliver, 6 Humphreys, 126.....	xiv, 508
Bacon v. Sheppard, 6 Halted, 197.....	xx, 583	Baily v. Cranfill, 61 North Carolina, 293.....	49, 611
Bacon v. Smith, 2 Louisiana An. 441.....	xlvi, 549	Bajus v. Syracuse R. & N. Y. R. R. Co., 103 New York, 213.....	57, 722
Bacon v. Sondley, 3 Strobhart's Law, 542.....	li, 646	Bakeman ada. Commonwealth, 121 Mass. 877.....	41, 248
Bacon ada. State, 13 Oregon, 143.....	57, 8	Bakeman v. Talbot, 31 New York, 306.....	lxxxviii, 278
Badger v. American Pop. L. I. Co., 103 Mass. 244, 4, 547		Baker's Appeal, 107 Penn. St., 381.....	53, 478
Badger v. Badger, 68 New York, 548.....	42, 263	Baker's Appeal, 106 Penn. St. 610.....	50, 231
Badger v. Gilmore, 33 New Hampshire, 361.....	lxvi, 729	Baker v. Allegheny R. R. Co., 26 Penn. St. 211.....	40, 634
Badger v. Phinney, 15 Massachusetts, 359.....	viii, 105	Baker v. Baker, 4 Dutcher, 13.....	lxxxv, 263
Badger v. Titcomb, 15 Pickering, 403.....	xxvi, 611	Baker v. Baker, 13 Metcalf, 125.....	xlvi, 725
Badgley v. Votratin, 68 Illinois, 25.....	18, 541	Baker v. Barney, 6 Johnson, 73.....	v, 326
Badlam v. Tucker, 3 Pickering, 399.....	xi, 202	Baker v. Bessey, 73 Maine, 473.....	40, 377
Badnall v. Roylance, 11 Cushing, 117.....	lix, 140	Baker v. Boston, 12 Pickering, 124.....	xlii, 421
Bagg's Appeal, 43 Pennsylvania State, 513.....	lxxxii, 583	Baker v. Braman, 6 Hill (N. Y.), 47.....	xi, 387
Bahn v. Bowa, 105 New York, 171.....	59, 488	Baker v. Briggs, 8 Pickering, 121.....	xix, 311
Bagley v. Fiddle, 16 New York, 469.....	lxix, 713	Baker v. Brinson, 9 Richardson's L. 301.....	lxvii, 548
Bagley v. People, 43 Michigan, 355.....	38, 122	Baker v. Bush, 28 Georgia, 594.....	lxix, 193
Bagley v. Smith, 10 New York (6 Selden), 489.....	lxii, 756	Baker v. Clopper, 26 Texas, 629.....	lxxxiv, 581
Bagley v. Ward, 27 California, 121.....	xxix, 256	Baker v. Copenhaver, 15 Illinois, 103.....	lxviii, 699
Bagley v. White, 4 Pickering, 395.....	xvi, 353	Baker v. Cordon, 86 North Carolina, 118.....	41, 448
Bagott v. Mullen, 22 Indiana, 332.....	2, 351	Baker v. Crandall, 78 Missouri, 684.....	47, 126
Baham v. Bach, 13 Louisiana, 297.....	lxxxiii, 561	Baker v. Dodson, 4 Humphreys, 242.....	xi, 659
Bahn v. Bahn, 23 Texas, 518.....	50, 639	Baker v. Drake, 53 New York, 211.....	13, 507
Bailey v. Bailey, 4 Penn. State, 274.....	lxxxiv, 439	Baker v. Drake, 66 New York, 518.....	23, 80
Bailey v. Bancker, 3 Hill (N. Y.), 128.....	lxxxviii, 625	Baker v. Evans, Winst. Eq. 109.....	lxxxvi, 498
Bailey v. Bryan, 3 Jones' Law, 357.....	lxvii, 246	Baker v. Freeman, 9 Wendell, 36.....	xiv, 117
Bailey v. Carleton, 12 New Hampshire, 9.....	lxxxvii, 120	Baker v. Frick, 45 Maryland, 337.....	24, 508
Bailey v. Colby, 34 New Hampshire, 29.....	lxvi, 753	Baker v. Gregory, 28 Alabama, 544.....	lxv, 268
Bailey ada. Commonwealth, 1 Mass. 62.....	ii, 3	Baker v. Haines, 6 Wharton, 224.....	lxxxii, 224
Bailey v. Dilworth, 10 Smedes & M. 404.....	xlviii, 760	Baker v. Haldeman, 24 Missouri, 219.....	lxix, 439
Bailey v. Fairplay, 6 Binney, 456.....	vi, 486	Baker v. Haskell, 47 New Hampshire, 679.....	xxiii, 453
Bailey v. Fillebrown, 9 Greenleaf, 12.....	xxiii, 529	Baker v. Hoag, 7 N. Y. (3 Selden), 525.....	lx, 431
Bailey v. Freeman, 11 Johnson, 231.....	vi, 371	Baker v. Hunt, 40 Illinois, 264.....	lxxxix, 346
Bailey v. Godfrey, 54 Illinois, 507.....	8, 157	Baker v. Jewell, 6 Massachusetts, 450.....	iv, 163
Bailey v. Harris, 6 Iowa, 331.....	lxxxiv, 312	Baker v. Kelly, 41 Mississippi, 696.....	xxiii, 274
Bailey v. Hull, 11 Wisconsin, 289.....	lxxxvii, 706	Baker v. Kinsey, 28 California, 631.....	xxix, 439
Bailey v. Hyde, 3 Connecticut, 463.....	viii, 202	Baker v. Lever, 67 New York, 304.....	23, 117
Bailey v. Irby, 2 Nott & McCord, 343.....	x, 609	Baker v. Lewis, 33 Penn. State, 301.....	lxxxv, 598
Bailey v. Jackson, 16 Johnson, 210.....	viii, 309	Baker v. Lovett, 6 Massachusetts, 78.....	iv, 98
Bailey v. James, 11 Grattan, 468.....	lxii, 659	Baker v. Marshall, 16 Vermont, 522.....	lxiii, 522
Bailey v. Kennedy, 3 Delaware Ch. 12.....	xxix, 351	Baker v. N. Y. Nat. Bk., 100 New York, 21.....	53, 159
Bailey v. Kilburn, 10 Metcalf, 176.....	xliii, 423	Baker v. Page, 11 Maine, 381.....	lxvi, 549
Bailey v. King, 1 Wharton, 113.....	lxix, 42	Baker v. Pendergast, 28 Ohio State, 494.....	30, 629
Bailey v. Mayor of N. Y., 3 Hill (N. Y.), 531.....	lxxxviii, 669	Baker ada. People, 76 New York, 71.....	33, 274
Bailey v. Miller, 5 Iredell's Law, 444.....	xliv, 47	Baker v. Portland, 58 Maine, 199.....	4, 274
Bailey v. New England L. I. Co., 114 Mass. 177.....	19, 329	Baker v. Scott, 29 Kansas, 136.....	44, 628
Bailey v. Nikola, 2 Book, 407.....	i, 83	Baker v. Seaborn, 1 Swan, 54.....	iv, 794
Bailey v. Ogden, 3 Johnson, 399.....	lii, 509	Baker v. Stockpools, 9 Cowan, 420.....	lxviii, 578
Bailey v. PhDa., W. & B. R. R., 4 Har. (Del.) 289.....	xliv, 863		

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Baker ada. State, 64 Missouri, 187.....	214	Baltimore v. Lefterman, 4 Gill, 425.....	xiv, 148
Baker v. State, 29 Ohio State, 184.....	23, 731	Baltimore v. Reynolds, 20 Maryland, 1.....	lxviii, 538
Baker v. Todd, 6 Texas, 273.....	iv, 775	Baltimore C. P. R. Co. v. Kemp, 61 Md. 619.....	48, 136
Baker v. Vining, 30 Maine, 121.....	1, 617	Baltimore C. P. R. Co. v. Sewell, 35 Md. 226.....	6, 409
Baker v. Walnwright, 33 Maryland, 536.....	11, 496	Baltimore & H. T. Co. v. Union R'y Co., 35 Maryland, 224.....	6, 397
Baker v. Wheaton, 5 Massachusetts, 509.....	iv, 71	Baltimore v. Hughes, 1 Gill & J. 480.....	xix, 246
Baker v. Wheeler, 8 Wendell, 505.....	xiv, 66	Baltimore & L. T. Co. v. Cassell, 66 Md. 619.....	59, 171
Baker v. Whiteside, Breese, 174.....	xii, 168	Baltimore & Ohio R. R. Co. v. Breinig, 25 Maryland, 578.....	xx, 48
Baker v. Willis, 123 Massachusetts, 194.....	25, 61	Baltimore & Ohio R. R. Co. v. Eitner, 15 West Virginia, 458.....	36, 639
Baker v. Young, 44 Illinois, 42.....	xvii, 146	Baltimore & O. R. R. Co. v. Brydon, 65 Md. 196.....	57, 319
Baker's Appeal, 21 Penn. State, 76.....	lix, 733	Baltimore & O. R. R. Co. v. Campbell, 26 Ohio St. 647.....	38, 617
Bakersfield Cong. Soc. v. Baker, 15 Vt. 119.....	xl, 668	Baltimore & O. R. R. Co. v. Gallahue, 13 Grant, 655, lrv, 354	
Balch v. Patten, 45 Maine, 41.....	lxvi, 636	Baltimore & O. R. Co. v. Glenn, 28 Md. 267.....	xvii, 609
Balch v. Wilson, 25 Minnesota, 599.....	33, 467	Baltimore & O. R. R. Co. v. Jameson, 13 W. Virginia, 633.....	31, 771
Baldwin v. Aldrich, 34 Vermont, 526.....	lxix, 695	Baltimore & O. R. R. Co. v. Potomac Coal Co., 51 Maryland, 327.....	34, 314
Baldwin v. American Express Co., 23 Ill. 197.....	lxiv, 190	Baltimore & Ohio R. R. Co. v. Rathbone, 1 W. Va. 57.....	lxviii, 664
Baldwin v. Baldwin, 61 Virginia, 405.....	59, 669	Baltimore & O. R. Co. v. Schumacher, 29 Md. 168.....	xvi, 519
Baldwin v. Bank of La., 1 Louisiana An. 13.....	xiv, 72	Baltimore & O. R. Co. v. Schwinding, 107 Penn. State, 266.....	47, 706
Baldwin v. Banks, 20 Illinois, 48.....	lxvi, 249	Baltimore & Ohio R. R. Co. ada. State, 15 West Virginia, 363.....	36, 609
Baldwin v. Barney, 13 Rhode Island, 332.....	34, 670	Baltimore & O. R. R. Co. v. State, 63 Md. 479.....	59, 233
Baldwin v. Carter, 17 Connecticut, 301.....	xiii, 735	Baltimore & Ohio R. R. Co. v. State, 24 Maryland, 84.....	lxvii, 609
Baldwin v. Chouteau Ins. Co., 56 Missouri, 151.....	17, 671	Baltimore & O. R. Co. v. State, 29 Md. 393.....	xvii, 539
Baldwin ada. Commonwealth, 11 Gray, 197.....	lxvi, 703	Baltimore & O. R. Co. ada. State, 13 Gill & J. 399.....	lxviii, 327
Baldwin ada. Commonwealth, 1 Watts, 54.....	xvii, 53	Baltimore & Ohio R. R. Co. ada. State, 24 Maryland, 84.....	lxvii, 609
Baldwin v. Emign, 49 Connecticut, 113.....	44, 306	Baltimore & O. R. Co. v. Stricker, 51 Md. 47.....	34, 326
Baldwin v. Farnsworth, 10 Maine, 414.....	xv, 252	Baltimore & O. R. Co. v. Sulphur Spring L. S. Dist., 98 Pennsylvania State, 65.....	42, 529
Baldwin v. Gray, 4 Martin, N. S. 192.....	xvi, 169	Baltimore & Ohio R. R. Co. v. Worthington, 21 Md. 275.....	lxviii, 573
Baldwin v. Greenwood T. Co., 40 Conn. 238.....	16, 33	Baltimore & O. R. Co. v. Wightman, 29 Grant, 431.....	36, 394
Baldwin v. Hartford Ins. Co., 60 N. Hamp. 422.....	49, 324	Baltimore & O. R. Co. v. Wilkins, 44 Md. 11.....	32, 36
Baldwin v. Leonard, 39 Vermont, 260.....	xvii, 324	Baltimore & P. R. R. Co. v. Magruder, 34 Md. 79.....	6, 319
Baldwin v. Liverpool & G. W. S. Co., 74 N. Y. 125.....	36, 377	Baltimore P. R. & L. Soc. v. Smith, 54 Md. 187.....	39, 374
Baldwin v. Munn, 3 Wendell, 399.....	xx, 627	Baltimore R. & F. R. Co. v. Mall, 65 Md. 93.....	57, 304
Baldwin v. O'Brien, Cox, 418.....	1, 208	Balt. and Susq. R. R. Co. v. Faunce, 6 Gill, 68.....	xvi, 658
Baldwin v. Palmer, 10 New York (6 Selden), 332.....	lxv, 743	Balt. and Susq. R. R. Co. v. Woodruff, 4 Md. 342.....	lix, 79
Baldwin v. Parker, 99 Massachusetts, 72.....	xvii, 697	Baltimore Steam Packet Co. v. Smith, 23 Maryland, 402.....	lxvii, 577
Baldwin v. Peck, 23 Texas, 708.....	lxv, 806	Baltzell v. Noles, 1 Iowa, 568.....	lxviii, 406
Baldwin v. Snowden, 11 Ohio State, 303.....	lxviii, 303	Bamber v. Savage, 52 Wisconsin, 110.....	38, 723
Baldwin ada. State ex rel. Mayne, 1 Halst. Ch. 454.....	xiv, 369	Bamberg v. South Carolina R. Co., 9 B. C. 61.....	36, 13
Baldwin v. United States Tel. Co., 45 N. Y. 744.....	6, 165	Bancroft v. Grover, 23 Wisconsin, 463.....	lxix, 196
Baley v. Homestead Fire Ins. Co., 80 N. Y. 21.....	36, 570	Bancroft v. Inhab. of Lynnfield, 18 Pick. 508.....	lxix, 626
Ballo v. Wilson, 13 Martin, 358.....	xiii, 376	Bancroft v. Merchants' D. T. Co., 47 Iowa, 262.....	39, 423
Ball v. Bank of Ala., 8 Alabama, 590.....	xiii, 649	Bancroft v. Wardell, 13 Johnson, 489.....	vii, 306
Ball v. Bennett, 21 Indiana, 427.....	lxviii, 356	Baney v. Killmer, 1 Penn. State, 30.....	xiv, 109
Ball v. Claffin, 6 Pickering, 303.....	xvi, 407	Banfield v. Whipple, 10 Allen, 37.....	lxvii, 618
Ball v. Deas, 2 Strobhart's Eq. 24.....	xlix, 651	Bangor O. & M. R. R. Co. v. Smith, 49 Me. 9.....	lxvii, 246
Ball v. Grand, 14 Louisiana An. 305.....	lxiv, 431	Bangor v. Goding, 35 Maine, 73.....	lxvi, 699
Ball v. Liney, 48 New York, 6.....	8, 511	Bangor v. Masonic Lodge, 73 Maine, 428.....	46, 393
Ball v. Nye, 99 Massachusetts, 583.....	xvii, 56	Bangor v. Warren, 34 Maine, 324.....	lxvi, 657
Ball ada. People, 14 California, 101.....	lxviii, 631	Bangor Bank v. Treat, 6 Greenleaf, 307.....	xix, 219
Ball v. Siegel, 116 Illinois, 137.....	56, 767	Bangs v. Hall, 2 Pickering, 368.....	xviii, 437
Ball v. Slack, 2 Wharton, 508.....	xxx, 273	Bangs v. Strong, 7 Hill (N. Y.) 250.....	xiii, 64
Ball v. Stanley, 5 Yerger, 199.....	xvii, 263	Banister v. Higginson, 15 Maine, 73.....	xxxii, 134
Ball v. Woodbine, 61 Iowa, 83.....	47, 806	Bank v. Alexander, 35 North Carolina, 353.....	39, 703
Ballance v. Rankin, 13 Illinois, 430.....	liv, 413	Bank v. Butler, 41 Ohio State, 519.....	52, 34
Ballantine v. Harrison, 37 New Jersey Eq. 660.....	45, 667		
Ballard v. Carter, 5 Pickering, 112.....	xvi, 377		
Ballard v. Merchants' Ins. Co., 9 La. 258.....	lxix, 444		
Ballard v. Russell, 33 Maine, 196.....	liv, 620		
Ballantine v. North Mo. R. R. Co., 40 Mo. 491.....	xviii, 315		
Baller ada. State, 26 West Virginia, 90.....	53, 66		
Ballet v. Commonwealth, 17 Penn. State, 509.....	iv, 561		
Ballinger v. Bourland, 87 Illinois, 513.....	39, 69		
Ballinger v. Tarbell, 16 Iowa, 491.....	lxv, 527		
Ballo v. Poimset, 8 Martin, N. S. 336.....	xix, 185		
Ballou v. Chicago, M. & St. P. R. Co., 54 Wis. 259.....	41, 31		
Ballou v. Hale, 47 New Hampshire, 347.....	xviii, 438		
Ballou v. Talbot, 16 Massachusetts, 461.....	viii, 146		
Balsley v. St. Louis, A. & T. H. R. Co., 119 Ill. 68.....	59, 784		
Baltimore v. B. & O. R. R., 6 Gill, 298.....	xviii, 531		
Baltimore v. Chester, 53 Vermont, 315.....	58, 677		

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Bank v. Cooper, 2 Yerges, 599.....xxiv, 517
 Bank v. Douglass, 4 Watts, 96.....xxviii, 689
 Bank v. Fordyce, 9 Penn. State, 375.....xlix, 561
 Bank v. Knotts, 10 Richardson's L. 543.....lxx, 234
 Bank v. Williams, 46 Mississippi, 618.....12, 319
 Bankard v. Baltimore & O. R. R. Co., 34 Md. 197... 6, 331
 Bank of ———. If not found here, see name of bank.
 Bank of Alabama v. Comagys, 13 Alabama, 773.....xvi, 273
 Bank of Bangor v. Treat, 6 Greenleaf, 207.....xix, 210
 Bank of Batavia v. New York, L. R. & W. R. R.
 Co., 106 New York, 135.....64, 440
 Bank of Brighton v. Smith, 13 Allen, 243.....no, 144
 Bank of British North Am. v. Hooper, 5 Gray, 567.lvi, 390
 Bank of Cadiz v. Stemmons, 34 Ohio St. 143.....37, 364
 Bank of Carlisle v. Hopkins, 1 T. B. Monroe, 245...xv, 113
 Bank of Cass Co. v. Morrison, 17 Nebraska, 341...52, 417
 Bank of Charleston v. Curtis, 18 Conn. 342.....xvi, 325
 Bank of Charleston ada. State, 2 McMill. L. 439.xxxx, 136
 Bank of Charleston v. Zorn, 14 S. C. 444.....37, 733
 Bank of Chillicothe v. Mayor etc., 7 Ohio Pt. 2, 51.xxx, 185
 Bank of Chillicothe v. Swayne, 8 Ohio, 257.....xxvii, 707
 Bank of Columbia v. Haldeman, 7 Watts & S. 233...xii, 229
 Bank of Columbia v. Magruder, 6 Harris & J. 173.xiv, 271
 Bank of Commerce v. Barrett, 38 Georgia, 136.....xov, 384
 Bank of Commerce v. Bogy, 44 Missouri, 13.....c, 247
 Bank of Commerce v. Hoebler, 68 Missouri, 37.....57, 359
 Bank of Commerce v. Owens, 31 Maryland, 520... 3, 60
 Bank of Commonw'h v. McChord, 4 Dana, 121.....xxix, 398
 Bank of Deer Lodge v. Hope M. Co., 3 Mont. 146.35, 458
 Bank of Delaware Co. v. Broomhall, 38 Penn. St.
 135.....
 Bank of Elizabeth v. Ayers, 2 Halsted, 130.....xi, 535
 Bank of Gallipolis v. Doman, 13 Ohio, 329.....xi, 478
 Bank of Greensboro v. Chambers, 30 Grant. 302...32, 661
 Bank of Hamburg v. Wray, 4 Strobhart's Law, 57...ii, 699
 Bank of Holly Springs v. Pinson, 58 Miss. 431.....38, 330
 Bank of Illinois v. Sloc, 16 Louisiana, 539.....xxv, 223
 Bank of Indiana v. Anderson, 14 Iowa, 544...lxxxvii, 390
 Bank of Kentucky v. Clark, 4 Missouri, 59.....xxviii, 345
 Bank of Kentucky v. Hancock, 6 Dana, 284.....xxvii, 76
 Bank of Kentucky v. Herndon, 1 Bush, 359...lxxxix, 630
 Bank of Kentucky v. Sanders, 3 A. K. Marshall,
 184.....
 Bank of Limestone v. Penick, 2 T. B. Monroe, 96...xv, 136
 Bank of Louisiana v. Satterfield, 14 La. An. 80.lxxiv, 427
 Bank of Louisiana v. Williams, 46 Miss. 618.....19, 319
 Bank of Louisville v. First Nat. Bank, 8 Bank. 101.35, 691
 Bank of Manchester v. Bartlett, 13 Va. 315.....xxvii, 694
 Bank of Maryland ada. State, 6 Gill & Johnson,
 205.....
 Bank of Michigan v. Niles, 1 Douglass, 401.....xii, 575
 Bank of Missouri v. Matson, 26 Missouri, 943...lxxii, 206
 Bank of Missouri v. Wells, 12 Missouri, 361.....ii, 163
 Bank of Missouri v. White, 23 Missouri, 342.....lvi, 671
 Bank of Mobile v. Hall, 6 Alabama, 141.....xii, 41
 Bank of Mobile v. Hall, 6 Alabama, 639.....xii, 72
 Bank of Monroe Ex parte, 7 Hill (N. Y.), 177.....xiii, 61
 Bank of Monroe v. Widner, 11 Paige, 529.....xliv, 768
 Bank of Montgomery v. Walker, 9 Serg. & R. 229...xi, 709
 Bank of Montpelier v. Dixon, 4 Vermont, 587.....xxiv, 640
 Bank of Muskingum v. Carpenter, 7 Ohio St. 21.xxviii, 616
 Bank of Mut. Redemption v. Hill, 56 Mo. 388.....xvi, 470
 Bank of New Brunswick v. Nelson, 3 Green's
 Law 337.....
 Bank of Newbury v. Sinclair, 60 N. H. 100.....49, 397
 Bank of North Am. v. Wheeler, 28 Conn. 433...lxxxiii, 683
 Bank of Ohio Valley v. Lockwood, 13 W. Va. 398.31, 788
 Bank of Old Dominion v. Dubuque and Pacific
 R. R. Co., 8 Iowa, 277.....lxxiv, 302
 Bank of Orleans v. Whittemore, 13 Gray, 469...lxxiv, 605
 Bank of Oswego v. Doyle, 91 New York, 32.....43, 634
 Bank of Owensboro v. Western Bank, 13 Bush, 526.26, 211
 Bank of Pennsylvania v. Winger, 1 Rawls, 295...xviii, 633
 Bank of Pittsburgh v. Whitehead, 10 Watts,
 207.....
 Bank of the Republic v. Carrington, 5 E. L. 515.lxxxii, 83
 Bank of Rochester v. Jones, 4 N. Y. 497.....iv, 290
 Bank of Rochester v. Monteth, 1 Denio, 402...xliv, 681
 Bank of Rome v. Village of Rome, 19 N. Y. 20...lxxv, 272
 Bank of Sonoma Co. v. Gore, 63 California, 355...49, 92
 Bank of St. Albans v. Farm. & M. Bk., 10 Vt. 141.lxxxii, 128
 Bank of St. Albans v. Gilliland, 23 Wend. 311...xxxv, 556
 Bank of Smyrna ada. State, 2 Houston, 99...lxxxii, 609
 Bank of South Carolina v. S. C. M. Co., 3 Strob-
 hart's Law, 190.....
 Bank of Syracuse v. Hollister, 17 New York, 46.lxxxii, 416
 Bank of Tennessee v. Beatty, 3 Sneed, 305.....lxv, 58
 Bank of Tennessee v. Hill, 10 Humphreys, 178.....ii, 698
 Bank of Tennessee v. Patterson, 8 Comp. 363...xvii, 618
 Bank of U. S. v. Behrme, 1 Grattan, 234.....xiii, 551
 Bank of U. S. v. Lane, 3 Hawks, 452.....xiv, 585
 Bank of U. S. v. Marie, 2 Robinson (La.) 117...lxxxvii, 201
 Bank of U. S. v. Patton, 5 Howard, 300.....xxxv, 429
 Bank of U. S. v. Hill, 5 Connecticut, 105.....xii, 44
 Bank of Utica v. Bender, 21 Wendell, 643.....lxxxv, 281
 Bank of Utica v. City of Utica, 4 Paige Ch. 309.xxxv, 71
 Bank of Utica v. Finch, 3 Barbour's Ch. 393.....xix, 175
 Bank of Utica v. Mercereau, 3 Barbour's Ch. 528.xix, 189
 Bank of Utica v. Smalley, 2 Cowen, 770.....xiv, 523
 Bank of Whitehall, v. Pettis, 13 Vermont, 295.lxxxvii, 609
 Bank of Wooster v. Stevens, 1 Ohio State, 433...ix, 619
 Banks v. Brown, 2 Hill Ch. 553, 1 Riley Ch. 131...xxx, 399
 Banks v. Evans, 10 Smedes & M. 35.....xviii, 734
 Banks v. McClalla, 24 Maryland, 68.....lxxxvii, 694
 Banks v. Mitchell, 8 Yerges, 111.....
 Banks v. Pettianx, 3 Randolph, 138.....xv, 706
 Banner Pub. Co. v. State, 16 Lea, 178.....57, 218
 Banning v. Bleakley, 27 Louisiana An. 257.....71, 554
 Banning v. Bradford, 21 Minnesota, 306.....18, 386
 Bannon v. Brandon, 24 Penn. State, 263.....lxxxv, 635
 Banorgoe v. Hovey, 5 Massachusetts, 11.....iv, 17
 Bansemer v. Maco, 18 Indiana, 27.....lxxxii, 344
 Bansemer v. Toledo and Wabash Railway Co. 26
 Indiana, 434.....
 Banks v. Vreeland, 2 McCarter, 103.....lxxxii, 299
 Bantleon v. Smith, 3 Binney, 148.....iv, 439
 Bantley ada. State, 44 Connecticut, 537.....36, 486
 Barber v. Armistead, 10 Iradell's Law, 539.....ii, 404
 Barber v. Abendroth, 102 New York, 408.....55, 621
 Barber v. Bennett, 58 Vermont, 475.....54, 595
 Barber v. Brace, 3 Connecticut, 9.....viii, 146
 Barber v. Chandler, 17 Penn. State, 48.....iv, 533
 Barber v. Fire & M. Ins. Co., 16 W. Va. 658...47, 809
 Barber v. Hall, 26 Vermont, 112.....lx, 309
 Barber v. Slade, 30 Vermont, 191.....lxxxii, 290
 Barber v. St. Louis etc. R. R. Co., 43 Iowa, 223...32, 243
 Barber v. Swan, 4 G. Greene, 352.....lxii, 124
 Barber v. Wheeling F. & M. I. Co., 16 W. Va. 658.37, 809
 Barbour v. Bayon, 5 Louisiana An. 304.....lii, 588
 Barbour ada. State, 53 Connecticut, 76.....55, 86
 Barclay v. Commonwealth, 35 Penn. State, 503...lxiv, 715
 Barclay v. Smith, 107 Illinois, 349.....47, 437
 Barclay v. Weaver, 19 Penn. State, 396.....lvii, 661
 Barcus v. State, 49 Mississippi, 17.....
 Barden v. McKinnie, 4 Hawks, 279.....xv, 619
 Barden v. Superv'rs of Columbia Co., 53 Wla. 445...14, 788
 Bardtown etc. R. R. Co. v. Metcalf, 4 Met. (Ky.)
 199.....
 Bardwell v. Mobile & O. R. R. Co., 63 Miss. 574...54, 647
 Bardwell v. Perry, 19 Vermont, 262.....xvii, 627

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Baro v. Hoffman, 79 Pennsylvania 84, 71..... 31, 43
 Barrell v. Brown, 1 McCord, 449.....x. 663
 Barfield v. Britt, 2 Jones' Law, 41.....lxii, 190
 Barfield v. State, 29 Georgia, 127.....lxiv, 49
 Barge v. Commonwealth, 3 Penrose & Watts, 263, xxviii, 51
 Barham v. Turbeville, 1 Swan, 437.....lvii, 723
 Barhydt v. Valk, 12 Wendell, 145.....xxvii, 124
 Baring v. Petree, 5 Watts & Serg. 548.....xi, 534
 Barkeloo v. Randall, 4 Blackford, 476.....xxvii, 46
 Barker v. Baltimore & O. R. E. Co., 23 Ohio 84, 45, 10, 726
 Barker v. Bates, 13 Pickering, 258.....xxviii, 673
 Barker v. Bradley, 42 New York, 316.....1, 521
 Barker v. Bucklin, 2 Denio, 45.....xlvi, 726
 Barker v. Clark, 4 New Hampshire, 380.....xvii, 423
 Barker v. Dimmock, 73 Pennsylvania 84, 427.....13, 697
 Barker v. Havens, 17 Johnson, 234.....viii, 393
 Barker v. Hubbard, 54 New Hampshire, 839.....39, 160
 Barker v. Mann, 5 Bush, 673.....xvii, 373
 Barker v. Mech. Fire Ins. Co., 3 Wendell, 94.....xx, 664
 Barker v. Pearce, 30 Penn. State, 173.....lxvii, 691
 Barker v. People, 3 Cowen, 686.....xv, 323
 Barker v. Phoenix Ins. Co., 8 Johnson, 307.....v, 339
 Barker v. Savage, 45 New York, 191.....6, 66
 Barker v. Schooner E. M. Wright, 1 Mackay, 24, 47, 234
 Barker ada. State, 4 Kansas, 379.....xvii, 175
 Barker v. Stetson, 7 Gray, 53.....lxvi, 487
 Barker v. Wheelip, 5 Humphreys, 329.....xlvi, 423
 Barkhamsted v. Case, 5 Connecticut, 528.....xiii, 92
 Barkley v. Tarrant, 20 South Carolina, 574.....47, 653
 Barkley v. Wilcox, 85 New York, 140.....49, 519
 Barkdale v. Brown, 1 Nott & McCord, 517.....ix, 720
 Barkdale v. Garrett, 64 Alabama, 277.....38, 6
 Barkdale v. White, 28 Gratt. 234.....39, 244
 Barkshire v. State, 7 Indiana, 399.....lxv, 726
 Barling v. West, 29 Wisconsin, 307.....9, 576
 Barlow v. Bell, 1 A. K. Marshall, 245.....x, 731
 Barlow v. Curtis, 60 New York, 321.....10, 453
 Barlow v. Lambert, 28 Alabama, 704.....lxv, 374
 Barlow v. Myers, 64 New York, 41.....31, 592
 Barlow v. St. Nicholas Nat. Bank, 63 N. Y. 399.....39, 547
 Barlow v. Walnwright, 23 Vermont, 83.....lii, 79
 Barnard v. Jay, 2 McCord, 371.....xiii, 736
 Barnard ada. Commonwealth, 134 Mass. 215.....45, 319
 Barnard v. Bartlett, 10 Cushing, 501.....lvii, 123
 Barnard v. Campbell, 58 New York, 73.....17, 208
 Barnard v. Coffin, 141 Massachusetts, 27.....55, 443
 Barnard v. Cushing, 4 Metcalf, 230.....xxviii, 363
 Barnard v. Duncan, 38 Missouri, 170.....x, 416
 Barnard v. Edwards, 4 New Hampshire, 107.....xvii, 403
 Barnard v. Pope, 14 Massachusetts, 434.....vii, 226
 Barnard v. Stevens, 2 Alaska, 428.....xvi, 733
 Barnard v. Whipple, 29 Vermont, 401.....lxx, 422
 Barnes v. Campbell, 59 New Hampshire, 126.....47, 183
 Barnes v. Chapin, 4 Allen, 444.....lxxxi, 710
 Barnes v. Chiscopee, 135 Massachusetts, 67.....52, 269
 Barnes v. Dean, 5 Watts, 543.....xxx, 246
 Barnes v. Gibbs, 2 Vroom, 317.....lxxvii, 210
 Barnes v. Harris, 7 Cushing, 578.....lv, 734
 Barnes v. Haynes, 13 Gray, 188.....lxiv, 629
 Barnes v. Irwin, 2 Dallas, 199.....1, 278
 Barnes v. Martin, 15 Wisconsin, 240.....lxxvii, 670
 Barnes v. McClintock, 3 Penrose & Watts, 67.....xxviii, 63
 Barnes v. Meane, 23 Illinois, 379.....25, 226
 Barnes v. Meade, 5 Iredell's Eq. 293.....xlix, 369
 Barnes v. Milne, Richardson's Eq. Cases, 489.....xlv, 422
 Barnes v. Moody, 5 Howard (Mass.), 636.....lxxvii, 172
 Barnes v. Mott, 64 New York, 397.....31, 625
 Barnes v. People, 12 Illinois, 52.....lxv, 699
 Barnes v. Shelton, Harper's Law, 33.....xviii, 642
 Barnes v. Simmons, 27 Illinois, 512.....lxxxi, 246

Barnes v. Simms, 5 Iredell's Eq. 322.....xlix, 436
 Barnes v. Teague, 1 Jones' Equity, 377.....lxii, 309
 Barnes v. Union M. F. I. Co., 81 Maine, 119.....lxxxi, 563
 Barnes v. Ward, Busbee's Eq. 93.....lxvii, 590
 Barnes v. Webster, 16 Missouri, 258.....lvii, 232
 Barnett v. Barnett, 15 Serg. & R. 73.....xvi, 516
 Barnett v. Fergus, 51 Illinois, 363.....xlix, 547
 Barnett v. Smith, 30 New Hampshire, 296.....lxiv, 296
 Barnett ada. State, 1 Jones' L. 539.....lxii, 186
 Barnett v. Atlantic & Pacific R.R. Co., 66 Mo. 86, 30, 773
 Barnett v. Caruth, 23 Texas, 173.....lxvii, 255
 Barnett v. Goring, 8 Blackford, 284.....lxiv, 706
 Barnett v. Nelson, 54 Iowa, 41.....37, 153
 Barnett v. Reed, 51 Penn. St. 190.....lxxviii, 574
 Barnett ada. State, 3 Kansas, 260.....lxxvii, 471
 Barnett v. Shackelford, 6 J. J. Marshall, 532.....xvii, 109
 Barnett v. Ward, 26 Ohio St. 107.....38, 561
 Barnett's Appeal, 46 Penn. State, 362.....lxxvii, 503
 Barnewall v. Church, 1 Calnes, 217.....3, 189
 Barney v. Bliss, 1 D. Chipman, 309.....xii, 606
 Barney v. Brown, 2 Vermont, 374.....xix, 729
 Barney v. Currier, 1 D. Chipman, 215.....vi, 729
 Barney v. Dewey, 13 Johnson, 234.....vii, 373
 Barney v. McCarty, 15 Iowa, 510.....lxxviii, 427
 Barney v. Parsons, 54 Vermont, 633.....41, 303
 Barney v. Prentiss, 4 Harris & J. 317.....vii, 679
 Barney v. Smith, 4 Harris & J. 493.....vii, 679
 Barnitz v. Rice, 14 Maryland, 24.....lxvii, 513
 Barnes v. Barrow, 61 New York, 29.....19, 247
 Barnes v. Graham, 4 Cowen, 422.....xv, 394
 Barnes v. Hatch, 3 New Hampshire, 304.....xiv, 369
 Barnstine v. Eggart, 3 McCord, 162.....xv, 626
 Barnum v. Baltimore, 63 Maryland, 275.....50, 219
 Barnum v. Barnum, 3 Connecticut, 469.....xvi, 699
 Barnum v. Barnum, 26 Maryland, 118.....x, 86
 Barnum v. Gilman, 27 Minnesota, 466.....38, 304
 Barnum v. Mayor, etc. of Baltimore, 63 Md. 275, 50, 219
 Barnum v. State, 15 Ohio, 717.....xiv, 601
 Barnwell v. McGrath, 1 McMullan's Law, 174.....lxxvi, 254
 Baron v. Abel, 3 Johnson, 431.....lii, 515
 Barr v. Doe ex dem. Blinford, 6 Black. 335.....lxxviii, 146
 Barr v. Moore, 87 Pennsylvania 84, 268.....39, 367
 Barrera v. Alpuente, 6 Martin, N. S., 69.....xvii, 179
 Barret v. Hart, 42 Ohio St. 41.....51, 601
 Barrett v. Bell, 62 Missouri, 110.....52, 361
 Barrett v. Black, 86 Maine, 496.....xvii, 497
 Barrett v. Buxton, 2 Alaska, 167.....xvi, 691
 Barrett v. Copeland, 18 Vermont, 67.....lxv, 392
 Barrett v. Dolan, 120 Massachusetts, 309.....39, 495
 Barrett v. French, 1 Connecticut, 254.....vi, 241
 Barrett v. Lightfoot, 1 T. B. Monroe, 241.....xv, 119
 Barrett ada. People, 2 Calnes, 304.....3, 239
 Barrett v. Pritchard, 3 Pickering, 512.....xii, 449
 Barrett v. Rogers, 7 Massachusetts, 297.....v, 46
 Barrett v. White, 2 New Hampshire, 210.....xiv, 363
 Barrett v. Willis, 4 Leigh, 114.....lxvi, 315
 Barrie v. Earle, 148 Massachusetts, 1.....58, 126
 Barringer v. Sneed, 2 Stewart, 201.....xx, 74
 Barroilhet v. Hathaway, 21 California, 263.....lxxvix, 193
 Barron v. Cobbleigh, 11 New Hampshire, 557.....lxv, 506
 Barron v. Eldredge, 100 Massachusetts, 495.....1, 126
 Barron v. Tucker, 23 Vermont, 338.....38, 694
 Barrow v. Landry, 15 Louisiana An. 621.....lxxvii, 199
 Barrow v. Paxton, 5 Johnson, 258.....iv, 264
 Barrow v. Richard, 8 Paige, 361.....lxxv, 712
 Barrow ada. State, 14 Texas, 179.....lxv, 169
 Barrows v. Bell, 7 Gray, 301.....lxvi, 479
 Barrows v. Downe, 9 Rhode Island, 446.....11, 263
 Barrows v. Knight, 6 Rhode Island, 434.....lxxviii, 493
 Barrows v. Lane, 5 Vermont, 161.....lxvi, 299

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Barrows ad. State, 76 Maine, 401.....49, 639
 Barry v. City of Lowell, 8 Allen, 137.....lxixv, 690
 Barry v. Isaman, 14 Richardson's Law, 129.....xci, 363
 Barry v. Jones, 11 Helak, 206.....37, 743
 Barry v. Lambert, 98 New York, 300.....54, 677
 Barry v. N. York Cent. etc. R. Co., 62 N. Y. 289.....44, 377
 Barry v. Oyster Bay etc. S. Co., 67 N. Y. 301.....55, 115
 Barry v. Schmidt, 57 Wisconsin, 173.....46, 36
 Bartow v. Savage Mining Co., 64 California, 386.49, 706
 Barter vs. Wheeler, 49 New Hampshire, 9.....6, 434
 Barth ad. State, 25 South Carolina, 175.....66, 496
 Barthe v. Lines, 118 Illinois, 374.....59, 374
 Barthe v. Succession of Lacroix, 29 La. An. 236.....39, 330
 Bartholomew v. Bentley, 15 Ohio, 686.....xiv, 596
 Bartholomew v. Bushnell, 20 Connecticut, 271.....lii, 336
 Bartholomew v. Jackson, 20 Johnson, 26.....xi, 237
 Bartholomew v. Merchants' Ins. Co., 25 La. 557.....xvii, 65
 Bartholomew v. People, 104 Illinois, 801.....44, 97
 Bartholomew v. St. Louis, Jacksonville, etc. R. R. Co., 53 Illinois, 227.....5, 45
 Bartholomew v. Warner, 22 Connecticut, 96.....lxixv, 261
 Bartlet v. Harlow, 12 Massachusetts, 347.....vii, 76
 Bartlet v. Knight, 1 Massachusetts, 401.....ii, 36
 Bartlett v. Bartlett, 113 Massachusetts, 313.....18, 493
 Bartlett v. Blaine, 53 Illinois, 25.....96, 346
 Bartlett v. Blake, 37 Maine, 134.....viii, 775
 Bartlett v. Boston Gas-light Co. 117 Mass. 523.....19, 421
 Bartlett v. Brown, 6 Rhode Island, 37.....lxix, 675
 Bartlett v. Crozier, 17 Johnson, 449.....viii, 428
 Bartlett v. Doe ex dem. Gayle, 6 Alabama, 205.....xii, 53
 Bartlett v. Drake, 100 Massachusetts, 174.....xvii, 93
 Bartlett v. Drake, 100 Massachusetts, 174.....1, 101
 Bartlett v. Hoppock, 34 New York, 118.....lxixviii, 428
 Bartlett v. Isbell, 31 Connecticut, 296.....lxixxi, 146
 Bartlett v. Jones, 2 Strobhart's Law, 471.....xlix, 606
 Bartlett v. Judd, 21 New York, 200.....lxixviii, 131
 Bartlet v. King, 12 Massachusetts, 537.....vii, 99
 Bartlett v. Levy, 3 Strobhart's Law, 471.....xlix, 606
 Bartlett v. Peaslee, 20 New Hampshire, 547.....ii, 243
 Bartlett v. Slater, 53 Connecticut, 103.....55, 73
 Bartlett ad. State, 43 New Hampshire, 224.....lxix, 154
 Bartlett v. Tucker, 104 Massachusetts, 336.....6, 340
 Bartlet v. Walter, 13 Massachusetts, 267.....vii, 143
 Bartlett v. Western Union Tel. Co., 62 Ma. 206.....16, 437
 Bartley v. Richtmyer, 4 N. Y. (4 Const.) 26.....liii, 338
 Barto v. Himrod, 8 New York (4 Selden), 453.....lix, 606
 Barto v. Schmeck, 28 Penn. State, 447.....lxix, 145
 Barton v. Baker, 1 Serg. & R. 334.....vii, 630
 Barton v. Barbours, 3 MacArthur, 212.....34, 104
 Barton v. Faberty, 3 G. Greene, 237.....lv, 508
 Barton v. Home Ins. Co., 42 Missouri, 186.....xviii, 329
 Barton v. Kane, 17 Wisconsin, 36.....lxixiv, 726
 Barton v. Murrain, 27 Missouri, 235.....lxixii, 239
 Barton v. State, 67 Georgia, 653.....44, 743
 Barton v. St. Louis & Iron Mountain R. R. Co., 28 Missouri, 253.....14, 618
 Barton v. Thompson, 46 Iowa, 30.....36, 131
 Barton v. Thompson, 54 Iowa, 571.....41, 119
 Barton v. White, 144 Massachusetts, 261.....59, 84
 Barton Coal Co. v. Cox, 39 Maryland, 1.....17, 526
 Bartram's Estate, 42 Penn. State, 330.....lxixiii, 517
 Basford v. Brown, 9 Maine, 2.....lxixviii, 261
 Basford v. Pearson, 9 Allen, 387.....lxixv, 764
 Baskin's Appeal, 3 Penn. State, 304.....xlv, 641
 Bason v. Holt, 3 Jones' Law, 223.....lxix, 586
 Bass v. Chicago etc. R. R. Co., 28 Illinois, 9.....lxixxi, 364
 Bass v. Chicago & N. E'y Co., 36 Wisconsin, 450.....17, 496
 Bass v. Chicago & N. W. E'y Co., 43 Wis. 654.....24, 437
 Bass v. Mayor of Nashville, Meigs, 451.....xixiii, 154
 Bass Furnace Co. v. Glasscock, 82 Alabama, 452.....66, 746
 Basse v. Gallagher, 7 Wisconsin, 442.....lxixvi, 226
 Bassett v. Carleton, 23 Maine, 563.....lv, 605
 Bassett v. Garthwaite, 22 Texas, 230.....lxixii, 237
 Bassett v. Kinney, 24 Connecticut, 267.....lxixii, 161
 Bassett v. Salisbury Mfg. Co., 43 N. H. 569.....lxixvii, 173
 Bassett v. Spofford, 45 New York, 387.....6, 101
 Bassett v. St. Joseph, 53 Missouri, 290.....14, 446
 Bast v. Byrne, 51 Wisconsin, 531.....37, 641
 Baston v. Clifford, 68 Illinois, 67.....18, 547
 Batavia Bank v. N. Y. etc. R. R. Co., 106 N. Y. 185.66, 449
 Batchelder v. Batchelder, 48 N. H. 23.....xviii, 569
 Batchelder v. Carter, 2 Vermont, 168.....xix, 707
 Batchelder v. Kelly, 10 New Hampshire, 426.....lxixiv, 174
 Batchelder & Keniston, 51 New Hampshire, 456.....12, 143
 Batchelder v. Low, 43 Vermont, 602.....5, 311
 Batchelder v. Putnam, 54 New Hampshire, 84.....36, 115
 Batchelder ad. People, 27 California, 66.....lxixv, 231
 Batchelor ad. People, 53 New York, 128.....13, 489
 Batchelder v. Shapleigh, 10 Maine, 135.....lxix, 213
 Bates, In re, 118 Illinois, 524.....59, 383
 Bates v. Austin, 2 A. K. Marshall, 270.....xii, 306
 Bates v. Bank of Mo., 15 Missouri, 269.....iv, 145
 Bates v. Barry, 125 Massachusetts, 63.....26, 207
 Bates v. Bates, 27 Iowa, 110.....1, 269
 Bates v. Bates, 134 Massachusetts, 110.....45, 306
 Bates v. Bates, Walker, 401.....xii, 573
 Bates v. Chicago M. & St. P. R. R. Co., 60 Wis. 296.54, 269
 Bates v. Foster, 59 Maine, 157.....6, 406
 Bates v. Lancaster, 10 Humphreys, 134.....ii, 696
 Bates v. Norcross, 17 Pickering, 14.....lxixviii, 271
 Bates ad. People, 11 Michigan, 262.....lxixviii, 745
 Bates v. Prickett, 5 Indiana, 23.....lxix, 73
 Bates v. Riddick, 2 Iowa, 423.....lxix, 774
 Bates v. Starr, 2 Vermont, 536.....xii, 563
 Bates v. State Bank, 7 Arkansas, 394.....xvi, 293
 Bathrick v. Detroit P. & T. Co. 50 Michigan, 629.....45, 63
 Bateson v. Murrell, 10 Humphreys, 201.....ii, 707
 Batterton v. Chiles, 12 B. Monroe, 246.....lv, 539
 Battle v. Bering, 7 Yerger, 539.....lxixvii, 536
 Battle v. Mobble, 9 Alabama, 234.....xix, 438
 Battle v. Petway, 5 Iredell's Law, 573.....xlix, 59
 Battle v. State, 4 Texas Ct. Appeals, 299.....36, 169
 Batton v. Allen, 1 Halsted's Ch. 90.....lxixiii, 639
 Batton v. South & N. Ala. R. Co. 17 Ala. 291.54, 89
 Batton v. Watson, 13 Georgia, 63.....lxixvii, 504
 Batturs v. Sellers, 5 Harris & J. 117.....lxix, 493
 Baty v. Sale, 43 Illinois, 361.....xviii, 123
 Baudin v. Roliff, 1 Martin, N. S., 165.....xix, 181
 Baugh v. Baugh, 27 Michigan, 59.....26, 495
 Baugh v. Kirkpatrick, 54 Penn. State, 94.....xviii, 678
 Baugher v. Nelson, 9 Gill, 269.....18, 694
 Baugher v. Wilkins, 16 Maryland, 35.....lxixvii, 273
 Baughman v. Shenango and Allegheny R. Co., 28 Pennsylvania 335.....27, 699
 Beale v. N. Y. & H. R. R. Co., 59 New York, 266.17, 325
 Baum v. Grigby, 21 California, 173.....lxixxi, 153
 Bauman v. Bauman, 18 Arkansas, 230.....lxixviii, 171
 Baumer v. State, 49 Indiana, 544.....19, 691
 Baumgard v. Mayor, 9 Louisiana 112.....lxixxi, 437
 Baumgartner v. Hasty, 100 Indiana, 573.....59, 639
 Baute v. Kuhworth, 1 Montana, 123.....25, 737
 Bavington v. Clark, 2 Penrose & Watts, 115.....xii, 439
 Baxley v. Linah, 16 Penn. State, 261.....lv, 494
 Baxter v. Bradbury, 20 Maine, 260.....lxixvii, 49
 Baxter v. Bush, 29 Vermont, 465.....lxix, 739
 Baxter v. Chelsea M. F. I. Co., 1 Allen, 294.....lxixxi, 739
 Baxter v. Dear, 24 Texas, 17.....lxixvi, 69
 Baxter v. Duren, 29 Maine, 434.....1, 608
 Baxter v. Graves, 2 A. K. Marshall, 152.....xii, 374
 Baxter v. Harris, 6 Metcalf, 7.....lxixviii, 73

Roman letters [xlx] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Baxter v. Little, 6 Metcalf, 7.....	xlxix, 707
Baxter v. Moses, 77 Maine, 468.....	52, 783
Baxter v. New Eng. M. Ins. Co., 6 Mass. 377.....	iv, 125
Baxter v. Roberts, 44 California, 187.....	13, 160
Baxter v. Willey, 9 Vermont, 276.....	xxxi, 623
Baxter v. Winoski T. Co., 22 Vermont, 114.....	lii, 84
Bay v. Coddington, 5 Johns. Ch. 54.....	ix, 268
Bay v. Williams, 113 Illinois, 91.....	54, 209
Bay County v. Bradley, 39 Michigan, 163.....	33, 367
Bayard v. Malcolm, 3 Johnson, 550.....	lii, 450
Bayard v. Shunk, 1 Watts & Serg. 92.....	xxxvii, 441
Bayler v. Commonwealth, 40 Penn. State, 37.....	lxxx, 551
Bayler v. Delaware L. & W. R. Co., 11 Vroom, 23.79, 308	
Bayley v. Onondaga Ins. Co., 6 Hill (N. Y.) 476.....	xli, 759
Bayley v. Taber, 5 Massachusetts, 296.....	iv, 57
Baynard v. Norris, 5 Gill, 463.....	xli, 647
Baystinger v. State, 77 Alabama, 63.....	54, 46
Bay State I. Co. v. Goodall, 39 New Hamp. 233.....	lxv, 319
Beach v. Beach, 3 Hill (N. Y.) 260.....	xxxviii, 684
Beach v. Beach, 14 Vermont, 36.....	xxxix, 304
Beach v. Botsford, 1 Douglass, 199.....	xi, 45
Beach v. Catlin, 4 Day, 394.....	iv, 221
Beach v. Craik, 28 New York, 508.....	lxxxvi, 360
Beach v. Craik, 3 N. Y., 2 Comst. 86.....	xlx, 369
Beach v. Hancock, 37 New Hampshire, 223.....	lix, 273
Beach v. Miller, 51 Illinois, 308.....	2, 290
Beach v. Packard, 10 Vermont, 96.....	xxxiii, 185
Beach v. Schoff, 28 Penn. State, 196.....	lxx, 123
Beadies v. Bliss, 37 Illinois, 330.....	lxxxii, 231
Beard v. Foreman, Breese, 385.....	xli, 197
Beal v. Boston Spring Car Co., 125 Mass. 157.....	38, 316
Beal v. Brooks' Ex'rs., 7 J. J. Marshall, 233.....	xxxiii, 401
Beal v. Park Fire Ins. Co., 16 Wisconsin, 241.....	lxxxii, 719
Beal ada. State, 68 Indiana, 345.....	34, 263
Beal ada. State, 37 Ohio State, 108.....	41, 490
Beale v. Delaney, 6 Martin N. S. 640.....	xvii, 199
Beale v. Parish, 20 New York, 407.....	lxv, 414
Beall v. Blake, 13 Georgia, 317.....	lviii, 513
Beall v. Cunningham, 3 B. Monroe, 360.....	xxxix, 459
Beall v. Davenport, 48 Georgia, 163.....	15, 656
Beall v. Harwood, 3 Harris & J. 167.....	lii, 532
Beall v. Hillary, 1 Maryland, 136.....	liv, 649
Beall v. Leverett, 32 Georgia, 106.....	lxxxix, 396
Beall v. Schley, 3 Gill, 181.....	xli, 415
Beall v. Taylor, 3 Grafton, 533.....	xliv, 396
Beals v. Allen, 18 Johnson, 363.....	ix, 221
Beals v. Coarney, 5 Johnson, 446.....	v, 348
Beals v. Olmstead, 34 Vermont, 114.....	lviii, 150
Beals v. Providence Rubber Co., 11 R. I. 381.....	23, 472
Beals v. Sea, 10 Penn. State, 56.....	xlx, 573
Beaman v. Russell, 30 Vermont, 305.....	xlx, 775
Bean v. Abwater, 4 Connecticut, 3.....	x, 91
Bean v. Briggs, 1 Iowa, 438.....	lxiii, 464
Bean v. Burbank, 16 Maine, 468.....	xxxiii, 681
Bean v. Harriet, 13 Maine, 363.....	xxxviii, 176
Bean v. Pioneer Mining Co., 66 California, 451.....	56, 106
Bean v. Sturtevant, 9 New Hampshire, 146.....	xxxviii, 389
Bean v. Thompson, 19 New Hampshire, 290.....	xlx, 154
Bean v. Tonnelle, 94 New York, 381.....	46, 153
Beaudet ada. State, 63 Connecticut, 536.....	55, 155
Beav. v. Btmer, 16 Penn. State, 175.....	iv, 490
Beavre v. Barstow, 9 Massachusetts, 45.....	vi, 25
Beard v. Beard, 25 West Virginia, 486.....	53, 219
Beard v. Campbell, 2 A. K. Marshall, 125.....	xii, 362
Beard v. Dennis, 6 Indiana, 200.....	lxiii, 390
Beard v. Knox, 5 California, 363.....	lxiii, 125
Beard v. Murphy, 37 Vermont, 99.....	lxxxvi, 693
Beardale v. French, 7 Connecticut, 125.....	xlviii, 86
Beardale v. Richardson, 11 Wendell, 26.....	xv, 596
Beardale v. Bridgeport, 53 Connecticut, 489.....	55, 152
Beardale v. Foot, 14 Ohio St. 414.....	lxxxiv, 405
Beardale v. Hall, 36 Connecticut, 270.....	4, 74
Beardale v. Hartford, 50 Connecticut, 639.....	47, 677
Beardale v. Knight, 10 Vermont, 185.....	xxxiii, 193
Beardale v. Root, 11 Johnson, 464.....	vi, 396
Beardale v. Selectmen of Bridgeport, 53 Conn. 489.55, 153	
Beardale v. Smith, 16 Connecticut, 368.....	xli, 148
Bear River M. Co. v. New York M. Co., 8 Cal. 327.....	lxviii, 325
Bease ada. Commonwealth, 133 Mass. 542.....	42, 460
Beasley v. State, 50 Alabama, 149.....	26, 292
Beatie v. Butler, 21 Missouri, 313.....	lxiv, 334
Beatty v. Gilmore, 16 Penn. State, 463.....	lv, 514
Beatty v. Gregory, 17 Iowa, 109.....	lxxxv, 566
Beatty v. Locomotive Co. M. I. Co., 65 Penn. St. 2, 5, 318	
Beatty v. Marine Ins. Co., 3 Johnson, 109.....	lii, 405
Beatty v. Wray, 19 Penn. State, 516.....	lvii, 677
Beauchamp v. Archer, 55 California, 431.....	41, 266
Beauchamp v. Saginaw Mining Co., 50 Mich. 163.45, 30	
Beaufort v. Collier, 6 Humphreys, 487.....	xliv, 231
Beaumont v. State, 1 Texas Ct. App. 533.....	26, 694
Beaumont's Case, 1 Wharton, 52.....	xxix, 36
Beaupland v. McKee, 28 Penn. State, 124.....	lxx, 115
Beaver v. Morrison, 22 Georgia, 107.....	lxviii, 486
Beaver v. Bare, 104 Pennsylvania St. 58.....	49, 567
Beebe v. Bank of N. Y., 1 Johnson, 539.....	lii, 363
Beebe v. Hartford Co. etc. Ins. Co., 25 Conn., 61.....	lxv, 553
Beck v. Allison, 56 New York, 368.....	15, 490
Beck v. Bine, 43 Alabama, 23.....	xv, 630
Beck v. Burdett, 1 Paige's Ch., 305.....	xix, 436
Beck v. Carter, 66 New York, 263.....	23, 175
Beck v. Parker, 65 Pennsylvania St. 262.....	3, 626
Beck ada. State, 1 Hill, 363.....	xxvi, 199
Beck v. Ulrich, 13 Penn. State, 636.....	liii, 507
Becker v. Koch, 104 New York, 394.....	58, 515
Becker v. Western U. Tel. Co., 11 Nebraska, 67.....	38, 396
Beckett v. Selover, 7 California, 515.....	lxviii, 237
Beckman v. Creamer, 43 Illinois, 447.....	xvii, 126
Beckman v. Shouse, 5 Rawle, 179.....	xxviii, 663
Beckwith v. Burrough, 14 Rhode Island, 368.....	51, 393
Beckwith v. Hartford Railroad, 29 Conn. 268.....	lxxvi, 599
Beckwith v. Smith, 22 Maine, 125.....	xxxviii, 269
Beckwith ada. State 1 Stewart 318.....	xviii, 46
Bedell v. Long Island R. R. Co., 44 New York, 367.....	4, 698
Bedford v. Hickman, 5 Call, 236.....	ii, 590
Bedford v. Shilling, 4 Berg. & R., 401.....	viii, 718
Bedford v. Terhune, 30 New York, 453.....	lxxxvi, 394
Bedford v. Urquhart, 8 Louisiana, 234.....	xxviii, 137
Bedford Com. Ins. Co. v. Parker 3 Pickering, 1.....	xiii, 368
Beebe v. Bull, 12 Wendell, 504.....	xxvii, 150
Beebe v. Dudley, 26 New Hampshire, 249.....	lix, 341
Beebe v. Johnson, 19 Wendell, 500.....	xxxii, 518
Beebe v. Robert, 12 Wendell, 413.....	xxvii, 123
Beebe ada. State, 13 Kansas, 589.....	19, 98
Beebe v. State, 6 Indiana, 501.....	lxiii, 391
Beecher v. Buckingham, 18 Connecticut, 110.....	xliv, 590
Beecher v. Bush, 45 Michigan, 128.....	40, 465
Beecher v. Conrad, 13 New York (3 Kern.), 108.....	lxiv, 538
Beecher v. Parmale, 9 Vermont, 263.....	xxxii, 633
Beecher v. People, 36 Michigan, 289.....	31, 316
Beecker v. Beecker, 7 Johnson, 99.....	v, 246
Beeckman v. Montgomery, 14 N. J. Eq. 106.....	lxxx, 229
Beeckman v. Bonsor, 23 New York, 396.....	lxxx, 399
Beeckman v. Frost, 18 Johnson, 544.....	ix, 246
Beeckman v. Lansing, 3 Wendell, 446.....	xx, 707
Beeckman v. Saratoga R. R. Co., 3 Paige Ch. 45.....	xvii, 679
Beeckman ada. State, 3 Dutcher, 124.....	lxvii, 323
Beegle v. Wentz, 55 Pennsylvania State, 369.....	xviii, 783
Beeler v. Bullitt, 3 A. K. Marshall, 230.....	xlii, 161
Beeler v. Cardwell, 29 Missouri, 72.....	lxxxvii, 566
Beeler v. Dunn, 3 Head, 87.....	lxxxv, 761

Roman letters [xliz] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Barrows ada. State, 76 Maine, 401.....49, 639
 Barry v. City of Lowell, 8 Allen, 137.....lxixv, 690
 Barry v. Isaman, 14 Richardson's Law, 129.....xci, 363
 Barry v. Jones, 11 Helak, 206.....37, 743
 Barry v. Lambert, 98 New York, 300.....54, 677
 Barry v. N. York Cent. eta. R. Co., 62 N. Y. 263.....44, 377
 Barry v. Oyster Bay eta. S. Co., 67 N. Y. 301.....53, 115
 Barry v. Schmidt, 37 Wisconsin, 173.....46, 36
 Bartow v. Savage Mining Co., 64 California, 386.49, 706
 Barter vs. Wheeler, 49 New Hampshire, 9.....6, 434
 Barth ada. State, 25 South Carolina, 175.....66, 496
 Barthe v. Limes, 118 Illinois, 374.....58, 374
 Barthe v. Succession of Lacroix, 29 La. An. 236.....39, 330
 Bartholomew v. Bentley, 15 Ohio, 686.....xiv, 566
 Bartholomew v. Bushnell, 20 Connecticut, 271.....lii, 336
 Bartholomew v. Jackson, 20 Johnson, 26.....xi, 237
 Bartholomew v. Merchants' Ins. Co., 25 La. 557.....xvii, 65
 Bartholomew v. People, 104 Illinois, 801.....44, 97
 Bartholomew v. St. Louis, Jacksonville, eta. R. R. Co., 53 Illinois, 227.....5, 45
 Bartholomew v. Warner, 22 Connecticut, 96.....lxixv, 261
 Bartlet v. Harlow, 12 Massachusetts, 367.....vii, 76
 Bartlet v. Knight, 1 Massachusetts, 401.....ii, 36
 Bartlett v. Bartlett, 113 Massachusetts, 313.....18, 493
 Bartlett v. Blaine, 53 Illinois, 25.....78, 346
 Bartlett v. Blake, 37 Maine, 134.....lviii, 775
 Bartlett v. Boston Gas-light Co. 117 Mass. 523.....19, 421
 Bartlett v. Brown, 6 Rhode Island, 37.....lxix, 675
 Bartlett v. Crozier, 17 Johnson, 449.....viii, 428
 Bartlett v. Doe ex dem. Gayle, 6 Alabama, 205.....xli, 53
 Bartlett v. Drake, 100 Massachusetts, 174.....xvii, 93
 Bartlett v. Drake, 100 Massachusetts, 174.....1, 101
 Bartlett v. Hopcock, 34 New York, 118.....lxixviii, 428
 Bartlett v. Isbell, 31 Connecticut, 296.....lxixxi, 146
 Bartlett v. Jones, 2 Strobhart's Law, 471.....xliz, 606
 Bartlett v. Judd, 21 New York, 200.....lxixviii, 121
 Bartlet v. King, 12 Massachusetts, 537.....vii, 99
 Bartlett v. Levy, 3 Strobhart's Law, 471.....xliz, 606
 Bartlett v. Peaslee, 20 New Hampshire, 547.....ii, 243
 Bartlett v. Slater, 23 Connecticut, 102.....55, 73
 Bartlett ada. State, 43 New Hampshire, 224.....lxix, 154
 Bartlett v. Tucker, 104 Massachusetts, 336.....6, 340
 Bartlet v. Walter, 13 Massachusetts, 267.....vii, 143
 Bartlett v. Western Union Tel. Co., 62 Ma. 208.....16, 437
 Bartley v. Richtmyer, 4 N. Y. (4 Comst.) 36.....liii, 338
 Barto v. Himrod, 8 New York (4 Selden), 493.....lix, 606
 Barto v. Schmeck, 28 Penn. State, 447.....lxix, 145
 Barton v. Baker, 1 Serg. & R. 334.....vii, 630
 Barton v. Barbour, 3 MacArthur, 212.....34, 104
 Barton v. Faberty, 5 G. Greene, 327.....lv, 508
 Barton v. Home Ins. Co., 42 Missouri, 186.....xviii, 329
 Barton v. Kane, 17 Wisconsin, 36.....lxixiv, 736
 Barton v. Murrain, 27 Missouri, 235.....lxixii, 289
 Barton v. State, 67 Georgia, 653.....44, 743
 Barton v. St. Louis & Iron Mountain R. R. Co., 28 Missouri, 223.....14, 418
 Barton v. Thompson, 46 Iowa, 30.....36, 131
 Barton v. Thompson, 56 Iowa, 571.....41, 119
 Barton v. White, 144 Massachusetts, 261.....59, 84
 Barton Coal Co. v. Cox, 39 Maryland, 1.....17, 626
 Bartram's Estate, 42 Penn. State, 330.....lxixii, 517
 Basford v. Brown, 22 Maine, 9.....lxixviii, 261
 Basford v. Pearson, 9 Allen, 387.....lxixv, 764
 Baskin's Appeal, 3 Penn. State, 304.....xiv, 641
 Bason v. Holt, 3 Jones' Law, 323.....lxix, 586
 Bass v. Chicago eta. R. R. Co., 28 Illinois, 9.....lxixxi, 264
 Bass v. Chicago & N. E'y Co., 26 Wisconsin, 450.....17, 436
 Bass v. Chicago & N. W. R'y Co., 43 Wia. 654.....24, 437
 Bass v. Mayor of Nashville, Meigs, 421.....lxixii, 154
 Bass Furnace Co. v. Glasscock, 52 Alabama, 482.....66, 748
 Basse v. Gallagher, 7 Wisconsin, 442.....lxixvi, 226
 Bassett v. Carleton, 22 Maine, 563.....lv, 626
 Bassett v. Garthwaite, 22 Texas, 230.....lxixii, 257
 Bassett v. Kinney, 24 Connecticut, 267.....lxixii, 161
 Bassett v. Salisbury Mfg. Co., 43 N. H. 569.....lxixvii, 179
 Bassett v. Spofford, 45 New York, 267.....6, 101
 Bassett v. St. Joseph, 53 Missouri, 290.....14, 446
 Bast v. Byrne, 51 Wisconsin, 531.....37, 841
 Baston v. Clifford, 68 Illinois, 67.....18, 547
 Batavia Bank v. N. Y. eta. R. R. Co., 106 N. Y. 185.66, 449
 Batchelder v. Batchelder, 48 N. H. 23.....xviii, 569
 Batchelder v. Carter, 2 Vermont, 162.....xix, 767
 Batchelder v. Kelly, 10 New Hampshire, 426.....lxixiv, 174
 Batchelder & Keniston, 51 New Hampshire, 426.....12, 143
 Batchelder v. Low, 43 Vermont, 602.....5, 311
 Batchelder v. Putnam, 54 New Hampshire, 84.....36, 115
 Batchelder ada. People, 27 California, 66.....lxixv, 231
 Batchelor ada. People, 53 New York, 128.....13, 489
 Batchelder v. Shapleigh, 10 Maine, 135.....lxix, 213
 Bates, In re, 118 Illinois, 524.....59, 323
 Bates v. Austin, 2 A. K. Marshall, 270.....xi, 305
 Bates v. Bank of Mo., 15 Missouri, 269.....lv, 145
 Bates v. Barry, 125 Massachusetts, 63.....26, 267
 Bates v. Bates, 27 Iowa, 110.....1, 269
 Bates v. Bates, 134 Massachusetts, 110.....45, 306
 Bates v. Bates, Walker, 401.....xli, 573
 Bates v. Chicago M. & St. P. R. R. Co., 60 Wia. 296.54, 369
 Bates v. Foster, 59 Maine, 157.....8, 408
 Bates v. Lancaster, 10 Humphreys, 134.....N, 696
 Bates v. Norcross, 17 Pickering, 14.....lxixvii, 271
 Bates ada. People, 11 Michigan, 362.....lxixviii, 748
 Bates v. Prickett, 5 Indiana, 23.....lxix, 73
 Bates v. Ruddick, 2 Iowa, 425.....lxix, 774
 Bates v. Starr, 2 Vermont, 536.....xli, 568
 Bates v. State Bank, 7 Arkansas, 364.....xvii, 293
 Bathrick v. Detroit P. & T. Co. 50 Michigan, 629.....45, 63
 Bateson v. Murrell, 10 Humphreys, 201.....N, 707
 Batterton v. Chiles, 12 B. Monroe, 248.....lv, 539
 Battle v. Bering, 7 Yerger, 539.....lxixvii, 528
 Battle v. Moblie, 9 Alabama, 234.....xlii, 438
 Battle v. Petway, 5 Iredell's Law, 573.....xlii, 59
 Battle v. State, 4 Texas Ct. Appeals, 599.....36, 169
 Batton v. Allen, 1 Halsted's Ch. 99.....lxixxi, 639
 Batton v. South & N. Ala. R. Co. 17 Ala. 591.54, 89
 Batton v. Watson, 13 Georgia, 63.....lviii, 504
 Batturs v. Sellers, 5 Harris & J. 117.....lix, 493
 Baty v. Sale, 43 Illinois, 261.....xviii, 128
 Baudin v. Roliff, 1 Martin, N. R., 165.....xiv, 181
 Baugh v. Baugh, 27 Michigan, 59.....36, 495
 Baugh v. Kirkpatrick, 54 Penn. State, 94.....xviii, 675
 Baugher v. Nelson, 9 Gill, 269.....li, 694
 Baugher v. Wilkins, 16 Maryland, 35.....lxixvii, 279
 Baughman v. Shenango and Allegheny R. Co., 62 Pennsylvania St. 235.....27, 699
 Beale v. N. Y. & H. R. R. Co., 59 New York, 264.17, 325
 Baum v. Grigby, 21 California, 173.....lxixxi, 153
 Bauman v. Bauman, 18 Arkansas, 230.....lxixvii, 171
 Baumer v. State, 49 Indiana, 544.....19, 691
 Baumgard v. Mayor, 9 Louisiana, 112.....lxixxi, 437
 Baumgartner v. Hasty, 100 Indiana, 573.....59, 639
 Baits v. Kuhworth, 1 Montana, 123.....23, 737
 Bavington v. Clark, 2 Penrose & Watts, 115.....xli, 423
 Baxley v. Linah, 16 Penn. State, 261.....lv, 494
 Baxter v. Bradbury, 20 Maine, 260.....lxixvii, 49
 Baxter v. Bush, 29 Vermont, 465.....lxix, 429
 Baxter v. Chelsea M. F. I. Co., 1 Allen, 294.....lxixxi, 739
 Baxter v. Dear, 24 Texas, 17.....lxixvi, 89
 Baxter v. Duren, 29 Maine, 434.....1, 608
 Baxter v. Graves, 2 A. K. Marshall, 152.....xi, 374
 Baxter v. Harris, 6 Metcalf, 7.....lxixvii, 707

Roman letters [xliv] refer to volumes of American Decisions, and Arable figures [49] to American Reports.

Baxter v. Little, 6 Metcalf, 7.....	xliv, 707
Baxter v. Moses, 77 Maine, 468.....	52, 783
Baxter v. New Eng. M. Ins. Co., 6 Mass. 377.....	iv, 125
Baxter v. Roberts, 44 California, 187.....	13, 180
Baxter v. Willey, 9 Vermont, 276.....	xxxi, 623
Baxter v. Winouski T. Co., 22 Vermont, 114.....	lii, 84
Bay v. Coddington, 5 Johns. Ch. 54.....	ix, 268
Bay v. Williams, 112 Illinois, 91.....	54, 209
Bay County v. Bradley, 39 Michigan, 163.....	33, 367
Bayard v. Malcolm, 3 Johnson, 550.....	lii, 450
Bayard v. Shunk, 1 Watts & Serg. 92.....	xxvii, 441
Bayler v. Commonwealth, 40 Penn. State, 37.....	lxxx, 651
Baylor v. Delaware L. & W. R. Co., 11 Vroom, 23.99.....	308
Bayley v. Onondaga Ins. Co., 6 Hill (N. Y.) 476.....	xii, 759
Bayley v. Taber, 5 Massachusetts, 296.....	iv, 57
Baynard v. Norris, 5 Gill, 458.....	xlvi, 647
Bayringer v. State, 77 Alabama, 63.....	54, 46
Bay State I. Co. v. Goodall, 39 New Hamp. 233.....	lxv, 219
Beach v. Beach, 2 Hill (N. Y.) 380.....	xxviii, 584
Beach v. Beach, 14 Vermont, 26.....	xxix, 304
Beach v. Botsford, 1 Douglas, 199.....	xl, 45
Beach v. Catlin, 4 Day, 294.....	iv, 221
Beach v. Cooke, 28 New York, 508.....	lxxxvi, 260
Beach v. Craik, 2 N. Y., 2 Comet, 86.....	xlx, 369
Beach v. Hancock, 27 New Hampshire, 232.....	lix, 273
Beach v. Miller, 51 Illinois, 306.....	2, 290
Beach v. Packard, 10 Vermont, 96.....	xxxi, 185
Beach v. Schoff, 26 Penn. State, 195.....	lxx, 122
Beables v. Bliss, 37 Illinois, 320.....	lxxxii, 231
Beard v. Foreman, Breese, 385.....	xii, 197
Beal v. Boston Spring Car Co., 125 Mass. 157.....	29, 216
Beal v. Brooks' Ex'rs, 7 J. J. Marshall, 232.....	xxiii, 401
Beal v. Park Fire Ins. Co., 16 Wisconsin, 241.....	lxxxii, 719
Beal ada. State, 68 Indiana, 345.....	34, 263
Beal ada. State, 37 Ohio State, 108.....	41, 490
Beale v. Delaney, 6 Martin N. S. 640.....	xvii, 199
Beale v. Parish, 20 New York, 407.....	lxv, 414
Beall v. Blake, 13 Georgia, 517.....	lviii, 513
Beall v. Cunningham, 3 B. Monroe, 390.....	xxix, 469
Beall v. Davenport, 48 Georgia, 168.....	15, 656
Beall v. Harwood, 2 Harris & J. 167.....	lii, 532
Beall v. Hillary, 1 Maryland, 198.....	liv, 649
Beall v. Leverett, 32 Georgia, 105.....	lxxxix, 296
Beall v. Schley, 2 Gill, 181.....	xii, 415
Beall v. Taylor, 2 Gtatten, 533.....	xliv, 398
Beals v. Allen, 18 Johnson, 363.....	ix, 221
Beals v. Gormsey, 8 Johnson, 446.....	v, 348
Beals v. Olmstead, 24 Vermont, 114.....	lviii, 150
Beals v. Providence Rubber Co., 11 R. I. 381.....	23, 472
Beals v. Sea, 10 Penn. State, 55.....	xlx, 573
Beaman v. Russell, 20 Vermont, 305.....	xlx, 775
Bean v. Aswater, 4 Connecticut, 3.....	x, 91
Bean v. Briggs, 1 Iowa, 488.....	lxiii, 464
Bean v. Burbank, 16 Maine, 468.....	xxviii, 681
Bean v. Herriot, 12 Maine, 362.....	xxviii, 176
Bean v. Pioneer Mining Co., 66 California, 451.....	56, 106
Bean v. Sturtevant, 8 New Hampshire, 146.....	xxviii, 389
Bean v. Thompson, 19 New Hampshire, 390.....	xlx, 154
Bean v. Toumele, 94 New York, 381.....	46, 153
Beaudet ada. State, 63 Connecticut, 536.....	55, 155
Beav v. Bitter, 16 Penn. State, 175.....	lv, 490
Beavre v. Barstow, 9 Massachusetts, 45.....	vi, 25
Beard v. Beard, 26 West Virginia, 486.....	52, 219
Beard v. Campbell, 2 A. K. Marshall, 125.....	xii, 362
Beard v. Dennis, 6 Indiana, 200.....	lxiii, 380
Beard v. Knox, 5 California, 263.....	lxiii, 125
Beard v. Murphy, 37 Vermont, 99.....	lxxxvi, 693
Beardslee v. French, 7 Connecticut, 125.....	xviii, 86
Beardslee v. Richardson, 11 Wendell, 25.....	xiv, 596
Beardsley v. Bridgeport, 33 Connecticut, 489.....	55, 152
Beardsley v. Foot, 14 Ohio St. 414.....	lxxxiv, 405
Beardsley v. Hall, 36 Connecticut, 270.....	4, 74
Beardsley v. Hartford, 50 Connecticut, 629.....	47, 677
Beardsley v. Knight, 10 Vermont, 185.....	xxviii, 193
Beardsley v. Root, 11 Johnson, 464.....	vi, 396
Beardsley v. Selectmen of Bridge's, 53 Conn. 499.55.....	193
Beardsley v. Smith, 16 Connecticut, 368.....	xii, 148
Beard River M. Co. v. New York M. Co., 8 Cal. 337.....	lxviii, 325
Bease ada. Commonwealth, 133 Mass. 542.....	42, 450
Beasley v. State, 50 Alabama, 149.....	29, 292
Beatie v. Butler, 21 Missouri, 313.....	lxiv, 234
Beatty v. Gilmore, 16 Penn. State, 463.....	iv, 514
Beatty v. Gregory, 17 Iowa, 109.....	lxxxv, 546
Beatty v. Lycoming Co. M. I. Co., 65 Penn. St. 2.....	5, 312
Beatty v. Marine Ins. Co., 3 Johnson, 109.....	lii, 607
Beatty v. Wray, 19 Penn. State, 516.....	lvii, 677
Beauchamp v. Archer, 58 California, 431.....	41, 266
Beauchamp v. Saginaw Mining Co., 50 Mich. 163.45.....	30
Beaufort v. Collier, 6 Humphreys, 487.....	xiv, 321
Beaumont v. State, 1 Texas Civ. App. 533.....	28, 494
Beaumont's Case, 1 Wharton, 82.....	xxix, 36
Beaupland v. McKean, 26 Penn. State, 134.....	lxx, 115
Beaver v. Morrison, 22 Georgia, 107.....	lxviii, 466
Beaver v. Bara, 104 Pennsylvania St. 58.....	49, 567
Beebe v. Bank of N. Y., 1 Johnson, 539.....	lii, 353
Beebe v. Hartford Co. eta. Ins. Co., 25 Conn. 51.....	lxv, 553
Beck v. Allison, 56 New York, 266.....	15, 430
Beck v. Bine, 42 Alabama, 23.....	xciv, 630
Beck v. Burdett, 1 Paige's Ch., 305.....	xlx, 436
Beck v. Carter, 68 New York, 283.....	23, 176
Beck v. Parker, 65 Pennsylvania St. 262.....	3, 626
Beck ada. State, 1 Hill, 363.....	xxvi, 190
Beck v. Ulrich, 13 Penn. State, 636.....	liii, 507
Becker v. Koch, 104 New York, 394.....	58, 515
Becker v. Western U. Tel. Co., 11 Nebraska, 87.....	28, 266
Beckett v. Selover, 7 California, 315.....	lxviii, 237
Beckman v. Kreamer, 43 Illinois, 447.....	xcii, 146
Beckman v. Shouse, 5 Rawle, 179.....	xxviii, 653
Beckwith v. Burrough, 14 Rhode Island, 268.....	51, 268
Beckwith v. Hartford Railroad, 29 Conn. 268.....	lxvii, 599
Beckwith v. Smith, 22 Maine, 125.....	xxviii, 266
Beckwith ada. State 1 Stewart 318.....	lxviii, 46
Bedell v. Long Island R. R. Co., 44 New York, 367.....	4, 698
Bedford v. Hickman, 5 Call, 236.....	ii, 660
Bedford v. Shilling, 4 Berg. & R., 401.....	viii, 718
Bedford v. Terhune, 30 New York, 453.....	lxxxvi, 394
Bedford v. Urquhart, 8 Louisiana, 234.....	xxviii, 137
Bedford Com. Ins. Co. v. Parker 2 Pickering, 1.....	xiii, 398
Beebe v. Bull, 12 Wendell, 504.....	xxvii, 150
Beebe v. Dudley, 26 New Hampshire, 249.....	lix, 341
Beebe v. Johnson, 19 Wendell, 500.....	xxviii, 518
Beebe v. Robert, 12 Wendell, 413.....	xxvii, 132
Beebe ada. State, 13 Kansas, 589.....	19, 98
Beebe v. State, 6 Indiana, 501.....	lxviii, 391
Beecher v. Buckingham, 18 Connecticut, 110.....	xlv, 680
Beecher v. Bush, 45 Michigan, 128.....	40, 465
Beecher v. Conrad, 13 New York (3 Kern.), 108.....	lxiv, 538
Beecher v. Parmele, 9 Vermont, 353.....	xxxi, 633
Beecher v. People, 36 Michigan, 289.....	31, 316
Beecker v. Beecker, 7 Johnson, 99.....	v, 246
Beekman v. Montgomery, 14 N. J. Eq. 106.....	lxxx, 229
Beekman v. Bonsor, 23 New York, 398.....	lxxx, 369
Beekman v. Frost, 18 Johnson, 544.....	lx, 246
Beekman v. Lansing, 3 Wendell, 446.....	xx, 707
Beekman v. Saratoga, R. R. Co., 3 Paige Ch. 45.....	xxii, 679
Beekman ada. State, 3 Dutcher, 124.....	lxxxii, 353
Beegle v. Wentz, 55 Pennsylvania State, 389.....	xciii, 783
Beeler v. Bullitt, 3 A. K. Marshall, 230.....	xiii, 161
Beeler v. Cardwell, 29 Missouri, 72.....	lxxvii, 550
Beeler v. Dunn, 3 Head, 87.....	lxxv, 763

Roman letters (xliv) refer to volumes of American Decisions, and Arabic figures (49) to American Reports.

- Beeman v. Buck, 3 Vermont, 53 xxi, 571
 Beeman v. Cook, 48 Vermont, 301 31, 123
 Beers v. Beers, 4 Connecticut, 535 x, 186
 Beers v. Board of Health, 35 La. An. 1132 48, 256
 Beers v. Strong, Kirby, 12 i, 10
 Beery v. Irick, 22 Gratt. 484 12, 539
 Beggary v. Craft, 31 Georgia, 309 lxvii, 687
 Beggis v. Thompson, 2 Ohio, 95 xv, 539
 Begley v. Morgan, 15 Louisiana, 163 xxxv, 188
 Behaly v. Hatch, Walker, 393 xii, 570
 Behrens v. McKenzie, 23 Iowa, 333 xcii, 438
 Belirne v. Dord, 5 New York (1 Selden), 95 iv, 321
 Belisrael v. New York O. R., 34 N. Y., 623 x, 741
 Belis v. Fuller, 1 McCord, 641 x, 693
 Belcher v. Weaver, 46 Texas, 283 96, 267
 Belden v. Carter, 4 Day, 65 iv, 185
 Belden v. Menger, 5 Minnesota, 211 lxxv, 407
 Belden v. Seymour, 8 Connecticut, 304 xxi, 661
 Belden ad. State, 23 Wisconsin, 121 14, 748
 Belding v. Frankland, 3 Lea, 67 41, 630
 Belding v. State, 25 Arkansas, 315 4, 26
 Belding v. State, 25 Arkansas, 315 xlix, 214
 Belford v. Crane, 16 New Jersey Eq. 268 lxxiv, 185
 Belger v. Dismore, 61 New York, 166 10, 875
 Belknap v. Belknap, 2 Johns. Ch. 463 vii, 548
 Belknap v. Bender, 75 New York, 446 31, 476
 Belknap v. Gleason, 11 Connecticut, 160 xlvii, 721
 Belknap v. Nat. Bank of North Am., 100 Massachusetts, 376 xvii, 106
 Belknap v. Reinhart, 2 Wendell, 375 x, 621
 Belknap v. Sealey, 14 N. Y. (4 Kernan) 143 lxvii, 130
 Bell v. Beeman, 3 Murphy, 273 ix, 604
 Bell v. Bell, 37 Alabama, 536 lxxix, 73
 Bell v. Blount, 4 Hawks, 384 xv, 526
 Bell v. Boumy, 7 Louisiana An. 170 lvi, 601
 Bell v. Byerson, 11 Iowa, 233 lxxvii, 142
 Bell v. Clapp, 10 Johnson, 263 vi, 339
 Bell v. Cotel, 2 Hill Ch. 106 xlvii, 448
 Bell v. Eason, 26 Indiana, 463 xcii, 329
 Bell v. Farmers' Bank, 11 Bush, 84 21, 205
 Bell v. Graham, 1 Nott & McCord, 378 ix, 687
 Bell v. Josselyn, 3 Gray, 309 lxviii, 741
 Bell v. L. & N. R. R., 1 Bush, 404 lxxix, 632
 Bell v. Layman, 1 T. R. Monroe, 39 xv, 83
 Bell v. Looka, 8 Paige, 75 xlviv, 371
 Bell v. McClintock, 9 Watts, 119 xlviii, 507
 Bell v. McConnell, 37 Ohio St. 296 41, 528
 Bell v. McGinnis, 40 Ohio St. 304 48, 673
 Bell v. Monahan, Dudley's Law, 38 xxxi, 548
 Bell v. Nealy, 1 Bailey's Law, 312 xix, 686
 Bell v. Ohio & Penn. R. R. Co., 26 Penn. St. 161 lxiv, 637
 Bell v. Packard, 69 Maine, 106 31, 251
 Bell v. Parker, 3 Dana, 51 xlviii, 55
 Bell v. Peabody, 63 New Hampshire, 233 54, 506
 Bell v. Perkins, 1 Peck, 261 xiv, 745
 Bell v. Quarles, 5 Yerges, 463 xxi, 280
 Bell v. Reed, 4 Hiney, 127 v, 368
 Bell v. Reynolds, 46 Alabama, 511 54, 82
 Bell v. Rowland, Hardin, 301 xli, 729
 Bell v. Seawmon, 15 New Hampshire, 281 xli, 706
 Bell v. State, 4 Gill, 301 xiv, 130
 Bell v. State, 48 Alabama, 684 17, 40
 Bell v. State, 3 Tex. Ct. App. 216 28, 439
 Bell v. State, 18 Tex. Ct. App. 53 51, 293
 Bell ad. State, 7 Baxter, 9 57, 549
 Bell ad. State, 27 Maryland, 675 xcii, 668
 Bell v. Twilight, 18 New Hampshire, 189 xiv, 367
 Bell v. Watkins, 62 Alabama, 512 64, 756
 Bell v. Western F. Ins. Co., 5 Robinson (La.), 423 xxxix, 542
 Bell County v. Alexander, 22 Texas, 350 lxviii, 268
 Bell's Gap R. R. Co. v. Christy, 79 Penn. St. 54 31, 39
 Bellamy v. Woodson, 4 Georgia, 175 lxviii, 221
 Bellas v. Hays, 5 Serg. & E. 427 ix, 385
 Bellefontaine & I. R. R. v. Snyder, 18 Ohio St. 399 lxviii, 175
 Bellefontaine R'y Co. v. Hunter, 33 Indiana, 335 8, 301
 Bellemire v. Bank of U. S., 4 Wharton, 105 xxxiii, 46
 Beller v. Schultz, 44 Michigan, 539 38, 290
 Belleville & I. R. R. Co. v. Gregory, 15 Illinois, 20 lxviii, 589
 Bellinger v. Glenn, 80 Alabama, 190 64, 95
 Bellows v. Russell, 30 New Hampshire, 437 11, 238
 Bellows v. Sowles, 35 Vermont, 391 45, 621
 Bellows v. Sowles, 37 Vermont, 164 52, 118
 Belmont v. Coman, 22 N. Y. 436 lxviii, 213
 Belo v. Commissioners of Forsyth Co., 82 North Carolina, 415 33, 688
 Beloit ad. State, 21 Wisconsin, 200 xci, 474
 Belote v. Henderson, 5 Cold. 471 lxviii, 623
 Belote v. State, 35 Mississippi, 96 lxxii, 163
 Belt v. Mahen, 3 California, 159 lvi, 339
 Belt v. Wilson's Adm'r, 6 J. J. Marshall, 485 xxi, 86
 Belton v. Avery, 2 Root, 279 i, 79
 Belton v. Baxter, 54 New York, 245 13, 878
 Belton ad. State, 24 South Carolina, 125 58, 245
 Beltschouer v. Blackstock, 3 Watts, 20 lxxviii, 339
 Bemis v. Connecticut R. R. Co., 43 Vermont, 275. 1, 329
 Bemis v. Leonard, 118 Massachusetts, 502 19, 479
 Ben v. State, 23 Alabama, 9 lxviii, 234
 Benaway v. Bond, 3 Pinney, 449, 3 Chand. 110 liv, 147
 Benbow v. N. O. R. R., 1 Phill. L. 421 lxviii, 76
 Bend v. Susquehanna etc. Co., 6 Harris & J. 128 xiv, 261
 Bender v. Askew, 3 Devereux's Law, 149 xxi, 714
 Bendall v. Bendall, 34 Alabama, 295 ix, 469
 Bender v. Crawford, 26 Texas, 745 7, 279
 Bendernagle v. Cooks, 19 Wendell, 207 xxxii, 448
 Benedict v. Bachelder, 24 Michigan, 425 9, 139
 Benedict v. Bray, 2 California, 251 lvi, 333
 Benedict v. Cowden, 49 New York, 394 14, 262
 Benedict v. Flanigan, 18 South Carolina, 608 44, 263
 Benedict v. Gaylord, 11 Connecticut, 332 xxi, 299
 Benedict v. Lynch, 1 Johns. Ch. 370 vii, 484
 Benedict v. Montgomery, 7 Watts & Sergeant, 238 xxi, 239
 Benedict v. Renfro, 75 Alabama, 121 51, 429
 Benedict ad. State, 11 Vermont, 296 xlviii, 698
 Benford v. Sanner, 40 Penn. State, 9 lxxx, 545
 Benge v. Hlatt, 23 Kentucky, 606 54, 612
 Benham v. Bishop, 9 Connecticut, 320 xlviii, 359
 Benham v. Rowe, 2 California, 357 lvi, 342
 Benham ad. State, 23 Iowa, 154 xcii, 416
 Benjamin v. Benjamin, 15 Connecticut, 367 xxi, 294
 Benjamin v. McConnell, 2 Gilman, 536 lxvi, 474
 Benn v. Hatcher, 21 Virginia, 24 59, 445
 Benners v. Howard, Taylor, N. C., 149 i, 263
 Benneson v. Allen, 102 Illinois, 224 44, 588
 Bennet v. Holt, 2 Yerges, 8 xlv, 455
 Bennet v. Palma, 7 Watts, 334 xxxii, 765
 Bennett v. Baker, 1 Humphreys, 309 xlviii, 696
 Bennett v. Beam, 42 Michigan, 344 34, 449
 Bennett v. Bell's Administrator, 23 Mo., 24 lxv, 299
 Bennett v. Byram & Co., 28 Mississippi, 17 lxxv, 89
 Bennett v. Child, 19 Wisconsin, 263 lxxviii, 692
 Bennett ad. Commonwealth, 105 Mass. 30 11, 394
 Bennett v. Cook, 48 New York, 267 3, 727
 Bennett v. Everett, 3 Rhode Island, 152 lxvii, 495
 Bennett v. Fifield, 13 Rhode Island, 126 43, 17
 Bennett v. Garlock, 79 New York, 302 55, 517
 Bennett v. Gillette, 3 Minnesota, 423 lxxv, 774
 Bennett v. Goldthwait, 109 Mass. 494 12, 742
 Bennett v. Hood, 1 Allen, 47 lxxix, 765
 Bennett v. Lockwood, 20 Wendell, 228 xxxii, 698

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Bennett v. Lovell, 12 Rhode Island, 166.....34, 638
 Bennett v. Maehan, 83 Indiana, 566.....43, 78
 Bennett v. McLaughy, 3 Howard, 192.....xxiv, 77
 Bennett v. O'Fallon, 2 Missouri, 63.....xxii, 440
 Bennett v. New Jersey R. R. & T. Co., 35 N. J. 225, 12, 436
 Bennett v. New York O. etc., R. Co. 69 New York, 694.....35, 280
 Bennett v. North British etc. Ins. Co., 51 New York, 273.....37, 801
 Bennett ada. People, 29 Michigan, 451.....18, 107
 Bennett ada. People, 37 New York, 117.....xxii, 551
 Bennett v. Russell, 39 Missouri, 152.....x, 457
 Bennett v. Sherrod, 3 Iredell's Law, 303.....xi, 410
 Bennett ada. State, Harper's Law, 503.....xviii, 663
 Bennett v. State, 57 Wisconsin, 69.....46, 26
 Bennett v. Toler, 15 Gratt. 588.....lxviii, 638
 Bennett v. Truebody, 66 California, 509.....54, 117
 Bennett v. Welsh, 25 Indiana, 140.....lxxxvii, 354
 Bennington I. Co. v. Rutherford, 3 Harr. 105.....xxxv, 528
 Bennock v. Whipple, 12 Maine, 345.....xxviii, 186
 Benny v. Pagram, 15 Missouri, 191.....lix, 298
 Benny v. Rhodes, 18 Missouri, 147.....lix, 293
 Bensell v. Chancellor, 5 Wharton, 371.....xxiv, 561
 Bensley v. Mountain L. W. Co., 13 Cal. 306.....lxviii, 575
 Benson, Ex parte, 18 South Carolina, 36.....44, 564
 Benson, In re, 96 New York, 499.....48, 645
 Benson v. Adams, 69 Indiana, 283.....35, 220
 Benson v. Atwood, 13 Maryland, 20.....lxvi, 611
 Benson v. Monroe, 7 Oushing, 125.....lv, 716
 Benson v. Smith, 42 Maine, 414.....lxvi, 285
 Benson v. Thompson, 27 Maine, 470.....xvi, 617
 Benson ada. People, 6 California, 221.....lxv, 506
 Benetline v. State, 2 Lea, 162.....31, 593
 Bent v. Cobb, 9 Gray, 397.....lxix, 295
 Bentham v. Smith, Cheves' Eq. 33.....xxiv, 599
 Bentley v. Bustard, 16 B. Monroe, 643.....lxiii, 561
 Bentley v. DeForest, 2 Ohio, 221.....xv, 546
 Bentley v. Doggett, 51 Wisconsin, 294.....37, 827
 Bentley v. Harris, 10 Rhode Island, 434.....14, 686
 Bentley v. Lamb, 112 Pennsylvania State, 490.....54, 330
 Bentley v. Long, 1 Strobhart's Eq. 43.....xlvi, 523
 Bentley v. Reynolds, 1 McMullan's Law, 16.....xxvi, 251
 Bentley v. Walls, 61 Illinois, 59.....14, 53
 Bentley v. White, 3 B. Monroe, 263.....lxxxviii, 186
 Bentley v. Whittemore, 19 New Jersey Eq. 462.....xvii, 671
 Bently v. Terry, 69 Georgia, 555.....27, 399
 Benton v. Benton, 63 New Hampshire, 289.....54, 512
 Benton v. Pratt, 2 Wendell, 385.....xx, 623
 Benton v. Trustees of City Hospital, 140 Mass. 13, 54, 436
 Bent's Ex'r v. Graves, 3 McCord, 280.....xv, 632
 Bents v. Armstrong, 6 Watts & Berg. 40.....xlii, 265
 Benz v. Hines, 3 Kansas, 390.....lxxxix, 594
 Bepler v. State, 4 Indiana, 364.....lviii, 628
 Bequette v. Canfield, 4 California, 278.....lx, 615
 Bequillard v. Bartlett, 19 Kansas, 382.....37, 120
 Berdette ada. State, 73 Indiana, 185.....38, 117
 Berea Stone Co. v. Kraft, 31 Ohio State, 287.....27, 610
 Berg v. Abbott, 89 Pennsylvania State, 177.....34, 158
 Bergamini v. Bastian, 35 Louisiana An. 60.....48, 216
 Bergen v. Bennett, 1 Oakes' Cases, 1.....ii, 281
 Bergen v. People, 17 Illinois, 426.....lxv, 673
 Bergen v. Riggs, 34 Illinois, 170.....lxxxv, 304
 Bergen v. Riggs, 40 Illinois, 61.....lxxxix, 335
 Berkey's Appeal, 60 Pennsylvania, 408.....5, 578
 Berkmyer v. Kallerman, 22 Ohio State, 239.....36, 577
 Berks & D. T. Road Co. v. Myers, 6 Serg. & R. 12.....ix, 402
 Berkshire Bank v. Jones, 6 Massachusetts, 534.....lv, 175
 Berkshire G. Co. v. Wolcott, 2 Allen, 227.....lxxxix, 781
 Berkshire W. Co. v. Juillard, 75 New York, 535.....31, 488
 Berlin ada. State, 21 South Carolina, 295.....53, 677
 Bernal v. Hovious, 17 California, 541.....lxix, 147
 Bernard v. Campbell, 55 New York, 456.....14, 239
 Bernecker v. Miller, 40 Missouri, 473.....xxii, 209
 Berner v. Dinmore, 141 Massachusetts, 43.....55, 448
 Bernheimer v. Marshall, 2 Minnesota, 78.....lxvii, 79
 Bernier v. Cabot Mfg Co., 71 Maine, 506.....34, 343
 Berns v. Gaston Gas Coal Co., 27 W. Va. 298.....55, 304
 Bernhouse v. Abbott, 16 Vroom, 531.....46, 729
 Bernstein v. Humes, 60 Alabama, 592.....31, 52
 Berrenberg v. Boston, 137 Massachusetts, 231.....50, 296
 Berridge v. Glassey, 112 Pennsylvania State, 442.....54, 222
 Berry v. Baltimore etc. R. R. Co., 41 Md. 446.....20, 69
 Berry v. Billings, 44 Maine, 416.....lxix, 107
 Berry v. Carter, 4 Stewart & Porter, 387.....xxiv, 762
 Berry ada. Commonwealth, 29 Mass. 628.....xvi, 767
 Berry v. Gills, 17 New Hampshire, 9.....lxiii, 584
 Berry v. Griffin, 10 Maryland, 27.....lxix, 123
 Berry v. Griffith, 2 Harris & Gill, 337.....xviii, 269
 Berry v. Hamilton, 12 B. Monroe, 191.....lv, 515
 Berry v. Harris, 23 Maryland, 30.....lxxxv, 639
 Berry v. Fuller, 69 Maine, 101.....31, 245
 Berry v. Robinson, 9 Johnson, 121.....vi, 207
 Berry v. Snyder, 3 Bush, 266.....xvii, 219
 Berry v. State, 21 Ohio State, 219.....27, 606
 Berry v. Windham, 69 New Hampshire, 268.....47, 202
 Bersch v. State, 13 Indiana, 434.....lxix, 263
 Berthelamy v. Johnson, 3 B. Monroe, 90.....lxxxviii, 179
 Berthel ada. State, 6 Blackford, 474.....lxix, 448
 Berthold v. Fox, 13 Minnesota, 501.....xvii, 242
 Berthold v. Holman, 12 Minnesota, 235.....xxii, 223
 Bertholf v. O'Reilly, 74 New York, 209.....20, 223
 Bertles v. Numan, 22 New York, 182.....44, 261
 Besondy, In re, 23 Minnesota, 285.....50, 579
 Besse v. Dyer, 9 Allen, 151.....lxxxv, 747
 Besse v. Fellochoux, 73 Illinois, 285.....24, 242
 Best v. Allen, 30 Illinois, 30.....lxviii, 338
 Best v. Crall, 23 Kansas, 482.....33, 185
 Best v. Flint, 53 Vermont, 543.....56, 570
 Best v. Strong, 2 Wendell, 312.....xx, 607
 Bewick ada. State, 13 Rhode Island, 211.....43, 26
 Bethae v. Byrd, 95 North Carolina, 309.....59, 240
 Bethel v. Bethel, 6 Bush, 65.....lxix, 658
 Bethel v. Sharp, 25 Illinois, 173.....lxvii, 730
 Bethel S. M. Co. v. Brown, 57 Maine, 1.....lxix, 708
 Bethell v. Bethell, 54 Indiana, 428.....23, 699
 Bethlehem v. Anna, 40 New Hampshire, 34.....lxvii, 709
 Bethum v. Turner, 1 Greenleaf, 111.....x, 26
 Bethune v. Hughes, 28 Georgia, 560.....lxviii, 739
 Bettis v. Reynolds, 12 Iredell's Law, 344.....lv, 417
 Bettison v. Budd, 17 Arkansas, 546.....lxv, 442
 Betts v. Badger, 12 Johnson, 223.....vii, 309
 Betts v. Harper, 39 Ohio St. 639.....48, 477
 Betts v. Farmers' L. & T. Co., 21 Wisconsin, 80.....xci, 409
 Betts v. Lea, 5 Johnson, 342.....lv, 369
 Betts v. Norris, 21 Maine, 314.....lxxxviii, 264
 Betts v. Starr, 5 Connecticut, 550.....xlii, 94
 Betts v. Union Bank, 1 Harris & Gill, 175.....xviii, 283
 Bevan v. Bank of U. S., 4 Wharton, 301.....lxviii, 64
 Bevard v. Hoffman, 18 Maryland, 479.....lxix, 618
 Bever v. Brown, 56 Iowa, 565.....41, 118
 Beverley v. Burke, 9 Georgia, 440.....lv, 351
 Bevin v. Linguard, 1 Brevard, 503.....ii, 694
 Bevis v. Landis, 6 Jones's Eq. 812.....lxvii, 418
 Bewick v. Fletcher, 41 Michigan, 625.....32, 179
 Beyer v. Beyer, 80 Wisconsin, 254.....36, 648
 Bias v. Cookrum, 37 Mississippi, 509.....lxv, 76
 Bibb v. Hitchcock, 49 Alabama, 468.....20, 288
 Bibb v. Prather, Sneed, 136.....ii, 711
 Bickerstaff v. Doub, 19 California, 109.....lxix, 204
 Bickerstaff v. Marlin, 60 Mississippi, 508.....45, 619

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Bickford v. First N. B., 42 Illinois, 238.....lxix, 436
 Biddall v. Wales, 19 Missouri, 36.....lix, 327
 Biddall v. Wales, 20 Missouri, 546.....lxiv, 205
 Biddle v. James, 6 Binney, 321.....vi, 458
 Biddle v. Corryell, 3 Harrison, 377.....xxviii, 521
 Biddle's Appeal, 83 Penn. St. 340.....24, 183
 Bidwell v. Pittsburgh, 85 Penn. St. 412.....27, 662
 Bidwell v. Webb, 10 Minnesota, 59.....lxixviii, 56
 Biederman v. O'Connor, 117 Ill. 493.....57, 576
 Bierbach v. Goodyear R. Co., 54 Wisconsin, 208.....41, 19
 Biery v. Ziegler, 93 Pennsylvania State, 367.....39, 756
 Biesenthal v. Williams, 1 Duval, 339.....lxixv, 629
 Bigaquette v. Paulet, 134 Massachusetts, 123.....45, 307
 Bigby v. Powell, 25 Georgia, 244.....lxix, 168
 Bigelow v. Benedict, 70 New York, 202.....26, 673
 Bigelow v. Berkshires L. Ins. Co., U. S. Sup. Ct. 19, 628
 Bigelow v. Bigelow, 4 Ohio, 134.....lxix, 691
 Bigelow v. Colton, 13 Gray, 309.....lxixiv, 633
 Bigelow v. Gillett, 123 Massachusetts, 102.....25, 32
 Bigelow v. Hartford Bridge Co., 14 Conn. 585.....lxixvi, 502
 Bigelow v. Kellar, 6 Louisiana An. 59.....liv, 555
 Bigelow v. Kinney, 3 Vermont, 353.....xci, 589
 Bigelow v. Littlefield, 52 Maine, 24.....lxixiii, 484
 Bigelow v. Stearns, 19 Johnson, 39.....x, 189
 Bigelow v. Topliff, 25 Vermont, 273.....lx, 264
 Bigelow v. Walker, 24 Vermont, 149.....lviii, 156
 Bigelow v. Woodward, 15 Gray, 560.....lxixvii, 389
 Biggam v. Merritt, Walker, 430.....xii, 576
 Biggs v. Garrard, 6 B. Monroe, 484.....xlv, 778
 Biggs v. McCarty, 86 Indiana, 353.....44, 320
 Biggs v. State, 29 Georgia, 723.....lxixvi, 630
 Biles v. Commonwealth, 33 Penn. State, 529.....lxix, 568
 Billard v. State, 30 Texas, 367.....xdiv, 317
 Billigery v. Branch & Sons, 19 Grattan, 363.....c, 679
 Billing v. Pilcher, 7 B. Monroe, 458.....xlv, 523
 Billings v. Billings, 3 California, 107.....lvi, 319
 Billings v. Gibbs, 55 Maine, 238.....xdi, 587
 Billings v. Morrow, 7 California, 171.....lxviii, 235
 Billings v. Russell, 23 Penn. State, 189.....lxli, 330
 Billings v. State, 107 Indiana, 84.....57, 75
 Billings v. Taylor, 10 Pickering, 460.....xx, 533
 Billings v. Tolland, 20 Connecticut, 139.....i, 277
 Billings v. Worcester, 102 Mass. 529.....3, 460
 Billingsley v. Bates, 30 Alabama, 376.....lxviii, 126
 Billington v. Walsh, 5 Binney, 129.....vi, 406
 Billman v. Indianapolis C. & I. R. Co., 78 Ind. 186.....46, 230
 Billups v. Sears, 5 Grattan, 31.....i, 105
 Bimeler v. Dawson, 4 Scammon, 636.....lxixix, 430
 Binford v. Johnston, 82 Indiana, 426.....42, 608
 Bingham v. Barley, 55 Texas, 281.....46, 801
 Bingham v. Jordan, 1 Allen, 373.....lxix, 748
 Bingham v. Lamping, 26 Penn. State, 340.....lxvii, 418
 Bingham v. Miller, 17 Ohio, 445.....xlix, 471
 Bingham v. Rogers, 6 Watts & Serg. 498.....xi, 581
 Binney v. Annan, 107 Massachusetts, 94.....9, 10
 Binney v. Plumley, 5 Vermont, 500.....xvii, 313
 Binns v. State, 57 Indiana, 46.....26, 48
 Binns v. Barker, 1 Green's Law, 263.....xxiii, 720
 Birch v. Linton, 78 Virginia, 584.....49, 381
 Bird v. Bird, 15 Florida, 424.....21, 296
 Bird v. Caritat, 2 Johnson, 342.....lii, 433
 Bird v. Clark, 3 Day, 272.....lii, 269
 Bird v. Cromwell, 1 Missouri, 81.....xlii, 470
 Bird v. Gardner, 10 Massachusetts, 364.....vi, 137
 Bird v. Lishro, 9 California, 1.....lxx, 617
 Bird v. Muhlinbrink, 1 Richardson's Law, 199.....xlv, 247
 Bird v. Munroe, 66 Maine, 337.....22, 571
 Bird v. Smith, 3 Watts, 434.....xxiv, 465
 Bird v. Smith, 34 Maine, 63.....lvi, 635
 Bird v. Ward, 1 Missouri, 398.....xlii, 506
 Bird v. Wilmington & M. R. R. Co., 8 Rich. Eq. 46.....lxiv, 739
 Birdsall v. Clark, 73 New York, 73.....79, 105
 Birdsall ada. Commonwealth, 69 Penn. St. 462.....38, 293
 Birdsall v. Heacock, 33 Ohio St. 177.....30, 572
 Birdsall v. Hewlett, 1 Paige's Ch. 32.....xi, 393
 Birdsall v. Birdsall, 23 Kansas, 433.....52, 739
 Birley's Ex'rs v. Staley, 5 Gill & Johnson, 432.....xxv, 303
 Birge v. Gardner, 19 Connecticut, 507.....i, 261
 Birkbeck v. Ackroyd, 74 New York, 356.....29, 304
 Birke v. Abbott, 103 Indiana, 1.....53, 474
 Birkett v. Chatterton, 13 Rhode Island, 299.....43, 30
 Birmingham & P. M. St. R'y Co. v. Birmingham
 St. Ry. Co. 79 Alabama, 463.....56, 615
 Birmingham F. I. Co. v. Kroegher, 83 Penn. St. 64.....24, 147
 Birney v. Hann, 3 A. K. Marshall, 322.....xlii, 167
 Birney v. N. Y. & Wash. P. T. Co., 18 Mary-
 land, 311.....lxixi, 607
 Bisham v. Graham, 14 Penn. State, 14.....liii, 610
 Bisham v. Third Nat. Bank, 83 Penn. St. 79.....39, 726
 Bishop v. Banks, 33 Connecticut, 118.....lxixvii, 197
 Bishop v. Bishop, 11 New York (1 Kernan), 123.....liii, 68
 Bishop v. Boyle, 9 Indiana, 169.....lxviii, 615
 Bishop v. Day, 13 Vermont, 81.....lxixvii, 583
 Bishop v. Hubbard, 23 California, 514.....lxixviii, 133
 Bishop v. Mayor etc. of Macon, 7 Georgia, 200.....i, 400
 Bishop v. Moorman, 96 Indiana, 1.....49, 731
 Bishop v. Morgan, 82 Illinois, 351.....25, 327
 Bishop ada. People, 111 Illinois, 194.....53, 608
 Bishop v. Schneider, 46 Missouri, 473.....2, 533
 Bishop ada. State, 24 Maryland, 310.....lxixvii, 608
 Bishop ada. State, 51 Vermont, 287.....21, 680
 Bishop v. Union R. R. Co., 14 Rhode Island, 314.....51, 386
 Bishop v. Weber, 139 Massachusetts, 411.....52, 716
 Bishops v. McNary, 3 B. Monroe, 132.....lxixvi, 592
 Bisquay v. Jeunelot, 9 Alabama, 245.....xlv, 463
 Bissel v. Collins, 26 Michigan, 277.....15, 217
 Bissell v. Briggs, 9 Massachusetts, 462.....vi, 96
 Bissell v. Edwards, 5 Day, 363.....v, 166
 Bissell v. Gold, 1 Wendell, 210.....xix, 489
 Bissell v. Hopkins, 3 Cowen, 166.....xv, 259
 Bissell v. Kankakee, 64 Illinois, 249.....21, 654
 Bissell v. N. Y. Central R. R. Co., 25 N. Y. 442.....lxixvii, 369
 Bissell ada. People, 19 Illinois, 291.....lxviii, 591
 Bissell v. Roden, 34 Missouri, 63.....lxixiv, 71
 Bissell v. Spencer, 9 Connecticut 367.....xlii, 336
 Bissig v. Britton, 59 Missouri, 204.....21, 379
 Bitting v. Ten Eyck, 82 Indiana, 421.....42, 606
 Bittinger v. Baker, 29 Penn. State, 66.....lxix, 154
 Bitz v. Meyer, 11 Vroom, 252.....29, 233
 Bitzer v. Shunk, 1 Watts & Serg. 340.....lxixvii, 469
 Bivins v. McElroy, 11 Arkansas, 23.....18, 258
 Birby v. Brundige, 2 Gray, 129.....lxi, 443
 Birby v. Dunlap, 56 New Hampshire, 486.....27, 475
 Birby v. Parsons, 49 Connecticut, 493.....44, 244
 Bizzell v. Nix, 60 Alabama, 231.....31, 36
 Blackley v. Labe, 63 Iowa, 22.....59, 724
 Black v. Baltimore, 50 Maryland, 235.....33, 320
 Black v. Brislin & Bigelow, 3 Minnesota, 360.....lxixiv, 763
 Black v. Caldwell, 4 Rawle, 376.....lxvii, 274
 Black v. Carrollton Railroad Co., 10 La. An. 33.....lxlii, 586
 Black v. Columbia, 19 South Carolina, 412.....45, 785
 Black v. Gilmore, 9 Leigh, 446.....xxviii, 253
 Black v. Goodrich T. Co. 55 Wisconsin, 219.....42, 713
 Black v. Hair, 2 Hill's Ch. 632.....xxx, 399
 Black v. Harsh, 18 Indiana, 342.....lxixi, 363
 Black v. Hills, 36 Illinois, 376.....lxixvii, 294
 Black v. Kirgan, 3 Green Law, 45.....lxviii, 394
 Black v. Mayor etc. of Baltimore, 50 Md. 235.....33, 320
 Black v. Oliver, 1 Alabama, 449.....lxixv, 36
 Black v. Paul, 10 Missouri, 103.....xlv, 363

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Black v. State, 26 Georgia, 447.....xci, 772
 Black ads. State, 1 Winst. L. 266.....lxxxvi, 436
 Black v. Wabash St. L. & P. R'y Co. 111 Ill. 361.53, 628
 Black v. Ward, 27 Michigan, 191.....15, 162
 Black v. Webb, 20 Ohio, 304.....lv, 456
 Black v. Whitall, 1 Stockton's Ch. 672.....lix, 423
 Black & White S. S. v. Vandye, 2 Wharton, 309.xxx, 263
 Black v. Wilmington & W. R. R. Co., 92 N. O. 42.53, 450
 Blackburn v. Reilly, 47 N. J. Law, 290.....54, 159
 Blackburn v. State, 71 Alabama, 319.....46, 323
 Blackinton v. Blackinton, 141 Massachusetts, 433.55, 484
 Blacklaws v. Milne, 82 Illinois, 505.....15, 339
 Blackledge v. Simpson, 2 Haywood, 20.....li, 614
 Blackman v. Gordon, 2 Richardson's Eq. 43.....xliv, 241
 Blackman v. Lehman, 63 Alabama, 547.....35, 57
 Blackman v. Nearing, 43 Connecticut, 56.....21, 634
 Blackmore v. Gregg, 10 Watts, 223.....xxxvi, 171
 Blacknell v. Parish, 6 Jones' Eq. 70.....lxxviii, 239
 Black R. I. Co. v. La Crosse B. & T. Co., 64 Wis. 689.41, 66
 Blackstock v. N. Y. & E. R. R. Co., 20 N. Y. 48.lxiv, 372
 Blackstone v. Blackstone, 3 Watts, 335.....xxvii, 359
 Blackstone B'k v. Davis, 21 Pickering, 42.....xxxi, 241
 Blackwell v. Lane, 4 Dev. and Bat. L. 113.....xxxi, 675
 Blackwell v. Blackwell, 33 Alabama, 57.....lxx, 556
 Blackwell v. State, 67 Georgia, 76.....44, 717
 Blackwell v. Willard, 65 North Carolina, 555.... 6, 749
 Blackwell D. T. Co. v. McElwae, 96 N. O. 71.....60, 404
 Blade v. Noland, 12 Wendell, 173.....xxvii, 126
 Blain A. Co. v. McCulloch, 59 Md. 405.....43, 530
 Blaser v. Milwaukee Ins. Co., 37 Wisconsin, 21.19, 747
 Blagge v. Halsey, 127 Massachusetts, 191.....34, 361
 Blaine v. Bourne, 11 Rhode Island, 119.....23, 429
 Blaine v. Curtis, 59 Vermont, 120.....59, 708
 Blair v. Bartlett, 75 New York, 150.....31, 455
 Blair v. Canby, 2 Speer's Law, 34.....xlii, 360
 Blair v. Chamblin, 39 Illinois, 821.....lxxxix, 822
 Blair v. Coffman, 2 Overton, 176.....v, 659
 Blair v. Erie R'y Co., 66 New York, 313.....23, 85
 Blair v. Forehand, 100 Massachusetts, 136.....1, 94
 Blair v. Forehand, 100 Massachusetts, 136.....xvii, 89
 Blair v. Perpetual Insurance Co., 10 Mo. 559.....xlvi, 129
 Blair v. Ridgely, 41 Missouri, 63.....xvii, 248
 Blair v. Minneapolis v. St. Louis R. R. Co., 24
 Minnesota, 57.....57, 37
 Blaisdell v. Ahern, 144 Massachusetts, 363.....59, 99
 Blaisdell v. Hight, 69 Maine, 306.....31, 378
 Blaisdell v. Stephens, 14 Nevada, 17.....33, 623
 Blake's Appeal, 68 Pennsylvania State, 204..... 8, 169
 Blake v. Coleman, 22 Wisconsin, 415.....xcix, 53
 Blake v. Ferris, 5 New York (1 Selden), 48.....lv, 304
 Blake v. Graham, 6 Ohio State, 580.....lxvii, 360
 Blake v. Hamburg & B. F. I. Co., 67 Texas, 160....60, 15
 Blake v. Howe, 1 Alken's 306.....xv, 681
 Blake v. Jones, 1 Bailey's Eq. 141.....xci, 530
 Blake v. Langdon, 18 Vermont, 485.....xlvi, 701
 Blake v. Maine Central R. Co., 70 Maine, 60.....35, 297
 Blake v. Niles, 13 New Hampshire, 459.....xxxviii, 506
 Blake v. Watson, 48 Connecticut, 223.....29, 683
 Blake v. Williams, 6 Pickering, 286.....xvii, 373
 Blake v. Winona etc. R. Co., 19 Minn. 418.....18, 345
 Blakely v. Patrick, 67 North Carolina, 40.....12, 600
 Blakely v. Phoenix Ins. Co., 30 Wisconsin, 306....xci, 398
 Blakeney v. Blakeney, 6 Porter, 109.....xxx, 574
 Blakey v. Johnson, 13 Bush, 197.....26, 254
 Blanc v. Alsbury, 63 Texas, 469.....51, 668
 Blanc v. Banks, 10 Robinson (Louisiana), 115.....xlili, 175
 Blanc v. Murray, 36 Louisiana An. 162.....51, 7
 Blanc v. Mutual Nat. Bank, 28 Louisiana An. 321.26, 119
 Blanchard v. Allain, 5 Louisiana An. 367.....lii, 594
 Blanchard v. Baker, 8 Greenleaf, 253.....xlili, 504
 Blanchard v. Blanchard, 3 Iredell's L. 105.....xxviii, 717
 Blanchard v. Blanchard, 123 Massachusetts, 536....23, 397
 Blanchard v. Detroit L. etc. R. R., 31 Mich. 43....18, 142
 Blanchard v. Dyer, 21 Maine, 111.....xxviii, 253
 Blanchard v. Ellis, 1 Gray, 195.....lxi, 417
 Blanchard v. Ely, 21 Wendell, 343.....xxiv, 250
 Blanchard v. Halsey, 120 Massachusetts, 457.....31, 535
 Blanchard v. Lambert, 43 Iowa, 228.....22, 245
 Blanchard v. McDougal, 6 Wisconsin, 17.....lxx, 458
 Blanchard v. Paschal, 62 Georgia, 32.....45, 474
 Blanchard v. Russell, 13 Massachusetts, 1.....vii, 106
 Blanchard v. Stevens, 3 Cushing, 162.....1, 723
 Blanchard v. Tyler, 12 Michigan, 339.....lxxxvi, 87
 Blanchard v. Waite, 23 Maine, 51.....xlvi, 474
 Blanche Bradford, 38 Penn. State, 344.....lxxx, 459
 Bland v. Adams Express Co., 1 Duval, 232.....lxxxv, 632
 Bland v. Muncaster, 24 Mississippi, 63.....lvii, 163
 Bland v. Southern Pac. R. R. Co., 55 Cal. 570....26, 60
 Blane v. Mutual Nat. Bank, 28 Louisiana An. 321.26, 117
 Blandford v. Barger, 9 Dana, 22.....xxxi, 515
 Blandford v. Minneapolis & St. L. R'y Co., 71
 Iowa, 310.....60, 798
 Blanding v. Columbia, 10 Richardson's Eq. 573.lxxxii, 129
 Blanding ads. Commonwealth, 3 Pickering, 304....xv, 214
 Blanding v. Rogers, 2 Brevard, 394.....lv, 598
 Blanding v. Sargent, 33 New Hampshire, 339....lxvi, 726
 Blane v. Proctor, 3 Call, 207.....li, 546
 Blaney v. Rice, 20 Pickering, 63.....xxxi, 204
 Blankenship v. Douglas, 28 Texas, 228.....lxxxii, 608
 Blanks v. Rector, 24 Arkansas, 496.....lxxxviii, 780
 Blann v. Crocheron, 19 Alabama, 647.....liv, 203
 Blann v. State, 39 Alabama, 353.....lxxxiv, 788
 Blanque v. Peytavin, 4 Martin, 458.....v, 706
 Blanton v. Morrow, 7 Iredell's Eq. 47.....liii, 391
 Blaudel v. Fowler, 120 Massachusetts, 447.....21, 533
 Blasius v. People, 69 New York, 107.....25, 146
 Bleak v. Farmers' & M. B'k, 17 Serg. & R. 64.xvii, 636
 Blodoe v. Nixon, 69 North Carolina, 69.....12, 643
 Blodoe v. Thompson, 6 Richardson's Law, 44....lvii, 777
 Blen v. Bear R. & A. W. M. Co., 30 Cal. 603.....lxxx, 122
 Blots v. Columbia National Bank, 57 Penn. St. 37.30, 343
 Blige v. State, 20 Florida, 742.....51, 628
 Blight v. Banks, 6 T. B. Monroe, 192.....xvii, 136
 Blight v. Schenck, 10 Penn. State, 285.....li, 478
 Blight v. Tobin, 7 T. B. Monroe, 612.....xviii, 219
 Blin v. Hay, 2 Tyler, 304.....lv, 739
 Blin v. Mayo, 10 Vermont, 56.....xxviii, 179
 Bliss v. Anderson, 31 Alabama, 612.....lxx, 511
 Bliss v. Arnold, 8 Vermont, 252.....xxx, 457
 Bliss v. Clark, 39 Illinois, 690.....lxxxix, 336
 Bliss v. Commonwealth, 2 Littlell, 90.....xlii, 261
 Bliss v. Greeley, 45 New York, 671.....6, 156
 Bliss v. Lawrence, 58 New York, 442.....17, 273
 Bliss v. McIntyre, 18 Vermont, 466.....xlvi, 168
 Bliss v. Rawson, 43 Georgia, 181.....9, 164
 Bliss v. Vedder, 34 Kansas, 57.....25, 237
 Bliss v. Well, 14 Wisconsin, 35.....lxxx, 768
 Bliss v. Whitney, 9 Allen, 114.....lxxxv, 748
 Blizard v. Hays, 46 Indiana, 166.....15, 291
 Bloch v. Isham, 28 Indiana, 57.....xci, 287
 Block v. McMurry, 56 Mississippi, 217.....31, 357
 Blockley v. Fowler, 21 California, 236.....lxxxii, 747
 Blodgett v. Bickford and Tate, 30 Vermont, 731.lxxxii, 334
 Blodgett v. Royalton, 17 Vermont, 40.....xlii, 476
 Blood v. Enos, 12 Vermont, 625.....xxvi, 363
 Blood v. Goodrich, 9 Wendell, 68.....xxiv, 121
 Blood v. Goodrich, 12 Wendell, 523.....xxvii, 153
 Blood v. Light, 38 California, 649.....xcia, 441
 Blood v. Marcuse, 33 California, 690.....xcia, 438
 Blood v. Nashua & L. R. R. Co., 2 Gray, 127....li, 446

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Blood v. Palmer, 11 Maine, 414.....xxvi, 547
 Bloodgood v. Mohawk & H. R. R., 15 Wend. 9.....xxxi, 313
 Bloodworth v. State, 6 Bart. 514.....32, 546
 Bloom v. Burdick, 1 Hill (N. Y.), 130.....xxvii, 299
 Bloom v. Franklin L. I. Co., 97 Indiana, 478.....49, 469
 Bloom ada. State, 68 Indiana, 54.....34, 247
 Bloomer v. Henderson, 8 Michigan, 395.....lxvii, 453
 Bloomfield v. Trimble, 54 Iowa, 399.....37, 212
 Blooming G. M. F. Ins. Co. v. McAnerney, 102 Penn. State, 335.....48, 209
 Bloomington v. Shrock, 110 Illinois, 219.....51, 679
 Bloomington M. B. Ass'n v. Blue, 120 Ill. 121.....60, 558
 Blom v. Plymouth, 3 West Virginia, 393.....c, 753
 Blomson v. Barrett, 37 New York, 434.....xvii, 747
 Blomson v. Dodd, 43 New York, 364.....3, 701
 Blomson v. Griffin, 13 New York (3 Kernan), 569.....lxvii, 75
 Blomson v. Van Court, 34 Missouri, 300.....lxixvi, 114
 Blot v. Bolesau, 3 New York (3 Comst.) 78.....11, 345
 Blount v. Windley, 68 North Carolina, 1.....12, 616
 Blow v. Spear, 43 Missouri, 496.....xxvii, 412
 Blue v. Blue, 38 Illinois, 9.....lxixvii, 267
 Blue v. Kibby, 1 T. B. Monroe, 196.....xv, 95
 Blunt v. State, 12 Tex. Ct. App. 39.....41, 666
 Blum v. Marks, 31 Louisiana An. 269.....xix, 723
 Blum v. State, 20 Tex. Ct. App. 578.....54, 530
 Blumantle v. Fitchburg R. R. Co., 127 Mass. 322-34, 376
 Blumb v. Kansas, 84 Missouri, 112.....54, 87
 Blumenberg v. Myers, 22 California, 93.....xci, 580
 Blumenthal v. Brainerd, 38 Vermont, 402.....xci, 350
 Blumer v. Phoenix Ins. Co., 48 Wisconsin, 535.....33, 630
 Blunt v. Aitkin, 15 Wendell, 522.....xxx, 72
 Blunt v. Commonwealth, 4 Leigh, 669.....xxvi, 341
 Blunt v. Norris, 123 Massachusetts, 55.....25, 14
 Blunt v. Walker, 11 Wisconsin, 334.....lxixviii, 709
 Blydenburgh v. Bingham, 38 New York, 371.....xviii, 49
 Blymire v. Bolster, 6 Watts, 123.....xxxi, 458
 Blystone v. Burgett, 10 Indiana, 28.....lxviii, 688
 Blythe v. Lovinggood, 2 Ireland's Law, 30.....xxvii, 408
 Blythe v. Richards, 10 Serg. & R. 261.....xiii, 673
 Boardman v. Acer, 13 Michigan, 77.....lxixvii, 736
 Boardman v. Gore, 1 Stewart, 517.....xviii, 73
 Boardman v. Keeler, 1 Alkana, 158.....xv, 670
 Boardman v. Meriden B. Co., 35 Conn. 402.....xcv, 370
 Boardman v. Spooner, 13 Allen, 353.....xc, 196
 Board of Comm'rs v. Bradford, 72 Indiana, 455.....37, 174
 Board v. Desatur, 64 Texas, 7.....53, 735
 Board of Comm'rs v. Elston, 32 Indiana, 27.....2, 327
 Board of Comm'rs v. Hurd, 49 Georgia, 463.....15, 682
 Board of Comm'rs v. Legg, 93 Indiana, 523.....47, 390
 Board of Comm'rs v. Merchant, 103 N. Y. 143.....57, 705
 Board of Comm'rs v. O'Connor, 86 Indiana, 531.....44, 338
 Board of Comm'rs v. Reynolds, 44 Indiana, 509.....15, 245
 Board of Comm'rs ada. State, 80 Indiana, 478.....41, 621
 Board of Education v. Edison, 18 Ohio St., 221.....xviii, 114
 Board of Education v. McLandaborough, 36 Ohio State, 227.....36, 582
 Board of Education v. Minor, 23 Ohio St. 211.....13, 323
 Board of Education ada. People, 101 Ill. 306.....40, 196
 Board of Education ada. State, 63 Wis. 234.....53, 282
 Board of Park Comm'rs v. Detroit, 28 Mich. 225.....15, 302
 Bd. of Police Attala Co. v. Grant, 9 Sm. & M. 77. civil, 102
 Board of Registration ada. People, 26 Mich. 51.....12, 297
 Board of Supervisors v. Cowan, 60 Miss. 876.....43, 424
 Board of Trade Tel. Co. v. Barnett, 107 Ill. 507.....47, 453
 Board of Trustees v. Anderson, 63 Indiana, 367.....30, 224
 Board of Trustees, v. Serrett, 31 La. An. 719.....33, 229
 Boas v. Updegrave, 6 Penn. State, 516.....xlvi, 425
 Boatman's F. & M. I. Co. v. Parker, 23 Ohio St., 13, 228
 Boatman's Savings Institution v. Bank of the State of Missouri, 33 Missouri, 497.....lxixiv, 61
 Boatner v. Ventres, 8 Martin, N. S. 644.....xx, 269
 Boatner v. Walker, 11 Louisiana, 583.....xxx, 723
 Bobb v. Bosworth, Littell's Select Ca. 51.....xii, 279
 Bobbitt v. Liverpool, L. & G. Ins. Co., 66 N. O. 70, 8, 494
 Bobo v. Bryson, 21 Arkansas, 387.....lxixvi, 406
 Bobo v. Patton, 6 Heisk. 172.....19, 693
 Bodenhamner v. Newsom, 5 Jones' Law, 107.....lxix, 775
 Bodfish v. Fox, 23 Maine, 90.....xxix, 611
 Bodine v. Exchange F. Ins. Co., 61 New York, 117-16, 568
 Bodine v. Glading, 21 Penn. State, 50.....lix, 749
 Bodwell v. Crawford, 26 Kansas, 292.....40, 306
 Bodwell v. Osgood, 3 Pickering, 379.....xv, 226
 Boehen v. Williamsburg City Ins. Co., 35 N. Y. 121, xc, 787
 Boehne v. Murphy, 46 Missouri, 67.....2, 485
 Boetcher v. Staples, 27 Minnesota, 306.....38, 295
 Boffl v. Fisher, 3 Richardson's Eq. 1.....iv, 627
 Bogart v. McClung, 11 Heisk. 106.....27, 737
 Bogart v. Perry, 17 Johnson, 351.....viii, 411
 Boggs v. Fowler & Hargrave, 16 California, 559.....lxixvi, 551
 Boggs v. Reed, 8 Martin, 673.....xii, 428
 Boggs v. State, 45 Alabama, 30.....6, 689
 Boggs v. Willard, 70 Illinois, 315.....32, 77
 Bohannon v. Walcott, 1 Howard, 336.....xix, 632
 Bohannon v. Commonwealth, 8 Bush, 651.....8, 474
 Bohannon v. State, 18 Nebraska, 57.....53, 791
 Bohon v. Waseca, 33 Minnesota, 176.....54, 664
 Boies v. Hartford & N. H. R. R. Co., 27 Connecticut, 272.....9, 247
 Boladere v. Citizens' Bank, 9 Louisiana, 506.....xix, 453
 Bolmeau v. Aldridge, 5 Leigh, 222.....lxixvi, 699
 Bolmeau v. Bolmeau, 79 Virginia, 73.....52, 616
 Boker v. Hazard, 6 Watts & Serg. 237.....xi, 654
 Bolander v. Gentry, 36 California, 106.....xov, 162
 Boles v. Johnston, 23 California, 225.....lxixviii, 111
 Bolles v. Beach, 2 Zabrickie, 680.....liii, 263
 Bolling v. Stokes, 2 Leigh, 178.....xxi, 608
 Bolling v. Tate, 65 Alabama, 417.....39, 5
 Bolman v. Overall, 80 Alabama, 451.....60, 107
 Bolton v. Hamilton, 2 Watts & Serg. 294.....lxixvii, 509
 Bolton v. Harrod, 9 Martin, 326.....xiii, 306
 Bolton v. Johns, 5 Penn. State, 149.....xlvi, 404
 Bomar v. Maxwell, 9 Humphries, 620.....11, 682
 Bombay v. Boyer, 14 Serg. & R. 253.....xvi, 494
 Bomberger v. Turner, 13 Ohio State, 263.....lxixxi, 439
 Bon v. Railway Pass. A. Co. 58 Iowa, 664.....41, 127
 Bonoe v. Dubuque S. R. Co., 53 Iowa, 273.....36, 221
 Bond, Ex parte, 9 South Carolina, 80.....30, 20
 Bond v. Aitkin, 6 Watts & Serg. 165.....xi, 650
 Bond v. Appleton, 8 Massachusetts, 473.....v, 111
 Bond v. Farnham, 5 Massachusetts, 170.....iv, 47
 Bond v. Hilton, Busbee's Law, 306.....lix, 632
 Bond v. Mount Hope Iron Co., 99 Mass. 506.....xvii, 49
 Bond v. Quattlebaum, 1 McCord, 584.....x, 708
 Bond v. Ward, 7 Massachusetts, 123.....v, 29
 Bond v. Wilson, 8 Kansas, 228.....12, 468
 Bond v. Ziegler, 1 Georgia, 324.....xlv, 624
 Bonds v. State, 1 Mart. & Yerg. 143.....xvii, 795
 Bondurant v. Buford, 1 Alabama, 369.....xxv, 33
 Bonesteel v. Orris, 23 Wisconsin, 506.....xcix, 301
 Bonesteel v. Todd, 9 Michigan, 371.....lxix, 99
 Bongard v. Block, Illinois, 186.....25, 276
 Bonnaffe v. Fenner, 6 Smedes & M. 212.....xlv, 278
 Bonnemer v. Negrete, 16 Louisiana, 474.....xvii, 217
 Bonner v. City of Chicago, 24 Illinois, 106.....lxixvi, 738
 Bonner v. Marsh, 10 Smedes & M. 378.....xlviii, 754
 Bonnett v. Bonnett, 61 Iowa, 198.....47, 810
 Boody v. Davis, 20 New Hampshire, 140.....11, 216
 Booe v. Davis, 5 Blackford, 115.....xxviii, 457
 Boofter v. Rodgers, 9 Gill, 44.....lii, 689
 Booge v. Pacific Railroad, 33 Missouri, 212.....lxixxi, 169

Roman letters [xliz] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Boege v. Parsons, 2 Vermont, 468.....xl, 557
 Boogher v. Life Ass'n, 75 Missouri, 319.....42, 413
 Book ada. State, 41 Iowa, 550.....30, 609
 Booker v. Booker, 29 Gratt, 608.....26, 401
 Booker v. Ball, 3 Bibb, 173.....vi, 641
 Bool v. Mix, 17 Wendell, 119.....xxxi, 285
 Boomer v. Cunningham, 22 Illinois, 320.....lxiv, 155
 Boon v. Bowers, 30 Mississippi, 246.....lxiv, 159
 Boon ada. State, 13 Iredell's Law, 244.....lvii, 555
 Boon & Co. v. Steamboat Belfast, 40 Alabama, 184.....lxxviii, 761
 Boone v. Otislen's S. Bank, 84 N. Y. 83.....38, 498
 Boone v. Hall, 7 Bush, 68.....3, 288
 Boone v. Funnell, 28 Maryland, 607.....xdl, 713
 Boone v. Sinkler, 1 Bay, 369.....i, 623
 Boone v. State, 10 Texas, Ct. App. 418.....38, 641
 Boone Co. v. Jones, 54 Iowa, 699.....37, 229
 Boone County v. Lowry, 9 Missouri, 23.....xlili, 532
 Boor v. Lowrey, 103 Indiana, 468.....53, 519
 Boorman v. Jenkins, 12 Wendell, 586.....xxvii, 158
 Boos v. Ewing, 17 Ohio, 500.....xliz, 478
 Booth v. Ableman, 16 Wisconsin, 460.....lxxxiv, 711
 Booth v. Ableman, 20 Wisconsin, 21.....lxxxviii, 730
 Booth v. Adams, 11 Vermont, 156.....xxxiv, 680
 Booth v. Barnum, 9 Connecticut, 286.....xxlii, 339
 Booth v. Bierce, 38 New York, 463.....xviii, 73
 Booth v. Boston & A. R. Co., 73 N. Y. 38.....29, 97
 Booth v. Bunce, 33 New York, 139.....lxxxviii, 373
 Booth v. Elghmia, 60 New York, 238.....19, 171
 Booth v. Starr, 5 Day, 375.....v, 149
 Booth v. Starr, 1 Connecticut, 244.....vi, 233
 Boothby v. Flaisted, 51 New Hampshire, 436.....12, 140
 Booser Adm'r v. Addison, 2 Richardson's Eq. 273. xli, 43
 Borchardt v. Wausau, B. Co., 54 Wisconsin, 107.....41, 13
 Borden v. Borden, 5 Massachusetts, 67.....iv, 32
 Borden v. Fitch, 15 Johnson, 121.....viii, 226
 Borden v. Hingham Ins. Co., 18 Pickering, 523.....xxix, 614
 Borden v. Jenks, 140 Massachusetts, 562.....54, 507
 Borden v. State, 11 Arkansas, 519.....liv, 217
 Borden v. Sumner, 4 Pickering, 264.....xvi, 338
 Bore v. Quilley, 4 Martin, 545.....vi, 713
 Boreal v. Lawton, 90 New York, 283.....43, 170
 Boren v. McGhee, 6 Porter, 432.....xxxi, 695
 Boring ada. People ex rel. Dunn, 3 Cal. 406.....lxviii, 331
 Borland v. Barrett, 76 Virginia, 128.....44, 128
 Borland v. Boston, 133 Massachusetts, 59.....43, 494
 Borland v. Nichols, 12 Penn. State, 38.....ll, 576
 Born v. Shaw, 29 Penn. State, 283.....lxlii, 633
 Borneman v. Sidingler, 15 Maine, 429.....xxdii, 626
 Bornmesser v. Harrison, 12 Wisconsin, 544.....lxxxviii, 757
 Bornman v. Boyer, 3 Binney, 515.....v, 380
 Borough v. Apple, 35 Penn. State, 264.....lxxxviii, 336
 Borough of Carlisle v. Brisbane, 113 Penn. St. 544. 57, 463
 Borough of Easton v. Neff, 102 Penn. St. 474.....48, 213
 Borough of Manch Chunk v. Kline, 100 Penn. St. 119.....45, 364
 Borough of Norristown v. Fitzpatrick, 94 Penn. St. 121.....39, 771
 Borough of Susquehanna v. Simmons, 118 Penn. St. 384.....56, 317
 Borrekens v. Bevan, 3 Rawle, 23.....xxiii, 26
 Borrows v. Patterson, Taylor, N. C., 37.....i, 876
 Bort, In re, 25 Kansas, 308.....37, 256
 Boris v. Boris, 48 Penn. State, 323.....lxxxvi, 608
 Borch v. B. & M. R. R. Co., 44 Iowa, 402.....24, 754
 Boscowitz v. Adams Ex. Co., 23 Illinois, 623.....34, 191
 Bosler v. Exchange Bank, 4 Penn. State, 32.....xiv, 645
 Bosley v. Chesapeake Ins. Co., 3 Gill & J. 450.....xxii, 337
 Bosley v. Taylor, 5 Dana, 157.....xxx, 677
 Bosman v. Ashley, 28 Michigan, 710.....33, 447
 Bostick v. Blades, 69 Maryland, 281.....43, 548
 Bostick v. Keiser, 4 J. J. Marshall, 397.....xi, 237
 Boston v. Binney, 11 Pickering, 1.....xxli, 353
 Boston v. Cummins, 16 Georgia, 102.....lx, 717
 Boston v. Dodge, 1 Blackford, 19.....xli, 205
 Boston v. State, 5 Texas Ct. App. 383.....39, 578
 Boston & Col. S. Co. v. Smith, 13 R. I., 27.....43, 3
 Boston & L. R. R. v. Proctor, 1 Allen, 267.....lxix, 729
 Boston & Maine R. Co. ada. Commonwealth, 129 Massachusetts, 500.....37, 288
 Boston & M. R. R. v. Portland R. R., 119 Massachusetts, 498.....30, 338
 Boston & R. M. Corp. v. Newman, 12 Pick. 467.....xxlii, 689
 Boston & S. Ice Co. v. Royal Ins. Co., 12 Allen, 281.....28, 182
 Boston & W. R. R. v. Sparkhawk, 1 Allen, 448.....lxix, 738
 Boston C. & M. R. R. v. Gilmore, 37 New Hamp. 410.....lxix, 338
 Boston, City of, v. Worthington, 10 Gray, 496.....lxix, 678
 Boston Distate Co. v. Florence Mfg. Co., 114 Massachusetts, 69.....19, 318
 Boston Glass Man. v. Langdon, 24 Pick. 49.....xxv, 263
 Boston Ice Co. v. Potter, 123 Massachusetts, 28.....25, 9
 Boston M. Corp. v. Bulfinch, 6 Mass. 229.....iv, 120
 Boston Seamen's F. Soc. v. Boston, 116 Massachusetts, 181.....17, 153
 Boston Type Co. v. Mortimer, 7 Pickering, 168.....xiz, 206
 Bostwick v. Dodge, 1 Douglass, 413.....xli, 584
 Bostwick v. Lewis, 1 Day, 250.....41, 73
 Bostwick v. Williams, 26 Illinois, 65.....lxxxv, 385
 Boswell v. Goodwin, 31 Connecticut, 74.....lxxxi, 169
 Boswell v. Laird, 8 California, 469.....lxviii, 245
 Boswell v. State, 63 Alabama, 307.....33, 20
 Bosworth v. Inhab. of Swansea, 10 Metcalf, 363.....xlili, 441
 Botkin v. Commissioners, 1 Ohio, 375.....xlii, 630
 Botkin ada. State, 71 Iowa, 87.....69, 730
 Bott v. McCoy, 20 Alabama, 578.....lvi, 228
 Bott v. Pratt, 33 Minnesota, 323.....53, 47
 Bott ada. State, 31 Louisiana An. 663.....33, 224
 Bottome v. Mithvin, 26 Georgia, 481.....lxix, 225
 Boughner v. Meyer, 5 Colorado, 71.....40, 128
 Boulware v. Robinson, 8 Texas, 337.....lviii, 117
 Bound v. Lathrop, 4 Connecticut, 336.....x, 147
 Bourgeois, Ex parte, 60 Mississippi, 663.....45, 420
 Bourke v. Granberry, Gilmer, 16.....lx, 569
 Bours v. Zachariah, 11 California, 281.....lxix, 779
 Boutelle v. Melendy, 19 New Hamp. 196.....xliz, 123
 Boutelle v. Westchester F. Ins. Co., 51 Va. 4.....31, 666
 Bouthemy v. Ducommun, 6 Martin, 657.....xli, 486
 Boutwell v. Bartlett, 11 New Hampshire, 418.....xxv, 805
 Bow v. Allenstown, 34 New Hampshire, 351.....lxix, 489
 Bowden v. Lewis, 13 Rhode Island, 189.....43, 21
 Bowden v. Schatzell, 1 Bailey's Eq. 360.....xxlii, 179
 Bowditch v. New England M. L. Ins. Co., 141 Massachusetts, 282.....55, 474
 Bowdoinham v. Richmond, 6 Greenleaf, 113.....xix, 197
 Bowe v. Hunking, 135 Massachusetts, 280.....46, 471
 Bowen, Petition on Habeas Corpus, 30 Wis. 200.....xci, 404
 Bowen v. Allen, 113 Illinois, 53.....55, 398
 Bowen v. Bailey, 43 Mississippi, 405.....2, 601
 Bowen v. Beck, 94 New York, 36.....46, 124
 Bowen v. Bell, 20 Johnson, 338.....xi, 286
 Bowen ada. Commonwealth, 13 Mass. 356.....vii, 154
 Bowen v. Detroit C. R'y 84 Michigan, 498.....59, 323
 Bowen v. Eichel, 91 Indiana, 22.....46, 574
 Bowen v. Hope Ins. Co., 20 Pickering, 275.....xxxi, 218
 Bowen v. Hoskins, 45 Mississippi, 183.....7, 728
 Bowen v. Johnson, 6 Indiana, 110.....xli, 110
 Bowen v. Johnson, 5 Rhode Island, 113.....lxix, 49
 Bowen v. Jones, 13 Iredell's Law, 25.....iv, 486

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Bowen v. Merch. Ins. Co., 20 Pickering, 275.....	xxii, 213
Bowen v. Newell, 13 N. Y. (3 Kernan), 290.....	xliv, 560
Bowen v. New York C. R. R. Co., 18 N. Y. 408.....	lxix, 529
Bowen ada. People, 43 California, 439.....	13, 148
Bowen v. Rutherford, 60 Illinois, 41.....	14, 25
Bowen v. Slaughter, 24 Georgia, 538.....	lxxi, 135
Bowen v. State, 9 Bart. 45.....	40, 71
Bowen v. Sullivan, 62 Indiana, 281.....	30, 172
Bowen v. Team, 6 Richardson's Law, 298.....	lx, 127
Bowen v. Vickers, 1 Green's Ch. 530.....	xxv, 516
Bower v. Fenn, 90 Pennsylvania St. 359.....	35, 663
Bower v. Hoffman, 23 Maryland, 263.....	lxxvii, 569
Bower v. State, 5 Missouri, 364.....	xxii, 325
Bowers v. Bowers, 26 Penn. State, 74.....	lxvii, 398
Bowers v. Bowers, 1 Richardson's Eq. 551.....	lxxiii, 99
Bowers v. Whittle, 63 New Hampshire, 147.....	56, 490
Bowersox's Appeal, 100 Pennsylvania St. 434.....	45, 387
Bowie v. Maddox, 23 Georgia, 285.....	lxxiv, 61
Bowie v. Napier, 1 McCord, 1.....	x, 641
Bowie v. Stonestreet, 6 Maryland, 418.....	lxi, 318
Bowker v. Smith, 48 New Hampshire, 111.....	9, 189
Bowker v. Walker, 1 Vermont, 18.....	xviii, 670
Bowler v. Huston, 30 Gratt. 268.....	32, 673
Bowles v. Bingham, 2 Munford, 443.....	v, 497
Bowles v. Drayton, 1 Desauture, 489.....	1, 689
Bowles v. Lewis, 48 Missouri, 32.....	8, 65
Bowlin v. Commonwealth, 2 Bush, 8.....	xcii, 468
Bowlin v. Lyon, 67 Iowa, 636.....	56, 355
Bowlby v. Spear, 2 Vroom, 351.....	lxxvi, 216
Bowman v. Bates, 2 Bibb, 47.....	iv, 677
Bowman v. Floyd, 3 Allen, 76.....	lxxx, 85
Bowman v. Gonsal, 19 La. An. 328.....	xcii, 537
Bowman v. Halstead, 2 A. K. Marshall, 200.....	xii, 390
Bowman v. Miller, 139 Massachusetts, 153.....	39, 443
Bowman v. Irons, 2 Bibb, 78.....	iv, 696
Bowman v. Manter, 33 New Hampshire, 530.....	lxvi, 743
Bowman v. Miller, 25 Gratt. 331.....	18, 696
Bowman v. People, 82 Illinois, 246.....	35, 316
Bowman v. Slifer, 25 Penn. State, 23.....	lxiv, 680
Bowman v. Smiley, 31 Penn. State, 225.....	lxxii, 738
Bowman v. State, 19 Nebraska, 523.....	56, 750
Bowman v. Teall, 23 Wendell, 306.....	xxxv, 563
Bowman v. Van Kuren, 29 Wisconsin, 209.....	9, 554
Bowser v. Bliss, 7 Blackford, 344.....	xlili, 93
Box v. Stanford, 13 Smedes & M. 93.....	li, 142
Boye v. Kalbaugh, 47 Maryland, 334.....	28, 464
Boye v. Lake, 17 South Carolina, 481.....	43, 618
Boye v. McCulloch, 3 Watts & Serg. 429.....	xxxix, 26
Boye v. Moore, 2 Dallas, 196.....	1, 277
Boye v. Murphy, 91 Indiana, 1.....	46, 567
Boye v. Owens, 2 McCord, 206.....	xlil, 711
Boye v. Smith, 9 Grattan, 704.....	lx, 313
Boye v. Wabash R'y Co., 63 Iowa, 70.....	50, 730
Boye v. Williams, 84 North Carolina, 275.....	37, 618
Boyd v. Anderson, 1 Overton, 438.....	lii, 762
Boyd v. Bank of Toledo, 32 Ohio St. 526.....	30, 624
Boyd v. Barclay, 1 Alabama, 34.....	xxxiv, 762
Boyd v. Baynham, 5 Humphreys, 396.....	xlil, 436
Boyd v. Blankman, 29 California, 19.....	lxxvii, 146
Boyd v. Bryant, 35 Arkansas, 69.....	37, 6
Boyd v. Byrd, 3 Blackford, 113.....	xliv, 740
Boyd v. Carlton, 69 Maine, 300.....	31, 268
Boyd v. Chesapeake & O. C. Co., 17 Md. 196.....	lxxix, 646
Boyd v. Conklin, 44 Michigan, 583.....	52, 831
Boyd v. De La Montagne, 73 New York, 498.....	29, 197
Boyd v. Eaton, 44 Maine, 51.....	lxix, 83
Boyd v. Glass, 34 Georgia, 253.....	lxxix, 253
Boyd v. Hitchcock, 20 Johnson, 76.....	xi, 247
Boyd v. Kennedy, 9 Vroom, 146.....	30, 376
Boyd v. Ladsen, 4 McCord, 76.....	xvii, 707
Boyd v. Mexico Southern Bank, 67 Mo. 537.....	29, 515
Boyd ada. State, 2 Hill, 288.....	xxvii, 376
Boyd v. Toledo Bank, 32 Ohio St. 526.....	30, 624
Boyd v. Turpin, 84 North Carolina, 137.....	55, 697
Boyd v. Weeks, 2 Denio, 321.....	xlili, 740
Boyd v. Wilson, 83 Penn. St. 519.....	24, 176
Boyer's Estate, 51 Penn. St. 432.....	xc, 129
Boyer v. Barr, 8 Nebraska, 68.....	30, 814
Boyer v. Williams, 5 Missouri, 335.....	xxxi, 324
Boykin v. Bank of Mobile, 72 Alabama, 263.....	47, 406
Boykin v. Boykin, 70 North Carolina, 263.....	16, 776
Boykin v. Ciple, 2 Hill Ch. 200.....	xxix, 67
Boykin v. Mobile Bank, 72 Alabama, 263.....	47, 406
Boykin v. Rain, 28 Alabama, 332.....	lxv, 340
Boyle v. Agawam Canal Co., 22 Pickering, 361.....	xxlii, 740
Boyle v. People, 4 Colo. 176.....	34, 76
Boyle v. State, 105 Indiana, 469.....	55, 219
Boyle v. State, 57 Wisconsin, 472.....	46, 41
Boyston Ins. Co. v. Davis, 68 North Carolina, 17.13.....	624
Boynton v. Farmers' M. F. Ins. Co., 43 Va. 266.....	8, 276
Boynton v. Haselboom, 14 Allen, 107.....	xcii, 730
Boynton v. Rees, 8 Pickering, 329.....	xix, 226
Boyton v. Kellogg, 3 Massachusetts, 159.....	lii, 122
Bozarth v. Dudley, 15 Vroom, 304.....	43, 373
Bozeman v. State Bank, 7 Arkansas, 323.....	xlvi, 261
Bozza v. Rowe, 20 Illinois, 198.....	lxxxi, 184
Brabham v. Supervisors of Hinds Co., 54 Missis-	issippi, 363.....
Brabrook v. Boston F. C. Sav. Bank, 104 Massa-	chusetts, 226.....
Bracken v. Dillon, 64 Georgia, 243.....	37, 70
Bracken v. Preston, 1 Pinney, 564.....	xliv, 412
Brackenridge v. Holland, 3 Blackford, 877.....	xx, 123
Bracket v. McNair, 14 Johnson, 170.....	vii, 447
Brackett v. Blake, 7 Metcalf, 335.....	xli, 443
Brackett v. Edgerton, 14 Minnesota, 174.....	c, 211
Brackett v. Lubke, 4 Allen, 138.....	lxxxi, 694
Brackett v. McGowan, 77 Illinois, 644.....	20, 254
Brackett v. Norton, 4 Connecticut, 517.....	x, 179
Brackett v. Persons Unknown, 53 Ma. 223.....	lxxvii, 548
Brackett v. Rich, 23 Minnesota, 485.....	23, 708
Bradbury v. Comy, 62 Maine, 223.....	16, 440
Bradbury v. Furlong, 13 Rhode Island, 18.....	43, 1
Bradbury v. Johnson, 41 Maine, 533.....	lxvi, 264
Braddy v. Milledgeville, 74 Georgia, 616.....	56, 443
Braden v. La. State Ins. Co., 1 Louisiana, 220.....	xx, 277
Bradford v. Aband, 89 Illinois, 78.....	31, 67
Bradford v. Andrews, 20 Ohio State, 208.....	5, 646
Bradford v. Bradford, 19 Ohio State, 546.....	2, 419
Bradford v. Brooks, 2 Allen, 284.....	xvi, 715
Bradford v. Greenway, 17 Alabama, 797.....	li, 203
Bradford v. Hill, 1 Haywood, 22.....	1, 546
Bradford v. Manly, 13 Massachusetts, 139.....	vii, 122
Bradford v. Marbury, 12 Alabama, 620.....	xlvi, 264
Bradford v. Rice, 102 Massachusetts, 472.....	2, 463
Bradford v. Shine, 18 Florida, 398.....	7, 229
Bradford v. South Carolina R. R. & Rich. L. 201.....	lxii, 411
Bradford Oil Co. v. Blair, 113 Penn. St. 63.....	57, 442
Bradlee v. Warren F. C. Sav. Bk., 127 Mass. 107.24.....	331
Bradley v. Aldrich, 40 New York, 604.....	c, 539
Bradley v. Ballard, 65 Illinois, 413.....	8, 666
Bradlee v. Bander, 36 Ohio State, 26.....	28, 547
Bradley v. Blodget, Kirby, 22.....	1, 11
Bradley v. Boynton, 23 Maine, 267.....	xxxix, 589
Bradley v. Broughton, 34 Alabama, 694.....	lxxxi, 474
Bradley v. Buford, Sneed, 12.....	li, 708
Bradley v. Camp, Kirby, 77.....	1, 13
Bradley v. Comm'rs, 3 Humphreys, 423.....	lxxvii, 363
Bradley v. Cramer, 59 Wisconsin, 209.....	46, 611
Bradley v. Davis, 14 Maine, 44.....	xxx, 729

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Bradley v. Heath, 12 Pickering, 163.....xxii, 418
 Bradley v. Hunt, 5 Gill & Johnson, 54.....xxiii, 597
 Bradley v. Kasee, 5 Cold. 223.....xxiv, 246
 Bradley v. McAtee, 7 Bush, 667.....3, 309
 Bradley v. Mutual Ben. L. Ins. Co., 45 N. Y. 422... 6, 115
 Bradley v. Nashville Ins. Co., 3 La. An. 708.....xlviii, 465
 Bradley v. Norton, 33 Connecticut, 157.....lxxxvii, 200
 Bradley v. Poole, 98 Massachusetts, 169.....xxiii, 144
 Bradley v. Potomac F. Ins. Co., 32 Md. 108.....3, 121
 Bradley v. Rea, 103 Massachusetts, 186.....4, 524
 Bradley v. Rea, 113 Illinois, 327.....55, 422
 Bradley v. Rice, 13 Maine, 198.....xix, 501
 Bradley v. Snyder, 14 Illinois, 263.....lviii, 564
 Bradley v. Spofford, 23 New Hampshire, 444.....lv, 205
 Bradley v. White, 10 Metcalf, 303.....xlili, 435
 Bradshaw v. Commonwealth, 16 Gratt. 507.....lxxxvi, 722
 Bradshaw v. Ellis, 2 Dev. & Bat. Eq. 30.....xxxi, 686
 Bradshaw v. Newman, Breese, 133.....xii, 149
 Bradshaw v. South Boston R. Co., 135 Mass. 407... 46, 481
 Bradstreet v. Everson, 72 Pennsylvania St. 124... 18, 665
 Brady v. Hill, 1 Missouri, 315.....xiii, 503
 Brady ada. People, 40 California, 198.....6, 604
 Bragg v. Mamie, 38 Alabama, 89.....lxix, 83
 Bragg v. Morrill, 49 Vermont, 45.....24, 102
 Bragie ada. People, 88 New York, 585.....42, 269
 Brahmsstadt v. McWhirter, 9 Nebraska, 6.....31, 396
 Braldis ada. Williams, 15 Maryland, 150.....lxix, 559
 Brainard v. Buck, 25 Vermont, 573.....lx, 291
 Brainard v. Clapp, 10 Cushing, 6.....lvii, 74
 Brainard v. Harris, 14 Ohio, 107.....xiv, 535
 Brainard v. Stillpin, 6 Vermont, 9.....xvii, 532
 Brainard ada. State, 59 Vermont, 532.....48, 818
 Braly v. Henry, 71 California, 481.....60, 543
 Braman v. Stiles, 2 Pickering, 460.....xiii, 445
 Bramhall v. Ferris, 14 N. Y. (4 Kernan), 41.....lxvii, 113
 Bramhall v. Sun M. Ins. Co., 104 Mass. 510.....6, 261
 Bramlett v. Pickett, 2 A. K. Marshall, 10.....xii, 350
 Bramlette v. State, 21 Texas Ct. App. 611.....57, 622
 Brancham v. Hotel Co., 39 Ohio State, 333.....48, 457
 Branch v. Comm'rs of Sinking F'd, 80 Va. 427.....56, 596
 Branch v. Libbey, 78 Maine, 321.....57, 810
 Branch v. Sinking Fund Comm'rs, 80 Va. 427.....56, 596
 Branch ada. State, 68 North Carolina, 163.....12, 633
 Branch & Thomas v. Morrison, 5 Jones' Law, 16...lxix, 770
 Brand v. Daunoy, 8 Martin, N. S., 159.....xix, 176
 Brander v. Justice, 5 Call, 548.....11, 606
 Brandon v. Huntsville Bank, 1 Stewart, 330.....xviii, 48
 Brandon Manuf. Co. v. Frazer, 47 Vt. 88.....19, 118
 Brandreth v. Lanco, 8 Paige, 24.....xxiv, 368
 Branham v. Turnpike Co., 1 Lea, 704.....27, 789
 Brann v. Chicago R. I. & P. R. Co., 53 Iowa, 596, 596, 243
 Brannan v. Oliver, 2 Stewart, 47.....xix, 37
 Brannenburgh v. Ind., P. & C. R. R., 13 Ind. 103...lxix, 230
 Brannock v. Brannock, 10 Iredell's Law, 428.....11, 396
 Brannon ada. State, 53 Missouri, 63.....17, 643
 Bransom v. Labrot, 81 Kentucky, 638.....50, 193
 Branson v. Hill, 31 Maryland, 181.....1, 40
 Brant v. Gallup, 111 Illinois, 487.....53, 638
 Brantley v. Thomas, 22 Texas, 270.....lxiii, 264
 Brashar v. Burton, 3 Bibb, 9.....vi, 634
 Brasher v. Davidson, 34 Texas, 190.....xviii, 525
 Braswell v. Morehead, Busbee's Eq. 26.....lvii, 586
 rasfield ada. State, 81 Missouri, 181.....51, 235
 Brattle Square Church v. Grant, 3 Gray, 142.....lxiii, 725
 Braudschach, Ex parte, 2 Hill (N. Y.), 367.....xxxviii, 593
 Brawn v. Keller, 43 Penn. State, 104.....lxviii, 554
 Braxton v. Coleman, 5 Call, 453.....11, 592
 Braxton v. Freeman, 6 Richardson's L. 35.....lvii, 775
 Bray v. Lamb, 2 Devereux Eq. 372.....xxv, 718
 Bray v. Marsh, 75 Maine, 452.....46, 416
 Braynard v. Hoppock, 32 New York, 571.....lxxxviii, 346
 Brayton v. Fall River, 113 Mass. 218.....18, 470
 Brazier v. Ansley, 11 Iredell's Law, 12.....11, 408
 Brazil v. Moran, 8 Minnesota, 236.....lxxxviii, 773
 Breasted v. F. L. & T. Co., 8 N. Y. (4 Seld.), 299.....lx, 482
 Breaux v. Gallusseau, 14 Louisiana An. 233...lxiv, 430
 Breaux v. Johns, 4 Louisiana An. 141.....1, 555
 Brechbill v. Randall, 103 Indiana, 586.....52, 696
 Breck v. Blanchard, 22 New Hampshire, 525.....11, 222
 Breckenridge v. Brooks, 2 A. K. Marshall, 336...xii, 401
 Breckenridge v. Olinkenbeard, 2 Littlell, 127.....xiii, 261
 Breckenridge v. Duncan, 2 A. K. Marshall, 50.....xii, 399
 Breckenridge v. Ormsby, 1 J. J. Marshall, 526...xix, 71
 Breckenridge v. Todd, 3 T. B. Monroe, 53.....xvi, 63
 Breckenridge v. Waters, 5 T. B. Monroe, 180...xvii, 48
 Bredin, Appeal of, 92 Pennsylvania State, 941...37, 677
 Breed v. Conley, 14 Iowa, 269.....lxxxii, 488
 Breeding v. Davis, 77 Virginia, 639.....46, 740
 Breese v. State, 13 Ohio State, 144.....lxxx, 340
 Breese v. United States Tel. Co., 48 N. Y. 122... 8, 526
 Breitenbach v. Bush, 44 Penn. State, 213...lxxxiv, 442
 Breneman v. Furnish, 90 Penn. St. 126.....35, 651
 Brengle v. Busbey, 40 Maryland, 141.....xvi, 586
 Brennan v. Fairhaven & W. R. Co., 45 Conn. 294, 297, 679
 Brennan v. Swasey, 16 California, 140.....lxvii, 507
 Brennan v. Weatherford, 53 Texas, 330.....37, 758
 Brenner v. Weaver, 1 Kansas, 488.....lxxxiii, 444
 Brent v. Ervin, 3 Martin, N. S., 303.....xv, 157
 Brent v. Kimball, 60 Illinois, 211.....14, 35
 Brent v. Shouse, 16 Louisiana An. 158.....lxix, 673
 Brentnal v. Helms, 1 Root, 291.....1, 44
 Brenton v. Davis, 8 Blackford, 317.....xiv, 769
 Breslin v. Brown, 24 Ohio St. 565.....15, 627
 Bresler v. Kent, 61 Illinois, 426.....14, 67
 Bretton ada. Commonwealth, 100 Mass. 206...xxvii, 95
 Breuner v. Liverpool etc. Ins. Co., 51 Cal. 101...31, 703
 Brewer v. Baxter, 41 Georgia, 212.....5, 630
 Brewer v. Boston etc. R. R. Co., 5 Metcalf, 478...xxxix, 694
 Brewer v. Bowman, 3 J. J. Marshall, 492...xx, 158
 Brewer v. Davis, 9 Humphreys, 208.....xix, 706
 Brewer v. Hardy, 22 Pickering, 376.....xxxii, 747
 Brewer v. Harris, 2 Smodes & M. 84.....xii, 587
 Brewer v. Herbert, 30 Maryland, 301.....xvi, 583
 Brewer v. Lamar, 69 Georgia, 686.....47, 766
 Brewer v. Marshall, 19 New Jersey Eq. 537...xxvii, 679
 Brewer v. Maurer, 38 Ohio St. 543.....43, 436
 Brewer v. Smith, 3 Greenleaf, 44.....xiv, 213
 Brewer v. Strong's Ex'rs, 10 Alabama, 261.....xiv, 514
 Brewer v. Union Ins. Co., 12 Massachusetts, 169...vii, 53
 Brewer v. Wall, 23 Texas, 585.....lxvii, 76
 Brewer v. Watson, 71 Alabama, 299.....46, 518
 Brewer v. Weakley, 2 Overton, 99.....v, 656
 Brewer v. Woodward, 54 Vermont, 581.....41, 687
 Brewer Brick Co. v. Brewer, 62 Maine, 62.....16, 398
 Brewington v. Lowe, 1 Ind. 21 (Smith, 79)...lxviii, 949
 Brewster v. Burnett, 125 Massachusetts, 68.....28, 309
 Brewster v. Hartley, 37 California, 15.....xix, 237
 Brewster v. Kilduff, 15 Illinois, 492.....lx, 768
 Brewster v. Wakefield, 1 Minnesota, 362.....lxix, 942
 Brewster v. Vall, 1 Spencer, 56.....xxxviii, 547
 Brewster v. Van Liew, 119 Illinois, 554.....59, 623
 Brewster v. Warner, 136 Massachusetts, 87.....49, 6
 Briant ada. Commonwealth, 142 Mass. 463.....56, 708
 Brice ada. Commonwealth, 22 Penn. State, 211...lx, 79
 Brice v. Lide, 30 Alabama, 647.....lxviii, 148
 Brickhouse v. Hunter, 4 Henning & M. 363.....iv, 628
 Bridge v. Eggleston, 14 Massachusetts, 245...vii, 209
 Bridge v. Gray, 14 Pickering, 55.....xxv, 368
 Bridge v. Hubbard, 15 Massachusetts, 96.....viii, 86
 Bridgeford v. Masonville Mfg. Co., 34 Conn. 544...xii, 744

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Bridgeport v. New York etc. R. R. Co.**, 36 Conn. 255.....4, 63
Bridgeport Sav. Bank v. Eldredge, 28 Conn. 555. lxxviii, 583
Bridges v. Lanham, 14 Nebraska, 359.....45, 121
Bridges v. Phillips, 25 Alabama, 136.....lx, 425
Bridges v. Pleasant, 4 Iredell's Eq. 26.....xliv, 94
Bridges v. Sprague P. Iron Co., 57 Maine, 543. xcix, 788
Bridges v. Winters, 43 Mississippi, 135.....xviii, 443
Bridges v. Winters, 43 Mississippi, 135.....9, 598
Bridgewater Acad. v. Gilbert, 3 Pickering, 579.....xlii, 457
Bridgman ada. State, 49 Vermont, 303.....94, 124
Brisewick v. Brunswick, 51 Georgia, 639.....91, 240
Brigance v. Erwin, 1 Swan, 375.....lvii, 779
Briff v. State, 58 Wisconsin, 39.....46, 621
Brigg v. Hilton, 59 New York, 517.....53, 63
Briggs v. Boston etc. R. R. Co., 6 Allen, 246. lxxviii, 626
Briggs v. Brushaber, 43 Michigan, 330.....58, 187
Briggs v. Cent. Nat. Bank, 89 New York, 123.....42, 298
Briggs v. Davis, 20 New York, 15.....lxxx, 363
Briggs v. Ewart, 51 Missouri, 245.....11, 445
Briggs v. Garrett, 111 Penn. St. 404.....56, 274
Briggs v. Hall, 4 Leigh, 484.....xxvi, 326
Briggs v. Hill, 6 Howard, 303.....xxxviii, 441
Briggs v. Latham, 36 Kansas, 355.....59, 546
Briggs v. McCabe, 27 Indiana, 337.....lxxxix, 503
Briggs v. Parkman, 3 Metcalf, 256.....xxvii, 89
Briggs v. Partridge, 64 New York, 387.....21, 617
Briggs v. Penniman, 3 Cowen, 387.....xviii, 454
Briggs v. Richmond, 10 Pickering, 391.....xx, 526
Briggs v. Spencer, 3 Robinson (La.), 268.....xxviii, 239
Briggs v. Starke, 2 Mill, 111.....xii, 659
Briggs ada. State, 9 Rhode Island, 361.....11, 270
Briggs v. Winzsmith, 10 South Carolina, 133.....30, 46
Brigham v. Carlisle, 73 Alabama, 243.....56, 29
Brigham v. Claffin, 31 Wisconsin, 607.....11, 623
Brigham v. Henderson, 1 Cushing, 430.....xviii, 610
Brigham v. Myers, 51 Iowa, 397.....53, 140
Brigham v. Smith, 4 Gray, 397.....lxiv, 76
Bright v. Carpenter, 9 Ohio, 139.....xxiv, 432
Bright v. Coffman, 15 Indiana, 371.....lxxvii, 96
Bright v. Lord, 51 Indiana, 273.....19, 732
Bright v. Patton, 5 Mack, 634.....60, 326
Bright ada. State, 38 Louisiana An. 1.....58, 155
Brightman v. Bristol, 55 Maine, 426.....90, 711
Brighton Bank v. Smith, 12 Allen, 243.....x, 144
Briley v. Cherry, 2 Devereux's Law, 2.....xviii, 561
Briley v. Sugg, 1 Dev. & Bat. Eq. 366.....xxx, 172
Brill v. Singer M. Co., 41 Ohio St. 127.....52, 74
Brill v. Stiles, 35 Illinois, 305.....lxxxv, 364
Brill v. Tuttle, 81 New York, 454.....37, 515
Brimhall v. Van Campen, 8 Minnesota, 12.....lxxvii, 118
Brinagar v. Phillips, 1 B. Monroe, 293.....xxvi, 575
Brinckerhoff v. Lansing, 4 Johns. Ch. 65.....viii, 538
Brinagar v. Chaffin, 3 Dev. L. 108.....xvii, 711
Bringard ada. People, 39 Michigan, 23.....53, 344
Bringhurst ada. Commonwealth, 103 Pennsylvania State, 134.....49, 119
Brink v. State, 16 Tex. Ct. App. 344.....51, 317
Brinkman vs. Hunter, 73 Missouri, 172.....39, 422
Brinkley v. Brinkley, 50 New York, 124.....10, 460
Brinley v. Grou, 50 Connecticut, 66.....47, 618
Brinley v. Mann, 3 Cushing, 337.....xviii, 669
Brinson v. Thomas, 3 Jones' Equity, 414.....lxvii, 224
Brisco v. State, 4 Tex. Ct. App. 219.....30, 162
Briscoe v. Anketell, 28 Mississippi, 361.....lxi, 563
Briscoe v. Brown, 1 Texas, 326.....xvii, 106
Bristol v. Burt, 7 Johnson, 254.....v, 264
Bristol v. Dann, 12 Wendell, 142.....xvii, 122
Bristol Knife Co. v. First Nat. Bank, 41 Conn. 621. 19, 517
Subst. Manuf. Co. v. Gridley, 27 Conn. 221.....lxi, 56
Bristow v. Payton's Adm's, 2 T. B. Monroe, 91.....xv, 136
Brite v. Gill, 2 T. B. Monroe, 65.....xv, 122
British & F. M. Ins. Co. v. Gulf, C. & S. F. Ry. Co., 63 Texas, 475.....51, 661
British North Am. B'k v. Hooper, 5 Gray, 567.....lxvi, 320
Britt v. Aylett, 11 Arkansas, 475.....111, 282
Brittain v. Doylestown B'k, 5 Watts & Serg. 67. xxxix, 119
Brittain v. McKay, 1 Iredell's Law, 265.....xxiv, 729
Brittain v. Quiet, 1 Jones' Equity, 328.....lxii, 202
Brittain v. Handy, 20 Arkansas, 381.....lxxxiii, 497
Britton v. Atlanta & C. A. L. R. Co., 68 N. C. 536. 43, 749
Britton v. Dierker, 46 Missouri, 561.....2, 553
Britton v. Turner, 6 New Hamp. 461.....xxvi, 713
Brizendine v. Frankfort Br. Co., 2 B. Mon. 31. xxxvi, 587
Broadnax v. Baker, 94 North Carolina, 676.....55, 633
Broadway Bapt. Church v. McAtee, 8 Bush, 508.....9, 420
Broadway Nat. B'k v. Adams, 133 Mass. 170.....43, 504
Broadwell v. Kansas, 75 Missouri, 213.....42, 406
Broadwell v. Swigert, 7 B. Monroe, 39.....xlv, 47
Broadwell v. Wilcox, 23 Iowa, 568.....xvii, 404
Brobst v. Buff, 100 Pennsylvania State, 21.....45, 399
Brobst v. Skillen, 16 Ohio St. 332.....lxxxviii, 468
Broburg v. Des Moines, 63 Iowa, 523.....50, 756
Brook v. Gale, 14 Florida, 523.....14, 356
Brook v. Eastman, 23 Vermont, 658.....lxvii, 733
Brook v. Stimson, 108 Massachusetts, 620.....11, 398
Brocket v. Ohio etc. R. R. Co., 14 Penn. St. 241.....111, 534
Brockett v. McGowan, 77 Illinois, 644.....90, 254
Brookway v. Crawford, 3 Jones' Law, 433.....lxvii, 290
Brookway v. Innes, 39 Michigan, 47.....33, 348
Brookway v. Mullin, 46 New Jersey Law, 448.....50, 448
Broderick v. Detroit U. D. Co., 56 Michigan, 361. 54, 362
Brodhead v. Milwaukee, 19 Wis. 624.....lxxxviii, 711
Brodie v. Watkins, 33 Arkansas, 545.....34, 49
Broh v. Jenkins, 9 Martin, 626.....xviii, 298
Brokaw v. N. J. T. & R. R. Co., 22 New Jersey L. 338.....xx, 620
Bromley v. Goodrich, 40 Wisconsin, 131.....22, 696
Bromley v. Elliot, 38 New Hampshire, 287.....lxxv, 122
Bromley v. Hutchins, 8 Vermont, 194.....xxx, 400
Bronson v. Bruce, 59 Michigan, 447.....60, 307
Bronson v. Coffin, 106 Massachusetts, 175.....11, 235
Bronson v. Oberlin, 41 Ohio State, 476.....53, 30
Brooks v. New York L. R. & W. R. R. Co., 106 Penn. St. 523.....50, 236
Brooks v. Washington, 8 Grattan, 245.....lv, 142
Brooker v. Coffin, 5 Johnson, 158.....lv, 337
Brookline v. Sherman, 140 Massachusetts, 1.....54, 424
Brooklyn v. Brooklyn C. R. R. Co., 47 N. Y. 475.....7, 469
Brooklyn Park Comm'n v. Armstrong, 46 New York, 224.....6, 79
Brooklyn ada. People, 4 New York (4 Comst.), 419. lv, 299
Brooklyn ada. People, 1 Wendell, 318.....xix, 602
Brooklyn v. Smith, 104 Illinois, 429.....44, 90
Brooklyn Bank v. De Grauw, 23 Wendell, 243.....xxv, 569
Brookman v. Hammill, 43 New York, 564.....3, 731
Brooks v. Bondsey, 17 Pickering, 441.....xxviii, 313
Brooks v. Brooks, 12 Gill & J. 306.....lxxxviii, 510
Brooks v. Chaplin, 3 Vermont, 281.....xviii, 209
Brooks v. Commonwealth, 61 Penn. State, 382.....6, 645
Brooks v. Cook, 44 Michigan, 617.....38, 292
Brooks v. Cotton, 48 New Hampshire, 58.....2, 172
Brooks v. Curtis, 50 New York, 639.....10, 545
Brooks v. Hubbard, 3 Connecticut, 88.....viii, 154
Brooks v. Martin, 43 Alabama, 380.....xciv, 686
Brooks ada. People, 1 Denio, 457.....xviii, 704
Brooks v. People, 49 New York, 436.....10, 390
Brooks ada. People, 40 Michigan, 333.....90, 534
Brooks v. Powers, 15 Massachusetts, 244.....viii, 90
Brooks v. Rooney, 11 Georgia, 623.....lv, 420

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Brooks v. White, 2 Metcalf, 263xxvii, 95
 Brooks' Syndies v. Hamilton, 10 Martin, 286xiii, 338
 Brookshire v. Brookshire, 8 Iredell's Law, 74xiv, 341
 Brooksville & C. T. Co. v. Pumphrey, 59 Ind. 78.....26, 76
 Brookville & G. T. Co. v. McCarty, 8 Ind. 392.....lxv, 768
 Brookville & M. H. Co. v. Butler, 91 Ind. 134.....46, 580
 Brosius v. Reuter, 1 Harris & J. 551.....ii, 534
 Brown v. Lehigh Valley R. R. Co., 113 Penn. St. 490.....57, 479
 Brothers v. Cartter, 82 Missouri, 373.....14, 424
 Brothers v. Outwright, 2 Jones' Equity, 113lxiv, 563
 Brothers v. Hurdle, 10 Iredell's Law, 490.....ii, 400
 Brothers v. McCurdy, 36 Penn. State, 407.....lxviii, 368
 Broten v. Bateman, 3 Devereux's Eq. 115.....xxii, 732
 Brotsman v. Dunnell, 5 Wharton, 126.....xxiv, 537
 Broughton v. Bradley, 34 Alabama, 694.....lxixiii, 474
 Broughton v. Birchmore, Harper's Law, 300xviii, 654
 Broughton v. Silloway, 114 Massachusetts, 71.....19, 312
 Broughton ada. State, 7 Iredell's Law, 96.....xiv, 507
 Brower v. Wooten, N. O. Term. Rep. 70vii, 692
 Brown, Ex parte, 72 Missouri, 83.....37, 426
 Brown's Case, 113 Massachusetts, 409.....17, 114
 Brown's Petition, 14 Rhode Island, 371.....51, 397
 Brown's Will, 1 B. Monroe, 56.....xxv, 174
 Brown v. Adams, 1 Stewart, 51.....xviii, 36
 Brown v. Austin, 1 Massachusetts, 306.....ii, 11
 Brown v. Ayres, 33 California, 525.....xci, 655
 Brown v. Banner C. & O. Co., 97 Illinois, 214.....37, 105
 Brown v. Barnes, 39 Michigan, 211.....33, 375
 Brown v. Bashford, 11 B. Monroe, 67.....lii, 559
 Brown v. Bates, 55 Maine, 520.....xcii, 613
 Brown v. Beatty, 84 Mississippi, 227lxix, 389
 Brown v. Beauchamp, 5 T. B. Monroe, 413xvii, 81
 Brown v. Beaver, 3 Jones' Law, 516lxvii, 255
 Brown v. Bebee, 1 D. Chipman, 227.....vi, 728
 Brown v. Benight, 3 Blackford, 39.....xxiii, 373
 Brown v. Bicknell, 1 Pinney, 223 (1 Burnett, 65).....xxix, 399
 Brown v. Blydenburgh, 7 N. Y. (3 Selden), 141.....lvii, 506
 Brown v. Bonner, 8 Leigh, 1.....xxxi, 637
 Brown v. Bowen, 30 New York, 519.....lxxvi, 408
 Brown v. Brown, 13 Alabama, 208.....xviii, 53
 Brown v. Brown, 18 Connecticut, 410.....xxvi, 328
 Brown v. Brown, 3 Connecticut, 299.....viii, 187
 Brown v. Brown, 4 Indiana, 627lxiii, 641
 Brown v. Brown, 14 Lea (Tenn.) 263.....59, 169
 Brown v. Brown, 47 Missouri, 130.....4, 320
 Brown v. Brown, 37 New Hampshire, 536lxix, 154
 Brown v. Buford, 3 B. Monroe, 508.....xxix, 477
 Brown v. Burkesmeyer, 9 Dana, 159.....xxdii, 541
 Brown v. Butchers' etc. Bank, 6 Hill (N. Y.), 443.....xii, 755
 Brown v. Caldwell, 23 West Virginia, 187.....48, 376
 Brown v. Caldwell, 10 Serg. & R. 114.....xiii, 680
 Brown v. Cape Girardeau, 90 Missouri, 377.....59, 28
 Brown v. Carpenter, 26 Vermont, 638.....lxii, 603
 Brown v. Chadbourne, 31 Maine, 9i, 641
 Brown v. Chicago M. & St. P. R. Co., 54 Wis. 242, 41, 41
 Brown v. Christie, 37 Texas, 73.....lxxiv, 607
 Brown v. Clegg, 6 Iredell's Eq. 90ii, 413
 Brown v. Clegg, 63 Pennsylvania State, 51.....3, 522
 Brown v. Collins, 53 New Hampshire, 442.....16, 372
 Brown v. Colquhitt, 73 Georgia, 59.....54, 867
 Brown v. Commonwealth, 9 Leigh, 633.....xxdii, 263
 Brown v. Commonwealth, 73 Pennsylvania St. 221, 13, 740
 Brown v. Commonwealth, 4 Rawle, 259xxvi, 130
 Brown v. Coon, 36 Illinois, 343.....lxxv, 402
 Brown v. County Treasurer, 54 Michigan, 132.....52, 800
 Brown v. Crowley, 39 Georgia, 376.....xxix, 463
 Brown v. Dickson, 3 Humphreys, 396.....xxvii, 560
 Brown v. Dillaburny, 4 Smades & M. 713xlili, 496
 Brown v. Doonell, 49 Maine, 421lxvii, 266
 Brown v. Duncanson, 4 Harris & McH. 350.....i, 408
 Brown v. Ferguson, 4 Leigh, 37.....xxiv, 707
 Brown v. Force, 7 B. Monroe, 357.....xvi, 515
 Brown v. '49 and '56 Quar. M. Co., 15 Cal. 152, lxxvi, 468
 Brown v. Foster, 113 Massachusetts, 136.....18, 463
 Brown v. French, 125 Massachusetts, 410.....28, 254
 Brown v. Frost, 2 Bay, 123.....i, 633
 Brown v. Furer, 4 Serg. & R. 213viii, 693
 Brown v. Gilmore, 8 Greenleaf, 107.....xxii, 223
 Brown v. Girard, 4 Yeates, 115; 8 O. C. 1 Binney, 40, ii, 400
 Brown v. Gray, 6 Jones' Law, 103lxvii, 563
 Brown v. Haft, 5 Paige Ch. 235xxvii, 426
 Brown v. Hall, 14 Rhode Island, 249.....51, 375
 Brown v. Hannibal & St. J. R. R. Co., 50 Missouri, 461.....11, 439
 Brown v. Harris, 2 G. Greene, 505lii, 535
 Brown v. Hebard, 20 Wisconsin, 326.....xci, 408
 Brown v. Higginbotham, 5 Leigh, 553.....xxvii, 618
 Brown v. Hobson, 3 A. K. Marshall, 380.....xiii, 187
 Brown v. Hunn, 27 Connecticut, 332lxvi, 71
 Brown v. Illius, 27 Connecticut, 84lxvi, 49
 Brown v. Jaquette, 94 Pennsylvania St. 113.....39, 770
 Brown v. Johnson, 12 Smades & M. 336ii, 118
 Brown v. Jordhal, 32 Minnesota, 135.....59, 560
 Brown v. Keller, 32 Illinois, 151lxxviii, 268
 Brown v. Lakeman, 17 Pickering, 444.....xxviii, 314
 Brown v. Lasselle, 6 Blackford, 147.....lxxviii, 135
 Brown v. Latham, 58 New Hampshire, 20.....42, 598
 Brown v. Leitch, 60 Alabama, 513.....31, 42
 Brown v. Long, 1 Iredell's Eq. 190xxxi, 637
 Brown v. Lynn, 31 Penn. State, 510lxvii, 708
 Brown v. Manning, 3 Minnesota, 35.....lxiv, 734
 Brown v. Manning, 6 Ohio, 258xxvii, 266
 Brown v. Manter, 21 New Hampshire, 628lxiii, 223
 Brown v. Marshall, 47 Michigan, 576.....41, 728
 Brown v. Mass. M. L. Ins. Co., 59 N. H. 298.....47, 205
 Brown v. Maxwell, 6 Hill (N. Y.), 592.....xii, 771
 Brown v. McCormick, 6 Watts, 60.....xxxi, 450
 Brown v. McDonald, 8 Yeager, 158.....xxix, 113
 Brown v. McFarland, 41 Penn. State, 129lxxx, 596
 Brown v. McKinney, 9 Watts, 565.....xxvi, 139
 Brown v. Meady, 10 Maine, 391xxv, 246
 Brown v. Metz, 33 Illinois, 339.....lxxxv, 377
 Brown v. Milwaukee etc. R'y Co., 21 Wis. 39.....xci, 456
 Brown v. Montgomery, 20 New York, 287.....lxxx, 404
 Brown v. Moore, 26 Illinois, 421lxix, 389
 Brown v. Moore, 3 J. J. Marshall, 306ix, 142
 Brown v. Neale, 3 Allen, 74.....lxxx, 53
 Brown v. N. Y. Cent. Co., 32 New York, 597.....lxxxviii, 353
 Brown v. Nourse, 55 Maine, 230.....xcii, 583
 Brown v. O'Brien, 1 Richardson's Law, 268.....xlv, 254
 Brown v. O'Connell, 36 Connecticut, 433.....4, 89
 Brown v. People, 86 Illinois, 239.....29, 26
 Brown v. People, 17 Michigan, 459.....xxvii, 185
 Brown ada. People, 34 Michigan, 339.....29, 531
 Brown ada. People, 72 New York, 571.....28, 183
 Brown v. Pierce, 97 Massachusetts, 46.....xciii, 57
 Brown v. Pratt, 4 Wisconsin, 613lxv, 339
 Brown v. Quincy M. F. Ins. Co., 105 Mass. 396.....7, 538
 Brown v. Randall, 36 Connecticut, 56.....4, 35
 Brown v. Ray, 18 New Hampshire, 102xiv, 361
 Brown v. Ray, 10 Iredell's Law, 72.....ii, 379
 Brown v. Reed, 79 Penn. State, 370.....21, 78
 Brown v. Rice, 57 Maine, 55.....2, 11
 Brown v. Ricketts, 4 Johns. Ch. 308.....viii, 567
 Brown v. Saul, 4 Martin, N. S., 434.....xvi, 175
 Brown v. Sennett, 68 California, 235.....58, 8
 Brown v. Slater, 16 Connecticut, 192.....xli, 128
 Brown v. South K. A. Soc., 47 Maine, 275.....lxvii, 484
 Brown v. Staples, 28 Maine, 497.....xlvi, 504

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Brown v. State, 35 Alabama, 123.....	28, 693	Bruen v. Bragaw, 3 Green's Ch. 261.....	xxxviii, 519
Brown ada. State, 69 Indiana, 95.....	35, 210	Bruen v. Bokes, 4 Denio, 55.....	xlvii, 239
Brown ada. State, 1 Devereux's Law, 137.....	xvii, 582	Bruggeman v. Hoerr, 7 Minnesota, 237.....	lxixii, 97
Brown ada. State, 1 Haywood, 100.....	i, 546	Braker v. Covington, 69 Indiana, 33.....	35, 308
Brown ada. State, 4 Rhode Island, 528.....	lxx, 168	Brumagin v. Tillinghast, 18 California, 208.....	lxxix, 176
Brown v. Stone, 10 Gray, 61.....	lxix, 303	Brumfield v. Brown, 7 Blackford, 142.....	xli, 217
Brown v. Straw, 6 Nebraska, 538.....	79, 369	Brumfield v. Carson, 33 Indiana, 94.....	5, 184
Brown v. Sullivan, 23 Indiana, 359.....	lxxxv, 421	Brumley v. State 21 Texas, Ct. App. 222.....	57, 612
Brown v. Susquehanna B. Co., 109 Penn. St. 57.....	58, 708	Brummagin v. Tallant, 29 California, 502.....	lxxxix, 61
Brown v. Swinford, 44 Wisconsin, 222.....	28, 552	Brummer v. Cohn, 86 New York, 11.....	40, 808
Brown v. Taylor, 13 Vermont, 631.....	xxxvii, 618	Bruner v. Manlove, 3 Scammon, 339.....	xxxvi, 551
Brown v. Thompson, 14 Bush, 538.....	79, 416	Brunn v. Schuetz, 59 Wisconsin, 261.....	48, 469
Brown v. Thurston, 26 Maine, 136.....	xvii, 438	Brunst ada. State, 26 Wisconsin, 412.....	7, 84
Brown v. Toell's Adm'r, 5 Randolph, 542.....	xvi, 759	Brunswick v. Vallean, 50 Iowa, 12.....	57, 119
Brown v. Turner, 1 Alton, 350.....	xv, 696	Brunswick & B. Co. v. Hoover, 26 Penn. St. 508.....	40, 674
Brown v. Tyler, 6 Gray, 135.....	lxix, 239	Brunswick Sav. Ins. v. Commercial Ins. Co., 68	
Brown v. Union Ins. Co., 4 Day, 179.....	iv, 204	Maine, 313.....	28, 88
Brown v. Union Ins. Co., 5 Day, 1.....	7, 123	Brush v. Barrett, 82 New York, 400.....	37, 566
Brown v. Houston, 39 Louisiana An. 243.....	39, 284	Brush v. Fowler, 36 Illinois, 53.....	lxxxv, 329
Brown v. Howard F. Ins. Co., 42 Maryland, 394.....	70, 90	Brush v. Scithner, 11 Connecticut, 382.....	lxix, 383
Brown v. Howe, 9 Gray, 84.....	lxix, 276	Brusie v. Griffith, 34 California, 302.....	xcl, 685
Brown v. Hummel, 6 Penn. State, 88.....	xlvii, 431	Bryan v. Atwater, 5 Day, 181.....	v, 136
Brown v. Vandyke, 4 Halsted Ch. 795.....	lv, 250	Bryan v. Averett, 21 Georgia, 401.....	lxviii, 454
Brown v. Vinalhaven, 65 Maine, 402.....	70, 709	Bryan v. Batcheller, 6 Rhode Island, 542.....	lxxviii, 454
Brown v. Wadsworth, 15 Vermont, 170.....	xl, 674	Bryan v. Beckley, Littell's Sel. Ca. 91.....	xli, 276
Brown v. Wait, 19 Pickering, 470.....	xxxi, 184	Bryan v. Brislin, 26 Missouri, 423.....	lxxii, 219
Brown v. Ward, 53 Maryland, 378.....	36, 422	Bryan v. Glass, 6 Louisiana An. 740.....	lv, 576
Brown v. Watson, 47 Maine, 161.....	lxix, 482	Bryan v. Hunt, 4 Sneed, 543.....	lxix, 302
Brown v. Welch, 18 Illinois, 343.....	lxviii, 549	Bryan v. Hyre, 1 Robinson (Va.) 94.....	lxxxix, 246
Brown v. Wellington, 106 Massachusetts, 218.....	8, 330	Bryan v. Loftus, 1 Robinson (Va.) 12.....	lxxxix, 246
Brown v. Wentworth, 46 New Hamp. 490.....	lxxxviii, 223	Bryan v. Lyon, 104 Indiana, 227.....	54, 300
Brown v. Wheeler, 17 Connecticut, 345.....	xliv, 530	Bryan v. Miller, 28 Missouri, 32.....	lxv, 107
Brown v. White, 5 Dutch, 514.....	lxxx, 226	Bryan v. Moore, 11 Martin, 26.....	xlii, 347
Brown v. Winona and St. P. R. Co., 27 Minn. 162.....	38, 285	Bryan v. Page, 51 Texas, 532.....	52, 637
Brown v. Wright, 7 T. B. Monroe, 396.....	xviii, 190	Bryan v. Ramirez, 8 California, 461.....	lxviii, 340
Brown v. Wright, 17 Vermont, 97.....	xlii, 451	Bryan v. Reynolds, 5 Wisconsin, 300.....	lxviii, 85
Brown v. Wyle, 2 West Virginia, 502.....	xviii, 781	Bryan v. Rooks, 25 Georgia, 622.....	lxxi, 194
Brown v. Wyman, 56 Iowa, 452.....	41, 117	Bryan v. Stump, 8 Grattan, 241.....	lvi, 139
Browne v. Browne, 17 Florida, 607.....	35, 96	Bryan v. Weems, 29 Alabama, 423.....	lxv, 407
Browne v. Kennedy, 5 Harris & J. 195.....	lx, 503	Bryant v. Booths, 30 Alabama, 211.....	lxviii, 117
Browne v. Phila. Bank, 6 Serg. & R. 494.....	lx, 463	Bryant v. Bryant, 3 Bush, 155.....	xvii, 205
Browne v. Providence etc. R. R. Co., 12 Gray, 55.....	lxxi, 736	Bryant v. Burlington, O. R. & N. Ry. Co., 66	
Brownell v. Bradley, 16 Vermont, 105.....	lxiii, 496	Iowa, 305.....	55, 275
Brownell v. Winnie, 29 New York, 400.....	lxxxvi, 314	Bryant v. Carson Riv. Lumber Co., 2 Nev. 212.....	xvii, 463
Brownfield v. Brownfield, 12 Penn. State 136.....	li, 590	Bryant v. Crosby, 36 Maine, 562.....	lxviii, 787
Browning v. City of Springfield, 17 Ill. 143.....	lxiii, 345	Bryant v. Edson, 8 Vermont, 325.....	lxix, 473
Browning v. Estes, 3 Texas, 462.....	lxix, 760	Bryant v. Inburgh, 13 Gray, 607.....	lxix, 655
Browning v. Hanford, 5 Hill (N. Y.), 588.....	xl, 369	Bryant v. Moore, 26 Maine, 84.....	xiv, 96
Browning v. Headley, 2 Rob. (Va.) 340.....	xl, 755	Bryant v. Pennell, 61 Maine, 108.....	14, 520
Browning v. Home Ins. Co., 71 New York, 808.....	37, 86	Bryant v. Rich, 106 Massachusetts, 180.....	8, 511
Browning v. Lawson, 8 Arkansas, 380.....	lxviii, 728	Bryant v. Scott, 1 Dev. & B. Eq. 155.....	lxviii, 580
Browning v. Roane, 9 Arkansas, 354.....	1, 218	Bryant v. St. Paul, 33 Minnesota, 289.....	53, 31
Browning v. Wheeler, 24 Wend. 258.....	lxxxv, 617	Bryce v. Joynt, 63 California, 378.....	49, 94
Brownson v. Hull, 16 Vermont, 309.....	xlii, 517	Bryce v. Lottard Fire Ins. Co., 55 N. Y. 240.....	14, 240
Brubaker v. Paul, 7 Dana, 428.....	lxxxii, 111	Bryden v. Taylor, 2 Harris & J. 304.....	lii, 554
Brue v. Bonney, 12 Gray, 107.....	lxxi, 739	Bryson v. Lucas, 24 N. C. 680.....	37, 634
Brue v. Cloutman, 45 New Hampshire, 87.....	lxxxiv, 111	Bryson v. Rayner, 25 Maryland, 424.....	xc, 69
Brue v. Crews, 39 Georgia, 544.....	xcix, 467	Buchan v. Sumner, 2 Barb. Ch. 165.....	lxvii, 305
Brue v. Edwards, 1 Stewart, 11.....	lxviii, 33	Buchanan v. Bordley, 4 Harris & J. 317.....	lx, 534
Brue v. Fulton Nat. Bank, 79 New York, 184.....	35, 505	Buchanan v. Curry, 19 Johnson, 137.....	x, 300
Brue v. Hastings, 41 Vermont, 330.....	lxviii, 592	Buchanan v. Curtis, 25 Wisconsin, 99.....	3, 28
Brue v. Luke, 9 Kansas, 301.....	17, 491	Buchanan v. Matlock, 8 Humphreys, 390.....	lxvii, 622
Brue v. Reed, 104 Pennsylvania State, 408.....	49, 586	Buchanan v. Moore, 13 Serg. & R. 304.....	xv, 601
Brue v. Schuyler, 4 Gilman, 221.....	lxvi, 447	Buchanan ada. State, 5 Harris & J. 317.....	lx, 534
Brue ada. State, 3 Brevard, 264.....	vi, 576	Buchanan v. Adams, 49 N. J. L. 626.....	60, 686
Brue ada. State, 48 Iowa, 530.....	30, 403	Bucher v. Fitchburg R. Co., 131 Mass. 128.....	41, 216
Brue ada. State, 5 Oregon, 68.....	70, 734	Buchman v. State, 59 Indiana, 1.....	96, 75
Brue v. Wood, 1 Metcalf, 542.....	lxxxv, 380	Buck v. Alkin, 1 Wendell, 468.....	lxix, 582
Bruch v. Lantz, 2 Rawie, 392.....	lxii, 458	Buck v. Albee, 26 Vermont 184.....	lxii, 584

Roman letters [xlx] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Buck v. Colbath, 7 Minnesota, 310.....	xlxii, 91	Bulkeley v. Stewart, 1 Day, 130.....	li, 57
Buck v. Collins, 51 Georgia, 391.....	21, 236	Bull v. Bull, 8 Connecticut, 47.....	xx, 96
Buck v. Cotton, 2 Connecticut, 126.....	vii, 261	Bull v. Douglas, 4 Munford, 303.....	vi, 511
Buck v. Doyle, 4 Gill, 473.....	xiv, 176	Bull ada. People, 46 New York, 57.....	7, 302
Buck v. First Nat. Bank, 27 Michigan, 293.....	15, 189	Bull v. Talbot, 2 Root, 119.....	i, 62
Buck v. Kent, 3 Vermont, 98.....	xxi, 576	Bullard v. Briggs, 7 Pickering, 533.....	xix, 292
Buck v. Martin, 21 South Carolina, 590.....	53, 702	Bullard v. Copps, 2 Humphreys, 409.....	xxxvii, 561
Buck v. Smith, 29 Michigan, 106.....	18, 84	Bullard v. Hinkley, 6 Greenleaf, 289.....	xx, 304
Buck v. Swasey, 35 Maine, 41.....	lvi, 681	Bullard v. Randall, 1 Gray, 605.....	lxi, 433
Buck M. Co. v. L. C. & N. Co., 50 Penn. St. 91.....	lxxxviii, 531	Bullard v. State, 38 Texas, 504.....	19, 31
Buckalew v. State, 62 Alabama, 334.....	34, 22	Bullen v. Runnels, 2 New Hampshire, 356.....	ix, 56
Bucky v. Snouffer, 10 Maryland, 149.....	lxix, 129	Bullion M. Co. v. Crossus M. Co., 2 Nevada, 168.....	xc, 526
Buckingham v. Elliott, 62 Mississippi, 296.....	52, 183	Bullitt v. Thatcher, 5 Howard (Miss.), 690.....	xxxvii, 175
Buckland v. Adams Express Co., 97 Mass. 124.....	xciii, 68	Bullitt v. Taylor, 34 Mississippi, 708.....	lxix, 412
Buckles v. Ellers, 72 Indiana, 220.....	37, 156	Bulloch v. State, 10 Georgia, 47.....	liv, 369
Buckley's Appeal, 48 Penn. State, 491.....	lxxxviii, 468	Bullock v. Hubbard, 23 California, 496.....	lxxxviii, 136
Buckles v. Lafferty's Legatees, 2 Rob. (Va.) 292.....	xi, 752	Bullock v. Pottinger, 3 J. J. Marshall, 94.....	lxix, 164
Buckley v. Beardslee, 2 Southard, 570.....	viii, 620	Bullock v. Taylor, 39 Michigan, 137.....	33, 356
Buckley v. Garrett, 60 Pennsylvania, 333.....	c, 561	Bullock v. Tinnen, 2 Carolina Law Repos. 271.....	vi, 565
Buckley v. O'Neil, 113 Massachusetts, 193.....	18, 468	Bulman ada. Commonwealth, 118 Mass. 456.....	19, 469
Buckley v. Second Nat. Bank, 35 N. J. 400.....	10, 249	Bumpas v. Dotson, 7 Humphreys, 310.....	xvii, 61
Buckman v. Bugles, 15 Massachusetts, 180.....	viii, 98	Bumpas v. Taggart, 26 Arkansas, 396.....	7, 623
Buckman ada. State, 8 New Hampshire, 203.....	xxix, 646	Bumpas v. Webb, 1 Stewart, 19.....	xviii, 34
Buckmaster v. McElroy, 20 Nebraska, 557.....	57, 843	Bumpas v. Webb, 4 Porter, 65.....	xxix, 274
Buckminster v. Buckminster, 38 Va. 248.....	lxxxviii, 652	Bunch v. Hurst, 3 Demasura, 273.....	v, 551
Bucknall v. Story, 46 California, 589.....	13, 220	Bundy v. Hart, 46 Missouri, 460.....	2, 535
Bucknam v. Thompson, 38 Maine, 171.....	lxi, 237	Bundy ada. State, 24 South Carolina, 439.....	54, 269
Buckner v. Bush, 1 Duvall, 394.....	lxxxv, 634	Bunge v. Koop, 48 New York, 226.....	8, 546
Buckner v. Kingsbury, 58 Illinois, 310.....	11, 67	Bunker v. Miles, 30 Maine, 431.....	i, 632
Buckner v. Real Estate Bank, 5 Arkansas, 536.....	xii, 105	Bunker v. Rand, 19 Wisconsin, 253.....	lxxxviii, 684
Buckner v. Smith, 1 Washington (Va.), 296.....	i, 463	Bunn v. Jetmore, 70 Missouri, 228.....	35, 426
Buckner v. Terrill, Littell's Sel. Ca. 29.....	xii, 269	Bunn v. Riker, 4 Johnson, 426.....	iv, 292
Buckner v. Watt, 19 Louisiana, 216.....	xxxvi, 671	Bunn, Raiguel & Co. v. Ahi, 29 Penn. St. 387.....	lxix, 639
Buckout v. Swift, 27 California, 433.....	lxxxviii, 90	Bunnell v. Collinsville S. Soc., 38 Conn. 203.....	9, 390
Budd v. Brooke, 3 Gill, 198.....	xliii, 221	Buntain v. Moogrove, 25 Illinois, 152.....	lxxxvi, 789
Budd v. Multnomah St. R'y Co., 12 Or. 271.....	53, 356	Bunting v. Ricks, 2 Dev. & Bat. Eq. 130.....	xxxii, 696
Budd v. The State, 3 Humphreys, 483.....	xxxix, 189	Bunting v. Willis, 27 Gratt. 144.....	21, 336
Buddensack ada. People, 103 New York, 487.....	57, 763	Banton v. Lyford, 37 New Hampshire, 512.....	lxix, 144
Buddington v. Bradley, 10 Connecticut, 213.....	xxvi, 386	Banton v. Worley, 4 Bibb 38.....	vii, 736
Buddington v. Smith, 13 Connecticut, 334.....	xxxiii, 407	Bunte v. Cole, 7 Blackford, 265.....	xii, 229
Buel v. N. Y. Cent. & E. R., 31 N. Y. 314.....	lxxxviii, 271	Burbank v. Bethel S. M. Co., 75 Maine, 373.....	46, 407
Buel v. People, 78 New York, 492.....	34, 555	Burbank v. Crooker, 7 Gray, 158.....	lxvi, 470
Buel v. Pumphrey, 2 Maryland, 261.....	lvi, 714	Burbank v. Payne & Harrison, 17 La. An. 15.....	lxxxvii, 51
Buell v. Buckingham, 16 Iowa, 284.....	lxxxv, 516	Burbank v. Pillsbury, 48 New Hampshire 47 S.....	xvii, 632
Buell v. Chapin, 99 Massachusetts, 594.....	xcvii, 58	Burbank v. Rockingham M. F. I. Co., 24 N. H. 580.....	lvii, 301
Buell v. Flowers, 39 Connecticut, 462.....	12, 414	Burbank v. Whitney, 24 Pickering, 146.....	xxxv, 312
Buesching v. St. Louis Gas Light Co., 73 Mis-		Burch v. Breckinridge, 16 B. Monroe, 482.....	lxviii, 553
souri, 219.....	39, 503	Burch v. Davenport & St. P. R. R. Co., 46 Iowa,	
Buffalo, City of, v. Holloway, 7 N. Y. (Seld.) 493.....	lvii, 550	449.....	26, 150
Buffalo v. O'Malley, 61 Wisconsin, 255.....	50, 137	Burch v. Hardwick, 30 Gratt. 24.....	32, 646
Buffalo B. S. C. Co. v. Dow, 63 Texas, 492.....	51, 668	Burch v. Smith, 15 Texas, 219.....	lxv, 154
Buffalo ada. People, 76 New York, 558.....	32, 337	Burchard v. Dunbar, 82 Illinois, 460.....	25, 334
Buffandau v. Edmondson, 17 California, 436.....	lxxxix, 139	Burckhardt v. Burckhardt, 42 Ohio State, 474.....	51, 842
Bufferlow v. Newsum, 1 Deversux's Law, 208.....	fvii, 566	Burden v. McElhenny, 2 Nott & McCord, 60.....	x, 571
Buffington v. Cook, 33 Alabama, 312.....	lxxxiii, 491	Burden v. Sheridan, 36 Iowa, 125.....	14, 506
Buffington v. Curtis, 15 Massachusetts, 527.....	viii, 115	Burden v. Stein, 27 Alabama, 104.....	lxii, 756
Buffington v. Gerrish, 15 Massachusetts, 156.....	viii, 97	Burden v. Thayer, 3 Metcalf, 76.....	lxxxvii, 117
Buffington ada. State, 20 Kansas, 599.....	27, 128	Burdano v. Amperse, 14 Michigan, 91.....	xc, 222
Bufford v. Holliman, 10 Texas, 560.....	ix, 223	Burdge v. Bolin, 106 Indiana, 175.....	55, 724
Buffum v. Buffum, 49 Maine, 108.....	lxxxvii, 249	Burdick v. Cheadle, 26 Ohio St. 393.....	20, 767
Buffum v. Green, 5 New Hampshire, 71.....	xx, 563	Burdick ada. Commonwealth, 2 Penn. State, 163.....	xliv, 186
Buffum v. Ramedell, 86 Maine, 252.....	xcii, 589	Burdick v. Murray, 3 Vermont, 302.....	xxi, 598
Buffum v. Stimpson, 5 Allen, 591.....	lxxxvi, 767	Burditt v. Hunt, 25 Maine, 419.....	xlvi, 286
Buford v. Buford, 4 Munford, 241.....	vi, 511	Burditt v. Swenson, 17 Texas, 489.....	lxxxvii, 668
Buford v. Fannan, 1 Bay, 273.....	i, 615	Burford v. Grand Rapids, 53 Michigan, 86.....	51, 106
Buford ada. Willis, 1 Speer's Law, 379.....	xi, 606	Burgan v. Lyell, 2 Michigan, 102.....	lv, 53
Buhl v. Canyon, 11 Michigan, 349.....	lxxxviii, 738	Burge v. Brown, 5 Bush, 535.....	xcvi, 369
Bulger v. Roche, 11 Pickering, 36.....	xxii, 359	Burgess v. Carpenter, 2 South Carolina, 7.....	16, 643
Bulkeley v. Derby Fish Co., 2 Connecticut, 252.....	vii, 271	Burgess v. Equitable M. Ins. Co., 126 Mass. 70.....	30, 654
Bulkeley v. Eckert, 3 Penn. State, 368.....	xiv, 650	Burgess v. Pollock, 53 Iowa, 273.....	36, 218

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Burgess ada. State, 24 Missouri, 381.....	lix, 433	Burnham ada. State, 56 Vermont, 445.....	48, 301
Burgess v. Vreeland, 4 Zabrickie, 71.....	lix, 408	Burnheimer v. Hart, 27 Iowa, 19.....	xcix, 641
Burgett v. Burgett, 1 Ohio, 469.....	xiii, 634	Burnheimer v. Hart, 27 Iowa, 19.....	1, 206
Burgoon v. Bixler, 55 Maryland, 384.....	39, 417	Burnley v. Cook, 13 Texas, 598.....	lrv, 79
Burgoyne ada. State, 7 Lea, 173.....	40, 60	Burnley v. Stevenson, 24 Ohio St. 474.....	15, 621
Burgwin v. Hostler, Taylor (N. C.), 75.....	1, 582	Burns v. Anderson, 68 Indiana, 302.....	34, 229
Burhans v. Hutcheson, 25 Kansas, 623.....	37, 274	Burns v. Chicago, M. & St. P. R'y Co., 69 Ia. 450.....	58, 227
Burk, Ex parte, 59 California, 6.....	43, 231	Burns v. Hamilton's Administrator, 33 Ala. 310.....	lxx, 679
Burk's Appeal, 75 Penn. St. 141.....	15, 587	Burns v. Moore, 76 Alabama, 339.....	52, 333
Burk v. Adams, 80 Missouri, 504.....	50, 510	Burns v. State, 48 Alabama, 186.....	17, 34
Burk v. Hill, 48 Indiana, 52.....	17, 731	Burnside v. Grand Trunk R'y Co. 47 N. H. 554.....	xcviii, 474
Burk v. Serrill, 80 Penn. St. 413.....	31, 105	Burpee v. Sparhawk, 108 Mass. 111.....	11, 339
Burk v. Simonson, 104 Indiana, 173.....	54, 304	Burr v. Beers, 24 New York, 173.....	lxxx, 337
Burkart v. Bucher, 2 Blinney, 455.....	iv, 457	Burr v. Byers, 10 Arkansas, 398.....	li, 239
Burke v. Allen, 29 New Hampshire, 106.....	lx, 642	Burr v. Sickles, 17 Arkansas, 428.....	lxv, 437
Burke v. Bishop, 37 Louisiana An. 465.....	31, 567	Burr v. Sim, 4 Wharton, 150.....	xcviii, 59
Burke v. Cassin, 45 California, 467.....	13, 204	Burr v. Sim, 1 Wharton, 252.....	xcix, 48
Burke v. Oruger, 8 Texas, 66.....	lviii, 102	Burr v. Spencer, 26 Connecticut, 159.....	lxxviii, 379
Burke ada. Commonwealth, 106 Mass. 376.....	7, 631	Burr v. Smith, 7 Vermont, 341.....	xcix, 154
Burke v. Elliot, 4 Iredell's Law, 355.....	xiii, 142	Burrage's Lessee v. Beardale, 16 Ohio, 438.....	xlvii, 382
Burke v. Louisville eta. R. R. Co., 7 Hotak, 451.....	19, 618	Burrall v. Acker, 23 Wendell, 605.....	xcv, 583
Burke v. Shaw, 59 Mississippi, 443.....	42, 370	Burrell T. v. Pittsburgh eta., 62 Penn. St. 472.....	1, 441
Burke v. Wall, 29 Louisiana An. 38.....	29, 316	Burrill v. Augusta, 78 Maine, 118.....	57, 728
Burket ada. State, 2 Mill, 153.....	xii, 662	Burrill v. Boardman, 43 New York, 254.....	3, 694
Burkhalter v. Edwards, 16 Georgia, 593.....	ix, 744	Burrill v. Dollar Sav. Bank, 92 Penn. St. 134.....	37, 699
Burkhart v. Travelers' Ins. Co., 102 Penn. St. 263.....	48, 205	Burrill v. Nahant Bank, 2 Metcalf, 163.....	xcv, 368
Burkhauser v. Schmitt, 45 Wisconsin, 316.....	30, 740	Burrill v. Stevens, 73 Maine, 395.....	40, 366
Burkholder v. Ludlam, 30 Grant, 255.....	32, 668	Burritt v. Belfy, 47 Connecticut, 323.....	34, 79
Burks v. Albert, 4 J. J. Marshall, 97.....	xx, 209	Burritt v. Saratoga Co. M. F. L. Co. 5 Hill (N. Y.) 128.....	xi, 345
Burks v. Shain, 2 Bibb, 341.....	v, 616	Burritt v. Stillman, 13 N. Y. (3 Kernan), 93.....	lxv, 539
Burleigh v. Bennett, 9 New Hampshire, 15.....	xxxi, 213	Burroughs v. Housatonic R. R., 15 Con. 134.....	xxxviii, 64
Burleigh v. Coffin, 22 New Hampshire, 118.....	liii, 236	Burroughs v. North Car. R. R. Co., 67 N. C. 376.....	12, 611
Burleigh v. Clough, 52 New Hampshire, 267.....	13, 23	Burroughs v. Norwich & W. R. R. Co., 100 Mass. 26.....	1, 78
Burles v. Shannon, 99 Massachusetts, 200.....	xcvi, 733	Burroughs v. Richman, 1 Green Law, 253.....	xcviii, 717
Burley v. Harris, 8 New Hampshire, 233.....	xxix, 680	Burroughs v. Saterlee, 67 Iowa, 396.....	54, 359
Burley v. Russell, 10 New Hampshire, 184.....	xxxiv, 146	Burrows v. Carnes, 1 Denzansure, 409.....	1, 677
Burlingame v. Brewster, 79 Illinois, 515.....	22, 177	Burrows v. Gallup, 32 Connecticut, 498.....	lxxxvii, 126
Burlington v. Burlington S. R. R. Co., 49 Ia. 144.....	31, 145	Burrows v. Fitzley, 1 Root, 363.....	1, 56
Burlington v. Calala, 1 Vermont, 385.....	xviii, 691	Burrows v. Trieber, 21 Maryland, 320.....	lxxxvii, 599
Burlington v. Gilbert, 31 Iowa, 356.....	7, 143	Burrows v. Turner, 24 Wendell, 376.....	xxxv, 622
Burlington v. Schwarzman, 52 Connecticut, 181.....	52, 571	Burrows v. Whitaker, 71 New York, 231.....	27, 42
Burlington & H. C. F. Co. v. Davis, 48 Iowa, 133.....	30, 390	Burrows v. Yount, 6 Blackford, 458.....	xcviii, 439
Burlington & M. R. R. Co. v. Thompson, 31 Kan- sas, 180.....	47, 497	Bursinger v. Watertown Bank, 67 Wisconsin, 75.....	54, 668
Burlington & M. R. R. Co. v. Webb, 18 Neb. 215.....	53, 809	Bursley v. Hamilton, 15 Pickering, 40.....	xxv, 423
Burlington & U. R. Co. v. Reinackie, 15 Neb. 279.....	48, 342	Burson v. Huntington, 21 Michigan, 415.....	4, 497
Burlington, Town of, v. Fosby, 6 Vermont, 83.....	xxvii, 535	Burson v. Nat. P. Bank, 40 Indiana, 173.....	13, 285
Burlington University v. Barrett, 22 Iowa, 60.....	xcii, 376	Burt v. Dewey, 40 New York, 263.....	6, 482
Burnap v. Cook, 16 Iowa, 149.....	lxxxv, 507	Burt v. McKinstry, 4 Minnesota, 304.....	lxxvii, 507
Burnell v. New York C. R. R. Co., 45 N. Y. 184.....	6, 61	Burt v. Merchants' Ins. Co., 106 Mass. 392.....	8, 339
Burnes v. McCubbin, 3 Kansas, 221.....	lxxxvii, 468	Burt v. Sternburgh, 4 Cowen, 559.....	xv, 482
Burnet v. Cincinnati, 3 Ohio, 73.....	xvii, 583	Burt v. Wilson, 28 California, 632.....	lxxxvii, 142
Burnett v. Burkhead, 21 Arkansas, 77.....	lxxvi, 358	Burtch v. Nickerson, 17 Johnson, 217.....	xviii, 399
Burnett v. Craig, 30 Alabama, 135.....	lxxviii, 115	Burtis v. Burtis, Hopkins' Ch. 567.....	xiv, 568
Burnett v. Eufaula H. Ins. Co., 46 Alabama, 11.....	7, 581	Burtis v. Thompson, 42 New York, 246.....	1, 616
Burnett v. Gustafson, 54 Iowa, 86.....	37, 190	Burtis v. Bridgeport Sav. Bank, 28 Conn. 289.....	52, 602
Burnett v. Mayor eta. Sacramento, 12 Cal. 76.....	lxxviii, 518	Burton ada. Commonwealth, 4 Leigh, 645.....	xxvi, 337
Burnett v. Meadows' Adm'r, 7 B. Monroe, 277.....	xvi, 517	Burton v. Currys, 40 Illinois, 339.....	lxxxix, 369
Burnett v. Snyder, 81 New York, 580.....	37, 527	Burton v. Hanford, 10 W. Virginia, 470.....	27, 571
Burnett v. State, 14 Texas, 455.....	lxv, 131	Burton v. Holley, 29 Alabama, 358.....	lxv, 468
Burnham v. City of Fond du Lac, 15 Wis. 193.....	lxxxii, 668	Burton v. Knapp, 14 Iowa, 198.....	lxxxii, 465
Burnham v. Coffin, 8 New Hampshire, 114.....	xxviii, 383	Burton v. Larkin, 36 Kansas, 246.....	58, 541
Burnham v. Cornwall, 16 B. Monroe, 284.....	lxiii, 529	Burton v. Marshall, 4 Gill, 487.....	xiv, 171
Burnham v. Ellis, 39 Maine, 319.....	lxviii, 625	Burton v. Patton, 2 Jones' Law, 124.....	lxii, 194
Burnham v. Grand Trunk R'y, 63 Maine, 298.....	18, 220	Burton v. Scherpf, 1 Allen, 133.....	lxviii, 717
Burnham v. Hays, 3 California, 115.....	lviii, 389	Burton v. State, 3 Texas, Ct. App. 406.....	30, 146
Burnham v. Morrissey, 14 Gray, 226.....	lxxiv, 676	Burton ada. State, 45 Wisconsin, 180.....	30, 706
Burnham v. Nevins, 144 Massachusetts, 88.....	59, 61	Burton v. Stevens, 24 Vermont, 131.....	lviii, 153
Burnham v. Seaverns, 101 Massachusetts 260.....	c, 123	Burton v. Stewart, 3 Wendell, 236.....	xx, 688
Burnham ada. State, 9 New Hampshire, 34.....	xxxi, 217	Burton v. Wilkinson, 18 Vermont, 186.....	xvii, 145
		Burts v. Loyd, 46 Georgia, 104.....	12, 676

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Burwell v. Commissioners, 93 North Carolina 73.	53, 454
Burwell v. Corbin, 1 Randolph, 131.	x, 494
Burwell v. Hobson, 12 Gratian, 322.	lxv, 247
Burwell v. Lumsden, 24 Gratt. 443.	18, 648
Burwell v. Vance Co., 93 N. C., 73.	53, 454
Busby v. Conoway, 8 Maryland, 65.	lxviii, 688
Busby v. North Am. L. Ins. Co., 40 Md. 572.	17, 634
Busey v. Hooper, 35 Maryland, 18.	6, 350
Bush v. Brainard, 1 Cowen, 78.	xviii, 513
Bush v. Breinig, 113 Pennsylvania St. 310.	57, 469
Bush v. Brown, 49 Indiana, 573.	19, 695
Bush v. Bush, 3 Strobhart's Eq. 131.	11, 675
Bush v. Cole, 28 New York, 361.	lxxxiv, 313
Bush v. Cooper, 26 Mississippi, 599.	lix, 270
Bush v. Foote, 28 Mississippi, 5.	38, 310
Bush v. Lindsey, 24 Georgia, 245.	lxix, 117
Bush v. Livingston, 2 Calnes' Cases, 66.	xii, 316
Bush v. Rogan, 65 Georgia, 330.	38, 785
Bush v. Stowell, 71 Pennsylvania St. 208.	10, 694
Bush v. Sullivan, 3 G. Greene, 344.	liv, 506
Bushnell v. Scott, 21 Wisconsin, 451.	xiv, 555
Buzey v. McCurley, 61 Maryland, 436.	48, 117
Busey v. McKie, 2 McCord's Ch. 23.	xvi, 628
Busey v. Mississippi V. T. Co., 24 La. An. 168.	13, 120
Busey v. State, 71 Georgia, 100.	51, 256
Busted v. Parsons, 54 Alabama, 393.	25, 663
Buswell v. Bicknell, 17 Maine, 344.	xxv, 252
Butcher v. Bk of Brownville, 2 Kansas, 70.	lxxxviii, 446
Butcher v. Peterson, 26 West Virginia, 447.	53, 69
Butcher v. Providence Gas Co., 13 R. I. 149.	34, 626
Butcher v. Yocum, 61 Penn. State, 168.	c, 625
Butler v. Boyles, 10 Humphreys, 155.	xii, 697
Butler v. Breck, 7 Metcalf, 164.	xxxix, 768
Butler v. Buckingham, 5 Day, 492.	v, 174
Butler v. Butler, 21 Kansas, 521.	39, 441
Butler v. Butler, 77 New York, 472.	33, 648
Butler v. Commonwealth, 12 Serg. & R. 237.	xiv, 679
Butler v. Cowles, 4 Ohio, 205.	xix, 612
Butler v. Craig, 37 Mississippi, 628.	lxi, 537
Butler v. Dorman, 68 Missouri, 296.	39, 795
Butler v. Duncan, 47 Michigan, 94.	41, 711
Butler v. Hamilton, 2 Desanures, 226.	ii, 692
Butler v. Huestis, 63 Illinois, 694.	33, 689
Butler v. Jones, 7 Howard (Miss.), 587.	xi, 82
Butler v. Kent, 19 Johnson, 223.	x, 219
Butler v. Leavitt, 7 Metcalf, 164.	xxxix, 768
Butler v. Lee, 11 Alabama, 385.	xvii, 230
Butler v. Maynard, 11 Wendell, 548.	xviii, 100
Butler v. Moore, 68 Georgia, 780.	45, 508
Butler v. Moore, 73 Maine, 151.	49, 348
Butler v. Murray, 30 New York, 88.	lxxxvi, 353
Butler v. O'Hear, 1 Desanures, 332.	i, 671
Butler v. Page, 7 Metcalf, 40.	xxxix, 757
Butler v. Peck, 16 Ohio St. 335.	lxxxviii, 452
Butler v. Roy, 25 Michigan, 63.	12, 218
Butler v. Scofield, 4 J. J. Marshall, 139.	xx, 211
Butler v. Slocumb, 33 Louisiana An. 170.	39, 265
Butler v. Triplett, 1 Dana, 153.	xxv, 136
Butler v. Wendell, 57 Michigan, 62.	58, 329
Butler v. Winona Mill Co., 28 Minnesota, 206.	41, 277
Butman ada. State, 61 New Hampshire, 511.	60, 333
Butte Canal & D. Co. v. Vaughn, 11 Cal. 143.	lxx, 769
Butte ada. People, 4 Montana, 179.	47, 346
Butterfield v. Hartshorn, 7 New Hamp. 345.	xvii, 741
Butterfield v. Kinzie, 1 Seamon, 445.	xxx, 657
Butterfield v. Walsh, 21 Iowa, 97.	lxxxix, 557
Butterfield v. Western R. R., 10 Allen, 532.	lxxxvii, 678
Butterick ada. Commonwealth, 100 Mass. 1.	xcvii, 65
Butters v. Harghewout, 43 Illinois, 18.	lxxxix, 401
Butterton v. Scope, 3 Lea, 215.	31, 633
Butterworth v. Crawford, 46 New York, 349.	7, 339
Buttler v. Rosenblath, 42 New Jersey Eq. 651.	59, 59
Button v. Frink, 51 Connecticut, 342.	50, 24
Button v. Hoffman, 61 Wisconsin, 20.	50, 131
Buttrick v. Allen, 8 Massachusetts, 273.	v, 105
Buttrick v. City of Lowell, 1 Allen, 172.	lxxxix, 721
Butts v. Dean, 2 Metcalf, 76.	xxxv, 389
Butts v. Voorhees, 1 Green, 13.	xxii, 489
Buts v. Gillespie, 2 Johnson, 115.	iii, 404
Buzard v. Greenville Bank, 67 Texas, 63.	60, 7
Buzick v. Buzick, 44 Iowa, 259.	24, 740
Buzzell v. Laconia M. Co., 48 Maine, 113.	lxxxvii, 212
Buzzell ada. State, 58 New Hampshire, 307.	43, 586
Byars v. Spencer, 101 Illinois, 429.	40, 212
Byars v. Thompson, 12 Leigh, 550.	lxxxvii, 630
Byarnes v. Reese, 4 Met. (Ky.) 573.	lxxxviii, 481
Bybee v. Ashby, 2 Gilman, 151.	xliii, 47
Bybee v. State, 94 Indiana, 443.	48, 175
Byer v. Einyre, 2 Gill, 150.	xli, 410
Byers v. Farmers' Ins. Co., 35 Ohio St. 606.	35, 623
Byers v. Fowler, 12 Arkansas, 218.	liv, 271
Byers v. Hoppe, 61 Maryland, 307.	48, 89
Byers v. Martin, 2 Colorado, 608.	25, 755
Byington v. Bookwalter, 7 Iowa, 512.	lxiv, 379
Byington v. Simpson, 134 Massachusetts, 169.	45, 314
Bynum v. Clark, 3 McCord, 238.	xv, 633
Bynum v. Miller, 86 North Carolina, 559.	41, 467
Byrd v. Boyd, 4 McCord, 246.	xvii, 740
Byrd v. Hughes, 84 Illinois, 174.	25, 442
Byrd v. State, 57 Mississippi, 243.	34, 440
Byrkes v. Monohon, 7 Blackford, 83.	xli, 212
Byrne v. Byrne, 3 Serg. & R. 54.	viii, 641
Byrne v. New York C. & H. R. R. Co., 104 New York 363.	58, 812
Byrnes v. Stillwell, 103 New York, 453.	57, 799
Cabe v. Jameson, 10 Iredell's Law, 193.	ii, 386
Cabene v. Mulligan, 37 Illinois, 230.	lxxxvii, 247
Cable v. Gaty, 34 Missouri, 573.	lxxxvi, 126
Cable v. McCune, 26 Missouri, 371.	lxvii, 214
Caborne v. Godfrey, 3 Desanures, 514.	v, 563
Cabot v. Christie, 42 Vermont, 121.	1, 313
Cade v. Brownlee, 15 Indiana, 369.	lxxxvii, 95
Cadens v. Teasdale, 53 Vermont, 460.	38, 697
Cadis Bank v. Slemmons, 34 Ohio State, 142.	37, 364
Cady v. Shepherd, 11 Pickering, 400.	xli, 379
Caffrey v. Dudgeon, 39 Indiana, 512.	10, 126
Cage v. Foster, 5 Yerger, 261.	xvii, 265
Cage v. Her, 5 Smodes & M. 410.	xliii, 521
Cage ada. People, 48 California, 323.	17, 436
Cagill v. Wooldrige, 8 Bart. 580.	35, 716
Cahon v. Platt, 69 New York, 348.	25, 903
Cahill v. Eastman, 18 Minnesota, 394.	10, 194
Cahill v. Layton, 87 Wisconsin, 600.	46, 46
Cahill v. Kala. M. Ins. Co., 2 Douglas, 124.	xliii, 487
Cahoon v. Levy, 6 California, 396.	lxv, 615
Cain v. Ligon, 71 Georgia, 682.	51, 261
Cain v. Maples, 1 Hill, (S. C.) 304.	xxvi, 184
Cain v. McCann, 2 Pennington, 438.	iv, 364
Cain v. Wright, 5 Jones' Law, 282.	lxxxii, 551
Cairo & F. R. Co. v. Turner, 31 Arkansas, 494.	25, 564
Cairo & St. L. R. Co. v. Mahoney, 63 Illinois, 73.	58, 399
Cairo & St. L. R. Co. v. Peoples, 93 Illinois, 97.	54, 112
Cairo & V. R. Co. v. Stevens, 73 Indiana, 378.	28, 139
Cake's Appeal, 23 Penn. State, 186.	lxii, 328
Calahan v. Babcock, 21 Ohio State, 221.	8, 63
Caldar v. Chapman, 53 Penn. St. 359.	xc, 163
Caldar v. Smalley, 66 Iowa, 219.	55, 379
Caldwell v. Auger, 4 Minnesota, 217.	lxxxvii, 515
Caldwell v. Center, 30 California, 539.	lxxxix, 131
Caldwell v. City of Alton, 33 Illinois, 416.	lxxxv, 298

Roman letters [xlx] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Caldwell v. Copeland, 37 Penn. State, 427.....lxviii, 436	Camley v. Stanfield, 10 Texas, 546.....lx, 219
Caldwell v. Eneas, 2 Mill, 348.....xii, 681	Camp's Appeal, 36 Connecticut, 88.....4, 39
Caldwell v. Evans, 5 Bush, 380.....xvii, 358	Camp v. Bates, 11 Connecticut, 51.....xxvii, 707
Caldwell v. Fulton, 31 Penn. State, 475.....lxvii, 760	Camp v. Bostwick, 20 Ohio St, 337.....5, 669
Caldwell v. Hall, 60 Mississippi, 330.....45, 410	Camp v. Camp, 5 Connecticut, 291.....xii, 60
Caldwell v. Kennison, 4 Minnesota, 47.....lxvii, 499	Camp v. Camp, 2 Alabama, 633.....xxxi, 423
Caldwell v. Kirkpatrick, 6 Alabama, 60.....xli, 36	Camp v. Grant, 21 Connecticut, 41.....lv, 321
Caldwell v. Mercantile M. I. Co., 32 Penn. St. 75.....lxvii, 773	Camp v. Western Union Telegraph Co., 1 Metcalf (Ky.) 164.....lxvi, 461
Caldwell v. Neil Bros., 21 La. An. 342.....xcix, 738	Camp v. Wood, 76 New York, 92.....52, 283
Caldwell v. Reed, Little's Sel. Ca. 366.....xli, 314	Campau v. Godfrey, 18 Michigan, 27.....c, 133
Caldwell v. Sacra., Little's Sel. Ca. 118.....xli, 285	Campau v. Gillett, 1 Michigan, 416.....liii, 73
Caldwell v. Tuttle, 10 Lea, 258.....43, 307	Campau v. Langley, 39 Michigan, 451.....33, 414
Caldwell v. Walters, 18 Penn. State, 79.....lv, 592	Campau v. North, 39 Michigan, 608.....33, 423
Caldwell v. West'n M. & F. Ins. Co., 19 La. 42.....xxvii, 667	Campbell's Appeal, 39 Penn. State, 401.....lxvii, 641
Calef v. Calef, 54 Maine, 365.....xcii, 549	Campbell's Case, 2 Bland's Ch. 209.....xx, 369
Calef v. Steamer Bonaparte, 1 Rob. (La.) 463.....xxviii, 190	Campbell's Estate, 7 Penn. State, 100.....xiv, 563
Calhoun v. Atchison, 4 Bush, 261.....xcvi, 299	Campbell v. American P. L. Ins. Co., 1 Metcalf thur, 246.....39, 691
Calhoun v. Calhoun, 2 Strobhart's Eq. 231.....xlx, 667	Campbell v. Boyd, 68 North Carolina, 139.....43, 749
Calhoun v. Curtis, 4 Metcalf, 413.....xxviii, 380	Campbell v. Brown, 64 Iowa, 425.....52, 448
Calhoun v. Hays, 8 Watts & Serg. 177.....xlii, 275	Campbell v. Brown, 86 North Carolina, 276.....41, 464
Calhoun v. Marshall, 61 Georgia, 275.....34, 99	Campbell ada. Commonwealth, 7 Allen, 641.....lxviii, 705
Calhoun v. Thompson, 56 Alabama, 166.....28, 754	Campbell v. Dearborn, 109 Massachusetts, 120.....12, 671
Calhoun v. Williams, 32 Gratt. 18.....34, 759	Campbell v. Gardner, 3 Stockton's Ch. 423.....lxix, 606
California St. N. Co. v. Wright, 6 California, 253.....lv, 511	Campbell v. Hillman, 15 B. Monroe, 508.....lxi, 196
Calking v. Baldwin, 4 Wendell, 667.....xxi, 168	Campbell v. Knights, 26 Maine, 224.....xiv, 167
Calkins v. Chandler, 36 Michigan, 320.....24, 593	Campbell v. Kuhn, 45 Michigan, 613.....46, 479
Calkins v. City of Hartford, 33 Connecticut, 87.....lxvii, 194	Campbell v. Lambert, 36 Louisiana An. 25.....51, 1
Calkins v. Lockwood, 16 Connecticut, 278.....xli, 143	Campbell v. Lowe, 9 Maryland, 500.....lxvi, 339
Calkins v. Lockwood, 17 Connecticut, 154.....xlii, 729	Campbell v. McArthur, 2 Hawk, 33.....xi, 736
Calkins v. Smith, 48 New York, 614.....8, 675	Campbell v. Merchants' & Farmers' Mut. Fire Ins. Co., 27 New Hampshire, 35.....lxvii, 394
Calkins v. State, 18 Ohio St. 366.....xviii, 121	Campbell v. Mesier, 4 Johnson's Ch. 336.....viii, 579
Calkins v. Sumner, 13 Wisconsin, 193.....lxix, 738	Campbell v. Miller, 38 Georgia, 304.....xv, 369
Call ada. Commonwealth, 21 Pickering, 509.....xxxi, 284	Campbell v. Montgomery, 53 Alabama, 227.....25, 686
Call v. Gray, 37 New Hampshire, 428.....lxv, 141	Campbell ada. People, 59 California, 243.....43, 297
Call ada. People, 1 Denio, 120.....xlii, 655	Campbell v. People, 16 Illinois, 17.....lx, 46
Call v. Ward, 4 Watts & Serg. 118.....xxix, 64	Campbell v. People, 109 Illinois, 668.....56, 621
Callahan v. Donnelly, 45 California, 182.....13, 172	Campbell v. Pettengill, 7 Greenleaf, 136.....xx, 349
Callahan v. First Nat. Bank, 78 Kentucky, 604.....39, 262	Campbell & Pharo's Appeal, 36 Penn. St. 267.....lxviii, 375
Callahan v. Lintleum, 43 Maryland, 97.....26, 106	Campbell v. Phelps, 1 Pickering, 62.....xi, 139
Callahan v. Patterson, 4 Texas, 61.....11, 712	Campbell v. Portland S. Co., 63 Maine, 222.....16, 503
Callahan v. State, 63 Indiana, 198.....36, 211	Campbell v. Poultney, 6 Gill & J. 94.....xxvi, 559
Callaway v. Alexander, 8 Leigh, 114.....xxxi, 640	Campbell v. Race, 7 Cushing, 408.....lv, 726
Callen v. Ellison, 13 Ohio St. 446.....lxviii, 448	Campbell v. Seaman, 63 New York, 563.....29, 567
Callen v. Thompson, 3 Yerger, 475.....xxiv, 587	Campbell v. Smith, 3 Halsted, 140.....xiv, 400
Calloway v. Laydon, 47 Iowa, 456.....29, 489	Campbell v. Smith, 71 New York, 26.....27, 8
Calloway v. Middleton, 2 A. K. Marshall, 372.....xii, 406	Campbell v. Spence, 4 Alabama, 543.....xxix, 301
Calloway v. Varner, 77 Alabama, 541.....54, 73	Campbell v. Stokes, 2 Wendell, 137.....xix, 551
Calvert v. Aldrich, 59 Massachusetts, 74.....xvii, 693	Campbell v. State, 18 Indiana, 375.....lxviii, 363
Calvert v. Hamilton M. F. I. Co., 1 Allen, 308.....lxix, 744	Campbell v. State, 9 Yerger, 353.....xxx, 417
Calvo v. Charlotte C. & A. R. R. Co., 23 S. C. 526.55, 23	Campbell ada. State, 29 Texas, 44.....xciv, 281
Calvo v. Davies, 73 New York, 211.....29, 130	Campbell v. Stillwater, 33 Minnesota, 306.....59, 567
Calwell v. Boome, 51 Iowa, 637.....33, 154	Campbell v. Thomas, 42 Wisconsin, 437.....34, 427
Camberling v. McCall, 3 Yeates, 281 (S. C. 2 Dal- las, 280).....1, 341	Campbell v. Upshaw, 7 Humphreys, 125.....xvi, 76
Cambridge Sav. Bank v. Hyde, 131 Mass. 77.....41, 193	Campbell v. Wallace, 12 New Hampshire, 302.....xxvii, 219
Camden and A. R. Co. v. Hooley, 99 Penn. St. 492.....44, 120	Campbell v. Whittingham, 5 J. J. Marshall, 96.....xx, 241
Camden v. Belgrade, 75 Maine, 126.....46, 264	Campbell v. Whitson, 68 Illinois, 240.....16, 553
Camden C. O. Co. v. Sohlens, 59 Maryland, 21.....43, 837	Campbell v. Wilson, 23 Texas, 223.....lxvii, 67
Camden v. McKoy, 3 Beaumont, 437.....xxviii, 91	Canaday ada. People, 73 North Carolina, 126.....21, 465
Camden etc. R. R. Co. v. Baldauf, 16 Penn. St. 67.....lv, 481	Canal Bridge v. Gordon, 1 Pickering, 206.....xi, 176
Camden etc. R. R. Co. v. Burke, 13 Wend. 611.....xxviii, 488	Candee v. Deere, 54 Illinois, 439.....5, 125
Cameron v. Cameron, 10 Smedes & M. 294.....xlvi, 759	Candee v. Lord, 2 New York (2 Conn.), 299.....11, 294
Cameron v. Cameron, 15 Wisconsin, 1.....lxviii, 623	Candee v. Pennsylvania R. R. Co., 21 Wis. 522.....xciv, 566
Cameron v. McFarland, 2 Carolina L. Rep. 415.....vi, 866	Candee v. Western U. Tel. Co., 34 Wisconsin, 471.17, 429
Cameron v. Rich, 5 Richardson's L. 353.....lvii, 747	Candler v. Pettit, 1 Paige's Ch. 168.....lix, 399
Cameron v. Rich, 4 Strobhart's L. 168.....liii, 670	Canedy v. Haskins, 13 Metcalf, 369.....xvi, 739
Cameron v. Seaman, 69 New York, 396.....25, 212	Canedy v. Jones, 19 South Carolina, 297.....45, 777
Cameron v. State, 14 Alabama, 546.....xlvi, 111	Canebox v. Crenshaw, 24 Missouri, 129.....lxix, 427
Cameron v. The Justices, 1 Georgia, 36.....xlv, 636	

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures (49) to American Reports.

- Canfield v. Andrews, 54 Vermont, 1.....41, 628
 Canfield v. Baltimore, & O. R. Co., 93 N. Y. 639...43, 266
 Canfield v. Squire, 2 Root, 300.....1, 71
 Canon v. Grigby, 116 Illinois, 151.....56, 769
 Cannon v. Alsbury, 1 A. K. Marshall, 76.....x, 709
 Cannon v. Beggs, 1 McCord, 370.....x, 677
 Cannon v. Cooper, 39 Mississippi, 784.....lxxx, 101
 Cannon v. Folsom, 2 Iowa, 101.....xlili, 474
 Cannon v. Hatcher, 1 Hill, 260.....xxvi, 177
 Cannon v. Stockmon, 36 California, 535.....xv, 205
 Cantling v. Hannibal etc. R. R. Co., 84 Mo. 395...14, 478
 Canto, Ex parte, 21 Texas Ct. App. 61.....57, 606
 Cape Fear etc. Navigation Co. v. Wilson, 7
 Jones' Law, 481.....lxviii, 260
 Cape Girardeau v. Riley, 22 Missouri, 426.....14, 427
 Caphart v. Rankin, 3 West Virginia, 671.....c, 779
 Caphart v. Seaboard & Ro. R. Co., 61 N. C. 438...31, 805
 Capen v. Foster, 12 Pickering, 485.....xliii, 633
 Capen v. Pacific Mutual Ins. Co., 1 Dutcher, 67...lxiv, 412
 Caperton v. Martin, 4 West Virginia, 268.....c, 270
 Caperton v. Schmidt, 26 California, 479.....lxixv, 187
 Caphart v. Dodd, 3 Bush, 584.....xxvi, 268
 Caples v. Branham, 20 Missouri, 244.....lxiv, 183
 Caplinger v. Sullivan, 2 Humphreys, 543.....xxviii, 875
 Carbery v. Willis, 7 Allen, 364.....lxixiii, 688
 Card v. Alexander, 48 Conn. 492.....46, 187
 Card v. Ellsworth, 65 Maine, 547.....96, 722
 Card v. Forehand, 1 Missouri, 704.....xiv, 317
 Cardinal v. Smith, 109 Massachusetts, 188.....12, 682
 Cardot v. Barney, 63 New York, 281.....96, 833
 Cardozo ada. State, 8 South Carolina, 71.....28, 275
 Cardwell v. Strother, Littell's Sel. Cas. 429.....xii, 326
 Carew v. Rutherford, 106 Massachusetts, 1.....8, 287
 Carew ada. State, 13 Rich. 1, 496.....xci, 245
 Carey, In re, 49 Vermont, 236.....94, 133
 Carey, In re, 40 Vermont, 236.....94, 133
 Carey v. Berkshire R. R. Co., 1 Oushing, 475...xlvi, 616
 Carey v. Baughn, 36 Iowa, 540.....14, 834
 Carey v. Burruss, 20 West Virginia, 671.....43, 790
 Carey v. Gullow, 106 Massachusetts, 18.....7, 494
 Carhart v. Harshaw, 45 Wisconsin, 240.....36, 792
 Carl ada. State, 43 Arkansas, 353.....51, 565
 Carle v. Deleanderis, 13 Maine, 367.....xix, 508
 Carlson v. Bickford, 13 Gray, 581.....lxiv, 652
 Carlson v. Tyler, 16 Maine, 362.....xliii, 673
 Carl v. Stillwater S. Ry. etc. Co., 26 Minn. 373...41, 290
 Carlin v. Chappell, 101 Pennsylvania St. 248...47, 722
 Carlin v. Hudson, 12 Texa, 202.....lxii, 621
 Carlin v. Paul, 11 Missouri, 62.....xvii, 159
 Carlin v. Western A. Co., 57 Maryland, 518...46, 440
 Carlisle v. Brisbane, 113 Pennsylvania State, 544...57, 483
 Carlisle v. Chambers, 4 Bush, 268.....xvi, 204
 Carlisle v. Holton, 3 Louisiana An. 48.....xviii, 440
 Carlisle v. Pullman P. O. Co., 8 Colorado, 290...54, 553
 Carlisle v. Wallace, 12 Indiana, 222.....lxixv, 207
 Carlisle Bank v. Hopkins, 1 T. B. Monroe, 245...xv, 113
 Carlton v. Cameron, 54 Texas, 72.....38, 620
 Carlton v. Carlton, 72 Maine, 118.....39, 207
 Carlton v. King, 1 Stewart & Porter, 472.....xlili, 295
 Carlton ada. People, 67 California, 83.....46, 112
 Carman v. Johnson, 20 Missouri, 108.....lx, 593
 Carman ada. State, 63 Iowa, 130.....56, 741
 Carmichael v. Buck, 10 Richardson's L. 333...lx, 226
 Carmichael ada. People, 5 Michigan, 10.....lxii, 769
 Carmichael v. Hunter, 4 Howard (Mia.), 308...xxv, 401
 Carmichael v. N.Y. of Pa., 4 Howard (Mia.), 567...xxv, 408
 Carmichael v. Latimer, 11 Rhode Island, 386...33, 481
 Carmouche v. Boule, 6 Louisiana An. 95.....lv, 558
 Carnary v. Woodcock, 2 Munford, 234.....v, 470
 Carnahan v. Western U. Tel. Co., 89 Ind. 828...46, 178
 Carnall v. Wilson, 21 Arkansas, 62.....lxvii, 351
 Carnal v. May, 2 A. K. Marshall, 587.....xli, 453
 Carnay v. Carney, 10 Yerger, 491.....xxxi, 590
 Carnochan v. Gould, 1 Bailey's Law, 179.....xix, 658
 Carolina Nat. Bank v. Wallace, 13 S. C. 247...36, 694
 Carondelet O. and Nav. Co. v. Parker, 29 Lou-
 isiana An. 420.....29, 539
 Carotti v. State, 42 Mississippi, 334.....xxvii, 468
 Carpenter v. Boston & A. R. R. Co., 97 N. Y. 494...49, 640
 Carpenter v. Branch, 13 Vermont, 161.....xxvii, 587
 Carpenter v. Carpenter, 30 Kansas, 712.....46, 108
 Carpenter v. Carpenter, 12 Rhode Island, 844...34, 716
 Carpenter v. Centennial M. Life Association, 68
 Iowa, 463.....56, 585
 Carpenter v. Cohoes, 81 New York, 21.....37, 468
 Carpenter v. Dresser, 72 Maine, 377.....39, 537
 Carpenter v. Farnsworth, 108 Mass. 563.....8, 390
 Carpenter v. Gookin, 2 Vermont, 495.....xli, 568
 Carpenter v. Grand Trunk R'y Co., 72 Me. 288...39, 340
 Carpenter v. Griffin, 9 Paige Ch., 310.....xxvii, 596
 Carpenter v. Harrington, 25 Wendell, 370.....xxvii, 529
 Carpenter v. Hollister, 13 Vermont, 562.....xxvii, 612
 Carpenter v. King, 9 Metcalf, 511.....xliii, 408
 Carpenter v. McBride, 3 Florida, 232.....li, 379
 Carpenter v. McClure, 39 Vermont, 9.....xci, 270
 Carpenter v. McLaughlin, 12 Rhode Island, 270...34, 638
 Carpenter v. Miller, 3 West Virginia, 174.....c, 744
 Carpenter v. Pier, 30 Vermont, 61.....lxliii, 288
 Carpenter v. Soule, 88 New York, 251.....42, 248
 Carpenter v. State, 4 Howard, 163.....xxiv, 118
 Carpenter ada. State, 68 Wisconsin, 165.....60, 848
 Carpenter v. Thompson, 3 New Hampshire, 304...xiv, 348
 Carpentier v. Mendenhall, 28 California, 484...lxixvii, 128
 Carr v. Caldwell, 10 California, 280.....lxix, 740
 Carr v. Clough, 26 New Hampshire, 260.....lxix, 348
 Carr ada. Commonwealth, 114 Massachusetts, 260...19, 348
 Carr v. Estill, 16 D. Monroe, 309.....xlili, 548
 Carr v. Givens, 9 Bush, 679.....15, 747
 Carr v. Nat. Sec. Bank, 107 Mass. 45.....9, 6
 Carr v. Northern L., 35 Penn. State, 324.....lxixvii, 348
 Carr ada. People, 100 New York, 236.....53, 161
 Carr v. State, 19 Texas Ct. App. 635.....53, 308
 Carr v. State, 34 Arkansas, 443.....36, 18
 Carr ada. State, 21 New Hampshire, 168.....liii, 179
 Carr v. Steamboat Michigan, 27 Missouri, 196...xxvii, 267
 Carr v. Williams, 10 Ohio, 305.....xxvii, 67
 Carr v. Youse, 29 Missouri, 346.....xc, 470
 Carradine v. Carradine, 68 Mississippi, 288...38, 234
 Carrere v. Union Ins. Co., 3 Harris & J. 394...v, 437
 Carrier v. Sears, 4 Allen, 236.....lxixi, 707
 Carrier v. Cameron, 31 Michigan, 573.....18, 193
 Carrere v. Labiche, 14 Louisiana An. 211.....lxixv, 428
 Carrigan v. Looming Fire Ins. Co., 83 Vt. 418...38, 687
 Carrigan v. Whittington, 26 Missouri, 811.....xlili, 212
 Carrington v. St. Louis, 89 Missouri, 208.....58, 108
 Carroll v. Ballance, 26 Illinois, 9.....lxix, 354
 Carroll v. Bosley, 6 Yerger, 220.....xxvii, 460
 Carroll v. Carroll, 60 New York, 121.....19, 144
 Carroll Co. v. Ruggles, 39 Iowa, 269.....58, 223
 Carroll v. East St. Louis, 67 Illinois, 648...16, 633
 Carroll v. Lee, 3 Gill & Johnson, 504.....xlii, 356
 Carroll v. Minn. Valley R. R. Co., 13 Minn. 26...xvii, 221
 Carroll v. Missouri R'y Co., 68 Missouri, 236...57, 323
 Carroll v. State, 23 Alabama, 28.....lviii, 288
 Carroll v. State, 28 Arkansas, 99.....18, 636
 Carroll ada. State, 38 Connecticut, 449.....9, 408
 Carroll v. Staten Island R. R. Co., 58 N. Y. 126...17, 221
 Carroll v. Waters, 9 Martin, 500.....xlii, 316
 Carroll v. Weld, 13 Illinois, 682.....lv, 481
 Carrollton Bank v. Taylor, 16 Louisiana, 489...xxv, 219

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Carron v. Martin, 3 Dutcher, 584.....lxix, 584	Carruthers v. Harbert, 5 Cold. 323.....novii, 421
Carron ada. State, 18 Iowa, 373.....lxixvii, 401	Carruthers v. Hartford, 3 Yerger, 366.....xxiv, 580
Carruthers v. Russell, 53 Iowa, 346.....36, 222	Carver v. Smith, 90 Indiana, 221.....46, 210
Carroway v. Chaney, 3 Jones' Law, 170.....lxiv, 577	Carver v. State, 69 Indiana, 61.....35, 305
Carrugi v. Atlantic Fire Ins. Co., 40 Ga. 126.....2, 567	Carver ada. State, 40 Maine, 588.....lxixvii, 273
Carruth v. Gramie, 11 Gray, 211.....lxix, 707	Carville v. Crane, 5 Hill (N. Y.), 463.....xl, 364
Carruth v. Walker, 8 Wisconsin, 289.....lxixvi, 235	Cary v. Bancroft, 14 Pickering, 316.....xv, 368
Carskadden v. Poorman, 10 Watts, 83.....lxixvi, 145	Cary v. Courtenay, 103 Massachusetts, 318.....4, 539
Carsley v. White, 21 Pickering, 254.....lxixvi, 269	Cary v. Daniels, 8 Metcalf, 466.....xli, 533
Carson v. Allen, 2 Pinney, 457 (3 Chandler, 133).....lv, 148	Cary v. Gruman, 4 Hill (N. Y.), 635.....xli, 290
Carson v. Baillie, 19 Penn. State, 375.....lvii, 650	Cary v. Hotelling, 1 Hill (N. Y.), 211.....lxixvii, 323
Carson v. Baker, 4 Dev. L. 220.....lxv, 708	Cary v. Pakin, 26 Illinois, 154.....36, 643
Carson v. Blakely, 3 Missouri, 273.....lxixv, 440	Case of Supervisors of Election, 114 Mass. 267.....13, 341
Carson v. Blane, 3 Binney, 475.....lv, 463	Case v. Allen, 21 Kansas, 217.....30, 426
Carson v. Burnett, 1 Dev. & Bat. L. 546.....xxx, 143	Case v. Board of Co. Comm'rs, 4 Kan. 511.....novi, 190
Carson v. Clark, 1 Bonammon, 113.....lxv, 79	Case v. Oushman, 3 Watts & Serg. 544.....lxixix, 47
Carson v. Doe ex d. Huntington, 6 Sma. & M. 111. xiv, 273	Case v. Dennison, 9 Rhode Island, 88.....11, 229
Carson v. Godley, 26 Penn. State, 121.....lxvii, 404	Case v. Green, 5 Watts, 283.....lxix, 311
Carson v. Hunter, 46 Missouri, 465.....2, 530	Case v. Henderson, 23 La. An. 49.....8, 560
Carson v. Jersey C. F. Ins. Co., 14 Vroom, 300.....39, 584	Case v. Hall, 24 Wendell, 103.....lxixv, 685
Carson v. McFarland, 3 Rawle, 118.....lxix, 627	Case v. Hart, 11 Ohio, 364.....lxixviii, 735
Carson v. Noble, 1 Carolina L. Repos. 523.....vi, 584	Case v. Jewett, 13 Wisconsin, 408.....lxix, 728
Carson v. Ray, 7 Jones L. 609.....lxixviii, 267	Case v. Riber, 10 Vermont, 483.....lxixviii, 211
Carson v. Smith, 5 Minnesota, 78.....lxixvii, 539	Case ada. State, 83 North Carolina, 548.....53, 471
Carson v. Wilson, 6 Halsted, 43.....lxix, 368	Case v. Winship, 4 Blackford, 435.....lxix, 684
Carson's Adm'r v. Suggett's Adm'r, 24 Mo. 364. lxixvi, 113	Case v. Woolley, 6 Dana, 17.....lxixviii, 54
Carter v. Allen, 69 Maine, 236.....8, 430	Casbeer v. Mowry, 26 Penn. St. 419.....lxix, 706
Carter v. Bailey, 64 Maine, 486.....18, 273	Cassy v. Allen, 1 A. K. Marshall, 468.....x, 720
Carter v. Berlin Mills, 58 New Hampshire, 58.....42, 573	Cassy ada. Commonwealth, 11 Oushing, 426.....lxix, 150
Carter v. Bradley, 19 Maine, 63.....lxixvi, 735	Cassy v. Gregory, 13 B. Monroe, 505.....lxix, 581
Carter v. Carriger's Adm'r, 3 Yerger, 411.....lxixv, 585	Cassy v. Inloe, 1 Gill, 430.....lxixix, 688
Carter v. Carter, 2 Day, 448.....xi, 113	Cash v. Whitworth, 13 Louisiana An. 401.....lxix, 515
Carter v. Carter, 4 Day, 30.....lv, 177	Cashman v. Henry, 75 New York, 103.....31, 467
Carter v. Carter, 30 Florida, 555.....51, 613	Cass v. Bellows, 31 New Hampshire 501.....lxixv, 347
Carter v. Champion, 5 Connecticut, 549.....xli, 686	Cass v. Thompson, 1 New Hampshire, 65.....viii, 26
Carter v. Chesapeake and O. R. R. Co., 26 West Virginia, 644.....53, 116	Cass Co. Bank v. Morrison, 17 Nebraska, 341.....52, 417
Carter v. Columbia and G. R. R. Co., 19 South Carolina, 30.....45, 754	Cassell v. Backrack, 42 Mississippi, 56.....lxixvii, 436
Carter v. Dale, 3 Lea, 710.....31, 680	Cassell v. Backrack, 42 Mississippi, 56.....2, 536
Carter v. Darby, 15 Alabama, 606.....1, 156	Cassell v. Cooke, 8 Serg. & R. 328.....xi, 610
Carter v. Glas, 44 Michigan, 154.....38, 240	Cassell v. Farin, 11 Missouri, 307.....lxixv, 181
Carter v. Hobbs, 12 Michigan, 62.....lxixviii, 768	Cassell v. Ross, 23 Illinois, 244.....lxixv, 270
Carter v. Howe M. Co., 61 Maryland, 200.....34, 311	Casselman v. Packard, 16 Wisconsin, 114.....lxixviii, 720
Carter v. Jones, 5 Ireland's Eq. 198.....lxix, 435	Cassiday v. McKenzie, 4 Watts & Serg. 528.....lxixix, 76
Carter v. Louisville N. A. & C. R. R. Co., 28 Indiana, 553.....49, 780	Cassiday v. Young, 4 B. Monroe, 265.....lxixix, 585
Carter v. Manuf. Wat. Bank, 71 Maine, 449.....36, 338	Cassidy v. Angell, 12 Rhode Island, 447.....34, 600
Carter v. Neal, 24 Georgia, 346.....lxixi, 136	Cassidy ada. State, 22 Minnesota, 812.....31, 765
Carter v. Peck, 4 Sneed, 203.....lxixv, 604	Castel v. Castel, 8 Blackford, 240.....lxixv, 763
Carter v. Smith, 23 Alabama, 334.....60, 738	Castel v. Walker, 40 Arkansas, 117.....46, 5
Carter v. Spencer, 4 Howard, 42.....lxixiv, 106	Castle v. Houston, 10 Kansas, 417.....37, 127
Carter v. State, 63 Alabama, 82.....35, 4	Castle v. Rieky, 44 Ohio St. 420.....56, 830
Carter v. State, 12 Texas, 500.....lxixi, 639	Castleberry v. Pierce, 5 Stew. & Porter, 158.....lxixv, 774
Carter v. Thurston, 58 New Hampshire, 104.....42, 584	Castles ada. Commonwealth, 9 Gray, 121.....lxix, 278
Carter v. Towne, 28 Massachusetts, 567.....lxixv, 683	Castner v. Walrod, 83 Illinois, 171.....35, 260
Carter v. Union Bank, 7 Humphreys, 548.....lxixv, 80	Caston v. Dunlap, Rich Eq. Cases, 77.....lxixv, 194
Carter v. Worrell, 96 North Carolina, 208.....60, 430	Caston v. Perry, 1 Bailey's Law, 523.....xli, 488
Carthage v. First Nat. Bk., 71 Missouri, 508.....36, 494	Castro v. Illies, 23 Texas, 479.....lxixviii, 277
Carthage T. Co. v. Andrews, 103 Indiana, 136.....52, 683	Caswell v. Boston etc. R. R. Co., 26 Mass. 194.....lxixv, 181
Carthage v. Brown, 3 Leigh, 96.....lxixviii, 255	Caswell v. Davis, 58 New York, 253.....17, 239
Cartmill v. Brown, 1 A. K. Marshall, 578.....x, 763	Cate v. Cate, 50 New Hampshire, 144.....9, 179
Carton v. Illinois C. R. Co., 59 Iowa, 148.....44, 673	Cater v. Eveleigh, 4 Desamours, 19.....vi, 586
Cartwright v. Bates, 1 Allen, 514.....lxixix, 789	Cates v. McKinney, 46 Indiana, 582.....lxixviii, 17, 708
Cartwright v. Carpenter, 7 Howard, 236.....xi, 68	Cates v. Wadlington, 1 McCord, 580.....x, 680
Cartwright v. Chabert, 3 Texas, 261.....lxixix, 742	Cathay v. Cathay, 9 Humphreys, 470.....lxix, 714
Cartwright v. Chicago & G. T. R. R. Co., 23 Michigan, 606.....50, 274	Catlett v. Trustees of M. R. Church, 63 Ind. 268.....36, 127
Cartwright v. State, 16 Texas Ct. App. 473.....49, 536	Catlin v. Gunter, 11 N. Y. (1 Kernan), 398.....lxix, 113
Carruth v. Thompson, 16 B. Monroe, 573.....lxixviii, 639	Catlin v. Haddox, 49 Connecticut, 402.....44, 260
	Catlin ada. State, 3 Vermont, 530.....lxixv, 239
	Catlin v. Tobias, 26 New York, 517.....lxixviii, 183
	Catlin v. Valentine, 9 Paige, 576.....lxixviii, 567
	Catlin v. Ware, 9 Massachusetts, 218.....vi, 84

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Catron v. Nichols, 51 Missouri, 80.....	51, 223	Chaboon v. Hollenback, 16 Serg. & R. 435	xvi, 587
Catterlin v. Frankfort, 79 Indiana, 547.....	41, 627	Chalfant v. Payton, 91 Indiana, 303	46, 596
Catterlin v. Mitchell, 27 Indiana, 296.....	lxvix, 501	Chalfin v. Malone, 9 B. Monroe, 490	1, 525
Caulley v. Pittsburg, O. & St. L. R'y Co., 85 Penn. St. 308.....	46, 684	Chalker v. Chalker, 1 Connecticut, 79.....	vi, 206
Caulkins v. Holliman, 47 New York, 449.....	7, 461	Chalker v. Dickinson, 1 Conn. 383.....	vi, 259
Caulkins v. Whisler, 39 Iowa, 495.....	4, 236	Challies v. McCrum, 22 Kansas, 137.....	51, 151
Causel v. Miles, 22 Texas, 479.....	lxviii, 277	Chalmers v. McMurdo, 5 Munford, 283.....	vii, 684
Causton v. Burke, 3 Harris & Gill, 395.....	xviii, 297	Chamberlain v. Bates, 3 Porter, 550	xxvii, 667
Cavanagh v. Boston, 139 Massachusetts, 436.....	52, 716	Chamberlain v. Bell, 7 California, 392.....	lxviii, 269
Cavanaugh v. Ainsbacher, 35 Georgia, 800.....	xci, 778	Chamberlain v. Bradley, 101 Massachusetts, 128.....	3, 331
Cavender v. Smith, 3 G. Greene, 349	lvi, 541	Chamberlain v. Clayton, 56 Iowa, 331.....	41, 101
Cavett's Appeal, 8 Watts & Serg. 21.....	xlii, 263	Chamberlain v. Dover, 13 Maine, 466.....	xxix, 517
Cavilland v. Yale, 3 California, 108.....	lviii, 389	Chamberlain v. Faria, 1 Missouri, 517.....	xiv, 304
Caviness v. Rushton, 101 Indiana, 600	51, 759	Chamberlain v. Godfrey, 36 Vermont, 380.....	lxxiv, 690
Cawein v. Brownski, 6 Bush, 457.....	xcix, 684	Chamberlain v. People, 23 New York, 85.....	lxxx, 358
Cayce v. Powell, 20 Texas, 787.....	lxviii, 211	Chamberlain v. Reed, 13 Maine, 367.....	xxix, 508
Cayzer v. Taylor, 10 Gray, 274.....	lxix, 217	Chamberlain v. Thompson, 10 Conn. 243	xxvi, 396
Cecil v. Beaver, 23 Iowa, 341.....	4, 174	Chamberlain v. Western T. Co., 44 New York, 305.....	4, 631
Cecil v. Cecil, 19 Maryland, 72.....	lxxxi, 636	Chamberlain v. Wilson, 12 Vermont, 491.....	lxxvi, 356
Cecil v. Hicks, 29 Gratt. 1.....	76, 391	Chamberlayne v. Temple, 2 Randolph, 384.....	xiv, 798
Cecil v. French, 4 Martin, N. S., 255.....	xvi, 171	Chamberlin v. Shaw, 18 Pickering, 278	xxix, 586
Cecil v. Spurger, 32 Missouri, 463.....	lxxvii, 140	Chambers v. Atlas Ins. Co., 51 Connecticut, 17.....	50, 1
Cecil v. Walsh, 2 Bush, 168.....	xcii, 481	Chambers v. Bedell, 2 Watts & Serg. 225	lxxvii, 508
Cecil Bank v. Barry, 30 Maryland, 257.....	lxxviii, 553	Chambers v. Calhoun, 18 Penn. State, 26	iv, 533
Cemetery Co. ada. People, 86 Illinois, 336.....	79, 23	Chambers v. Chalmers, 4 Gill & J. 420.....	xxdii, 572
Central Bank v. Willard, 17 Pickering, 150.....	lxviii, 284	Chambers v. Chambers, 3 Hawke, 223.....	xiv, 588
Central Bank of Frederick v. Copeland, 18 Mary- land, 305.....	lxxxi, 597	Chambers v. Church, 14 Rhode Island, 398.....	51, 109
Central Bank of Wla. v. Knowlton, 12 Wla. 694.....	lxviii, 769	Chambers v. Crook, 42 Alabama, 171.....	xciv, 637
Central Branch etc. R. Co. v. Fritz, 20 Kans. 430.....	27, 178	Chambers v. Davis, Phillips Eq. 152.....	xxdii, 608
Central Branch etc. R. Co. v. Hemigh, 23 Kansas, 347.....	33, 167	Chambers v. Hilliard, 2 Richardson's Law, 286	xiv, 733
Central Branch etc. R. Co. v. Shoup, 28 Kansas, 394.....	42, 163	Chambers v. Pleak, 6 Dana, 426.....	lxxxi, 78
Central Branch etc. R. Co. v. Twine, 23 Kans. 585.....	33, 205	Chambers v. Rubey, 47 Missouri, 99.....	4, 318
Central Iowa R'y Co. ada. State, 71 Iowa, 410.....	60, 806	Chambers ada. State, 22 West Virginia, 779.....	46, 850
Central Nat. Bank v. Adams, 11 S. Carolina, 423.....	37, 496	Chambers v. Watson, 60 Iowa, 339.....	46, 79
Central Nat. B'k v. Charlotte R. R. Co., 5 South Carolina, 158.....	72, 12	Chambers v. Winn, Sneed, 166.....	li, 713
Central Nat. B'k v. Hume, 3 Mackey, 360.....	51, 780	Chambers v. Wright, 40 Missouri, 482.....	xxdii, 311
Central Nat. B'k v. Pratt, 115 Mass. 539.....	15, 138	Chamblee v. Tarbox, 27 Texas, 139.....	lxxiv, 614
Central Ohio R. R. Co. v. Lawrence, 13 Ohio State, 66.....	lxxvii, 494	Chambliss ada. State, Cheves' Law, 220.....	lxxiv, 699
Central R. R. v. Combs, 70 Georgia, 533.....	48, 532	Champ v. Commonwealth, 2 Metcalfs (Ky.), 17.....	lxxiv, 388
Central R. R. v. Crosby, 74 Georgia, 737.....	56, 463	Champeau ada. State, 52 Vermont, 313.....	56, 754
Central R. R. v. Green, 86 Penn. St. 437.....	77, 718	Champion v. Bostwick, 18 Wendell, 175	xxxi, 376
Central R. R. & B. Co. v. Carr, 76 Alabama, 388.....	52, 339	Champion v. Brown, 6 Johnson's Ch. 396.....	x, 343
Central R. R. & B. Co. v. Lampley, 76 Ala. 397.....	52, 334	Champion v. Doughty, 3 Harrison (N. J.), 3.....	lxxv, 523
Central R. R. & B. Co. v. Letcher, 69 Ala. 106.....	44, 505	Champion v. Gordon, 70 Penn. St. 474.....	16, 631
Central R. R. & B. Co. v. Smith, 76 Alabama, 572.....	52, 363	Champlin v. Dotson, 13 Smedes & M. 553.....	liii, 109
Central Sav. Bank v. Shins, 46 Missouri, 456.....	8, 113	Champlin v. Laytin, 18 Wendell, 407.....	xxxi, 368
Cerr v. Home Ins. Co., 44 California, 330.....	13, 165	Chance v. Comm'rs, 5 Blackford, 441.....	lxxv, 131
Cesar v. Karuts, 60 New York, 229.....	19, 164	Chancey v. Smith, 25 West Virginia, 404.....	53, 217
Cesma v. Thurman, 1 Bush, 293.....	lxxix, 628	Chancellor v. Milly, 9 Dana, 23.....	lxxvii, 521
Chace v. Chace, 6 Rhode Island, 407	lxviii, 446	Chancellor ada. State, 1 Strobhart's Law, 347	xlvi, 557
Chace ada. Commonwealth, 9 Pickering, 15.....	xix, 348	Chancellor v. Wiggins, 4 B. Monroe, 301.....	lxxix, 499
Chace v. Hinman, 8 Wendell, 423.....	lxiv, 39	Chancellor v. Windham, 1 Rich. Law, 161.....	xlvi, 411
Chace v. Trafford, 116 Massachusetts, 529	17, 171	Chancelly v. Bailey and Cleveland, 37 Ga. 532.....	xcv, 359
Chadborn ada. State, 80 North Carolina, 479.....	30, 94	Chandler v. Barrett, 21 La. An. 58.....	xcix, 701
Chadborn v. Watts, 10 Massachusetts, 121.....	vi, 100	Chandler v. Belden, 18 Johnson, 157.....	ix, 198
Chadbourne v. Sumner, 16 New Hampshire, 129.....	xii, 730	Chandler v. Oca, 56 New Hampshire, 124.....	72, 437
Chaddock v. Briggs, 13 Massachusetts, 343.....	vii, 137	Chandler v. Douglass, 8 Blackford, 10.....	xliv, 732
Chadwick v. Jeffers, 1 Richardson's Law, 397.....	xliv, 260	Chandler v. Drew, 6 New Hampshire, 469	lxvi, 704
Chadwick v. Knox, 31 New Hampshire, 236.....	lxiv, 339	Chandler v. Duane, 16 Wendell, 563.....	xxv, 578
Chadwick v. Moore, 3 Watts & Serg. 49	xlvi, 267	Chandler v. Fulton, 10 Texas, 3.....	lx, 128
Chadwick v. Webber, 3 Greenleaf, 141.....	xiv, 222	Chandler v. Howland, 7 Gray, 348.....	lxvii, 487
Chaddock v. Vanness, 35 New Jersey, 517.....	10, 256	Chandler v. McKinney, 6 Michigan, 217.....	lxxiv, 686
Chaffee v. Bapt. Miss. of N. Y., 10 Paige, 85.....	xi, 225	Chandler v. Sanger, 114 Massachusetts, 364.....	19, 362
Chaffee v. Fourth Nat. Bank, 71 Maine, 514.....	36, 345	Chandler v. Simmons, 97 Massachusetts, 508.....	xxdii, 117
		Chandler v. Sprague, 5 Metcalf, 306.....	lxxviii, 404
		Chandler v. St. Paul F. & M. Ins. Co., 21 Min- nesota, 85.....	18, 385
		Chandler ada. State, 5 Louisiana An. 469.....	lii, 599
		Chandler ada. State, 24 Missouri, 371.....	lxix, 433
		Chandler v. Walker, 21 New Hampshire, 328.....	lii, 303

Roman letters [xlx] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Chaney v. Hoxie, 143 Massachusetts, 582.....58, 149
 Chapin ada. Commonwealth, 5 Pickering, 199.....xvi, 396
 Chapin v. Dake, 57 Illinois, 295.....xl, 15
 Chapin v. Dobson, 78 New York, 74.....34, 512
 Chapin v. Fellowes, 26 Connecticut, 129.....4, 49
 Chapin v. Freeland, 142 Massachusetts, 283.....56, 701
 Chapin v. James, 11 Rhode Island, 86.....23, 412
 Chapin v. Marlborough, 9 Gray, 244.....xlx, 281
 Chapin v. Pease, 10 Connecticut, 69.....xv, 56
 Chapin v. Perse, 30 Connecticut, 461.....lxix, 263
 Chapin v. Sullivan Railroad, 39 New Hamp. 564.lcxv, 237
 Chapin v. Sullivan Railroad, 39 New Hamp. 53.....lxv, 207
 Chapin ada. State, 17 Arkansas, 561.....lxv, 452
 Chaplin v. Barrett, 12 Richardson's Law, 284.....lxv, 721
 Chapline v. Atkinson, 45 Arkansas, 67.....55, 531
 Chapline v. Conant, 3 West Virginia, 507.....c, 788
 Chapline v. Overseers of Poor, 7 Leigh, 231.....xxx, 504
 Chapman v. Allen, Kirby, 399.....l, 24
 Chapman v. Chapman, 2 Connecticut, 347.....vii, 277
 Chapman v. Chicago & N. Ry. Co., 26 Wis. 298... 7, 81
 Chapman v. Cook, 10 Rhode Island, 204.....14, 696
 Chapman v. Cole, 12 Gray, 141.....lxvi, 739
 Chapman v. Commonwealth, 5 Wharton, 427.....xxxiv, 565
 Chapman v. Cowles, 41 Alabama, 103.....xci, 508
 Chapman v. Dougherty, 87 Missouri, 617.....54, 469
 Chapman v. Dyett, 11 Wendell, 21.....xv, 598
 Chapman v. Glaswell, 13 Alabama, 50.....xiviii, 41
 Chapman v. Harwood, 8 Blackford, 83.....xlv, 796
 Chapman v. Kimball, 9 Connecticut, 38.....xci, 707
 Chapman v. Lathrop, 6 Cowen, 110.....xvi, 433
 Chapman v. McIlwraith, 77 Missouri, 38.....44, 1
 Chapman v. Murch, 19 Johnson, 290.....x, 227
 Chapman v. New Haven Railroad Co., 19 New York, 341.....lxv, 344
 Chapman v. New York Cent. R. R. Co. 23 New York, 369.....lxviii, 392
 Chapman v. N. O. J. & G. N. R'y, 21 La. An. 294..xcix, 722
 Chapman v. Robertson, 6 Paige's Ch. 637.....xxxi, 264
 Chapman v. Rose, 56 New York, 137.....15, 401
 Chapman v. State, 78 Alabama, 463.....54, 42
 Chapman v. Thames Mfg. Co., 13 Conn. 369.....xxviii, 401
 Chapman v. Thornburgh, 17 California, 67.....lxvii, 571
 Chapman v. Turner, 1 Call, 290.....l, 514
 Chapman v. Twitchell, 37 Maine, 59.....lviii, 773
 Chapman v. White, 6 N. Y. (2 Selden), 412.....lvii, 464
 Chappel v. Chappel, 12 N. Y. (2 Kernan), 215.....lxiv, 496
 Chappel v. Marvin, 2 Atkins, 79.....xvi, 684
 Chapsky v. Wood, 26 Kansas, 650.....40, 321
 Chardon v. Oliphant, 3 Brevard, 183.....vi, 572
 Chariton v. Barber, 54 Iowa, 360.....37, 209
 Chariton ada. State, 11 West Virginia, 332.....27, 603
 Charles v. Charles, 8 Gratian, 496.....lvi, 155
 Charles v. Denis, 42 Wisconsin, 86.....24, 383
 Charles v. Haskins, 11 Iowa, 339.....lxvii, 148
 Charles v. Hoskins, 14 Iowa, 471.....lxviii, 376
 Charles v. Lamberson, 1 Iowa, 436.....lxviii, 467
 Charles v. Rankin, 22 Missouri, 566.....lxvi, 642
 Charleston Bank v. Outtiss, 16 Conn. 342.....xlv, 328
 Charleston v. Blotme, 15 South Carolina, 124.....40, 690
 Charleston v. Peoples Nat. Bank, 5 S. C. 103.....22, 1
 Charlestown ada. Commonw., 1 Pick. 180.....xi, 161
 Charleston v. Reed, 27 West Virginia, 681.....55, 336
 Charleston v. Ryan, 22 South Carolina, 339.....53, 713
 Charlotte, C. etc. R. R. Co. v. Gow, 59 Ga. 665.....27, 403
 Charlotte, Steamboat v. Hammond, 9 Mo. 58.....xlxii, 536
 Charlton's Appeal, 34 Penn. State, 473.....lxv, 673
 Charlton v. Miller, 27 Ohio State, 296.....22, 307
 Charlton v. Reed, 61 Iowa, 166.....47, 806
 Charnock v. District Township of Colfax, 51 Ia. 70.33, 116
 Charter Oak L. Ins. Co. v. Brant, 47 Mo. 419.....4, 326
 Charter v. Stevens, 3 Denio, 83.....xlv, 444
 Charter etc. Co. v. McNamee, 72 Penn. St. 273..13, 673
 Chase's Case, 1 Bland's Ch. 206.....xvii, 277
 Chase v. American S. Co., 9 Rhode Island, 419.....11, 274
 Chase v. Burnham, 13 Vermont, 447.....xxxvii, 608
 Chase v. Cheney, 58 Illinois, 509.....11, 96
 Chase v. City of Cleveland, 44 Ohio State, 504.....58, 843
 Chase v. Dwinall, 7 Greenleaf, 134.....xx, 333
 Chase v. Kittredge, 11 Allen, 49.....lxviii, 687
 Chase v. Lockerman, 11 Gill & J. 126.....xxxv, 277
 Chase v. Maine C. R. Co., 77 Maine, 88.....52, 744
 Chase v. Merrimack Bk, 19 Pickering, 564.....xxxi, 163
 Chase v. Plymouth, 20 Vermont, 469.....l, 62
 Chase v. Second Ave. R. R. Co., 37 N. Y. 294...49, 531
 Chase v. Silverstone, 62 Maine, 175.....16, 419
 Chase v. Washburn, 1 Ohio State, 344.....lx, 621
 Chase v. Wingate, 68 Maine, 204.....28, 26
 Chastee v. Phillips, 4 Jones' Law, 489.....lxix, 798
 Chatard v. O'Donovan, 20 Indiana, 20.....41, 723
 Chatburn ada. State, 63 Iowa, 699.....50, 790
 Chatnam v. Bradford, 50 Georgia, 227.....15, 685
 Chatham's ada. Commonw. 50 Penn. St. 121..lxviii, 539
 Chaudron v. Hunt, 3 Stewart, 31.....xx, 60
 Chautauque Bk v. White, 6 N. Y. (2 Selden) 226..lvii, 443
 Chautauque County Bank v. Raley, 19 N. Y. 369.lcxv, 347
 Cheatem v. Shearon, 1 Swan, 212.....lv, 724
 Cheadle v. State, 110 Indiana, 301.....59, 199
 Cheatham, Ex parte, 1 English, 531.....xlv, 525
 Cheatham v. Hatcher, 30 Grant, 54.....32, 690
 Cheek v. Bellows, 17 Texas, 613.....lxvii, 686
 Cheney v. Clark, 3 Vermont, 431.....xxvii, 219
 Cheney v. Lafayette, R. & M. R. Co., 63 Ill. 876..18, 594
 Cheesborough v. Green, 10 Connecticut, 212.....xxvi, 396
 Cheesbrough v. Millard, 1 Johnson's Ch. 469.....vii, 494
 Cheesman, In re, 49 New Jersey Law, 115.....60, 598
 Cheesum v. State, 8 Blackford, 332.....xlv, 773
 Chenango B. Co. v. Paige, 83 New York, 178.....23, 677
 Chenery v. Palmer, 6 California, 119.....lxv, 469
 Cheney v. Arnold, 15 New York, 345.....lxix, 609
 Cheney v. Boston etc. R. R. Co., 11 Metcalf, 121..xiv, 199
 Cheney ada. Commonwealth, 141 Mass. 121.....55, 448
 Cheney v. Dunlap, 20 Nebraska, 265.....57, 628
 Cheney v. White, 5 Nebraska, 261.....25, 467
 Cheney v. Watkins, 1 Harris & J. 537.....2, 899
 Chenoweth v. Chamberlain, 6 R. Monroe, 60.....xlxi, 146
 Cheraw & S. R. R. Co. v. Broadnax, 109 Pennsylv. St. 632.....58, 733
 Cheriot v. Barker, 2 Johnson, 346.....lii, 437
 Cherry v. Mann, Cooke, 262.....v, 226
 Cherry v. Smith, 3 Humphreys, 19.....xxxix, 159
 Chesapeake Bank v. First Nat. Bank, 40 Md. 202..17, 603
 Chesapeake and O. C. Co. v. Co. Comm'r's of Maryland, 201.....40, 429
 Chesapeake & P. Tel. Co. v. Balk & O. Tel. Co., 64 Maryland, 399.....59, 107
 Cheshire v. Barrett, 4 McCord, 241.....xvii, 736
 Chesley v. King, 74 Maine, 164.....43, 569
 Chesley v. Thompson, 3 New Hampshire, 9.....xiv, 324
 Cheneau v. Girod, 2 Martin, N. S., 612.....xiv, 204
 Cheenut v. Shans's Lessee, 16 Ohio, 899.....xlvii, 267
 Chees' Appeal, 4 Penn. State, 52.....lv, 608
 Chees' Appeal, 57 Pennsylvania State, 298.....30, 261
 Chees v. Chees, 1 Fenrose & Watts, 32.....xli, 360
 Chester v. Dickerson, 54 New York, 1.....13, 599
 Chester Glass Co. v. Dewey, 16 Mass. 94.....viii, 128
 Chesterfield Mfg. Co. v. Dehon, 5 Pickering, 7.....xvi, 267
 Chesterman v. Gardner, 5 Johns. Ch. 29.....ix, 265
 Chestnut H. T. Co. v. Rutter, 4 Serg. & R. 6.....viii, 673
 Cheswell v. Chapman, 36 New Hampshire, 14.....lxv, 154
 Chevallier v. Strahan, 2 Texas, 115.....xlvii, 629

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Chew v. Ellingwood, 88 Missouri, 350.....54, 429
 Chowning v. Johnson, 5 Louisiana An. 678.....lii, 610
 Chicago v. Birby, 84 Illinois, 83.....35, 429
 Chicago v. Caga, 96 Illinois, 593.....35, 183
 Chicago v. Hasting, 83 Illinois, 304.....35, 378
 Chicago v. Huenerbein, 86 Illinois, 594.....35, 636
 Chicago v. Hulbert, 118 Illinois, 633.....59, 400
 Chicago v. Keefe, 114 Illinois, 222.....55, 860
 Chicago v. Langless, 83 Illinois, 256.....4, 603
 Chicago v. Major, 18 Illinois, 349.....lxvii, 553
 Chicago v. Martin, 49 Illinois, 941.....xov, 590
 Chicago v. McGinn, 51 Illinois, 396.....2, 296
 Chicago v. O'Brien, 111 Illinois, 532.....53, 640
 Chicago ada. People, 51 Illinois, 17.....9, 278
 Chicago v. Powers, 43 Illinois, 169.....lxxxix, 418
 Chicago v. Rumpff, 45 Illinois, 90.....xcii, 196
 Chicago v. Starr, 43 Illinois, 174.....lxxxix, 422
 Chicago v. Union Building Ass'n, 103 Illinois, 379, 40, 508
 Chicago v. Wheeler, 26 Illinois, 478.....lxxxix, 342
 Chicago & A. R. Co. v. Erikson, 91 Illinois, 613...33, 70
 Chicago & A. R. Co. v. Goodwin, 111 Ill. 373...53, 622
 Chicago & A. R. Co. v. Joliet etc. R. Co., 105 Illinois, 388.....44, 799
 Chicago & A. R. Co. v. Kellam, 93 Illinois, 245...34, 128
 Chicago & A. R. Co. v. Murphy, 53 Ill. 338...8, 48
 Chicago & Alton R. R. Co. ada. People, 58 Ill. 95...8, 631
 Chicago & A. R. Co. v. People, 67 Illinois, 11...16, 599
 Chicago & A. R. Co. v. Pondrom, 51 Ill. 333...9, 306
 Chicago & A. R. Co. v. Randolph, 53 Ill. 510...5, 60
 Chicago & E. R. Co. v. Fierman, 103 Ill. 546...42, 33
 Chicago & E. R. Co. v. Loeb, 118 Illinois, 203...59, 341
 Chicago & E. I. R. Co. v. Boggs, 101 Ind. 522...51, 761
 Chicago & I. R. Co. v. Russell, 81 Illinois, 286...33, 54
 Chicago and Mississippi Railroad Co. v. Patchin, 16 Illinois, 196.....lxi, 66
 Chicago & N. W. R'y v. Ft. Howard, 21 Wis. 44.....xci, 458
 Chicago & N. W. R'y Co. v. Jackson, 55 Ill. 492...8, 641
 Chicago & N. W. R'y Co. v. Moranda, 93 Ill. 302...34, 168
 Chicago & N. W. R. Co. v. Oconto, 50 Wis. 189...36, 840
 Chicago & N. W. R'y Co. v. People, 56 Ill. 365...8, 690
 Chicago & N. W. R'y Co. v. Sawyer, 69 Ill. 285...18, 613
 Chicago & N. W. R'y Co. v. Simonsen, 54 Ill. 504...5, 155
 Chicago & N. W. R'y v. Smith, 46 Mich. 504...41, 177
 Chicago & N. W. R. Co. v. Swett, 45 Ill. 197...xcii, 206
 Chicago & N. W. R'y Co. v. Taylor, 69 Ill. 441...18, 636
 Chicago & N. W. R'y Co. v. Williams, 55 Ill. 186...8, 641
 Chicago and North-western Railway Company v. Goss, 17 Wisconsin, 428.....lxxxiv, 765
 Chicago & R. I. R. Co. v. Boyce, 73 Illinois, 510...24, 268
 Chicago & R. I. R. Co. v. Fahay, 83 Illinois, 81...4, 587
 Chicago & R. I. R. Co. v. Still, 19 Ill. 499.....lxix, 236
 Chicago & R. I. R. Co. v. Warren, 16 Ill. 502...lxiii, 317
 Chicago & W. I. R. Co. v. Englewood C. R'y Co., 115 Illinois, 375.....56, 173
 Chicago & W. M. R'y Co. v. Linard, 94 Ind. 319...48, 155
 Chicago, B. & Q. R. Co. v. Coleman, 18 Ill. 297...lxviii, 544
 Chicago, B. & Q. R. Co. v. Dewey, 26 Ill. 255...lxix, 374
 Chicago, B. & Q. R. Co. v. Dickson, 63 Ill. 151...14, 114
 Chicago, B. & Q. R. Co. v. George, 19 Ill. 510...lxix, 239
 Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460...lxviii, 568
 Chicago, Burlington, and Quincy Railroad Co. v. Steamboat W. G. Woodside, 10 Iowa, 468.....lxvii, 126
 Chicago, B. etc. R. Co. v. Hale, 83 Ill. 260.....25, 403
 Chicago, B. etc. R. Co. v. Duan, 53 Ill. 280...4, 606
 Chicago C. R. Co. v. Chicago, 80 Illinois, 573.....32, 54
 Chicago C. R. Co. v. McMahon, 103 Illinois, 485...42, 29
 Chicago, D. etc. R. Co. v. Smith, 62 Ill. 263...14, 99
 Chicago etc. R. R. Co. v. Flagg, 43 Illinois, 364...xcii, 133
 Chicago etc. R'y Co. v. Harney, 28 Indiana, 28...xcii, 252
 Chicago M. & F. Ins. Co. v. Stanford, 28 Ill. 168...lxix, 270
 Chicago, M. & St. P. R. R. Co. v. Keokuk etc. Co., 106 Illinois, 317.....45, 557
 Chicago P. & P. Co. v. Chicago, 98 Illinois, 231...36, 545
 Chicago R. Co. v. Scurr, 59 Mississippi, 456.....42, 373
 Chicago, St. L. & N. O. R. Co. v. Moss, 60 Mississippi, 1003.....45, 498
 Chicago, St. P., M. etc. R. R. Co. v. Swanson, 16 Nebraska, 254.....49, 718
 Chicago, St. Paul, and Fond du Lac R. R. Co. v. McCarthy, 30 Illinois, 386.....lxix, 285
 Chichester v. Cande, 3 Cowen, 39.....xv, 239
 Chichester v. Vass, 1 Oall, 83.....i, 509
 Chichester v. Vass, 1 Munford, 98.....iv, 531
 Chick v. Pillsbury, 24 Maine, 458.....xli, 394
 Chick v. Trevela, 20 Maine, 462.....lxxxvii, 68
 Chidsey v. Powell, 91 Missouri, 623.....60, 297
 Child v. Boston & F. I. Wks, 137 Mass. 516.....50, 228
 Child v. City of Boston, 4 Allen, 41.....lxxxix, 680
 Childress v. Bennett, 10 Alabama, 751.....xiv, 603
 Childress v. McCullough & Richardson, 5 Port. 54...xxx, 549
 Childs v. Childs, 10 Ohio State, 339.....lxv, 512
 Childs v. Clark, 3 Barbour's Ch. 53.....xlix, 184
 Childs v. Hyde, 10 Iowa, 294.....lxxxvii, 113
 Childs v. McChesney, 30 Iowa, 431.....lxxxix, 546
 Childs v. Wyman, 44 Maine, 433.....lxix, 111
 Chiles v. Coleman, 2 A. K. Marshall, 296.....xli, 396
 Chiles v. Drake, 2 Metcalf (Ky.), 146.....lxxxix, 406
 Chillicothe Bank v. Mayor etc., 7 Ohio, Pt. 2, 31...xxx, 186
 Chillicothe Bank v. Swayne, 8 Ohio, 397.....lxxxix, 707
 Chilton v. Robbins, 4 Alabama, 223.....lxxxvii, 741
 Chilton v. Willford, 2 Wisconsin, 1.....lx, 309
 Chipman v. Bates, 15 Vermont, 51.....xi, 663
 Chipman v. Emerie, 5 California, 49.....lxiii, 89
 Chipman v. Palmer, 77 New York, 51.....33, 566
 Chipman v. Tucker, 38 Wisconsin, 43.....30, 67
 Chisholm v. Coleman, 43 Alabama, 204.....xov, 67
 Chisholm v. Gadsden, 1 Strobhart's Law, 280...lxvii, 554
 Chisholm v. National C. L. Ins. Co. 52 Mo. 213...14, 414
 Chism v. Woods, Hardin, 531.....lii, 740
 Chittenden v. Barney, 1 Vermont, 28.....xviii, 672
 Chosen v. State, 52 Indiana, 347.....xi, 179
 Choices v. Mosely, 1 Bailey's Law, 136.....xix, 661
 Chollar-Potosi M. Co. v. Kennedy, 3 Nev. 361...xcii, 408
 Chope v. Detroit & H. P.R. Co., 37 Michigan, 165...60, 613
 Chorpenning's Appeal, 32 Penn. State, 215.....lxix, 789
 Choteau v. Goddin, 39 Missouri, 229.....xx, 463
 Choteau v. Jones, 11 Illinois, 300.....i, 469
 Chouteau v. Russell, 4 Missouri, 553.....lxix, 121
 Chouteau v. Webster, 6 Metcalf, 1.....lxxxix, 705
 Chouteau Ins. Co. v. Holmes, 65 Missouri, 601...30, 807
 Chouteaux v. Leech, 18 Penn. State, 224.....lvii, 609
 Chowning v. Cox, 1 Randolph, 306.....x, 530
 Choyne v. Cohen, 39 California, 501.....2, 476
 Chrisman v. Bruce, 1 Duval, 63.....lxxxv, 603
 Chrisman v. Harman, 29 Gratt. 694.....96, 387
 Chrisp ada. State, 85 North Carolina, 288.....39, 713
 Christ v. Diffenbach, 1 Reg. & R. 464.....vii, 634
 Christenson v. American Ex. Co., 15 Minn. 270...2, 122
 Christenson v. Eno, 106 New York, 97.....60, 429
 Christian v. Crocker, 26 Arkansas, 327.....xix, 283
 Christian v. Greenwood, 23 Arkansas, 258.....lxxxix, 104
 Christian v. Miller, 3 Leigh, 78.....xviii, 261
 Christian v. Scott, 1 Stewart, 450.....xviii, 68
 Christian County Co. v. Rankin, 2 Duval, 802...lxxxvii, 506
 Christianberry v. Christianberry, 3 Blackford, 202...xv, 283
 Christie, Succession of, 30 Louisiana An. 282...xvii, 411
 Christy v. Barnhart, 14 Penn. State, 260.....liii, 538
 Christy v. Dyer, 14 Iowa, 438.....lxxxix, 499
 Christy v. Flemington, 10 Penn. State, 128.....xlix, 680
 Christy v. Sullivan, 50 California, 337.....19, 458

Roman letters [xliz] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Christy's Adm'r v. St. Louis, 20 Missouri, 143.....lxii, 598
 Chrysler v. Canaday, 80 New York, 373.....43, 166
 Chumot v. Larson, 43 Wisconsin, 536.....28, 567
 Church v. Bull, 3 Denio, 430.....xlili, 754
 Church ada. Comm'wealth, 1 Penn. State, 165.....xliv, 112
 Church v. Giffman, 15 Wendell, 636.....xxx, 83
 Church v. Griffith, 9 Penn. State, 117.....xliz, 548
 Church ada. State, 5 Oregon, 375.....20, 746
 Churchhill v. Bradley, 68 Vermont, 463.....54, 563
 Churchhill ada. Comm'wealth, 11 Metcalf, 538.....xiv, 239
 Churchhill v. Holt, 137 Massachusetts, 165.....34, 365
 Churchhill v. Holt, 131 Massachusetts, 67.....41, 191
 Churchhill v. Hulbert, 110 Massachusetts, 42.....14, 578
 Churchhill v. Moore, 23 Iowa, 229.....xvii, 423
 Churchhill v. Warren, 2 New Hampshire, 298.....ix, 73
 Churchhill v. Watson, 5 Day, 140.....v, 130
 Churochman v. Smith, 6 Wharton, 146.....xxxvi, 211
 Cioot ada. People, 16 Michigan, 283.....xxvii, 141
 Cincinnati v. Penny, 21 Ohio State, 469.....8, 73
 Cincinnati & Z. R. Co. v. Smith, 23 Ohio St. 237.....10, 729
 Cincinnati B. of Ed. v. Minor, 23 Ohio State, 211.13, 233
 Cincinnati, City of, v. Bryson, 15 Ohio, 635.....xiv, 593
 Cincinnati, City of, v. First Fr. Ch., 8 Ohio, 296. xxxii, 718
 Cincinnati G. Co. v. Timberlake, 10 Ohio St. 548. lxxviii, 286
 Cincinnati H. & D. etc. R. Co. v. Cole, 29 Ohio State, 126.....23, 729
 Cincinnati H. & D. etc. R. Co. v. Pontius, 19 O. State, 221.....2, 391
 Cincinnati H. & I. R. Co. v. Eaton, 94 Ind. 474.....48, 179
 Cincinnati I. & O. R'y Co. v. Gaines, 104 Indiana, 536.....54, 334
 Cincinnati Ins. Co. v. Duffield, 6 Ohio St. 300.....lviii, 339
 Cincinnati Mut. H. A. Co. v. Rosenthal, 66 Ill. 85. 8, 636
 Cima v. Beach, 15 Ohio, 300.....xiv, 576
 Cist v. Zeigler, 16 Serg. & R. 282.....xvi, 573
 Citizens' Bank v. Grafflin, 31 Maryland, 807.....1, 66
 Citizens' Bank v. Payne, 18 Louisiana, 222.....lxxix, 650
 Citizens' Bank of Baltimore v. Howell, 8 Maryland, 530.....lxviii, 714
 Citizens' Coach Co. v. Camden H. R. Co., 33 New Jersey Eq. 267.....36, 542
 Citizens' Fire Ins. Co. v. Doll, 36 Maryland, 89... 6, 360
 Citizens' Loan Ass'n v. Nugent, 11 Vroom, 215.....29, 230
 Citizens' Nat. B'k v. Culver, 54 N. H. 237.....26, 134
 Citizens' Nat. Bank v. Elliott, 55 Iowa, 104.....59, 167
 City Bank v. Perkins, 29 New York, 554.....lxxvi, 333
 City Bank v. Weiss, 61 Texas, 231.....60, 29
 City Bank of Columbus v. Phillips, 22 Mo. 85.....lxiv, 254
 City Council v. Benjamin, 3 Strobb. Law, 508.....xliz, 608
 City Council v. Rogers, 2 McCord, 465.....xiii, 751
 City Council v. Ryan, 23 South Carolina, 339.....53, 713
 City Council v. Townsend, 20 Alabama, 469.....60, 112
 City Council v. Wright, 73 Alabama, 411.....47, 423
 City Council of Montgomery v. Gilmer, 33 Alabama, 116.....lxx, 563
 City Fire Ins. Co. v. Corlies, 21 Wendell, 397.....xxxiv, 258
 City of —. See name of city.
 City Nat. Bank v. Burns, 66 Alabama, 267.....44, 136
 City Nat. Bank v. Phelps, 97 New York, 44.....49, 513
 City of —. See name of city.
 City of Alton v. Ill. Tr. Co., 12 Illinois, 36.....lii, 479
 City of Aurora v. West, 23 Indiana, 88.....lxxv, 413
 City of Chicago v. Martin, 49 Illinois, 241.....xov, 690
 City of Chicago v. Powers, 43 Illinois, 169.....lxxix, 418
 City of Chicago v. Starr, 43 Illinois, 174.....lxxix, 422
 City of Chicago v. Wheeler, 25 Illinois, 478.....lxxix, 343
 City of Cincinnati v. Bryson, 15 Ohio, 635.....xiv, 593
 City of Cincinnati v. First Fr. Ch., 8 Ohio, 296. xxxii, 718
 City of Cleveland v. State Bank, 16 Ohio State, 226.....lxxviii, 445
 City of Galena v. Corwith, 49 Illinois, 423.....xov, 557
 City of Joliet v. Verley, 35 Illinois, 58.....lxxv, 343
 City of Jeffersonville v. Louisville F. Co., 27 Indiana, 100.....lxxix, 495
 City of Jeffersonville v. Patterson, 26 Ind. 15. lxxix, 448
 City of Lexington v. McQuillan, 9 Dana, 513.....xxv, 159
 City of Lexington v. Milton, 12 B. Mon. 213.....lv, 522
 City of Louisville v. Commonw., 1 Duval, 296. lxxv, 624
 City of Louisville v. Hyatt, 2 B. Mon. 177.....xxxvi, 594
 City of Louisville v. Louisville R. M. Co., 3 Bush, 416.....xxvi, 243
 City of Lowell v. Parker, 10 Metcalf, 398.....xlili, 436
 City of Lowell v. Spaulding, 4 Cushing, 277.....1, 775
 City of Madison v. Ross, 3 Indiana, 236.....lv, 451
 City of Marshall v. Snediker, 25 Texas, 460.....lxxviii, 534
 City of Natchez v. Vandervelde, 21 Miss. 706.....lxvi, 581
 City of New Albany v. Meekin, 3 Indiana, 481.....lvi, 523
 City of New Orleans v. Halpin, 17 Louisiana An. 185.....lxxvii, 523
 City of Olney v. Harvey, 80 Illinois, 453.....xvii, 530
 City of Pekin v. Reynolds, 21 Illinois, 538.....lxxviii, 244
 City of Pekin v. Smelser, 21 Illinois, 464.....lxxiv, 106
 City of Pella v. Schoite, 24 Iowa, 283.....xov, 729
 City of Philadelphia v. Girard's Heirs, 48 Penn. State, 9.....lxxvii, 479
 City of Portland v. Richardson, 54 Me. 46.....lxxix, 720
 City of Richmond v. Long, 17 Gratt. 378.....xvii, 451
 City of Salem v. Eastern R. R. Co., 96 Mass. 431. xvi, 630
 City of Springfield v. Harris, 4 Allen, 494.....lxxii, 715
 City of St. Paul v. Colter, 12 Minn. 41.....28, 278
 City of St. Paul v. Laidler, 2 Minnesota, 180.....lxxii, 89
 City of St. Paul v. Selts, 3 Minnesota, 297.....lxxiv, 753
 City of Tallahassee v. Fortune, 3 Florida, 12.....lii, 358
 Claassen v. Shaw, 5 Watts, 466.....xxx, 326
 Clabaugh v. Byerly, 7 Gill, 354.....lxviii, 575
 Claffin v. Carpenter, 4 Metcalf, 580.....lxxviii, 361
 Claffin v. McDonough, 23 Missouri, 412.....lxxiv, 54
 Claffin v. Meyer, 75 New York, 390.....51, 467
 Claffin v. Rosenberg, 43 Missouri, 429.....xviii, 336
 Clague v. His Creditors, 2 Louisiana, 114.....xx, 309
 Clair v. Barr, 2 A. K. Marshall, 355.....xli, 391
 Clamagaran v. Bucks, 4 Martin, N. S., 467.....xvi, 185
 Clancy v. Byrne, 56 New York, 129.....15, 351
 Clap ada. Commonwealth, 4 Massachusetts, 163.....lii, 212
 Clap v. Day, 2 Greenleaf, 305.....xli, 99
 Clap v. Draper, 4 Massachusetts, 269.....lii, 215
 Clapp v. Burlington, 42 Vermont, 579.....1, 355
 Clapp v. County of Cedar, 5 Iowa, 15.....lxviii, 678
 Clapp v. Fullerton, 34 New York, 190.....28, 681
 Clapp v. Hale, 112 Massachusetts, 368.....17, 111
 Clapp v. Nelson, 12 Texas, 370.....lxii, 530
 Clapp v. Phelps, 19 Louisiana An. 461.....xvii, 545
 Clapp v. Rice, 15 Gray, 557.....lxxvii, 357
 Clapp v. Rice, 15 Gray, 403.....lxxiv, 639
 Clapp v. Stanton, 20 Louisiana An. 469.....xvii, 417
 Claremont v. Carlton, 2 New Hampshire, 369.....ix, 89
 Clark Ex parte, 1 Spencer, 645.....xiv, 394
 Clark's Case, 1 Blackford, 123.....xli, 213
 Clark v. Adams, 18 Vermont, 436.....lxvi, 161
 Clark v. Allen, 11 Rhode Island, 439.....23, 496
 Clark v. Atkins, 80 North Carolina, 669.....47, 529
 Clark v. Averill, 31 Vermont, 513.....lxxvi, 121
 Clark v. Baker, 14 California, 613.....lxxvii, 491
 Clark v. Baker, 11 Metcalf, 136.....xiv, 199
 Clark v. Barnes, 76 New York, 301.....33, 396
 Clark v. Bayer, 33 Ohio St. 299.....39, 589
 Clark v. Board of Comm'rs, 33 Kansas, 202.....59, 639
 Clark v. Boggs, 6 Alabama, 809.....xli, 66
 Clark v. Burns, 118 Massachusetts, 275.....19, 456
 Clark v. Carter, 12 Georgia, 200.....lxviii, 463

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Clark v. Olney, 36 Alabama, 652.....lxvii, 343	Clark v. Wells, 87 Illinois, 436.....29, 88
Clark v. City of Des Moines, 19 Iowa, 198.....lxviii, 423	Clark v. Wells, 45 Vermont, 4.....13, 187
Clark v. Clark, 10 New Hampshire, 380.....xxiv, 165	Clark v. Whitaker, 18 Connecticut, 543.....xlv, 337
Clark v. Clark, 8 Paige's Ch. 153.....xxv, 678	Clark v. Whitaker, 19 Connecticut, 519.....xviii, 160
Clark v. Crane, 5 Michigan, 151.....lxvi, 776	Clark v. Whitaker, 50 New Hampshire, 474.....9, 266
Clark v. Depew, 25 Penn. State, 809.....lxiv, 717	Clark v. Wilmington & W. R. R. Co., 91 N. C. 506.49, 647
Clark v. Downing, 55 Vermont, 259.....45, 612	Clark v. Wilson, 103 Massachusetts, 219.....4, 533
Clark v. Edgar, 84 Missouri, 106.....54, 84	Clark v. Wyatt, 15 Indiana, 271.....lxvii, 96
Clark v. Eckstein, 23 Penn. State, 507.....lxii, 307	Clarke v. Bank of Mississippi, 10 Arkansas, 516.....lii, 248
Clark v. Eighth Avenue R. R. Co., 38 N. Y. 136.xciii, 496	Clarke v. Burke, 65 Wisconsin, 359.....54, 631
Clark v. Farrow, 10 B. Monroe, 446.....lii, 552	Clarke v. Brookfield, 81 Missouri, 603.....51, 243
Clark v. Fisher, 1 Paige's Ch. 171.....xix, 402	Clarke v. Calloway, 1 Sneed (Ky.), 46.....li, 708
Clark v. Fitch, 2 Wendell, 459.....xx, 639	Clarke v. Cotton, 2 Devereux's Eq. 301.....xxiv, 279
Clark v. Flint, 22 Pickering, 231.....xxdii, 733	Clarke v. Curtis, 11 Leigh, 659.....xxvii, 636
Clark v. Foxcroft, 6 Greenleaf, 236.....xx, 309	Clarke v. Diggs, 6 Iredell's Law, 159.....xlv, 78
Clark v. French, 23 Maine, 221.....xxix, 618	Clarke v. Gordon, 3 Richardson's Law, 311.....xlv, 798
Clark v. Fry, 8 Ohio State, 358.....lxvii, 590	Clarke v. Inhabitants etc., 81 Missouri, 603.....51, 243
Clark v. Gifford, 7 Louisiana, 594.....lxvi, 511	Clarke v. Lancaster, 36 Maryland, 136.....11, 490
Clark v. Gilbert, 28 New York, 379.....lxxxvi, 189	Clarke v. May, 2 Gray, 410.....lxii, 470
Clark v. Goddard, 39 Alabama, 164.....lxxxiv, 777	Clarke v. Perry, 5 California, 58.....lxiii, 83
Clark v. Goss, 12 Texas, 395.....lxii, 631	Clarke v. Rochester & S. R. R. Co., 14 N. Y. 570..lxvii, 206
Clark v. Haney, 62 Texas, 611.....50, 836	Clarke v. State, 6 Gill & J. 263.....xxvi, 576
Clark v. Holden, 7 Gray, 8.....lxvi, 450	Clarke ada. State, 33 New Hampshire, 339.....lxvi, 723
Clark v. Hyman, 55 Iowa, 14.....39, 160	Clarke ada. State, 54 Missouri, 17.....14, 471
Clark v. Jones, 1 Denio, 516.....xlili, 708	Clarison v. White, 4 J. J. Marshall, 539.....xx, 239
Clark v. Knox, 70 Alabama, 607.....45, 93	Clauser v. Stone, 29 Illinois, 114.....lxxxii, 239
Clark v. Laidlaw, 4 Robinson (La.), 346.....xxix, 596	Clay v. Ballard, 9 Robinson (Louisiana), 308.....xi, 326
Clark v. Lamb, 8 Pickering, 415.....xix, 333	Clay v. Bynum, 1 Martin, N. S., 608.....xiv, 192
Clark v. Lawrence, 6 Jones' Eq. 83.....lxviii, 241	Clay v. Caperton, 1 T. B. Monroe, 10.....xv, 77
Clark v. Marigla, 1 Denio, 317.....xlili, 670	Clay v. Edgerton, 19 Ohio St. 549.....2, 423
Clark v. Mass. F. & M. Ins. Co., 3 Pickering, 104.xlii, 400	Clay v. Fry, 3 Bibb, 248.....vi, 654
Clark v. Mayor of N. Y., 4 N. Y. (4 Comst.), 338.....liii, 379	Clay v. Williams, 2 Munford, 106.....v, 456
Clark v. Morton, 5 Rawle, 236.....xxviii, 687	Clayborn v. Hill, 1 Washington, 177.....i, 463
Clark v. Mosely, 1 Richardson's Eq. 396.....xlv, 239	Clayburgh v. City, 35 Illinois, 535.....lxxx, 346
Clark v. Mumyan, 22 Pickering, 410.....xxdii, 752	Clayton v. Akin, 38 Georgia, 320.....xov, 369
Clark v. New Eng. M'n. F. In. Co., 6 Cushing, 342.lii, 44	Clayton v. Bussey, 30 Georgia, 346.....lxvii, 696
Clark v. Ostrander, 1 Cowen, 437.....xlii, 546	Clayton v. Johnson, 33 Arkansas, 406.....38, 60
Clark v. Pacific R. R., 39 Missouri, 184.....xv, 458	Clayton ada. State, 37 Kansas, 443.....41, 418
Clark v. Parkinson, 10 Allen, 133.....lxxxvii, 628	Clealand v. Walker, 11 Alabama, 1056.....xvii, 236
Clark v. Parr, 14 Ohio, 118.....xiv, 539	Cleaver v. Cleaver, 39 Wisconsin, 98.....20, 30
Clark v. Patton, 4 J. J. Marshall, 33.....xx, 203	Cleaves ada. State, 59 Maine, 296.....8, 432
Clark v. Peak, 41 Vermont, 146.....xoviii, 673	Cleore v. Cleore, 82 Alabama, 531.....60, 750
Clark v. Peckham, 10 Rhode Island, 26.....14, 654	Clegg v. Fields, 7 Jones' L. 37.....lxv, 469
Clark v. People, Bross, 340.....xii, 177	Cleghorn v. N. Y. & H. R. R. Co., 56 N. Y. 44.....15, 375
Clark v. Randall, 9 Wisconsin, 135.....lxvii, 262	Cleland v. Porter, 74 Illinois, 78.....94, 373
Clark v. Rowling, 3 N. Y. (3 Comst.), 216.....lii, 290	Clem v. Holmes, 23 Gratt, 723.....36, 798
Clark v. Richmond & D. R. R. Co., 78 Va. 709.....49, 394	Clem v. Newcastle & D. R. R. Co., 3 Ind. 628..lxviii, 663
Clark v. Russel, 3 Watts, 213.....xxvii, 248	Clem v. State, 42 Indiana, 420.....13, 360
Clark v. Sanderson, 3 Binney, 192.....v, 368	Clemence v. Steere, 1 Rhode Island, 373.....liii, 621
Clark v. Seiser, 7 Watts, 107.....xxdii, 745	Clemens v. Clemens, 28 Wisconsin, 637.....9, 630
Clark v. Sickler, 64 New York, 231.....21, 606	Clemens v. Hannibal etc. R. R. Co., 53 Mo. 366..14, 460
Clark v. Skinner, 30 Johnson, 468.....xi, 308	Clemens v. Runkel, 34 Missouri, 41.....lxxxiv, 69
Clark v. Smith, 10 Connecticut, 1.....xv, 47	Clement v. Hyde, 50 Vermont, 716.....23, 622
Clark v. South Bend, 85 Indiana, 376.....44, 13	Clements v. Henderson, 4 Georgia, 148.....xlviii, 216
Clark v. Spencer, 14 Kansas, 396.....19, 96	Clemmer v. Cooper, 24 Iowa, 185.....xov, 729
Clark v. State, 73 Alabama, 474.....56, 45	Cleodennen v. Paulsel, 3 Missouri, 230.....xxv, 435
Clark v. State, 12 Ohio, 483.....xli, 481	Cleodennen v. Lantua, 3 Indiana, 441.....lvi, 518
Clarke v. State, 2 McOrd, 47.....xlii, 701	Cleodinen v. Black, 2 Bailey, 438.....xxii, 169
Clark ada. State, 28 New Hampshire, 176.....lxii, 611	Clerk's Office v. President etc. Cape Fear Bank, 66 North Carolina, 214.....8, 506
Clark v. Stoughton, 18 Vermont, 50.....xlv, 361	Cleveland v. Creviston, 83 Indiana, 31.....47, 267
Clark v. Thayer, 105 Massachusetts, 216.....7, 611	Cleveland v. Havens, 2 Beasley, 101.....lxxxvii, 90
Clark v. Thompson, 47 Illinois, 26.....xov, 457	Cleveland v. State Bank, 16 Ohio State, 226..lxxxviii, 445
Clark v. Turnbull, 47 New Jersey L. 268.....54, 157	Cleveland v. Williams, 29 Texas, 304.....xov, 374
Clark v. Union Ferry Co., 35 New York, 468.....xci, 66	Cleveland v. Woodward, 15 Vermont, 302.....xi, 683
Clark v. Union F. Ins. Co., 40 New Hamp. 353.lxxxvii, 721	Cleveland, C. & O. R. R. Co. v. Crawford, 24 Ohio St. 631.....15, 633
Clark v. United Ins. Co., 7 Massachusetts, 365.....v, 50	Cleveland, C. C. & I. R. R. Co. v. Newell, 104 Indiana, 264.....54, 212
Clark v. Van Court, 100 Indiana, 113.....50, 774	Cleveland, etc. R. R. Co. v. Speer, 56 Pa. St. 398.xciv, 84
Clark v. Vorce, 15 Wendell, 193.....xli, 53	
Clark v. Washington Ins. Co., 100 Mass. 808.....1, 135	
Clark v. Waterman, 7 Vermont, 76.....xxix, 159	

Roman letters [xliz] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Cleveland, P. etc. R. R. Co. v. Curran, 19 Ohio St. 1.....	2, 363
Cleveland Paper Co. v. Banks, 15 Nebraska, 20.....	48, 334
Claws v. New York Nat. B. Ass., 89 N. Y. 418.....	49, 303
Clifford v. Thomaaton M. I. Co., 50 Me. 197.....	lxix, 606
Clifford ada. State, 14 Nevada, 73.....	53, 836
Clifton v. Foster, 103 Massachusetts, 233.....	4, 539
Clifton v. Howard, 89 Missouri, 192.....	58, 97
Clifton v. Murray, 7 Georgia, 564.....	1, 411
Olmer v. Wallace, 28 Missouri, 566.....	lxxv, 135
Olme v. Guthrie, 42 Indiana, 227.....	13, 367
Olme v. Lsby, 46 Wisconsin, 133.....	33, 700
Clinton v. Crowell, 2 Calnes, 244.....	11, 235
Clinton v. Myers, 46 New York, 511.....	7, 373
Clinton v. Phillips, 68 Illinois, 102.....	11, 83
Clinton v. Root, 58 Michigan, 183.....	55, 671
Clinton ada. State, 67 Missouri, 380.....	29, 506
Clippenger v. Hepbaugh, 5 Watts & Serg. 315.....	xl, 519
Clodfelter v. Cox, 1 Sneed, 330.....	lx, 157
Clodfelter v. State, 86 North Carolina, 51.....	41, 440
Clonts v. Ritoh, 13 Florida, 633.....	xv, 345
Clopper v. Union B'k, 7 Harris & J. 28.....	xvi, 294
Closson v. Morrison, 47 New Hampshire, 469.....	xxiii, 469
Closson v. Staples, 42 Vermont, 309.....	1, 316
Closson v. Stearns, 4 Vermont, 11.....	xxiii, 245
Cloud v. Olinckbeard's Ex'rs, 8 B. Mon. 207.....	xviii, 307
Cloud v. El Dorado County, 12 California, 126.....	lxxvii, 536
Cloud v. Hamilton, 11 Humphreys, 104.....	liii, 778
Cloud v. Webb, 4 Dev. L. 230.....	xxv, 711
Clough v. Clough, 73 Maine, 437.....	40, 386
Clough ada. People, 17 Wendell, 361.....	xxxi, 303
Cloughessey v. Waterbury, 51 Connecticut, 408.....	50, 38
Clow v. Woods, 5 Serg. & R. 375.....	ix, 346
Clower v. Rawlings, 9 Smedes & M. 122.....	xviii, 108
Cingage v. Swan, 4 Binney, 150.....	v, 400
Cinley v. Lockhart, 59 Penn. St. 376.....	xviii, 350
Clute v. Carr, 30 Wisconsin, 531.....	xd, 448
Clute ada. People, 50 New York, 451.....	10, 508
Clute v. Wiggins, 14 Johnson, 175.....	vii, 448
Clymer v. Willis, 3 California, 363.....	lviii, 414
Coal Creek M. & M. Co. v. Moses, 15 Lea, 300.....	54, 415
Coecker v. Hunter, 4 Randolph, 58.....	xv, 736
Coeate v. Spear, 3 McOrd, 227.....	xv, 637
Coeates v. Penn. F. Ins. Co., 58 Maryland, 172.....	42, 327
Cobb v. Bennett, 75 Pennsylvania State, 326.....	15, 762
Cobb v. Charter, 32 Connecticut, 338.....	lxxxvii, 178
Cobb v. Cornegay, 6 Iredell's Law, 358.....	xiv, 407
Cobb v. Cowdery, 40 Vermont, 25.....	xciv, 370
Cobb v. Davenport, 33 New Jersey L. 223.....	xviii, 718
Cobb v. Duke, 36 Mississippi, 60.....	lxvii, 157
Cobb v. Hall, 29 Vermont, 510.....	lxx, 432
Cobb v. Haskell, 14 Maine, 303.....	xxxi, 56
Cobb v. Hines, Busbee's Law, 343.....	lii, 569
Cobb v. Knapp, 71 New York, 348.....	27, 51
Cobb v. Lavalle, 89 Illinois, 331.....	31, 91
Cobb v. Little, 2 Greenleaf, 261.....	xi, 73
Cobb v. Portland, 55 Maine, 361.....	xcii, 596
Cobb v. Stewart, 4 Met. (Ky.) 265.....	lxxxviii, 465
Cobb v. Wallace, 5 Cold. 539.....	xviii, 435
Cobb, Welsh & Co. v. Johnson, 2 Sneed, 73.....	lxii, 457
Cobham v. Adm'rs, 2 Haywood, 6.....	li, 612
Cobbey v. Burkh, 11 Nebraska, 157.....	38, 364
Coble v. Coble, 79 North Carolina, 509.....	28, 338
Coburn v. Ames, 52 California, 385.....	28, 634
Coburn v. Harwood, Minor, 83.....	xii, 37
Coburn v. Pickering, 3 New Hampshire, 415.....	xiv, 375
Coburn v. Webb, 55 Indiana, 96.....	26, 15
Coebecho Nat. Bank v. Haskell, 51 N. H. 116.....	12, 68
Cochran's Will, 1 T. B. Monroe, 264.....	xv, 116
Cochran v. Butterfield, 18 New Hampshire, 118.....	xiv, 363
Cochran v. Cunningham, 16 Alabama, 448.....	1, 186
Cochran v. Guild, 106 Massachusetts, 39.....	8, 290
Cochran v. O'Hern, 4 Watts & Serg. 95.....	xxxix, 60
Cochran v. Tucker, 3 Cold. 186.....	xd, 376
Cochran v. Van Surlay, 20 Wendell, 365.....	xxvii, 570
Cochran v. Walker, 82 Kentucky, 230.....	54, 591
Cochran v. Wheeler, 7 New Hampshire, 302.....	xxvi, 732
Cock v. Taylor, 2 Overton, 49.....	v, 650
Cocke v. Chapman, 2 English, 197.....	xliv, 536
Cocke v. Dickens, 4 Yerger, 29.....	xxvi, 214
Cocke v. Hoffman, 5 Lea, 105.....	46, 23
Cocke v. McGinnis, 1 Mart. & Yerg. 361.....	xvii, 800
Cockey v. Cole, 28 Maryland, 278.....	xxi, 694
Cockey v. Leister, 12 Maryland, 124.....	lxvii, 589
Cockfield v. Braveboy, 2 McMullan's Law, 270.....	xxxix, 123
Coddington v. Bay, 20 Johnson, 637.....	xi, 342
Coddington v. Mott, 1 McOarter, 430.....	lxxxvii, 252
Codman v. Evans, 5 Allen, 308.....	lxxxii, 748
Cody v. Quinn, 6 Iredell's Law, 191.....	xliv, 75
Coe v. Col. P. & I. R. R. 10 Ohio St. 372.....	lxv, 519
Coe v. Hobby, 72 New York, 141.....	28, 120
Coe v. Smith, 4 Indiana, 79.....	lviii, 612
Coffey v. Nat. B'k of Missouri, 46 Mo. 140.....	2, 459
Coffee v. Planters' B'k, 11 Smedes & M. 459.....	xlix, 68
Coffee v. Silvan, 15 Texas, 354.....	lxv, 169
Coffee v. State, 3 Yerger, 233.....	xxiv, 570
Coffin v. Bramlitt, 42 Mississippi, 194.....	xxvii, 449
Coffin v. Coffin, 4 Massachusetts, 1.....	lii, 189
Coffin v. Coffin, 23 New York, 9.....	lxxx, 235
Coffin v. Dunham, 8 Cushing, 404.....	liv, 700
Coffin v. Knott, 2 G. Green, 582.....	lii, 537
Coffin v. Rich, 45 Maine, 507.....	lxvii, 509
Coffin v. Storer, 5 Massachusetts, 252.....	lv, 54
Coffman v. Bank of Ky., 40 Mississippi, 29.....	xc, 311
Coffman v. Bank of Ky., 41 Mississippi, 212.....	xc, 371
Coffman v. Brown, 7 Smedes & M. 135.....	xiv, 290
Coffman v. Hampton, 2 Watts & Serg. 377.....	lxxxvii, 511
Coffman v. Lockout Bank, 5 Lea, 232.....	46, 31
Cogburn v. Spence, 15 Alabama, 549.....	1, 140
Cogdell v. Erum, 69 North Carolina, 464.....	19, 657
Cogdell ada. People, 1 Hill (N. Y.), 94.....	lxxxvii, 297
Coger v. McGee, 2 Bibb, 331.....	v, 619
Coghlin v. Ford, 1 Dana, 350.....	xxv, 146
Cogswell v. Dolliver, 2 Massachusetts, 217.....	lii, 45
Cogswell v. N. Y., N. H. & H. R. R. Co., 108 New York, 10.....	57, 701
Coggeshall v. Felton, 7 Johns. Ch. 292.....	xi, 471
Coggill v. Am. Ex. B'k, 1 N. Y. (1 Comst.), 113.....	xliz, 210
Coggin v. Central R. R. Co., 62 Georgia, 695.....	35, 132
Coggsell v. Baldwin, 15 Vermont, 404.....	xi, 686
Coggsell ada. State, 3 Blackford, 54.....	xxvii, 379
Cohas v. Hunt, 2 Smedes & M. 227.....	xlii, 589
Cohen v. Carroll, 5 Smedes & M. 545.....	xiv, 287
Cohen v. Continental F. I. Co., 67 Tex. 335.....	60, 24
Cohen v. Charleston F. & M. Ins. Co., Dudley's Law, 147.....	xxxi, 549
Cohen v. Dubois, 1 Harper's Equity, 102.....	xiv, 709
Cohen v. N. Y. M. L. Ins. Co., 50 New York, 610.....	10, 822
Cohen v. Pemberton, 53 Connecticut, 221.....	55, 101
Cohen v. St. Louis, F. S. & W. R. R. Co., 24 Kansas, 158.....	55, 205
Cohn v. Chapman, Phill. Eq. 92.....	xxvii, 600
Cohoon ada. State, 12 Iredell's Law, 178.....	lv, 407
Coit v. Com. Ins. Co., 7 Johnson, 295.....	v, 282
Coit v. Comstock, 51 Connecticut, 392.....	50, 29
Coit v. Fitch, Kirby, 264.....	1, 20
Coit v. Haven, 30 Conn. 190.....	lxxxix, 244
Coit v. Humbert, 5 California, 200.....	lxvii, 130
Coit v. Tracy, 8 Connecticut, 252.....	xx, 110
Coke v. Guthrie, 80 Kentucky, 596.....	44, 409

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Colker v. Birge, 9 Georgia, 425.....liv, 347
 Colburn v. Averill, 30 Maine, 310.....i, 630
 Colburn v. Mason, 25 Maine, 434.....xliii, 293
 Colburn v. Morrill, 117 Massachusetts, 262.....19, 415
 Colburn v. Richards, 13 Massachusetts, 420.....vii, 160
 Colby v. Reynolds, 6 Vermont, 469.....xxvii, 574
 Coldwater v. Tucker, 36 Michigan, 474.....34, 601
 Cole v. Berry, 13 Vroom, 306.....34, 511
 Cole v. Cassidy, 138 Massachusetts, 437.....52, 284
 Cole v. Cole, 5 Need, 57.....lxix, 275
 Cole ada. Commonwealth, 7 B. Monroe, 250.....xvi, 500
 Cole v. Covington, 85 North Carolina, 235.....41, 458
 Cole v. Oregon, 1 Hill Oh. 311.....xxvi, 208
 Cole v. Drew, 44 Vermont, 49.....8, 363
 Cole v. Goodall, 39 Vermont, 400.....xxiv, 334
 Cole v. Goodwin, 19 Wendell, 351.....xxiii, 470
 Cole v. Hughes, 54 New York, 444.....23, 611
 Cole v. Marple, 90 Illinois, 58.....38, 83
 Cole v. McKay, 68 Wisconsin, 500.....57, 293
 Cole v. Newburyport, 129 Massachusetts, 594.....37, 394
 Cole v. Parker, 7 Iowa, 167.....lxix, 439
 Cole v. Robertson, 5 Texas, 355.....iv, 734
 Cole v. Ross, 9 B. Monroe, 393.....1, 517
 Cole v. Seeley, 25 Vermont, 220.....ix, 258
 Cole v. Shurtliff, 41 Vermont, 311.....xxviii, 587
 Cole v. Smith, 29 Louisiana An. 551.....29, 343
 Cole v. Sprowl, 35 Maine, 161.....lvi, 636
 Cole ada. State, 19 Wisconsin, 129.....lxxxviii, 678
 Cole v. Superior Court, 63 California, 65.....49, 78
 Cole v. Swanston, 1 California, 51.....lii, 299
 Cole v. Tyng, 24 Illinois, 99.....lxvii, 735
 Cole v. Union Mutual Ins. Co., 12 Gray, 501.....lxiv, 609
 Cole's Widow v. His Ex'rs, 7 Martin, N. S., 41.....xviii, 241
 Colebrook v. Stewartstown, 30 New Hamp. 9.....lxiv, 275
 Colegrove v. New York & N. H. R. R. Co., 30
 New York 493.....lxrv, 418
 Coleman v. B'k of Hamburg, 3 Strobb. Eq. 365.....xlix, 671
 Coleman v. Burr, 33 New York, 17.....45, 160
 Coleman v. Carpenter, 9 Penn. State, 173.....xlix, 552
 Coleman v. Coleman, 3 Dana, 308.....xxviii, 86
 Coleman v. Coleman, 19 Penn. State, 109.....lvii, 641
 Coleman v. Coche, 6 Randolph, 618.....xviii, 757
 Coleman v. Chadwick, 80 Penn. St. 81.....31, 93
 Coleman v. Commonwealth, 25 Gratt. 863.....18, 711
 Coleman v. Darling, 66 Wisconsin, 155.....57, 283
 Coleman v. Forbes, 23 Penn. State, 156.....lx, 75
 Coleman v. Frasier, 4 Richardson's Law, 145.....lii, 727
 Coleman v. Henderson, Littell's Sel. Ca. 171.....xii, 596
 Coleman v. Holmes, 44 Alabama, 124.....4, 121
 Coleman v. Hutchinson, 3 Bibb, 203.....vi, 649
 Coleman v. McNulty, 16 Missouri, 173.....lvii, 229
 Coleman ada. People, 4 California, 45.....lx, 581
 Coleman v. Rowe, 5 Howard (Miss), 460.....lxxxvii, 184
 Coleman v. Shelton, 3 McOord's Ch. 135.....xvi, 639
 Coleman v. Southwick, 9 Johnson, 45.....vi, 263
 Coleman v. Talbot, 2 Bibb, 129.....iv, 687
 Coleman ada. Territory of Oregon, 1 Or. 191.....lxv, 554
 Coleman v. Walker, 3 Met. (Ky.) 65.....lxxxvii, 183
 Coleman v. White, 14 Wisconsin, 700.....lxxxix, 797
 Coleman v. Wilmington, C. & A. R. R. Co., 25
 South Carolina, 445.....60, 516
 Colerick v. Hooper, 3 Indiana, 316.....lvi, 505
 Coles v. Coles, 15 Johnson, 159.....viii, 231
 Coles v. Co. of Madison, Breese, 154.....xii, 161
 Coles v. Kealey, 2 Texas, 541.....lxvii, 661
 Coles v. Peck, 36 Indiana, 333.....49, 161
 Cole's Widow v. His Ex'rs, 7 Martin, N. S., 41.....xviii, 241
 Colgate ada. State, 31 Kansas, 511.....47, 507
 Colgrove v. Tallman, 67 New York, 95.....53, 90
 Collins v. McLeod, 3 Iredell's Law, 231.....xlix, 376
 Collard's Adm'r v. Tuttle, 4 Vermont, 491.....xiv, 637
 Collberg ada. Commonwealth, 119 Mass. 350.....20, 328
 Collender v. Dinwiddie, 55 New York, 300.....14, 224
 Colley v. Westbrook, 57 Maine, 181.....2, 39
 Collett v. Jones, 2 B. Monroe, 139.....xxvii, 586
 Collier v. Collier, 3 Richardson's Eq. 555.....iv, 653
 Collier v. Davis, 47 Arkansas, 367.....56, 738
 Collier v. Harkness, 26 Georgia, 362.....lxix, 216
 Collier v. Lattimer, 8 Baxt. 420.....35, 711
 Collier ada. People, 1 Michigan, 137.....xlviii, 699
 Collier v. Pierce, 7 Gray, 18.....lxvi, 453
 Collier v. State, 39 Georgia, 31.....xvix, 449
 Collier ada. State, 72 Missouri, 13.....37, 417
 Collier v. Valentine, 11 Missouri, 299.....xlix, 81
 Collier v. Vason, 12 Georgia, 440.....lviii, 481
 Collier's Adm'r v. Windham, 27 Alabama, 291.....lxii, 767
 Collin v. Collin, 1 Barbour's Ch. 630.....xiv, 420
 Collingsworth v. Horn, 4 Stew. & Port. 237.....lxv, 753
 Collins' Appeal, 107 Pennsylvania State, 590.....59, 479
 Collins v. Allen, 12 Wendell, 356.....xxvii, 130
 Collins v. Benbury, 3 Iredell's Law, 277.....lxxxviii, 723
 Collins v. Benbury, 3 Iredell's Law, 112.....xiii, 155
 Collins v. Buckeye State Ins. Co., 17 Ohio 84, 215, refile, 613
 Collins v. Champ's Heirs, 15 B. Monroe, 118.....lxi, 179
 Collins v. Collins, 51 Mississippi, 311.....34, 632
 Collins v. Collins, Phill. Eq. 153.....xxiii, 606
 Collins v. Council Bluffs, 32 Iowa, 294.....7, 300
 Collins v. Dawley, 4 Colorado, 138.....34, 73
 Collins v. Farmville I. & B. Co., 79 N. C. 279.....38, 232
 Collins v. Foley, 63 Maryland, 153.....59, 508
 Collins v. Hasbrouck, 56 New York, 187.....15, 407
 Collins v. Hatch, 18 Ohio, 523.....11, 623
 Collins v. Hayte, 50 Illinois, 337.....xvix, 621
 Collins v. Jones, 6 Leigh, 530.....lxix, 216
 Collins v. Lemasters, 1 Bailey's Law, 348.....xvi, 469
 Collins v. Loftus, 10 Leigh, 5.....lxvii, 719
 Collins v. People, 36 Illinois, 594.....38, 108
 Collins v. Prentiss, 15 Connecticut, 39.....lxxxviii, 61
 Collins v. Smith, 6 Wharton, 294.....lxvii, 228
 Collins v. South Boston R. R. Co., 143 Mass. 301, 56, 673
 Collins v. State, 33 Alabama, 434.....lxviii, 426
 Collins v. State, 3 Tex. Ct. App. 333.....34, 142
 Collins ada. State, 70 North Carolina, 241.....16, 771
 Collins ada. State, 15 South Carolina, 273.....40, 697
 Collins v. Tillou's Adm'r, 26 Connecticut, 368.....lxviii, 393
 Collins v. Torrey, 7 Johnson, 278.....v, 273
 Collins v. Welch, 58 Iowa, 72.....43, 111
 Collins v. Westbury, 2 Bay. 211.....i, 643
 Collyer v. Moulton, 9 Rhode Island, 99.....lxviii, 270
 Colman v. Post, 10 Michigan, 432.....lxxxii, 49
 Colorado Nat. B'k v. Boettcher, 5 Colorado, 185, 40, 142
 Colson v. Arnot, 57 New York, 283.....15, 498
 Colt v. Barnard, 15 Pickering, 298.....lxix, 594
 Colt v. Ives, 31 Connecticut, 26.....lxxxii, 161
 Colt v. Malmesbury, 6 Johnson, 160.....v, 308
 Coltar v. Allen, 40 Alabama, 155.....lxxxviii, 787
 Colter v. Lower, 35 Indiana, 285.....9, 735
 Colton v. Cleveland & P. R. Co., 67 Penn. St. 211.....5, 424
 Colton v. Onderdonk, 69 California, 158.....58, 558
 Colton v. Ross, 3 Paige's Ch. 364.....xii, 648
 Colton v. Smith, 11 Pickering, 311.....lxix, 378
 Coltraine v. Canney, 3 Iredell's Eq. 345.....xiii, 168
 Coltraine v. McCaine, 3 Devereux's Law, 308.....lxiv, 268
 Columbia B. and L. A. v. Bollinger, 12 Rich. Eq.
 124.....lxxxviii, 463
 Columbia Bank v. Jacobs, 10 Michigan, 349.....lxxxii, 723
 Columbia B'k v. Haldeman, 7 Watts & Serg. 233.....xiii, 229
 Columbia Bank v. Magruder, 6 Harr. & J. 172.....xiv, 271
 Columbia City v. Anthes, 84 Indiana, 31.....43, 80
 Columbia Ins. Co. v. Buckley, 83 Penn. St. 296.....34, 173

Roman letters [xliz] refer to volumes of American Decisions, and Arabic figures [49] to American Reports

- Columbia, Mayor of v. Beasley, 1 Humph. 232....xliv, 646
 Columbus C. & I. C. R. Co. v. Trosch, 68
 Illinois, 545.....18, 578
 Columbus City Bank v. Phillips, 22 Missouri, 85....lxiv, 254
 Columbus G. L. & C. Co. ada. State, 34 O. St. 572.32, 390
 Columbus S. P. Co. v. Ganser, 58 Michigan, 385....55, 697
 Columbus & I. E. v. Arnold, 31 Indiana, 174....xlix, 615
 Colvin v. Colvin, 2 Paige's Ch. 383.....xlii, 644
 Colvin ada. State, 11 Humphreys, 599.....llv, 58
 Colvin v. Williams, 3 Harris & J. 38.....v, 417
 Colwell v. Woods, 3 Watts, 183.....xxvii, 345
 Colyer v. Higgins, 1 Duval, 6.....lxxv, 601
 Oman v. Thompson, 47 Michigan, 22.....41, 708
 Combs v. Hannibal S. & Ins. Co., 43 Mo. 148.....xxvii, 383
 Combs v. Jackson, 2 Wendell, 153.....xix, 568
 Combs v. Little, 3 Green's Ch. 310.....xi, 207
 Combs v. Winchester, 39 New Hampshire, 13....lxxv, 203
 Combs v. Young's Widow, 4 Yerges, 218.....xxvi, 225
 Comcays v. Carley, 3 Watts, 280.....xxvii, 356
 Comcays v. Cox, 1 Stewart, 362.....xxviii, 45
 Comer v. Cunningham, 77 New York, 391.....33, 626
 Comfort v. Mather, 2 Watts & Serg. 450.....xxvii, 523
 Comly v. Hillegas, 94 Pennsylvania State, 132....39, 774
 Commerce Bank of v. Barrett, 33 Ga. 126.....xov, 384
 Commerce Bank v. Hoeber, 83 Missouri, 37.....57, 359
 Com'l Bank v. Cor. of Yasco Co., 6 How. 530....xxviii, 447
 Com'l Bank v. Cunningham, 34 Pick. 270.....xxiv, 332
 Com'l Bank v. French, 21 Pickering, 486.....xxii, 280
 Com'l Bank v. Martin, 1 Louisiana An. 344.....xiv, 87
 Com'l Bank v. Perry, 10 Robinson (La), 61.....xliv, 168
 Com'l Bank ada. State, 6 Smedes & M. 569.....liii, 106
 Com'l Bank ada. State, 13 Smedes & M. 569.....liii, 106
 Com'l Bk v. Western B. Bk, 11 Ohio, 444....xxviii, 739
 Com'l Bank of Albany v. Strong, 28 Vt. 316....lxvii, 714
 Com'l Bank of Buffalo v. Kortright, 22 Wendell, 348.....xxiv, 317
 Com'l Bk of N. O. v. Newport M. Co., 1 B. Monro, 13.....lxxv, 171
 Commercial Ex. Bk. v. McLeod, 65 Iowa, 665....54, 36
 Com'l and R. R. Bank v. Hamer, 7 Howard, 448....xi, 80
 Commercial F. Ins. Co. v. Capital C. Ins. Co., 81
 Alabama, 330.....60, 162
 Commercial Ins. Co. v. Hallock, 3 Dutcher, 645....lxvii, 379
 Commercial Ins. Co. v. Mehlman, 48 Ill. 513....xov, 543
 Commercial Ins. Co. v. Robinson, 64 Illinois, 265.16, 657
 Commercial Ins. Co. v. Spanknebel, 52 Ill. 53....4, 582
 Commercial Ins. Co. v. Treasury Bank, 61 Ill. 482.14, 73
 Commercial Nat. Bank v. Gillette, 90 Ind. 268....46, 223
 Commercial & F. Nat. Bank v. First Nat. Bank,
 30 Maryland, 11.....lxvi, 584
 Commissioners—See Board of Commissioners.
 Commissioners v. Elston, 32 Indiana, 27.....2, 337
 Comm'r's v. Gansett, 2 Bailey, 330.....xxiii, 139
 Commissioners v. Holyoke Water Power Co., 104
 Massachusetts, 446.....6, 247
 Comm'r's v. Lecky, 6 Serg. & R. 166.....ix, 418
 Comm'r's v. Martin, 4 Michigan, 557.....lxix, 333
 Commissioners v. Reynolds, 44 Indiana, 809....15, 245
 Comm'r's v. Rosa, 3 Binney, 520.....v, 383
 Comm'r's v. State, 3 Car. L. Repos. 617.....vi, 567
 Commissioners ada. State, 9 Vroom, 190.....20, 330
 Comm'r's ada. State, 3 Zabriskie, 510.....lvii, 403
 Comm'r's v. Taylor, 2 Bay, 282.....i, 647
 Comm'r's v. Walker, 6 Howard (Miss.), 143....xxviii, 433
 Comm'r's v. Wood, 10 Penn. State, 93.....xliz, 582
 Comm'r's of Ashland Co. v. Directors Richland
 Co. Infirmary, 7 Ohio State, 65.....lxix, 49
 Commissioners of — County. See name of County.
 Commissioners of Funded Debt of City of San
 Jose v. Younger, 29 California, 147....lxxvii, 164
 Commissioners of Homochitto River v. Withers,
 29 Mississippi, 21.....lxiv, 126
 Commissioners of Highways ada. People, 54 New
 York, 376.....13, 561
 Commissioners of Inland Fisheries v. Holyoke
 W. P. Co., 104 Massachusetts, 446.....6, 247
 Commissioners of Jefferson v. Lindeberger, 3
 Montana, 231.....35, 408
 Commissioners of Leavenworth v. Miller, 7 Kan-
 sas, 479.....12, 436
 Comm'r's of Lucas Co. v. Hunt, 5 Ohio St. 426....lxvii, 303
 Commissioners of Ottawa v. Nelson, 19 Kans. 234.27, 101
 Comm'r's of Roads ada. State, 1 Mill, 55.....xii, 596
 Commissioners of Saline v. Anderson, 20 Kans. 296.27, 171
 Commons v. Walters, 1 Porter, 377.....lxvii, 636
 Common Council ada. People, 28 Michigan, 294....15, 203
 Common Council ada. People, 77 New York, 603....33, 659
 Common Council ada. People, 78 New York, 83....34, 500
 Common Pleas ada. State, 36 New Jersey, 73....13, 422
 Commonwealth v. Adams, 114 Mass. 323.....19, 362
 Commonw. v. Albro, 1 Gray, 1.....lxi, 351
 Commonwealth v. Allen, 128 Massachusetts, 46....35, 256
 Commonw. v. Andrews, 2 Massachusetts, 14.....lii, 17
 Commonw. ada. Armistead, 11 Leigh, 697....xxvii, 633
 Commonw. v. Arrison, 16 Serg. & R. 137.....xvi, 631
 Commonwealth v. Avery, 14 Bush, 626.....29, 439
 Commonwealth v. Bacon, 13 Bush, 210.....26, 189
 Commonw. v. Bailey, 1 Massachusetts, 63.....ii, 3
 Commonwealth v. Bakeman, 131 Mass. 577.....41, 246
 Commonw. v. Baldwin, 11 Gray, 197.....lxvi, 703
 Commonw. v. Baldwin, 1 Watts, 54.....xxvi, 38
 Commonw. ada. Barge, 3 Penrose & W. 298....xxiii, 81
 Commonwealth v. Barnacle, 134 Mass. 215.....45, 319
 Commonwealth v. Beane, 123 Mass. 542.....43, 450
 Commonwealth v. Bennett, 108 Mass. 30.....11, 304
 Commonw. v. Berry, 99 Mass. 428.....xvi, 767
 Commonw. ada. Bides, 23 Penn. State, 539....lxxv, 568
 Commonwealth v. Birdall, 69 Penn. St. 483....8, 263
 Commonw. v. Blanding, 3 Pickering, 304.....xv, 214
 Commonw. ada. Blunt, 4 Leigh, 689.....xxvi, 341
 Commonwealth v. Boston and Me. R. Co., 129
 Massachusetts, 500.....37, 362
 Commonwealth v. Bosworth, 113 Mass. 200.....18, 467
 Commonw. v. Bowen, 13 Massachusetts, 266....vii, 154
 Commonw. ada. Bowlin, 3 Bush, 5.....xvii, 468
 Commonw. v. Brettun, 100 Mass. 206.....xxvii, 86
 Commonwealth v. Briant, 142 Mass. 463.....50, 707
 Commonw. v. Brice, 23 Penn. State, 211.....ix, 79
 Commonwealth v. Bringham, 103 Penn. St. 134....49, 119
 Commonw. ada. Brown, 9 Leigh, 633.....xxviii, 263
 Commonw. ada. Brown, 4 Rawle, 269.....lxvi, 120
 Commonwealth v. Bulman, 118 Mass. 466.....19, 469
 Commonw. v. Burdick, 2 Penn. State, 163.....xliv, 186
 Commonwealth v. Burke, 105 Massachusetts, 376....7, 531
 Commonw. v. Burton, 4 Leigh, 645.....xxvi, 337
 Commonw. v. Butterick, 100 Mass. 1.....xxvii, 88
 Commonw. v. Call, 21 Pickering, 509.....xxvii, 264
 Commonw. v. Campbell, 7 Allen, 541.....lxxviii, 706
 Commonwealth v. Carr, 114 Massachusetts, 290....19, 345
 Commonw. v. Casey, 11 Cushing, 417.....lxix, 159
 Commonw. v. Castles, 9 Gray, 121.....lxix, 273
 Commonw. v. Chace, 9 Pickering, 15.....xix, 348
 Commonw. v. Chapin, 5 Pickering, 199.....xvi, 386
 Commonw. ada. Chapman, 5 Wharton, 427....xxiv, 666
 Commonw. v. Charlestown, 1 Pickering, 180.....xi, 161
 Commonw. v. Chatham, 50 Penn. St. 181....lxxviii, 539
 Commonwealth v. Cheney, 141 Massachusetts, 102.55, 449
 Commonw. v. Church, 1 Penn. State, 106.....xliv, 112
 Commonw. v. Churchill, 11 Metcalf, 536.....xv, 229

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures (49) to American Reports.

Commonw. v. Olap, 4 Massachusetts, 163.....	lii, 212
Commonw. v. Olney, 56 Penn. St. 270.....	xiv, 75
Commonw. v. Oola, 7 R. Monroe, 259.....	xiv, 506
Commonwealth v. Ollberg, 119 Mass. 350.....	96, 226
Commonwealth v. Cook, 8 Bush, 220.....	8, 456
Commonw. v. Cook, 6 Serg. & R. 577.....	ix, 465
Commonw. v. Cooper, 5 Allen, 498.....	lxxxi, 762
Commonwealth v. Costello, 121 Mass. 371.....	23, 277
Commonw. v. Crotty, 13 Allen, 403.....	lxxvii, 669
Commonw. v. Cullen, 13 Penn. State, 253.....	liii, 450
Commonw. v. Cummings, 3 Cushing, 212.....	l, 732
Commonw. v. Cushing, 11 Massachusetts, 67.....	vi, 156
Commonw. v. Dabney, 1 Robinson (Va.) 994.....	xi, 717
Commonwealth v. DeJardin, 126 Mass. 45.....	34, 652
Commonw. v. Dickinson, 5 R. Monroe, 506.....	xliii, 139
Commonw. v. Donovan, 99 Mass. 435.....	xvii, 765
Commonwealth v. Duffy, 96 Pennsylvania, 506.....	43, 554
Commonw. v. Duane, 1 Binney, 601.....	ii, 497
Commonwealth v. Eastern R. R. Co., 103 Mass. 25.4 4, 555	
Commonw. v. Eastman, 1 Cushing, 189.....	xlviii, 596
Commonw. v. Ewell, 5 Metcalf, 150.....	xxv, 396
Commonw. v. Emigrant I. S. Bank, 98 Mass. 12.....	xviii, 126
Commonw. v. Erie & N. E. R. R. Co., 27 Penn. State, 339.....	lxvii, 471
Commonwealth v. Erie R'y Co., 62 Penn. St. 296..	1, 399
Commonw. v. Farm. & Mech. B'k, 21 Pick. 542.....	xxxi, 290
Commonw. v. First Nat. Bank, 4 Bush, 96.....	xvii, 285
Commonw. v. Fogarty, 8 Gray, 489.....	lxix, 264
Commonwealth v. Ford, 130 Massachusetts, 64.....	39, 426
Commonwealth v. Foster, 114 Massachusetts, 311.19, 353	
Commonwealth v. Foster, 122 Massachusetts, 317.23, 226	
Commonw. ada. French, 5 Leigh, 512.....	xxvii, 613
Commonw. v. Fuller, 8 Metcalf, 313.....	xli, 509
Commonwealth v. Gamble, 62 Penn. St. 343.....	1, 422
Commonw. v. Gannett, 1 Allen, 7.....	lxxix, 693
Commonw. v. Garrigue, 26 Penn. State, 2.....	lxx, 103
Commonwealth v. Gavin, 121 Massachusetts, 54..	23, 265
Commonwealth v. Gessolo, 123 Mass. 220.....	25, 79
Commonw. v. Gillespie, 7 Serg. & R. 469.....	x, 475
Commonw. ada. Gollither, 2 Duval, 162.....	lxxvii, 493
Commonwealth v. Grady, 13 Bush, 225.....	96, 192
Commonwealth v. Gray, 129 Massachusetts, 474..	37, 378
Commonw. v. Gray, 2 Gray, 501.....	lxi, 476
Commonw. v. Grimes, 10 Gray, 470.....	lxxi, 666
Commonwealth v. Haines, 97 Penn. St. 228.....	39, 805
Commonw. v. Hall, 9 Gray, 262.....	lxix, 225
Commonw. ada. Hall, 6 Leigh, 615.....	xxix, 236
Commonwealth v. Hall, 128 Massachusetts, 410..	35, 387
Commonw. v. Hallway, 44 Penn. St., 210.....	lxxiv, 431
Commonw. v. Hallway, 42 Penn. St. 446.....	lxxvii, 526
Commonw. v. Harney, 3 Cushing, 562.....	xlviii, 679
Commonwealth v. Hartwell, 129 Mass. 415.....	35, 391
Commonw. v. Harwood, 4 Gray, 41.....	lxiv, 49
Commonwealth v. Hawes, 13 Bush, 697.....	96, 242
Commonw. v. Hays, 14 Gray, 62.....	lxxiv, 962
Commonw. v. Haynes, 3 Gray, 72.....	lxi, 437
Commonw. ada. Helfrich, 33 Penn. St. 68.....	lxxv, 579
Commonwealth v. Hilde & L. Ins. Co., 113 Massachusetts, 126.....	17, 72
Commonw. v. Hite, 6 Leigh, 568.....	xxix, 226
Commonwealth v. Holmes, 127 Mass. 494.....	34, 391
Commonwealth v. Hopkins, 133 Mass. 381.....	43, 527
Commonw. v. Hunt, 4 Metcalf, 111.....	lxxviii, 346
Commonw. ada. Hord, 4 Leigh, 674.....	xxvi, 340
Commonw. ada. Hughes, 17 Gratian, 565.....	xiv, 498
Commonw. ada. Hunt, 13 Gratian, 757.....	lxx, 443
Commonw. v. Hutchinson, 1 Massachusetts, 7.....	ii, 1
Commonw. v. Hutton, 5 Gray, 59.....	lxvi, 362
Commonwealth v. Jackson, 11 Bush, 673.....	21, 226
Commonw. v. Jeffries, 7 Allen, 548.....	lxxviii, 712
Commonwealth v. Jennings, 121 Mass. 47.....	23, 249
Commonwealth v. Jones, 121 Massachusetts, 57..	23, 257
Commonw. v. Judd, 2 Massachusetts, 239.....	lii, 54
Commonwealth v. Kane, 108 Massachusetts, 423..	11, 373
Commonw. ada. Keenan, 44 Penn. St. 55.....	lxxiv, 414
Commonwealth v. Kendall, 113 Mass. 210.....	18, 469
Commonw. v. Kenny, 12 Metcalf, 235.....	xvi, 672
Commonwealth v. Kestner, 23 Penn. St. 272.....	27, 692
Commonwealth v. Killian, 109 Mass. 345.....	12, 714
Commonw. v. Kimball, 24 Pickering, 358.....	xxv, 526
Commonw. v. Knapp, 9 Pickering, 496.....	xx, 491
Commonw. v. Knapp, 10 Pickering, 477.....	xx, 534
Commonw. v. Knight, 12 Massachusetts, 273.....	vii, 72
Commonwealth v. Lane, 113 Massachusetts, 486..	18, 509
Commonwealth v. Lay, 13 Bush, 263.....	23, 718
Commonw. v. Lecky, 1 Watts, 66.....	lxvi, 37
Commonwealth v. Leonard, 140 Mass. 473.....	54, 498
Commonw. v. Libbey, 11 Metcalf, 64.....	xiv, 186
Commonwealth v. Lockwood, 109 Mass. 223.....	12, 699
Commonw. v. Lord, 8 Metcalf, 226.....	lxxvii, 129
Commonwealth v. Louisville & Nashville R. R. Co., 80 Kentucky, 291.....	44, 475
Commonw. v. Luckie, 99 Mass. 431.....	xvii, 769
Commonw. ada. Lynch, 6 Watts, 495.....	xxxi, 490
Commonwealth v. Lynes, 142 Massachusetts, 577..	56, 709
Commonwealth v. Mason, 105 Massachusetts, 163..	7, 507
Commonwealth v. McAfee, 108 Mass. 458.....	11, 593
Commonw. v. McAllister, 1 Watts, 307.....	lxvi, 70
Commonwealth v. McCormick, 130 Mass. 61.....	39, 422
Commonw. v. McCoy, 8 Watts, 153.....	lxxiv, 445
Commonwealth v. McDermott, 123 Mass. 440.....	25, 129
Commonw. v. McGinnis, 3 Cushing, 212.....	l, 732
Commonw. v. McGowan, 4 Bibb, 63.....	vii, 737
Commonwealth v. McHale, 97 Penn. St. 297.....	39, 808
Commonw. v. McKie, 1 Gray, 61.....	lxi, 416
Commonw. v. McKimmon, 8 Serg. & R. 430.....	xi, 639
Commonw. v. McLoon, 5 Gray, 91.....	lxvi, 354
Commonw. v. MacLoon, 101 Massachusetts, 1.....	c, 89
Commonw. v. McPike, 3 Cushing, 181.....	l, 727
Commonw. v. Magee, 8 Penn. State, 240.....	xlii, 509
Commonw. v. Magowan, 1 Metcalf (Ky.), 358.....	lxxi, 498
Commonw. v. Marshall, 11 Pickering, 350.....	xxii, 577
Commonw. v. Mead, 12 Gray, 167.....	lxxi, 741
Commonw. v. Merriam, 14 Pickering, 518.....	xv, 429
Commonw. v. Merrill, 14 Gray, 415.....	lxxvii, 536
Commonw. v. Messinger, 1 Binney, 273.....	ii, 441
Commonw. ada. Million, 1 R. Monroe, 310.....	lxvii, 599
Commonw. v. Milton, 12 R. Monroe, 212.....	liv, 522
Commonwealth v. Mink, 123 Massachusetts, 422..	25, 109
Commonw. v. Mitchell, 3 Bush, 35.....	xvii, 192
Commonw. v. Mohr, 62 Penn. St. 243.....	xci, 153
Commonw. v. Molts, 10 Penn. State, 527.....	ii, 499
Commonw. v. Montgomery, 12 Metcalf, 634.....	xiv, 227
Commonwealth v. Moore, 143 Mass. 126.....	56, 128
Commonw. v. Morris, 1 Virginia Cases, 175.....	v, 615
Commonwealth v. Manson, 127 Mass. 459.....	34, 411
Commonw. v. Murray, 4 Binney, 487.....	v, 412
Commonw. v. Murray, 11 Serg. & R. 73.....	xv, 614
Commonw. v. Neal, 10 Massachusetts, 122.....	vi, 106
Commonwealth v. Nichols, 114 Mass. 225.....	19, 346
Commonw. v. Nichols, 10 Metcalf, 329.....	xliii, 432
Commonwealth v. O'Brien, 119 Mass. 342.....	20, 225
Commonw. ada. Oslander, 3 Leigh, 780.....	xxiv, 693
Commonwealth v. Overy, 80 Kentucky, 298.....	44, 471
Commonw. v. Parker, 9 Metcalf, 263.....	xliii, 266
Commonw. ada. Pendleton, 4 Leigh, 694.....	xxvi, 243
Commonwealth v. Pennsylvania C. Co., 66 Penn- sylvania State, 41.....	5, 329
Commonw. ada. Phillips, 2 Duval, 228.....	lxxvii, 499
Commonw. v. Phoenix Iron Co., 105 Pa. St. 111.....	51, 184

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports

- Commonw. v. Pickering, 8 Gratian, 638lvi, 158
Commonwealth v. Pierce, 138 Massachusetts, 163. 53, 264
Commonwealth v. Pomphret, 137 Mass. 664.....56, 340
Commonw. v. P & O R. R. Co., 34 Penn. St. 159.....lxii, 372
Commonw. v. Posey, 4 Call, 109.....ii, 560
Commonw. v. Power, 7 Metcalf, 806.....xii, 465
Commonw. v. Price, 10 Gray, 472.....lxix, 668
Commonw. v. Purchase, 2 Pickering, 631.....xiii, 452
Commonw. v. Rand, 7 Metcalf, 475.....xii, 455
Commonwealth v. Reading Savings Bank, 133
Massachusetts, 16.....43, 495
Commonw. v. Reed, 34 Penn. State, 375.....lxv, 661
Commonw. v. Reynolds, 14 Gray, 87.....lxix, 665
Commonwealth v. Reynolds, 120 Mass. 190.....71, 610
Commonw. v. Richards, 18 Pickering, 494.....xix, 608
Commonwealth v. Richardson, 136 Mass. 34.....36, 647
Commonw. v. Riggs, 14 Gray, 378.....lxvii, 333
Commonwealth v. Robinson, 126 Mass. 269.....36, 674
Commonw. v. Rogers, 7 Metcalf, 800.....xii, 455
Commonw. v. Rosceter, 2 Binn. 360.....iv, 451
Commonw. v. Runnels, 10 Massachusetts, 518.....vi, 148
Commonw. v. Sanders, 14 Gray, 394.....lxvii, 335
Commonw. v. Sankey, 23 Penn. State, 390.....lx, 91
Commonwealth v. Scott, 123 Mass. 222.....25, 81
Commonwealth v. Scott, 123 Massachusetts, 239.....25, 87
Commonw. v. Seale, 2 Binney, 332.....iv, 446
Commonw. v. Sharpless, 2 Serg. & R. 91.....vii, 633
Commonw. v. Shaw, 4 Allen, 308.....lxix, 706
Commonw. v. Shaw, 4 Cushing, 594.....i, 613
Commonw. v. Shepherd, 6 Binney, 233.....vi, 449
Commonw. ada. Sherban, 8 Watts, 212.....xxiv, 460
Commonw. v. Shouse, 16 B. Monroe, 325.....lxiii, 551
Commonw. ada. Slaughter, 11 Leigh, 681.....xxviii, 638
Commonw. v. Slicer, 25 Penn. State, 23.....lxiv, 680
Commonw. ada. Smith, 54 Penn. St. 309.....xxiii, 686
Commonw. v. Smith, 10 Allen, 448.....lxvii, 672
Commonw. v. Smith, 2 Gray, 518.....lx, 478
Commonw. v. Somerville, 1 Virginia Cases, 163.....v, 614
Commonw. v. Bowie, 9 Gray, 304.....lxix, 239
Commonw. ada. Sperry, 9 Leigh, 633.....xxviii, 391
Commonwealth v. Spilman, 124 Mass. 337.....36, 668
Commonw. v. Stauffer, 10 Penn. State, 390.....ii, 489
Commonw. v. Stephenson, 11 Cushing, 481.....lx, 154
Commonw. v. Stodder, 2 Cushing, 562.....lxviii, 679
Commonw. v. St. Patrick's Soc., 2 Binney, 441.....iv, 453
Commonwealth v. Stratton, 114 Mass. 303.....19, 350
Commonwealth v. Stratton, 114 Mass. 303.....20, 350
Commonw. v. Strombach, 3 Rawle, 341.....xxiv, 351
Commonwealth v. Strupney, 105 Mass. 588.....7, 586
Commonw. v. Stub, 11 Penn. State, 150.....ii, 515
Commonw. v. Stump, 53 Penn. St. 133.....xci, 196
Commonwealth v. Sturdivant, 117 Mass. 123.....19, 401
Commonw. v. Swmney, 1 Virginia Cases, 146.....v, 612
Commonw. v. Swope, 45 Penn. State, 535.....lxixiv, 618
Commonwealth v. Teevens, 143 Mass. 210.....56, 131
Commonw. v. Thatcher, 97 Mass. 563.....xxiii, 125
Commonw. v. Thompson, 6 Allen, 561.....lxixiii, 663
Commonw. v. Thompson, 11 Allen, 23.....lxixvii, 685
Commonw. v. Thompson, 4 Leigh, 667.....xxvi, 339
Commonw. v. Thompson, 2 Cushing, 562.....lxviii, 679
Commonwealth v. Titus, 116 Mass. 42.....17, 138
Commonw. v. Tivnon, 8 Gray, 375.....lxix, 248
Commonwealth v. Tobin, 108 Mass. 436.....11, 375
Commonwealth v. Tobin, 125 Mass. 203.....25, 220
Commonw. v. Tolliver, 8 Gray, 386.....lxix, 253
Commonw. v. Union F. Ins. Co., 5 Mass. 230.....iv, 80
Commonw. v. Uppichard, 3 Gray, 494.....lxviii, 762
Commonw. v. Van Tuyl, 1 Metcalfe (Ky.), 1.....lxix, 455
Commonw. ada. Vase, 3 Leigh, 786.....xxiv, 695
Commonw. v. Vt. & M. R. R. Co., 108 Mass. 7.....11, 301
Commonw. v. Walke, 11 Allen, 264.....lxixvii, 711
Commonwealth v. Wallace, 114 Penn. St. 405.....60, 353
Commonwealth v. Walter, 83 Penn. State, 105.....24, 154
Commonwealth v. Wardell, 128 Massachusetts, 52.35, 257
Commonw. v. Webster, 5 Cushing, 295.....ii, 711
Commonwealth v. Weller, 14 Bush, 219.....39, 467
Commonw. v. Weymouth, 2 Allen, 144.....lxix, 776
Commonwealth v. White, 123 Massachusetts, 430.25, 118
Commonw. v. Wilde, 5 Gray, 83.....lxvi, 359
Commonw. ada. Williams, 2 Gratian, 567.....xlv, 463
Commonw. v. Wilkinson, 16 Pickering, 175.....xxvi, 654
Commonwealth v. Williams, 79 Kentucky, 42.....43, 304
Commonw. v. Wing, 9 Pickering, 1.....xix, 247
Commonw. v. Woolper, 3 Serg. & R. 29.....viii, 638
Commonw. v. Wolbert, 6 Binney, 292.....vi, 423
Commonw. v. Wormley, 8 Gratian, 713.....lvi, 162
Commonwealth v. Wright, 79 Kentucky, 42.....43, 303
Commonwealth v. Wright, 137 Mass. 260.....50, 306
Commonw. v. York, 9 Metcalf, 93.....xiii, 373
Commonw. for Lee v. O'Call, 7 J. J. Marshal, 149. xlviii, 393
Commonw. Bank v. McChord, 4 Dana, 191.....lxix, 398
Commonw. I. Co. v. Bennett, 37 Pennsylvania St. 305.....lxviii, 418
Commonw. Insurance Co. v. Berger and Bats, 43 Penn. State, 265.....lxviii, 504
Compton v. Barnes, 4 Gill, 55.....xiv, 115
Compton v. Bunker Hill Bank, 96 Illinois, 361.....36, 147
Compton v. Gilman, 19 West Virginia, 312.....43, 776
Compton v. Mathews, 3 Louisiana, 138.....xxii, 167
Compton v. State, 13 Texas Ct. App. 371.....44, 703
Comstock v. Adams, 23 Kansas, 513.....53, 191
Comstock v. Draper, 1 Michigan, 481.....lxii, 78
Comstock v. Hadlyme Ec. Soc., 8 Conn. 254.....xx, 109
Comstock v. Hlar, 73 New York, 269.....29, 142
Comstock v. Rayford, 1 Smedes & M. 423.....xi, 102
Comstock v. Smith, 13 Pickering, 116.....xxvii, 670
Conant, Ex parte, 77 Maine, 275.....52, 739
Conant v. Burnham, 133 Massachusetts, 503.....43, 632
Conant v. Conant, 10 California, 249.....lxix, 717
Conant v. Smith, 1 Atkins, 67.....xv, 669
Concklin v. Coddington, 1 Beasley's Ch. 260.....lxvii, 263
Concord & P. R. R. v. Farnish, 59 N. H. 122.....47, 182
Condit v. Baldwin, 41 New York, 219.....lxviii, 137
Condon v. Barr, 47 New Jersey Law, 113.....54, 121
Condon v. Marquette & O. R. Co., 55 Michigan, 218.....54, 367
Cone v. Delaware etc. R. Co., 81 New York, 206. 27, 492
Cone v. Lewis, 64 Texas, 231.....53, 767
Congar v. Chicago & N. W. Ry Co., 24 Wis. 187.....1, 184
Congdon v. Central Vt. R. Co., 56 Vt. 200.....48, 738
Conger v. Atwood, 23 Ohio St. 124.....22, 492
Conger v. Dean, 3 Iowa, 463.....lxvi, 38
Conger v. Weaver, 6 California, 548.....lxv, 526
Congregational Soc. v. Fleming, 11 Iowa, 693.....lxix, 611
Cong. Soc. v. Perry, 6 New Hampshire, 164.....xv, 425
Congress & E. Spring Co. v. High Rock C. S. Co., 45 New York, 391.....6, 28
Congreve v. Morgan, 16 New York, 94.....lxix, 495
Conhoben S. R. v. Buffalo etc. R. R. Co., 61 New York, 573.....16, 646
Conigland v. N. O. M. L. Ins. Co., 1 Phil. Pa. 341.....xxviii, 29
Conine v. J. & B. R. R. Co., 3 Houston, 268.....lxixix, 299
Conkey v. Amis, 13 Indiana, 260.....lxixiv, 261
Conkey v. Milwaukee & St. P. Ry Co., 31 Wis. 619. 11, 636
Conklin v. Smith, 7 Indiana, 107.....lxix, 616
Conkling v. Ridgely & Co., 113 Illinois, 26.....54, 304
Conkling v. Shalley, 28 New York, 360.....lxixiv, 348
Conley v. Flinn, 3 Blackford, 72.....xxvii, 398
Conn v. Coburn, 7 New Hampshire, 398.....lxvii, 761

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Conn v. Gano, 1 Ohio, 483.....xiii, 639
 Conn v. Manifee, 2 A. K. Marshall, 366.....xii, 417
 Conn v. Wilson, 2 Overton, 233.....v, 663
 Connaughty v. State, 1 Wisconsin, 189.....lx, 370
 Connecticut v. Jackson, 1 Johns. Ch. 13.....vii, 471
 Connecticut F. Ins. Co. v. Erie R'y Co., 73 New York, 369.....xix, 171
 Connecticut M. L. Ins. Co. v. Groom, 86 Pennsylvania State, 92.....xvii, 669
 Connecticut M. L. Ins. Co. v. Burroughs, 94 Connecticut, 305.....xvi, 723
 Connecticut M. L. Ins. Co. v. N. Y. & New Haven R. R., 26 Connecticut, 265.....lxv, 671
 Conn. & P. R. R. v. Cooper, 3 Vt. 476.....lxviii, 619
 Conn. & Passump. Riv. R. Co. v. Bailey, 24 Vt. 465.....lxviii, 181
 Connecticut R. R. Co. v. County Comm'rs, 127 Massachusetts, 60.....xv, 338
 Connell v. Chandler, 13 Texas, 5.....lxii, 545
 Connell v. Reed, 128 Massachusetts, 477.....xv, 397
 Connell v. Woodard, 8 Howard, 665.....xxvii, 173
 Connely v. Bourg, 16 Louisiana An. 108.....lxix, 568
 Connely v. State, 60 Alabama, 89.....xli, 34
 Conner v. Banks, 16 Alabama, 43.....lii, 309
 Conner v. Citizens St. R'y Co., 105 Indiana, 63.....xv, 177
 Conner v. Clark, 12 California, 163.....lxviii, 629
 Conner v. Henderson, 15 Massachusetts, 319.....viii, 103
 Conner v. New Albany, 1 Blackford, 88.....xii, 207
 Conner v. Robertson, 37 Louisiana An. 814.....xv, 621
 Conner v. South, 7 Howard, 176.....xl, 59
 Conner v. Southern Ex. Co., 42 Georgia, 37.....v, 543
 Conner v. State, 25 Georgia, 615.....lxix, 184
 Conner v. State, 4 Yerger, 137.....xxvi, 217
 Conner v. Trawrick, 37 Alabama, 269.....lxix, 58
 Conner v. Winston, 8 Indiana, 315.....lxv, 761
 Conner, In re, 39 California, 96.....x, 427
 Conners v. Burlington etc. R'y Co., 71 Iowa, 490.....xvi, 614
 Connersville v. Wadleigh, 7 Blackford, 102.....xii, 214
 Connolly v. Boston, 117 Massachusetts, 64.....xix, 396
 Connolly v. Branstler, 3 Bush, 702.....xvii, 278
 Connolly v. Davidson, 15 Minnesota, 619.....x, 154
 Connolly v. Pardon, 1 Paige's Ch. 291.....xix, 433
 Connolly v. Warren, 106 Massachusetts, 146.....x, 300
 Connor v. Berry, 46 Illinois, 370.....xov, 417
 Connor v. Hillier, 11 Richardson's L. 193.....lxviii, 106
 Connor v. Sullivan, 40 Connecticut, 26.....xvi, 10
 Connor ada. State, 69 Iowa, 357.....lxiv, 686
 Connor v. Bardine, 69 Missouri, 125.....xv, 498
 Connor v. Commonw., 3 A. K. Marshall, 586.....xii, 451
 Connor v. Smith, 2 O. E. Green, 51.....lxviii, 247
 Connor v. Warren, 1 Gilman, 498.....xii, 198
 Connor v. Wright, 3 Halstead's Ch. 613.....lxvii, 213
 Connor ada. State, 4 Dutcher, 294.....lxviii, 54
 Conrad v. Lane, 26 Minnesota, 389.....xv, 412
 Conrad v. Saginaw R. Co., 54 Michigan, 249.....xv, 617
 Conradt v. Clauve, 83 Indiana, 476.....xv, 398
 Conradt v. Sullivan, 45 Indiana, 130.....xv, 261
 Conroe v. Birdall, 1 Johnson's Cases, 127.....xi, 106
 Conroy v. Warren, 3 Johnson's Cases, 259.....xi, 158
 Conroy v. Woods, 13 California, 626.....lxviii, 606
 Conser v. Snowden, 54 Maryland, 175.....xv, 368
 Conso Gaa. Co. v. Baltimore, 60 Maryland, 588.....xv, 237
 Constantine ada. State, 42 Ohio State, 457.....xv, 633
 Continental Ins. Co. v. Hulm., 92 Illinois, 145.....xv, 122
 Continental Ins. Co. v. Jaehnichen, 110 Ind. 69.....xv, 194
 Continental Ins. Co. v. Kasey, 25 Gratt. 268.....xv, 681
 Continental L. Ins. Co. v. Palmer, 42 Conn. 60.....xv, 630
 Continental L. Ins. Co. v. Rogers, 119 Ill. 474.....xv, 610
 Continental L. Ins. Co. v. Volger, 89 Ind. 672.....xv, 188
 Converse v. Rinnrich, 14 Michigan, 109.....xv, 230
 Converse v. Converse, 21 Vermont, 168.....xii, 58
 Conway v. Cable, 37 Illinois, 62.....lxviii, 240
 Conway v. Hale, 4 Haywood, 1.....lx, 746
 Conway v. Jett, 3 Yerger, 481.....xxiv, 590
 Conway v. Read, 66 Missouri, 346.....xv, 364
 Conway v. Seamons, 65 Vermont, 8.....xv, 679
 Conway v. Williams' Adm'r, 10 Louisiana, 568.....xxix, 466
 Conway Tool Co. v. Hudson R. I. Co., 13 Oush. 144.....lx, 173
 Conwell v. Brookhart, 4 B. Monroe, 580.....xii, 244
 Conwell v. Pumphrey, 9 Indiana, 135.....lxviii, 611
 Conwell v. State, 3 Indiana, 367.....lxvi, 632
 Conwell v. Voorhesa, 13 Ohio, 523.....xviii, 206
 Conyers v. State, 50 Georgia, 103.....xv, 686
 Conyers' Adm'r v. Kenan, 4 Georgia, 608.....lxviii, 239
 Coogan v. Parker, 2 South Carolina, 265.....xv, 669
 Cook v. Baldwin, 120 Massachusetts, 317.....xv, 517
 Cook v. Barkley, 1 Pennington, 169.....xii, 343
 Cook v. Bradley, 7 Connecticut, 57.....lxviii, 79
 Cook v. Brown, 125 Massachusetts, 603.....xv, 259
 Cook v. Burlington, 30 Iowa, 94.....xv, 649
 Cook v. Burlington, 59 Iowa, 351.....xv, 44, 679
 Cook v. Carpenter, 34 Vermont, 121.....lxix, 670
 Cook v. Cockrill, 1 Stewart, 475.....lxviii, 67
 Cook v. Combs, 39 New Hampshire, 632.....lxv, 241
 Cook v. Comm'l Ins. Co. 11 Johnson, 40.....xv, 353
 Cook ada. Commonwealth, 8 Bush, 220.....x, 466
 Cook ada. Commonw., 6 Serg. & R. 577.....lx, 466
 Cook v. Continental Ins. Co., 70 Missouri, 610.....xv, 438
 Cook v. Cook, 56 Wisconsin, 195.....xv, 43, 706
 Cook v. Corthell, 11 Rhode Island, 467.....xv, 518
 Cook v. Courtright, 40 Ohio St. 246.....xv, 681
 Cook v. Darby, 4 Munford, 444.....xv, 639
 Cook v. Deerfield, 64 Penn. St. 445.....xv, 606
 Cook v. Dillon, 9 Iowa, 407.....lxix, 364
 Cook v. Ellis, 6 Hill (New York), 466.....xii, 767
 Cook v. Field, 3 Alabama, 63.....lxviii, 436
 Cook v. Grant, 16 Serg. & R. 198.....xvi, 664
 Cook v. Gray, 2 Houston, 455.....lxviii, 126
 Cook v. Holmes, 29 Missouri, 61.....lxviii, 548
 Cook v. Hull, 3 Pick. 269.....lxviii, 206
 Cook v. Irvine, 5 Serg. & R. 432.....lx, 397
 Cook v. Johnson, 1 Beasley's Ch. 61.....lxviii, 381
 Cook v. Johnson, 47 Connecticut, 175.....xv, 64
 Cook v. Johnson, 58 Michigan, 437.....xv, 55, 703
 Cook v. Kane, 13 Oregon, 452.....xv, 29
 Cook v. McCabe, 53 Wisconsin, 250.....xv, 766
 Cook v. McClure, 58 New York, 437.....xv, 17, 270
 Cook v. Milwaukee, 24 Wisconsin, 370.....xv, 1, 183
 Cook ada. People, 39 Michigan, 236.....xv, 399
 Cook ada. People, 8 New York (4 Seld.), 67.....lx, 451
 Cook v. Pridgen, 45 Georgia, 331.....xv, 683
 Cook v. Rives, 13 Smedes & M. 228.....lxviii, 88
 Cook v. Sanders, 15 Rich. L. 63.....lxviii, 136
 Cook v. Satterlee, 6 Cowen, 106.....xvi, 432
 Cook v. Skelton, 30 Illinois, 107.....lxviii, 259
 Cook v. Southwick, 9 Texas, 615.....lx, 161
 Cook v. State, 60 Alabama, 39.....xli, 31
 Cook v. State, 11 Georgia, 63.....lxvi, 416
 Cook v. State Company, 36 Ohio State, 135.....xv, 686
 Cook v. State Nat. Bank, 52 New York, 38.....xv, 687
 Cook v. Thornhill, 13 Texas, 293.....lxv, 63
 Cook v. Vimont, 6 T. B. Monroe, 394.....lxviii, 157
 Cook v. Walker, 21 Georgia, 370.....lxviii, 461
 Cook v. Whipple, 55 New York, 150.....xv, 14, 202
 Cook v. Wood, 30 Georgia, 691.....lxviii, 677
 Cooke v. Bremond, 27 Texas, 457.....lxviii, 626
 Cooke v. Crawford, 1 Texas, 9.....xv, 93
 Cooke v. England, 27 Maryland, 14.....xv, 618
 Cooke v. Spears, 2 California, 469.....lxvi, 346
 Cooke v. Millard, 65 New York, 357.....xv, 619
 Cooke ada. State, 24 Minnesota, 267.....xv, 344

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Cooley v. Broad, 39 Louisiana An. 345.....39, 333
 Cooley v. Dewey, 4 Pickering, 93.....xvi, 396
 Cooley v. Ferrine, 12 Vroom, 323.....39, 310
 Cooley v. Scarlett, 38 Illinois, 315.....lxxxvii, 396
 Cooley v. Willard, 34 Illinois, 68.....lxxxv, 396
 Coolidge v. Hager, 43 Vermont, 9.....5, 356
 Coombs v. Jordan, 3 Bland. Ch. 234.....xvii, 396
 Coombs v. New Bedford C. Co., 103 Mass. 573.....3, 306
 Coombs v. Parker, 17 Ohio, 389.....xlix, 459
 Coombs ada. State, 55 Maine, 477.....xvii, 610
 Coon v. Knap, 8 New York (4 Selden), 402.....lx, 503
 Coon v. Moffett, 3 Pennington, 683.....iv, 392
 Coon v. People, 69 Illinois, 363.....39, 28
 Cooney v. Hayes, 40 Vermont, 478.....xciv, 435
 Cooney v. Wade, 4 Humphreys, 444.....xi, 657
 Coons v. Benick, 11 Texas, 134.....lx, 230
 Cooper, Ex parte, 3 Texas Ct. App. 489.....36, 183
 Cooper's Estate, 4 Penn. State, 68.....xiv, 673
 Cooper v. Chambers, 4 Deversaux's Law, 361.....xv, 710
 Cooper ada. Commonwealth, 5 Allen, 486.....lxxxii, 763
 Cooper v. Cooper, 17 Michigan, 305.....xvii, 183
 Cooper v. F. M. F. Ins. Co., 50 Penn. St., 390.....lxxxviii, 544
 Cooper v. Kane, 19 Wendell, 386.....xxvii, 513
 Cooper v. Massachusetts L. Ins. Co., 103 Mass. 227. 3, 451
 Cooper v. Manpin, 6 Missouri, 634.....lxxxv, 456
 Cooper v. McChinnin, 33 Texas, 383.....7, 363
 Cooper v. McKenna, 134 Massachusetts, 294.....36, 667
 Cooper v. Mullins, 30 Georgia, 146.....lxvii, 638
 Cooper v. Pacific Mutual Ins. Co., 7 Nevada, 116. 8, 708
 Cooper v. Page, 24 Maine, 73.....xli, 571
 Cooper v. Pogue, 32 Pennsylvania State, 254.....37, 681
 Cooper v. Poston, 1 Duval, 92.....lxxxv, 610
 Cooper v. Sandford, 4 Yerges, 452.....lxvii, 339
 Cooper v. Singleton, 19 Texas, 260.....lxix, 333
 Cooper v. Smith, 9 Serg. & R. 36.....xi, 698
 Cooper v. State, 5 Texas Ct. App. 315.....33, 671
 Cooper v. State, 8 Bant. 334.....35, 704
 Cooper ada. State, 3 Overton, 96.....v, 656
 Cooper ada. State, 1 Green's Law, 351.....xv, 490
 Cooper ada. State, 3 Zabricka, 63.....ii, 248
 Cooper v. Sunderland, 3 Iowa, 114.....lxvi, 82
 Cooper v. Thompson, 30 Louisiana An. 123.....xvii, 362
 Cooper v. Tyler, 46 Illinois, 463.....xv, 443
 Cooper v. Wilcox, 3 Dev. & Bst. Eq. 90.....xxvii, 695
 Cooper v. Williams, 4 Ohio, 353.....xvii, 745
 Cooper v. Williams, 5 Ohio, 391.....xvii, 399
 Cooper v. Young, 22 Georgia, 369.....lxviii, 502
 Cooper and Boykin v. Berry, 21 Georgia, 626.....lxviii, 468
 Cooper's Appeal, 29 Penn. State, 9.....lxix, 149
 Oope v. District F. Am'n, 69 Illinois, 469.....39, 30
 Oope v. Smith, 8 Serg. & R. 110.....xi, 563
 Copeland v. Boss, 9 Bant. 223.....46, 89
 Copeland v. Touchstone, 16 Alabama, 333.....i, 181
 Copelin v. Phoenix Ins. Co., 46 Missouri, 311.....2, 504
 Copley v. Sanford's Ex'r, 2 Louisiana An. 535.....xvii, 548
 Coplin v. McCalley, 1 Leigh, 280.....xix, 748
 Copp v. Henniker, 55 New Hampshire, 179.....39, 194
 Coppage v. Alexander's Heirs, 2 B. Mon. 313.....lxxxviii, 153
 Copper v. Dolvin, 68 Iowa, 757.....56, 872
 Coppin v. Greenlee & R. Co., 38 Ohio St. 275.....43, 425
 Coquillard's Adm'r v. Beams, 21 Indiana, 479.....lxxxviii, 363
 Corbett v. Cochran, 3 Hill L. 41 (1 Riley L. 44).....xxx, 348
 Corbett v. Clark, 45 Wisconsin, 403.....36, 763
 Corbett v. Roobe, 2 Hill, 307.....lxvii, 387
 Corbett v. Underwood, 23 Illinois, 324.....35, 392
 Corbin v. American Mills, 37 Connecticut, 274.....lxvi, 63
 Corbin v. Jackson, 14 Wendell, 619.....lxviii, 550
 Corbin ada. People, 56 New York, 363.....15, 427
 Corbit v. Bank of Smyrna, 2 Harrington, 235.....xxx, 635
 Corbit v. Smith, 7 Iowa, 60.....lxvi, 431
 Corbitt v. Salem Gas-Light Co., 6 Oregon, 405.....25, 541
 Corbley v. Wilson, 71 Illinois, 309.....37, 98
 Corbleys v. Ripley, 23 West Virginia, 154.....46, 303
 Corcoran v. Holbrook, 69 New York, 517.....17, 389
 Corcoran v. White, 117 Illinois, 118.....57, 658
 Cordell v. New York C. etc. R. Co., 70 N. Y. 119-96, 550
 Cordes v. Miller, 39 Michigan, 381.....33, 439
 Corey v. Corey, 19 Pickering, 20.....lxxxii, 117
 Corey v. Perry, 67 Maine, 140.....34, 18
 Corey v. Ripley, 57 Maine, 69.....2, 19
 Corgan v. Frew, 39 Illinois, 31.....lxxxix, 208
 Coriell v. Ham, 4 G. Greene, 455.....lxii, 134
 Cork v. Bacon, 45 Wisconsin, 122.....36, 712
 Corlies v. Howe, 11 Gray, 135.....lxvi, 693
 Corlies, In re, 11 Rhode Island, 638.....33, 338
 Cornelius v. Burford, 26 Texas, 303.....xvi, 309
 Cornelius v. Wash. Bruce, 98.....xii, 145
 Cornier v. Bieuvau, 22 Louisiana An. 300.....2, 738
 Corn Ex. Bank v. Nassau Bank, 91 New York, 74-43, 658
 Corn Ex. Ins. Co. v. Babcock, 42 New York, 613. 1, 601
 Corning v. McOullough, 1 N. Y. (1 Comst.) 47.....lxix, 387
 Corning ada. People, 2 N. Y. (3 Comst.), 9.....xlix, 364
 Corning v. White, 3 Paige's Ch. 567.....xxii, 659
 Cornwall v. Isham, 1 Day, 35.....ii, 59
 Cornwall, State ex rel. v. Allen, 21 Ind. 516.....lxxxviii, 387
 Corp. of Albany ada. People, 11 Wendell, 639.....lxviii, 95
 Corporation of Knoxville v. Bird, 13 Lea, 121.....47, 324
 Corr v. Sellers, 100 Pennsylvania State 169.....45, 379
 Correll v. B. O. R. & M. E. R. Co. 38 Iowa, 120.....18, 23
 Corrigan Con. St. R'y Co. ada. State, 65 Mo. 263. 55, 361
 Corrigan v. Union Sugar Refinery, 98 Massachusetts, 577.....xvii, 689
 Corser v. Paul, 41 New Hampshire, 24.....lxxxvii, 753
 Corson's Appeal, 113 Pennsylvania State, 438.....57, 479
 Corson v. Hunt, 14 Penn. State, 510.....liii, 598
 Corson v. Mulvaney, 49 Penn. State, 68.....lxxxviii, 486
 Cortleyou v. Hathaway, 3 Stockton's Ch. 39.....lxiv, 478
 Cortleyou v. Van Brunt, 2 Johnson, 367.....lii, 439
 Corvallis v. Oadilla, 10 Oregon, 139.....45, 124
 Corwin v. Corwin, 6 N. Y. (3 Selden), 343.....lvii, 463
 Corwin v. Walton, 18 Missouri, 71.....lxix, 295
 Corwin v. Ward, 35 California, 126.....xv, 98
 Corwith v. State Bank, 11 Wisconsin, 430.....lxxxviii, 719
 Corwith v. State Bank, 18 Wisconsin, 540.....lxxxvi, 736
 Cory v. Boylston F. & M. Ins. Co., 107 Mass. 140. 9, 14
 Cory v. Carter, 45 Indiana, 327.....17, 738
 Cory v. Little, 6 New Hampshire, 213.....xv, 458
 Coryell v. Colbaugh, Coxe, 77.....i, 122
 Coryell v. Dunton, 7 Penn. State, 530.....lxix, 469
 Cosack v. Descondrea, 1 McCord, 435.....x, 681
 Cosby v. Ross' Adm'r, 3 J. J. Marshall, 290.....xx, 149
 Cosgrove v. N. Y. C. & H. R. R. Co., 67 N. Y. 93-41, 265
 Cosgrove v. Ogden, 49 New York, 265.....16, 361
 Costar v. Davies, 6 Arkansas, 213.....xvii, 311
 Coste ada. State, 36 Mo., 437.....lxxxviii, 149
 Costello v. Cave, 2 Hill, 523.....lxvii, 404
 Costello ada. Commonwealth, 131 Mass. 371.....33, 377
 Costello v. Crowell, 127 Massachusetts, 233.....34, 367
 Costigan v. Hawkins, 22 Wisconsin, 74.....lxv, 383
 Costigan v. Mohawk etc. R. R. Co., 3 Dunc., 609.....lxii, 736
 Cota v. Buck, 7 Metcalf, 588.....xli, 464
 Cothead v. Talmage, 9 New York (5 Selden), 551.....lxii, 716
 Cottage S. Church v. Kendall, 121 Mass. 528.....33, 399
 Cotten v. Willoughby, 83 North Carolina, 75.....35, 584
 Cottle v. Cottle, 6 Greenleaf, 140.....xix, 396
 Cottle v. Spitzer, 65 California, 486.....52, 366
 Cotton S. L. Ins. Co. v. Lester, 63 Georgia, 247.....35, 123
 Cotton v. Sharpstein, 14 Wisconsin, 236.....lxxx, 774
 Cotton v. Ulmer, 45 Alabama, 378.....6, 738
 Cottrell v. Varnum, 5 Alabama, 238.....lxxxix, 37

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures (49) to American Reports.

Cottrell v. Chicago, M. & St. P. Ry. Co., 47 Wis- consin, 634.....	32, 796	Cox v. Bailey, 9 Georgia, 467.....	lxv, 358
Cotthausen v. Judd, 43 Wisconsin, 213.....	36, 539	Cox v. Baird, 6 Halsted, 106.....	xix, 388
Couch v. City F. Ins. Co., 38 Connecticut, 181.....	9, 375	Cox v. Baltischover, 11 Missouri, 142.....	xlvii, 148
Couch v. Couch, 7 Alabama, 519.....	xlii, 602	Cox v. Boone, 8 West Virginia, 800.....	23, 627
Couch v. Eastham, 27 West Virginia, 798.....	55, 346	Cox v. Charleston F. & M. Ins. Co., 3 Rich. L. 331.....	xiv, 771
Couch v. Meeker, 2 Connecticut, 302.....	vii, 274	Cox v. Cox, 19 Ohio State, 502.....	9, 415
Coughlin v. Knowles, 7 Metcalf, 87.....	xxxix, 759	Cox v. Cox, 26 Penn. State, 373.....	lxvii, 432
Coughlin v. N. Y. C. & H. R. R. Co., 71 N. Y., 443.....	27, 75	Cox v. Davis, 17 Alabama, 714.....	lii, 199
Coughlin v. People, 18 Illinois, 208.....	lxviii, 541	Cox v. Haynes, 55 Vermont, 94.....	45, 569
Coughlin v. Ryan, 43 Missouri, 99.....	xvii, 375	Cox v. Ellsworth, 18 Nebraska, 604.....	53, 527
Coughtry v. Globe Woolen Co., 58 N. Y. 124.....	15, 387	Cox v. Foscoe, 37 Alabama, 505.....	lxix, 69
Coulter v. Robertson, 24 Mississippi, 278.....	lvii, 169	Cox v. Freedley, 33 Penn. State, 134.....	lxv, 584
Council ada. State, 9 Vroom, 430.....	30, 404	Cox v. Jagger, 3 Cowen, 638.....	xiv, 622
Council Bluffs v. Kansas ex. R. R. Co., 45 Ia. 239.....	24, 773	Cox v. Kealey, 38 Alabama, 340.....	lxvii, 328
Count Joannes v. Bennett, 5 Allen, 169.....	lxix, 738	Cox v. Livingston, 2 Watts & Serg. 108.....	xxxvii, 486
Count Joannes v. Burt, 6 Allen, 236.....	lxix, 635	Cox v. Marietta, 36 New Jersey, 369.....	13, 454
Co. Com. of Anne A. Co. v. Duckett, 20 Md. 488.....	lxix, 557	Cox v. Nelson, 1 T. R. Monroe, 94.....	xv, 88
County Comm'rs v. Duvall, 64 Maryland, 350.....	39, 363	Cox v. O'Reilly, 4 Indiana, 588.....	lviii, 628
County Comm'rs v. Hamilton, 60 Maryland, 340.....	45, 738	Cox v. Peterson, 30 Alabama, 608.....	lxviii, 148
County Comm'rs of Prince George's Co. v. Bur- gess, 61 Maryland, 29.....	48, 88	Cox v. Skeen, 2 Iredell's Law, 220.....	xxxviii, 601
County Comm'r's ada. State, 4 Nebraska, 537.....	19, 641	Cox v. Smith, 1 Nevada, 161.....	xc, 478
County Court of Boone Co. ada. State, 50 Mo. 317.....	11, 415	Cox v. State, 8 Tex. Ct. App. 264.....	34, 746
County Court ada. State, 51 Missouri, 350.....	11, 454	Cox v. State, 64 Georgia, 374.....	37, 79
County of Alleghany v. C. & P. R. R. Co., 51 Penn. State, 228.....	lxviii, 579	Cox v. Strode, 2 Bibb, 273.....	v, 602
County of St. Charles v. Powell, 23 Mo. 528.....	lxvi, 637	Cox v. Sullivan, 7 Georgia, 144.....	1, 206
County of Wapello v. Bigham, 10 Iowa, 38.....	lxix, 370	Cox v. Walls, 7 Blackford, 410.....	xliii, 28
Coup v. Wabash, St. L. & P. Ry. Co., 55 Mich. 111.....	54, 374	Coxe v. Blanden, 1 Watts, 533.....	lxvi, 83
Course v. Prince, 1 Mill, 416.....	xli, 649	Coxe v. Gibson, 27 Penn. State, 168.....	lxvii, 454
Coursey v. Davis, 46 Penn. State, 25.....	lxix, 519	Coxe v. Post, 1 Watts, 533.....	lxvi, 83
Courts v. Cane, 33 Vermont, 232.....	lxix, 174	Coxe v. State Bank, 3 Halsted, 172.....	xiv, 417
Couse v. Boyles, 3 Green's Ch., 212.....	xxxviii, 514	Coy v. City Council of Lyons, 17 Iowa, 1.....	lxix, 639
Court of C. P. ada. State, 36 New Jersey, 72.....	13, 423	Coye v. Leach, 8 Metcalf, 271.....	xli, 518
Court of O. & T. ada. People, 101 New York, 245.....	54, 681	Coyle v. Commonwealth, 100 Pennsylvania St. 573.....	45, 307
Cousins v. State, 50 Alabama, 113.....	30, 230	Coxsens v. Farnan, 30 Ohio State, 491.....	37, 679
Coutts v. Greenhow, 2 Munford, 363.....	v, 472	Crabtree v. Baker, 75 Alabama, 81.....	51, 424
Covell v. Loud, 135 Massachusetts, 41.....	44, 446	Crabtree v. Hagenbaugh, 23 Illinois, 349.....	lxvi, 694
Cover v. Davenport, 1 Heisk. 368.....	2, 706	Crabtree v. Hagenbaugh, 25 Illinois, 332.....	lxix, 294
Covert v. Rogers, 38 Michigan, 263.....	31, 319	Cradlebaugh v. Pritchett, 8 Ohio State, 646.....	lxvi, 616
Covington S. Ry. Co. v. Packer, 9 Bush, 455.....	15, 726	Craft v. Bloom, 59 Mississippi, 69.....	42, 251
Covington ada. State, 94 North Carolina, 913.....	55, 680	Craft v. Commonwealth, 81 Kentucky, 350.....	50, 189
Covenhoven v. Hart, 21 Penn. State, 436.....	lx, 57	Craft v. McCounghey, 79 Illinois, 246.....	32, 171
Coveney v. Tannahill, 1 Hill (N. Y.), 33.....	xxxvii, 287	Craft v. Snook, 2 Beasley, 121.....	lxviii, 94
Covenhoven v. Shuler, 3 Paige's Ch., 122.....	xxi, 73	Crafts v. Dexter, 8 Alabama, 767.....	xlii, 606
Coveny v. Barton, 17 Johnson, 142.....	viii, 378	Crafts v. Silas, 4 Gray, 194.....	lxiv, 63
Cowen v. Adams, 10 Maine, 374.....	xxv, 242	Craig v. Hadley, 99 New York, 131.....	52, 9
Cowan v. Buyers, Cooke, 53.....	v, 668	Craig v. Oragin, 66 Maine, 517.....	33, 368
Cowan v. Campbell's Adm'r, 17 R. Monroe, 522.....	lxvi, 184	Craig v. N. Y. C. & H. R. Co., 51 New York, 61.....	10, 599
Cowan v. Iowa S. Ins. Co., 40 Iowa, 551.....	30, 583	Craig v. Fowler, 34 Vermont, 238.....	lxix, 639
Cowan v. Price, 1 Bibb, 173.....	iv, 637	Craig v. Childress, 1 Peck, 270.....	xiv, 761
Cowan v. Wheeler, 25 Maine, 267.....	xliii, 263	Craig v. Cox, 2 Bibb, 309.....	v, 608
Coward v. East Tenn. & G. R. R. Co., 16 Lea, 235.....	57, 227	Craig v. Craig, 3 Rawle, 473.....	lxiv, 269
Cowden v. Wright, 24 Wendell, 429.....	xxxv, 633	Craig v. Dale, 1 Watts & Serg. 508.....	xxxvii, 477
Cowdrey, In re, 69 California, 32.....	58, 545	Craig v. Durrett, 1 J. J. Marshall, 266.....	xix, 103
Cowdrey v. Cuth, 44 New York, 382.....	4, 690	Craig v. First Pres. Church, 88 Penn. St. 42.....	32, 417
Cowee v. Cornell, 75 New York, 21.....	31, 428	Craig v. Godfrey, 1 California, 415.....	lxv, 208
Cowell v. Thayer, 5 Metcalf, 253.....	xxxviii, 400	Craig v. Henderson, 2 Penn. State, 321.....	xliv, 129
Cowell v. Lumley, 39 California, 131.....	2, 430	Craig v. Kline, 65 Penn. St. 299.....	3, 604
Coweta Falls Mfg. Co. v. Rogers, 19 Georgia, 416.....	lxv, 602	Craig v. Lelper, 2 Yerger, 193.....	lxiv, 479
Cowing v. Alkman, 71 N. Y. 435.....	27, 70	Craig v. Martin, 3 J. J. Marshall, 60.....	xix, 197
Cowles v. Bacon, 21 Connecticut, 451.....	lvi, 371	Craig v. Parks, 40 New York, 121.....	4, 469
Cowles v. Kiddle, 24 New Hampshire, 364.....	lvii, 287	Craig v. United Ins. Co., 6 Johnson, 226.....	v, 223
Cowles v. Richmond & D. R. Co., 84 N. C. 209.....	37, 620	Craig v. Warner, 5 Mack, 460.....	40, 281
Cowles v. Whitman, 10 Connecticut, 121.....	xxv, 60	Craig v. Zimmerman, 87 Missouri, 478.....	54, 466
Cowley v. People, 83 New York, 464.....	38, 464	Craig ada. State, 59 North Carolina, 475.....	45, 628
Cowley v. Pulsifer, 137 Massachusetts, 368.....	50, 318	Craighead v. Peterson, 73 New York, 279.....	26, 129
Cowley v. Smyth, 45 New Jersey Law, 390.....	50, 432	Craighead v. Wells, 8 Barr, 28.....	25, 608
Cowls v. Cowls, 3 Gilman, 435.....	xliv, 708	Crain v. McGoon, 68 Illinois, 431.....	29, 27
		Crain v. Paine, 4 Osmberg, 423.....	1, 897
		Crain v. Petrie, 6 Hill (N. Y.) 622.....	xli, 708
		Cran v. Allen, 13 Maine, 239.....	lxix, 208

Roman letters [xliz] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Cram v. Burnham, 5 Greenleaf, 213.....xvii, 318
 Cramer v. Lepper, 26 Ohio State, 89.....29, 754
 Cramer v. Baford, 17 N. J. Eq. 367.....x, 594
 Crandall v. Bacon, 30 Wisconsin, 639.....xvi, 451
 Crandall v. Lincoln, 32 Connecticut, 73.....52, 560
 Crane v. Conklin, 1 Saxton Ch. 346.....xii, 519
 Crane v. Dwyer, 9 Michigan, 350.....lxix, 57
 Crane v. March, 4 Pickering, 181.....xvi, 329
 Crane v. Marshall, 16 Maine, 27.....xxvii, 631
 Crane v. Maginnis, 1 Gil & J. 463.....xix, 237
 Crane v. Newell, 2 Pickering, 618.....xiii, 461
 Crane v. Reeder, 21 Michigan, 24.....4, 430
 Crane v. Reeder, 28 Michigan, 337.....15, 323
 Crane v. Thayer, 18 Vermont, 163.....xvi, 143
 Crane v. Waggoner, 17 Indiana, 32.....lxix, 473
 Crank ada. State, 2 Bailey, 66.....xxiii, 117
 Cranson v. Cranson, 4 Michigan, 230.....lxvi, 534
 Cranson v. Goss, 107 Massachusetts, 490.....9, 45
 Cranson v. Smith, 37 Michigan, 308.....29, 514
 Cranstone v. Crane, 97 Massachusetts, 459.....xviii, 106
 Cranwell v. Ship Fudick, 15 Louisiana An. 436.....lxvii, 190
 Cranz v. White, 27 Kansas, 319.....41, 408
 Crapo ada. People, 76 New York, 268.....33, 303
 Crary v. Goodman, 12 N. Y. (2 Kernan), 296.....lxiv, 506
 Cray v. Sprague, 12 Wendell, 41.....xxvii, 110
 Crater v. Binniger, 33 New Jersey L. 813.....xviii, 737
 Cratty v. Bangor, 57 Maine, 423.....2, 56
 Craufurd v. Blackburn, 17 Maryland, 49.....lxvii, 283
 Cravens v. Booth, 8 Texas, 243.....lviii, 112
 Crawl v. Village of Tolono, 96 Illinois, 258.....34, 143
 Crawford's Appeal, 61 Penn. State, 52.....c, 609
 Crawford v. Br. E'k of Mobile, 6 Alabama, 12.....xli, 33
 Crawford v. Clute, 7 Alabama, 157.....xli, 92
 Crawford v. Foster, 6 Georgia, 202.....1, 367
 Crawford v. Kirksey, 55 Alabama, 283.....28, 704
 Crawford v. Scovell, 34 Penn. St. 48.....39, 766
 Crawford v. Southern E. R. Am'n, 51 Mass. 222.....24, 636
 Crawford v. Slade, 9 Alabama, 387.....xlv, 453
 Crawford v. State, 15 Lea, 343.....54, 423
 Crawford v. State, 2 Yerger, 60.....xxiv, 467
 Crawford ada. State, 26 Kansas, 796.....42, 182
 Crawford v. Taylor, 6 Gil & Johnson, 323.....xvi, 579
 Crawford v. Thompson, 91 Indiana, 266.....46, 598
 Crawford v. West Side Bank, 100 New York, 80.....53, 163
 Crawford v. Wick, 18 Ohio State, 190.....xviii, 103
 Crawford v. Williams, 1 Sneed, 205.....lx, 146
 Crawfordville v. Smith, 79 Indiana, 306.....41, 612
 Craycroft ada. People, 2 California, 243.....lv, 531
 Creager v. Brungle, 5 Harris & J. 234.....lx, 516
 Cream City E. R. Co. v. Chicago, M. & St. P. E'y Co., 63 Wisconsin, 93.....53, 267
 Creamer v. Perry, 17 Pickering, 332.....xxvii, 577
 Creamer & Graham v. Shannon, 17 Georgia, 65.....lxiii, 236
 Crease v. Babcock, 23 Pickering, 334.....xxiv, 61
 Creed v. Hartmann, 29 New York, 591.....lxixvi, 341
 Creed v. Penn. R. Co., 86 Penn. St. 139.....27, 693
 Creery v. Cummings, 3 Louisiana An. 163.....xlviii, 444
 Cregler, In Matter of Infant, 1 Barb. Ch. 596.....xiv, 416
 Cregin v. Brooklyn C. R. Co., 75 New York, 122.....31, 459
 Cregin v. Brooklyn C. R. Co., 83 New York, 896.....38, 474
 Crehore v. Crehore, 97 Massachusetts, 330.....xviii, 96
 Creight ada. State, 1 Brevard, 199.....11, 656
 Crenshaw v. Carpenter, 69 Alabama, 572.....44, 539
 Crenshaw v. Davenport, 6 Alabama, 360.....xii, 56
 Crenshaw v. Jackson, 6 Georgia, 509.....1, 361
 Crenshaw v. State, 1 Martin & Yerg. 122.....xvii, 788
 Crescent v. Anderson, 114 Pennsylvania St. 643.....40, 367
 Crestinger v. Welch, 15 Ohio, 156.....xiv, 665
 Creasey v. Northern E. Co., 59 New Hamp. 564.....47, 227
 Creasey v. Parks, 76 Maine, 267.....44, 406
 Cressman's Appeal, 42 Pennsylvania St. 147.....lxixvi, 496
 Cresson v. Stout, 17 Johnson, 116.....viii, 373
 Crest v. Jack, 3 Watts, 238.....xxvii, 263
 Creveling v. Bloomsbury Nat. E'y, 46 New Jersey Law, 268.....54, 417
 Crews v. Bleakley, 16 Illinois, 21.....lx, 323
 Crews v. Pendleton, 1 Leigh, 297.....xix, 750
 Crews v. Williams, 2 Bibb, 263.....iv, 701
 Critbb v. Rogers, 13 South Carolina, 564.....32, 511
 Crittben v. Maxwell, 34 Kansas, 8.....53, 233
 Crittben v. Markwood, 13 Grattan, 496.....lxvii, 775
 Crim v. Starkweather, 88 New York, 339.....42, 250
 Crippen v. Chappel, 35 Kansas, 496.....57, 187
 Crisfield v. Storr, 36 Maryland, 129.....11, 480
 Crisler v. Garland, 11 Smedes & M. 138.....lxix, 49
 Crisman v. Matthews, 1 Scammon, 148.....xvi, 417
 Crispin v. Babbitt, 31 New York, 816.....37, 521
 Crist v. Crist, 1 Indiana, 570.....1, 481
 Critcher v. Walker, 1 Murphy, 468.....iv, 573
 Critchfield v. Humbert, 39 Penn. State, 427.....lxix, 876
 Critchett v. American Ins. Co., 53 Iowa, 404.....36, 239
 Crittenden v. Lingie, 14 Ohio State, 153.....lxixiv, 376
 Crittenden v. White, 23 Minnesota, 24.....23, 676
 Crittenden v. Wilson, 5 Cowen, 165.....xv, 462
 Crittenden v. Fiska, 46 Michigan, 70.....41, 146
 Crittenden v. Schermerhorn, 39 Michigan, 661.....33, 46
 Crocker v. Chicago & N. W. E'y Co., 36 Wis. 687.....17, 504
 Crocker v. Bellangee, 6 Wisconsin, 648.....lxix, 469
 Crocker v. Crane, 21 Wendell, 211.....xxiv, 226
 Crocker v. Crocker, 31 New York, 507.....lxixviii, 222
 Crocker v. Gullifer, 44 Maine, 491.....lxix, 118
 Crocker v. Hill, 61 New Hampshire, 345.....40, 323
 Crocker v. McGregor, 76 Maine, 282.....49, 611
 Crocker v. Mann, 3 Missouri, 472.....xvi, 666
 Crocker v. Marine Nat. Bank, 101 Mass. 240.....2, 390
 Crocker v. Monroe, 18 Louisiana, 553.....lxixv, 666
 Crocker v. Spencer, 2 D. Chipman, 68.....xv, 662
 Crockett v. Dodge, 12 Maine, 190.....xxviii, 179
 Crockett v. Lashbrook, 5 T. R. Monroe, 531.....xvii, 96
 Crockett v. State, 22 Wisconsin, 211.....38, 733
 Crofut v. Brandt, 58 New York, 106.....17, 213
 Croff v. Ballinger, 18 Illinois, 200.....lxv, 726
 Crogan v. Shiele, 53 Connecticut, 196.....53, 26
 Cromarty v. Boston, 127 Massachusetts, 395.....34, 261
 Cromer v. Platt, 37 Michigan, 132.....26, 360
 Crommelin v. Coxz, 30 Alabama, 313.....lxviii, 139
 Crommelin v. Thiesz, 31 Alabama, 412.....lxix, 499
 Cromwell v. Brooklyn Fire Ins. Co., 44 N. Y. 42.....4, 641
 Cromwell v. Clay, 1 Dana, 578.....lxix, 166
 Cromwell v. Hewitt, 40 New York, 661.....c, 592
 Cromwell v. Royal Can. Ins. Co., 49 Md. 366.....33, 266
 Cromwell v. Tate's E'r, 7 Leigh, 301.....xix, 596
 Cronan v. Otting, 104 Massachusetts, 265.....6, 233
 Cronin v. People, 23 New York, 318.....37, 594
 Cronister v. Weiss, 8 Watts, 215.....xxiv, 421
 Cronkhite v. Nebeker, 51 Indiana, 319.....42, 127
 Cronly v. Hall, 67 North Carolina, 9.....12, 587
 Crooker v. Bragg, 10 Wendell, 260.....xv, 556
 Crooker v. Crooker, 82 Maine, 267.....lxixviii, 509
 Crooker v. Holmes, 65 Maine, 156.....29, 687
 Crookshank v. Burrell, 18 Johnson, 96.....lx, 187
 Crosby v. Burger, 11 Paige, 377.....xiii, 117
 Crosby v. Boney, 49 Maine, 539.....lxvii, 271
 Crosby v. Fitch, 12 Connecticut, 410.....xxxi, 745
 Crosby v. Harlow, 21 Maine, 499.....lxixviii, 276
 Crosby v. Ross' Adm'rs, 3 J. J. Marshall, 260.....xx, 149
 Crosby v. Roub, 16 Wisconsin, 616.....lxixiv, 726
 Crosby v. Taylor, 15 Gray, 64.....lxixv, 399
 Cross v. Carson, 8 Blackford, 138.....xlv, 746
 Cross v. Cross, 3 Paige's Ch. 138.....xxvii, 779

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures (49) to American Reports.

Cross v. Guthery, 2 Root, 90.....	61	Cumberland Mnt. F. Ins. Co. v. Giffman, 48 N. J. L. 495.....	57, 598
Cross v. Kitts, 69 California, 217.....	58, 558	Cumberland Valley M. P. Co. v. Douglas, 58 Iowa State, 419.....	xviii, 298
Cross v. O'Donnell, 44 New York, 661.....	4, 721	Cumberl. Val. R. R. Co. v. Baah, 9 Watts, 458.....	xxvi, 138
Cross v. Kansas, 90 Missouri, 13.....	59, 1	Cumberl. Val. R. R. Co. v. Hughes, 11 Penn. St. 141, 11, 513	
Cross v. Marston, 17 Vermont, 533.....	xlv, 353	Cumberland Valley R. R. Co. v. Mangana, 61 Maryland, 53.....	48, 82
Cross v. McFadden, 17 Michigan, 511.....	2, 3	Cumins v. Wood, 44 Illinois, 416.....	xcd, 189
Cross v. People, 47 Illinois, 182.....	xv, 474	Cummer v. Butts, 40 Michigan, 322.....	29, 536
Cross v. Peters, 1 Greenleaf, 376.....	x, 78	Cummings' Appeal, 25 Penn. State, 268.....	lxiv, 696
Cross v. Shultze, 2 Bay, 220.....	1, 645	Cumming v. Cumming, 138 Massachusetts, 386.....	44, 476
Cross ada. State, 13 Iowa, 66.....	lxix, 519	Cummings v. Arnold, 3 Metcalf, 48.....	xxvii, 158
Crossen v. Hutchinson, 9 Massachusetts, 205.....	vi, 55	Cummings v. Coleman, 7 Richardson's Eq. 509.....	lxii, 402
Crossen v. White, 19 Iowa, 109.....	lxxvii, 420	Cummings ada. Commonw., 3 Cushing, 312.....	1, 733
Crosley v. O'Brien, 24 Indiana, 325.....	lxxvii, 329	Cummings v. Dudley, 60 California, 383.....	44, 58
Croswaigh v. Hutchinson, 2 Bibb, 407.....	v, 610	Cummings v. Friedman, 65 Wisconsin, 183.....	54, 628
Crothwaite v. Ross, 1 Humphreys, 23.....	xxiv, 613	Cummings v. Harris, 3 Vermont, 244.....	xxiii, 206
Crosswell v. Lehman, 54 Alabama, 363.....	35, 684	Cummings v. Kent, 44 Ohio St. 92.....	58, 796
Crosswell ada. People, 13 Michigan, 427.....	lxxvii, 774	Cummings v. Lebo, 3 Rawls, 23.....	xix, 615
Croteau ada. State, 23 Vermont, 14.....	liv, 90	Cummings v. Long, 16 Iowa, 41.....	lxxv, 503
Crotty ada. Commonwealth, 10 Allen, 403.....	lxxvii, 669	Cummings v. Nichols, 13 New Hamp. 420.....	xxviii, 501
Crouch v. Briles, 7 J. J. Marshall, 285.....	xxiii, 404	Cummings v. Plummer, 94 Indiana, 403.....	48, 167
Crouch v. Carrier, 16 Connecticut, 505.....	xii, 156	Cummings v. Smith, 50 Maine, 568.....	lxxix, 629
Crouch v. Fowle, 9 New Hampshire, 219.....	xxviii, 501	Cummins v. Agricultural Ins. Co., 67 N. Y. 280.....	23, 111
Crouch v. Puryear, 1 Randolph, 258.....	x, 528	Cummins v. Crawford, 88 Illinois, 312.....	39, 558
Crouse v. Derbyshire, 10 Michigan, 479.....	lxxvii, 51	Cummins v. Griggs, 2 Duval, 87.....	lxxvii, 432
Croussat v. Ball, 3 Yeates, 375 (S. C., 4 Dallas, 294), 11, 375		Cummins v. Heald, 24 Kansas, 600.....	36, 264
Crowe v. Wilson, 65 Maryland, 479.....	57, 343	Cummins v. Kennedy, 3 Littell, 118.....	xiv, 45
Crowell v. Beebe, 10 Vermont, 33.....	xxviii, 172	Cummins v. Scott, 6 Watts, 519.....	xxxi, 493
Crowell v. Maugh, 3 Gilman, 419.....	xlili, 63	Cummins v. Seymour, 79 Indiana, 491.....	41, 618
Crowley ada. State, 41 Wisconsin, 271.....	27, 719	Cummock v. Newburyport Sav. Inst., 143 Massachusetts, 342.....	54, 679
Crowner v. Crowner, 44 Michigan, 180.....	38, 245	Cumpston v. Lambert, 18 Ohio, 81.....	li, 443
Croyle v. Moses, 90 Penn. St. 250.....	35, 654	Cuncle v. Dripps, 3 Penrose & Watts, 391.....	xxiii, 84
Crozier v. Kihler, 4 Texas, 252.....	li, 724	Cunningham v. Ashley, 16 Arkansas, 181.....	lxiii, 62
Crozier's Appeal, 90 Penn. St. 384.....	35, 636	Cunningham v. Brown, 18 Vermont, 123.....	lxvi, 141
Cruge v. Armstrong, 3 Johnson's Cases, 8.....	li, 126	Cunningham v. Bucklin, 8 Cowen, 178.....	xviii, 439
Cruge ada. People, 102 New York, 510.....	55, 830	Cunningham v. Butler, 142 Massachusetts, 47.....	54, 667
Crum v. Moore, 1 McMaster, 436.....	lxxvii, 282	Cunningham v. Cochran, 18 Alabama, 479.....	liii, 230
Crum v. State, 64 Mississippi, 1.....	66, 44	Cunningham v. Cunningham, 19 B. Monroe, 19, lxviii, 718	
Crump v. Black, 6 Iredell's Equity, 321.....	li, 422	Cunningham v. Evansville & T. H. R. R. Co., 102 Indiana, 478.....	52, 683
Crump v. Morgan, 3 Iredell's Equity, 91.....	xi, 447	Cunningham v. Hawkins, 24 California, 403.....	lxxv, 73
Crump v. United States M. Co., 7 Grattan, 382.....	lvi, 116	Cunningham v. International R. Co., 51 Tex. 503, 32, 633	
Crumpton v. Newman, 12 Alabama, 198.....	xlv, 251	Cunningham v. Irwin, 7 Serg. & R. 247.....	x, 458
Cruse v. McKee, 2 Head, 1.....	lxxvii, 186	Cunningham v. Moore, 55 Texas, 373.....	49, 812
Cruselle v. Pugh, 67 Georgia, 430.....	44, 724	Cunningham v. Morrell, 10 Johnson, 203.....	vi, 332
Crutcher v. Ryan, 2 Bush, 228.....	xci, 481	Cunningham v. Morris, 19 Georgia, 583.....	lxv, 611
Crutchfield v. Donathon, 49 Texas, 691.....	39, 112	Cunningham v. Nat. Bank, 71 Georgia, 400.....	51, 266
Crutchfield v. Robins, 5 Humphreys, 15.....	xlii, 417	Cunningham ada. People, 1 Denio, 524.....	xlili, 709
Cuculla v. La. Ins. Co., 5 Martin, N. E., 464.....	xvi, 199	Cunningham v. Pitzer, 2 West Virginia, 264.....	xclv, 526
Cudworth v. B. Car. Ins. Co., 4 Rich. Law, 416.....	lv, 693	Cunningham v. Beardon, 98 Massachusetts, 538.....	xvii, 670
Cudworth v. Hall, 3 Denmansure, 256.....	iv, 617	Cunningham v. Smith, 10 Grattan, 255.....	lx, 333
Cuddy v. Horn, 46 Michigan, 596.....	41, 178	Cunningham v. Squires, 2 West Virginia, 422.....	xviii, 770
Cuff v. Newark etc. R. R. Co., 35 N. J. 17.....	19, 208	Cunningham v. State, 56 Mississippi, 269.....	21, 360
Culbertson v. Cox, 29 Minnesota, 309.....	43, 204	Cupps v. Irvin, 2 Blackford, 112.....	xviii, 136
Culbertson v. Milbollar, 23 Indiana, 363.....	lxxv, 428	Curan v. Colbert, 3 Georgia, 239.....	xlvi, 427
Culbertson v. Smith, 53 Maryland, 628.....	36, 284	Curd v. Wallace, 7 Dana, 190.....	xxiii, 85
Culbreath v. Culbreath, 7 Georgia, 64.....	1, 378	Curell v. Mm. etc. Ins. Co., 9 Louisiana, 163.....	xxix, 439
Cullen v. Carthage, 103 Indiana, 195.....	53, 604	Cureton v. Doby, 10 Richardson's Eq. 411.....	lxviii, 96
Cullen ada. Commonw., 13 Penn. State, 153.....	liii, 480	Cureton v. Massey, 13 Richardson's Eq. 104.....	xclv, 151
Cullen v. Motzer, 13 Serg. & R. 356.....	xv, 604	Cureton v. Mills, 13 South Carolina, 409.....	34, 706
Culley v. Edwards, 44 Arkansas, 423.....	51, 614	Curi v. Watson, 25 Iowa, 38.....	xv, 783
Cullum v. Branch Bank, 4 Alabama, 21.....	xxvii, 728	Curle's Heirs and Adm'r v. Eddy, 24 Mo. 117.....	lxvi, 699
Cullum v. Casey, 9 Porter, 131.....	xxviii, 304	Curley v. Dean, 4 Connecticut, 259.....	x, 140
Cullum v. Emanuel, 1 Alabama, 23.....	xxiv, 757	Curling v. Curling, 8 Dana, 38.....	xxviii, 475
Culp v. State, 1 Porter, 83.....	xxvi, 257	Curran v. Merchants' Manuf. Co., 150 Mass. 374, 38, 427	
Culpeper Mfg. Soc. v. Digges, 6 Randolph, 165.....	xviii, 708	Curran v. Witter, 68 Wisconsin, 16.....	60, 827
Culver v. Avery, 7 Wendell, 380.....	xxii, 586	Currell v. Johnson, 12 Louisiana, 380.....	xxvii, 117
Culver v. Hill, 68 Alabama, 66.....	44, 134		
Culver ada. State, 65 Missouri, 607.....	27, 296		
Culver v. Wilbern, 49 Iowa, 26.....	34, 381		
Cumberland v. Codrington, 3 Johns. Ch. 229.....	viii, 493		
Cumberland v. Fennell, 69 Maine, 287.....	31, 284		

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [40] to American Reports.

Currie v. Mut. Ass'n Society, 4 Hen. & M. 315.....iv, 517	Daggett v. Robins, 2 Blackford, 418.....xxi, 753
Currie v. Stewart, 27 Mississippi, 63.....lxii, 500	Daggett v. Shaw, 3 Missouri, 264.....xxv, 430
Currier v. Continental L. I. Co., 57 Va. 498.....52, 134	Daggett v. State, 4 Connecticut, 60.....x, 100
Currier v. Currier, 2 New Hampshire, 75.....ix, 43	Dahlill v. Booker, 140 Massachusetts, 308.....54, 465
Currier v. Gale, 14 Gray, 504.....lxvii, 343	Dahlberg v. Minneapolis St. Ry. Co., 32 Minn. 401.50, 585
Currier v. Lockwood, 40 Connecticut, 342.....16, 40	Dalley v. Coker, 33 Texas, 615.....7, 279
Currier v. Sutherland, 54 New Hampshire, 476.....30, 143	Daily v. New York and New Haven Railroad Company, 23 Connecticut, 356.....lxixvii, 176
Curry v. Commonwealth Ins. Co., 10 Pick. 635.....xx, 547	Dain v. Cowing, 22 Maine, 347.....xxix, 585
Curry v. Fowler, 87 New York, 53.....41, 343	Dain v. Wyckoff, 18 New York, 45.....lxvii, 433
Curry v. Lacer, 7 Penn. State, 470.....xliz, 498	Daingerfield v. Thompson, 33 Gratt. 136.....36, 783
Curry v. Powers, 70 New York, 212.....38, 577	Dakin v. Dunning, 7 Hill, 30.....xlii, 33
Curry v. Savannah, 64 Georgia, 290.....37, 74	Dale v. Gear, 38 Connecticut, 15.....9, 353
Curry v. Spencer, 61 New Hampshire, 634.....60, 337	Dale v. Knapp, 96 Pennsylvania State, 328.....42, 624
Currer v. Merrill, 14 Minnesota, 1.....35, 450	Dale v. Robinson, 51 Vermont, 20.....31, 608
Curtis v. Aaronson, 49 New Jersey Law, 68.....60, 584	Dale v. Smith, 1 Delaware Ch. 1.....xli, 64
Curtis v. Aspinwall, 114 Massachusetts, 127.....19, 335	Daley v. Norwich & W. R.R. Co., 26 Conn. 691. lxviii, 413
Curtis v. Bemis, 26 Connecticut, 1.....lxviii, 377	Daley ada. State, 53 Vermont, 442.....38, 694
Curtis v. Blah, 26 Mississippi, 309.....lix, 257	Dall v. Confidence Silver M. Co., 3 Nevada, 531.xviii, 419
Curtis v. Curtis, 40 Maine, 34.....lxiii, 651	Dallas v. Sellers, 17 Indiana, 479.....lxix, 465
Curtis v. Delaware, L. & W. R. Co., 74 N. Y. 116.30, 271	Dallas & W. Ry Co. v. Spicker, 61 Texas, 427....48, 297
Curtis v. Groat, 6 Johnson, 163.....v, 204	Dalrymple v. Hillenbrand, 63 New York, 5.....30, 438
Curtis v. Harlick, 14 California, 117.....lxviii, 632	Dalrymple v. Williams, 63 New York, 301.....30, 544
Curtis v. Hubbard, 4 Hill (N. Y.) 437.....xl, 282	Dalton, Ex parte, 44 Ohio State, 142.....56, 309
Curtis v. Lyman, 24 Vermont, 233.....lxviii, 174	Daly v. Butchers, & D. Bank, 56 Missouri, 94.....17, 603
Curtis v. Millard & Co., 14 Iowa, 123.....lxvii, 460	Daly v. Matland, 66 Penn. St. 394.....32, 497
Curtis v. Murphy, 63 Wisconsin, 4.....53, 242	Damainville v. Mann, 32 New York, 197.....lxviii, 324
Curtis v. O'Brien, 30 Iowa, 376.....lxix, 543	Dame v. Dame, 38 New Hampshire, 429.....lxv, 195
Curtis ada. People, 50 New York, 331.....10, 483	Dame ada. State, 11 New Hampshire, 271.....lxix, 465
Curtis v. Portland S. Bank, 77 Maine, 151.....53, 780	Dame ada. State, 60 New Hampshire, 479.....49, 331
Curtis v. Rochester & S. R. R. Co., 18 N. Y. 534.lxiv, 258	Damon v. Beche, 58 Pennsylvania State, 67.....xviii, 730
Curtis v. State, 22 Tex. Ct. App. 237.....58, 636	Damon v. Osborn, 1 Pickering, 476.....xi, 329
Curtis v. State Bank, 6 Blackford, 313.....lxviii, 143	Damon v. Scituate, 119 Massachusetts, 68.....30, 315
Curtis ada. State, 35 Connecticut, 374.....xov, 263	Damont v. N. O. & C. R. R. Co., 9 La. An. 441.....lxii, 214
Curtis v. Woodward, 58 Wisconsin, 499.....46, 647	Dan v. Brown, 4 Cowen, 463.....xv, 305
Curtis v. Whipple, 58 Wisconsin, 390.....1, 187	Dana v. Coombs, 6 Greenleaf, 68.....xix, 194
Curtiss v. Hoyt, 19 Connecticut, 154.....xlvi, 149	Dana v. Fiedler, 12 N. Y. (2 Kernan) 40.....lxii, 130
Curtiss v. Strong, 4 Day, 51.....iv, 179	Dana v. Gill, 5 J. J. Marshall, 242.....xx, 265
Cusack v. White, 2 Hill, 379.....xii, 669	Dana v. Jackson St. Wharf Co., 51 Cal. 112.....lxix, 184
Cushing v. Boston, 128 Mass. 330.....35, 383	Dana v. Merrill, 6 Cushing, 282.....li, 703
Cushing v. Breed, 14 Allen, 376.....xvii, 777	Dana v. Roberts, 1 Root, 134.....1, 36
Cushing ada. Commonw., 11 Massachusetts, 67.....vi, 156	Dana v. Sawyer, 22 Maine, 244.....lxix, 574
Cushing v. Field, 70 Maine, 50.....35, 293	Dana v. Third N. B., 13 Allen, 445.....32, 226
Cushing v. Hurd, 4 Pickering, 253.....xvi, 335	Danbury v. Robinson, 1 McMaster, 212.....lxviii, 244
Cushing v. Rice, 46 Maine, 303.....lxvii, 679	Dancy v. Stricklands, 15 Texas, 537.....lxv, 179
Cushman v. Blanchard, 2 Greenleaf, 388.....xi, 76	Dandridge v. Harris, 1 Washington, 232.....i, 405
Cushman v. Glover, 1 Illinois, 600.....lii, 461	Dane v. Corduan, 24 California, 157.....lxixv, 83
Cushman v. Thayer Man. Jewelry Co., 76 New York, 365.....32, 315	Dane v. Derby, 64 Maine, 96.....lxix, 728
Cusulo v. Douglas, 3 Kansas, 123.....lxviii, 408	Dane, County of, v. Smith, 13 Wisconsin, 525.....lxix, 764
Custis v. Adkins, Adm'r of Potter, House, 329.lxviii, 423	Danenhoffer v. State, 66 Indiana, 296.....34, 216
Cuthbert v. Kuhn, 3 Wharton, 357.....xxxi, 513	Danforth v. Culver, 11 Johnson, 146.....vi, 302
Cutler v. Ballou, 136 Massachusetts, 337.....49, 36	Danforth v. Grant, 14 Vermont, 263.....lxix, 224
Cutler v. Bonney, 30 Michigan, 289.....18, 127	Danforth v. State, 75 Georgia, 614.....56, 490
Cutler v. Cox, 3 Blackford, 173.....lxviii, 123	Danforth ada. State, 46 Iowa, 43.....30, 367
Cutler v. James, 64 Wisconsin, 173.....54, 603	Danforth v. Woodward, 10 Pickering, 429.....xx, 531
Cutler v. Roberts, 7 Nebraska, 4.....79, 371	Daniel v. Daniel, 2 Richardson's Eq. 113.....lxiv, 244
Cutler v. Winsor, 6 Pickering, 336.....xvii, 385	Daniel v. Ellis, 1 A. K. Marshall, 60.....x, 707
Cutler va. Butler, 25 New Hampshire, 343.....lvii, 330	Daniel v. Gibson, 73 Georgia, 347.....53, 645
Cutter v. Davenport, 1 Pickering, 61.....xi, 149	Daniel v. McRae, 2 Hawks, 690.....xi, 737
Cutts v. Brainerd, 42 Vermont, 556.....1, 363	Daniel v. Modawell, 28 Alabama, 308.....lviii, 260
Cutts v. Gordon, 13 Maine, 474.....xlix, 630	Daniel v. Pogue, Speed, 26.....xi, 708
Dabney ada. Commonw., 1 Robinson, (Va.) 604.....xi, 717	Daniel v. Swearingen, 6 South Carolina, 297.....34, 471
Dabney v. Dabney, 2 Robinson (Va.), 622.....xi, 761	Daniel v. Western U. Tel. Co., 61 Texas, 492.....48, 365
Dabney v. Green, 4 Henning & M. 101.....iv, 503	Daniel v. Wood, 1 Pickering, 102.....xi, 151
Dabney v. Manning, 3 Ohio, 321.....lxvii, 597	Daniels v. Ballantine, 28 Ohio State, 522.....12, 264
Dabbs v. State, 39 Arkansas, 383.....43, 375	Daniels v. Brown, 34 New Hampshire, 484.....lxix, 365
Daggett v. Daggett, 5 Paige's Ch. 509.....lxviii, 442	Daniels v. Chicago etc. R. R. Co., 25 Iowa, 129.....14, 490
Daggett v. Davis, 53 Michigan, 35.....51, 91	Daniels v. Hatch, 1 Zabrickie, 391.....lxvii, 149
Daggett v. Durden, 20 Georgia, 467.....lxv, 633	Daniels v. Hayward, 5 Allen, 43.....lxix, 728
Daggett v. Hudson, 43 Ohio State, 548.....54, 832	Daniels v. Hudson Riv. F. I. Co., 12 Outh. 418.....lx, 340

Roman letters [xlx] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Daniels v. Nelson, 41 Vermont, 161.....	xcviii, 577
Daniels v. Newton, 114 Massachusetts, 580.....	19, 384
Daniels v. Pond, 21 Pickering, 367.....	xxii, 369
Daniels v. Rowe, 25 Iowa, 403.....	xov, 797
Danley v. Rector, 10 Arkansas, 211.....	l, 242
Dankel v. Hunter, 61 Pennsylvania St. 382.....	c, 651
Dann v. Oudguy, 13 Michigan, 239.....	lxxxvii, 785
Dann ada. People, 63 Michigan, 490.....	51, 151
Danner v. S. Car. R. R. Co., 4 Rich. Law, 339.....	lv, 678
Danner v. State, 54 Alabama, 127.....	25, 863
Danolds v. State, 89 New York, 36.....	49, 277
Danville v. Pace, 25 Gratt. 1.....	18, 663
Danville v. Pace, 25 Gratt. 1.....	18, 663
D'Arcy v. Miller, 96 Illinois, 102.....	39, 11
Darby v. Ruessel, 5 Haywood, 139.....	lx, 767
Darden v. Cowper, 7 Jones' Law, 210.....	lxxv, 461
Dargan v. Mayor etc. of Mobile, 31 Ala. 498.....	lxx, 505
Dargan v. Waddill, 9 Iredell's Law, 344.....	xlx, 421
Dargan v. Waring, 11 Alabama, 368.....	xlvi, 234
Dark v. Johnston, 55 Pennsylvania St. 164.....	xxiii, 732
Darland v. Taylor, 52 Iowa, 502.....	35, 265
Darling, Ex parte, 16 Nevada, 98.....	40, 485
Darling v. Bryant, 17 Alabama, 10.....	li, 162
Darling v. Westmoreland, 52 New Hampshire, 401.13.....	55
Darling v. Wilson, 60 New Hampshire, 59.....	49, 305
Darling v. Younker, 37 Ohio State, 487.....	41, 632
Darlington's Appeal, 56 Pennsylvania State, 512.....	97, 736
Darlington v. Mayor of New York, 51 New York 164.....	lxxxviii, 248
Darlington v. United States, 22 Penn. St., 290.....	29, 766
D'Armond v. Dubois, 22 Louisiana An. 131.....	2, 718
Darrell v. Eden, 3 Demmeure, 241.....	lv, 613
Darrigan v. New York & N. E. R. R. Co., 62 Connecticut, 285.....	52, 580
Darrow v. Harlow, 21 Wisconsin, 302.....	xotv, 541
Darst v. People, 51 Illinois, 286.....	2, 301
Dart v. Sherwood, 7 Wisconsin, 523.....	lxxvi, 228
Dart ada. State, 29 Connecticut, 153.....	lxxvi, 596
Dart v. Woodhouse, 40 Michigan, 299.....	79, 544
D'Arment v. Jones, 4 Lea, 251.....	40, 12
Darwin v. Charlotte, C. & A. R. R. Co., 23 South Carolina, 531.....	55, 32
Daah v. Van Kleeck, 7 Johnson, 477.....	v, 291
Daehleil v. Atty Gen., 5 Harris & J. 302.....	lx, 572
Dauenbauer v. Devine, 51 Texas, 480.....	32, 687
Daughtery v. Am. Union Tel. Co., 75 Ala. 168.....	51, 435
Dausterive v. Broussard, 5 Robinson (La.), 516.....	lxxxix, 550
Davenport v. Foulke, 63 Indiana, 382.....	34, 265
Davenport v. Hubbard, 46 Vermont, 200.....	14, 620
Davenport v. Magoon, 13 Oregon, 1.....	57, 1
Davenport v. Muir, 3 J. J. Marshall, 310.....	xx, 143
Davenport v. Parsons, 10 Michigan, 42.....	lxxxii, 772
Davenport v. Richmond, 61 Virginia, 636.....	59, 694
Davenport v. Sleight, 2 Dev. & Bat. Law, 381.....	lxxxii, 420
Davenport v. Wynne, 6 Iredell's Law, 128.....	xliv, 70
Davenport v. Young, 16 Illinois, 848.....	lxiii, 330
Davenport Nat. Bk v. Homeyer, 45 Missouri, 145.....	c, 263
Davey v. Jones, 13 Vroom, 28.....	36, 505
David v. New Orleans, 16 Louisiana An. 404.....	lxxxix, 586
David v. Sittig, 1 Martin, N. E., 147.....	xiv, 179
David v. Williamsburgh C. F. Ins. Co., 63 New York, 268.....	38, 418
Davidson v. Abbott, 52 Vermont, 870.....	36, 767
Davidson v. Follett, 27 Iowa, 217.....	xcix, 648
Davidson v. Frew, 3 Dev. L. 2.....	xxii, 708
Davidson v. Givins, 2 Bibb, 200.....	lv, 695
Davidson v. Hawkeye Ins. Co., 71 Iowa, 532.....	60, 818
Davidson v. Keyes, 2 Robinson (La.), 254.....	lxxxviii, 209
Davidson v. Little, 22 Penn. State, 245.....	lx, 81
Davidson v. Nebaker, 21 Indiana, 334.....	lxxxiii, 350
Davidson v. Phillips, 9 Yeager, 93.....	xxx, 398
Davidson v. Portland, 69 Maine, 116.....	51, 253
Davidson v. Reed, 111 Illinois, 167.....	53, 613
Davidson v. Root, 11 Ohio, 98.....	lxxxvii, 411
Davidson v. State, 4 Tex. Ct. App. 548.....	30, 166
Davidson ada. State, 20 Missouri, 212.....	lxii, 603
Davidson ada. State, 30 Vermont, 377.....	lxxdii, 312
Davidson v. Waldron, 31 Illinois, 120.....	lxxxiii, 204
Davies v. Skinner, 58 Wisconsin, 638.....	46, 965
Davies, In re, 93 Pennsylvania State, 116.....	39, 729
Davis' Appeal, 21 Penn. State, 78.....	lx, 752
Davis v. Allen, 11 Pickering, 466.....	xxii, 396
Davis v. Arledge, 3 Hill's Law (S. O.), 170.....	xxx, 369
Davis v. Bagley, 40 Georgia, 181.....	2, 670
Davis v. Ball, 6 Cushing, 505.....	liii, 53
Davis v. Bartlett, 12 Ohio State, 534.....	lxxx, 375
Davis v. Bechstein, 69 New York, 440.....	35, 218
Davis v. Bell, 8 New Hampshire, 500.....	lxxxii, 202
Davis v. Bigler, 63 Penn. St. 242.....	1, 593
Davis v. Blunt, 6 Massachusetts, 487.....	lv, 168
Davis v. Bradley, 28 Vermont, 118.....	lxv, 226
Davis v. Burgess, 54 Michigan, 514.....	52, 528
Davis v. Burnett, 4 Jones' Law, 71.....	lxvii, 263
Davis v. Burton, 3 Seamon, 41.....	lxxxvi, 511
Davis v. Calvert, 5 Gill & J. 269.....	lxv, 282
Davis v. Calloway, 30 Indiana, 112.....	xov, 671
Davis v. Cent. Cong. Soc., 129 Massachusetts, 267.37.....	309
Davis v. Cent. Vt. R. Co., 55 Vermont, 84.....	45, 690
Davis v. Chicago & N. W. Ry Co., 58 Wis. 646.....	46, 687
Davis v. Cilley, 44 New Hampshire, 448.....	lxixv, 85
Davis v. Clark, 26 Indiana, 424.....	lxxxix, 471
Davis v. Clinton W. W. Co., 54 Iowa, 59.....	37, 185
Davis v. Crawford, 2 Mill, 401.....	xii, 682
Davis v. Cross, 14 Lea, 637.....	52, 177
Davis v. Davis, 26 California, 23.....	lxxxv, 187
Davis v. Detroit & Mil. R. R. Co., 20 Mich. 105.....	4, 364
Davis v. Dixon's Adm'r, 1 Howard, 64.....	lxvi, 608
Davis v. Drew, 6 New Hampshire, 392.....	lxv, 467
Davis v. Dudley, 70 Maine, 238.....	38, 218
Davis v. Emery, 61 Maine, 140.....	14, 653
Davis v. Eppinger, 18 California, 378.....	lxxxix, 184
Davis v. First Nat. Bank, 5 Nebraska, 242.....	25, 494
Davis v. Fish, 1 G. Greene, 408.....	lxviii, 367
Davis v. Francisco, 11 Missouri, 672.....	lxix, 98
Davis v. French, 20 Maine, 21.....	lxxxvii, 36
Davis v. Fuller, 12 Vermont, 178.....	lxxxvi, 534
Davis v. Funk, 39 Penn. State, 243.....	lxxx, 619
Davis v. Gale, 22 California, 26.....	xc4, 564
Davis v. Garr, 6 N. Y. (2 Selden) 124.....	lv, 267
Davis v. Getchell, 50 Maine, 602.....	lxxxix, 636
Davis v. Gorton, 16 New York, 255.....	lxix, 694
Davis v. Hamlin, 109 Illinois, 39.....	48, 541
Davis v. Hall, 3 New Hampshire, 382.....	xiv, 372
Davis v. Harkness, 1 Gilman, 173.....	lxii, 184
Davis v. Harvard, 15 Serg. & R. 165.....	xvi, 637
Davis v. Helbig, 27 Maryland, 462.....	xotv, 646
Davis v. Henderson, 25 Mississippi, 549.....	lx, 229
Davis v. Hooper, 4 Stewart & P. 231.....	lxvii, 751
Davis v. Justice, 31 Ohio St. 259.....	27, 614
Davis v. Kansas City R. R., 53 Missouri, 217.....	34, 457
Davis v. Lane, 2 Indiana, 548.....	lv, 468
Davis v. Lee, 26 Mississippi, 505.....	lx, 267
Davis v. McCready, 17 New York, 239.....	lxxii, 461
Davis v. McFarlane, 37 California, 634.....	xotv, 240
Davis v. McNealley, 5 Sneed, 583.....	lxxdii, 159
Davis v. Macon, 64 Georgia, 128.....	37, 60
Davis v. Mayor of New York, 14 N. Y. 506.....	lxvii, 186
Davis v. Michigan S. etc. R. R. Co., 22 Ill. 278.....	lxxxv, 151
Davis v. Millaudon, 17 Louisiana An. 97.....	lxxxvii, 517
Davis v. Minor, 1 Howard (Mia.), 183.....	lxxxvii, 226

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Davis v. Montgomery, 51 Alabama, 139.....23, 545
 Davis v. Morton, 4 Bush, 442.....xvii, 309
 Davis v. Morton, 5 Bush, 160.....xvii, 345
 Davis v. Munson, 43 Vermont, 676.....5, 315
 Davis v. Murphy, 3 Richardson's Law, 560.....xiv, 749
 Davis v. Murray, 2 Mill, 143.....xii, 661
 Davis v. Newman, 2 Robinson (Va.), 664.....xi, 764
 Davis v. New York & N. E. R. R. 143 Mass. 301.....58, 138
 Davis v. Ney, 125 Massachusetts, 680.....38, 273
 Davis v. Old Colony R. R., 131 Mass. 285.....41, 221
 Davis v. Oswalt, 18 Arkansas, 414.....lxviii, 183
 Davis v. Ownaby, 14 Missouri, 170.....iv, 105
 Davis v. Parish, Little's Sel. Ca. 153.....xii, 287
 Davis v. Pawlette, 3 Wisconsin, 300.....lxii, 690
 Davis v. Petway, 3 Head, 667.....lxv, 789
 Davis v. Pierce, 7 Minnesota, 13.....lxviii, 65
 Davis v. Randall, 145 Massachusetts, 547.....15, 146
 Davis v. Richardson, 45 Mississippi, 499.....7, 732
 Davis v. Richardson, 10 Yerger, 290.....xxxi, 581
 Davis v. Robertson, 1 Mill, 71.....xii, 611
 Davis v. Rock Creek L. F. & M. Co., 55 Cal. 330.....34, 40
 Davis v. Rowell, 2 Pickering, 64.....xiii, 398
 Davis v. Ruff, Cheves' Law, 17.....xxiv, 584
 Davis v. Russell, 53 California, 611.....28, 647
 Davis v. Sawyer, 133 Massachusetts, 289.....43, 519
 Davis v. Shaver, Phill. L. 18.....xii, 92
 Davis v. Shreve, 3 Little, 260.....xiv, 66
 Davis v. Simma, 14 Iowa, 154.....lxviii, 463
 Davis v. Simpson, 5 Harris & J. 147.....ix, 500
 Davis v. Smith, 5 Georgia, 274.....xlvi, 279
 Davis v. Somerville, 125 Massachusetts, 594.....35, 399
 Davis v. State, 68 Alabama, 58.....44, 128
 Davis v. State, 35 Indiana, 496.....9, 760
 Davis v. State, 7 Maryland, 151.....lxi, 331
 Davis v. State, 15 Ohio, 72.....xiv, 559
 Davis ad. State, 3 Brevard, 3.....v, 529
 Davis ad. State, 1 Iredell's Law, 125.....xxv, 735
 Davis ad. State, 66 Missouri, 684.....37, 387
 Davis ad. State, 14 Nevada, 439.....33, 563
 Davis ad. State, 80 North Carolina, 351.....30, 86
 Davis ad. State, 13 Rhode Island, 493.....34, 704
 Davis ad. State, 9 Vroom, 178.....90, 367
 Davis v. Statte, 43 Indiana, 103.....13, 282
 Davis v. Steiner, 14 Penn. State, 275.....liii, 547
 Davis v. Swanson, 54 Alabama, 277.....25, 678
 Davis v. Waterman, 10 Vermont, 536.....xxviii, 216
 Davis v. Wetherell, 13 Allen, 60.....x, 177
 Davis v. Whitesides, 1 Dana, 177.....xxv, 138
 Davis v. Wilbourn, 1 Hill's Law (S. O.), 27.....xxvi, 154
 Davis v. Winslow, 51 Maine, 264.....lxviii, 573
 Davis & Desauque's Est., 5 Wharton, 530.....xxiv, 574
 Davison v. Johnsonot, 7 Metcalf, 328.....xii, 448
 Davison v. State, 4 Vermont, 235.....xxiv, 598
 Davy v. Hallett, 3 Caines, 16.....ii, 941
 Dawell ad. People, 25 Michigan, 247.....12, 260
 Dawes v. Boylston, 9 Massachusetts, 337.....vi, 72
 Dawes v. Shed, 15 Massachusetts, 6.....viii, 80
 Dawkins v. State, 58 Alabama, 376.....29, 754
 Dawson v. Dawson, 1 Devereux's Eq. 93.....xviii, 573
 Dawson v. Holcomb, 1 Ohio, 275.....xiii, 618
 Dawson v. Holt, 11 Lea, 563.....47, 312
 Dawson v. Lawrence, 13 Ohio, 543.....xiii, 210
 Dawson v. Miller's Administrator, 20 Texas, 171.....lxx, 380
 Dawson v. Powell, 9 Bush, 663.....15, 745
 Dawson v. St. Paul F. Ins. Co., 115 Minn. 136.....9, 109
 Dawson v. State, 16 Indiana, 428.....lxix, 439
 Day v. Caton, 119 Massachusetts, 513.....20, 347
 Day v. Connecticut G. L. Ins. Co., 45 Conn. 480.....29, 683
 Day v. Hammond, 57 New York, 479.....15, 822
 Day v. Highland Street R'y Co., 126 Mass. 113.....46, 447
 Day v. Hill, 2 Spear's Law, 632.....xii, 398
 Day v. Mechanics' & T. Ins. Co., 25 Missouri, 225.57, 416
 Day v. Mut. B. L. Ins. Co., 1 McArthur, 41.....29, 595
 Day v. New England L. Ins. Co., 111 Pennsylv-
 vania State, 507.....56, 297
 Day v. Noble, 2 Pickering, 615.....xiii, 463
 Day v. Owen, 5 Michigan, 530.....lxviii, 62
 Day v. Pool, 52 New York, 416.....11, 719
 Day v. Ridley, 16 Vermont, 48.....xiii, 489
 Day v. Sharp, 4 Wharton, 339.....xxiv, 599
 Day v. Spiral S. B. Co., 57 Michigan, 146.....58, 352
 Day v. Stevens, 88 North Carolina, 63.....43, 732
 Day v. Vallette, 25 Indiana, 42.....lxviii, 353
 Day v. Wilson, 83 Indiana, 463.....43, 76
 Day v. Zimmerman, 63 Pennsylvania State, 72.....8, 157
 Day-light Burner Co. v. Odlin, 51 N. H. 56.....12, 46
 Dayton v. Rutland, 84 Illinois, 279.....25, 437
 Dayton ad. State, 3 Zabrickie, 49.....lii, 270
 Dayton v. Walsh, 47 Wisconsin, 113.....33, 707
 Dayton Ins. Co. v. Kelly, 24 Ohio State, 245.....15, 612
 Deadrick v. Cantrell, 10 Yerger, 263.....xxxi, 576
 Deal v. Bogue, 20 Penn. State, 238.....lvii, 702
 Deal v. Harris, 8 Maryland, 40.....lxviii, 698
 Dean, Ex parte, 2 Cowen, 605.....xv, 521
 Dean v. Bailey, 50 Illinois, 481.....xv, 533
 Dean v. Brown, 23 Maryland, 11.....lxviii, 538
 Dean v. Charlton, 23 Wisconsin, 590.....xv, 406
 Dean v. Duffield, 8 Texas, 235.....lviii, 108
 Dean v. Goddard, 13 Iowa, 222.....lxviii, 433
 Dean v. McLean, 48 Vermont, 412.....21, 130
 Dean v. Mason, 4 Connecticut, 428.....x, 162
 Dean v. Negley, 41 Penn. State, 312.....lxviii, 629
 Dean v. Shelly, 57 Penn. St., 426.....xviii, 236
 Dean v. Smith, 23 Wisconsin, 463.....xv, 198
 Dean ad. State, 49 Iowa, 73.....31, 143
 Dean v. Vaccaro, 2 Head, 493.....lxv, 744
 Dean v. Walker, 107 Illinois, 540.....47, 667
 Deane v. Hodge, 35 Minnesota, 146.....50, 221
 Deansville Cem. Ass'n, In re, 66 New York, 599.....23, 86
 Deansville Cem. Ass'n, Matter of, 66 N.Y. 599.....23, 86
 Dearborn v. North Western Sav. Bk., 43 Ohio
 St. 617.....51, 661
 Dearborn v. Parks, 5 Greenleaf, 81.....xvii, 206
 Dearborn v. Turner, 16 Maine, 17.....xxviii, 630
 Deardorf v. Thacher, 78 Missouri, 128.....47, 96
 Dearing v. Bank of Charleston, 5 Georgia, 497.....xlvi, 209
 Dearmon v. Blackburn, 1 Sneed, 390.....ix, 169
 Dearth v. Williamson, 3 Serg. & R. 496.....vii, 622
 Deaver v. Bedford, 5 Robinson (La.), 245.....xxviii, 538
 Deaver v. Rice, 4 Dev. & Bat. Law, 431.....xxv, 398
 Deaver v. Savage, 3 Missouri, 262.....xxv, 437
 Debard v. Crow, 7 J. J. Marshall, 7.....xxii, 113
 Debevoise v. New York L. E. & W. R. R. Co. 98
 New York, 377.....50, 693
 Debesse v. Napier, 1 McCord, 106.....x, 658
 Deblieux v. Bullard, 1 Robinson (La.), 66.....xxviii, 694
 Deblols v. Ocean Ins. Co., 16 Pickering, 303.....xviii, 245
 De Bolle v. Penn. Ins. Co., 4 Wharton, 63.....xxviii, 38
 Debrys v. Mollere, 3 Martin (N. S.), 318.....xv, 159
 Decamp v. Feay, 5 Serg. & R. 323.....ix, 572
 Decamp v. Hewett, 11 Robinson (La.), 290.....xiii, 204
 Decan v. Shipper, 35 Penn. State, 239.....lxviii, 234
 Decell v. Lawenthal, 57 Mississippi, 331.....34, 449
 De Chastellux v. Fairchild, 15 Penn. St. 18.....liii, 570
 Deck v. Gerke, 12 California, 433.....lxviii, 556
 Deckard v. Case, 5 Watts, 22.....xxx, 297
 Decker v. Adams, 4 Dutcher, 511.....lxviii, 68
 Decker v. Gammon, 44 Maine, 322.....lxix, 89
 De Cordova v. Smith, 9 Texas, 129.....lviii, 136
 Deconche v. Savotier, 3 Johns. Ch. 120.....viii, 478

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

De Oon's Appeal, 47 Penn. State, 214.....	lxxvi, 536	Denning v. Houlton, 64 Maine, 254.....	18, 253
Dedway v. Powell, 4 Bush, 77.....	xxvi, 283	Denning v. Williams, 26 Connecticut, 226.....	lxviii, 398
Deel v. Berry, 21 Texas, 463.....	lxviii, 236	De Moss v. Robinson, 46 Michigan, 62.....	41, 144
Deere v. Chapman, 25 Illinois, 610.....	lxix, 350	De Mott v. Hagerman, 8 Cowen, 220.....	lxviii, 443
Deerfield, Inhab. of, v. Arms, 17 Pickering, 41.....	xxviii, 276	De Mott v. Laraway, 14 Wendell, 235.....	xxviii, 523
Deerfield, Inhab. of, v. Arms, 20 Pickering, 480.....	xxxii, 228	Dempsey v. Gardener, 127 Massachusetts, 351.....	24, 389
Deering v. Boyle, 8 Kansas, 525.....	12, 480	Dempsey v. State, 3 Tex. Ct. App. 429.....	30, 148
Deering v. Chapman, 12 Maine, 488.....	xxxix, 592	Den v. Morris, 2 Hales, 6.....	xi, 508
Deering v. Cobb, 74 Maine, 332.....	43, 596	Den v. Tomlin, 3 Harrison (N. J.), 14.....	xxxv, 536
Deer Lodge Bk v. Hope M. Co., 3 Montana, 148.....	35, 458	Den v. Westbrook, 3 Green's Law, 371.....	xxix, 692
De Feriet v. Bank of America, 23 La. An. 310.....	8, 597	Denegre v. Haun, 14 Iowa, 240.....	lxxxi, 480
Deford v. Mercer, 24 Iowa, 118.....	xxii, 480	Den ex d. Aber v. Clark, 5 Halsted, 217.....	lxviii, 417
De Forth v. Wia. & M. R. R. Co., 52 Wia. 330.....	38, 737	Den ex d. Brinegar v. Chaffin, 3 Dev. L. 108.....	xxii, 711
De France v. Spencer, 2 G. Greene, 462.....	lii, 533	Den ex d. Clarke v. Diggs, 8 Ired. L. 159.....	xliv, 73
De Freest v. Warner, 98 New York, 217.....	50, 657	Den ex d. Cloud v. Webb, 4 Dev. L. 290.....	xxv, 711
Defreese v. Trumper, 1 Johnson, 274.....	lii, 329	Den ex d. Davenport v. Wynne, 6 Ired. L. 128.....	xliv, 79
Defrese v. State, 3 Hales, 53.....	8, 1	Den ex d. Davidson v. Frew, 3 Dev. L. 3.....	xxii, 708
De Graffenreid v. Mitchell, 3 McCord, 506.....	xv, 648	Den ex d. Hardenbergh v. Hardenbergh, 5 Hal-	
Degraffenreid v. Scruggs, 4 Humphreys, 451.....	xi, 658	sted, 42.....	lxviii, 371
De Grove v. Metropolitan Ins. Co., 61 N. Y. 594.....	19, 305	Den ex d. Harry v. Graham, 1 Dev. & Bak. 76.....	xxvii, 226
De Haas v. Bunn, 2 Penn. State, 335.....	xliv, 301	Den ex d. Houser v. Belton, 10 Ired. L. 359.....	li, 391
De Haven v. Williams, 80 Pennsylvania St. 490.....	21, 107	Den ex d. Johnson v. Morris, 2 Halsted, 6.....	xi, 508
Deichman's Appeal, 2 Wharton, 335.....	xxx, 271	Den ex d. Jones v. Lewis, 8 Ired. L. 70.....	xliv, 338
Delhi v. King, 6 Serg. & R. 29.....	ix, 407	Den ex d. Lyerly v. Wheeler, 11 Ired. L. 298.....	liii, 414
Dejardin ada. Commonwealth, 126 Mass. 48.....	30, 682	Den ex d. McEntire v. Durham, 7 Ired. L. 151.....	xliv, 519
De Jarrette's Ex'r v. McQueen, 31 Ala. 230.....	lxviii, 164	Den ex d. Meredith v. Andros, 7 Ired. L. 8.....	xliv, 504
Delacy v. Neuse R. Nav. Co., 1 Hawke, 274.....	ix, 636	Den ex d. Merritt v. Johnson, 2 Southard, 455.....	viii, 610
De la Garza v. Booth, 28 Texas, 478.....	xcii, 328	Den ex d. Murrell v. Roberts, 11 Ired. L. 424.....	liii, 419
Delahanty v. Warner, 75 Illinois, 185.....	29, 237	Den ex d. Needham v. Branson, 5 Ired. L. 436.....	xliv, 48
Delahoussaye v. Judice, 13 Louisiana An. 587.....	lii, 521	Den ex d. Seawell v. Bk of Cape F., 3 Dev. L. 279.....	xxii, 723
Delatre v. Keenan, 3 Demoursure, 74.....	iv, 604	Den ex d. Smith v. Fere, 10 Ired. L. 37.....	li, 376
Delamater v. Miller, 1 Cowen, 75.....	xiii, 512	Den ex d. Stith v. Barnes, 1 Carolina L. Repos. 494.....	vi, 547
Deland v. Hiett, 27 California, 611.....	lxxviii, 108	Den ex d. Swan v. Despreaux, 7 Halsted, 162.....	xxii, 498
Delaney v. Rochereau, 34 La. An. 1123.....	44, 486	Den ex d. Tours v. Vreelandt, 2 Halsted, 353.....	xi, 551
Delaney v. Root, 99 Massachusetts, 546.....	xxviii, 53	Den ex d. Trumbull v. Gibbons, 2 Zab. 117.....	li, 259
Delano v. Bedford M. Ins. Co., 10 Mass. 347.....	vi, 139	Den ex d. Walker v. Marshall, 7 Ired. L. 1.....	xliv, 502
Delano v. Blaka, 11 Wendell, 85.....	xxv, 617	Den ex d. White v. Albertson, 3 Dev. L. 241.....	xxxi, 719
Delano v. Goodwin, 48 New Hampshire, 308.....	xxvii, 601	Den ex d. Williamson v. Snowhill, 1 Green, 23.....	xxii, 496
Delano v. Wild, 6 Allen, 1.....	lxxviii, 605	Den ex d. Wright v. Wright, 2 Halsted, 175.....	xi, 546
Delano v. Wilde, 11 Gray, 17.....	lxxxi, 687	Den ex d. Wyckoff v. Gardner, 1 Spencer, 556.....	xliv, 398
Delano's case, 58 New Hampshire, 5.....	42, 555	Den ex d. Wynne v. Alexander, 7 Ired. L. 237.....	xliv, 398
Delany v. Erickson, 10 Nebraska, 422.....	35, 487	Dengler v. Klehner, 13 Penn. State, 38.....	liii, 441
Delaplaine v. Chicago etc. Ry Co., 48 Wia. 214.....	24, 398	Denham v. Holeman, 26 Georgia, 182.....	lxxi, 198
Delasham v. Berry, 20 Michigan, 292.....	4, 398	Denis v. Leclercq, 1 Martin, 297.....	v, 712
De Lavallette v. Wendt, 75 New York, 879.....	31, 494	Denison v. Shuler, 47 Michigan, 598.....	41, 734
De La Vergne v. Evertson, 1 Paige's Ch. 181.....	xix, 411	Denn v. Sparks, Coxe, 56.....	i, 189
De La Vergne v. Norris, 7 Johnson, 268.....	v, 281	Dennet v. Hopkinson, 68 Maine, 350.....	18, 227
Delaware Co. Bk v. Broomhall, 28 Penn. St. 126.....	lxxx, 471	Dennett, Petitioner, 32 Maine, 506.....	liiv, 602
Delaware D. C. Co. v. Commonwealth, 60 Pa. 267.....	c, 870	Dennett v. Chick, 2 Greenleaf, 191.....	xi, 59
Delaware etc. R. R. Co. v. Stump, 8 Gill & J. 479.....	xxix, 561	Dennett v. Dennett, 44 New Hampshire, 331.....	lxxxiv, 97
Delaware L. & W. R. R. Co. v. Salmon, 10 Vroom,		Dennett v. Penobscot F. G. Co., 57 Maine, 425.....	2, 5 th
229.....	93, 214	Dennett v. Short, 7 Greenleaf, 150.....	xx, 356
Delaware L. & W. R. R. Co. v. Sanderson, 109		Dennis v. Chapman, 19 Alabama, 29.....	liiv, 186
Pennsylvania State, 583.....	58, 743	Dennis v. Clark, 2 Cushing, 347.....	xliviii, 671
Del., L. & W. R. R. Co. ada. State, 48 N. J. L. 55.....	57, 843	Dennis v. Cummins, 3 Johns. Cases, 297.....	li, 199
De Leon v. Trevino, 49 Texas, 83.....	30, 101	Dennis v. Heath, 11 Smedes & M. 206.....	xliv, 51
Delhi v. Youmans, 48 New York, 362.....	6, 100	Dennis v. Hayek, 48 Michigan, 620.....	42, 479
Deik v. State, 63 Mississippi, 77.....	60, 46	Dennis v. Ryan, 65 New York, 389.....	22, 635
Delmas v. Margo, 25 Texas, 1.....	lxxviii, 516	Dennis ada. People, 4 Michigan, 609.....	lxix, 338
De Louis v. Meek, 2 G. Greene, 55.....	i, 491	Dennison v. Foster, 9 Ohio, 126.....	lxxxiv, 429
Delphi v. Evans, 26 Indiana, 20.....	10, 12	Dennison v. Goehring, 7 Penn. State, 175.....	xliv, 505
Delphi v. Lowery, 74 Indiana, 529.....	39, 98	Dennison v. Page, 29 Penn. State, 420.....	lxxii, 644
Delle v. Kennedy, 49 Wisconsin, 555.....	35, 786	Dennison v. Thomaston M. I. Co., 20 Me. 125.....	xxvii, 42
Demarest v. Wynkoop, 3 Johns. Ch. 129.....	viii, 467	Densmore v. State, 67 Indiana, 306.....	33, 96
De May v. Roberts, 46 Michigan, 180.....	41, 154	Denny v. Dana, 2 Cushing, 160.....	xliviii, 655
Dement v. State, 2 Head, 505.....	lxxv, 747	Denny v. Lyon, 38 Penn. State, 98.....	lxxx, 463
Dement, Ex parte, 83 Alabama, 399.....	23, 611	Denny v. Mattoon, 2 Allen, 351.....	lxxxix, 734
De Mill ada. People, 15 Michigan, 164.....	xxii, 179	Denny v. New York C. R. R. Co., 13 Gray, 481.....	lxxiv, 645
Deming v. Carrington, 12 Connecticut, 1.....	xxx, 591	Denny v. White, 2 Coldwell, 283.....	lxxviii, 596
Deming v. Grand Trunk R'y Co., 48 N. H. 485.....	2, 267	Denny v. Willard, 11 Pickering, 519.....	xxii, 399

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Dent v. Chiles, 5 Stewart & P. 383.....	xvii, 350	Devoreux v. Buckley, 34 Ohio State, 16.....	32, 342
Dent v. Cotschhausen, 23 Wisconsin, 120.....	xcix, 111	Devlin v. Commonwealth, 101 Penn. St. 273.....	47, 710
Denton v. Chicago, R. I. & P. R. Co., 62 Iowa, 161.	35, 263	Devlin ada. People, 33 New York, 269.....	lxxxviii, 377
Denton v. English, 2 Nott. & McC. 561.....	x, 638	Devlin v. Smith, 89 New York, 470.....	42, 311
Denton v. Livingston, 9 Johnson, 96.....	vi, 264	De Voin v. Michigan Lumber Co., 64 Wis. 616.....	54, 669
Denton v. McKenzle, 1 Desanasure, 269.....	i, 664	Devore v. Sunderland, 17 Ohio, 53.....	xlix, 449
Denton v. Noyes, 6 Johnson, 236.....	v, 237	De Voss v. Richmond, 18 Gratt, 236.....	xviii, 647
Denver v. Capelli, 4 Colorado, 25.....	34, 62	Dew v. Cunningham, 28 Alabama, 468.....	lxv, 369
Denver F. Ins. Co. v. McClellan, 9 Colorado, 11.....	59, 134	Dew v. Judges, 3 Hening & M. 1.....	iii, 639
Denver S. P. & P. R. R. Co. v. Conway, 8 Colo. 1.	54, 637	Dewar v. People, 40 Michigan, 401.....	79, 548
Depas v. Mayo, 11 Missouri, 314.....	xlix, 88	Dewar v. Spence, 2 Wharton, 211.....	xxx, 341
Depau v. Ocean Ins. Co., 5 Cowan, 63.....	xv, 431	Dewey v. Alpena School Dis., 43 Michigan, 469.....	38, 304
DePeau v. Russell, 1 Brevard, 441.....	ii, 676	Dewey v. Brownell, 54 Vermont, 441.....	41, 653
DePeau v. Waddington, 6 Wharton, 230.....	xxxvi, 216	Dewey v. Dewey, 1 Metcalf, 349.....	xxxv, 367
Depere v. Town of Bellevue, 31 Wisconsin, 120.....	ii, 602	Dewey v. Erie Borough, 14 Penn. State, 211.....	iii, 633
Depeyster v. Gould, 3 Green Ch. 474.....	xxix, 723	Dewey v. Field, 4 Metcalf, 381.....	xxxviii, 376
DePeyster v. Howland, 8 Cowen, 277.....	xviii, 448	Dewey v. McLain, 7 Kansas, 126.....	12, 418
DePeyster v. Michael, 6 N. Y. (2 Selden), 467.....	lvii, 470	Dewey v. St. Albans T. Co., 56 Vermont, 476.....	48, 808
DePeyster v. Sun Mut. Ins. Co., 19 N. Y., 273.....	lxxx, 331	Dewey v. Warriner, 71 Illinois, 126.....	22, 81
Deputy v. Tobias, 1 Blackford, 311.....	xii, 943	Dewey v. Williams, 40 New Hampshire, 322.....	lxvii, 708
Depuy v. Swart, 3 Wendell, 135.....	xx, 673	Dewire v. Bailey, 131 Massachusetts, 169.....	41, 219
DeRance ada. State, 34 Louisiana An. 186.....	44, 426	De Witt v. Elmira N. Manuf'g Co., 66 New York, 459.....	23, 73
Derby v. Thrall, 44 Vermont, 413.....	8, 389	DeWitt v. Hayes, 2 California, 463.....	lvi, 329
Derby Turnpike Co. v. Parks, 10 Conn. 822.....	xxvii, 700	Dewitt v. Pierson, 112 Massachusetts, 8.....	17, 59
Derby v. Weyrich, 8 Nebraska, 174.....	30, 627	DeWitt ada. State, 2 Hill (S. O.), 262.....	xxxvii, 371
De Rivañoli v. Corsetti, 4 Paige's Ch. 264.....	xv, 632	DeWitt v. Yates, 10 Johnson, 156.....	vi, 326
Derman v. Home M. Ins. Co., 26 La. An. 69.....	21, 544	DeWolf v. Gardner, 12ushing, 19.....	lix, 149
Derocher v. Continental Mills, 58 Maine, 217.....	4, 286	De Wolf v. Lawson, 61 Wisconsin, 469.....	50, 149
Derrickson v. Edwards, 5 Dutch. 468.....	lxxx, 220	De Wolf v. Strada, 26 Illinois, 226.....	lxix, 371
Derringer v. Plate, 29 California, 262.....	lxxxvii, 170	DeWolf ada. State, 8 Connecticut, 93.....	xx, 99
Derwin v. Parsons, 52 Michigan, 425.....	50, 262	Deyo v. N. Y. Cent. R. R. Co. 34 N. Y. 473.....	lxxxviii, 418
Descombes v. Wood, 91 Missouri, 196.....	60, 239	Dexter v. Cole, 6 Wisconsin, 219.....	lxx, 465
Desobats v. Berquier, 1 Binney, 336.....	ii, 448	Dexter v. Norton, 47 New York, 63.....	7, 415
Des Farges v. Pugh, 93 North Carolina, 21.....	53, 446	Dexter v. Phillips, 151 Massachusetts, 178.....	23, 262
Desha v. Holland, 12 Alabama, 513.....	xvii, 261	Dexter v. Snow, 12 Cushing, 594.....	lx, 206
Desha v. Pope, 6 Alabama, 690.....	xii, 76	Dexter v. Syracuse etc. R. R. Co., 42 N. Y. 326.....	1, 527
Desha v. Lewis, 5 Stewart & P. 91.....	xxiv, 769	Dey v. Dox, 9 Wendell, 129.....	xxiv, 137
Desilver v. Beers, 33 Illinois, 368.....	lxxxiii, 274	DeYoung v. Buchanan, 10 Hill & J., 149.....	xxxiii, 156
Desilver, Matter of, 5 Rawle, 111.....	xxxviii, 645	Dezell v. Odell, 3 Hill (N. Y.), 215.....	lxxxviii, 638
Deakins v. Goss, 85 Missouri, 435.....	55, 387	Dial v. Farrow, 1 McMullan's L. 232.....	xxxvi, 267
Dealondes v. Wilson, 6 Louisiana, 397.....	xv, 187	Dial v. Gary, 14 South Carolina, 573.....	37, 737
Des Moines v. Gilchrist, 67 Iowa, 210.....	56, 341	Dial v. Hair, 18 Alabama, 798.....	lv, 179
Des Moines Gas Co. v. Des Moines, 44 Iowa, 505.....	24, 758	Diamond v. Lawrence Co., 37 Penn. St. 263.....	lxxxviii, 429
Des Moines Valley R. R. v. Graff, 27 Iowa, 92.....	1, 256	Diamond Match Co. v. Roebor, 106 N. Y. 473.....	60, 464
Desmond's Appeal, 103 Pennsylvania State, 126.....	49, 118	Dias v. Chickering, 64 Maryland, 248.....	54, 776
Desmond v. Brown, 29 Iowa, 53.....	4, 194	Dias v. State, 7 Blackford, 20.....	xxxix, 448
DeSobry v. DeLalre, 2 Harris & J. 191.....	iii, 535	Dibble v. Brown, 12 Georgia, 217.....	lvi, 499
DeSobry v. Tête, 31 La. An. 309.....	53, 232	Dibble v. Taylor, 2 Speer's Law, 306.....	xiii, 368
De Soto Bank v. Memphis, 6 Baxt. 415.....	32, 530	Dibble v. Mitchell, 15 Indiana, 435.....	lxxvii, 29
Despatch Line v. Bellamy Co., 12 N. H. 205.....	lxxxvii, 203	Dibrell v. Miller, 8 Yeager, 476.....	xxix, 126
Desribes v. Wilmer, 69 Alabama, 25.....	44, 501	Dice v. Willamette T. & L. Co., 8 Oregon, 60.....	34, 575
De St. Romes v. Blanc, 20 La. An. 424.....	xvii, 415	Dick v. Bailey, 2 Louisiana An. 974.....	xlvi, 561
Desvangers v. Willis, 56 Georgia, 515.....	21, 289	Dick v. Cooper, 24 Penn. State, 217.....	lxiv, 628
De Thomas v. Witherby, 61 California, 92.....	44, 542	Dick v. Page, 17 Missouri, 234.....	lvii, 267
DeTollenere v. Fuller, 1 Mill, 117.....	xii, 616	Dick ada. State, 2 Winst. L. 45.....	lxxxvi, 429
DeTreville v. Ellis, 1 Bailey's Eq. 35.....	xxi, 518	Dickson v. Williams, 129 Massachusetts, 129.....	37, 316
Detrick v. Migatt, 19 Illinois, 146.....	lxviii, 584	Dicken's Case, 67 Penn. St. 169.....	5, 429
Detroit v. Beckman, 34 Michigan, 125.....	22, 507	Dickenson v. Chamber of Comm., 29 Wis. 45.....	9, 544
Detroit v. Blakeby, 21 Michigan, 84.....	4, 450	Dickerman v. Day, 31 Iowa, 444.....	7, 156
Detroit v. Corey, 9 Michigan, 165.....	lxxx, 78	Dickerman v. Graves, 6 Cushing, 306.....	iii, 41
Detroit v. Martin, 34 Michigan, 170.....	22, 512	Dickerman v. Lord, 21 Iowa, 236.....	lxxxix, 879
Detroit ada. People, 28 Michigan, 228.....	15, 202	Dickerson v. Bd. of Com. of Ripley Co., 6 Ind. 128.	lxiii, 373
Detroit & M. R. R. Co. v. Curtis, 23 Wis. 152.....	xcix, 141	Dickerson v. Nabbs, Speed, 320.....	ii, 726
Detroit Savings B'k v. Ziegler, 49 Michigan, 157.....	43, 456	Dickerson v. Robinson, 1 Halsted, 196.....	x, 396
De Uprey v. De Uprey, 27 California, 329.....	lxxxvii, 81	Dickerson v. Rogers, 4 Humphreys, 179.....	xi, 643
Deusting ada. State, 33 Minnesota, 102.....	53, 12	Dickerson v. Tillinghast, 4 Paige's Ch. 215.....	xxv, 628
Devanbogh v. Devanbogh, 5 Paige's Ch. 554.....	xxviii, 443	Dickerson v. Wason, 47 New York, 439.....	7, 458
Dever v. Steamboat Hope, 42 Mississippi, 715.....	2, 643	Dickey v. Am. Ins. Co., 3 Wendell, 692.....	xx, 929
Devers v. Ross, 10 Grattan, 252.....	ix, 321		

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Dickey v. Lincoln, 30 Maine, 453.....	xxxvii, 66	District Tp of Union v. Smith, 39 Iowa, 9.....	18, 39
Dickey v. Malech, 6 Missouri, 177.....	xxiv, 130	Ditch v. Edwards, 1 Scammon, 127.....	xxvi, 414
Dickins v. Jones, 6 Yerger, 483.....	xxvii, 488	Dittman v. Repp, 50 Maryland, 516.....	33, 328
Dickinson's Appeal, 42 Connecticut, 491.....	19, 553	Dittmer & P. v. Germania I. Co., 23 La. An. 438..	8, 600
Dickinson v. Barber, 9 Massachusetts, 235.....	vi, 58	Diversy v. Kellogg, 44 Illinois, 114.....	xci, 154
Dickinson v. Boyle, 17 Pickering, 78.....	xxviii, 281	Diversy v. Moor, 22 Illinois, 330.....	lxxiv, 157
Dickinson v. Bradford, 59 Alabama, 581.....	31, 23	Diversy v. Smith, 103 Illinois, 378.....	42, 14
Dickinson v. Cent. Nat. Bank, 129 Mass. 279.....	37, 351	Divine v. Harvie, 7 T. B. Monroe, 439.....	xviii, 194
Dickinson v. Coates, 79 Missouri, 251.....	49, 228	Divine v. Mitchum, 4 B. Monroe, 488.....	xli, 241
Dickinson ada. Commonw., 5 B. Mon. 506.....	xlili, 139	Diver v. McLaughlin, 2 Wendell, 596.....	xx, 658
Dickinson v. Davis, 43 New Hampshire, 647.....	lxxx, 202	Dixon, Ex parte, 1 Delaware Ch. 261.....	xli, 92
Dickinson v. Dickinson, 3 Murphy, 337.....	ix, 608	Dixon v. Baker, 65 Illinois, 518.....	16, 591
Dickinson v. Edwards, 77 New York, 573.....	33, 671	Dixon v. Caldwell, 15 Ohio State, 412.....	lxxvi, 497
Dickinson v. Gay, 7 Allen, 29.....	lxxxiii, 656	Dixon v. Chicago, R. I. & P. Ry Co., 64 La. 531..	53, 460
Dickinson v. Hall, 14 Pickering, 217.....	xxv, 390	Dixon v. Dixon, 31 Vermont, 450.....	lxxvi, 129
Dickinson v. Lee, 4 Watts, 62.....	xxviii, 684	Dixon v. Dixon's Ex'r, 4 Louisiana, 188.....	xxdii, 478
Dickinson v. McCamy, 5 Georgia, 498.....	xlvi, 298	Dixon v. Ewing, 3 Ohio, 280.....	xvii, 590
Dickinson v. Maynard, 20 Louisiana An. 66.....	xvii, 379	Dixon v. Hood, 7 Missouri, 414.....	lxxxviii, 461
Dickinson v. Mayor, 48 Maryland, 583.....	30, 492	Dixon v. Nicolls, 39 Illinois, 373.....	lxxxix, 312
Dickinson v. Williams, 11 Cushing, 268.....	lix, 142	Dixon v. Olmstead, 9 Vermont, 310.....	xxxi, 639
Dickinson v. Winchester, 4 Cushing, 114.....	1, 760	Dixon v. Sinclair, 4 Vermont, 354.....	xxiv, 610
Dickson v. Burk, 1 English, 412.....	xliv, 521	Doak v. Donelson's Lessee, 2 Yerger, 349.....	xxiv, 498
Dickson v. Chorn & Dickerson, 6 Iowa, 19.....	lxxi, 382	Doak v. Swann, 8 Greenleaf, 170.....	xci, 333
Dickson v. Dickson's Heirs, 1 Yerger, 110.....	xxiv, 444	Doane v. Keating, 12 Leigh, 301.....	lxxxvii, 671
Dickson v. Frisbee, 52 Alabama, 165.....	23, 565	Doane v. Lake, 32 Maine, 268.....	lii, 654
Dickson v. Jordan, 11 Iredell's Law, 166.....	liii, 403	Doane v. Willont, 5 Gray, 323.....	lxvi, 369
Dickson v. Miller, 11 Smedes & M. 594.....	xlx, 71	Dob v. Halsey, 15 Johnson, 34.....	viii, 393
Dickson v. Parker, 3 Howard (Miss.), 219.....	xxxi, 78	Dobbin v. Hubbard, 17 Arkansas, 189.....	lxv, 428
Dickson v. United States, 125 Mass. 311.....	28, 230	Dobbin v. Richmond & D. R. Co., 81 N. C. 446..	31, 512
Dickson v. Wright, 52 Mississippi, 585.....	24, 677	Dobbins v. Walton, 37 Georgia, 614.....	xov, 371
Dickson & Gantt v. Desiré's Adm'r, 23 Mo. 151..	lxvi, 661	Dobson v. Pearce, 12 New York (2 Kernan), 156..	lxii, 182
Diedrich v. N. W. U. Ry Co., 42 Wis. 248.....	24, 399	Dockham v. Parker, 9 Greenleaf, 137.....	xxdii, 547
Diefenback v. Stark, 56 Wis. 462.....	43, 719	Dockham v. Smith, 113 Massachusetts, 330.....	18, 495
Diehl v. Adams Co. M. I. Co., 59 Penn. St. 443..	xviii, 302	Dodd v. Brett, 1 Minnesota, 370.....	lxvi, 541
Dieringer v. Meyer, 42 Wisconsin, 311.....	24, 415	Dodd v. Farlow, 11 Allen, 426.....	lxxxvii, 726
Dietrich v. Mitchell, 43 Illinois, 40.....	xcii, 99	Dodd v. McCraw, 8 Arkansas, 83.....	xli, 301
Dietrich v. Northampton, 138 Mass. 14.....	52, 242	Dodd v. Watson, 4 Jones' Eq. 48.....	lxxdii, 677
Dietrich v. Penn. St. R. R. Co., 71 Penn. St., 432..	10, 711	Dodd v. Witt, 139 Massachusetts, 63.....	52, 700
Dietrick v. Noel, 43 Ohio St. 13.....	51, 788	Dodds v. Combs & Co., 3 Met. (Ky.), 28.....	lxxxvii, 150
Digby v. People, 113 Illinois, 123.....	53, 402	Dodge v. Bartol, 5 Greenleaf, 286.....	xvii, 233
Dignowitty v. State, 17 Texas, 521.....	lxvii, 670	Dodge v. Cole, 97 Illinois, 338.....	37, 111
Dikeman v. Parrish, 6 Penn. State, 310.....	xlv, 455	Dodge v. Dodge, 1 Root, 233.....	4, 40
Dikes v. Miller, 25 Tex. Supp. 281.....	lxxxviii, 571	Dodge v. Hollinshead, 6 Minnesota, 35.....	lxxx, 433
Dill, In re, 32 Kansas, 668.....	49, 505	Dodge v. Nat. Ex. Bank, 20 Ohio State, 234.....	8, 648
Dill v. Shahan, 25 Alabama, 694.....	lx, 540	Dodge v. Walley, 22 California, 294.....	lxxxviii, 61
Dill v. South Carolina R. R. Co., 7 Rich. L. 158..	lxii, 407	Dodge & S. M. Co., Matter of, 77 New York, 101..	33, 579
Dillard v. Manhattan I. Ins. Co., 44 Georgia, 119..	9, 167	Dodge County ada. State, 8 Nebraska, 124.....	30, 619
Dillard ada. State, 5 Blackford, 363.....	lxxxv, 128	Dodge's Appeal, 106 Pennsylvania St., 216.....	51, 619
Dille v. State, 34 Ohio St. 617.....	32, 395	Dodson v. Ball, 60 Pennsylvania, 492.....	6, 898
Dilleher v. Home L. Ins. Co., 69 N. Y. 256.....	25, 182	Dodson v. Cooke, 1 Overton, 314.....	lii, 787
Dillenbeck v. Dygert, 97 New York, 303.....	49, 525	Dodson v. McAdams, 96 North Carolina, 149....	60, 406
Diller v. Brubaker, 52 Pennsylvania St. 498.....	xci, 177	Dodson v. Mock, 4 Dev. & Bat. L. 146.....	lxxxii, 677
Diller v. Roberts, 13 Serg. & R. 60.....	xv, 578	Dodson v. Swan, 2 W. Va. 511.....	xxviii, 787
Dillard ada. State, 3 Iredell's Law, 102.....	lxxxviii, 708	Doe v. Brown, 7 Blackford, 142.....	xli, 217
Dilling v. Murray, 6 Indiana, 324.....	lxlii, 385	Doe ex dem ——— See name of Real Plaintiff.	
Dillingham v. Roberts, 75 Maine, 469.....	44, 419	Doe ex d. Barnes v. Provoost, 4 Johnson, 61.....	lv, 249
Dillon v. Allen, 46 Iowa, 299.....	26, 145	Doe ex d. Brannock v. Brannock, 10 Iredell's L. 428..	li, 398
Dillon v. Brown, 11 Gray, 179.....	lxxi, 700	Doe ex d. Brumfield v. Brown, 7 Blackford, 142..	xli, 217
Dills v. Zeigler, 1 G. Greene, 164.....	xlvi, 370	Doe ex d. Carson v. Baker, 4 Devereux's Law, 220..	xxv, 706
Dilworth v. Commonwealth, 12 Grattan, 689.....	lxv, 264	Doe ex d. Chandler v. Douglas, 8 Blackford, 10..	xlv, 732
Dilworth v. Sinderling, 1 Binney, 493.....	ii, 469	Doe ex dem. Clegg v. Fields, 7 Jones' Law, 37....	lxxv, 460
Dimalac ada. State, 12 New Hampshire, 194.....	lxxxvii, 197	Doe ex d. Clements v. Henderson, 4 Ga. 148.....	xlvi, 214
Diamond v. Petit, 2 Louisiana An. 537.....	xlvi, 556	Doe ex d. Clendenning v. Lanier, 3 Indiana, 441..	lvi, 518
Dinmay v. R. R. Co., 27 West Virginia, 33.....	55, 292	Doe ex d. Cobb v. Hines, Busbee's Law, 343.....	lix, 589
Dinkey v. Commonw., 17 Penn. State, 126.....	lv, 542	Doe ex d. De Foyster v. Howland, 8 Cowen, 277..	xvii, 448
Dismore v. Duncan, 57 New York, 573.....	15, 534	Doe ex d. Foster v. Dugan, 8 Ohio, 87.....	xxxi, 432
Diskin ada. State, 34 Louisiana An. 919.....	44, 448	Doe ex d. Glenn v. Peters, Busbee's Law, 457....	lix, 563
Dismukes v. Board of Sup., 58 Mississippi, 612..	38, 339	Doe ex d. Hit-tuk-ho-mi v. Watts, 7 Sm. & M. 363..	xlv, 306
District of Columbia v. Oyster, 4 Mackey, 285....	54, 275	Doe ex d. Hoiser v. Hall, 2 Indiana, 556.....	lv, 469
District of Columbia v. Saville, 1 McArthur, 581..	39, 616	Doe ex d. Hutchinson v. Horn, 1 Indiana, 363.....	lv, 479

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Doe ex d. Mace v. Dutton, 3 Indiana, 309.....lii, 510
 Doe ex dem. Mitchell v. Bowen, 3 Indiana, 197.....lxv, 758
 Doe on d. Maxwell v. Moore, 4 Blackford, 445.....xxx, 608
 Doe ex d. McPherson v. Walters, 16 Alabama, 714..i, 300
 Doe ex d. Merton v. Jackson, 1 Smedes & M. 494..xi, 107
 Doe ex d. Nickles v. Hawkins, 15 Alabama, 619.....i, 154
 Doe ex d. Phillips' Heirs v. Porter, 3 Ark. 18.....xxvii, 448
 Doe ex d. Reynolds v. Ingersoll, 11 Sm. & M. 249..xlix, 87
 Doe ex d. Robinson v. Parker, 3 Sm. & M. 114.....xli, 614
 Doe ex dem. Saltonstall v. Riley, 28 Ala. 164.....lxv, 334
 Doe ex d. Shelton v. Hamilton, 23 Miss. 498.....lvii, 149
 Doe ex d. Smith v. Smith, 1 Jones' Law, 135.....lix, 681
 Doe ex d. Smith v. Tupper, 4 Smedes & M. 261..xliii, 483
 Doe ex d. Stevens v. Hays, 1 Indiana, 247.....xlviii, 399
 Doe ex d. Sutton v. Reagan, 5 Blackf. 217.....xxviii, 466
 Doe ex d. Tatem v. Paine, 4 Hawks, 64.....xv, 807
 Doe ex d. Thomas v. Orrell, 5 Iredell's Law, 599..xlii, 58
 Doe ex d. Vancompton v. Snyder, 3 Howard, 65.....xxxi, 311
 Doe ex d. Wallace v. Maxwell, 10 Ired. Law, 110.....ii, 390
 Doe ex d. Wilkins v. Rue, 4 Blackford, 263.....xxix, 368
 Doe ex d. Williams v. Harrington, 11 Ired. L. 618..lii, 421
 Doe ex d. Wynne v. Wynne, 23 Mississippi, 281..lvii, 139
 Doe d. Potts v. Dowdall, 3 Houst. 369.....xii, 757
 Doe ada. State, 79 Indiana, 9.....41, 699
 Doepke ada. State, 63 Missouri, 308.....39, 786
 Doring v. State, 49 Indiana, 65.....19, 669
 Doggett v. Dill, 108 Illinois, 560.....48, 685
 Doggett v. Hart, 5 Florida, 218.....lviii, 464
 Doherty v. Dolan, 65 Maine, 87.....90, 677
 Doherty ada. State, 25 Louisiana An. 119.....13, 131
 Dohring ada. People, 59 New York, 374.....17, 349
 Doig v. Barkley, 5 Richardson's Law, 126.....xiv, 763
 Dolan v. Mayor, 68 New York, 274.....23, 168
 Dolby v. Mullins, 3 Humphreys, 437.....xxix, 180
 Dolby ada. State, 49 New Hampshire, 483.....6, 688
 Dole v. Lyon, 10 Johnson, 447.....vi, 346
 Dole v. Olmstead, 36 Illinois, 180.....lxxxv, 397
 Dole v. Olmstead, 41 Illinois, 344.....lxxxix, 396
 Dole v. Warren, 32 Maine, 94.....lii, 640
 Doll v. Bisotti, 30 Louisiana Ann. 263.....xcvi, 399
 Dollarhide v. United States, 1 Morris, 233.....xxix, 460
 Dollfus v. Froesch, 8 Hill (N. Y.), 433.....xi, 368
 Dolliver v. St. Joseph F. & M. Ins. Co., 128 Massachusetts, 315.....35, 378
 Dolph v. Ferris, 7 Watts & Serg. 367.....xlii, 246
 Dolph v. Rice, 18 Wisconsin, 397.....lxxxvi, 778
 Domingus v. The State, 7 Smedes & M. 475.....xiv, 315
 Dominick v. State, 40 Alabama, 680.....xci, 496
 Donahoe v. Richards, 38 Maine, 379.....lxi, 256
 Donahoe v. Wabash, St. L. & P. R'y Co., 83 Missouri, 580.....53, 691
 Donahue v. Drexler, 83 Kentucky, 157.....54, 686
 Donahue v. McNulty, 24 California, 411.....lxxxv, 78
 Donald v. Hewitt, 33 Alabama, 834.....lxxviii, 431
 Donaldson v. B'k of Cape Fear, 1 Dev. Eq. 103..xviii, 677
 Donaldson v. Mississippi and Missouri Railroad Co., 18 Iowa, 280.....lxxvii, 391
 Donaldson v. Phillips, 18 Penn. State, 170.....iv, 614
 Donegan v. Wood, 49 Alabama, 242.....39, 375
 Doner v. Stauffer, 1 Penrose & Watts, 198.....xxi, 370
 Donham v. Wild, 19 Pickering, 530.....xxxi, 161
 Donlan v. Provident Instit. for Savings, 127 Massachusetts, 183.....34, 358
 Donley v. Camp, 22 Alabama, 659.....lviii, 274
 Donley v. Tindall, 33 Texas, 43.....5, 234
 Don Moran v. People, 25 Michigan, 356.....12, 263
 Donnally v. Merchants' Mut. Ins. Co., 28 Louisiana An. 939.....26, 129
 Donnell v. United States, 1 Morris, 141.....xxix, 457
 Donnell v. Jones, 13 Alabama, 490.....xlviii, 59
 Donnell v. Jones, 17 Alabama, 689.....lii, 194
 Donnell v. State, 48 Mississippi, 661.....12, 375
 Donnell v. Thompson, 10 Maine, 170.....xxv, 218
 Donnell v. Walsh, 33 New York, 43.....lxxxviii, 361
 Donnelly v. Decker, 58 Wisconsin, 461.....46, 637
 Donnelly v. People, 11 Illinois, 583.....lii, 459
 Donnelly ada. State, 69 Iowa, 705.....58, 234
 Donohoe v. Gamble, 38 California, 341.....xv, 399
 Donohoe v. Lea, 1 Swan, 119.....lv, 725
 Donohue v. Woodbury, 6 Oushing, 148.....lii, 777
 Donovan ada. Commonwealth, 99 Mass. 425.....xcvi, 765
 Donovan v. Finn, Hopkins' Ch. 59.....xiv, 531
 Donovan v. Mayor of Vicksburg, 29 Miss. 247.....lxiv, 143
 Donovan v. McAlpin, 85 New York, 126.....39, 649
 Donovan v. Pitcher, 53 Alabama, 411.....23, 434
 Dooley v. Kansas, 83 Missouri, 441.....53, 399
 Dooley v. Meriden, 44 Connecticut, 117.....26, 433
 Doolling v. Budget Pub. Co., 144 Mass. 258.....59, 53
 Doolittle v. Blakesley, 4 Day, 265.....iv, 218
 Doolittle v. Ferry, 20 Kansas, 230.....27, 168
 Doolittle v. Holton, 28 Vermont, 819.....lxvii, 748
 Doolittle v. Lewis, 7 Johns. Ch. 45.....xi, 398
 Doolittle v. Malcolm, 8 Leigh, 608.....xxxi, 671
 Dord v. Bonnaiffe, 6 Louisiana An. 563.....lv, 573
 Doremus v. Walker, 8 Alabama, 194.....xlii, 634
 Dorman v. Jacksonville, 13 Florida, 638.....7, 253
 Dorr v. Harkness, 49 N. J. L. 571.....60, 656
 Dorr v. Harrah, 101 Massachusetts, 531.....3, 398
 Dorr v. N. Jersey S. N. Co., N. N. Y. (1 Kerr.) 485.lxii, 125
 "Dorr" Tug-boat v. Waldron, 62 Illinois, 221.....14, 86
 Dorrance v. Scott, 3 Wharton, 309.....xxxi, 679
 Dorsey v. Abrams, 85 Penn. St. 299.....27, 637
 Dorsey v. Allen, 85 North Carolina, 358.....39, 704
 Dorsey v. Barbee, Littell's Sel. Cases, 204.....xii, 294
 Dorsey v. Dorsey, 5 J. J. Marshall, 280.....xxii, 33
 Dorsey v. Dorsey, 3 Harris & J. 410.....vi, 606
 Dorsey v. Dorsey, 30 Maryland, 522.....xcvi, 638
 Dorsey v. Dorsey, 37 Maryland, 64.....11, 639
 Dorsey v. Dorsey, 7 Watts, 346.....xxviii, 767
 Dorsey v. Gasaway, 2 Harris & J. 402.....lii, 587
 Dorsey v. Jackman, 1 Serg. & R. 42.....vii, 611
 Dorsey v. Kyle, 30 Maryland, 512.....xcvi, 617
 Dorsey v. Sheppard, 12 Gill & J. 123.....lxxxvii, 77
 Doudall v. Olmstead, 30 Minnesota, 86.....44, 185
 Doss v. Campbell, 19 Alabama, 590.....lv, 198
 Doss v. Missouri etc. R. R. Co., 59 Mo. 27.....21, 371
 Doss v. State, 21 Texas Ct. App. 505.....57, 618
 Doster v. Brown, 25 Georgia, 24.....lxxi, 153
 Dowell v. Buchanan's Ex'rs, 3 Leigh, 368.....xxviii, 289
 Dotson v. State, 62 Alabama, 141.....34, 2
 Dott v. Cunningham, 1 Bay, 463.....i, 634
 Doty v. Brown, 4 N. Y. (4 Comst.) 71.....liii, 359
 Doty v. Gorham, 5 Pickering, 487.....xvi, 417
 Doty v. Hawkins, 6 New Hampshire, 247.....xv, 439
 Doty v. Strong, 1 Pinney, 313 (Burnett, 1883).....xi, 773
 Doty v. Wilder, 15 Illinois, 407.....lx, 736
 Doubleday v. Kress, 50 New York, 410.....10, 602
 Doubleday v. Makspence, 4 Blackford, 9.....xxviii, 33
 Doud v. Wisconsin, P. & S. R'y Co., 65 Wisconsin, 108.....54, 639
 Dougal v. Fryer, 3 Missouri, 40.....xxii, 469
 Dougherty v. Cent. Nat. Bank, 93 Penn. St. 227..39, 780
 Dougherty v. Creary, 30 California, 280.....lxxxix, 116
 Dougherty v. Jack, 5 Watts, 466.....xxx, 336
 Dougherty v. Matthews, 35 Missouri, 890.....lxxxviii, 126
 Dougherty v. Missouri R. R. Co., 61 Missouri, 225..31, 239
 Dougherty v. Snyder, 15 Serg. & R. 84.....xvi, 528
 Dougherty's Estate, 9 Watts & Serg. 189.....xlii, 328
 Doughy v. Somerville etc. R. R. Co., 3 Halstead's Ch. 629.....ii, 267

Roman letters [xliz] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Doughty v. State, 18 Tex. Ct. App. 178.....	51, 303	Draper v. Hitt, 43 Vermont, 439.....	5, 298
Douglas v. Matting, 29 Iowa, 493.....	4, 238	Draper v. Joiner, 9 Humphreys, 613.....	xliz, 719
Douglas v. Montgomery & W. P. R. R. Co., 37 Alabama, 638.....	xliz, 76	Draper v. Owley, 15 Missouri, 613.....	lvii, 218
Douglas ada. State, 17 Maine, 193.....	xxxv, 248	Draper v. Rice, 56 Iowa, 114.....	41, 88
Douglas v. Boonborough Turnpike Road Co. 22 Maryland, 219.....	lxxxv, 647	Draper v. Shoot, 25 Missouri, 197.....	lxix, 463
Douglas v. Harrisville, 9 West Virginia, 182.....	27, 548	Draper v. Snow, 20 New York, 331.....	lxxv, 408
Douglas v. Mantis, 16 Ohio, 271.....	xlvii, 375	Draper v. Wood, 112 Massachusetts, 315.....	17, 92
Douglas ada. People, 4 Cowen, 26.....	xv, 332	Draper ada. State, 65 Missouri, 335.....	27, 287
Douglas v. Spears, 2 Nott & McO. 207.....	xix, 583	Draghan v. Tombeckee B'k, 1 Stewart, 68.....	xviii, 38
Douglas ada. State, 26 Wisconsin, 428.....	7, 87	Drayton v. Grinke, Rich. Eq. Ca. 321.....	xlix, 419
Douglas v. Tousey, 2 Wendell, 332.....	xx, 616	Drayton v. Marshall, Rice's Ch. 373.....	xxdii, 84
Douglas v. Waddie, 1 Ohio, 413.....	xlii, 630	Drayton v. Rose, 7 Richardson's Eq. 328.....	lxiv, 731
Doupe v. Gemin, 45 New York, 119.....	6, 47	Drayton v. Wells, 1 Nott & McO. 409.....	lx, 718
Douthitt v. Applegate, 23 Kansas, 386.....	52, 633	Dreher v. Fitchburg, 23 Wisconsin, 673.....	xoix, 91
Dow v. Irasburgh Nat. Bank, 50 Vermont, 113.....	28, 493	Drehman v. Stifel, 41 Missouri, 184.....	xevii, 368
Dow v. Jewell, 18 New Hampshire, 340.....	xlv, 371	Drennan v. Douglas, 103 Illinois, 341.....	46, 689
Dow v. Norris, 4 New Hampshire, 18.....	xvii, 400	Dresher v. Allentown Water Co., 53 Penn. State, 225.....	xcii, 150
Dow v. Sargent, 15 New Hampshire, 116.....	xii, 684	Dreucker v. Solomon, 21 Wisconsin, 621.....	xoiv, 671
Dow v. Smith, 7 Vermont, 465.....	xxix, 202	Drew v. Clarke, Cooke, 373.....	v, 688
Dow v. Sweet, 134 Massachusetts, 140.....	45, 310	Drew v. Davis, 10 Vermont, 506.....	xxdii, 213
Dow v. Tuttle, 4 Massachusetts, 414.....	lii, 236	Drew v. Kimball, 43 New Hampshire 223.....	lxxx, 163
Dowd v. Wadsworth, 2 Devereux's Law, 130.....	xviii, 567	Drew v. Mason, 31 Illinois, 498.....	25, 298
Dowdy v. Commonwealth, 9 Grattan, 727.....	lx, 314	Drew v. Sutton, 55 Vermont, 686.....	45, 644
Dowe ada. State, 27 Iowa, 273.....	1, 371	Drew v. Towle, 30 New Hampshire, 531.....	lxiv, 309
Dower v. Seeds, 28 West Virginia, 113.....	57, 616	Drew v. Towle, 27 New Hampshire, 412.....	lix, 390
Dowling v. Allen, 74 Missouri, 13.....	41, 298	Drexel v. Man, 6 Watts & Serg. 386.....	xl, 673
Dowling v. Hennings, 20 Maryland, 179.....	lxxdii, 545	Drexel v. Man, 2 Penn. State, 371.....	xliv, 196
Downer v. Chesebrough, 36 Connecticut, 39.....	4, 29	Driggs v. Abbott, 27 Vermont, 580.....	lxv, 214
Downer v. Hollister, 14 New Hampshire, 122.....	xl, 175	Driggs v. Dwight, 17 Wendell, 71.....	xxxi, 323
Downer v. Lent, 6 California, 94.....	lxv, 489	Drinkard v. Ingram, 21 Texas, 660.....	lxxdii, 359
Downer v. Smith, 32 Vermont, 1.....	lxvii, 148	Drinkwater v. Dinsmore, 80 New York, 390.....	34, 624
Downer ada. State, 8 Vermont, 424.....	xxx, 482	Driscoll v. Newark L. & C. Co., 37 N. Y. 637.....	xevii, 761
Downey v. Hendrie, 46 Michigan, 498.....	41, 177	Driskell v. Mateer, 31 Missouri, 335.....	lxxx, 105
Downie v. Heaver, 12 Wisconsin, 174.....	lxxviii, 730	Drift v. Snodgrass, 66 Missouri, 286.....	27, 843
Downie v. White, 12 Wisconsin, 176.....	lxxviii, 731	Driver v. Western Un. R. R. Co., 32 Wis. 589.....	14, 726
Downing v. Marshall, 23 New York, 366.....	lxxx, 290	Drover's Nat. B'k v. Anglo-American F. & P. Co., 117 Illinois, 100.....	57, 655
Downing v. Ruger, 21 Wendell, 178.....	xxiv, 223	Drucke v. Manhattan E'y Co., 106 N. Y. 157.....	60, 437
Downing v. Wherrin, 19 New Hampshire, 9.....	xliz, 139	Druke v. Helken, 61 California, 346.....	44, 553
Downs v. Fuller, 2 Metcalf, 136.....	xxxv, 393	Drum v. Simpson, 6 Binney, 478.....	vi, 496
Downs v. Jackson, 33 Illinois, 464.....	lxxxv, 289	Drummond v. Hyams, Harper's Law, 368.....	xviii, 649
Downs v. New York & N. H. R. R. Co., 36 Con- necticut, 257.....	4, 77	Drumwright v. Philpot, 16 Georgia, 424.....	lx, 738
Downs v. Planters' Bank, 1 Smedes & M. 261.....	xl, 92	Drury v. Shumway, 1 D. Chipman, 110.....	1, 704
Downs v. Quarles, Littell's Sel. Ca. 489.....	xii, 337	Drury v. Young, 58 Maryland, 546.....	43, 943
Dows v. Faneuil Hall Ins. Co., 127 Mass. 346.....	34, 384	Dryden v. Hanway, 31 Maryland, 254.....	6, 61
Dows v. Harper, 6 Ohio, 518.....	xxvii, 270	Duane ada. Commonwealth, 1 Binney, 601.....	ii, 497
Dows v. Merchants' Ins. Co., 127 Mass. 346.....	34, 384	Dubois' Appeal, 38 Penn. State, 231.....	lxxx, 473
Dows v. Traders' & M. Ins. Co., 127 Mass. 346.....	34, 384	Dubois v. Beaver, 25 New York, 123.....	lxxdii, 326
Doyle v. Dixon, 87 Massachusetts, 208.....	xciii, 80	Du Bois v. Kingston, 102 New York, 219.....	55, 804
Doyle v. Lord, 64 New York, 432.....	21, 629	Dubois v. Mason, 127 Massachusetts, 37.....	34, 338
Doyle v. Lynn & B. R. Co., 118 Mass. 196.....	19, 431	Dubose v. Dubose, 7 Alabama, 235.....	xlvi, 668
Doyle v. Murphy, 23 Illinois, 503.....	lxix, 165	Dubreuil v. Soulie, 4 Martin, N. B. 91.....	xvi, 168
Doyle v. Raleigh, 89 North Carolina, 133.....	45, 677	Dubuc v. Voss, 19 La. Ann. 210.....	xcii, 326
Doyle v. Raffly, 18 Iowa, 108.....	lxxxv, 582	Dubuque, City of, v. Maloney, 9 Iowa, 451.....	lxiv, 358
Doyle ada. State, 40 Wisconsin, 175.....	22, 692	Dubuque v. Stout, 32 Iowa, 80.....	7, 171
Doyle v. White, 26 Maine, 341.....	xiv, 110	Ducat v. City of Chicago, 43 Illinois, 172.....	xv, 628
Drago v. Moco, 1 Speers' Law, 212.....	xl, 692	Ducker ada. State, 8 Oregon, 394.....	34, 590
Drake v. Chandler, 18 Gratt, 909.....	xeviii, 762	Duckett, Ex parte, 15 South Carolina, 210.....	46, 694
Drake v. Chicago, R. I. & P. E'y Co., 63 Iowa, 302.....	50, 746	Dudley v. Bosworth, 10 Humphreys, 2.....	li, 690
Drake v. Doyle, 40 Wisconsin, 175.....	22, 692	Dudley v. Briggs, 141 Massachusetts, 582.....	55, 494
Drake v. Markie, 21 Indiana, 433.....	lxxdii, 358	Dudley v. Camden & P. F. Co., 13 Vroom, 25.....	36, 601
Drake v. Mooney, 31 Vermont, 617.....	lxvii, 145	Dudley v. Camden & Phila. F. Co., 16 Vroom, 368.....	44, 731
Drake, State ex rel. v. Doyle, 40 Wis. 175.....	22, 692	Dudley v. Foote, 63 New Hampshire, 57.....	56, 469
Drake ada. State, 26 Maine, 366.....	lviii, 757	Dudley v. Lindsey, 9 B. Monroe, 486.....	1, 532
Draper v. Baker, 61 Wisconsin, 450.....	50, 113	Dudley v. Little, 2 Ohio, 504.....	xv, 575
Draper v. Bryson, 17 Missouri, 71.....	lvii, 257	Dudley v. McCluer, 65 Missouri, 311.....	27, 273
Draper v. Bryson, 26 Missouri, 108.....	lxix, 483	Dudley v. Odom, 5 South Carolina, 131.....	22, 6
		Dudley v. Santhine, 49 Iowa, 650.....	31, 165
		Dudley v. Shaw 70 Maine, 238.....	35, 314

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Duff v. Allegheny R. R. Co., 31 Penn. St. 458.....36, 675
 Duff v. Bayard, 4 Watts & Serg. 240.....xxxix, 73
 Duffin v. People, 107 Illinois, 113.....47, 431
 Duffy ada. Commonwealth, 96 Pennsylvania, 506.42, 554
 Duffy v. Dubuque, 63 Iowa, 171.....56, 743
 Duffy v. Hobson, 40 California, 240.....6, 617
 Duffy v. Rutherford and Dawson, 21 Ga. 363.....lxviii, 459
 Duffy v. Shockey, 11 Indiana, 70.....lxvi, 346
 Duffy ada. State, 7 Nevada, 342.....8, 713
 Duffy v. Wunach, 42 New York, 243.....1, 514
 Dufolt v. Gorman, 1 Minnesota, 301.....lxvi, 543
 Dufour v. Camfrane, 11 Martin, 607.....xiii, 360
 Dugan v. Anderson, 36 Maryland, 567.....11, 509
 Dugan v. Bridge Company, 27 Penn. State, 305.....lxvii, 464
 Dugan v. Cureton, 1 Arkansas, 31.....xxxii, 737
 Dugan v. Gittings, 3 Gill, 138.....xliii, 306
 Dugan v. Vattier, 3 Blackford, 245.....xxv, 105
 Dugas v. Mathews, 9 Georgia, 510.....lv, 361
 Duggan v. Bliss, 4 Colorado, 223.....34, 80
 Duggan v. King, 1 Rice's Law, 239.....xxxiii, 107
 Duggan v. McCruder, Walker, 112.....xii, 527
 Duggins v. Watson, 15 Arkansas, 112.....lx, 560
 Duke v. Oahawha Nav. Co., 10 Alabama, 81.....xlv, 473
 Duke v. Fuller, 9 New Hampshire, 536.....xxxi, 363
 Duke v. Harper, 66 Missouri, 51.....37, 314
 Duke v. Harper, 6 Yerger, 290.....xxvii, 462
 Duker v. Franz, 7 Bush, 273.....3, 514
 Dukas v. State, 11 Indiana, 567.....lxci, 370
 Dula v. Cowles, 7 Jones' Law, 290.....lxv, 463
 Dulaney v. Hoffman, 7 Gill & J., 170.....xxviii, 207
 Delaney v. Payne, 101 Illinois, 325.....46, 205
 Du Laurens v. First Division St. P. P. & R. Co.,
 15 Minnesota, 49.....2, 102
 Dullam v. Willson, 53 Michigan, 322.....51, 128
 Dumas v. State, 14 Tex. Ct. App. 464.....46, 241
 Dumall and Wife v. Terstegge, 23 Ind. 397.....lxxxv, 466
 Dummer ada. Den ex d. Selectman, 1 Spenc. 86.....xi, 213
 Dumesnil v. Dupont, 18 B. Monroe, 800.....lxviii, 750
 Dumey v. Schoeffler, 24 Missouri, 170.....lxix, 422
 Dumont v. Kellogg, 29 Michigan, 420.....18, 102
 Dumont v. Williamson, 18 Ohio St. 515.....xviii, 186
 Dun v. Seaboard eta. R. R. Co., 78 Va. 645.....49, 388
 Dunaway v. People, 110 Illinois, 333.....51, 686
 Dunbar v. Armor, 5 Robinson (La.), 1.....xxxix, 628
 Dunbar v. Boston & Prov. R. R. Co., 110 Mass. 26.14, 576
 Dunbar v. Glenn, 42 Wisconsin, 118.....34, 395
 Dunbar v. Rawles, 23 Indiana, 225.....xvii, 311
 Dunbar ada. State, 13 Oregon, 591.....57, 33
 Dunbar v. Day, 12 Nebraska, 596.....41, 772
 Duncan v. Bateman, 23 Arkansas, 327.....lxix, 109
 Duncan v. Barnett, 11 South Carolina, 333.....39, 476
 Duncan v. Bloomstock, 2 M'Cord, 312.....xiii, 728
 Duncan v. Brown, 1 M'Cord, 375.....x, 679
 Duncan v. Commonwealth, 2 B. Mon. 281.....xxxviii, 182
 Duncan v. Drury, 9 Penn. State, 332.....xlix, 565
 Duncan v. Duncan, 23 Illinois, 364.....lxvii, 689
 Duncan v. Hodges, 4 M'Cord, 339.....xvii, 734
 Duncan v. Jeter, 5 Alabama, 604.....xxxix, 342
 Duncan v. Klinefelter, 5 Watts, 141.....xxx, 286
 Duncan v. Louisville, 13 Bush, 378.....96, 201
 Duncan v. Lyon, 3 Johns. Ch. 361.....viii, 513
 Duncan v. Martin, 7 Yerger, 519.....xxvii, 526
 Duncan v. Matney, 29 Missouri, 368.....lxviii, 575
 Duncan v. Niles, 23 Illinois, 533.....lxviii, 293
 Duncan v. Potts, 5 Stewart & P. 62.....xxiv, 766
 Duncan v. Reed, 39 Maine, 415.....lxviii, 435
 Duncan v. Stewart, 25 Alabama, 406.....lx, 527
 Duncan v. Sun Fire Ins. Co., 6 Wendell, 488.....xxii, 539
 Duncan v. Sylvester, 13 Maine, 417.....xix, 512
 Duncan v. Sylvester, 24 Maine, 463.....xii, 400
 Duncan v. Tobin, Cheves' Eq. 142.....xxiv, 608
 Duncan v. Ware's Ex'rs, 5 Stewart & P. 112.....xxiv, 772
 Dungan's Appeal, 68 Pennsylvania St. 204.....8, 189
 Dunham v. Averill, 45 Connecticut, 61.....39, 642
 Dunham v. Boston & M. R. Co., 70 Maine, 164.....35, 314
 Dunham v. Bower, 77 New York, 76.....33, 579
 Dunham v. Chatham, 21 Texas, 231.....lxviii, 228
 Dunham v. Comm'l Ina. Co., 11 Johnson, 315.....vi, 374
 Dunham v. Cox, 2 Stockton's Ch. 437.....lxiv, 460
 Dunham v. Dey, 15 Johnson, 554.....viii, 263
 Dunham v. Elford, 13 Rich. Eq. 190.....xxiv, 363
 Dunham v. Gould, 16 Johnson, 367.....viii, 323
 Dunham v. Kirkpatrick, 101 Pennsylvania 84. 36.47, 696
 Dunham v. Waterman, 17 New York, 9.....lxviii, 408
 Dunham v. Wyckoff, 3 Wendell, 290.....xxx, 695
 Dunkirk eta. R. R. Co. v. Bachelor, 83 N. Y. 126.12, 489
 Dunklee v. Adams, 30 Vermont, 445.....1, 44
 Dunlap v. Bartlett, 10 Gray, 282.....lxix, 320
 Dunlap v. Berry, 4 Seamon, 327.....xxxix, 413
 Dunlap v. Burnett, 5 Smodes & M. 702.....xiv, 269
 Dunlap v. Cady, 31 Iowa, 280.....7, 129
 Dunlap v. Freret, 10 Louisiana An. 63.....lxvii, 599
 Dunlap v. Gleason, 16 Michigan, 158.....xviii, 221
 Dunlap v. Gidden, 31 Maine, 438.....lii, 626
 Dunlap v. Hunting, 2 Denio, 643.....xliii, 763
 Dunlap v. Knapp, 14 Ohio State, 64.....lxvii, 468
 Dunlap v. Rogers, 47 New Hampshire, 261.....xxvii, 433
 Dunlap v. State, 9 Tex. Ct. App. 179.....35, 736
 Dunlap ada. State, 65 North Carolina, 491.....6, 746
 Dunlap v. Wagner, 85 Indiana, 529.....44, 42
 Dunlap's Adm'r v. Wright, 11 Texas, 597.....lxvii, 506
 Dunlop v. Gregory, 10 N. Y. (6 Selden), 241.....lxi, 746
 Dunlop v. Keith, 1 Leigh, 430.....xix, 735
 Dunlop v. Patterson F. Ins. Co., 74 N. Y. 145.....36, 263
 Dunman v. Hartwell, 9 Texas, 495.....lx, 176
 Dunman v. Strother, 1 Texas, 89.....xlvi, 97
 Dunn v. Adams, 1 Alabama, 527.....xxxv, 42
 Dunn v. Boring, 8 California, 406.....lxviii, 331
 Dunn v. Grand Trunk R'y, 56 Maine, 187.....4, 267
 Dunn v. Johnson, 33 Indiana, 54.....5, 177
 Dunn v. Lancaster, 4 Bush, 581.....xcvi, 317
 Dunn v. Oneal, 1 Sneed, 106.....lx, 149
 Dunn v. People, 29 New York, 523.....lxxxvi, 319
 Dunn v. Sparks, 1 Indiana, 397.....1, 473
 Dunn v. State, 2 Arkansas, 229.....xxxv, 84
 Dunn ada. State, Minor, 46.....xii, 31
 Dunn v. Vail, 7 Martin, 416.....xii, 513
 Dunn v. Weston, 71 Maine, 270.....26, 319
 Dunn, In re, 14 Vroom, 359.....39, 600
 Dunnivant ada. State, 3 Brevard, 9.....v, 539
 Dunne v. People, 94 Illinois, 120.....34, 213
 Dunnice v. Coy, 24 Missouri, 167.....lxix, 420
 Dunnice v. Coy, 23 Missouri, 535.....lxv, 123
 Dunnigan v. Chicago eta. R. R. Co., 18 Wls. 26.lxxxvi, 741
 Dunning v. Leavitt, 85 New York, 30.....39, 617
 Dunning v. Ocean Nat. Bank, 61 N. Y. 497.....20, 293
 Dunning v. Vandusen, 47 Indiana, 423.....17, 709
 Dunscumb v. Dunscumb, 1 Johns. Ch. 803.....vii, 304
 Dupacron v. Van Winkle, 4 Robinson (La.), 29.xxxix, 509
 Dupre v. Western Ins. Co., 2 Rob. (La.), 457.lxxxviii, 263
 Duplex R. R. Co. v. Garden, 101 New York, 267.....54, 709
 Dupont v. Dupont, 10 Iowa, 113.....lxxxiv, 373
 Dupre v. Richard, 11 Robinson (La.), 495.....xliii, 211
 Dupree v. Dupree, Busbee's Eq. 164.....lix, 590
 Dupree v. Dupree, 4 Jones' Law, 387.....lxix, 757
 Dupree v. State, 33 Alabama, 390.....lxviii, 423
 Dupy v. Wolkwitz, 1 D. Chipman, 237.....vi, 729
 Durant v. Abendroth, 69 New York, 148.....25, 126
 Durant v. Essex Company, 8 Allen, 103.....lxxxv, 686
 Durdin v. Hill, 75 Georgia, 223.....56, 467

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Durell v. Haley, 1 Paige's Ch. 492.....	xix, 444	Eager v. Atlas Ins. Co., 14 Pickering, 141.....	xv, 396
Durell v. Hayward, 9 Gray, 248.....	lxix, 284	Eagle v. Bucher, 6 Ohio State, 295.....	lxvii, 343
Durfee v. Jones, 11 Rhode Island, 683.....	83, 628	Eagle v. Eichalberger, 6 Watts, 29.....	xxxi, 449
Durgin v. Munson, 9 Allen, 306.....	lxxv, 770	Eagle v. White, 6 Wharton, 505.....	lxviii, 434
Durham v. Alden, 20 Maine, 228.....	xxxvii, 48	Eagle Bank v. Smith, 5 Connecticut, 71.....	xiii, 37
Durham v. Arledge, 1 Strobhart's Law, 5.....	xlvii, 514	Eagle Manuf. Co. v. Jennings, 39 Kansas, 637.....	44, 668
Durham v. Heaton, 28 Illinois, 264.....	lxxxi, 275	Eagle Mow. M. Co. v. Shattuck, 53 Wis. 455.....	49, 780
Durham v. Musselman, 2 Blackford, 96.....	xviii, 133	Eagle Packet Co. v. Detries, 94 Illinois, 598.....	34, 345
Durham v. Oddie, 1 Martin, N. S., 444.....	xiv, 180	Eakin v. Doe ex d. Vance, 10 Sm. & M. 549.....	lxviii, 770
Durham v. People, 4 Bosmon, 172.....	xxxix, 407	Eames v. Salem & L. R. R. Co., 96 Mass. 560.....	xcvi, 676
Durham v. Price, 5 Yerger, 300.....	xxvi, 297	Eames v. Savage, 77 Maine, 212.....	52, 751
Durkee v. Central P. R. Co., 55 California, 388.....	38, 59	Eames v. The State, 6 Humphreys, 83.....	lxiv, 289
Durkee v. Cent. Pac. R. R. Co., 69 California, 533.....	58, 662	Earl v. De Hart, 1 Beasley's Ch. 280.....	lxxii, 395
Durkee v. Janesville, 28 Wisconsin, 464.....	9, 630	Earl v. Dresser, 30 Indiana, 11.....	xov, 690
Durkee v. Kenosha, 53 Wisconsin, 123.....	48, 483	Earl v. Page, 6 New Hampshire, 477.....	xxvi, 711
Durnford v. Degruys, 8 Martin, 220.....	xiii, 285	Earl v. Rowe, 35 Maine, 414.....	lxviii, 714
Durnford v. Patterson, 7 Martin, 460.....	xii, 514	Earl v. Shaw, 1 Johnson's Cases, 314.....	i, 117
Durr v. Hervey, 44 Arkansas, 301.....	51, 694	Earle v. Blackford, 6 Allen, 549.....	lxxxiii, 651
Durrott v. Simpson, 3 T. B. Monroe, 517.....	xvi, 115	Earle ad. State, 24 Louisiana An. 32.....	13, 109
Durst v. Burton, 47 New York, 167.....	7, 428	Early v. Friend, 16 Gratt. 21.....	lxxxviii, 649
Dusenbury v. Ellis, 3 Johnson's Cases, 70.....	ii, 144	Early v. Mahon, 19 Johnson, 147.....	x, 204
Dusenbury v. Hoyt, 53 New York, 521.....	13, 543	Early v. State, 1 Tex. Ct. App. 248.....	38, 409
Dutcher v. Beckwith, 45 Illinois, 460.....	xxii, 232	Earnest v. Parke, 4 Rawle, 452.....	xxvii, 280
Dutcher v. Hill, 29 Missouri, 271.....	lxxvii, 572	Earp v. Cummins, 54 Penn. St. 394.....	xviii, 718
Dutches Mfg. Co. v. Davis, 14 Johnson, 238.....	vii, 459	Eason v. S. & E. T. Ry Co., 65 Texas, 577.....	57, 606
Dutil v. Pacheco, 21 California, 433.....	lxxxii, 749	East v. Matheny, 1 A. K. Marshall, 192.....	x, 721
Duttenhofer v. State, 34 Ohio St. 91.....	32, 362	Eastbrook R. R. v. U. N. L. I. Co., 64 Me. 224.....	lxxxix, 743
Dutton v. Gerrish, 9 Cushing, 89.....	iv, 45	Easterada. State, 30 Ohio St. 542.....	27, 478
Dutton v. Fallaret, 52 Penn. St. 109.....	xci, 135	Easterling v. Elytha, 7 Texas, 210.....	lvi, 45
Dutton v. Simmons, 65 Maine, 583.....	20, 729	Easterly v. Goodwin, 35 Connecticut, 279.....	xov, 237
Dutton v. Warshauer, 21 California, 608.....	lxxxii, 765	Eastern Railroad Co. v. Benedict, 5 Gray, 561.....	lxvi, 394
Dutton v. Wear, 17 New Hampshire, 34.....	xlvi, 590	Eastern R. R. Co. v. Boston & M. R. R., 111 Mas-	
Dutton v. Woodman, 9 Cushing, 255.....	lviii, 46	sachusetts, 125.....	15, 13
Duty v. Graham, 12 Texas, 427.....	lxii, 534	Eastern R. R. Co. ad. Commonwealth, 103 Mas-	
Duval v. Bibb, 4 Henning & M. 113.....	iv, 606	sachusetts, 254.....	4, 555
Duval v. Farmer's Bank, 4 Gill & J. 262.....	xxii, 558	Eastern Townships Bank v. Beebe, 53 Vt. 177.....	38, 665
Duval v. Waters, 1 Bland's Ch. 569.....	xviii, 260	Easterwood v. Quin, 2 Brevard, 64.....	lii, 700
Du Vivier v. Hopkins, 116 Massachusetts, 125.....	17, 141	Eastin v. Bank of Stockton, 66 California, 123.....	56, 77
Dwiggins v. Clark, 64 Indiana, 49.....	48, 140	Eastin v. Dugat, 10 Louisiana, 185.....	xxix, 461
Dwight v. Blackmar, 2 Michigan, 330.....	lvii, 130	Eastland v. Caldwell, 2 Bibb, 21.....	iv, 668
Dwight v. Brewster, 1 Pickering, 50.....	xi, 133	Eastman v. Amoskeag Mfg. Co., 44 New Hamp-	
Dwight v. Cutler, 3 Michigan, 565.....	lxiv, 105	shire, 143.....	lxxxii, 301
Dwight v. Germania L. Ins. Co., 103 N. Y. 241.....	57, 729	Eastman v. Batchelder, 36 New Hampshire, 141.....	lxii, 296
Dwight v. Mayor of Boston, 12 Allen, 316.....	xo, 149	Eastman v. Clark, 53 New Hampshire, 276.....	16, 192
Dwight v. Pomeroy, 17 Massachusetts, 303.....	ix, 148	Eastman ad. Commonwealth, 1 Cushing, 189.....	lxviii, 596
Dwinal v. Barnard, 23 Maine, 554.....	lxviii, 507	Eastman v. Cooper, 15 Pickering, 276.....	xxvi, 600
Dwinal v. Soper, 32 Maine, 119.....	lii, 643	Eastman v. Fifield, 3 New Hampshire, 333.....	xiv, 371
Dwinal v. Veasey, 44 Maine, 167.....	lxix, 94	Eastman v. Hibbard, 54 New Hampshire, 504.....	20, 157
Dwinal v. Brown, 65 Georgia, 438.....	38, 792	Eastman v. Howard, 30 Maine, 58.....	i, 611
Dyas v. Dinkgrave, 15 Louisiana An. 502.....	lxxvii, 196	Eastman v. Meredith, 36 New Hampshire, 264.....	lxii, 302
Dye v. Dye, 21 Ohio St. 85.....	8, 40	Eastman v. Potter, 4 Vermont, 313.....	xxiv, 609
Dye v. Scott, 25 Ohio St. 194.....	35, 601	Eastman v. Premo, 49 Vermont, 355.....	24, 142
Dyer v. Brannock, 66 Missouri, 391.....	27, 359	Eastman v. Sanborn, 3 Allen, 594.....	lxxxi, 677
Dyer v. Clark, 5 Metcalf, 562.....	xxxix, 697	Eastman v. State, 109 Indiana, 278.....	58, 400
Dyer v. Flint, 21 Illinois, 80.....	lxix, 73	Eastman v. Wadleigh, 65 Maine, 251.....	20, 695
Dyer v. Grand Trunk Ry Co., 42 Vermont, 441.....	1, 350	Easton v. Neff, 102 Pennsylvania State, 474.....	48, 213
Dyer v. Osborne, 11 Rhode Island, 321.....	23, 460	Easton v. State, 39 Alabama, 551.....	lxxxvii, 49
Dyer v. Sanford, 9 Metcalf, 395.....	xlvi, 399	East Kingston v. Towle, 48 New Hampshire, 57.....	lxvii, 575
Dyer v. Shurtleff, 112 Massachusetts, 165.....	17, 77	East Kingston v. Towle, 48 New Hamp. 57.....	2, 174
Dyer v. Tuscaloosa Bridge Co., 2 Porter, 295.....	xxvii, 655	East Saginaw M. Co. v. E. Saginaw, 19 Mich. 269.....	2, 82
Dyer v. Wittler, 29 Missouri, 81.....	58, 85	East St. Louis v. East St. Louis G. I. & C. Co., 98	
Dyett v. North Am. Coal Co., 20 Wendell, 570.....	xxxii, 598	Illinois, 415.....	38, 97
Dygart v. Bohanck, 23 Wendell, 445.....	xxxv, 575	East St. Louis v. O'Flynn, 119 Illinois, 200.....	59, 795
Dyke v. Erie Ry Co., 45 New York, 113.....	6, 43	East St. Louis v. Trustees, 102 Illinois, 428.....	40, 608
Dykens v. Allen, 7 Hill, 497.....	xlvi, 87	East Tennessee and Georgia R. R. Co. v. St. John,	
Eados ad. State, 68 Missouri, 150.....	30, 780	5 Sneed, 534.....	lxxxix, 149
Eadie v. Simmons, 26 New York, 9.....	lxxxii, 395	East Tennessee and Georgia R. R. Co. v. Whittle,	
Eads v. Braselton, 22 Arkansas, 499.....	lxxxix, 88	27 Georgia, 535.....	lxxxii, 741
Eads ad. State, 15 Iowa, 114.....	lxxxviii, 399	Eas' Tenn & V. and G. R. Co. v. Duffield, 12 Lea,	
Eagan v. Call, 24 Penn. State, 236.....	lxv, 633	63.....	47, 319

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

East Tennessee I. M. Co. v. Bynum, 3 Speed, 265.....lxv, 56	Edwards v. Chandler, 14 Michigan, 471.....xx, 249
East Tenn. R. R. Co. v. Rogers, 6 Hask. 143.....19, 569	Edwards v. Commonwealth, 73 Virginia, 36.....49, 377
East Tenn. V. & G. R. R. Co. v. Bayliss, 77 Alabama, 423.....54, 69	Edwards v. Edwards, 11 Vermont, 587.....xxiv, 711
E. Tenn. V. & G. R. Co. v. Johnston, 75 Ala. 896..51, 469	Edwards v. Elliott, 36 New Jersey, 449.....13, 463
Eathery v. Eathery, 1 Coldwell, 461.....lxviii, 499	Edwards v. Handley, Hardin, 602.....lxi, 746
Eaton v. Boismonsault, 67 Maine, 540.....24, 62	Edwards v. McKee, 1 Missouri, 123.....xlii, 474
Eaton v. Boston, Concord etc. R. R. Co., 81 New Hampshire, 501.....12, 147	Edwards v. Moses, 2 Nott & McC. 433.....x, 615
Eaton v. Boston and Lowell R. R. Co., 11 Allen, 500.....lxixvii, 730	Edwards v. N. Y. & H. R. R. Co., 96 N. Y. 245.....56, 659
Eaton v. R. & L. R. R., 11 Allen, 500.....lxixvii, 730	Edwards ada. State, 2 Nott & McC. 13.....577
Eaton v. Delaware etc. R. R. Co., 57 N. Y. 363..13, 513	Edwards v. University, 1 Dev. & Bat. Eq. 325.....xxx, 179
Eaton v. Eaton, 8 Vroom, 108.....18, 716	Edwards v. White L. T. Co., 104 Mass. 139.....6, 213
Eaton v. European & N. E'y Co., 59 Maine, 530....8, 430	Elbeck v. Granberry, 2 Haywood, 232.....li, 694
Eaton v. Gay, 44 Michigan, 431.....38, 276	Egbert v. Greenwalt, 44 Michigan, 245.....36, 269
Eaton v. Hasty, 6 Nebraska, 419.....29, 365	Egberts v. Wood, 3 Paige Ch. 517.....xxiv, 336
Eaton v. Hill, 50 New Hampshire, 235.....9, 189	Egerton v. Carr, 94 North Carolina, 648.....54, 639
Eaton v. Winnie, 20 Michigan, 156.....4, 377	Eggers v. Hink, 63 California, 445.....49, 96
Eaton v. Whitaker, 18 Connecticut, 222.....xlv, 586	Eglecht ada. State, 41 Iowa, 374.....26, 613
Eaton C. & B. Co. v. Avery, 83 New York, 31.....36, 369	Egyptian Levee Co. v. Cummins, 27 Mo. 495.....lxix, 276
Eaves v. Eaton, 8 Kansas, 314.....15, 345	Egyptian Levee Co. v. Hardin, 27 Missouri, 496.....lxix, 276
Eaves v. People's Savings Bank, 27 Conn. 229.....lxix, 59	Ehrenberg's Succession, 21 La. An. 280.....xlix, 729
Ebaugh v. Handel, 5 Watts, 43.....xxx, 291	Ehrgott v. Mayor etc., 96 New York, 264.....48, 622
Eberhart's Appeal, 39 Penn. State, 508.....lxix, 536	Elohar v. Kinsler, 14 Penn. State, 263.....lvi, 551
Ebert v. Wood, 1 Binney, 216.....li, 436	Elohebaum v. Irons, 6 Watts & Serg. 67.....xl, 649
Eberts v. Belover, 44 Michigan, 519.....38, 276	Eloheberger v. Finley, 7 Harris & J. 361.....xvi, 313
Eborn v. Zimpelman, 47 Texas, 503.....26, 315	Eloheberger v. McCauley, 5 Harris & J. 213.....ix, 514
Echert v. Des Coudres, 1 Mill, 69.....xii, 609	Eloheberger v. Murdock, 10 Maryland, 373.....lxix, 149
Echols, Ex parte, 39 Alabama, 696.....lxixviii, 749	Eichels v. Evansville 8. E'y Co., 78 Indiana, 261..41, 861
Eckel v. Murphy, 15 Penn. State, 488.....liii, 607	Eicks v. Copeland, 63 Texas, 581.....37, 769
Eckert v. Long Island R. R. Co., 43 N. Y., 502.....3, 721	Eidman v. Bowman, 58 Illinois, 444.....11, 99
Eckert v. Triplett, 43 Indiana, 174.....17, 735	Eigleberger v. Kibler, 1 Hill Ch. 113.....xxvi, 123
Eckhardt v. People, 83 New York, 468.....36, 462	Eisenberry v. Bazaar, 23 Kansas, 556.....31, 196
Eddings ada. State, 70 Missouri, 545.....36, 496	Eisenberry v. Edwards, 67 Iowa, 613.....56, 369
Eddy v. Bond, 19 Maine, 461.....xxxvi, 767	Eiland v. Radford, 7 Alabama, 794.....xlii, 610
Eddy v. Capron, 4 Rhode Island, 394.....lxvii, 541	Eilbert v. Finkbeiner, 68 Pennsylvania State, 243..8, 176
Eddy v. Hawkeye Ins. Co., 70 Iowa, 472.....59, 444	Elmer v. Best, 33 Missouri, 240.....lxixli, 129
Eddy v. Herrin, 17 Maine, 338.....xxxv, 261	Einstein v. Marshall, 58 Alabama, 153.....28, 729
Eddy v. Livingston, 36 Missouri, 487.....lxixviii, 123	Eisenlohr v. Swain, 35 Penn. State, 107.....lxixviii, 338
Eddy ada. People, 43 California, 331.....13, 143	Ekel v. Sneyly, 3 Watts & Serg. 272.....lxixviii, 738
Eddy v. Simpson, 3 California, 249.....lxvii, 408	Ela v. American Mer. Un. Ex. Co., 29 Wm. 611..9, 619
Eddy v. St. Mary, 83 Vermont, 463.....36, 695	Ela v. Card, 2 New Hampshire, 176.....lx, 46
Eddy v. Traver et al., 6 Paige's Ch. 621.....xxxli, 261	Ela v. Edwards, 13 Allen, 48.....xx, 174
Edelen v. Hardey, 7 Harris & J. 61.....xvi, 292	Ela v. Knox, 46 New Hampshire, 16.....lxixviii, 179
Edelin v. Clarkson, 3 B. Monroe, 31.....lxixviii, 177	Ela v. Smith, 5 Gray, 121.....lxvi, 395
Edens ada. State, 96 North Carolina, 698.....59, 294	Elam v. Keen, 4 Leigh, 333.....lxixv, 323
Edgar v. Castello, 14 South Carolina, 30.....37, 714	Elcock's Will, 4 McCord, 39.....xvii, 769
Edgar v. Greer, 8 Iowa, 394.....lxixv, 316	Elder v. Dyer, 26 Kansas, 604.....49, 328
Edgar v. Richardson, 33 Ohio St. 581.....31, 671	Elder v. Elder, 10 Maine, 80.....lxv, 295
Edgell v. Hart, 9 N. Y. (5 Selden), 213.....lix, 532	Elder v. Larrabee, 45 Maine, 590.....lxvi, 567
Edgell v. McLaughlin, 6 Wharton, 176.....xxxvi, 214	Elder v. Morrison, 10 Wendell, 136.....lxixv, 549
Edgerly v. Emerson, 23 New Hampshire, 555.....lv, 207	Elder v. Reel, 63 Pennsylvania State, 308.....1, 414
Edgerly v. Shaw, 25 New Hampshire, 514.....lvii, 349	Elder ada. State, 65 Indiana, 263.....37, 69
Edgerton v. Bird, 6 Wisconsin, 527.....lxix, 473	Elderkin v. Spurbeck, 2 Pin. 129, 1 Chand. 69.....li, 148
Edgerton v. State, 67 Indiana, 583.....33, 110	Eldred v. Malloy, 2 Colorado, 390.....25, 722
Edinboro Ac. v. Robinson, 37 Pa. State, 210.....lxixviii, 421	Eldridge v. Rowe, 2 Gilman, 91.....lxixli, 41
Edmonds v. Mutual S. F. I. Co., 1 Allen, 511.....lxixix, 746	Eldridge In re, 82 New York, 161.....37, 558
Edmeston v. Lyde, 1 Paige's Ch. 637.....xix, 454	Elgin v. Eaton, 83 Illinois, 535.....25, 412
Edmiston v. Baxter, 4 Haywood, 112.....lx, 751	Ellick ada. State, 2 Winst. L. 56.....lxixv, 443
Edmonds v. Banbury, 23 Iowa, 367.....4, 177	Eliot v. Lawton, 7 Allen, 274.....lxixviii, 683
Edmonds v. State, 70 Alabama, 8.....45, 67	Eliott v. Gower, 12 Rhode Island, 79.....34, 600
Edmonds v. Digges, 1 Grattan, 359.....xlii, 561	Elizabeth Bank v. Ayres, 2 Halsted, 130.....xli, 526
Edmondson v. Penny, 1 Penn. State, 334.....xliv, 137	Elizabeth City Acad. v. Lindsey, 6 Ired. L. 476.....xlv, 506
Edmondson v. State, 17 Alabama, 179.....lii, 169	Elizabeth etc. R. R. Co. v. Combs, 10 Bush, 382..19, 67
Edmondson v. Wragg, 104 Penn. St. 500.....49, 590	Elkhart Co. Lodge v. Cary, 93 Indiana, 238.....49, 744
Edrington v. Harper, 3 J. J. Marshall, 353.....xx, 145	Elkhart M. A. B. & R. Ass'n v. Houghton, 103 Indiana, 236.....53, 214
Edson v. Edison, 108 Massachusetts, 590.....11, 393	Elkin v. People, 3 Scammon, 207.....lxixvi, 541
Edwards, in re, 14 Vroom, 535.....39, 610	Elkins v. Boston etc. R. R. 19 New Hamp. 337.....31, 184
Edwards v. Allouez M. Co., 38 Michigan, 46.....31, 301	Elledge v. Todd, 1 Humphreys, 43.....lxixv, 616
	Ellerbe v. Ellerbe, 1 Speers' Eq. 358.....xli, 623
	Ellerman v. McMains, 30 La. Ann. 190.....31, 218

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Elliott v. Chamberlin, 38 N. J. Eq. 604.....48, 327
 Elliott v. Martin, 6 Maryland, 509.....xli, 327
 Elliott v. Nichols, 7 Gill, 85.....xlvi, 546
 Elliot v. Abbot, 12 New Hampshire, 649.....xxxvii, 327
 Elliot v. Alsberry, 2 Bibb, 473.....v, 631
 Elliot v. Fitch's R. R. Co., 10 Cushing, 191.....lvii, 85
 Elliot v. Porter, 5 Dana, 239.....xxx, 689
 Elliot v. Small, 35 Minnesota, 396.....59, 329
 Elliot v. Waring, 5 T. B. Munroe, 338.....xvii, 69
 Elliott & Ex parte, 5 Wharton, 524.....xxxiv, 579
 Elliott's Appeal, 80 Penn. State, 75.....lxxxviii, 625
 Elliott v. Booth, 41 Texas, 180.....23, 583
 Elliott v. Brown, 2 Wendell, 497.....xx, 644
 Elliott v. Coggeshall, 4 Blackford, 238.....xlix, 365
 Elliott v. Horn, 10 Alabama, 348.....xliv, 488
 Elliott v. Kalbaska Supervisors, 58 Mich. 432.....55, 706
 Elliott's Lessee v. Knott, 14 Maryland, 121.....lxix, 619
 Elliott v. Leake, 5 Missouri, 206.....xxxii, 314
 Elliott v. Looming Co. Mut. Ins. Co., 66 Penn.
 St. 22.....5, 323
 Elliott v. Philadelphia, 75 Penn. St. 342.....13, 691
 Elliott v. Powell, 10 Watts, 453.....xxvi, 200
 Elliott v. Pray, 10 Allen, 378.....lxxxvii, 653
 Elliott v. Rhett, 5 Richardson's L. 405.....lviii, 760
 Elliott v. Russell, 10 Johnson, 1.....vi, 306
 Elliott v. Thompson, 4 Humphreys, 99.....xi, 633
 Elliott v. Van Buren, 33 Mich. 49.....90, 668
 Ellis v. Albany City Ins. Co., 50 N. Y. 402.....10, 495
 Ellis v. Andrews, 58 New York, 83.....15, 379
 Ellis v. Beale, 18 Maine, 337.....xxxvi, 736
 Ellis v. Bittzer, 2 Ohio, 89.....xv, 534
 Ellis v. Buzzell, 60 Maine, 209.....11, 204
 Ellis v. Clark, 110 Massachusetts, 389.....14, 609
 Ellis v. Clarke, 19 Arkansas, 420.....lxx, 603
 Ellis v. Comm'l Bk of Natchez, 7 Howard, 294.....xi, 63
 Ellis v. Ellis, 15 Alabama, 296.....1, 132
 Ellis v. Eason, 50 Wisconsin, 133.....36, 830
 Ellis v. Fisher, 3 Sneed, 231.....lxv, 62
 Ellis v. Kansas City R. R. Co., 63 Mo. 131.....21, 436
 Ellis v. Kreutzinger, 37 Missouri, 311.....lxix, 270
 Ellis v. Little, 37 Kansas, 707.....41, 434
 Ellis v. Marshall, 2 Massachusetts, 369.....lii, 49
 Ellis v. Mathews, 19 Texas, 390.....lxx, 353
 Ellis v. Maxson, 19 Michigan, 186.....2, 81
 Ellis v. Milwaukee City Ry Co., 67 Wis. 135.....58, 858
 Ellis v. Secor, 21 Michigan, 185.....18, 173
 Ellis ad. State, 3 Connecticut, 185.....viii, 175
 Ellis ad. State, 74 Missouri, 385.....41, 321
 Ellis ad. State, 33 N. J. L. 102.....xvii, 707
 Ellis v. State Ins. Co., 68 Iowa, 578.....56, 865
 Ellis v. Temple, 4 Cold. 315.....xciv, 200
 Ellis v. Welch, 6 Massachusetts, 246.....iv, 122
 Ellis v. Wire, 33 Indiana, 127.....5, 189
 Ellis & Morton v. Ohio L. I. & T. Co., 4 Ohio St. 628.....lxiv, 610
 Ellison v. Commissioners, 5 Jones' Eq. 57.....lxxv, 430
 Ellsworth v. Tarr, 26 Alabama, 733.....lxix, 749
 Elmendorf v. Harris, 23 Wendell, 628.....xxv, 587
 Elmendorf v. Carmichael, 3 Littell, 473.....xiv, 86
 Elmore v. Naugatuck R. R. Co., 23 Conn. 457.....lxiii, 143
 Elmore v. Overton, 104 Indiana, 548.....54, 343
 Elmore v. Sands, 54 New York, 512.....13, 617
 Elmore v. Spear, 27 Georgia, 193.....lxix, 729
 Elot v. Mader, 1 Robinson (Louisiana), 581.....xxxviii, 192
 Elrod v. Lancaster, 2 Head, 571.....lxxv, 749
 Elston v. Oester, 101 Indiana, 426.....51, 754
 Elston v. Chicago, 40 Illinois, 514.....lxxxix, 361
 Elterson v. Leeds, 97 Indiana, 336.....49, 438
 Elton v. Johnson, 16 Connecticut, 253.....xii, 111
 Eltzroth v. Webster, 15 Indiana, 21.....lxxvii, 78
 Elwell ad. Commonwealth, 2 Metcalf, 190.....xxv, 328
 Elwell v. Shaw, 16 Massachusetts, 42.....viii, 126
 Elwood v. Western Un. Tel. Co., 45 N. Y. 549.....6, 140
 Ely v. Wilbur, 49 N. J. L. 685.....60, 668
 Ely v. Wilcox, 20 Wisconsin, 523.....xci, 436
 Emans v. Turnbull, 2 Johnson, 313.....lii, 427
 Emanuel v. Bird, 19 Alabama, 596.....liv, 200
 Emanuel v. White, 34 Mississippi, 56.....lxix, 385
 Embury v. Millar, 1 A. K. Marshall, 300.....x, 733
 Embury v. Conner, 3 N. Y. (3 Comst.) 511.....liii, 325
 Emerle v. Gilman, 10 California, 404.....lxx, 743
 Emerick v. Tavenor, 9 Grattan, 220.....lviii, 217
 Emerson v. Babcock, 66 Iowa, 257.....55, 373
 Emerson v. Brigham, 10 Massachusetts, 197.....vi, 109
 Emerson v. Durand, 64 Wisconsin, 111.....54, 593
 Emerson v. European etc. Ry Co., 67 Ma. 387.....24, 39
 Emerson v. Flak, 6 Greenleaf, 200.....lix, 206
 Emerson v. Lee, 18 Louisiana, 134.....lxxxix, 643
 Emerson v. Lowell Gaslight Co., 6 Allen, 146.....lxxxiii, 621
 Emerson v. Murray, 4 New Hampshire, 171.....xvii, 407
 Emerson v. Navarro, 31 Texas, 334.....xviii, 534
 Emerson v. Patridge, 27 Vermont, 8.....lxii, 617
 Emerson v. Peteler, 35 Minnesota, 461.....59, 337
 Emerson v. Proprietors, 1 Massachusetts, 464.....li, 34
 Emerson v. Prov. Hat Co., 13 Mass. 237.....vii, 68
 Emerson v. Simpson, 43 New Hamp. 475.....lxxxii, 169
 Emerson v. Smith, 51 Penn. State, 90.....lxxxviii, 586
 Emerson v. Taylor, 9 Greenleaf, 42.....lxiii, 531
 Emerson v. Udall, 13 Vermont, 477.....lxxxvii, 604
 Emerson v. Wilson, 11 Vermont, 357.....xxxiv, 696
 Emery's Case, 107 Massachusetts, 172.....9, 22
 Emery v. Berry, 28 New Hampshire, 473.....lxii, 623
 Emery v. Clough, 63 New Hampshire, 523.....56, 543
 Emery v. Fowler, 39 Maine, 326.....lxiii, 627
 Emery v. Goodwin, 13 Maine, 14.....xxix, 476
 Emery v. Gowen, 4 Greenleaf, 33.....xvi, 233
 Emery v. Haggood, 7 Gray, 55.....lxvi, 468
 Emery v. Harsey, 4 Greenleaf, 407.....xvi, 268
 Emery v. Hobson, 62 Maine, 578.....16, 513
 Emery v. Huntington, 109 Massachusetts, 431.....12, 728
 Emery v. Irvin Nat. Bank, 25 Ohio St. 300.....18, 309
 Emery v. Mutual C. & V. F. Ins. Co., 51 Michi-
 gan, 469.....47, 590
 Emery v. Neighbor, 2 Halsted, 143.....xi, 541
 Emery v. Owings, 7 Gill, 488.....xlvi, 580
 Emery ad. State, 78 Missouri, 77.....47, 98
 Emery v. Vroman, 19 Wisconsin, 659.....lxxxviii, 726
 Emery v. Webster, 42 Maine, 204.....lxvi, 274
 Emory v. Hazard P. Co., 22 South Carolina, 476.....53, 730
 Emigrant I. S. Bank v. Commonwealth, 96 Mass.
 12.....xviii, 126
 Emilen v. Lehigh Coal etc. Co., 47 Pa. St. 78.....lxxvii, 512
 Emmerson v. Claywell, 14 B. Monroe, 18.....lviii, 645
 Empire Trans. Co. v. Wallace, 68 Penn. St. 302.....8, 178
 Empire Trans. Co. v. Wamsutta Oil Co., 63 Penn-
 sylvania State, 14.....3, 518
 Emporia v. Soden, 25 Kansas, 589.....37, 365
 Emporia Nat. Bank v. Shotwell, 35 Kansas, 380.....57, 171
 Enaut v. Tax Collector, 36 Louisiana An. 804.....51, 14
 Endaley v. Johns, 120 Illinois, 469.....60, 573
 Enou v. Clark, 2 Penn. State, 234.....xliv, 191
 Enfield v. Permit, 8 New Hampshire, 512.....xxxi, 207
 Enfield, Props of, v. Day, 7 New Hamp. 457.....lxxxviii, 269
 Enfield T. B. v. Hartford R. R. 17 Conn. 40.....lxiii, 716
 Enfield T. B. v. Hartford R. R. 17 Conn. 454.....xliv, 558
 Engel v. Fischer, 102 New York, 400.....55, 818
 England ad. State, 8 Jones L. 379.....lxxx, 234
 Engle v. Burns, 5 Call, 463.....li, 593
 Engle v. Haines, 1 Halst. Ch. 186.....lxiii, 624
 Engle v. Scheuerman, 40 Georgia, 206.....2, 373
 Engle v. Sohn, 41 Ohio State, 691.....52, 108

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Engleman v. State, 2 Indiana, 91.....lii, 494
 Engles v. Brington, 4 Yeates, 345.....lii, 411
 Engles v. Engles, 4 Arkansas, 286.....xxxviii, 57
 English v. Beeble, 32 Missouri, 186.....lxixii, 126
 English v. Delaware & H. C. Co., 66 N. Y. 454.....93, 69
 English v. English, 2 Green Ch. 504.....xxix, 730
 English v. Franklin F. Ins. Co., 65 Mich. 273.....54, 577
 English v. Johnson, 17 California, 107.....lxvii, 574
 English v. Smock, 34 Indiana, 115.....7, 215
 English v. State, 35 Texas, 472.....14, 374
 Kno v. Woodworth, 4 N. Y. (4 Comst.) 249.....liii, 197
 Enoch ada. People, 13 Wendell, 150.....xxvii, 170
 Enosco v. Dunn, 44 Connecticut, 93.....28, 430
 Ensign v. Harney, 15 Nebraska, 330.....48, 344
 Ensign v. Webster, 1 Johns. Ca. 145.....1, 108
 Ensign, In re Estate of, 103 New York, 284.....57, 717
 Ensminger v. People, 47 Illinois, 384.....xov, 495
 Enterprise Ins. Co. v. Parlsot, 35 Ohio St. 35.....35, 589
 Enterprise Trans. Co. v. Sheedy, 103 Penn. St. 493.49, 130
 Episc. Church of Macon v. Wiley, 2 Hill Ch. 584,
 1 Riley Ch. 156.....xxx, 386
 Eppendorf v. Brooklyn C. etc. R. Co., 69 New
 York, 195.....25, 171
 Epperson v. Nugent, 57 Mississippi, 45.....34, 434
 Epps v. Cole, 4 Henning & M. 161.....iv, 612
 Eppinger v. Kirby, 23 Illinois, 521.....lxvi, 709
 Epps v. Hinds, 27 Mississippi, 657.....lxi, 528
 Equitable L. A. Soc. v. Vogel, 78 Alabama, 441.....52, 344
 Equitable Life Ins. Co. v. Paterson, 41 Ga. 338... 5, 538
 Erickson v. Bell, 53 Iowa, 627.....36, 246
 Erie v. Caulkins, 85 Penn. St. 247.....27, 642
 Erie v. Magill, 101 Penn. St. 616.....47, 739
 Erie v. Schwingle, 22 Penn. State, 384.....ix, 87
 Erie & N. E. R. R. Co. ada. Commonwealth, 27
 Penn. State, 339.....lxvii, 471
 Erie & P. R. R. Co. v. Douthet, 88 Penn. St. 243.....33, 451
 Erie & W. T. R. Co. v. Dater, 91 Illinois, 195.....33, 51
 Erie C. P. Ry Co. v. Schuster, 113 Penn. St. 412.57, 471
 Erie G. I. Wks v. Barber, 106 Penn. St. 125.....51, 608
 Erie Pres. Co. v. Miller, 52 Connecticut, 444.....53, 607
 Erie Ry Co. v. Commonwealth, 66 Penn. St. 84... 5, 351
 Erie Ry Co. ada. Commonwealth, 63 Penn. St.
 286.....1, 269
 Erie Railway Co. v. State, 2 Vroom, 631.....lxixvi, 228
 Erie Ry Co. v. Wilcox, 84 Illinois, 239.....25, 451
 Ernst v. Hudson R. R. Co., 35 New York 9.....xo, 761
 Ernst v. H. R. B. R. Co. 39 New York, 61.....c, 406
 Ernst v. Steckman, 74 Penn. St. 12.....15, 542
 Erskine v. De la Baum, 3 Texas, 406.....xliv, 751
 Erskine v. Plummer, 7 Greenleaf, 447.....xxii, 216
 Erskine v. Townsend, 2 Massachusetts, 483.....lii, 71
 Ervine's Appeal, 16 Penn. State, 256.....lv, 499
 Erwin's Appeal, 39 Penn. State, 836.....lxix, 542
 Erwin v. Bulla, 29 Indiana, 85.....xcii, 341
 Erwin v. Com'l & R. R. B't, 3 La. An. 126.....xlvi, 447
 Erwin v. Lowry, 2 Louisiana An. 314.....xlv, 548
 Erwin v. Maxwell, 3 Murphey, 241.....ix, 602
 Erwin v. Oldham, 6 Yerger, 185.....xxvii, 458
 Erwin v. Saunders, 1 Cowen, 249.....xiii, 520
 Erwin v. Shaffer, 9 Ohio State, 43.....lxvii, 613
 Erwin v. State, 29 Ohio St. 183.....23, 733
 Erwin v. Torrey, 8 Martin, 90.....xiii, 279
 Eschbach v. Collins, 61 Maryland, 478.....48, 123
 Esdon v. Colburn, 28 Vermont, 631.....lxvii, 730
 Eskridge v. Glover, 5 Stewart & Porter, 264.....xxvi, 344
 Esalava v. Elliott, 5 Alabama, 264.....xxxix, 326
 Esalava v. Lepretre, 21 Alabama, 504.....lvi, 268
 Esmond v. Tarbox, 7 Greenleaf, 61.....xx, 346
 Essex Company v. Edmonds, 12 Gray, 273.....lxv, 758
 Estabrook v. Smith, 6 Gray, 570.....lxvi, 443
 Estabrook v. Smith, 6 Gray, 572.....lxvi, 445
 Estate of ———. See name of decedent, etc.
 Estate of Davis and Demunqu, 5 Wharton, 530. xxxiv, 574
 Estate of Hinds, 5 Wharton, 138.....xxxiv, 543
 Estate of Knight, 12 California, 200.....lxixii, 531
 Estate of Nerac, 35 California, 392.....xcv, 111
 Estep v. Lacy, 35 Iowa, 419.....14, 498
 Estes v. Antrobua, 1 Missouri, 197.....xiii, 496
 Estes v. Browning, 11 Texas, 237.....ix, 238
 Estes v. Tower, 102 Massachusetts, 65.....3, 439
 Estill v. Fox, 7 T. B. Monroe, 553.....xxviii, 213
 Estill v. Taul, 2 Yerger, 466.....xxiv, 469
 Esty v. Baker, 50 Maine, 325.....lxix, 616
 Esty v. Clark, 101 Massachusetts, 38.....3, 339
 Etting v. Schuykill Bank, 2 Penn. State, 353.....xlv, 206
 Eufania v. McNab, 67 Alabama, 583.....42, 118
 Eugster v. West, 35 Louisiana An. 119.....48, 233
 Eureka Co. v. Bass, 51 Alabama, 300.....60, 128
 Eureka Co. v. Edwards, 71 Alabama, 248.....46, 314
 Eureka Ins. Co. v. Robinson, Roe & Co., 56 Penn.
 St. 256.....xciv, 65
 Evans v. Browne, 30 Indiana, 514.....xcv, 719
 Evans v. Bryan, 95 North Carolina, 174.....50, 233
 Evans v. Clapp, 123 Massachusetts, 165.....25, 28
 Evans v. Columbian Ins. Co., 44 New York, 144... 4, 659
 Evans v. Commonwealth, 4 Serg. & R. 273.....viii, 711
 Evans v. Commonwealth, 8 Watts, 398.....xxxiv, 477
 Evans v. Davidson, 53 Maryland, 245.....36, 409
 Evans v. Dendy, 2 Speers' Law, 9.....xiii, 358
 Evans v. Dravo, 24 Penn. State, 63.....lxii, 329
 Evans v. Elliott, 20 Indiana, 283.....lxixiii, 319
 Evans v. Fearn, 16 Alabama, 689.....1, 137
 Evans v. Fitchburgh R. R. Co., 111 Mass. 142.....15, 19
 Evans v. Gale, 17 New Hampshire, 573.....xliii, 614
 Evans v. Gibson, 29 Missouri, 223.....lxixvii, 555
 Evans v. Governor, 18 Alabama, 659.....liv, 173
 Evans v. Hamrick & Cole, 61 Penn. St. 19.....c, 585
 Evans v. Kingberry, 2 Randolph, 130.....xiv, 779
 Evans v. McDermott, 49 New Jersey Law, 163.....60, 608
 Evans v. Matson, 51 Penn. State, 356.....lxixviii, 594
 Evans v. Memphis & C. R. Co., 56 Ala. 246.....23, 771
 Evans v. Merriweather, 3 Seamon, 462.....lxixviii, 103
 Evans v. Miller, 58 Mississippi, 120.....28, 313
 Evans v. Pearce, 15 Gratt. 513.....lxixviii, 636
 Evans v. Root, 7 N. Y. (3 Selden), 185.....lvii, 513
 Evans v. Sanders, 6 Porter, 497.....xxxiii, 237
 Evans v. Smith, 28 Georgia, 98.....lxixii, 751
 Evans v. Smith, 5 T. B. Monroe, 263.....xvii, 74
 Evans v. Spurgin, 6 Grattan, 107.....liii, 106
 Evans v. State, 8 Ohio State, 196.....lxix, 96
 Evans ada. State, 3 Arkansas, 585.....lxixvi, 469
 Evans v. Tatum, 9 Serg. & R. 252.....xi, 717
 Evans v. Utica, 69 New York, 156.....25, 156
 Evans v. Walsh, 12 Vroom, 281.....32, 261
 Evans v. Webb, 1 Yeates, 434.....1, 306
 Evansloch v. G. C. & S. F. Ry Co., 57 Tex. 128.....44, 586
 Evansville v. Decker, 84 Indiana, 225.....43, 86
 Evansville v. Morris, 87 Indiana, 366.....44, 753
 Evansville v. Pfisterer, 24 Indiana, 26.....7, 214
 Evansville & T. H. R. R. Co. v. Griffin, 100 Ind-
 iana, 221.....50, 759
 Evansville & T. H. R. R. Co. v. McKee, 99 Ind-
 iana, 519.....50, 108
 Evansville etc. R. R. Co. v. Duncan, 28 In-
 diana, 441.....xcii, 323
 Evansville G. L. Co. v. State, 73 Indiana, 212.....35, 129
 Evansville Nat. B't v. Kaufman, 93 N. Y. 273.....45, 204
 Evans v. Strode, 11 Ohio, 430.....lxixviii, 744
 Evans v. Middlebury, 53 Vermont, 639.....33, 767
 Eveleth v. Blossom, 54 Maine, 447.....xcii, 585

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Evaleth v. Seifner*, 12 Maine, 34.....xxviii, 147
Evening Journal Ass'n v. McDermott, 15
 Vroom, 430.....43, 392
Evening Journal Assn. v. State Board of Amuse-
sors, 47 New Jersey Law, 38.....54, 114
Evening News Ass'n v. Tyron, 42 Mich. 549.....36, 480
Evans v. Griscom, 13 Vroom, 579.....36, 542
Everett v. Coffin, 6 Wendell, 603.....xxii, 554
Everett v. Chicago, B. I. & P. R'y Co., 69 Iowa, 15.....58, 207
Everett v. Herrin, 46 Maine, 357.....lxiv, 455
Everett v. United States, 6 Porter, 168.....xxx, 584
Evergreen Cem. Ass'n v. New Haven, 43 Con-
 necticut, 234.....21, 643
Everhart v. Terre Haute and I. R. R. Co., 28
 Indiana, 292.....41, 567
Everman v. Robb, 59 Mississippi, 653.....24, 622
Everson v. Kirtland, 4 Paige Ch. 623.....xxvii, 91
Everson v. Powers, 89 New York, 537.....42, 319
Everts v. Agnes, 4 Wisconsin, 343.....lxv, 314
Everts v. Beach, 31 Michigan, 136.....18, 169
Everts v. Brown, 1 D. Chipman, 96.....1, 699
Everts v. Chittenden, 2 Day, 338.....ii, 97
Evertson v. Nat. Bank, 66 New York, 14.....23, 9
Evertson v. Sutton, 5 Wendell, 281.....xxi, 217
Evill v. Conwell, 2 Blackford, 133.....xxviii, 138
Ewan v. Lippincott, 47 N. J. Law, 192.....54, 143
Ewart v. Street, 2 Bailey, 157.....xxiii, 131
Ewell v. State, 6 Yerger, 364.....xxvii, 480
Ewer v. Coffin, 1 Cushing, 23.....xlvi, 587
Ewer v. Washington Ins. Co., 16 Pick. 502.....xxviii, 258
Ewing v. Gildwell, 3 Howard, 332.....xxxiv, 96
Ewing v. Handley, 4 Littell, 346.....xiv, 140
Ewing v. Higby, 7 Ohio, Pt. 1, 196.....xxviii, 633
Ewing v. Smith, 3 Desanais, 417.....v, 557
Ewing v. Tees, 1 Binney, 450.....ii, 455
Excelsior F. Ins. Co. v. Royal Ins. Co., 55 New
 York, 343.....14, 271
Exchange Bank v. McLoon, 73 Maine, 466.....40, 368
Exchange Bank v. Rice, 107 Mass. 37.....9, 1
Ex'rs of Thomas v. Erwin's Ex'rs, Chever' L., 22 xxxiv, 586
Executors of Ware v. Murph, Rice's Law, 54.....xxviii, 97
Exeter Bank v. Stowell, 16 New Hamp. 61.....xii, 716
Exhaust V. Co. v. Chicago, Mil. & St. P. R. R.
 Co., 66 Wisconsin, 218.....57, 257
Ex parte Gibson, 31 California, 619.....xci, 546
Eyler v. Crabbs, 2 Maryland, 137.....lvi, 711
Eyler v. County Comm., 49 Maryland, 257.....33, 249
Eyre v. Jacob, 14 Grattan, 422.....lxviii, 367
Eyster v. Hatheway, 50 Illinois, 521.....xcix, 537
Ezell, Ex parte, 40 Texas, 451.....19, 32
Ezzard v. Findley G. M. Co., 74 Georgia, 520.....58, 445
Fabens v. Merc. Bank, 23 Pickering, 330.....xxxiv, 59
Faber v. Hovey, 117 Massachusetts, 107.....19, 398
Faber ada. People, 92 New York, 146.....44, 357
Fagg v. Hambl, 21 Iowa, 140.....lxxxix, 561
Fagin v. Connolly, 25 Missouri, 94.....lxix, 450
Fahle v. Pressay, 2 Oregon, 23.....lxxx, 401
Fahn v. Reichart, 8 Wisconsin, 255.....lxvii, 237
Falmestock v. Bailey, 3 Met. (Ky.), 48.....lxviii, 161
Fain v. Commonwealth, 78 Kentucky, 123.....39, 213
Fain v. Inman, 6 Helak. 5.....19, 577
Fain v. Smith, 14 Oregon, 82.....58, 281
Fair v. Philadelphia, 58 Penn. St. 309.....39, 455
Fairbanks v. Kerr, 70 Penn. St. 86.....10, 664
Fairbanks v. Sargent, 104 New York, 106.....56, 490
Fairbanks v. Witter, 18 Wisconsin, 287.....lxxxvi, 765
Fairchild v. Bell, 2 Brevard, 129.....lii, 702
Fairchild v. Chastelleux, 1 Penn. State, 178.....xliv, 117
Fairchild v. New Orleans & N. E. R. Co., 60
 Mississippi, 561.....45, 427
Fairchild v. Ogdenburgh R. R., 15 N. Y. 337.....lxix, 606
Fairclough ada. State, 29 Connecticut, 47.....lxvii, 590
Fairfax v. New York Cent. etc. R. Co., 73 New
 York, 167.....39, 119
Fairfield v. Lawson, 50 Connecticut, 501.....47, 669
Fairfield v. Paine, 23 Maine, 498.....xii, 357
Fairfield Sav. B'k v. Chase, 72 Maine, 226.....39, 319
Fairley v. Smith, 87 North Carolina, 367.....49, 522
Fairy v. Kline, 2 Pennington, 754.....iv, 414
Fairmount etc. R'y Co. v. Studier, 54 Penn.
 St. 375.....xxvii, 714
Falconer v. Smith, 18 Penn. State, 130.....lv, 611
Falkinburg v. Lucy, 26 California, 53.....xov, 76
Falkner v. Streater, 3 Jones' Eq. 33.....lxvii, 239
Fall v. Hasebregg, 46 Indiana, 576.....18, 278
Falliett v. German, 5 Cold. 580.....xov, 111
Fallon v. Butler, 21 California, 34.....lxxxii, 140
Fallon v. Childester, 46 Iowa, 563.....26, 164
Fallon v. Kehoe, 38 Cal. 44.....xcix, 347
Fallon v. O'Brien, 12 Rhode Island, 515.....34, 713
Falloon v. Schilling, 29 1 ansas, 292.....44, 642
Falls v. Carpenter, 1 Dev. & B. Eq. 237.....xxviii, 592
Fanning v. Chadwick, 3 Pickering, 420.....xv, 233
Fanning v. Consequa, 17 Johnson, 511.....viii, 449
Fanning v. Dunham, 5 Johns. Ch. 122.....ix, 263
Fanning v. Ins. Co., 37 Ohio St. 339.....41, 517
Fanning ada. State, 94 North Carolina, 940.....53, 633
Fant v. McDaniel, 1 Brevard, 172.....ii, 660
Faran v. Robinson, 17 Ohio St. 242.....xxvii, 611
Farham v. Thompson, 34 Minnesota, 331.....57, 59
Faris v. Durham, 5 T. B. Monroe, 397.....xvii, 77
Faris v. Starke, 9 Dana, 128.....xxviii, 536
Farish v. Cook, 98 Missouri, 212.....47, 107
Farish v. Reigle, 11 Grattan, 697.....lxii, 698
Farley v. Cleveland, 4 Cowen, 432.....xv, 387
Farley v. Gilmer, 12 Alabama, 141.....xlvi, 249
Farley v. Lea, 4 Dev. & Bat. Law, 169.....xxxii, 680
Farley v. Lincoln, 51 New Hampshire, 677.....12, 182
Farley v. Moog, 79 Alabama, 148.....58, 688
Farley v. Parker, 6 Oregon, 105.....25, 504
Farlin v. Book, 30 Kansas, 401.....46, 109
Farmer v. Kimball, 46 New Hampshire, 435.....lxxxviii, 219
Farmer v. Lewis, 1 Bush, 68.....lxxxix, 619
Farmer v. Lewis, 22 Indiana, 444.....47, 153
Farmer v. Ray, 42 Alabama, 135.....xciv, 633
Farmer v. Samuel, 4 Littell, 187.....xiv, 106
Farmers' Bank v. Belrne, 1 Grattan, 234.....xiii, 561
Farmers' Bank v. Ewing, 78 Kentucky, 264.....39, 221
Farmers' Bank v. Little, 8 Watts & Serg. 307.....xiii, 293
Farmers' Bank v. Winalow, 3 Minnesota, 86.....lxix, 740
Farmers' and Cit. B'k v. Payne, 26 Conn. 444.....lxviii, 362
Farmers & M. Bank v. Baldwin, 23 Minnesota, 196.....23, 663
Farmers' & M. B'k v. Champ. T. Co., 16 Va. 52.....xiii, 491
Farmers' & M. B'k v. Champ. T. Co., 23 Vt. 186.....lvi, 68
Farmers' & M. B'k v. Chester, 6 Humph. 468.....xliv, 318
Farmers & M. Bank v. Downey, 53 Cal. 466.....31, 62
Farmers' & M. B'k v. Ege, 9 Watts, 436.....lxxxvi, 130
Farmers' & M. B'k v. Flint, 17 Vermont, 508.....xliv, 361
Farmers & M. B'k v. Galbraith, 10 Penn. St. 490.....li, 498
Farmers & M. Bank v. Hazeltine, 78 N. Y. 104.....34, 518
Farmers' & M. N. B'k v. King, 57 Penn. St. 202.....xviii, 218
Farmers' & M. B'k v. Rathbone, 26 Vermont, 19.....lviii, 209
Farmers' & M. Bank v. Wasson, 48 Iowa, 336.....30, 398
Farmers' and Mechanics' Bank v. Butchers' and
White, 2 Sneed, 483.....lxiv, 773
Farmers' and Mechanics' Bank v. Drovers' Bank,
 16 New York, 125.....lxix, 679
Farmers' and Merchants' Ins. Co. v. Chesnut, 50
 Illinois, 111.....xcix, 493
Farmers' and Planters' Bank v. Martin, 7 Md. 242.....lxi, 289

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Engleman v. State, 2 Indiana, 91.....lxli, 494
 Engles v. Brington, 4 Yeates, 345.....li, 411
 Engles v. Engles, 4 Arkansas, 286.....xxxviii, 37
 English v. Beeble, 32 Missouri, 188.....lxxxii, 126
 English v. Delaware & H. C. Co., 66 N. Y. 454.....23, 69
 English v. English, 2 Green Ch. 504.....xxix, 730
 English v. Franklin F. Ins. Co., 53 Mich. 273.....54, 377
 English v. Johnson, 17 California, 107.....lxxvi, 574
 English v. Smock, 34 Indiana, 118.....7, 215
 English v. State, 35 Texas, 472.....14, 374
 Eno v. Woodworth, 4 N. Y. (4 Comst.) 249.....liii, 370
 Enoch ada. People, 13 Wendell, 150.....xxvii, 197
 Enscoe v. Dunn, 44 Connecticut, 93.....26, 430
 Ensing v. Harney, 15 Nebraska, 330.....48, 344
 Ensing v. Webster, 1 Johns. Ca. 145.....i, 106
 Ensign, In re Estate of, 103 New York, 284.....57, 717
 Ensminger v. People, 47 Illinois, 334.....xov, 495
 Enterprise Ins. Co. v. Parisot, 35 Ohio St. 35.....35, 589
 Enterprise Trans. Co. v. Sheedy, 103 Penn. St. 492, 49, 130
 Episc. Church of Macon v. Wiley, 2 Hill Ch. 584,
 1 Riley Ch. 156.....xxx, 386
 Eppendorf v. Brooklyn C. eta. R. Co., 69 New
 York, 125.....25, 171
 Epperson v. Nugent, 57 Mississippi, 45.....34, 434
 Eppes v. Cole, 4 Heming & M. 161.....iv, 512
 Eppinger v. Kirby, 23 Illinois, 531.....lxxvi, 709
 Epps v. Hinds, 27 Mississippi, 657.....lxi, 538
 Equitable L. A. Soc. v. Vogel, 76 Alabama, 441.....52, 344
 Equitable Life Ins. Co. v. Paterson, 41 Ca. 336... 5, 535
 Erickson v. Bell, 53 Iowa, 627.....36, 246
 Erie v. Caulkins, 85 Penn. St. 247.....27, 643
 Erie v. Magill, 101 Penn. St. 616.....47, 739
 Erie v. Schwingle, 22 Penn. State, 384.....ix, 87
 Erie & N. E. R. R. Co. ada. Commonwealth, 27
 Penn. State, 339.....lxvii, 471
 Erie & P. R. R. Co. v. Douthett, 88 Penn. St. 243...39, 451
 Erie & W. T. R. Co. v. Dater, 81 Illinois, 195.....33, 51
 Erie C. P. R'y Co. v. Schuster, 113 Penn. St. 412...57, 471
 Erie G. I. Wks v. Barber, 106 Penn. St. 123.....51, 608
 Erie Pres. Co. v. Miller, 52 Connecticut, 444.....59, 607
 Erie R'y Co. v. Commonwealth, 66 Penn. St. 84... 5, 351
 Erie R'y Co. ada. Commonwealth, 69 Penn. St.
 284.....1, 399
 Erie Railway Co. v. State, 2 Vroom, 531.....lxxvi, 226
 Erie R'y Co. v. Wilcox, 84 Illinois, 239.....25, 451
 Ernst v. Hudson R. R. Co., 35 New York 9.....20, 761
 Ernst v. H. R. R. Co. 39 New York, 61.....6, 405
 Ernst v. Steckman, 74 Penn. St. 13.....15, 542
 Erskine v. De la Baum, 3 Texas, 406.....xlix, 751
 Erskine v. Plummer, 7 Greenleaf, 447.....xxii, 216
 Erskine v. Townsend, 2 Massachusetts, 483.....lii, 71
 Ervine's Appeal, 16 Penn. State, 256.....iv, 499
 Erwin's Appeal, 39 Penn. State, 535.....lxxx, 542
 Erwin v. Bulla, 29 Indiana, 95.....xcii, 341
 Erwin v. Com'l & R. R. Fk, 3 La. An. 186.....xlvi, 447
 Erwin v. Lowry, 2 Louisiana An. 314.....xvii, 545
 Erwin v. Maxwell, 3 Murphy, 341.....ix, 602
 Erwin v. Oldham, 6 Yerger, 185.....xxvii, 458
 Erwin v. Saunders, 1 Cowen, 249.....xiii, 530
 Erwin v. Shaffer, 9 Ohio State, 43.....lxxii, 613
 Erwin v. State, 29 Ohio St. 126.....23, 733
 Erwin v. Torrey, 8 Martin, 90.....xlii, 279
 Eschbach v. Collins, 61 Maryland, 478.....48, 123
 Esdon v. Colburn, 26 Vermont, 631.....lxvii, 730
 Eskridge v. Glover, 5 Stewart & Porter, 264.....xxvi, 344
 Eslava v. Elliott, 5 Alabama, 264.....xxxix, 326
 Eslava v. Lepreire, 21 Alabama, 504.....lvi, 266
 Esmond v. Tarbox, 7 Greenleaf, 61.....xx, 346
 Essex Company v. Edmonds, 12 Gray, 273.....lxxi, 758
 Estabrook v. Smith, 6 Gray, 570.....lxvi, 443
 Estabrook v. Smith, 6 Gray, 573.....lxvi, 445
 Estate of ———. See name of decedent, etc.
 Estate of Davis and Desanque, 5 Wharton, 530...xxxiv, 574
 Estate of Hinds, 5 Wharton, 138.....xxxiv, 542
 Estate of Knight, 12 California, 200.....lxxiii, 531
 Estate of Nerae, 35 California, 329.....xov, 111
 Estep v. Lacy, 35 Iowa, 419.....14, 498
 Estes v. Antrobus, 1 Missouri, 197.....xiii, 496
 Estes v. Browning, 11 Texas, 237.....lx, 238
 Estes v. Tower, 102 Massachusetts, 65.....3, 439
 Estill v. Fox, 7 T. B. Monroe, 552.....xxviii, 213
 Estill v. Taul, 2 Yerger, 466.....xxiv, 409
 Esty v. Baker, 50 Maine, 325.....lxxxix, 616
 Esty v. Clark, 101 Massachusetts, 36.....3, 329
 Etting v. Schuykill Bank, 2 Penn. State, 353.....xlv, 305
 Eufaula v. McNab, 67 Alabama, 588.....42, 118
 Eugster v. West, 35 Louisiana An. 119.....46, 232
 Eureka Co. v. Bass, 61 Alabama, 300.....60, 124
 Eureka Co. v. Edwards, 71 Alabama, 248.....46, 214
 Eureka Ins. Co. v. Robinson, Ree & Co., 56 Penn.
 St. 256.....xlv, 65
 Evans v. Browne, 30 Indiana, 514.....xv, 716
 Evans v. Bryan, 95 North Carolina, 174.....59, 233
 Evans v. Clapp, 123 Massachusetts, 165.....23, 58
 Evans v. Columbian Ins. Co., 44 New York, 144... 4, 639
 Evans v. Commonwealth, 4 Berg. & R. 273.....viii, 711
 Evans v. Commonwealth, 8 Watts, 398.....xxiv, 477
 Evans v. Davidson, 63 Maryland, 245.....36, 409
 Evans v. Dandy, 2 Speers' Law, 9.....xiii, 366
 Evans v. Dravo, 24 Penn. State, 62.....lxii, 359
 Evans v. Elliott, 20 Indiana, 283.....lxxxviii, 319
 Evans v. Fearn, 16 Alabama, 689.....i, 127
 Evans v. Fitchburgh R. R. Co., 111 Mass. 142.....15, 19
 Evans v. Gale, 17 New Hampshire, 573.....xlii, 614
 Evans v. Gibson, 29 Missouri, 223.....lxxvii, 658
 Evans v. Governor, 18 Alabama, 659.....iv, 179
 Evans v. Hamrick & Cole, 61 Penn. St. 19.....6, 125
 Evans v. Kingsberry, 2 Randolph, 120.....xiv, 779
 Evans v. McDermott, 49 New Jersey Law, 163...60, 608
 Evans v. Matson, 51 Penn. State, 366.....lxxxviii, 584
 Evans v. Memphis & C. R. Co., 56 Ala. 248.....28, 771
 Evans v. Merriweather, 3 Beaumont, 492.....lxxxviii, 106
 Evans v. Miller, 58 Mississippi, 120.....38, 313
 Evans v. Pearce, 15 Gratt. 513.....lxxxviii, 626
 Evans v. Root, 7 N. Y. (3 Selden), 186.....lvii, 513
 Evans v. Sanders, 8 Porter, 497.....xxxiii, 297
 Evans v. Smith, 28 Georgia, 98.....lxxiii, 751
 Evans v. Smith, 5 T. B. Monroe, 263.....xvii, 74
 Evans v. Spurgin, 6 Grattan, 107.....lii, 106
 Evans v. State, 8 Ohio State, 196.....xxx, 96
 Evans ada. State, 3 Arkansas, 685.....lxxxvi, 469
 Evans v. Tatem, 9 Berg. & R. 232.....xi, 717
 Evans v. Utica, 69 New York, 186.....25, 165
 Evans v. Walsh, 12 Vroom, 231.....32, 391
 Evans v. Webb, 1 Yeates, 424.....i, 396
 Evansiah v. G. C. & S. F. R'y Co., 57 Tex. 126...44, 586
 Evansville v. Decker, 84 Indiana, 325.....43, 86
 Evansville v. Morris, 57 Indiana, 269.....44, 753
 Evansville v. Pfisterer, 34 Indiana, 26.....7, 214
 Evansville & T. H. R. R. Co. v. Griffin, 100 Ind-
 iana, 221.....50, 793
 Evansville & T. H. R. R. Co. v. McKee, 80 Ind-
 iana, 519.....50, 108
 Evansville eta. R. R. Co. v. Duncan, 28 In-
 diana, 441.....xvii, 329
 Evansville G. L. Co. v. State, 73 Indiana, 218...28, 129
 Evansville Nat. Fk v. Kaufman, 95 N. Y. 273...45, 394
 Evans v. Strode, 11 Ohio, 480.....lxxxvii, 744
 Everts v. Middlebury, 53 Vermont, 629.....38, 707
 Evaletth v. Blossom, 54 Maine, 447.....xcii, 605

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Eveleth v. Scribner, 12 Maine, 24.....xviii, 147
 Evening Journal Ass'n v. McDermott, 15
 Vroom, 430.....43, 392
 Evening Journal Assn. v. State Board of Assess-
 sors, 47 New Jersey Law, 38.....54, 114
 Evening News Ass'n v. Tyron, 42 Mich. 549.....36, 460
 Evans v. Griscom, 13 Vroom, 579.....36, 542
 Everett v. Coffin, 6 Wendell, 603.....xxii, 554
 Everett v. Chicago, B. I. & P. R'y Co., 69 Iowa, 15.....58, 207
 Everett v. Herrin, 46 Maine, 337.....lxiv, 455
 Everett v. United States, 6 Porter, 166.....xxx, 584
 Evergreen Cem. Ass'n v. New Haven, 43 Con-
 necticut, 234.....71, 643
 Everhart v. Terre Haute and I. R. R. Co., 28
 Indiana, 292.....41, 567
 Everson v. Robb, 59 Mississippi, 653.....24, 693
 Everson v. Kirtland, 4 Paige Ch. 628.....xvii, 91
 Everson v. Powers, 89 New York, 527.....42, 319
 Everts v. Agnes, 4 Wisconsin, 343.....lxv, 514
 Everts v. Beach, 31 Michigan, 136.....18, 169
 Everts v. Brown, 1 D. Chipman, 96.....1, 699
 Everts v. Chittendon, 3 Day, 338.....ii, 97
 Evertson v. Nat. Bank, 66 New York, 14.....23, 9
 Evertson v. Sutton, 5 Wendell, 281.....xvi, 217
 Evill v. Conwell, 2 Blackford, 133.....xviii, 138
 Ewan v. Lippincott, 47 N. J. Law, 192.....54, 148
 Ewart v. Street, 2 Bailey, 157.....xxiii, 131
 Ewell v. State, 6 Yerger, 364.....xxvii, 490
 Ewer v. Coffin, 1 Cushing, 23.....xlviii, 587
 Ewer v. Washington Ins. Co., 16 Pick. 502.....xxviii, 258
 Ewing v. Gildwell, 3 Howard, 332.....xxxiv, 96
 Ewing v. Handley, 4 Littell, 346.....xiv, 140
 Ewing v. Higby, 7 Ohio, Pt. 1, 196.....xxviii, 633
 Ewing v. Smith, 3 Desautures, 417.....v, 557
 Ewing v. Tees, 1 Binney, 450.....ii, 455
 Excelsior F. Ins. Co. v. Royal Ins. Co., 55 New
 York, 343.....14, 271
 Exchange Bank v. McLoon, 73 Maine, 406.....40, 368
 Exchange Bank v. Rice, 107 Mass. 37.....9, 1
 Ex'rs of Thomas v. Erwin's Ex'rs, Cheves' L. 22, xxxiv, 586
 Executors of Ware v. Murph, Rice's Law, 54.....xxiii, 97
 Exeter Bank v. Stowell, 16 New Hamp. 61.....xii, 716
 Exhaust V. Co. v. Chicago, Mil. & St. P. R. R.
 Co., 66 Wisconsin, 218.....57, 257
 Ex parte Gibson, 31 California, 619.....xci, 546
 Eyler v. Crabbs, 2 Maryland, 137.....lvi, 711
 Eyler v. County Comm., 49 Maryland, 267.....33, 249
 Eyre v. Jacob, 14 Grattan, 422.....lxviii, 367
 Eyster v. Hatheway, 50 Illinois, 521.....xcix, 537
 Ezell, Ex parte, 40 Texas, 451.....19, 32
 Ezard v. Findley G. M. Co., 74 Georgia, 590.....58, 445
 Fabens v. Merc. Bank, 23 Pickering, 330.....xxxiv, 59
 Faber v. Hovey, 117 Massachusetts, 107.....19, 398
 Faber ada. People, 92 New York, 146.....44, 357
 Fagg v. Hambel, 21 Iowa, 140.....lxxix, 561
 Fagin v. Connolly, 25 Missouri, 94.....lxix, 450
 Fahle v. Pressay, 2 Oregon, 23.....lxxx, 401
 Fahn v. Reichart, 8 Wisconsin, 258.....lxvii, 137
 Fahnstock v. Bailey, 3 Met. (Ky.), 48.....lxviii, 161
 Fain v. Commonwealth, 78 Kentucky, 183.....39, 213
 Fain v. Inman, 6 Heisk. 5.....19, 577
 Fain v. Smith, 14 Oregon, 82.....56, 281
 Fair v. Philadelphia, 88 Penn. St. 309.....32, 455
 Fairbanks v. Kerr, 70 Penn. St. 86.....10, 664
 Fairbanks v. Sargent, 104 New York, 106.....56, 490
 Fairbanks v. Witter, 18 Wisconsin, 287.....lxxvi, 765
 Fairchild v. Bell, 2 Brevard, 129.....lii, 702
 Fairchild v. Chastelleux, 1 Penn. State, 178.....xlv, 117
 Fairchild v. New Orleans & N. E. R. Co., 60
 Mississippi, 561.....45, 427
 Fairchild v. Ogdensburgh R. R., 15 N. Y. 337.....lxix, 606
 Fairclough ada. State, 29 Connecticut, 47.....lxvii, 590
 Fairfax v. New York Cent. etc. R. Co., 73 New
 York, 167.....39, 119
 Fairfield v. Lawson, 50 Connecticut, 501.....47, 669
 Fairfield v. Paine, 23 Maine, 498.....xii, 367
 Fairfield Sav. B'k v. Chase, 72 Maine, 226.....39, 319
 Fairley v. Smith, 87 North Carolina, 367.....49, 522
 Fairly v. Kline, 2 Pennington, 754.....iv, 414
 Fairmount etc. R'y Co. v. Stutler, 54 Penn.
 St. 375.....xxvii, 714
 Falconer v. Smith, 18 Penn. State, 130.....iv, 611
 Falkinburg v. Lucy, 35 California, 53.....xv, 76
 Falkner v. Streater, 3 Jones' Eq. 33.....lxvii, 239
 Fall v. Hazeltree, 45 Indiana, 576.....18, 278
 Fallett v. German, 5 Cold. 560.....xv, 111
 Fallon v. Butler, 21 California, 94.....lxxxii, 140
 Fallon v. Childester, 46 Iowa, 588.....96, 164
 Fallon v. Kehoe, 38 Cal. 44.....xcix, 347
 Fallon v. O'Brien, 12 Rhode Island, 518.....34, 713
 Falloon v. Schilling, 29 1 ansas, 282.....44, 642
 Falls v. Carpenter, 1 Dev. & B. Eq. 237.....xxviii, 592
 Fanning v. Chadwick, 3 Pickering, 420.....xv, 233
 Fanning v. Consequa, 17 Johnson, 511.....viii, 442
 Fanning v. Dunham, 5 Johns. Ch. 122.....ix, 263
 Fanning v. Ins. Co., 37 Ohio St. 339.....41, 517
 Fanning ada. State, 94 North Carolina, 940.....53, 653
 Fant v. McDaniel, 1 Brevard, 173.....li, 660
 Faran v. Robinson, 17 Ohio St. 242.....xxvii, 617
 Farham v. Thompson, 34 Minnesota, 331.....57, 89
 Faris v. Durham, 5 T. B. Monroe, 397.....xvii, 77
 Faris v. Starke, 9 Dana, 128.....xxxiii, 636
 Farish v. Cook, 98 Missouri, 713.....47, 107
 Farish v. Reigle, 11 Grattan, 697.....lxii, 686
 Farley v. Cleveland, 4 Cowen, 432.....xv, 367
 Farley v. Gihmer, 12 Alabama, 141.....xvi, 249
 Farley v. Lea, 4 Dev. & Bet. Law, 169.....xxxii, 680
 Farley v. Lincoln, 51 New Hampshire, 877.....12, 182
 Farley v. Moog, 79 Alabama, 148.....56, 585
 Farley v. Parker, 6 Oregon, 105.....25, 504
 Farlin v. Sook, 30 Kansas, 401.....46, 100
 Farmer v. Kimball, 46 New Hampshire, 435.....lxxxviii, 219
 Farmer v. Lewis, 1 Bush, 66.....lxxxix, 610
 Farmer v. Lewis, 92 Indiana, 444.....47, 183
 Farmer v. Ray, 42 Alabama, 135.....xciv, 639
 Farmer v. Samuel, 4 Littell, 187.....xiv, 106
 Farmers' Bank v. Belrne, 1 Grattan, 234.....xiii, 561
 Farmers' Bank v. Ewing, 78 Kentucky, 264.....39, 231
 Farmers' Bank v. Little, 8 Watts & Serg. 207.....xiii, 293
 Farmers' Bank v. Winalow, 3 Minnesota, 86.....lxxxv, 740
 Farmers' and Cit. B'k v. Payne, 25 Conn. 444.....lxviii, 362
 Farmers & M. Bank v. Baldwin, 23 Minnesota, 196.....23, 663
 Farmers' & M. B'k v. Champ. T. Co., 16 Vt. 52.....xiii, 491
 Farmers' & M. B'k v. Champ. T. Co., 23 Vt. 186.....lvi, 68
 Farmers' & M. B'k v. Chester, 6 Humph. 468.....xlv, 312
 Farmers & M. Bank v. Downey, 53 Cal. 466.....31, 62
 Farmers' & M. B'k v. Ege, 9 Watts, 436.....xxxvi, 130
 Farmers' & M. B'k v. Flint, 17 Vermont, 808.....xlv, 361
 Farmers & M. B'k v. Galbraith, 10 Penn. St. 490.....li, 498
 Farmers & M. Bank v. Hazeltine, 78 N. Y. 104.....34, 518
 Farmers' & M. N. B'k v. King, 87 Penn. St. 202, xxvii, 218
 Farmers' & M. B'k v. Rathbone, 26 Vermont, 19, lviii, 208
 Farmers' & M. Bank v. Wasson, 48 Iowa, 336.....36, 398
 Farmers' and Mechanics' Bank v. Butchers' and
 White, 2 Sneed, 483.....lxiv, 773
 Farmers' and Mechanics' Bank v. Drovers' Bank,
 16 New York, 125.....lxix, 678
 Farmers' and Merchants' Ins. Co. v. Chesnut, 50
 Illinois, 111.....xcix, 493
 Farmers' and Planters' Bank v. Martin, 7 Md. 242, lxi, 269

Roman letters [xlx] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Farmers' & M. B'k ada. Commonw., 21 Pick. 543.	xxii, 290
Farmers' B'k of Del. v. Beeson, 7 Gill & J., 431.	xxviii, 226
Farmers' etc. Bank v. Humphrey, 36 Vt. 554.	lxxvii, 671
Farmers & D. Ins. Co. v. Curry, 13 Bush, 312.	96, 194
Farmers' Ins. & L. Co. v. Snyder, 16 Wend. 631.	xxx, 118
Farmers' L. & T. Co. v. Com. B'k, 15 Wis. 434.	lxxxii, 680
Farmington Academy v. Allen, 14 Mass. 172.	vii, 301
Farnham v. Pierce, 141 Massachusetts, 203.	55, 459
Farnham v. Thompson, 34 Minn. 330.	57, 59
Farnsworth v. Ohlida, 4 Massachusetts, 637.	lii, 249
Farnsworth v. Chase, 19 New Hampshire, 534.	li, 206
Farnsworth v. Fowler, 1 Swan, 1.	lv, 718
Farnsworth v. Hemmer, 1 Allen, 494.	lxxix, 756
Farnum v. Fowle, 12 Massachusetts, 89.	vii, 35
Farnum v. Patch, 60 New Hampshire, 294.	49, 513
Farnum v. Platt, 8 Pickering, 339.	xix, 330
Barr v. Farr, 34 Mississippi, 597.	lxix, 406
Farr v. Raseo, 9 Michigan, 353.	lxxx, 83
Farr v. Sims, Rich. Eq. Ca. 123.	lxiv, 306
Farr v. Smith, 9 Wendell, 338.	lxiv, 162
Farr v. Sumner, 12 Vermont, 23.	lxxvi, 327
Farrar v. Bridges, 5 Humphreys, 411.	xiii, 439
Farrar v. Farrar, 4 New Hampshire, 191.	xvii, 410
Farrar v. Gilman, 19 Maine, 440.	lxxvi, 768
Farrar v. Pearson, 57 Maine, 561.	8, 439
Farrar v. Stackpole, 6 Greenleaf, 154.	xix, 301
Farrar v. Wingate, 4 Richardson's L. 38.	liii, 709
Farrell v. Cook, 16 Nebraska, 483.	49, 721
Farrell v. Lovett, 68 Maine, 326.	38, 59
Farrell v. State, 32 Ohio St. 458.	30, 614
Farrell's v. Brennan, 32 Missouri, 328.	lxxxii, 137
Farrington v. Kimball, 126 Massachusetts, 213.	30, 680
Farrington v. Meek, 30 Missouri, 573.	lxxvii, 627
Farrington v. Turner, 27 Michigan, 72.	51, 89
Farris v. Dudley, 73 Alabama, 124.	56, 94
Farris v. Richardson, 6 Allen, 118.	lxxxviii, 618
Farrow v. Commonwealth Insurance Co., 18 Pick. 63.	xxix, 564
Farrow v. Edmundson, 4 B. Monroe, 606.	xli, 250
Farrow ada. State, Phill. Law, 161.	xxiii, 588
Farwell v. Boston etc. R. R. Co., 4 Met. 49.	lxxxviii, 330
Farwell v. Mather, 10 Allen, 322.	lxxxvii, 641
Fasdit v. Middleton, 47 Penn. State, 214.	lxxxvi, 638
Faucett v. Faucett, 1 Bush, 511.	lxxxix, 639
Faulds v. Yates, 57 Illinois, 416.	11, 34
Faulk v. Dashiell, 62 Texas, 642.	50, 542
Faulkner v. Aug. Ins. Co., 2 McMull. L. 158.	lxxxix, 119
Faulkner v. Aurora, 85 Indiana, 120.	44, 1
Faulkner v. Davis, 18 Grattan, 651.	lxviii, 698
Faulkner v. Faulkner's Ex'rs, 3 Leigh, 255.	xxviii, 264
Faulkner v. Hart, 82 New York, 413.	37, 674
Faulks v. People, 39 Michigan, 300.	33, 374
Faunce v. Burke, 16 Penn. State, 469.	lv, 519
Faure v. Martin, 7 N. Y. (3 Selden), 210.	lvii, 515
Faure v. Winans, Hopkins' Ch. 283.	xiv, 545
Faurie v. Morin, 4 Martin, 39.	vi, 701
Fausler v. Parsons, 6 West Virginia, 498.	90, 431
Favor v. Boston & L. R. R. Co., 114 Mass. 350.	19, 364
Favors v. Glass, 23 Alabama, 621.	lviii, 272
Fawcett v. Osborn, 32 Illinois, 411.	lxxxviii, 278
Fawcett v. Clark, 48 Maryland, 494.	30, 461
Fawcett v. Nat. L. Ins. Co., 97 Illinois, 11.	37, 98
Fay v. Burditt, 61 Indiana, 433.	43, 142
Fay v. Harlan, 128 Massachusetts, 244.	33, 372
Fay v. Munsey, 13 Gray, 53.	lxxiv, 619
Fay v. Oliver, 20 Vermont, 118.	xlx, 764
Fay v. Parker, 53 New Hampshire, 342.	16, 270
Fay v. Smith, 1 Allen, 477.	lxxxix, 752
Fay v. Valentine, 12 Pickering, 40.	xxii, 397
Fayette v. Chesterville, 77 Maine, 28.	57, 741
Fayson v. Prather, 1 Noté & McO. 294.	lx, 621
Fearing v. Clark, 16 Gray, 74.	lxxvii, 394
Fearing v. Kimball, 4 Allen, 128.	lxxxii, 690
Fearie v. Lewis, Ex parte, 13 Missouri, 467.	liii, 155
Fearn v. Shirley and Wife, 31 Mississippi, 201.	lxvi, 573
Fears v. Merrill, 9 Arkansas, 559.	1, 236
Feather v. Strohoecker, 3 Penrose & W. 505.	lxiv, 343
Fee v. Cowdry, 45 Arkansas, 410.	55, 560
Fee v. Fee, 10 Ohio, 469.	lxxxvi, 103
Feemster v. May, 13 Smedes & M. 275.	liii, 83
Feemster v. Markham, 2 J. J. Marshall, 303.	xix, 131
Feigley v. Feigley, 7 Maryland, 537.	lxii, 373
Feigley v. Whitaker, 22 Ohio St. 606.	10, 773
Fellen ada. People, 58 California, 218.	41, 259
Feineman v. Sachs, 33 Kansas, 631.	53, 547
Feital v. Middlesex R. R. Co., 109 Mass. 308.	12, 730
Felavary v. Broeseh, 58 Iowa, 68.	35, 261
Felch v. Bugbee, 48 Maine, 9.	lxxvii, 203
Felder v. Bonnett, 2 McMullen's L. 44.	lxxxvii, 548
Felder v. Columbus & G. R. R. Co., 21 S. C. 25.	53, 654
Felder v. State, 23 Tex. Ct. App. 477.	59, 777
Feldman v. Charleston, 23 S. C. 67.	55, 6
Felix v. Grand Lodge, 31 Kansas, 81.	47, 479
Felker v. Emerson, 16 Vermont, 653.	xlii, 533
Fell v. State, 43 Maryland, 71.	20, 63
Feller v. Alden, 23 Wisconsin, 301.	lxix, 173
Fellowes v. New Haven, 44 Connecticut, 250.	30, 447
Fellows v. Allen, 60 New Hampshire, 439.	43, 328
Fellows v. Fellows, 4 Cowen, 683.	xv, 413
Fellows v. Lewis, 65 Alabama, 343.	30, 1
Fellows v. Prentiss, 3 Denio, 512.	xiv, 494
Fellows v. Steamer R. W. Powell, 16 Louisiana	
An. 316.	lxxxix, 801
Fells Point Savings Institution v. Weedon, 18	
Maryland, 320.	lxxxii, 603
Felrath v. Schomfield, 76 Alabama, 190.	53, 319
Felton v. Deall, 23 Vermont, 170.	liv, 61
Felton v. Smith, 58 Indiana, 149.	45, 464
Fenderson v. Owen, 54 Maine, 373.	xxii, 551
Fennell v. Henry, 70 Alabama, 484.	45, 86
Fenner v. Buffalo & S. L. R. R. Co., 44 N. Y. 805. 4, 709	
Fennsey v. Gonsoulin, 11 Louisiana, 412.	xxx, 720
Fent v. Toledo etc. Ry Co., 59 Illinois, 349.	14, 13
Fenton v. Reed, 4 Johnson, 52.	lv, 244
Fentress v. Robins, N. C. Term Rep. 177.	vii, 704
Ferreira v. Sayres, 5 Watts & Serg. 210.	xl, 496
Ferguson's Case, 3 Grattan, 594.	lxvi, 196
Ferguson v. Coleman, 3 Richardson's L. 98.	xiv, 751
Ferguson v. Crawford, 70 New York, 253.	26, 598
Ferguson v. Etter, 21 Arkansas, 160.	lxxxvi, 351
Ferguson v. Hill, 3 Stewart, 488.	xxii, 641
Ferguson v. Hubble, 97 New York, 507.	49, 544
Ferguson v. Kennedy, Peck, 321.	xiv, 761
Ferguson v. Landram, 5 Bush, 230.	lxvi, 355
Ferguson v. Lowery, 54 Alabama, 516.	33, 719
Ferguson v. Miles, 6 Gilman, 368.	xliv, 703
Ferguson v. Miller, 1 Cowen, 243.	xlii, 519
Ferguson v. Northern Bank, 14 Bush, 555.	29, 418
Ferguson v. Smothers, 70 Indiana, 519.	36, 126
Ferguson ada. State, 3 Hill (S. C.), 613.	lxxxvii, 413
Ferguson v. Williams, 3 B. Monroe, 302.	lxxxix, 466
Ferguson v. Witsell, 5 Richardson's L. 280.	lvii, 744
Ferguson v. Brent, 12 Maryland, 9.	lxvi, 553
Ferlat v. Gojon, Hopkins' Ch. 478.	xiv, 534
Fernander v. Dunn, 19 Georgia, 497.	lxv, 607
Fernandes v. Great Western Ins. Co., 48 N. Y. 571. 8, 571	
Fernalter v. Moyer, 3 Watts & Serg. 416.	lxxxix, 33
Fero v. Buffalo & S. L. R. R., 23 N. Y. 209.	lxxxviii, 178
Ferrall v. Bradford, 2 Florida, 508.	1, 250
Ferrea v. Knipe, 28 California, 340.	lxxxvii, 128
Ferree v. Oxford F. & L. I. Co., 67 Penn. St. 372. 8, 638	

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Farrall v. Maxwell, 28 Ohio St. 263.....	32, 393
Farrall v. Scott, 2 Speer's Law, 344.....	xlii, 371
Farrachbach v. Turner, 86 Missouri, 418.....	56, 437
Ferrier's Petition, 103 Illinois, 367.....	42, 10
Ferrie v. Storoz, 63 Iowa, 484.....	59, 753
Ferris v. Carson W. Co., 16 Nevada, 44.....	40, 486
Ferris v. Henderson, 13 Penn. State, 40.....	ii, 580
Ferris v. Mosher, 27 Vermont, 218.....	lxv, 192
Ferris v. Wilcox, 51 Michigan, 108.....	47, 551
Ferris v. Harshen, 1 Mart. & Yerg. 42.....	xvii, 782
Ferriter v. Tyler, 48 Vermont, 444.....	21, 133
Ferry v. Williams, 12 Vroom, 332.....	32, 219
Fertich v. Michener, 111 Indiana, 472.....	60, 709
Fessenden v. Jones, 7 Jones' Law, 14.....	lxv, 445
Fessenden v. Willey, 2 Allen, 67.....	lxix, 763
Fetter, Matter of, 3 Zabriskie, 311.....	lxvii, 359
Fetterman v. Murphy, 4 Watts, 424.....	xxviii, 729
Fetters v. Muncie Nat. Bank, 34 Indiana, 251.....	7, 225
Fettyplace v. Dutch, 13 Pickering, 388.....	xliii, 686
Fiekhorn v. Boyer, 5 Watts, 182.....	xxx, 300
Fick v. Chicago & N. W. Ry Co., 48 Wm. 469.....	60, 878
Fickett v. Swift, 41 Maine, 65.....	lxvi, 214
Fickle v. Snapp, 97 Indiana, 289.....	40, 449
Field's Estate, 2 Rawle, 351.....	xxi, 454
Field v. Arrowsmith, 3 Humphries, 442.....	xxxix, 185
Field v. Chidley, 79 Kentucky, 260.....	47, 215
Field v. Des Moines, 39 Iowa, 575.....	18, 46
Field v. Dickinson, 3 Arkansas, 409.....	xxxvi, 456
Field v. Hitchcock, 17 Pickering, 122.....	xxviii, 288
Field v. Langsdorf, 43 Missouri, 32.....	xovii, 367
Field v. Mayor etc. of N. Y., 6 N. Y. (2 Seld.) 179.....	lvii, 435
Field v. New Orleans D. N. Co., 21 La. An. 24.....	nots, 609
Field v. Sanderson, 24 Missouri, 542.....	lxxvi, 124
Field v. Schieffelin, 7 Johns. Ch. 180.....	xi, 441
Field v. Stagg, 52 Missouri, 534.....	14, 435
Field v. State, 57 Mississippi, 474.....	34, 476
Field ada. State, 14 Maine, 244.....	xxxi, 82
Field ada. State, 17 Missouri, 529.....	lix, 275
Field v. Tibbets, 57 Maine, 368.....	nots, 779
Field and Adams v. Lucas, 21 Georgia, 447.....	lxviii, 465
Field's Heirs v. Goldsby, 28 Alabama, 312.....	lxv, 341
Fields v. State, 47 Alabama, 603.....	li, 771
Fields v. Stokley, 99 Pennsylvania State, 306.....	44, 109
Fife v. State, 31 Arkansas, 455.....	25, 556
Fifeild v. Penn. St. Ins. Co., 47 Penn. St. 166.....	lxxvi, 583
Fifth Nat. Bank v. Hyde Park, 101 Illinois, 596.....	40, 218
Fifty Associates v. Grace, 125 Massachusetts, 161.....	28, 218
Fight v. State, 7 Ohio, Pt. 1, 180.....	xxviii, 636
Filbert v. Hoff, 42 Penn. State, 97.....	lxxii, 493
Fildew v. Besley, 42 Michigan, 100.....	36, 433
Filer v. N. Y. C. & R. R. Co., 49 New York, 47.....	10, 327
Filkins v. People, 69 New York, 101.....	25, 143
Fillebrown v. Grand Trunk Ry Co., 55 Me. 402.....	noti, 606
Filley v. Duncan, 5 Nebraska, 124.....	xxii, 337
Filley v. Fassett, 44 Missouri, 169.....	c, 275
Filley v. Register, 4 Minnesota, 361.....	lxxvii, 532
Filson v. Himes, 5 Penn. State, 422.....	xviii, 422
Finch v. Board of Ed., 30 Ohio State, 27.....	27, 414
Finch v. Sink, 46 Illinois, 169.....	noti, 246
Finch ada. State, 70 Iowa, 316.....	59, 443
Finch v. York County, 19 Nebraska, 50.....	56, 741
Finch's Exrs v. Alston, 2 Stewart & Porter, 63.....	xliii, 299
Findlay v. Riddle, 3 Binney, 139.....	v, 265
Findlay v. Smith, 6 Munford, 134.....	viii, 733
Findley v. Hill, 8 Oregon, 247.....	34, 578
Findley v. State, 5 Blackford, 576.....	xxxvi, 557
Findley v. Wilson, 3 Littell, 380.....	xiv, 72
Fink v. Cox, 12 Johnson, 148.....	ix, 191
Fink v. Missouri F. Co., 62 Missouri, 276.....	59, 276
Fink v. Tatman, 26 Indiana, 289.....	16, 19
Finley v. Carothers, 9 Texas, 517.....	lx, 179
Finley v. Finley, 9 Dana, 62.....	xxviii, 628
Finley v. Lynch, 2 Bibb, 566.....	v, 635
Finley v. Looming Co. M. I. Co., 30 Penn. St. 311.....	lxvii, 705
Finley v. Quirk, 9 Minnesota, 194.....	lxxvi, 93
Finley v. Simpson, 2 Zabriskie, 311.....	lxii, 232
Finn v. Western R. Co., 112 Massachusetts, 524.....	17, 128
Finnegan v. Fernandez, 15 Florida, 379.....	21, 292
Finneran v. Leonard, 7 Allen, 54.....	lxxvii, 665
Finney v. Bedford Com'l Ins. Co., 8 Metcalf, 242.....	xii, 615
Finney v. Cist, 34 Missouri, 303.....	lxxiv, 62
Finney v. Cochran, 1 Watts & Serg. 112.....	lxxvii, 450
Finney v. Fairhaven Ins. Co., 5 Metcalf, 192.....	lxxviii, 397
Finney v. Smith, 31 Ohio State, 529.....	27, 424
Finney v. Warren Ins. Co., 1 Metcalf, 16.....	lxxv, 343
Fiquet v. Allison, 12 Michigan, 328.....	lxxvi, 16
Fire Ass'n ada. People, 62 New York, 311.....	44, 380
Fire Ins. Co. v. Fekrath, 77 Alabama, 194.....	54, 58
Fire Ins. Ass'n v. Merchants & M. T. Co., 66 Mary- land, 339.....	59, 198
Fireman's Ins. Co. of Dayton v. Holk, 35 Ohio St. 189.....	35, 601
Fireman's Ins. Co. v. Walden, 13 Johns. 513.....	vii, 240
Firemen's Benev. Ass. v. Lounsbury, 21 Ill. 611.....	lxix, 115
Firmstone v. Mack, 49 Penn. State, 387.....	lxxviii, 607
First Baptist Ch. v. Withersell, 3 Paige's Ch. 296.....	xiv, 223
First Mass. T. Co. v. Field, 3 Massachusetts, 201.....	iii, 124
First Nat. Bank v. Barnum W. & I. Works, 58 Michigan, 124.....	55, 609
First Nat. Bank v. Boyce, 78 Kentucky, 42.....	39, 198
First Nat. Bank v. Burkett, 101 Illinois, 291.....	40, 209
First Nat. Bank v. Bynum, 84 North Carolina, 24.....	37, 604
First Nat. Bk. v. Childs, 130 Mass. 519.....	39, 474
First Nat. Bank v. Christopher, 11 Vroom, 435.....	79, 263
First Nat. Bank v. Clark, 61 Maryland, 400.....	48, 114
First Nat. Bank v. Co. Comm'rs, 14 Minn. 77.....	c, 194
First Nat. Bank ada. Commonwealth, 4 Bush, 92.....	xvii, 285
First National Bank v. Dearborn, 115 Mass. 219.....	15, 99
First Nat. Bank v. Drake, 29 Kansas, 311.....	44, 646
First Nat. Bank v. Drake, 25 Kansas, 564.....	57, 128
First Nat. Bank v. Dubuque South Western Ry Co., 62 Iowa, 272.....	35, 399
First Nat. Bank v. Dunn, 97 New York, 149.....	49, 517
First Nat. Bank v. First National Bank, 78 In- diana, 561.....	49, 261
First Nat. B'k v. Fourth Nat. B'k, 77 N. Y. 230.....	33, 618
First Nat. Bank v. Fowler, 26 Ohio St. 524.....	38, 616
First Nat. Bank v. Fricks, 75 Missouri, 178.....	42, 267
First Nat. Bank v. Garlinghouse, 23 Ohio St. 493.....	10, 751
First Nat. Bank v. Gay, 63 Missouri, 33.....	21, 439
First Nat. Bank v. Graham, 79 Penn. St. 166.....	21, 49
First Nat. Bank v. Graham, 85 Penn. St. 91.....	37, 628
First Nat. Bank v. Grant, 71 Maine, 574.....	36, 234
First Nat. Bank v. Gruber, 87 Penn. St. 468.....	30, 378
First Nat. Bank v. Hall, 44 New York, 395.....	4, 608
First Nat. Bank v. Hendrie, 49 Iowa, 402.....	31, 123
First Nat. Bank v. Hoch, 89 Penn. St. 224.....	33, 769
First Nat. Bank v. Hubbard, 49 Vermont, 1.....	24, 97
First Nat. Bank v. Jaggan, 31 Maryland, 38.....	c, 63
First Nat. Bank v. Johns, 22 West Virginia, 620.....	44, 506
First Nat. Bank v. Lamb, 50 New York, 95.....	10, 438
First Nat. Bank v. Larsen, 60 Wisconsin, 209.....	50, 265
First Nat. Bank v. Leach, 62 New York, 250.....	11, 708
First Nat. Bank v. Lineberger, 83 N. C. 454.....	25, 528
First Nat. Bank v. Marietta etc. R. R. Co., 29 Ohio St. 259.....	5, 668
First Nat. Bank v. Mason, 95 Penn. St. 113.....	40, 632
First Nat. Bank v. Mayor etc., 68 Georgia, 119.....	45, 476
First Nat. Bank v. McAndrews, 5 Mont. 225.....	51, 52
First Nat. Bank v. McClung, 7 Lea, 462.....	40, 66

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

First Nat. Bank v. McKanigle, 69 Penn. St. 156..	8, 336
First Nat. Bank v. Nelson, 38 Georgia, 391.....	xv, 400
First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278.19,	181
First Nat. Bank v. Paul, 75 Virginia, 594.....	46, 740
First Nat. Bank v. Peterborough, 56 N. H. 38.....	32, 410
First Nat. Bank v. Pierson, 24 Minnesota, 140.....	31, 341
First Nat. Bank v. Plankinton, 27 Wisconsin, 177..	9, 453
First Nat. Bank v. Price, 33 Maryland, 487.....	3, 204
First Nat. Bank v. Rex, 89 Penn. St. 308.....	33, 767
First Nat. Bank v. Ricker, 71 Illinois, 439.....	22, 104
First Nat. Bank v. Rogers, 13 Minnesota, 407.....	xvii, 239
First Nat. Bank v. Tappan, 6 Kansas, 458.....	7, 568
First Nat. Bank v. Telegraph Co., 30 Ohio St. 555.27,	485
First Nat. Bank v. Town of Mt. Tabor, 52 Va. 67..34,	734
First Nat. Bank v. Turnbull, 32 Gratt. 685.....	34, 791
First National Bank v. Williams, 100 Pa. St. 123..43,	365
First Nat. Bank v. Wood, 71 New York, 405.....	27, 66
First Nat. Bank v. Wood, 51 Vermont, 473.....	31, 693
First Par. in Sherburne v. Fiske, 8 Cushing, 264..iv,	755
First Pres. Church v. Fort Wayne, 38 Ind. 338..16,	35
First Pres. Church v. N. O. 30 La. An. 259.....	31, 224
Fischli v. Fischli, 1 Blackford, 360.....	xii, 251
Fish v. Chapman, 2 Georgia, 349.....	xvii, 393
Fish v. Dodge, 4 Denio, 311.....	xviii, 254
Fish v. Jackman, 19 Maine, 467.....	xxxvi, 789
Fish v. Thomas, 5 Gray, 45.....	lxvii, 348
Fishback v. Woodford, 1 J. J. Marshall, 84.....	xix, 55
Fisher, Edward, in re, 4 Wisconsin, 254.....	lxv, 309
Fisher v. Anderson, 25 Iowa, 28.....	xv, 761
Fisher v. Bartlett, 8 Greenleaf, 123.....	xviii, 225
Fisher v. Basnett, 9 Leigh, 119.....	xxxviii, 227
Fisher v. Beckwith, 19 Vermont, 31.....	xvii, 174
Fisher v. Boston, 104 Massachusetts, 67.....	6, 196
Fisher v. Brown, 104 Massachusetts, 259.....	6, 235
Fisher v. Brown, 1 Tyler, 387.....	iv, 736
Fisher v. Butcher, 19 Ohio, 408.....	liii, 436
Fisher v. Comm., 1 Bush, 211.....	lxxxix, 620
Fisher v. Conway, 21 Kansas, 18.....	36, 419
Fisher v. Dennis, 6 California, 577.....	lxv, 534
Fisher v. Duncan, 1 Hening & M. 563.....	lii, 605
Fisher v. Knox, 13 Penn. State, 623.....	liii, 503
Fisher v. Leland, 4 Cushing, 456.....	i, 805
Fisher v. Litchhall, 4 Mackay, 82.....	54, 258
Fisher v. May, 2 Bibb, 448.....	v, 626
Fisher v. McGill, 1 Gray, 1.....	lxi, 381
Fisher v. Milliken, 8 Penn. State, 111.....	xliz, 497
Fisher v. New Jersey Bank, 48 N. J. L. 300.....	57, 561
Fisher ada. People, 14 Wendell, 9.....	xxviii, 501
Fisher v. Pollard, 2 Head, 314.....	lxv, 740
Fisher v. Salmon, 1 California, 413.....	lxv, 297
Fisher v. Seitzer, 23 Penn. State, 306.....	lxii, 335
Fisher v. Strickler, 10 Penn. State, 348.....	li, 498
Fisher v. Thirkell, 21 Michigan, 1.....	4, 423
Fisher v. Van Meter, 9 Leigh, 18.....	xxxviii, 221
Fisher v. Von Behren, 70 Indiana, 19.....	36, 163
Fisher v. Vose, 3 Robinson (La.), 467.....	xxxviii, 243
Fishkill Sav. Ins. v. Nat. Bank, 80 New York, 163.34,	595
Fiak v. Brackett, 22 Vermont, 738.....	lxxviii, 613
Fiak v. Chandler, 30 Maine, 79.....	i, 612
Fiak v. Cotteneat, 44 New York, 538.....	4, 715
Fiak v. Cushman, 6 Cushing, 20.....	lii, 761
Fiak v. Newton, 1 Denio, 45.....	xlili, 649
Fiak v. Norvel, 9 Texas, 13.....	lxviii, 128
Fiak v. Tank, 12 Wisconsin, 276.....	lxxviii, 737
Flake v. Tolman, 124 Massachusetts, 254.....	26, 659
Fitch's Appeal, 10 Penn. State, 451.....	li, 495
Fitch v. American F. L. Ins. Co., 69 N. Y. 567.....	17, 372
Fitch v. Harrington, 13 Gray, 468.....	lxxv, 641
Fitch v. Newberry, 1 Douglass, 1.....	xi, 33
Fitch ada. People, 1 Wendell, 198.....	xix, 477
Fitch v. Scott, 3 Howard (Mass.), 314.....	xxxiv, 86
Fitch v. Snedaker, 38 New York, 248.....	lxvii, 791
Fitchburg R. R. Co. v. Freeman, 12 Gray, 461.....	lxxiv, 606
Fitchburg R. R. Co. v. Hanna, 6 Gray, 539.....	lxv, 427
Fittler v. Fossard, 7 Penn. State, 540.....	xliz, 462
Fitzgerald v. Adams Ex. Co., 24 Ind. 44.7.....	lxxxvii, 341
Fitzgerald v. Arel, 63 Iowa, 104.....	56, 733
Fitzgerald v. Beebe, 7 Arkansas, 306.....	xlvi, 285
Fitzgerald v. Berlin, 51 Wisconsin, 81.....	37, 514
Fitzgerald v. Blocher, 23 Arkansas, 742.....	29, 3
Fitzgerald v. Gorham, 4 California, 269.....	lx, 616
Fitzgerald v. New Brunswick, 47 N. J. L. 479.....	54, 183
Fitzgerald ada. People, 105 New York, 148.....	59, 463
Fitzgerald v. St. Paul, M. & M. Ry Co., 89 Minn-	
nesota, 336.....	43, 212
Fitzgerald v. Staples, 88 Illinois, 324.....	39, 85
Fitzgerald ada. State, 49 Iowa, 260.....	31, 168
Fitzgibbon v. Lake, 29 Illinois, 165.....	lxxxii, 303
Fitzhugh v. Anderson, 2 H. & M. 289.....	lii, 625
Fitzhugh v. Bank, 3 T. B. Monroe, 126.....	xvi, 90
Fitzhugh v. Croghan, 2 J. J. Marshall, 429.....	xliz, 139
Fitzhugh v. Ouster, 4 Texas, 391.....	li, 728
Fitzhugh v. Love, 6 Call, 5.....	lii, 628
Fitzhugh's Ex'r v. Fitzhugh, 11 Grattan, 300.....	lxii, 653
Fitzpatrick v. Fitzpatrick, 36 Iowa, 674.....	14, 539
Fitzpatrick v. Fitzpatrick, 6 Rhode Island, 64.....	lxv, 681
Fitzpatrick v. Hearne, 44 Alabama, 171.....	4, 128
Fitzpatrick v. School Comm'r, 7 Humph. 224.....	xvii, 76
Fitzsimmons v. Brooklyn, 103 New York, 536.....	55, 635
Fitzsimmons v. Chapman, 37 Michigan, 139.....	26, 538
Fitzsimmons v. City Fire Ins. Co., 18 Wis. 294..lxxxvii,	761
Fitzsimmons v. Joslin, 21 Vermont, 129.....	lii, 46
Fitzsimmons v. Southern Ex. Co., 40 Georgia, 230..	2, 877
Flag v. Harrington, Breese, 213.....	xli, 170
Flag v. Baldwin, 38 New Jersey Eq. 212.....	48, 268
Flag v. Eames, 40 Vermont, 16.....	xciv, 363
Flag v. Hudson, 142 Massachusetts, 260.....	56, 674
Flanagan v. Hoyt, 36 Vermont, 568.....	lxxxvii, 678
Flanagan v. Pearson, 42 Texas, 1.....	19, 49
Flanagan v. People, 52 New York, 467.....	11, 731
Flanagan v. People, 60 California, 2.....	44, 82
Flanders v. Flanders, 23 Georgia, 249.....	lxxviii, 523
Flanigan v. People, 66 New York, 554.....	40, 656
Flannery v. Rohrmayer, 46 Connecticut, 588.....	33, 34
Flash v. Connecticut, 16 Florida, 426.....	26, 721
Fleig v. Sleat, 43 Ohio State, 51.....	54, 808
Fleming v. Beaver, 2 Rawle, 126.....	xlz, 639
Fleming v. Harrison, 2 Bibb, 171.....	iv, 691
Fleming v. Lockart, 10 Martin, 368.....	xlvi, 333
Fleming v. McClure, 1 Brevard, 428.....	ii, 671
Fleming v. McDonald, 50 Indiana, 278.....	19, 711
Fleming v. Marine L. Co., 3 Watts & Serg. 144..lxxxviii,	747
Fleming v. Riddick, 5 Grattan, 272.....	i, 119
Fleming v. Shenandoah, 67 Iowa, 605.....	56, 354
Fleming v. Shields, 21 La. An. 118.....	xxxix, 719
Fleming v. Slocum, 18 Johnson, 403.....	ix, 224
Fleming v. Townsend, 6 Georgia, 103.....	i, 319
Fleming ada. State, 7 Humphreys, 123.....	xlvi, 73
Flemming v. Marine Ins. Co., 4 Wharton, 69.....	xxxvii, 33
Flemming v. Mulligan, 3 McCord, 173.....	xlvi, 707
Flemming v. Prescott, 3 Richardson's L. 307.....	xiv, 706
Flemming ada. State, 66 Maine, 142.....	72, 528
Fletcher v. Austin, 11 Vermont, 447.....	xxxiv, 698
Fletcher v. Blodgett, 16 Vermont, 25.....	xliz, 467
Fletcher v. Boston & M. R. R., 1 Allen, 2.....	lxxxix, 685
Fletcher v. Bradley, 12 Vermont, 22.....	xxxvi, 324
Fletcher v. Edson, 8 Vermont, 394.....	xxx, 476
Fletcher v. Ferrel, 9 Dana, 372.....	xxxv, 143
Fletcher v. Fletcher, 7 New Hampshire, 462.....	lxviii, 259
Fletcher v. Grover, 11 New Hampshire, 252.....	lxxxv, 497

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports

<i>Fletcher v. Howard</i> , 2 Alaska, 115.....xvi, 686	<i>Follansbe v. Kilbreth</i> , 17 Illinois, 522.....lxv, 661
<i>Fletcher v. Jackson</i> , 23 Vermont, 581.....lvi, 98	<i>Follansbee v. Walker</i> , 73 Pennsylvania St. 228....13, 671
<i>Fletcher v. Pierson</i> , 69 Indiana, 281.....33, 214	<i>Follett v. Hall</i> , 18 Ohio, 111.....xlvii, 365
<i>Fletcher v. Sanders</i> , 7 Dana, 345.....xxxii, 93	<i>Follett v. Reese</i> , 20 Ohio, 546.....lv, 472
<i>Fletcher v. State</i> , 49 Indiana, 124.....19, 673	<i>Folger, In re</i> , 77 Maine, 275.....59, 759
<i>Fleet v. Hollenkamp</i> , 13 B. Monroe, 219.....lvi, 563	<i>Folman v. City of Mankato</i> , 35 Minn. 523.....59, 340
<i>Fley ada. State</i> , 2 Brevard, 338.....iv, 583	<i>Folls' Appeal</i> , 91 Penn. St. 434.....34, 671
<i>Flaytas v. Pontchartr'n R. R. Co.</i> , 18 La. 339.....xxvii, 658	<i>Folsom v. Carl</i> , 5 Minnesota, 333.....lxxx, 429
<i>Flike v. Boston & A. R. R. Co.</i> , 53 New York, 549....13, 545	<i>Folsom v. Carl</i> , 6 Minnesota, 420.....lxxx, 458
<i>Flint v. Board of Aldermen</i> , 99 Mass. 141.....xvii, 713	<i>Folsom v. Mussey</i> , 8 Greenleaf, 400.....xxiii, 522
<i>Flint v. Cuny</i> , 7 Louisiana, 379.....xxvi, 505	<i>Foltier v. Schroeder & Schreiber</i> , 19 La. An. 17.....xvii, 621
<i>Flint v. Flint</i> , 6 Allen, 34.....lxxxiii, 615	<i>Folts v. Kerlin</i> , 105 Indiana, 221.....55, 197
<i>Flint v. Pattee</i> , 33 New Hampshire, 530.....lxvi, 742	<i>Fonda v. Jones</i> , 42 Mississippi, 792.....2, 669
<i>Flint v. Pierce</i> , 93 Massachusetts, 68.....xvii, 691	<i>Fonda v. Van Horne</i> , 15 Wendell, 631.....xxx, 77
<i>Flint v. Sheldon</i> , 13 Massachusetts, 443.....vii, 162	<i>Fones v. Phillips</i> , 39 Arkansas, 17.....43, 264
<i>Flint & F. P. Co. v. Woodhull</i> , 25 Michigan, 99.....19, 333	<i>Fontaine's Admr. v. Thompson</i> , 60 Virginia, 229....56, 668
<i>Flint & P. M. R. Co. v. Wier</i> , 37 Michigan, 111.....26, 499	<i>Fonville v. Casey</i> , 1 Murphey, 389.....lxviii, 568
<i>Flint R. Steamh. Co. v. Foster</i> , 5 Georgia, 194.....xlvi, 248	<i>Fonville v. McNease</i> , Dudley's Law, 303.....xxxi, 556
<i>Flint R. Steamh. Co. v. Roberts</i> , 2 Florida, 102.....xlvi, 178	<i>Fooks v. Waples</i> , 1 Harrington, 131.....lxv, 64
<i>Fiorance v. Adams</i> , 2 Robinson (La.), 556.....xxviii, 226	<i>Foose v. Whitmore</i> , 82 New York, 405.....37, 572
<i>Florence S. M. Co. v. Grover eta.</i> , 130 Mass. 70....14, 579	<i>Foot v. Bentley</i> , 44 New York, 186.....4, 652
<i>Florida v. Gibbs</i> , 13 Florida, 85.....7, 233	<i>Foot v. Ketchum</i> , 15 Vermont, 258.....xii, 678
<i>Flori v. St. Louis</i> , 69 Missouri, 341.....33, 804	<i>Foot v. Sabin</i> , 19 Johnson, 154.....x, 208
<i>Flory v. Becker</i> , 2 Penn. State, 470.....xiv, 610	<i>Foots ada. Atty-Genl.</i> , 11 Wis. 14.....lxxxviii, 689
<i>Flournoy v. City of Jeffersonville</i> , 17 Ind. 169.....lxix, 468	<i>Foots v. Blanchard</i> , 6 Allen, 221.....lxxxiii, 634
<i>Flower v. Penn. R. R. Co.</i> , 69 Penn. St. 210.....8, 251	<i>Foots v. Burnet</i> , 10 Ohio, 317.....lxxxvi, 90
<i>Floyd v. Browne</i> , 1 Rawle, 121.....xviii, 602	<i>Foots v. City of Cincinnati</i> , 9 Ohio, 31.....lxxxv, 420
<i>Floyd v. Comm'rs of Eatonton</i> , 14 Georgia, 354.....lviii, 559	<i>Foots v. City of Cincinnati</i> , 11 Ohio, 408.....lxxxviii, 737
<i>Floyd v. Day</i> , 3 Massachusetts, 403.....lii, 171	<i>Foots v. Colvin</i> , 3 Johnson, 218.....lii, 478
<i>Floyd v. Erie R'y Co.</i> , 45 New York, 113.....6, 43	<i>Foots v. Emerson</i> , 10 Vermont, 338.....lxxxiii, 208
<i>Floyd v. Floyd</i> , 3 Strobhart's Law, 44.....xlix, 628	<i>Foots v. Gooch</i> , 96 North Carolina, 265.....60, 411
<i>Floyd v. Gordin</i> , 8 Yerger, 484.....xlix, 130	<i>Foots v. Merrill</i> , 54 New Hampshire, 490.....90, 151
<i>Floyd v. Johnson</i> , 3 Littell, 109.....xiii, 255	<i>Footman v. Stetson</i> , 32 Maine, 17.....lii, 634
<i>Floyd v. Neel</i> , 10 Richardson's Eq. 338.....lxxxiii, 94	<i>Forbes v. American M. L. I. Co.</i> , 15 Gray, 249.....lxviii, 808
<i>Floyd v. Richs</i> , 14 Arkansas, 286.....lviii, 374	<i>Forbes v. Foot</i> , 2 McCord, 351.....xiii, 732
<i>Floyd v. State</i> , 12 Arkansas, 43.....liv, 250	<i>Forbes v. Hall</i> , 34 Illinois, 169.....lxxxv, 301
<i>Floyd v. State</i> , 26 Georgia, 91.....xci, 760	<i>Forbes v. Howe</i> , 102 Massachusetts, 427.....3, 475
<i>Floyd ada. State</i> , 5 Strobhart's Law, 58.....liii, 689	<i>Forbes v. Omaha Nat. Bank</i> , 10 Nebraska, 338.....35, 489
<i>Floyd Co. v. Hurd</i> , 49 Georgia, 463.....15, 682	<i>Forbes v. Rice</i> , 2 Brevard, 363.....iv, 599
<i>Flock v. Hager</i> , 51 Penn. St. 469.....xci, 132	<i>Forbes v. Smith</i> , 5 Iredell's Eq. 369.....xlix, 423
<i>Flynn v. Bourneuf</i> , 143 Massachusetts, 277.....58, 135	<i>Forcheimer v. Stewart</i> , 65 Iowa, 594.....54, 30
<i>Flynn v. Canton Co.</i> , 40 Maryland, 312.....17, 603	<i>Ford v. Angelrodt</i> , 37 Missouri, 50.....lxxxviii, 174
<i>Flynn v. Equitable L. A. Soc.</i> , 67 New York, 500....23, 134	<i>Ford v. Buckeye State Ins. Co.</i> , 6 Bush, 123.....xcix, 663
<i>Flynn v. Equitable L. Ins. Co.</i> , 78 New York, 568-34, 561	<i>Ford v. Campfield</i> , 6 Halsted, 327.....xx, 589
<i>Flynn v. Kansas C. St. J. & C. B. R. Co.</i> , 78 Missouri, 198.....47, 99	<i>Ford v. Chicago & N. W. R. R.</i> , 14 Wis. 609.....lxix, 791
<i>Flynn v. Messenger</i> , 28 Minnesota, 208.....41, 279	<i>Ford v. Clough</i> , 8 Greenleaf, 334.....xliii, 613
<i>Flynn v. San Francisco & S. J. H. R. Co.</i> , 40 Cal. 14....6, 595	<i>Ford ada. Commonwealth</i> , 130 Mass. 64.....39, 428
<i>Flynt v. Conrad</i> , Phillips' Law, 190.....xciii, 538	<i>Ford v. Fitchburg R. R. Co.</i> , 110 Mass. 240.....14, 598
<i>Foard v. Johnson</i> , 4 Alabama, 568.....xxvi, 421	<i>Ford v. Ford</i> , 2 Martin, N. S., 574.....xiv, 201
<i>Foard v. N. O. R. R. Co.</i> , 8 Jones' Law, 235.....lxxxviii, 277	<i>Ford v. Ford</i> , Walker, 505.....xlii, 557
<i>Fogarties v. State Bank</i> , 12 Rich. L. 518.....lxxxviii, 468	<i>Ford v. Hays</i> , 1 Harrington, 48.....xliii, 269
<i>Fogarty v. Finlay</i> , 10 California, 239.....lxx, 714	<i>Ford v. Keith</i> , 1 Massachusetts, 139.....ii, 4
<i>Fogarty ada. Commonwealth</i> , 8 Gray, 499.....lxix, 264	<i>Ford v. Knapp</i> , 102 New York, 135.....55, 723
<i>Fogg v. Fogg</i> , 40 New Hampshire, 283.....lxvii, 715	<i>Ford v. Langel</i> , 4 Ohio State, 464.....xli, 598
<i>Fogg v. Johnston</i> , 27 Alabama, 439.....lxii, 771	<i>Ford v. Magnolia Ins. Co.</i> , 6 Bush, 133.....xcix, 663
<i>Fogg v. Lawry</i> , 68 Maine, 78.....28, 19	<i>Ford v. Sproule</i> , 2 A. K. Marshall, 638.....xii, 439
<i>Fogg v. Pew</i> , 10 Gray, 409.....lxix, 662	<i>Ford v. State</i> , 29 Indiana, 541.....xov, 658
<i>Fogg v. Portsmouth Athenaeum</i> , 44 N. H. 115.....lxxxii, 191	<i>Ford v. Threll</i> , 9 Gray, 401.....lxix, 297
<i>Fogg v. Virgin</i> , 19 Maine, 352.....xxvii, 787	<i>Ford v. Williams</i> , 13 N. Y. (3 Kernan), 577.....lxvii, 63
<i>Foley v. Cowgill</i> , 5 Blackford, 18.....xxiii, 49	<i>Ford v. Wilson</i> , 35 Mississippi, 490.....lxxxii, 137
<i>Foley v. Chicago & N. W. R'y Co.</i> , 48 Mich. 622....42, 481	<i>Foreman v. Wilcox</i> , 16 Louisiana, 20.....lxxxv, 212
<i>Foley v. Greene</i> , 14 Rhode Island, 618.....51, 419	<i>Forester v. Guard</i> , Breese, 74.....xii, 141
<i>Foley v. McKeegan</i> , 4 Iowa, 1.....lxvi, 107	<i>Forney v. Geldmacher</i> , 75 Missouri, 113.....42, 288
<i>Foley v. Wyeth</i> , 2 Allen, 131.....lxxxix, 71	<i>Forney v. Hallacher</i> , 8 Serg. & R. 129.....xi, 599
<i>Foley ada. State</i> , 31 Iowa, 527.....7, 166	<i>Fornhill v. Murray</i> , 1 Bland's Ch. 479.....xviii, 244
<i>Foley ada. State</i> , 15 Nevada, 64.....37, 458	<i>Forrest v. Collier</i> , 20 Alabama, 175.....lxv, 190
<i>Folger v. Columbian Ins. Co.</i> , 90 Mass. 26.....xcvi, 747	<i>Forsee v. Alabama G. S. R. R. Co.</i> , 63 Miss. 66....54, 601
<i>Folger v. R. R. Co.</i> , 93 Massachusetts, 277.....xcvi, 747	<i>Forshner ada. State</i> , 43 New Hampshire, 39.....lxxx, 138
<i>Folk and Smith v. Wilcox</i> , 21 Maryland, 133.....lxxxii, 599	<i>Forster v. Fuller</i> , 6 Massachusetts, 58.....iv, 87
	<i>Forster v. Juniata Br. Co.</i> , 16 Penn. St. 293.....iv, 608

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Forayth v. Ganson, 5 Wendell, 598.....xii, 241	Fountain Co. C. & M. Co. v. Beckelheimer, 102
Forayth v. Hopkins, 14 Penn. State, 29.....xii, 513	Indiana, 76.....52, 645
Forayth v. Matthews, 14 Penn. State, 100.....xiii, 522	Fountain v. West, 23 Iowa, 9.....xii, 405
Forayth v. Mayor, 45 Georgia, 152.....12, 576	Fourth N. H. Turn. ada. State, 15 N. H. 162.....xii, 590
Forayth v. Palmer, 14 Penn. State, 96.....xiii, 519	Fowke v. Slaughter, 3 A. K. Marshall, 56.....xiii, 133
Forayth v. Wells, 41 Penn. State, 291.....lxix, 617	Fowle v. New Haven & N. Co., 112 Mass. 234.....17, 106
Forayth v. Beveridge, 53 Illinois, 266.....4, 612	Fowle v. Springfield Ins. Co., 122 Mass. 191.....23, 308
Forayth v. Ellis, 4 J. J. Marshall, 298.....xx, 218	Fowle v. Ward, 113 Massachusetts, 548.....18, 534
Forayth v. Norcross, 5 Watts, 432.....xxx, 334	Fowler v. Stone F. Ins. Co., 6 Cowen, 673.....xvi, 429
Forayth v. Price, 8 Watts, 232.....xxiv, 465	Fowler v. Austin, 1 Howard, 156.....xxvi, 701
Fort Clark H. Ry Co. v. Anderson, 103 Ill. 64.....49, 545	Fowler v. Bebee, 9 Massachusetts, 231.....vi, 62
Fort Dearborn Lodge v. Klein, 115 Illinois, 177.....56, 133	Fowler v. Buttery, 78 New York, 68.....34, 507
Fort Madison Lumber Co. v. Batavian Bank, 71	Fowler v. Cravens, 3 J. J. Marshall, 428.....xx, 153
Iowa, 370.....60, 769	Fowler v. Currie, 2 Dana, 53.....xxvi, 436
Fort Smith v. Dodson, 46 Arkansas, 296.....55, 589	Fowler v. Lee, 10 Gill & J. 358.....xxii, 173
Fort Smith v. McKibbin, 41 Arkansas, 45.....48, 19	Fowler v. Pearce, 2 English, 23.....xlv, 526
Fort Wayne v. Coombs, 107 Indiana, 75.....57, 82	Fowler v. Souly, 73 Pennsylvania State, 458.....13, 699
Fort Wayne v. Rosenthal, 75 Indiana, 186.....39, 127	Fowler v. Stoneum, 11 Texas, 478.....lxii, 499
Fort Worth v. Crawford, 64 Texas, 203.....53, 75	Fowler v. Trebels, 16 Ohio St. 493.....xii, 99
Fortenberry v. Frasier, 5 Arkansas, 300.....xxix, 373	Fowler v. Williams, 2 Brevard, 304.....iv, 579
Fortin v. U. S. Wind & P. Co., 48 Illinois, 451.....xov, 569	Fowlkes v. Baker, 29 Texas, 125.....xov, 579
Fortman v. Bottler, 8 Ohio State, 548.....lxix, 616	Fox, Will of, 53 New York, 530.....11, 751
Forward v. Armistead, 12 Alabama, 124.....xvi, 246	Fox v. City of New Orleans, 13 La. An. 154.....lxviii, 768
Fosdick v. Cornell, 1 Johnson, 440.....xiii, 340	Fox v. Cronan, 47 New Jersey Law, 498.....54, 199
Fosdick v. Gooding, 1 Greenleaf, 30.....x, 25	Fox v. Davis, 113 Massachusetts, 255.....18, 476
Fosdick v. Green, 27 Ohio St., 484.....22, 328	Fox v. Hall, 74 Missouri, 315.....41, 316
Fosdick v. Rial, 15 Ohio, 84.....xlv, 563	Fox v. Hatch, 14 Vermont, 340.....xxix, 236
Foshay v. Glen Haven, 25 Wisconsin, 288.....3, 73	Fox v. Horah, 1 Iredell's Eq. 358.....xxvi, 48
Foss v. Isatt, 4 G. Greene, 76.....lxi, 117	Fox v. Hoyt, 12 Connecticut, 491.....xxxi, 769
Foster, Ex parte, 5 Tex. Ct. App. 625.....32, 577	Fox v. Jones, 1 West Virginia, 205.....xci, 363
Foster's Appeal, 74 Pennsylvania St. 391.....15, 553	Fox v. Minor, 33 California, 111.....xcii, 566
Foster's Appeal, 87 Pennsylvania St. 67.....30, 340	Fox v. Reeder, 23 Ohio State, 181.....22, 379
Foster v. Brown, 1 Bailey's Law, 231.....xix, 672	Fox v. Sackett, 10 Allen, 535.....lxxvii, 682
Foster v. Browning, 4 Rhode Island, 47.....lxvii, 505	Fox v. Sandford, 4 Sneed, 36.....lxvii, 587
Foster v. Clifford, 4 Wisconsin, 569.....28, 603	Fox v. State, 3 Texas Ct. App. 339.....36, 144
Foster ada. Commonwealth, 114 Mass. 311.....19, 353	Fox v. Willocks, 1 Binney, 194.....ii, 433
Foster ada. Commonwealth, 123 Mass. 317.....23, 326	Foy v. Blackstone, 31 Illinois, 536.....lxixii, 269
Foster v. Dupre, 5 Martin, 101.....xii, 466	Foye v. Leighton, 22 New Hampshire, 71.....lxii, 231
Foster v. Essex Bank, 16 Massachusetts, 245.....viii, 135	Fraker v. Little, 24 Kansas, 598.....36, 293
Foster v. Essex Bank, 17 Massachusetts, 479.....ix, 168	Fraser v. Sears' Union Water Co., 13 Cal. 555.....lxixii, 568
Foster v. Fletcher, 7 T. B. Monroe, 534.....xviii, 208	Friley v. Bispham, 10 Penn. State, 330.....ii, 486
Foster v. Hall, 12 Pickering, 89.....xxii, 400	Friley v. Kelly, 88 North Carolina, 227.....43, 743
Foster v. Jones, 79 Virginia, 648.....52, 637	Frailick v. Norton, 2 Michigan, 130.....lv, 86
Foster v. Julien, 24 New York, 28.....lxix, 320	Frailick v. Presley, 29 Alabama, 457.....lxv, 413
Foster v. Kelsey, 36 Vermont, 199.....lxxiv, 676	Frame v. Kenny, 3 A. K. Marshall, 145.....xii, 267
Foster v. Kennedy's Adm'r, 33 Alabama, 399.....lxxxi, 86	Francis v. Baker, 11 Rhode Island, 103.....23, 494
Foster v. Mabe, 4 Alabama, 402.....lxxvii, 749	Francis v. Dubuque etc. R. R. Co., 25 Iowa, 60.....xov, 769
Foster v. Mansfield, 3 Metcalf, 413.....xxxvii, 154	Frank, Ex parte, 53 California, 606.....28, 643
Foster v. McGregor, 11 Vermont, 595.....xxiv, 713	Frank v. Chemical Nat. Bank, 84 New York, 209, 36, 601
Foster v. Means, 1 Speer's Eq. 569.....xiii, 332	Frank v. Morris, 57 Illinois, 138.....11, 4
Foster v. Metts, 55 Mississippi, 77.....30, 504	Frank v. Mut. L. I. Co., 103 New York, 206.....53, 597
Foster v. Morris, 3 A. K. Marshall, 609.....xiii, 205	Frankford & C. P. R. R. v. Philadelphia, 66 Penn.
Foster v. Morse, 132 Massachusetts, 354.....42, 436	St. 112.....xxviii, 269
Foster v. Pettibone, 7 New York (3 Seldem), 453.....lvii, 530	Frankford Tea Co. v. Philadelphia R. R. Co., 54
Foster v. Poyner, 9 Cushing, 242.....lvii, 43	Penn. St. 345.....xxvii, 703
Foster v. Pierce, 11 Cushing, 437.....lix, 153	Frankfort Br. Co. v. Williams, 9 Dana, 403.....xxv, 155
Foster v. Runk, 109 Pennsylvania St. 291.....58, 730	Frankfort and S. T. Co. v. Churchill, 6 T. B.
Foster v. Scripps, 39 Michigan, 376.....33, 403	Monroe, 427.....xvii, 159
Foster v. Smith, 2 Coldwell, 474.....lxxviii, 604	Frankhouser v. Ellett, 23 Kansas, 127.....31, 171
Foster ada. State, 8 Louisiana An. 290.....lviii, 678	Frankland v. Hallowell, 26 Texas, 475.....lxxiv, 582
Foster ada. State, 23 New Hampshire, 348.....lv, 191	Franklin v. Coffee, 18 Texas, 413.....lxz, 329
Foster v. "The Richard Busted," 100 Mass. 409.....1, 126	Franklin v. Dorland, 26 California, 178.....lxxvii, 111
Foster v. Tucker, 3 Greenleaf, 458.....xiv, 243	Franklin v. Fisk, 13 Allen, 211.....xx, 194
Foster v. Van Reed, 70 New York, 19.....26, 544	Franklin v. Gorham, 2 Day, 142.....ii, 86
Foster v. Wilcox, 10 Rhode Island, 443.....14, 698	Franklin v. McCorkle, 16 Lea, 609.....57, 244
Foster v. Wiley, 27 Michigan, 244.....15, 185	Franklin v. March, 6 New Hampshire, 364.....xxv, 469
Fotheringham v. Price, 1 Bay, 291.....i, 618	Franklin v. Merida, 35 California, 526.....xov, 129
Fottrall v. German, 5 Cold. 580.....xviii, 442	Franklin v. State, 69 Georgia, 36.....47, 748
Fouch v. Wilson, 60 Indiana, 61.....28, 651	Franklin v. Twogood, 25 Iowa, 530.....xxvi, 73
Fouik v. McFarlane, 1 Watts Sarg. 297.....lxxvii, 467	Franklin B'k. Matter of, 1 Paige's Ch. 269.....xii, 618

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports

Franklin Bank v. Byram, 30 Maine, 480.....lxviii, 643	Friedlander v. Pugh etc., 43 Mississippi, 111..... 5, 478
Franklin B't v. Beechelder, 23 Maine, 60.....xxxix, 601	Freight Discrimination Cases, 95 N. C. 428.....59, 247
Franklin B't v. Lynch, 53 Maryland, 270.....36, 375	Freight etc. Co. v. Standard, 41 Mo. 71.....c, 255
Franklin B't v. Pa. D. & M. St. Nav. Co., 11 Gill & J. 28.....xxxiii, 687	Fremont v. Crippen, 10 California, 212.....lxix, 711
Franklin Coal Co. v. McMillan, 49 Maryland, 549.53, 289	French v. Boston, 129 Massachusetts, 562.....37, 393
Franklin Co. v. Lewiston Inst., 68 Maine, 43.....28, 9	French v. Brunswick, 21 Maine, 29.....xxxviii, 250
Franklin Falls Co. v. State, 49 N. H. 360..... 6, 513	French v. Camp, 18 Maine, 433.....xxxvi, 723
Franklin Fire Ins. Co. v. Chicago Ice Co., 36 Maryland, 102 .....11, 469	French v. Commonwealth, 5 Leigh, 513.....xxvii, 613
Franklin F. Ins. Co. v. Findlay, 6 Whart. 483. xxxvii, 430	French v. French, 8 Ohio, 214.....xxxii, 441
Franklin Fire Ins. Co. v. Martin, 11 Vroom, 568..39, 271	French v. Hall, 9 New Hampshire, 137.....xxxii, 341
Franklin Glass Co. v. Alexander, 2 N. H. 380.....ix, 92	French v. Hays, 43 New Hampshire, 30.....lxix, 197
Franklin Ins. Co. v. Humphrey, 65 Ind. 549.....32, 78	French v. Hoyt, 6 New Hampshire, 570.....xxv, 464
Franklin L. Ins. Co. v. Hassard, 41 Ind. 116.....13, 313	French v. Irwin, 4 Bart. 401.....37, 769
Franklin Sav. B't v. Greene, 14 R. I. 1.....51, 336	French v. Lund, 1 New Hampshire, 42.....lviii, 31
Franklin Wharf Co. v. Portland, 67 Maine, 46..24, 1	French v. Mastin, 94 New Hampshire, 440.....lvii, 294
Franks v. Dobson, 64 Mississippi, 631.....60, 68	French v. Pearce, 8 Connecticut, 439.....xxii, 689
Frary v. Frary, 10 New Hampshire, 61.....xxxii, 306	French v. Seely, 7 Watts, 231.....xxxii, 758
Fraser v. Boone, 1 Hill Oh. 360.....xxvii, 423	French v. Shepler, 83 Indiana, 268.....43, 67
Fraser v. Freeman, 43 New York, 568..... 3, 740	French v. Smith, 4 Vermont, 363.....xxiv, 616
Fraser v. Little, 13 Michigan, 195.....lxviii, 741	French v. Snyder, 30 Illinois, 336.....lxviii, 198
Fraser v. State, 3 Texas Ct. App. 263.....30, 131	French v. State, 12 Indiana, 670.....lxix, 229
Fratt v. Whittier, 58 California, 126.....41, 261	French v. State, 18 Indiana, 366.....lxix, 264
Fratt v. Woodward, 33 California, 219.....xci, 573	French v. Vining, 109 Massachusetts, 132..... 3, 440
Fraser v. D'Invernizzi, 2 Penn. State, 300.....xlv, 190	Frenkel v. Hudson, 82 Alabama, 158.....60, 736
Fraser v. McCloskey, 60 New York, 337.....19, 193	Frenzel v. Miller, 37 Indiana, 1.....10, 63
Fraser v. South & N. A. R. R. Co., 81 Ala. 185.....60, 145	Freon v. Carriage Co., 42 Ohio St. 30.....51, 794
Fraser v. Barnum, 19 New Jersey Eq. 316.....xcvii, 606	Frevall v. Fitch, 5 Wharton, 326.....xxxiv, 558
Fraser v. Brownlow, 3 Iredell's Eq. 237.....xlii, 165	Frew ada. State, 24 West Virginia, 416.....49, 257
Fraser v. Pa. R. E., 38 Penn. State, 104.....lxix, 467	Frey v. Drahos, 6 Nebraska, 1.....79, 363
Fraser v. Steensrod, 7 Iowa, 339 .....lxvi, 447	Frey v. Kirk, 4 Gill & Johnson, 509.....xxiii, 581
Fraser v. Syas, 10 Nebraska, 115.....35, 466	Frey v. Witman, 7 Penn. State, 440.....xlix, 484
Fraser v. Hardenbergh, 5 Johnson, 272.....iv, 366	Fridenberg v. Pierson, 18 California, 153.....lxix, 163
Fraser v. Davenport, 63 Iowa, 119.....50, 737	Friedeborn v. Commonwealth, 113 Penn. St. 242.57, 464
Frech v. Yawger, 47 N. J. L. 157.....54, 123	Fridge v. State, 3 Gill & Johnson, 103.....xx, 463
Fredendall v. Taylor, 23 Wisconsin, 538.....xcix, 203	Friedley v. Hamilton, 17 Serg. & R. 70.....xvii, 639
Frederick's Appeal, 62 Penn. St. 338.....xci, 159	Friedly v. Sheets, 9 Serg. & R. 156.....xi, 601
Frederick v. Marquette, H. & O. R. Co., 37 Michigan, 342.....76, 531	Friend v. Duryee, 17 Florida, 111.....36, 89
Frederick ada. State, 45 Arkansas, 247.....55, 555	Friend v. Friend, 53 Michigan, 543.....51, 161
Frederick v. Youngblood, 19 Alabama, 680.....liv, 209	Friend v. Garcelon, 77 Maine, 25.....53, 739
Frederick, Mayor of, v. Groshon, 30 Md. 436.....xvii, 591	Friend v. Woods, 6 Grattan, 189.....lii, 119
Freedom, Inhabitants of, v. Weed, 40 Ma. 383.....lxiii, 670	Frierson v. Brenham, 5 Louisiana An. 540.....lii, 603
Freehold Sussex v. Strader 3 Harr. (N. J.), 108.....xxv, 530	Frierson v. Harris, 5 Cold. 148.....xciv, 220
Freeland v. Edwards, 2 Haywood, 49.....li, 620	Frierson v. Van Buren, 7 Yarger, 606.....xxvii, 538
Freeland v. McCullough, 1 Denio, 414.....xlili, 685	Fries v. Boisselet, 9 Serg. & R. 128.....xi, 683
Freeman v. Bass, 34 Georgia, 355.....lxix, 255	Fries v. Brugler, 7 Haleted, 79.....xxi, 88
Freeman v. Boland, 14 Rhode Island, 39.....51, 340	Fries v. Rider, 24 New York, 367.....lxviii, 306
Freeman v. Bridger, 4 Jones' Law, 1 .....lxvii, 258	Frink v. Bellis, 33 Indiana, 135..... 5, 193
Freeman v. Carpenter, 10 Vermont, 433.....xxxiii, 210	Frink v. Coe, 4 G. Greene, 555.....lxii, 141
Freeman v. Curtis, 51 Maine, 140.....lxix, 564	Frink v. Darr, 14 Illinois, 304.....lviii, 575
Freeman v. Eelman, 3 Iredell's Eq. 31.....xi, 444	Frink v. Frink, 43 New Hampshire, 508.....lxix, 189
Freeman v. Freeman, 43 New York, 34..... 8, 637	Frink v. Lawrence, 30 Connecticut, 117.....1, 274
Freeman v. Hartman, 45 Illinois, 57.....xcii, 193	Frink v. Layton, 2 Bay, 166.....1, 638
Freeman v. Howell, 4 Louisiana An. 196.....1, 561	Frink v. Murphy, 21 California, 168.....lxix, 149
Freeman v. Morey, 45 Maine, 50.....lxix, 537	Frisby v. Ballance, 4 Seamon, 237.....xxxix, 409
Freeman v. Otis, 9 Massachusetts, 372.....vi, 66	Frisby v. Parkhurst, 29 Maryland, 88.....xcvi, 503
Freeman v. Paul, 3 Greenleaf, 260.....xiv, 237	Frische v. Kramer's Lessee, 16 Ohio, 126.....xlvii, 368
Freeman v. People, 4 Denio, 9.....xlvii, 216	Frith v. Frith, 18 Georgia, 273.....lxvii, 299
Freeman v. Robinson, 9 Vroom, 383.....30, 399	Frits v. Thomas, 1 Wharton, 66.....lxix, 39
Freeman v. Sedwick, 6 Gill, 23.....xlv, 650	Frogg's Ex'rs v. Long's Adm'r, 3 Dana, 157.....xxviii, 69
Freeman v. State, 11 Texas Ct. App. 92.....40, 787	Frommer v. Richmond, 31 Grattan, 648.....31, 746
Freeman ada. State, 8 Iowa, 428.....lxvii, 317	Frontier B't v. Morse, 22 Maine, 88.....xxxviii, 234
Freeman's Nat. Bank v. Savary, 127 Mass. 75.....34, 345	Frosch v. Schlumpf, 2 Texas, 423.....xlvii, 655
Freeport v. Isbell, 83 Illinois, 440.....25, 407	Frost v. Brislin, 19 Wendell, 11.....xxxii, 423
Free v. Cameron, 4 Richardson's L. 228.....iv, 663	Frost v. Butler, 7 Greenleaf, 225.....xvii, 159
Freesse v. Brownell, 36 New Jersey, 269.....10, 239	Frost v. Cloutman, 7 New Hampshire, 9.....xcvi, 723
Freidenholt v. Edmundson, 36 Mo. 227.....lxviii, 141	Frost v. Grand Trunk R. R. Co., 10 Allen, 367. lxxvii, 608
	Frost v. Martin, 26 New Hampshire, 422.....lix, 363
	Frost v. Plumb, 40 Connecticut, 111.....26, 18
	Frost v. Raymond, 2 Calnes, 126.....1, 288

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Frost v. Saratoga Mut. Ins. Co., 5 Denio, 154.....xlix, 234	Gaffield v. Hapgood, 17 Pickering, 192.....xxviii, 290
Frost v. Spaulding, 19 Pickering, 445.....xxxi, 150	Gaffney v. Hayden, 110 Massachusetts, 137.....14, 580
Frost v. Yonkers Sav. Bank, 70 N. Y. 553.....26, 627	Gage v. Allison, 1 Brevard, 435.....ii, 682
Frothingham v. Jenkins, 1 California, 42.....11, 296	Gage v. Censors of N. H. etc. Soc'y, 63 N. H. 92.....56, 492
Fruit v. Hardin, 56 Indiana, 165.....26, 18	Gage v. Dubuque & P. R. R., 11 Iowa, 310.....lxvii, 145
Frowman v. Smith, Littell's Select Cases, 7.....xii, 265	Gage v. Morse, 12 Allen, 410.....xx, 155
Fry v. Manlove, 1 Barker, 256.....23, 775	Gager v. Babcock, 48 New York, 154.....8, 532
Fry v. State, 63 Indiana, 582.....30, 238	Gagg v. Vetter, 41 Indiana, 223.....13, 322
Fry's Election Case, 71 Penn. St. 303.....10, 598	Gahagan v. Boston & L. R. R., 1 Allen, 187.....lxix, 724
Frye v. Sanders, 21 Kansas, 26.....30, 421	Galeennie v. Akin's Ex'r, 17 Louisiana, 42.....xxxvi, 604
Fugate v. Clarkson, 3 B. Monroe, 41.....xxvii, 689	Gallor ada. State, 71 North Carolina, 88.....17, 3
Fugua v. Carriel, Minor, 170.....xii, 46	Gallard v. Anneline, 10 Martin, 479.....xiii, 338
Fuhr v. Dean, 26 Missouri, 116.....lxix, 484	Gallard ada. State, 2 Bay, 11.....i, 638
Fuhrman v. London, 13 Serg. & R. 386.....xv, 608	Gains v. Gains, 2 A. K. Marshall, 130.....xii, 375
Fuham v. New York U. Ins. Co., 7 Gray, 61.....lxvii, 463	Gains v. Park, 3 B. Monroe, 223.....xxxvii, 185
Fuller v. Cowell, 8 Louisiana An. 136.....lviii, 676	Gaines v. Poor, 3 Met. (Ky.) 603.....lxix, 580
Fuller v. Crittenden, 9 Connecticut, 401.....xxiii, 364	Gaines v. Gaines, 9 B. Monroe, 236.....xlvi, 428
Fuller v. Curtis, 100 Indiana, 237.....50, 786	Gaines v. Smiley, 7 Smedes & M. 53.....xlv, 298
Fuller v. Duren, 36 Alabama, 73.....lxvii, 318	Gaines v. State, 7 Lea, 410.....40, 64
Fuller v. Ellis, 29 Vermont, 345.....xci, 327	Gaine v. People, 97 Illinois, 370.....57, 100
Fuller v. Green, 64 Wisconsin, 159.....54, 600	Gaither v. Ballew, 4 Jones' Law, 482.....lxix, 763
Fuller v. Hovey, 2 Allen, 524.....lxix, 782	Gaither v. Myrick, 9 Maryland, 118.....lxvi, 316
Fuller v. Hubbard, 6 Cowen, 13.....xvi, 423	Gelbraith v. McFarland, 3 Cold. 207.....xci, 281
Fuller v. Hutchings and Sweetser, 10 Cal. 523.....lxix, 746	Gelbreth v. Davidson, 25 Arkansas, 490.....xci, 233
Fuller v. Jewett, 80 New York, 46.....36, 675	Gale v. Green, Walker, 159.....xii, 548
Fuller v. McCall, 1 Yeates, 464.....i, 512	Gale v. Kalamazoo, 23 Michigan, 344.....9, 80
Fuller v. McDonald, Admr's, 8 Greenleaf, 213.....xxiii, 499	Gale v. Menasing, 20 Missouri, 461.....lxv, 197
Fuller v. Paige, 26 Illinois, 358.....lxix, 379	Gale v. Tappan, 12 New Hampshire, 145.....xxxvii, 194
Fuller v. Robinson, 86 New York, 306.....40, 540	Gale v. Ward, 14 Massachusetts, 323.....vii, 223
Fuller v. Shattuck, 13 Gray, 70.....lxix, 622	Galena, City of, v. Corwith, 48 Illinois, 623.....xv, 557
Fuller v. Steglitz, 27 Ohio St. 355.....22, 512	Galena eta. U. R. R. Co. v. Loomis, 13 Ill. 542.....lvi, 471
Fuller v. Sweet, 20 Michigan, 237.....18, 123	Galena Insurance Co. v. Kupfer, 28 Ill. 332.....lxix, 284
Fuller v. Swerthout, 3 Iredell's Law, 263.....xxxviii, 692	Galena & C. U. R. R. Co. v. Fay, 16 Illinois, 566 lxviii, 323
Fuller v. Williams, 7 Cowen, 53.....xvii, 498	Galena & C. U. R. R. Co. v. Roe, 18 Illinois, 468 lxviii, 574
Fuller ada. Commonwealth, 8 Metcalf, 313.....xii, 509	Galena & C. U. R. R. Co. v. Yarwood, 17 Ill. 809.....lxv, 683
Fuller ada. State, 1 Bay, 245.....i, 610	Gallagher v. Dodge, 48 Connecticut, 337.....40, 189
Fuller & J. M. Co. v. Bartlett, 68 Wis. 73.....60, 838	Gallagher v. Market St. R. R. Co., 67 Cal. 13.....50, 713
Fullerton v. Warrick, 3 Blackford, 219.....xxv, 99	Gallagher v. Shipley, 24 Maryland, 418.....lxviii, 611
Fulmer v. Seitz, 68 Penn. St. 237.....8, 172	Gallagher v. Williamson, 23 California, 333.....lxviii, 114
Fulbeare v. Randon, 18 Texas, 275.....lxix, 281	Gallagher ada. People, 93 New York, 438.....45, 232
Fulton v. Hood, 34 Penn. State, 365.....lxix, 664	Gallagher's Appeal, 114 Pennsylvania St. 263.....60, 350
Fulton v. Macraeken, 18 Maryland, 538.....lxix, 620	Galland v. Galland, 44 California, 475.....13, 167
Fulton v. Matthews, 15 Johnson, 433.....viii, 261	Galland v. Jackman, 26 California, 79.....lxix, 173
Fulton v. Roosevelt, 1 Paige's Ch. 178.....xix, 409	Gallago's Ex'r v. Attorney General, 3 Leigh, 460 lxv, 680
Fulton v. Stuart, 2 Ohio, 215.....xv, 543	Gallery v. Nat. Ex. Bank, 41 Michigan, 180.....32, 149
Funk v. Eggleston, 92 Illinois, 515.....34, 136	Galliano v. Pierre, 18 Louisiana, An. 10.....lxix, 643
Funk v. Gallivan, 49 Connecticut, 124.....44, 210	Gallinger v. Pomeroy, 3 G. Greene, 172.....liv, 406
Funk v. Paul, 64 Wisconsin, 33.....54, 676	Gallion v. McOaslin, 1 Blackford, 91.....xii, 209
Funk v. Smith, 66 Penn. St. 27.....5, 326	Galliot v. Plant & M. Bank, 1 McMull. L. 202 xxxvi, 258
Funk v. Vonelda, 11 Serg. & R. 110.....xiv, 617	Gallipolis Bank v. Domigan, 13 Ohio St. 250.....xi, 475
Funks v. Dreyfus, 34 La. An. 80.....44, 413	Galloway v. Bonestall, 65 Wisconsin, 79.....50, 616
Funks v. Minnesota F. Mut. Fire Ins. Ass'n, 29 Minnesota, 347.....43, 216	Galloway v. McKethen, 5 Iredell's Law, 12.....xii, 153
Fuqua v. Hunt, 1 Alabama, 197.....xxiv, 771	Galloway v. Stewart, 49 Indiana, 126.....19, 677
Furgison v. State, 4 G. Greene, 308.....lx, 120	Galloway, Matter of, 21 Wendell, 32.....xxxiv, 280
Furlong v. Polley, 30 Maine, 491.....i, 636	Galpin v. Critchley, 119 Massachusetts, 229.....17, 176
Furman v. Fisher, 4 Cold. 626.....xci, 310	Galpin v. Fishburne, 3 McCord, 21.....xv, 614
Furman v. Van Sise, 56 New York, 435.....15, 441	Galpin v. Hard, 3 McCord, 394.....xv, 640
Furnas v. Durgin, 119 Massachusetts, 500.....20, 341	Galt v. Adams' Ex. Co., McArthur & Mack, 124.....48, 743
Furness v. Fox, 1 Cushing, 134.....xiviii, 593	Galt's Ex'r v. Swain, 9 Gratian, 633.....lx, 311
Furrow v. Athey, 21 Nebraska, 671.....58, 867	Galveston v. Barbour, 22 Texas, 173.....50, 519
Fuss v. Fum, 24 Wisconsin, 256.....1, 180	Galveston v. Poshinsky, 63 Texas, 118.....50, 517
Fyffe v. Beers, 18 Iowa, 4.....lxix, 577	Galveston C. R. Co. v. Howitt, 67 Texas, 473.....60, 32
Gaar v. Louisville Banking Co., 11 Bush, 180.....21, 209	Galv. C. & Santa Fe R'y Co. v. Levy, 69 Texas, 542.....46, 280
Gable v. Wetherholt, 116 Illinois, 313.....54, 774	Galv. H. & H. R'y Co. v. Moore, 69 Texas, 64.....46, 263
Gabbert v. Jeffersonville R. R. Co., 11 Ind. 365.....lxix, 358	Galv. H. & San Antonio R'y Co. v. Drew, 69 Texas, 10.....46, 261
Gackenhach v. Brouse, 4 Watts & Serg. 846.....xxxix, 104	Galvin v. Bacon, 11 Maine, 23.....lxv, 286
Gadsden v. Carson, 9 Richardson's Eq. 263.....lxix, 207	Galvin v. Prentice, 45 New York, 163.....6, 80
Gadsden v. Lance, 1 McMullan's Eq. 87.....xxxvii, 548	Galway v. Shields, 68 Missouri, 312.....57, 321
Gaff v. Greer, 68 Indiana, 123.....45, 449	

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures (49) to American Reports.

- Gamble ada. Commonwealth, 8 Penn. St. 343.... 1, 422
 Gambrell v. Doe ex d. Ross, 8 Blackford, 140....xliv, 760
 Gammon v. Everett, 25 Maine, 66.....xlili, 255
 Gandy v. Chicago & N. W. R. R. Co., 30 Iowa, 430. 6, 682
 Gangwer v. Fry, 17 Penn. State, 491.....lv, 578
 Gangware's Estate, In re, 14 Penn. State, 417.....liii, 554
 Gannett ada. Commonwealth, 1 Allen, 7.....lxix, 633
 Gannon v. Hargadon, 10 Allen, 106.....lxxxvii, 625
 Gannon v. Housatonic R. R. Co., 112 Mass. 234....17, 82
 Gano v. Fisk, 43 Ohio State, 462.....54, 819
 Gans v. Benshaw, 2 Penn. State, 34.....xliv, 152
 Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108....28, 535
 Ganson v. Madigan, 15 Wisconsin, 144.....lxxxii, 659
 Gant v. Gant, 10 Humphreys, 484.....liii, 736
 Gant v. Hunsucker, 12 Iredell's Law, 254.....lv, 408
 Garbracht v. Commonwealth, 96 Penn. St. 449....42, 550
 Garbutt ada. People, 17 Michigan, 9.....xviii, 162
 Garcey v. State, 26 Texas, 279.....lxxxii, 606
 Gard v. Stevens, 12 Michigan, 292.....lxxxvi, 52
 Garden v. Derrickson, 3 Del. Ch. 386.....xv, 286
 Gardiner v. Nutting, 5 Greenleaf, 140.....xvii, 211
 Gardiner v. Tisdale, 2 Wisconsin, 153.....lx, 407
 Gardiner Mfg. Co. v. Heald, 5 Greenleaf, 381....xvii, 248
 Gardiner, In re, 103 New York, 533.....57, 788
 Gardner v. Allen's Err, 6 Alabama, 187.....xli, 45
 Gardner v. Astor, 3 Johns. Ch. 53.....viii, 465
 Gardner v. Buckbee, 3 Cowen, 120.....xv, 256
 Gardner v. Ferree, 15 Serg. & R. 28.....xvi, 513
 Gardner v. Gardner, 22 Wendell, 526.....xxxiv, 340
 Gardner v. Gardner, 5 Cushing, 483.....lii, 740
 Gardner v. Hope Ins. Co., 9 Rhode Island, 194....11, 238
 Gardner v. Kersey, 39 Georgia, 664.....xcix, 484
 Gardner v. Keteltas, 3 Hill (N. Y.), 330.....xxxviii, 637
 Gardner v. Knutta, 8 Jones' L. 375.....lxxx, 331
 Gardner v. Ladue, 47 Illinois, 211.....xcv, 487
 Gardner v. Lane, 9 Allen, 492.....lxxxv, 779
 Gardner v. Maynard, 7 Allen, 456.....lxxxiii, 639
 Gardner v. Merritt, 32 Maryland, 78.....3, 115
 Gardner v. Mitchell, 6 Pickering, 114.....xvii, 349
 Gardner v. Moore, 75 Alabama, 394.....51, 454
 Gardner v. Newburgh, 2 Johns. Ch. 161.....vii, 626
 Gardner v. New Haven & N. Co., 51 Conn. 143....50, 12
 Gardner v. Ogden, 22 New York, 327.....lxxviii, 192
 Gardner v. Preston, 2 Day, 206.....xi, 91
 Gardner v. Smith, 7 Michigan, 410.....lxiv, 722
 Gardner ada. State, 13 Les, 134.....49, 660
 Gardner v. Thomas, 14 Johnson, 134.....vii, 445
 Gardt v. Brown, 113 Illinois, 475.....55, 434
 Garfield v. Douglass, 22 Illinois, 100.....lxiv, 137
 Garland v. Britton, 12 Illinois, 232.....lii, 487
 Garland v. Chambers, 11 Smedes & M. 337.....xlx, 63
 Garland v. Hull, 13 Smedes & M. 76.....li, 140
 Garland v. Rives, 4 Randolph, 252.....xv, 756
 Garland v. Salem Bank, 9 Massachusetts, 408....vi, 88
 Garland v. Towne, 55 New Hampshire, 55.....20, 164
 Garland v. Watt, 4 Iredell's Law, 287.....xlii, 120
 Garlick v. James, 12 Johnson, 146.....vii, 294
 Garner v. Byard, 23 Georgia, 289.....lxviii, 527
 Garner v. Garner, Busbee's Equity, 1.....lvii, 583
 Garner v. Hudgins, 46 Missouri, 399.....2, 520
 Garnet v. State, 1 Texas Ct. Appeals, 606.....28, 425
 Garnett v. Garnett, 114 Massachusetts, 379.....19, 369
 Garnett ada. People, 35 California, 470.....xcv, 125
 Garnhart v. Finney, 40 Missouri, 449.....xciii, 333
 Garney v. Rogers, 47 New York, 233.....7, 410
 Garrard v. Dollar, 4 Jones' Law, 175.....lxvii, 271
 Garrard v. Hadden, 67 Pennsylvania State, 82....5, 412
 Garret v. Rex, 6 Watts, 14.....xxxi, 447
 Garretts v. Van Ness, 1 Pennington, 20.....li, 333
 Garretson v. Selby, 37 Iowa, 829.....18, 14
 Garretson v. Vanloon, 3 G. Greene, 128.....liv, 492
 Garrett v. Burlington P. Co., 70 Iowa, 697.....59, 461
 Garrett v. Cheshire, 69 North Carolina, 396....12, 647
 Garrett v. City of St. Louis, 25 Missouri, 505....lxix, 475
 Garrett v. Day, 2 McCord's Ch. 27.....xvi, 629
 Garrett v. Dewart, 43 Penn. State, 342.....lxxxii, 573
 Garrett v. Doe ex d. Wiggins, 1 Scam. 335.....530, 630
 Garrett v. Hamblin, 11 Smedes & M. 219.....xlx, 53
 Garrett v. McKie, 1 Richardson's L. 444.....xliv, 263
 Garrett v. Patchin, 29 Vermont, 248.....lxx, 414
 Garrett v. Rhame, 9 Richardson's L. 407.....lxvii, 557
 Garrett v. State, 49 New Jersey Law, 94.....60, 692
 Garrett ada. State, 17 North Carolina, 85.....17, 1
 Garrett ada. State, 1 Winst. L. 144.....lxxxiv, 386
 Garrett & Martin's Appeal, 32 Penn. State, 160....lxvii, 779
 Garretson v. Duencel, 50 Missouri, 104.....11, 406
 Garrey v. Stadler, 67 Wisconsin, 512.....58, 877
 Garrigus ada. Commonwealth, 251 Penn. St. 9....lxx, 103
 Garrigus v. Cox, 1 Binney, 592.....li, 493
 Garrison v. Combs, 7 J. J. Marshall, 84.....xvii, 120
 Garrison v. Haydon, 1 J. J. Marshall, 222.....xix, 70
 Garrison v. Savignac, 25 Missouri, 47.....lxix, 448
 Garrott v. Johnson, 11 Gill & J. 173.....lxviii, 273
 Garrow v. Brown, Winst. Eq. 46.....lxxxvi, 450
 Garth v. Roberts, 20 Missouri, 523.....lxiv, 203
 Garthwaite v. Tatum, 21 Arkansas, 336.....lxxvi, 402
 Garton ada. State, 32 Indiana, 1.....2, 315
 Gartrell v. Stafford, 12 Nebraska, 545.....41, 767
 Gartside v. Conn. M. L. Ins. Co., 76 Mo. 446....43, 768
 Gartside v. Outley, 58 Illinois, 210.....11, 59
 Garvey's Case, 7 Colorado, 394.....49, 358
 Garvey v. Jarvis, 46 New York, 310.....7, 336
 Garvey v. People, 6 Colorado, 569.....45, 531
 Garvey ada. State, 28 Louisiana An. 925.....96, 123
 Garvin v. Squires, 9 Arkansas, 533.....l, 234
 Garvin v. Williams, 44 Missouri, 466.....c. 314
 Garwood v. Eldridge, 1 Green's Ch. 145.....xxxiv, 196
 Garwood v. N. Y. C. & H. R. R. Co., 83 N. Y. 400.38, 453
 Gary v. Jacobson, 55 Mississippi, 204.....30, 514
 Garza v. Booth, 28 Texas, 478.....xci, 328
 Gasberis ada. People, 9 Johnson, 71.....vi, 363
 Gaschweiler v. Wabash, St. L. & P. Ry Co., 83 Missouri, 112.....53, 658
 Gaschweiler v. Willis, 33 California, 11.....xci, 667
 Gaskill v. Dudley, 6 Metcalf, 546.....xxxi, 750
 Gaskill v. Sins, 2 Beasley's Ch. 400.....lxxxviii, 106
 Gasz's Appeal, 73 Pennsylvania St. 39.....13, 726
 Gas v. N. Y., Prov. & B. R. Co., 99 Mass. 220....xcvi, 742
 Gas v. Wilhite, 2 Dana, 170.....xxvi, 446
 Gaston v. Drake, 14 Nevada, 175.....33, 548
 Gaston ada. State, 73 North Carolina, 93.....21, 459
 Gates v. Andrews, 37 New York, 667.....xvii, 764
 Gates v. Beecher, 60 New York, 518.....19, 207
 Gates v. Blincoe, 2 Dana, 158.....xxvi, 440
 Gates v. Brower, 9 N. Y. (5 Selden), 205.....lix, 530
 Gates v. Goreham, 5 Vermont, 317.....xxvii, 308
 Gates v. Green, 4 Paige Ch. 335.....xxvii, 68
 Gates v. Hackstahl, 57 Illinois, 534.....11, 45
 Gates v. Madison Ins. Co., 5 N. Y. (1 Seld.), 466....lv, 360
 Gates v. McDaniel, 2 Stewart, 211.....lix, 49
 Gates v. McKee, 13 N. Y. (3 Kernan), 232.....lxiv, 545
 Gates v. Salmon, 35 California, 576.....xcv, 139
 Gates v. Thompson, 57 Maine, 442.....xcix, 782
 Gates v. Whetstone, 8 South Carolina, 244.....28, 284
 Gathings v. Williams, 5 Iredell's Law, 487.....xliv, 49
 Gatlin v. Kilpatrick, 1 Carolina Law Repos. 534....vi, 487
 Gatling v. Comm'r of Carteret, 82 N. C. 536....53, 533
 Gatzweiler ada. State, 49 Missouri, 17.....8, 115
 Gauch v. St. Louis M. L. Ins. Co., 83 Ill. 251....30, 554
 Gault v. Brown, 48 New Hampshire, 183.....2, 216

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Gaullagher v. Caldwell, 23 Penn. State, 300.....lx, 85	George v. Wood, 9 Allen, 80.....lxxv, 748
Gause v. Perkins, 3 Jones' Eq. 177.....lxix, 728	Georgia M. S. ad. State ex rel. Waring, 36 Ga. 608. xcv, 408
Gaut v. Reed Brothers & Co., 24 Texas, 46.....lxvii, 94	Georgia Nat. Bank v. Henderson, 46 Ga. 487.....lx, 590
Garrett v. Manchester & L. R. R., 16 Gray, 501.....lxviii, 423	Georgia Pen. Co. v. Nelms, 65 Georgia, 499.....lx, 779
Gavin v. Chicago, 97 Illinois, 66.....lxviii, 37, 99	Georgia R. v. Beatie, 66 Georgia, 498.....lx, 73
Gavin ad. Commonwealth, 121 Mass. 54.....lxviii, 23, 255	Georgia R. R. v. Garr, 57 Georgia, 277.....lx, 423
Gay v. Baker, 5 Jones' Eq. 344.....lxviii, 239	Georgia R. R. v. Hayden, 71 Georgia, 518.....lx, 274
Gay v. Baker, 17 Massachusetts, 438.....lx, 159	Georgia R. R. v. McCurdy, 45 Georgia, 238.....lx, 57
Gay v. Ballou, 4 Wendell, 403.....xxi, 158	Georgia R. v. Spears, 66 Georgia, 495.....lx, 42, 81
Gay v. Bradstreet, 49 Maine, 580.....lxviii, 272	Gerard v. Basse, 1 Dallas, 119.....lx, 236
Gay v. Gay, 60 Iowa, 415.....lx, 46, 78	Gerard v. Gesteau, 44 Illinois, 121.....lx, 423
Gay v. Hunt, 1 Murphy, 141.....lx, 681	Gerard v. LeCoute, 1 Dallas, 194.....lx, 236
Gay v. Lloyd, 1 G. Greene, 78.....lxvi, 499	Gerault v. Anderson, Walker, 30.....lx, 521
Gay v. Mitchell, 35 Georgia, 133.....lxviii, 278	Gerber v. Ackley, 37 Wisconsin, 43.....lx, 751
Gay v. Moffit, 2 Bibb, 806.....lx, 633	Gerdes v. Weiser, 54 Iowa, 591.....lx, 229
Gay v. Rainey, 89 Illinois, 221.....lx, 76	Gerhardt v. Boatman's Sav. Inst. 38 Mo. 80.....lx, 407
Gay v. Seibold, 97 New York, 473.....lx, 49, 533	Gerke v. Cal. Steam. Nav. Co., 9 California, 251.....lx, 650
Gay v. Walker, 36 Maine, 54.....lxviii, 734	Gerlach v. Skinner, 34 Kansas, 86.....lx, 249
Gayetty v. Bethune, 14 Massachusetts, 49.....lxviii, 188	German Am. Bank v. Auth, 87 Penn. St. 419.....lx, 374
Gayles v. Johnson, 72 Alabama, 254.....lx, 405	German v. Gebbald, 3 Binney, 302.....lx, 372
Gaylord v. Imhoff, 26 Ohio St. 317.....lx, 762	German v. German, 27 Penn. State, 116.....lxviii, 451
Gaylord v. Lamar Fire Ins. Co., 40 Missouri, 13. xlii, 289	Germanada State, 49 Missouri, 536.....lx, 481
Gaylord v. Soragen, 32 Vermont, 110.....lxviii, 154	German Mut. Ins. Co. v. Grim, 32 Indiana, 249.....lx, 311
Gaynor v. Old Colony & N. R. Co., 100 Mass. 308. xlvii, 96	German Nat. Bank v. Meadowcroft, 96 Ill. 124.....lx, 137
Gazman v. Poyntis, 4 Alabama, 574.....lxviii, 745	Germania F. Ins. Co. v. Francis, 52 Miss. 457.....lx, 674
Gazolo ad. Commonwealth, 123 Mass. 320.....lx, 79	Germania F. Ins. Co. v. Memphis & C. R. Co., 72
Gear v. D. & S. O. R. R., 20 Iowa, 523.....lxviii, 550	New York, 90.....lx, 113
Gebhard v. Garner, 13 Bush, 321.....lx, 721	Germantown F. Mut. Ins. Co. v. Dhein, 43 Wis-
Gebhart v. Adams, 23 Illinois, 397.....lxvii, 703	consin, 420.....lx, 549
Gebhart v. Burkett, 57 Indiana, 378.....lx, 61	Germantown P. R'y Co. v. Filer, 60 Pa. 124.....lx, 546
Geddes, Ex parte, 4 Richardson's Eq. 301.....lxvii, 730	Germantown Pass. R'y Co. v. Walling, 97 Penn.
Gee v. Cheshire Co. Ins. Co., 55 New Hamp. 66.....lx, 171	St. 55.....lx, 796
Gee v. McMillan, 14 Oregon, 268.....lx, 315	Germond v. Germond, 6 Johns. Ch. 347.....lx, 338
Gee v. Pharr, 5 Alabama, 586.....lxviii, 339	Geron v. Geron, 15 Alabama, 558.....lx, 143
Gee v. Scott, 48 Texas, 510.....lx, 331	Gerrish v. Brown, 51 Maine, 256.....lxviii, 569
Gee's Adm'r v. Williamson, 1 Porter, 313.....lxviii, 623	Gerrish v. Clough, 48 New Hampshire, 9.....lxviii, 561
Geery's Appeal, 43 Connecticut, 289.....lx, 653	Gerrish v. Clough, 48 New Hampshire, 9.....lx, 165
Geiser v. Kershner, 4 Gill & Johnson, 305.....lxviii, 566	Gerrish v. Gerrish, 8 Oregon, 351.....lx, 34, 365
Geiser Threshing Mach. Co. v. Smith, 36 Wis. 295. lx, 494	Gerrish v. Nason, 22 Maine, 438.....lxviii, 369
Geisner v. Lake Shore & M. S. R'y Co., 102 New	Gerrish v. New Bedford Ins., 128 Mass. 159.....lx, 365
York, 563.....lx, 837	Gerrish v. Prop's Union Wharf, 26 Maine, 384.....lxviii, 658
Geiss v. Odenheimer, 4 Yeates, 378.....lx, 407	Gerst v. Jones, 32 Grattan, 518.....lx, 773
Gelpcke v. Blake, 15 Iowa, 387.....lxviii, 418	Gertz v. Fitchburg R. R. Co., 137 Mass. 77.....lx, 225
Gelstrop v. Moore, 25 Mississippi, 206.....lx, 254	Getor v. Commissioners, 1 Bay, 364.....lx, 621
Zeizenleuchter v. Nimeyer, 61 Wisconsin, 316.....lx, 616	Getty v. Binase, 49 New York, 385.....lx, 379
Gelzer v. Gelzer, 1 Bailey's Eq. 387.....lxviii, 180	Getty v. Rountree, 2 Pinney, 379, 2 Chand. 28.....lxv, 139
General German A. P. Home v. Hammerbecker,	Gettys v. Gettys, 3 Lea, 260.....lx, 637
64 Maryland, 1, 593.....lx, 782	Geyer v. Hancock Mut. L. Ins. Co., 50 N. H. 234.....lx, 185
General Ins. Co. v. U. S. Ins. Co., 10 Md. 517.....lxix, 174	Gholson v. State, 53 Alabama, 519.....lx, 639
Gent v. Lynch, 23 Maryland, 58.....lxviii, 558	Gibbons v. Dillingham, 10 Arkansas, 9.....lx, 233
Genet ad. People, 59 New York, 80.....lx, 315	Gibbons v. Gibbons, 140 Mass. 102.....lx, 453
Gentleman v. Soule, 32 Illinois, 271.....lxviii, 264	Gibbons v. Mahon, 4 Mackey, 130.....lx, 263
Gentry v. Gentry, 1 Sneed, 87.....lx, 137	Gibbs v. Cannon, 9 Serg. & R. 198.....lx, 639
Gentry v. Hutchcraft, 7 T. B. Monroe, 241.....lxviii, 173	Gibbs v. Chisolm, 2 Nott & McC. 38.....lx, 569
Gentry v. Owen, 14 Arkansas, 396.....lx, 549	Gibbs v. Drew, 16 Florida, 147.....lx, 709
Genung ad. People, 11 Wendell, 18.....lxv, 594	Gibbs v. Linabury, 22 Michigan, 479.....lx, 675
Geoghegan v. Ditto, 2 Metcalf (Ky.), 433.....lxix, 413	Gibbs v. Queen Ins. Co., 63 N. Y. 114.....lx, 513
George v. Andrews, 60 Maryland, 26.....lx, 706	Gibbs v. Shaw, 17 Wisconsin, 197.....lxix, 737
George v. Cutting, 46 New Hampshire, 130.....lxviii, 195	Gibbs v. State, 16 Vrooman, 379.....lx, 783
George v. East Tenn. Coal Co., 15 Lea, 455.....lx, 425	Gibbs v. Williams, 25 Kansas, 214.....lx, 241
George v. Gobey, 128 Massachusetts, 289.....lx, 376	Gibert v. Colt, Hopkins' Ch. 496.....lxviii, 567
George v. Harris, 4 New Hampshire, 533.....lxviii, 446	Gibert v. Peters, 38 New York, 166.....lxviii, 786
George v. Johnson, 6 Humphreys, 35.....lxv, 288	Gibson's Case, 1 Bland's Ch. 138.....lxviii, 257
George v. McNeill, 7 Louisiana, 124.....lxviii, 498	Gibson, Ex parte, 31 California, 619.....lx, 546
George v. Pilcher, 28 Gratt. 299.....lx, 350	Gibson v. Bingham, 43 Vermont, 410.....lx, 239
George v. Putney, 4 Cushing, 351.....lx, 783	Gibson v. Brookway, 8 New Hampshire, 465.....lxviii, 208
George v. Ransom, 15 California, 322.....lxviii, 490	Gibson v. Chedle, 1 Nevada, 487.....lx, 633
Georgiadis, State, 8 Iredell's Law, 394.....lxix, 392	Gibson v. Chouteau, 45 Missouri, 171.....lx, 386
George v. Thomas, 16 Texas, 74.....lxviii, 612	Gibson v. Cooke, 30 Pickering, 15.....lxviii, 194
George v. Williamson, 26 Missouri, 190.....lxviii, 203	Gibson v. Cranage, 39 Michigan, 49.....lx, 253

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Gibson v. Culver, 17 Wendell, 305.....	xxxi, 237	Gill v. Middleton, 105 Massachusetts, 477.....	7, 548
Gibson v. Dunnam, 1 Hill, 269.....	xxvi, 183	Gill v. Morris, 11 Heisk. 614.....	27, 744
Gibson v. Erie R'y Co., 63 New York, 449.....	90, 532	Gill v. Read, 5 Rhode Island, 343.....	lxxiii, 73
Gibson v. Fristoe, 1 Call, 63.....	l, 532	Gill v. Woods, 81 Illinois, 64.....	23, 264
Gibson v. Gibson, 15 Massachusetts, 106.....	viii, 91	Gillespie v. Kelley, 41 Indiana, 128.....	13, 318
Gibson v. Gibson, 43 Wisconsin, 23.....	28, 527	Gillespie v. Osburn, 3 A. K. Marshall, 77.....	xiii, 138
Gibson v. Goldthwaite, 7 Alabama, 251.....	xlii, 532	Gillespie v. Wesson, 7 Porter, 454.....	xxxi, 718
Gibson v. Haggerty, 37 New York, 555.....	xcvii, 752	Gillenwater v. Madison & I. R., 5 Ind. 339.....	lxi, 101
Gibson v. Hawkins, 69 Georgia, 354.....	47, 757	Gillespie v. Bailey, 12 W. Virginia, 70.....	20, 445
Gibson v. Holden, 115 Illinois, 199.....	56, 146	Gillespie v. Bradford, 7 Yergor, 168.....	xxvii, 494
Gibson v. Hutchins, 12 Louisiana An. 645.....	lxviii, 772	Gillespie v. Commercial M. Ins. Co., 12 Gray, 201.....	lxxi, 743
Gibson v. Miller, 29 Michigan, 355.....	18, 98	Gillespie ada. Commonwealth, 7 Serg. & E. 469.....	x, 475
Gibson v. Pacific R. R. Co., 46 Missouri, 163.....	2, 497	Gillespie v. Dew, 1 Stewart, 229.....	xviii, 43
Gibson v. Poor, 21 New Hampshire, 440.....	liii, 216	Gillespie v. Holland, 40 Arkansas, 23.....	48, 1
Gibson v. Roll, 27 Illinois, 88.....	lxxxi, 219	Gillespie v. McGowen, 100 Penn. 84, 144.....	45, 365
Gibson v. Roll, 30 Illinois, 172.....	lxxxiii, 181	Gillespie v. Moon, 2 Johns. Ch. 585.....	vii, 559
Gibson v. Seymour, 102 Indiana, 485.....	52, 638	Gillespie v. Nabors, 59 Alabama, 441.....	31, 30
Gibson v. Soper, 6 Gray, 379.....	lxxvii, 414	Gillespie v. Smith, 29 Illinois, 473.....	lxxxii, 328
Gibson ada. State, 26 Indiana, 389.....	10, 42	Gillespie v. State, 8 Yergor, 807.....	xxix, 157
Gibson v. Tilton, 1 Bland's Ch. 382.....	xvii, 306	Gillespie v. Torrance, 25 New York, 308.....	lxxvii, 353
Gibson v. Tobey, 46 New York, 637.....	7, 397	Gillet v. Maynard, 8 Johnson, 86.....	lv, 229
Gibson v. Vaughn, 3 Bailey, 389.....	xxvii, 143	Gillet v. Mead, 7 Wendell, 193.....	xxii, 573
Gibson v. Winslow, 46 Penn. State, 260.....	lxxxiv, 552	Gillet v. Missouri V. R. R. Co., 55 Mo. 315.....	17, 653
Gibson v. Zimmerman, 12 Missouri, 351.....	li, 168	Gilliam v. Bird, 8 Ireland's Law, 290.....	xlix, 379
Giddings v. Antonio, 47 Texas, 548.....	26, 321	Gilliam v. Chancellor, 43 Mississippi, 437.....	5, 498
Giddings v. Giddings, 51 Vermont, 227.....	31, 682	Gilliam v. Moore, 4 Leigh, 30.....	xxiv, 704
Giddings v. Steele, 28 Texas, 733.....	xci, 336	Gilliam v. State, 1 Head, 38.....	lxxviii, 151
Gifford v. Dyer, 2 Rhode Island, 99.....	lvii, 708	Gilliat v. Pawtucket M. F. Ins. Co., 8 R. I. 292.....	xxi, 299
Gifford v. Morrison, 37 Ohio St. 552.....	41, 537	Gillis v. Martin, 2 Doreux's Eq. 470.....	xxv, 729
Gil v. Williams, 12 Louisiana An. 219.....	lxviii, 767	Gillis v. Penn. R. R., 69 Penn. 84, 129.....	xxviii, 317
Gilbert v. Anthony, 1 Yergor, 69.....	xxiv, 439	Gillison v. Charleston, 16 W. Va. 232.....	37, 763
Gilbert v. Bulkley, 6 Connecticut, 262.....	xiii, 57	Gillot v. Eastbrook, 48 New York, 374.....	8, 653
Gilbert v. Carter, 10 Indiana, 16.....	lxviii, 655	Giluly v. Madison, 63 Wisconsin, 518.....	52, 299
Gilbert v. Dennis, 3 Metcalf, 495.....	xxviii, 329	Gilly v. Henry, 8 Martin, 403.....	xiii, 291
Gilbert v. Dickinson, 7 Wendell, 449.....	xxii, 592	Gilman v. Andrus, 28 Vermont, 241.....	lvii, 713
Gilbert v. Emmons, 43 Illinois, 143.....	lxxxix, 412	Gilman v. County of Contra Costa, 8 Cal. 52.....	lxviii, 290
Gilbert v. Flint & P. M. R'y Co., 51 Mich. 468.....	47, 592	Gilman v. Douglas, 6 Nevada, 27.....	3, 237
Gilbert v. Gilbert, 23 Alabama, 529.....	lviii, 268	Gilman v. Dwight, 13 Gray, 356.....	lxxiv, 634
Gilbert v. Hoffman, 66 Iowa, 305.....	53, 263	Gilman v. Eastern R. R. Corp., 10 Allen, 233.....	lxxvii, 636
Gilbert v. Hoffman, 3 Watts, 66.....	xxvi, 103	Gilman v. Eastern R. R. Corp., 13 Allen, 433.....	xc, 210
Gilbert v. Moore, 104 Penn. St. 74.....	49, 570	Gilman v. Gilman, 52 Maine, 165.....	lxxxviii, 508
Gilbert v. N. Am. Fire Ins. Co., 23 Wend. 43.....	xxv, 543	Gilman v. Gilman, 126 Mass. 26.....	30, 646
Gilbert v. People, 1 Denio, 41.....	xliii, 646	Gilman v. Hall, 11 Vermont, 510.....	lxxiv, 708
Gilbert v. Sanderson, 56 Iowa, 349.....	41, 103	Gilman v. Lowell, 8 Wendell, 573.....	xxiv, 96
Gilbert ada. State, 37 North Carolina, 587.....	42, 518	Gilman v. Laconia, 55 New Hampshire, 130.....	20, 175
Gilbert v. Williams, 8 Massachusetts, 51.....	v, 77	Gilman v. McArdle, 99 New York, 451.....	52, 41
Gilbert v. Wiman, 1 N. Y. (1 Comst.) 580.....	xlix, 389	Gilman v. Peck, 11 Vermont, 516.....	lxxxiv, 702
Gilbreth v. Grewell, 13 Indiana, 484.....	lxxiv, 266	Gilman ada. State, 69 Maine, 163.....	31, 257
Gilchrist v. Bala, 8 Watts, 355.....	lxxxiv, 469	Gilman v. Thompson, 11 Vermont, 643.....	lxxxiv, 714
Gilchrist v. Gough, 63 Indiana, 576.....	30, 250	Gilman v. Williams, 7 Wisconsin, 329.....	lxxvi, 219
Gilchrist v. Hilliard, 63 Vermont, 592.....	58, 706	Gilmer v. Mobile & M. R'y Co., 79 Ala. 569.....	58, 623
Gilchrist v. McKee, 4 Watts, 380.....	lxxviii, 721	Gilmer v. Morris, 80 Alabama, 78.....	60, 86
Gilchrist v. West Va. Oil & O. L. Co., 21 West Virginia, 115.....	45, 555	Gilmore v. Burch, 7 Oregon, 374.....	33, 719
Gilderleeve v. Caraway, 10 Alabama, 260.....	xliv, 485	Gilmore v. Carman, 1 Smedes & M. 279.....	xl, 96
Giles v. Acheson, 9 Penn. State, 147.....	xlix, 551	Gilmore v. Driscoll, 123 Massachusetts, 126.....	23, 312
Giles v. Comstock, 4 N. Y. (4 Comst.), 270.....	liii, 374	Gilmore v. Newton, 9 Allen, 171.....	lxxxv, 749
Giles v. Halseid, 4 Zablocki, 368.....	lxi, 668	Gilmore ada. People, 4 California, 376.....	lx, 626
Giles v. Palmer, 4 Jones' Law, 386.....	lxix, 756	Gilmore ada. State, 30 Kansas, 551.....	27, 139
Giles v. Pratt, 1 Hill (S. O.), 239.....	xxvi, 170	Gilmore v. Whitesides, Dudley's Eq. 14.....	xxxi, 563
Giles v. Simonds, 15 Gray, 441.....	lxxvii, 373	Gilmore v. Wilbur, 12 Pickering, 120.....	xxii, 416
Giles ada. State, 2 Finney, 166 (1 Chand. 112).....	lii, 149	Gilmore v. Woodcock, 69 Maine, 118.....	31, 258
Giles v. Vigoreux, 35 Maine, 300.....	lviii, 704	Gilpatrick v. Hunter, 24 Maine, 18.....	xii, 379
Giles v. Williams, 3 Alabama, 316.....	lxxxvii, 692	Gilpin v. Davis, 2 Bibb, 416.....	v, 622
Gilham v. Madison Co. R. Co., 49 Illinois, 494.....	xov, 627	Gilpin v. Howell, 5 Penn. State, 41.....	xiv, 729
Gilham v. State Bank of Illinois, 2 Soam. 245.....	lxxxv, 105	Gilpin v. Hollingsworth, 3 Maryland, 190.....	lvi, 737
Gill v. Benjamin, 64 Wisconsin, 393.....	54, 619	Gilson v. Gwinn, 107 Massachusetts, 126.....	9, 13
Gill v. Cole, 1 Harris & J. 403.....	li, 527	Gilson v. Spear, 38 Vermont, 311.....	lxxxviii, 639
Gill v. Denton, 71 North Carolina, 341.....	17, 8	Gimblin v. Harrison, Sneed (Ky.), 315.....	li, 730
Gill v. Frank, 12 Oregon, 807.....	53, 578	Gindrat v. Montgomery Gas L. Co., 22 Ala. 296.....	60, 769
		Gingrich v. Foltz, 19 Penn. State, 38.....	lvii, 623

Roman letters [R] refer to volumes of American Decisions, and Arabic figures [48] to American Reports.

- Giovanni v. First Nat. Bank of Montgomery, 55 Alabama, 305.....28, 723
- Girard v. Philadelphia, 4 Rawle, 323.....xvi, 145
- Girard v. Taggart, 5 Serg. & R. 19.....ix, 327
- Girard Bank v. Bank of Penn. T. 39 Penn. St. 92.....lxxx 507
- Girard L. I. eto. Co. v. Chambers, 46 Penn. State, 485.....lxxvi, 513
- Girard M. I. Co. v. Stephenson, 37 Penn. St. 293.....lxxxviii, 423
- Girdner v. Stephens, 1 Helsk. 280.....2, 700
- Gist v. Cole, 2 Nott & McO. 456.....x, 616
- Gist v. Davis, 2 Hill Ch. 535.....xxix, 89
- Gist v. Drakely, 2 Gill, 330.....xii, 426
- Gist v. Lybrand, 3 Ohio, 307.....xvii, 595
- Gittings v. Hall, 1 Harris & J. 14.....ii, 502
- Givens v. Bradley, 3 Bibb, 192.....vi, 646
- Givens v. Branford, 3 McOord, 182.....xiii, 702
- Givens v. Calder, 2 Desausure, 173.....ii, 686
- Givens v. Higgins, 4 McOord, 298.....xvii, 742
- Givens v. Mullinax, 4 Richardson's L. 890.....iv, 706
- Givens v. Van Studdiford, 86 Missouri, 149.....54, 421
- Glacius v. Black, 50 New York, 145.....10, 449
- Gladwin v. Lewis, 6 Connecticut, 49.....xvi, 33
- Glanz v. Gloeckler, 104 Illinois, 573.....44, 94
- Glascok v. Lyons, 20 Indiana, 1.....lxxxiii, 299
- Glascok v. Roberts, 14 Missouri, 350.....iv, 108
- Glasgow v. Pratte, 8 Missouri, 336.....xi, 142
- Glasgow ada. State, Conference Rep. 38.....ii, 629
- Glass v. Hulbert, 103 Massachusetts, 24.....3, 418
- Glass ada. State, 50 Wisconsin, 218.....36, 945
- Glass v. Warwick, 40 Penn. State, 140.....lxxx, 566
- Glascok v. Betton, 6 Randolph, 78.....xviii, 703
- Glavin v. Rhode Island Hospital, 12 R. I. 411.....34, 675
- Gleason v. Beers, 69 Vermont, 681.....59, 757
- Gleason v. Goodrich Trans. Co., 32 Wis. 85.....14, 716
- Gleason v. Knapp, 56 Michigan, 291.....54, 398
- Gleason v. Peck, 12 Vermont, 55.....lxxxvi, 329
- Gleason v. Smith, 9 Cushing, 484.....iv, 62
- Gleason v. Maignan, 3 Louisiana, 530.....xviii, 466
- Glen v. Fisher, 6 Johns. Ch. 83.....x, 310
- Glen eto. Manut. Co. v. Hall, 61 New York, 236.....19, 278
- Glendale W. Co. v. Protection Ins. Co., 21 Conn. 19.....li, 309
- Glendon Iron Co. v. Uhler, 75 Penn. St. 487.....15, 599
- Glenn v. Bank of United States, 8 Ohio, 72.....xxxi, 429
- Glenn v. Davis, 35 Maryland, 206.....6, 389
- Glenn v. McCullough, Harper's Law, 484.....xviii, 661
- Glenn v. Peters, Busbee's L. 487.....lix, 563
- Glenn v. Sempie, 80 Alabama, 159.....60, 92
- Glenn v. Sims, 1 Richardson's Law, 34.....xiii, 405
- Glenn v. Smith, 2 Gill & J. 493.....xx, 452
- Glenn v. Wallace, 4 Strobhart's Eq. 149.....liii, 687
- Glen's Falls Ins. Co. v. Judge of Jackson Circuit, 21 Michigan, 577.....4, 504
- Glickauf v. Maurer, 75 Illinois, 299.....90, 238
- Glidden v. Chase, 35 Maine, 90.....lvi, 690
- Glidden v. Henry, 104 Indiana, 278.....54, 316
- Glidden v. Moore, 14 Nebraska, 84.....45, 96
- Glidden v. Taylor, 16 Ohio St. 509.....xci, 98
- Glidden v. Town of Reading, 38 Vermont, 62.....lxxxviii, 639
- Gilman v. Newton, 1 Haywood, 385.....i, 559
- Globe Ins. Co. v. Lansing, 5 Cowen, 380.....xv, 474
- Globe Marble M. Co. v. Quinn, 76 New York, 23.32, 259
- Gloninger v. Franklin Coal Co., 55 Penn. St. 9.....xviii, 720
- Glooucester Mfg. Co. v. Howard Fire Ins. Co., 5 Gray, 497.....lxvi, 376
- Glover v. Robbins, 49 Alabama, 219.....90, 272
- Glover v. Smith, 1 Desausure, 433.....i, 687
- Glover v. Stamps, 73 Georgia, 209.....54, 870
- Goble v. Gale, 7 Blackford, 218.....xii, 219
- Goble v. Dillon, 96 Indiana, 327.....44, 303
- Gedbold v. Br'oh B & at Mobile, 11 Alabama, 191.....xvi, 211
- Gedbold v. Lambert, 8 Richardson's Eq. 155.....lxx, 198
- Godchaux v. Mulford, 26 California, 316.....lxxxv, 173
- Goddard, Petitioner, eto., 16 Pickering, 504.....xxviii, 259
- Goddard v. Binney, 115 Massachusetts, 450.....15, 112
- Goddard v. Bolster, 6 Greenleaf, 427.....xi, 329
- Goddard v. Bulow, 1 Nott & McO. 45.....ix, 653
- Goddard v. Chaffee, 2 Allen, 395.....lxxxix, 796
- Goddard v. East Texas F. Ins. Co., 67 Texas, 69.....60, 1
- Goddard v. Grand Trunk R'y Co., 57 Maine, 302.....2, 39
- Goddard v. Hapgood and Trustees, 25 Vt. 351.....lx, 272
- Goddard v. Monitor Mut. F. Ins. Co., 108 Massachusetts, 56.....11, 307
- Goddard v. Pres. Town of Jacksonville, 15 Ill. 698.....lx, 773
- Godeau v. Blood, 53 Vermont, 251.....36, 751
- Godeffroy v. Caldwell, 2 California, 499.....lvi, 369
- Godfrey v. City of Alton, 12 Illinois, 29.....lii, 476
- Godfrey v. Godfrey, 17 Indiana, 6.....lxxxix, 446
- Godfrey v. Hays, 6 Alabama, 501.....xii, 58
- Godfrey v. Humphrey, 18 Pickering, 537.....xxix, 621
- Godfrey v. State, 31 Alabama, 323.....lxix, 494
- Godfrey ada. State, 24 Maine, 233.....xii, 363
- Godley v. Goodloe, 6 Smiles & M. 253.....xiv, 297
- Godley v. Hagerty, 20 Penn. State, 387.....lix, 732
- Godwin v. Gregg, 28 Maine, 188.....xviii, 489
- Godwin ada. State, 5 Iredell's Law, 401.....xlv, 49
- Godwinsville eto. R. Co. ada. State, 49 New Jersey L. 268.....60, 611
- Goebel v. Linn, 47 Michigan, 499.....41, 723
- Goensen v. Commonwealth, 106 Penn. St. 477.....51, 634
- Goetz v. Foss, 14 Minnesota, 265.....c, 218
- Goforth v. Longworth, 4 Ohio, 129.....xix, 698
- Gogel v. Jacoby, 5 Serg. & R. 117.....ix, 339
- Goggans v. Turnipseed, 1 South Carolina, 80.....xviii, 397
- Goggans v. Turnipseed, 1 South Carolina, 80.....7, 23
- Golcochea v. Louisiana In. Co., 6 Mart. N. S. 51.....xvii, 175
- Goling v. Emery, 16 Pickering, 107.....xxvi, 645
- Gold v. Bailey, 44 Illinois, 491.....xvii, 190
- Gold v. Carter, 9 Humphreys, 369.....xlix, 712
- Golden v. Cockril, 1 Kansas, 259.....lxxxi, 510
- Golden v. Glock, 57 Wisconsin, 118.....66, 32
- Golden v. Levy, 1 Carolina L. Rep. 627.....vi, 556
- Golden v. Newbrand, 53 Iowa, 59.....35, 237
- Goldner v. Ogden, 15 Penn. State, 528.....lii, 618
- Golday v. Pennsylvania R. R. Co., 30 Penn. State, 242.....lxxii, 703
- Golding's Petition, 57 New Hampshire, 146.....34, 60
- Gold Run Ditch & Mining Co. ada. People, 66 California, 138.....56, 89
- Gollither v. Commonwealth, 2 Duval, 163.....lxxxvii, 498
- Gomber v. Hackett, 6 Wisconsin, 333.....lxx, 467
- Gonzales v. Hukil, 49 Alabama, 260.....70, 282
- Gonzales v. New York & H. R. R. 33 N. Y. 440.....xviii, 58
- Gooch v. McGee, 63 North Carolina, 59.....35, 598
- Good v. Fogg, 61 Illinois, 449.....14, 71
- Good v. Harr, 7 Watts & Serg. 253.....xiii, 696
- Good v. Martin, 1 Colorado, 165.....xci, 704
- Good v. Mylitz, 8 Penn. State, 61.....xlix, 493
- Good v. Towns, 56 Vermont, 410.....48, 799
- Goodal v. Godfrey, 53 Vermont, 219.....38, 671
- Goodale v. Fennell, 27 Ohio St. 426.....42, 321
- Goodale v. Lawrence, 88 New York, 513.....42, 259
- Goodale v. Mooney, 60 New Hampshire, 523.....49, 334
- Goodall v. Crofton, 33 Ohio St. 271.....31, 628
- Goodall v. Marshall, 11 New Hampshire, 68.....lxxxv, 672
- Goodall v. State, 1 Oregon, 333.....lxxx, 304
- Goode v. Goode, 22 Missouri, 518.....lxvi, 639
- Goode v. Martin, 57 Maryland, 606.....40, 448
- Goode & Ulrick v. Longmire, 35 Alabama, 668.....lxxvi, 309
- Goodell, Matter of, 39 Wisconsin, 222.....90, 42
- Goodell v. Jackson, 20 Johnson, 693.....xi, 261

Roman letters [i] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Goodell v. Fairbrother, 12 Rhode Island, 233.....34, 631
 Goodenow v. Ewer, 16 California, 451.....lxvii, 540
 Goodenow v. Tyler, 7 Massachusetts, 36.....v, 23
 Goodlin v. Clin. & W. Canal Co., 18 O. St. 169.....xviii, 95
 Gooding v. Shea, 103 Massachusetts, 360.....4, 563
 Goodlet v. Smithson, 8 Porter, 245.....xxx, 561
 Goodloe v. City of Cincinnati, 4 Ohio, 500.....xxii, 764
 Goodloe v. Godley, 13 Smiles & M. 233.....ii, 150
 Goodloe v. Rogers, 9 Louisiana An. 273.....lxi, 205
 Goodman v. Cody, 1 Washington, 329.....34, 808
 Goodman v. Gay, 15 Penn. State, 188.....liii, 589
 Goodman v. Hamibal et al. R. Co., 45 Mo. 33.....c, 236
 Goodman v. Litcher, 84 North Carolina, 8.....37, 602
 Goodman v. Newell, 13 Connecticut, 78.....xxviii, 378
 Goodman ad. State, 6 Rich. Law, 387.....lx, 132
 Goodman v. Walker, 30 Alabama, 483.....lxviii, 134
 Goodman v. Winter, 64 Alabama, 410.....38, 13
 Goodnough v. Oshkosh, 24 Wisconsin, 549.....1, 202
 Goodnow v. Empire Lumber Company, 21 Minnesota, 463.....47, 796
 Goodnow v. Howo, 20 Maine, 164.....xxvii, 46
 Goodnow v. Smith, 18 Pickering, 414.....xix, 600
 Goodnow v. Warren, 122 Massachusetts, 79.....23, 289
 Goodpastor v. Voria, 8 Iowa, 334.....lxiv, 313
 Goodrich v. Burbank, 12 Allen, 459.....xc, 161
 Goodrich v. Hathaway, 1 Vermont, 485.....xviii, 701
 Goodrich v. Hooper, 97 Massachusetts, 1.....xciii, 49
 Goodrich v. Hulbert, 123 Massachusetts, 190.....95, 60
 Goodrich v. Moore, 2 Minnesota, 61.....lxvii, 74
 Goodrich v. Reynolds, Wilder & Co., 21 Ill. 490.....lxviii, 240
 Goodrich ad. State, 19 Vermont, 116.....xvii, 676
 Goodrich v. Tracy, 43 Vermont, 314.....5, 281
 Goodrich v. Weston, 103 Massachusetts, 362.....3, 469
 Goodright v. McCausland, 1 Yeates, 372.....i, 306
 Goodrum v. Carroll, 2 Humphreys, 490.....xxvii, 564
 Goodsell v. Beeley, 46 Michigan, 623.....41, 183
 Goodspeed v. East Haddam Bk., 22 Conn. 530.....lviii, 439
 Goodspeed v. Fuller, 46 Maine, 141.....lxi, 572
 Goodwin v. Avery, 26 Connecticut, 585.....lxviii, 410
 Goodwin v. Balt. & O. R. R. Co., 80 N. Y. 154.....10, 457
 Goodwin v. Blake, 3 T. B. Moore, 106.....xvi, 87
 Goodwin v. Davenport, 47 Maine, 112.....lxiv, 478
 Goodwin v. Hammond, 13 California, 168.....lxviii, 574
 Goodwin v. Hardy, 67 Maine, 143.....xcix, 758
 Goodwin v. Jones, 3 Massachusetts, 514.....lii, 173
 Goodwin ad. People, 13 Johnson, 187.....lx, 203
 Goodwin v. Smith, 72 Indiana, 113.....37, 114
 Goodwin v. Thompson, 15 Lea, 209.....54, 410
 Goodins v. Gilmore, 47 Maine, 9.....lxiv, 472
 Gookin v. New England Mutual Marine Ins. Co., 12 Gray, 501.....lxiv, 609
 Gookin v. Richardson, 11 Alabama, 889.....xvi, 232
 Gould v. Chapin, 20 New York, 269.....lxv, 398
 Gould v. Camp, 3 Penn. State, 349.....xiv, 647
 Gordon v. Commonwealth, 92 Penn. St. 216.....37, 672
 Gordon v. Goodwin, 2 Nott & McC. 70.....x, 573
 Gordon v. Gordon, 88 North Carolina, 45.....43, 729
 Gordon v. Ellison, 9 Iowa, 317.....lxiv, 353
 Gordon v. Hutchinson, 1 Watts & Serg. 285.....xxvii, 464
 Gordon v. Little, 8 Serg. & R. 533.....xi, 632
 Gordon v. Manchester & L. R. Co., 52 N. H. 596.....13, 97
 Gordon v. Manpin, 10 Missouri, 352.....xvii, 118
 Gordon v. Moore, 44 Arkansas, 349.....51, 606
 Gordon v. Preston, 1 Watts, 338.....xvi, 75
 Gordon v. Stevens, 2 Hill Ch. 46.....xxvii, 445
 Gordon v. State, 52 Alabama, 306.....23, 575
 Gordon v. Torrey, 2 McCarter, 112.....lxviii, 273
 Gordon v. Tweedy, 74 Alabama, 233.....49, 813
 Gordon v. Winchester B. Ass'n, 12 Bush, 110.....23, 713
 Gore v. Brainer, 3 Massachusetts, 523.....lii, 182
 Gore v. Stevens, 1 Dana, 201.....xxv, 141
 Gorgarat v. McCarty, 2 Dallas, 144 (S. C. 1 Yates, 94) i, 270
 Gorham v. Canton, 5 Greenleaf, 366.....xvii, 231
 Gorham v. Gale, 7 Cowen, 739.....xvii, 549
 Gorham v. Gross, 126 Massachusetts, 232.....25, 234
 Gorman v. Pacific Railroad, 26 Missouri, 441.....lxvii, 220
 Gorman v. State, 38 Texas, 112.....19, 29
 Gorman ad. State, 2 Nott & McC. 90.....x, 576
 Gorton v. Brown, 27 Illinois, 469.....lxvii, 245
 Goshen v. Kern, 63 Indiana, 468.....34, 234
 Goshen v. Shoemaker, 12 Ohio State, 624.....lxix, 386
 Goshen v. Stonington, 4 Connecticut, 209.....x, 121
 Goshen et al. T. Corp. v. Hurlin, 9 Johnson, 217.....vi, 273
 Gosling v. Caldwell, 1 Lea, 454.....27, 774
 Gosman v. Cruger, 69 New York, 87.....25, 141
 Goss v. Coffin, 66 Maine, 423.....28, 585
 Goss v. McClaren, 17 Texas, 107.....lxvii, 646
 Goss ad. State, 59 Vermont, 102.....59, 706
 Gossom v. Badgett, 6 Bush, 97.....xcix, 658
 Gossom v. Donaldson, 18 B. Moore, 230.....lxviii, 723
 Gott v. Fulstifer, 123 Massachusetts, 238.....23, 322
 Gottschalk v. Jennings, 1 Louisiana An. 6.....xiv, 70
 Gottman v. Penn. Ins. Co., 56 Penn. St. 210.....xv, 55
 Gotsian, In re, 34 Minnesota, 159.....57, 43
 Goudy v. Hall, 36 Illinois, 313.....lxviii, 217
 Gough v. Goldsmith, 44 Wisconsin, 262.....28, 579
 Gould v. Banks, 53 Connecticut, 415.....55, 143
 Gould v. Banks, 8 Wendell, 562.....xix, 90
 Gould v. Emerson, 92 Massachusetts, 154.....xvi, 720
 Gould v. Lamb, 11 Metcalf, 84.....xiv, 157
 Gould v. Mansfield, 103 Mass. 408.....4, 573
 Gould v. McKenna, 86 Penn. St. 237.....27, 705
 Gould v. Murch, 70 Maine, 288.....25, 325
 Gould v. Norfolk Lead Co., 9 Cushing, 338.....lvii, 50
 Gould v. Stevens, 43 Vermont, 125.....5, 268
 Gould v. Topeka, 22 Kansas, 485.....49, 496
 Gould v. York Co. M. F. Ins. Co., 47 Maine, 403.....lxvii, 494
 Gourdin v. Davis, 2 Richardson's Law, 481.....xiv, 748
 Gove v. Blethen, 21 Minnesota, 80.....18, 399
 Gove v. Cather, 23 Illinois, 634.....lxvii, 711
 Gove v. Farmer's Mut. F. Ins. Co., 48 New Hampshire, 41.....2, 168
 Gove v. Farmers' Mut. Fire Ins. Co., 48 N. H. 41.....xvii, 572
 Gove v. Vining, 7 Metcalf, 212.....xxix, 770
 Governor v. Carter, 3 Hawke, 328.....xiv, 588
 Governor v. Foster, 6 Georgia, 202.....i, 327
 Governor ad. People, 29 Michigan, 320.....18, 89
 Governor v. White, 4 Stewart & Porter, 441.....xiv, 763
 Governor v. Williams, 3 Ireland's Law, 153.....xxviii, 713
 Governor v. Withers, 6 Gratian, 24.....i, 96
 Governor for Fisher v. Vanmeter, 9 Leigh, 18.....xxviii, 221
 Gowen v. Phila. Exch. Co., 5 Watts & Serg. 141.....xi, 469
 Gower v. Andrew, 59 California, 119.....43, 243
 Gower v. Carter, 3 Iowa, 244.....lxvi, 71
 Gower v. Moore, 25 Maine, 16.....xiii, 247
 Gower v. Stevens, 19 Maine, 92.....xxvii, 737
 Grabill v. Barr, 5 Penn. State, 441.....lxvii, 418
 Grable v. Margrave, 3 Scammon, 372.....xxviii, 88
 Grace v. Adams, 100 Massachusetts, 505.....xvii, 117
 Grace v. Adams, 100 Massachusetts, 505.....1, 121
 Grace v. Hale, 2 Humphreys, 27.....xxvi, 296
 Grace v. Mitchell, 31 Wisconsin, 533.....11, 613
 Grace, Ex parte, 12 Iowa, 208.....lxix, 629
 Gracey v. Davis, 3 Strobhart's Eq. 55.....ii, 663
 Grady ad. Commonwealth, 13 Bush, 236.....26, 128
 Grady v. McCorkle, 57 Missouri, 172.....17, 676
 Grady v. Wolner, 46 Alabama, 381.....7, 593
 Graeme v. Adams, 23 Gratian, 225.....14, 139
 Graff v. Bonnett, 31 New York, 9.....lxviii, 238
 Graff v. Castleman, 5 Randolph, 195.....xvi, 741

Roman letters [xlii] refer to volumes of *American Digest*

Gregory v. Thomas, 2 Bibb, 284.....	v, 608	
Gregory v. Wendell, 39 Michigan, 337.....	33, 390	
Gregory v. Wilson, 36 New Jersey, 315.....	13, 448	
Greir v. Taylor, 4 McOrd, 206.....	xvii, 731	
Gresham v. Thum, 3 Met. (Ky.), 287.....	lxxvii, 174	
Greusel v. Hubbard, 51 Michigan, 95.....	47, 549	
Greve v. Coffin, 14 Minnesota, 345.....	c, 229	
Grevemeyer v. Southern Ins. Co., 62 Penn. St. 340.....	1, 420	
Grew v. Breed, 12 Metcalf, 363.....	xlv, 687	
Grey v. Mobile T. Co., 45 Alabama, 387.....	28, 729	
Grey ada. Commonwealth, 2 Gray, 501.....	lxi, 476	
Grice v. Scarborough, 2 Speer's Law, 649.....	xiii, 391	
Griider v. Tally, 77 Alabama, 423.....	54, 65	
Gridley v. Bloomington, 88 Illinois, 584.....	30, 566	
Gridley v. Dorn, 57 California, 78.....	40, 110	
Grieff v. Boudouesque, 18 Louisiana, 631.....	lxxix, 698	
Griel v. Solomon, 82 Alabama, 88.....	60, 733	
Grier v. Huston, 8 Serg. & R. 402.....	xi, 627	
Griffey v. New York Cent. I. Co., 100 N. Y. 417.....	53, 202	
Griffin v. Bixby, 12 New Hampshire, 484.....	xxxvii, 225	
Griffin v. Camack, 36 Alabama, 696.....	lxxvi, 344	
Griffin v. Chubb, 7 Texas, 603.....	lviii, 85	
Griffin v. Coffey, 9 B. Monroe, 453.....	1, 619	
Griffin v. Colver, 16 New York, 489.....	lxix, 718	
Griffin v. Eaton, 27 Illinois, 379.....	lxxxi, 233	
Griffin v. Graham, 1 Hawks, 96.....	ix, 619	
Griffin v. Kentucky Ins. Co., 3 Bush, 593.....	xvi, 359	
Griffin v. Mayor etc. of New York, 9 N. Y. 456.....	lxi, 700	
Griffin v. McKensie, 7 Georgia, 163.....	1, 369	
Griffin v. Seymour, 15 Iowa, 30.....	lxxviii, 396	
Griffin v. Sheffield, 38 Mississippi, 359.....	lxxvii, 646	
Griffin v. Western M. L. Ass'n., 20 Neb. 620.....	57, 848	
Griffis v. Sellars, 2 Dev. & Bat. L. 492.....	xxxi, 422	
Griffis v. Younger, 6 Iredell's Eq. 620.....	ii, 438	
Griffith v. Buffum, 22 Vermont, 181.....	liv, 64	
Griffith v. Cave, 22 California, 534.....	lxxviii, 82	
Griffith v. Charlotte R. R. Co., 23 S. C. 250.....	55, 1	
Griffith v. Chew, 8 Serg. & R. 17.....	xi, 556	
Griffith v. Depew, 3 A. K. Marshall, 177.....	xiii, 141	
Griffith v. Douglass, 73 Maine, 533.....	40, 395	
Griffith v. Furry, 30 Illinois, 251.....	lxxviii, 186	
Griffith v. Ingledew, 6 Serg. & R. 429.....	ix, 444	
Griffith v. Reed, 21 Wendell, 503.....	lxxiv, 267	
Griffith v. Smith, 22 Wisconsin, 646.....	lxix, 90	
Griffith v. Townley, 69 Missouri, 13.....	33, 476	
Griffiths v. Kellogg, 29 Wisconsin, 290.....	90, 48	
Griggs v. Austin, 3 Pickering, 20.....	xv, 175	
Griggs v. Dodge, 2 Day, 28.....	ii, 82	
Griggs v. Fleckenstein, 14 Minnesota, 61.....	c, 199	
Griggs v. State, 58 Alabama, 426.....	79, 762	
Grigby v. Breckinridge, 2 Bush, 480.....	xcii, 509	
Grigby v. Napa County, 36 California, 686.....	xv, 213	
Grim v. Norris, 19 California, 140.....	lxxix, 206	
Grim v. Weissenberg S. D., 57 Penn. St. 433.....	xcviii, 237	
Grimes ada. Commonwealth, 10 Gray, 470.....	lxxi, 686	
Grimes v. Gates, 47 Vermont, 594.....	19, 129	
Grimes v. Harmon, 35 Indiana, 198.....	9, 680	
Grimes' Estate v. Norris, 6 California, 621.....	lrv, 645	
Grimson v. Russell, 14 Nebraska, 621.....	45, 126	
Grimmett v. State, 22 Tex. Ct. App. 36.....	58, 630	
Grimmett v. Witherington, 16 Arkansas, 377.....	lxiii, 66	
Grimalley v. Hooker, 3 Jones' Equity, 4.....	lxvii, 227	
Grimalley v. Riley, 6 Missouri, 280.....	xxviii, 319	
Grimstone v. Carter, 3 Paige's Ch. 421.....	lxiv, 230	
Grindle v. Eastern Express Co., 67 Ma. 317.....	34, 31	
Griner v. Butler, 61 Indiana, 362.....	28, 675	
Gring v. Lerch, 112 Penn. St. 244.....	54, 314	
Grinnell v. Cook, 3 Hill (N. Y.), 485.....	lxxviii, 663	
Grinnell v. W. U. Tel. Co., 113 Mass. 299.....	18, 485	
Grissom v. Evans, 11 Vroom, 403.....	79, 251	

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Gray v. State, 73 Indiana, 63.....	41, 545	Green v. Watson, 75 Georgia, 471.....	58, 479
Gray v. Stevens, 33 Vermont, 1.....	lxv, 210	Green v. Wardwell, 17 Illinois, 278.....	lxvii, 366
Gray v. Wain, 3 Serg. & R. 223.....	vii, 642	Green v. Wilding, 59 Iowa, 679.....	44, 696
Gray v. West, 33 North Carolina, 442.....	53, 462	Green v. Winter, 1 Johns. Ch. 27.....	vii, 475
Graydon, Swanwick & Co. v. Patterson & Co., 13 Iowa, 256.....	lxxxi, 432	Green v. Young, Adm'r, 8 Greenleaf, 14.....	xxii, 218
Grayson v. Veeche, 12 Martin, 688.....	xiii, 334	Green Bay & M. C. Co. v. Hewett, 55 Wis. 96.....	42, 701
Grayson v. Williams, Walker, 298.....	xii, 568	Greenbaum v. King, 4 Kansas, 323.....	xvii, 172
Grear ada. State, 28 Minnesota, 428.....	41, 296	Greenbalt v. Kreider, 3 Penn. State, 264.....	xiv, 630
Greathouse v. Brown, 5 T. R. Monroe, 280.....	xvii, 67	Greenby v. Willocks, 2 Johnson, 1.....	iii, 379
Great Works M. & M. Co. ada. State, 20 Ma. 41.....	xxvii, 38	Greencastle v. Martin, 74 Indiana, 449.....	39, 98
Great Western R. R. Co. v. Bacon, 30 Illinois 347.....	lxxviii, 190	Greene v. Dennis, 6 Connecticut, 293.....	xvi, 58
Great Western Turnpike Road Co. v. Loomis, 32 New York, 127.....	lxxviii, 311	Greene v. Greene, 2 Gray, 361.....	lx, 454
Grealey v. Dixon, 21 Florida, 413.....	58, 673	Greene v. Greene, 1 Ohio, 635.....	xii, 642
Grealey v. St. Paul, M. & M. R'y Co., 23 Minnesota, 136.....	53, 16	Greene v. Keane, 14 Rhode Island, 386.....	51, 400
Grealey v. Thurston, 4 Greenleaf, 479.....	xvi, 285	Greene v. Linton, 7 Porter, 133.....	xxxi, 707
Grealey v. Waterhouse, 19 Maine, 9.....	xxvii, 730	Greene v. Minneapolis & St. L. R'y Co., 21 Minnesota, 248.....	47, 788
Greely v. Bartlett, 1 Greenleaf, 172.....	x, 54	Greene v. Mumford, 5 Rhode Island, 472.....	lxvii, 79
Green v. Adams, 59 Vermont, 602.....	59, 761	Greene v. Tallman, 20 New York, 191.....	lxv, 284
Green v. Arnold, 11 Rhode Island, 364.....	23, 466	Greenfield Bank v. Leavitt, 1.....	xxvii, 268
Green v. Borough of Reading, 9 Watts, 392.....	xxvi, 127	Greenfield v. People, 85 New York, 75.....	39, 636
Green v. Boston & L. R. Co., 128 Mass. 221.....	35, 370	Greenfield Sav. Bank v. Stowell, 123 Mass. 194.....	25, 67
Green v. Bridge Creek, 33 Wisconsin, 449.....	20, 18	Greenhow v. Harris, 6 Munford, 472.....	viii, 751
Green v. Brookina, 23 Michigan, 42.....	9, 74	Greenhow v. James, 80 Va.....	638, 609
Green v. Brydles, 3 Humphreys, 167.....	xxix, 156	Greenleaf v. Ill. Cent. R. R. Co., 29 Iowa, 14.....	4, 181
Green v. Caldwell, 1 Dev. & Bat. L. 321.....	xxviii, 567	Greenleaf v. Ludington, 15 Wisconsin, 558.....	lxxviii, 698
Green v. Garrington, 16 Ohio State, 548.....	xc, 103	Greenleaf v. Quincy, 12 Maine, 11.....	xxviii, 148
Green v. Chilton, 57 Mississippi, 538.....	34, 483	Greenlee v. Gaines, 13 Alabama, 186.....	lxviii, 49
Green v. Collins, 86 New York, 246.....	40, 531	Greeno v. Munson, 9 Vermont, 37.....	xxxi, 606
Green v. Clay, 10 Allen, 90.....	lxxvii, 622	Greenough v. Greenough, 11 Penn. State, 460.....	ii, 567
Green v. Covilland, 10 California, 317.....	lxx, 725	Green Ridge R. R. Co. v. Brinkman, 64 Md. 62.....	54, 758
Green v. Cox, 10 Allen, 90.....	lxxvii, 622	Greensboro v. Ehrenreich, 80 Alabama, 572.....	60, 139
Green v. Creighton, 10 Smedes & M. 159.....	lxviii, 742	Greensboro Bank v. Chambers, 30 Gratt. 202.....	32, 661
Green v. Dabrow, 79 New York, 1.....	35, 496	Greensdale ada. State, 106 Indiana, 364.....	55, 759
Green v. Dodge, 6 Ohio, 80.....	xrv, 736	Greenstine v. Borobard, 50 Michigan, 434.....	45, 51
Green v. Drummond, 31 Maryland, 71.....	1, 14	Greenup v. Stoker, 12 Illinois, 94.....	iii, 474
Green v. Green, 16 Indiana, 253.....	lxxix, 423	Greenville & C. R. v. Woodlides, 5 Rich. L. 145.....	lv, 708
Green v. Green, 34 Kansas, 740.....	55, 256	Greenway v. Cannon, 3 Humphreys, 177.....	xxix, 161
Green v. Green, 69 New York, 553.....	25, 333	Greenwell v. Haydon, 78 Kentucky, 332.....	39, 234
Green v. Greensboro F. Col. 83 N. C. 449.....	35, 579	Greenwood v. Curtis, 6 Massachusetts, 358.....	iv, 148
Green v. Hamilton, 16 Maryland, 317.....	lxxvii, 236	Greenwood v. Ligon, 10 Smedes & M. 615.....	lxviii, 775
Green v. Harrison, 6 Jones Eq., 253.....	lxxviii, 415	Greenwood v. Louisville, 13 Bush, 226.....	26, 263
Green v. Hewitt, 97 Illinois, 113.....	37, 102	Greenwood v. Murdock, 9 Gray, 30.....	lxix, 273
Green v. Holway, 101 Massachusetts, 213.....	3, 339	Greenwood v. State, 6 Bart. 567.....	32, 539
Green v. Hollingsworth, 5 Dana, 173.....	xxx, 680	Greer v. Caldwell, 14 Georgia, 207.....	lviii, 653
Green v. Irving, 84 Mississippi, 450.....	28, 360	Greer v. Chartier R. Co., 96 Pennsylvania 84. 391.42, 548	
Green v. Johnson, 2 Hawks, 309.....	xi, 763	Greer v. McCrackin, Peck, 301.....	xiv, 758
Green v. Kellum, 23 Penn. State, 254.....	lxii, 332	Greer v. State, 50 Indiana, 267.....	19, 700
Green v. Kemp, 13 Massachusetts, 515.....	vii, 169	Greer v. Wright, 6 Gratian, 154.....	iii, 111
Green v. Kornegay, 4 Jones' Law, 66.....	lxvii, 261	Gregg v. Bigham, 1 Hill, 299.....	xxvi, 181
Green v. Lake, 54 Mississippi, 540.....	28, 378	Gregg v. Bostwick, 23 California, 220.....	xc, 637
Green v. Miller, 6 Johnson, 39.....	v, 184	Gregg v. Crawford, 4 Alabama, 180.....	lxxvii, 739
Green v. Palmer, 15 California, 411.....	lxxvi, 492	Gregg v. James, Breese, 143.....	xii, 151
Green ada. People, 7 Colorado, 237.....	49, 351	Gregg v. Massachusetts Med. Soc'y, 111 Mass. 185.15, 24	
Green v. Pettingill, 47 New Hampshire, 375.....	xciii, 444	Gregg v. Palmer, 46 Illinois, 398.....	xov, 412
Green v. Phillips, 26 Gratt. 732.....	21, 323	Gregg v. Sanford, 24 Illinois, 17.....	lxxvii, 719
Green v. Ramaga, 18 Ohio, 428.....	ii, 458	Gregory Ex parte, 20 Tex. Ct. App. 210.....	54, 516
Green v. Raymond, 58 Texas, 80.....	44, 601	Gregory v. Bridgeport, 41 Connecticut, 76.....	19, 488
Green v. Sargeant, 23 Vermont, 466.....	lv, 88	Gregory v. Brooks, 35 Connecticut, 437.....	xov, 273
Green v. Scranage, 19 Iowa, 461.....	lxxvii, 447	Gregory v. Brown, 4 Bibb 28.....	vii, 731
Green v. Spencer, 3 Missouri, 318.....	xvii, 672	Gregory v. Ford, 14 California, 136.....	lxxviii, 639
Green v. Sperry, 16 Vermont, 390.....	xli, 519	Gregory v. German Bank, 3 Colorado, 322.....	25, 760
Green v. State, 58 Alabama, 190.....	29, 739	Gregory v. Gregory, 78 Maine, 187.....	57, 792
Green v. State, 66 Alabama, 40.....	41, 744	Gregory v. Hooker, 1 Hawks, 394.....	ix, 646
Green v. State, 21 Florida, 403.....	58, 670	Gregory v. King, 58 Illinois, 169.....	11, 54
Green v. State, 39 Maryland, 123.....	43, 542	Gregory v. Lacey, 9 B. Monroe, 43.....	lxviii, 412
		Gregory v. State, 94 Indiana, 324.....	48, 163
		Gregory v. State, 26 Ohio State, 510.....	20, 774
		Gregory ada. State, 83 Missouri, 123.....	53, 563
		Gregory v. Taber, 19 California, 397.....	lxxix, 219

Roman letters [xlx] refer to volumes of American Decisions

Geallagher v. Caldwell, 22 Penn. State, 300.....	lx, 85	G
Gease v. Perkins, 3 Jones' Eq. 177.....	lxix, 728	C
Gaut v. Reed Brothers & Co., 24 Texas, 46.....	lxxvi, 94	C
Gavett v. Manchester & L. R. R., 16 Gray, 501.....	lxxvii, 422	G
Gavin v. Chicago, 97 Illinois, 68.....	37, 99	G
Gavinada Commonwealth, 121 Mass. 54.....	23, 255	G
Gay v. Baker, 5 Jones' Eq. 344.....	lxxviii, 229	G
Gay v. Baker, 17 Massachusetts, 438.....	lx, 159	Ge
Gay v. Ballou, 4 Wendell, 403.....	xxi, 158	Ge
Gay v. Bradstreet, 49 Maine, 580.....	lxxvii, 272	Ge
Gay v. Gay, 60 Iowa, 415.....	46, 78	Ger
Gay v. Hunt, 1 Murphey, 141.....	iii, 681	Ger
Gay v. Lloyd, 1 G. Greene, 78.....	xlvi, 499	Ger
Gay v. Mitchell, 35 Georgia, 139.....	lxxxix, 278	Gerl
Gay v. Moffit, 2 Bibb, 506.....	v, 633	Gerl
Gay v. Rainey, 89 Illinois, 221.....	31, 76	Gerh
Gay v. Seibold, 97 New York, 473.....	49, 533	Gerh
Gay v. Walker, 36 Maine, 54.....	lviii, 734	Gerls
Gayetty v. Bethune, 14 Massachusetts, 49.....	vii, 188	Gerin
Gayles v. Johnson, 72 Alabama, 254.....	47, 405	Gerin
Gaylord v. Imhoff, 26 Ohio St. 317.....	20, 762	Gerin
Gaylord v. Lamar Fire Ins. Co., 40 Missouri, 13.....	xciii, 289	Gerin
Gaylord v. Soragen, 32 Vermont, 110.....	lxxvi, 154	Germa
Gaynor v. Old Colony & N. R. Co., 100 Mass. 208.....	xcvii, 96	Germa
Gazzam v. Poynts, 4 Alabama, 374.....	lxxxvii, 745	Germa
Gazzoloada Commonwealth, 123 Mass. 230.....	23, 79	Germa
Gear v. D. & S. C. R. R., 20 Iowa, 523.....	lxxxix, 550	Ne
Gebhard v. Garnier, 12 Bush, 321.....	23, 721	Germa
Gebhart v. Adams, 23 Illinois, 397.....	lxxvi, 702	com
Gebhart v. Burkett, 57 Indiana, 378.....	26, 61	German
Geddes, Ex parte, 4 Richardson's Eq. 301.....	lvii, 730	German
Gee v. Cheshire Co. Ins. Co., 55 New Hamp. 65.....	20, 171	St. 5
Gee v. McMillan, 14 Oregon, 268.....	58, 315	Germond
Gee v. Pharr, 5 Alabama, 586.....	xxxix, 339	Geron v.
Gee v. Scott, 48 Texas, 510.....	26, 331	Gerrish v.
Gee's Adm'r v. Williamson, 1 Porter, 313.....	xxvii, 628	Gerrish v.
Geery's Appeal, 43 Connecticut, 289.....	21, 653	Gerrish v.
Gelser v. Karahner, 4 Gill & Johnson, 305.....	xcviii, 566	Gerrish v.
Gelser Threshing Mach. Co. v. Smith, 36 Wis. 295.17, 494		Gerrish v.
Gelsmer v. Lake Shore & M. S. R'y Co., 102 New York, 563.....	55, 837	Gerrish v.
Gelas v. Odenheimer, 4 Yeates, 278.....	ii, 407	Gerst v. Jc
Gelpcke v. Blake, 15 Iowa, 387.....	lxxxiii, 418	Gerz v. Ft
Gelstrop v. Moore, 26 Mississippi, 206.....	lx, 254	Getar v. Co
Belzenleuchter v. Niemeyer, 61 Wisconsin, 316.....	54, 616	Getty v. Bin
Gelzer v. Gelzer, 1 Bailey's Eq. 387.....	xcviii, 180	Getty v. Ro
General German A. P. Home v. Hammerbacher, 64 Maryland, 595.....	54, 782	Getty v. Ge
General Ins. Co. v. U. S. Ins. Co., 10 Md. 517.....	lxix, 174	Geyer v. Har
Gent v. Lynch, 23 Maryland, 68.....	lxxvii, 558	Gholson v. St
Genetada People, 59 New York, 80.....	17, 315	Gibbons v. D
Gentleman v. Soule, 32 Illinois, 271.....	lxxxviii, 264	Gibbons v. G
Gentry v. Gentry, 1 Sneed, 87.....	lx, 137	Gibbons v. M
Gentry v. Hutchcraft, 7 T. B. Monroe, 241.....	xcviii, 172	Gibbs v. Cann
Gentry v. Owen, 14 Arkansas, 396.....	lx, 549	Gibbs v. Chiao
Genungada People, 11 Wendell, 18.....	xxv, 504	Gibbs v. Drew
Geoghegan v. Ditto, 2 Metcalfe (Ky.), 433.....	lxiv, 413	Gibbs v. Linab
George v. Andrews, 69 Maryland, 26.....	45, 708	Gibbs v. Queen
George v. Cutting, 46 New Hampshire, 130.....	lxxxviii, 195	Gibbs v. Shaw
George v. East Tenn. Coal Co., 15 Lea, 455.....	54, 425	Gibbs v. State
George v. Gobey, 128 Massachusetts, 289.....	33, 378	Gibbs v. William
George v. Harris, 4 New Hampshire, 533.....	xvii, 446	Gibert v. Colk
George v. Johnson, 6 Humphreys, 35.....	xlv, 288	Gibert v. Petelo
George v. McNeill, 7 Louisiana, 124.....	xxvi, 498	Gibson's Case, 1
George v. Pilcher, 28 Gratt. 299.....	26, 350	Gibson, Ex parte
George v. Putney, 4 Cushing, 351.....	1, 788	Gibson v. Blingh
George v. Ransom, 15 California, 322.....	lxvi, 480	Gibson v. Brookw
Georgeada State, 8 Iredell's Law, 324.....	xlx, 392	Gibson v. Chadic
George v. Thomas, 16 Texas, 74.....	lxvii, 612	Gibson v. Chouter
George v. Williamson, 26 Missouri, 190.....	lxvii, 203	Gibson v. Cooke, 1
		Gibson v. Cranage

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Gulion v. Knapp, 6 Paige Ch. 35.....xxix, 741
 Gulf, C. & S. F. R'y Co. v. Levy, 59 Texas, 563....46, 278
 Gulf, C. & S. F. R'y Co. v. Redeker, 67 Texas, 190...66, 20
 Gulick v. Grover, 33 New Jersey Law, 463.....xviii, 728
 Gulick v. Loder, 1 Green Law, 68.....xxii, 711
 Gulick v. New, 14 Indiana, 83.....lxviii, 49
 Gulick v. Ward, 5 Halsted, 87.....xviii, 389
 Gulline v. Lowell, 144 Massachusetts, 491.....59, 102
 Gullion v. Bowliware, Sneed (Ky.), 76.....li, 708
 Gumbel v. Abrams, 20 Louisiana An. 568.....xxvi, 426
 Gunderson v. Richardson, 56 Iowa, 56.....41, 81
 Gunn v. Gunn, 74 Georgia, 553.....58, 447
 Gunn v. Howell, 37 Alabama, 663.....lxii, 785
 Gunn v. Howell, 35 Alabama, 144.....lxviii, 484
 Gunn v. Scott, 4 Day, 228.....iv, 208
 Gunn's Administrator v. Todd, 21 Missouri, 303...lxiv, 231
 Gunning v. Royal, 59 Mississippi, 45.....49, 350
 Gunnison v. Gunnison, 41 New Hamp. 121.....lxvii, 764
 Gunter v. Graniteville Mf. Co., 18 S. C. 263.....44, 673
 Gunther v. Lee, 45 Maryland, 60.....24, 604
 Guphill v. Isbell, 1 Bailey's Law, 230.....xix, 675
 Gurnee v. Maloney, 39 California, 85.....xvix, 362
 Gurney v. Howe, 9 Gray, 404.....lxix, 399
 Gurney ada. State, 37 Maine, 156.....lviii, 782
 Gurney v. Tufts, 37 Maine, 150.....lviii, 777
 Gurrin v. Cromartie, 11 Iredell's Law, 174.....lxiii, 406
 Guashee v. Eddy, 11 Gray, 603.....lxix, 728
 Guashee v. Leavitt, 5 California, 160.....lxviii, 116
 Gusman v. Hearsey, 28 La. An. 709.....26, 104
 Guthrie v. Imbrie, 12 Oregon, 182.....53, 331
 Guthrie v. Louisville & N. R. Co., 11 La., 573....47, 286
 Guthrie v. Murphy, 4 Watts, 80.....xxviii, 681
 Guthrie v. Owen, 2 Humphreys, 202.....xxvii, 311
 Guthrie v. Russell, 46 Iowa, 269.....26, 135
 Guthrie v. Wickliffe, 4 Bibb, 541.....vii, 746
 Guy v. Du Uprey, 16 California, 195.....lxvii, 518
 Guy v. Hermance, 5 California, 73.....lxviii, 85
 Guy v. Ide, 6 California, 99.....lxv, 490
 Goyer v. Smith, 22 Maryland, 239.....lxvix, 650
 Guyne v. City of Cincinnati, 3 Ohio, 24.....xviii, 576
 Guyther v. Pettijohn, 6 Iredell's Law, 388.....xiv, 499
 Gwathney v. Oason, 74 North Carolina, 5.....21, 484
 Gwathkin v. Commonwealth, 9 Leigh, 678.....xxviii, 264
 Gwinell v. Kameer, Eng.....15, 396
 Gwineth v. Thompson, 9 Pickering, 31.....xix, 350
 Gwyn v. Richmond & D. R. R. Co., 85 N. C. 429...39, 708
 Gwynn v. Duffield, 61 Iowa, 64.....47, 802
 Gwynn v. Duffield, 66 Iowa, 708.....53, 286
 Gyger's Appeal, 63 Penn. St. 73.....1, 382
 Haag v. Board of Comm'rs, 60 Indiana, 511.....28, 654
 Haak v. Linderman, 64 Pennsylvania St. 496.....3, 612
 Haas v. Myers, 111 Illinois, 421.....53, 634
 Haas v. Shaw, 21 Indiana, 324.....46, 607
 Habenicht v. Rawls, 24 South Carolina, 461.....58, 268
 Habenham v. Hopkins, 4 Strobhart's Law, 238...lxiii, 676
 Habenham v. Sears, 11 Oregon, 431.....56, 481
 Hackett v. Hewitt, 57 Vermont, 442.....59, 139
 Hackett v. King, 8 Allen, 144.....lxvix, 695
 Hackett v. Multnomah R'y Co., 12 Or. 124.....53, 327
 Hackett v. State, 105 Indiana, 250.....55, 201
 Hackley v. Swigert, 5 B. Monroe, 86.....xli, 266
 Hackney v. Welch, 107 Indiana, 253.....57, 101
 Hadd v. United States & C. Express Co., 53 Ver-
 mont, 336.....36, 757
 Hadden v. Knickerbocker, 70 Illinois, 677.....27, 80
 Haddock v. Boston & Maine R. R., 3 Allen, 298...lxvii, 656
 Haddock v. Crocheron, 32 Texas, 276.....5, 244
 Haddock v. Murray, 1 New Hampshire, 140.....viii, 43
 Haddock v. Wilmarth, 6 New Hampshire, 151....xx, 570
 Hadley v. City of Albany, 33 New York, 608...lxviii, 412

Hadley v. Clinton County Importing Co., 13 Ohio
 State, 503.....lxviii, 454
 Hadley v. Cross, 34 Vermont, 588.....lxvix, 699
 Hadley v. Upshaw, 37 Texas, 547.....lxviii, 654
 Haehnlen v. Commonwealth, 13 Penn. State, 617...lxiii, 502
 Haff v. Marine Ins. Co., 8 Johnson, 163.....v, 331
 Hafner v. Irwin, 4 Dev. & Bat. L. 433.....xxiv, 396
 Hagan v. Campbell, 8 Porter, 9.....xxviii, 267
 Hagan v. Deuell & Vaughn, 24 Ark. 216.....lxviii, 769
 Hagan v. Providence & W. R. R. Co., 3 R. I. 88...lxii, 377
 Hagar v. Buck, 44 Vermont, 235.....8, 368
 Hagedon v. Bank of Wisconsin, 1 Pinney, 61...xxix, 275
 Hageman v. Sharkey, 1 Howard, 277.....xxix, 627
 Hager v. Rice, 4 Colorado, 90.....34, 68
 Hagerstown Bank v. Adams Express Co., 45 Penn.
 State, 419.....lxviii, 499
 Hagerstown T. Co. v. Creager, 5 Harris & J. 123...lx, 498
 Hagerty v. Powers, 66 Cal. 368.....56, 101
 Hagey v. Hill, 75 Penn. St. 108.....15, 683
 Haggard v. Conkwright, 7 Bush, 16.....3, 297
 Haggart v. Morgan, 6 N. Y. (1 Seld.) 423.....xv, 356
 Haggarty v. Pittman, 1 Paige's Ch. 296.....xix, 434
 Haggerty v. Flint & P. M. R. Co., 69 Michi-
 gan, 368.....60, 301
 Haggerty v. Wilber, 16 Johnson, 266.....viii, 321
 Hagner v. Hayberger, 7 Watts & Serg. 104.....xiii, 220
 Hagthorp v. Neale, 7 Gill & J. 13.....xxvi, 694
 Hahn v. Doolittle, 18 Wisconsin, 196.....lxvii, 787
 Hahn v. Fredericks, 30 Michigan, 223.....18, 119
 Hahn v. Kelly, 34 California, 391.....xv, 742
 Hahnemannian L. Ins. Co. v. Beebe, 48 Ill. 87.....xv, 519
 Haight v. Gay, 8 California, 297.....lxviii, 323
 Haight v. Joyce, 2 California, 64.....lvi, 311
 Haight v. Steamboat Henrietta, 4 Iowa, 473...lxviii, 669
 Haile v. Petros, 32 Maryland, 327.....3, 139
 Haile v. State, 38 Arkansas, 564.....42, 3
 Hain v. Kalbach, 14 Serg. & R. 159.....xvi, 494
 Haine v. Lindsay, 4 Ohio, 88.....xix, 588
 Haines v. Allen, 78 Indiana, 100.....41, 556
 Haines v. Chicago, St. P. & M. R., 29 Minn. 160...43, 196
 Haines ada. Commonwealth, 97 Penn. St. 228...39, 805
 Haines v. Lewis, 54 Iowa, 301.....37, 203
 Haines v. O'Connor, 10 Watts, 313.....xxvii, 180
 Haines v. Stauffer, 13 Penn. State, 541.....lxiii, 466
 Hairston v. Hairston, 27 Mississippi, 704.....lx, 636
 Hairston v. State, 54 Mississippi, 689.....28, 392
 Halbert v. McCulloch, 3 Met. (Ky.) 456.....lxvix, 656
 Halbrook v. State, 34 Arkansas, 511.....34, 17
 Haldeman v. Bruckhart, 45 Penn. St., 514...lxviii, 511
 Haldeman v. Michael, 6 Watts & Serg. 128.....xi, 546
 Haldeman & Grubb v. B'k of M., 28 Penn. St. 440...lx, 142
 Halder ada. State, 2 M'Cord, 377.....xiii, 738
 Hale v. Ames, 3 T. B. Monroe, 143.....xv, 150
 Hale v. Barrett, 26 Illinois, 195.....lxvix, 357
 Hale v. Brown, 59 New Hampshire, 551.....47, 224
 Hale v. Crowell, 2 Florida, 534.....1, 301
 Hale v. Everett, 53 New Hampshire, 9.....16, 62
 Hale v. Hale, 1 Coldwell, 253.....lxviii, 496
 Hale v. Hale, 47 Texas, 336.....26, 294
 Hale v. Henrie, 2 Watts, 143.....lxviii, 269
 Hale v. Huston, 44 Alabama, 134.....4, 124
 Hale v. James, 6 Johns. Ch. 258.....x, 326
 Hale v. Jewell, 7 Greenleaf, 435.....xxii, 212
 Hale v. Lawrence, 1 Zabriskie, 714.....xvii, 190
 Hale v. Lawrence, 3 Zabriskie, 590.....lvii, 420
 Hale v. Mechanics' M. F. Ins. Co., 6 Gray, 169...lxvi, 416
 Hale v. Mill Dock Co., 23 Wisconsin, 276.....xvix, 166
 Hale v. Milwaukee Dock Co., 29 Wisconsin, 482...9, 603
 Hale v. N. J. Steam Nav. Co., 15 Conn. 830...xxix, 396
 Hale v. Patton, 60 New York, 233.....19, 168

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Hale v. Sherwood, 40 Connecticut, 232.....	16, 37
Hale v. State, 1 Coldwell, 167.....	lxviii, 498
Hale v. Union M. F. Ins. Co., 33 N. H. 296.....	lxiv, 370
Hale v. Walker, 31 Iowa, 344.....	7, 137
Hale v. Woods, 10 New Hampshire, 470.....	xxiv, 176
Haley v. Colcord, 59 New Hampshire, 7.....	47, 178
Haley v. Philadelphia, 66 Pennsylvania St. 45.....	8, 153
Haley v. Rowan, 5 Yerges, 301.....	xxvi, 268
Haleys v. Williams, 1 Leigh, 140.....	xix, 743
Hall, In re, 50 Connecticut, 131.....	47, 625
Hall's Appeal, 60 Penn. 438.....	c, 584
Hall's Case, 1 Bland's Ch. 303.....	xvii, 275
Hall v. Ames, 5 T. B. Monroe, 59.....	xvii, 42
Hall v. Ashby, 9 Ohio, 96.....	xxxiv, 424
Hall v. Auburn Turnpike Co., 27 Cal. 268.....	lxxxvii, 75
Hall v. Bank of Commonwealth, 5 Dana, 258.....	xxx, 685
Hall v. Banner, 1 Penrose & W. 402.....	xxd, 334
Hall v. Bliss, 118 Massachusetts, 554.....	19, 476
Hall v. Boston etc. R. R. Corp., 14 Allen, 439.....	xxd, 783
Hall v. Brooks, 8 Vermont, 435.....	xxx, 486
Hall v. Burton, 23 Illinois, 321.....	lxxxi, 310
Hall v. Butterfield, 59 New Hampshire, 354.....	47, 209
Hall v. Carmichael, 8 Baxter, 211.....	35, 696
Hall v. Carpen, 27 Illinois, 386.....	lxxxi, 234
Hall v. Click, 5 Alabama, 363.....	xxix, 327
Hall v. Commonwealth, 6 Leigh, 615.....	xxix, 238
Hall ada. Commonwealth, 128 Massachusetts, 410.35, 387	
Hall ada. Commonwealth, 9 Gray, 263.....	lxix, 285
Hall v. Corcoran, 107 Massachusetts, 251.....	9, 30
Hall v. Costello, 48 New Hampshire, 178.....	2, 207
Hall v. Crowell, 29 California, 567.....	lxxxix, 64
Hall v. Crumley, 5 Allen, 304.....	lxxxii, 745
Hall v. Cushman, 18 New Hampshire, 463.....	xlili, 563
Hall v. Delaplaine, 5 Wisconsin, 306.....	lxviii, 57
Hall v. Dorchester Mut. Ins. Co., 111 Mass. 63.....	15, 1
Hall v. Finch, 29 Wisconsin, 278.....	9, 559
Hall v. Freeman, 2 Nott & McO. 479.....	x, 621
Hall v. Green, 1 Houston, 548.....	lxxi, 96
Hall v. Hall, 43 Alabama, 488.....	xxiv, 703
Hall v. Hall, 8 Richardson's L., 407.....	lxiv, 758
Hall v. Hall, 52 Texas, 294.....	36, 723
Hall v. Hancock, 15 Pickering, 255.....	xxvi, 538
Hall v. Harrison, 21 Missouri, 227.....	lxiv, 225
Hall v. Howard, Rice's Law, 310.....	lxxxiii, 115
Hall v. Howd, 10 Connecticut, 514.....	xxvii, 636
Hall v. Hozey, 2 Robinson (Louisiana), 479.....	xxxviii, 223
Hall v. Huntton, 17 Vermont, 244.....	xliv, 332
Hall v. Insurance Co., 58 New York, 292.....	17, 255
Hall v. Klinek, 25 South Carolina, 348.....	69, 505
Hall v. Lambert, 3 Halsted's Ch. 651.....	li, 273
Hall v. Lawrence, 2 Rhode Island, 218.....	lvii, 715
Hall v. Leaming, 2 Vroom, 321.....	lxxxvi, 213
Hall v. McHenry, 19 Iowa, 321.....	lxxxvii, 451
Hall v. McLeod, 2 Metcalf (Ky.), 96.....	lxiv, 400
Hall v. Monahan, 6 Iowa, 216.....	lxxi, 404
Hall v. Naylor, 18 New York, 583.....	lxxv, 269
Hall v. Newcomb, 7 Hill (N. Y.), 416.....	xlil, 82
Hall v. Page, 4 Georgia, 428.....	xlviil, 236
Hall v. Parker, 37 Michigan, 590.....	26, 540
Hall v. Penney, 11 Wendell, 44.....	xxv, 601
Hall ada. People, 48 Michigan, 483.....	42, 477
Hall v. Powell, 4 Serg. & R. 456.....	viii, 722
Hall v. Power, 12 Metcalf, 482.....	xlvi, 698
Hall v. Ray, 40 Vermont, 576.....	xxiv, 440
Hall v. Richardson, 16 Maryland, 397.....	lxxvii, 303
Hall v. Rood, 40 Michigan, 46.....	29, 528
Hall v. Sampson, 35 New York, 274.....	xxd, 56
Hall v. Savill, 3 G. Greene 37.....	lxv, 488
Hall v. Shultz, 4 Johnson, 240.....	lv, 270
Hall v. Sprigg, 7 Martin, 243.....	xxi, 506
Hall v. State, 9 Florida, 203.....	lxvii, 617
Hall v. State, 16 Tex. Ct. App. 6.....	49, 624
Hall v. Stephens, 65 Missouri, 670.....	37, 302
Hall v. Tanner, 4 Penn. State, 244.....	xliv, 686
Hall v. Thayer, 105 Massachusetts, 219.....	7, 513
Hall v. Tuttle, 6 Hill (N. Y.), 39.....	xl, 393
Hall v. Williams, 6 Pickering, 232.....	xvii, 326
Hall v. Young, 3 Pickering, 80.....	xv, 189
Halgarten v. Oldham, 135 Massachusetts, 1.....	46, 433
Halleck v. Guy, 9 California, 181.....	lxv, 643
Hallenbake v. Fish, 8 Wendell, 547.....	xxiv, 39
Hallett v. Chicago etc. R'y Co., 23 Iowa, 259.....	xxd, 363
Hallett v. Wylie, 3 Johnson, 44.....	lii, 457
Haller v. Pine, 8 Blackford, 175.....	xliv, 763
Halley v. Oldham, 5 B. Monroe, 233.....	xx, 263
Halliday v. Martinet, 20 Johnson, 188.....	xi, 263
Halliday v. St. Louis, K. & N. R. Co., 74 Mo. 129.41, 309	
Halligan v. Wade, 21 Illinois, 470.....	lxxiv, 108
Halloch ada. State, 14 Nevada, 202.....	33, 529
Halloway ada. Commonwealth, 44 Penn. State, 210.....	lxxiv, 431
Halloway ada. Commonwealth ex rel. Johnson, 42 Penn. State, 446.....	lxxxii, 686
Halloway ada. Commonwealth, ex rel. Langhamer, 42 Penn. State, 446.....	lxxxii, 686
Halloway v. Platner, 20 Iowa, 121.....	lxxxix, 517
Halluck v. Bush, 2 Root, 26.....	i, 66
Halsey v. McLean, 12 Allen, 439.....	xx, 157
Halsey v. Norton, 45 Mississippi, 703.....	7, 745
Halstead v. Seaman, 82 New York, 27.....	37, 536
Halsted v. State, 12 Vroom, 532.....	32, 247
Halvy v. Markel, 44 Illinois, 225.....	xxd, 123
Halwerson v. Cole, 1 Speer's Law, 321.....	xi, 603
Halvard v. Dechelman, 29 Missouri, 459.....	lxxvii, 586
Ham v. Boody, 20 New Hampshire, 411.....	li, 236
Ham v. Santa Rosa Bank, 63 California, 126.....	48, 654
Hamaker v. Blanchard, 90 Pennsylvania St. 277.35, 684	
Hamaker v. Eberley, 2 Binney, 506.....	lv, 477
Hamaker v. Hamaker, 18 Illinois, 137.....	lxv, 766
Hamblen v. Hamblen, 33 Mississippi, 459.....	lxix, 326
Hambright v. Nat. Bank, 3 Lea, 40.....	31, 639
Hamburg Bank v. Wray, 4 Strobhart's Law, 67.....	li, 639
Hamburg Bremen F. I. Co. v. Garlington, 66 Texas, 103.....	59, 613
Hamet v. Letcher, 37 Ohio St. 356.....	41, 619
Hamilton v. Adams, 15 Alabama, 596.....	i, 159
Hamilton v. Bailin, 8 Minnesota, 403.....	lxxxiii, 787
Hamilton v. Bishop, 5 Yerges, 33.....	xxix, 101
Hamilton v. Booth, 55 Mississippi, 60.....	36, 599
Hamilton v. Buckwalter, 2 Yeates, 369.....	i, 299
Hamilton v. Cawood, 3 Harris & McH. 437.....	i, 376
Hamilton v. Commonwealth, 16 Penn. State, 129.4v, 486	
Hamilton v. Conine, 28 Maryland, 636.....	xxd, 726
Hamilton v. Cooper, Walker, 542.....	xi, 598
Hamilton v. Cutts, 4 Massachusetts, 349.....	lii, 323
Hamilton v. Dent, 1 Haywood, 117.....	i, 523
Hamilton v. Elliot, 4 New Hampshire, 122.....	xlvi, 406
Hamilton v. Greenwood, 1 Bay, 173.....	i, 697
Hamilton v. Hamilton, 2 Richardson's Eq. 328.....	xlvi, 89
Hamilton v. Hamilton, 18 Penn. State, 25.....	lv, 585
Hamilton v. Hooper, 46 Iowa, 515.....	26, 161
Hamilton v. Huntley, 78 Indiana, 581.....	41, 593
Hamilton v. Iauksee, 51 Illinois, 415.....	xxix, 563
Hamilton v. McPherson, 28 New York, 73.....	lxxxiv, 330
Hamilton v. Marks, 52 Missouri, 78.....	14, 361
Hamilton v. Overton, 6 Blackford, 206.....	lxxxvii, 136
Hamilton v. Pearson, 1 Indiana, 540.....	i, 499
Hamilton v. People, 113 Illinois, 34.....	53, 596
Hamilton v. Pleasant, 31 Texas, 628.....	xxviii, 662
Hamilton v. Prosty, 50 Wisconsin, 596.....	36, 698

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Hamilton v. Railroad Co., 34 La. An. 370.....	44, 451
Hamilton v. Soull's Adm'r, 26 Missouri, 165.....	lxix, 460
Hamilton v. Seitz, 26 Penn. State, 226.....	lxiv, 694
Hamilton v. Shrewsbury, 4 Randolph, 437.....	xv, 779
Hamilton v. Smith, 37 Iowa, 15.....	43, 39
Hamilton v. State, 26 Indiana, 230.....	16, 23
Hamilton v. State, 60 Indiana, 193.....	23, 653
Hamilton v. State, 103 Indiana, 94.....	53, 491
Hamilton v. Summers, 13 R. Monroe, 11.....	lv, 509
Hamilton v. Texas & P. R'y Co., 64 Texas, 261.....	53, 756
Hamilton v. Warfield, 2 Gill & J. 423.....	xx, 443
Hamilton v. Whitridge, 11 Maryland, 128.....	lxix, 184
Hamilton v. Wilson, 4 Johnson, 73.....	iv, 263
Hamilton v. Windolf, 36 Maryland, 301.....	11, 491
Hamlin v. Parsons, 13 Minnesota, 103.....	xx, 284
Hamlin ada. State, 47 Connecticut, 85.....	36, 54
Hamlin's Lessee v. Bevans, 7 Ohio, Pt. 1, 161.....	xxviii, 626
Hammatt, Ex'r., v. Emerson, 27 Maine, 303.....	xlv, 806
Hammel v. Queens Ins. Co., 54 Wisconsin, 73.....	41, 1
Hammett v. Philadelphia, 65 Penn. St. 144.....	2, 615
Hammond's Case, 2 Greenleaf, 33.....	xi, 39
Hammond v. Corbett, 30 New Hampshire, 381.....	9, 293
Hammond v. Holmes, 25 Maryland, 541.....	xx, 77
Hammond v. Hannin, 21 Michigan, 374.....	4, 490
Hammond v. Humes, 51 New Hampshire, 49.....	13, 41
Hammond v. Myers, 30 Texas, 375.....	xlv, 223
Hammond v. North Eastern R. R. Co., 6 South Carolina, 130.....	94, 467
Hammond v. People, 33 Illinois, 446.....	lxviii, 296
Hammond v. Ridgely, 5 Harris & J. 245.....	ix, 823
Hammond ada. State, 30 Indiana, 80.....	41, 791
Hammond v. Woodman, 41 Maine, 177.....	lxvi, 219
Hammons v. State, 50 Alabama, 164.....	31, 13
Hampson v. Edelen, 2 Harris & J. 64.....	xi, 630
Hampson v. Wear, 4 Iowa, 13.....	lxvi, 116
Hampton v. Specknagle, 9 Serg. & R. 212.....	xi, 704
Hampton v. State, 6 Humphreys, 69.....	lxvii, 599
Hansauer v. Gray, 25 Arkansas, 380.....	xxix, 226
Hanawalt v. State, 64 Wisconsin, 84.....	54, 688
Hanby v. Tucker, 23 Georgia, 133.....	lxviii, 514
Hancock v. Colyer, 30 Massachusetts, 157.....	xvii, 730
Hancock v. Day, 1 McMullan's Eq. 69.....	xxvii, 293
Hancock v. Hancock, 1 T. B. Monroe, 121.....	xv, 92
Hancock v. Jordan, 7 Alabama, 448.....	xii, 600
Hancock v. Rand, 94 New York, 1.....	44, 112
Hancock, Inhab. of, v. Hazard, 12 Cushing, 113.....	lx, 171
Hancock M. L. I. Co. v. Patterson, 103 Ind. 582.....	53, 650
Hand v. Baynes, 4 Wharton, 304.....	xxviii, 54
Hand v. Grant, 5 Smodes & M. 308.....	lxiii, 628
Hand v. Hand, 63 California, 135.....	58, 8
Hand v. Phillips, 18 Nebraska, 593.....	53, 694
Hand ada. State, 6 Arkansas, 169.....	xiii, 639
Hand ada. State, 7 Iowa, 411.....	lxix, 453
Handley v. Pfister, 29 California, 253.....	9, 449
Handy v. Collins, 60 Maryland, 229.....	45, 726
Handy v. Foley, 121 Massachusetts, 229.....	23, 270
Handy v. State, 63 Mississippi, 207.....	54, 303
Handy v. Stockbridge, 63 Maryland, 423.....	50, 229
Handywide v. Cameron, 21 Illinois, 638.....	lxix, 119
Haney v. Trost, 24 Louisiana An. 1146.....	44, 461
Hanford v. Palma, 39 Vermont, 443.....	lxviii, 806
Hanger v. Des Moines, 53 Iowa, 183.....	35, 266
Hankinson v. Lamhard, 25 Illinois, 573.....	lxix, 268
Hanks v. McKee, 2 Little, 237.....	xiii, 268
Hanks v. Naglee, 54 California, 51.....	35, 67
Hanley v. Donoghue, 25 Maryland, 129.....	43, 554
Hanley v. Gandy, 29 Texas, 213.....	xxi, 215
Hanlon v. Keokuk, 7 Iowa, 458.....	lxix, 276
Hanlon v. Thayer, Quincy, 99.....	i, 1
Hanly v. Blackford, 1 Dana, 1.....	xiv, 114
Hanna v. Bry, 5 Louisiana An. 651.....	lii, 608
Hanna v. Holton, 78 Pennsylvania State, 234.....	31, 30
Hanna v. McKenzie, 5 R. Monroe, 314.....	lxiii, 123
Hanna v. Mills, 21 Wendell, 90.....	xxiv, 216
Hanna v. Palmer, 6 Colorado, 156.....	45, 324
Hanna v. Phelps, 7 Indiana, 21.....	lxiii, 419
Hanna v. Reed, 101 Illinois, 596.....	40, 603
Hanna v. Spotts' Heirs, 5 R. Monroe, 363.....	lxiii, 132
Hanna v. Wilson, 3 Gratian, 243.....	xvi, 130
Hanna's Syndics v. Lanning, 10 Martin, 563.....	xiii, 339
Hannah v. Swarner, 8 Watts, 9.....	xxvii, 449
Hannah v. Swarner, 3 Watts & Serg. 233.....	xxviii, 794
Hannan v. Hannan, 123 Massachusetts, 441.....	25, 131
Hannan v. Towers, 3 Harris & J. 147.....	v, 467
Hannibal & St. J. R. Co. v. Crane, 103 Ill. 249.....	40, 331
Hannon v. Williams, 34 New Jersey Eq. 269.....	38, 373
Hannum v. Richardson, 48 Vermont, 508.....	31, 123
Hanoff v. State, 37 Ohio State, 178.....	41, 696
Hanover Nat. Bank v. Klein, 64 Mississippi, 141.....	60, 47
Hanover v. Turner, 14 Massachusetts, 227.....	vii, 203
Hansberg v. People, 120 Illinois, 21.....	60, 549
Hansbrough v. Hoce, 12 Leigh, 316.....	xxvii, 603
Hanse v. New Orleans etc. Ins. Co., 10 La. 1.....	xxix, 496
Hansen v. Meyer, 31 Illinois, 321.....	25, 293
Hansen v. Barnes, 3 Gill & J. 359.....	xxii, 323
Hansen v. Buckner's Ex'r, 4 Dana, 351.....	xxix, 401
Hansen v. European & N. A. R'y Co., 63 Mo. 84.....	16, 404
Hansen v. Johnson, 63 Maryland, 25.....	50, 139
Hansen v. Mansfield R'y & Trans. Co., 38 Louisi- ana An. 111.....	53, 163
Hanson v. McCue, 43 California, 303.....	10, 239
Hanson v. Vernon, 27 Iowa, 23.....	1, 215
Hanson v. Willard, 12 Maine, 143.....	xxviii, 163
Hapgood v. Cornwell, 48 Illinois, 64.....	xov, 616
Hapgood v. Fisher, 24 Maine, 407.....	lvi, 663
Happel v. Brethauer, 70 Illinois, 166.....	22, 79
Harberger v. State, 4 Tex. Ct. App. 26.....	30, 157
Harbers v. Gedden, 6 Richardson's Eq. 294.....	lxii, 390
Harblson v. Bank of Indiana, 29 Indiana, 123.....	xvii, 303
Harblson v. 1st Pres. Soc. of Hartford, 46 Con- necticut, 329.....	33, 94
Harblson v. Lemson 3 Blackford, 51.....	xxxi, 376
Hardaway v. Drummond, 27 Georgia, 221.....	lxviii, 729
Hardee & Co. v. Howard, 23 Georgia, 533.....	lxviii, 176
Hardaman v. State, 16 Tex. Ct. App. 1.....	49, 621
Hardenbergh v. Hardenbergh, 5 Halstead, 48.....	xviii, 371
Hardesty v. Newby, 29 Missouri, 567.....	lxix, 127
Hardesty v. Richardson, 44 Maryland, 617.....	22, 97
Hardesty v. Taft, 23 Maryland, 513.....	lxviii, 594
Hardesty v. Wilson, 2 Gill, 451.....	xii, 439
Hardie ada. State, 47 Iowa, 647.....	29, 496
Hardin v. Cheek, 3 Jones' Law, 135.....	lxiv, 600
Hardin v. Cumstock, 2 A. K. Marshall, 480.....	xii, 427
Hardin v. Hardin, 17 Alabama, 250.....	iii, 179
Hardin v. Kirk, 49 Illinois, 153.....	xov, 531
Hardin ada. State, 46 Iowa, 623.....	26, 174
Hardin v. Trustees, 51 Michigan, 127.....	47, 555
Harding v. Alden, 9 Greenleaf, 140.....	xxviii, 549
Harding v. Coburn, 12 Metcalf, 333.....	lxix, 699
Harding v. Evans, 3 Porter, 221.....	xxix, 256
Harding v. Goodlett, 3 Yawger, 40.....	xxiv, 546
Harding ada. People, 53 Michigan, 48.....	51, 39
Harding v. Springer, 14 Maine, 407.....	xxxi, 61
Harding v. Strong, 42 Illinois, 148.....	lxviii, 415
Harding v. Townsend, 43 Vermont, 536.....	5, 304
Hardister ada. State, 39 Arkansas, 605.....	43, 1
Hardy v. Blazer, 29 Indiana, 226.....	xxii, 347
Hardy v. Brooklyn, 90 New York, 436.....	43, 123
Hardy v. Chesapeake Bank, 51 Maryland, 623.....	34, 236
Hardy v. Hunt, 11 California, 243.....	lxix, 797

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Hardy v. Merrill, 56 New Hampshire, 227.....	22, 441	Harrington v. Harrington, 13 Gray, 513.....	lxiv, 608
Hardy v. Pilcher, 57 Mississippi, 18.....	34, 433	Harrington v. Inhab. of Lincoln, 4 Gray, 363.....	lxiv, 56
Hardy v. Summers, 10 Gill & J. 316.....	xxxii, 167	Harrington v. McShane, 2 Watts, 443.....	xxvii, 321
Hardy v. Thomas, 23 Mississippi, 544.....	lvii, 188	Harrington v. Miles, 11 Kansas, 490.....	13, 353
Hardy v. Tibbon, 69 Maine, 195.....	28, 34	Harrington v. O'Reilly, 9 Smedes & M. 215.....	xlviii, 794
Hare v. Fury, 3 Yeates, 13.....	1, 338	Harrington ada. People, 43 California, 145.....	16, 236
Hare v. Gibson, 23 Ohio State, 33.....	39, 586	Harrington v. Sharp, 1 G. Greene, 131.....	xlviii, 355
Hare v. Marsh, 51 Wisconsin, 435.....	50, 141	Harrington v. Stees, 52 Illinois, 52.....	25, 296
Harger v. Thomas, 44 Penn. State, 125.....	lxixiv, 423	Harrington v. Watson, 11 Oregon, 143.....	50, 469
Harger v. Worrall, 69 New York, 370.....	25, 206	Harris, Ex parte, 53 Alabama, 27.....	52, 539
Hargous v. Abbot, 3 Denio, 403.....	xiv, 451	Harris v. Alcock, 10 Gill & J. 235.....	xxxiii, 193
Hargrave v. Penrod, Breese, 401.....	xii, 201	Harris v. Board of Supervisors, 105 Ill. 445.....	44, 863
Hargreaves v. Kimberly, 25 W. Va. 787.....	53, 121	Harris v. Bridges, 57 Georgia, 407.....	24, 463
Haring v. Kauffman, 2 Beasley Ch., 307.....	lxixviii, 103	Harris v. Brooks, 21 Pickering, 195.....	xxxiii, 254
Harker v. Conrad, 13 Serg. & R. 301.....	xiv, 691	Harris v. Carmody, 131 Massachusetts, 51.....	41, 126
Harker v. Dement, 9 Gill, 7.....	lii, 670	Harris v. Carson, 7 Leigh, 633.....	xxx, 519
Harker v. Smith, 41 Ohio St. 336.....	52, 80	Harris v. Chap, 1 Massachusetts, 308.....	ii, 27
Harkins, Ex parte, 6 Alabama, 63.....	xii, 38	Harris v. Clark, 3 N. Y. (3 Comst.), 62.....	ii, 322
Harkinson's Appeal, 78 Pennsylvania St. 186.....	71, 9	Harris v. Columbiana etc. Ins. Co., 18 Ohio, 114.....	ii, 449
Harkness v. Seam, 26 Alabama, 498.....	lxii, 743	Harris v. Commonwealth, 51 Virginia, 240.....	50, 863
Hartbreder v. Clayton, 56 Mississippi, 333.....	31, 389	Harris v. Ellis, 30 Texas, 4.....	xciv, 296
Hartman, Estate of, 24 California, 123.....	lxix, 63	Harris v. Frink, 49 New York, 24.....	20, 318
Hartman v. Bernis & Mayer, 23 Arkansas, 217.....	lxixvi, 428	Harris v. Gillingham, 6 New Hampshire, 9.....	xxiii, 708
Hartman v. Brown, 3 Gill, 475.....	xii, 436	Harris v. Gray, 49 Georgia, 585.....	15, 536
Hartman v. Hartan, 15 Penn. State, 507.....	liii, 612	Harris v. Hannibal & St. L. R. Co., 89 Mis- souri, 233.....	56, 171
Hartman v. Peck, 23 California, 615.....	xcii, 653	Harris v. Harris, 7 Iredell's Law, 111.....	xi, 322
Hartman v. Read, 3 Ohio, 395.....	xvii, 594	Harris v. Hill, 7 Arkansas, 423.....	lxvi, 236
Hart v. McCoy, 7 J. J. Marshall, 313.....	xxxiii, 407	Harris v. Hopkins, 43 Michigan, 273.....	28, 186
Hart v. Hale, 56 Indiana, 196.....	64, 265	Harris v. Horner, 1 Dev. & B. Eq. 495.....	xxx, 188
Hartley v. Drew, 21 Maine, 480.....	xxxviii, 276	Harris v. Huntington, 2 Tyler, 129.....	iv, 738
Hartley v. Wight, 21 Maine, 480.....	xxxviii, 276	Harris v. Jex, 55 New York, 421.....	14, 296
Hartley v. St. Louis M. L. I. Co., 54 Minn. 425.....	26, 358	Harris v. Lynn, 25 Kansas, 251.....	27, 253
Harman v. Gertman, Harper's Law, 430.....	lxviii, 656	Harris v. Miller, Meigs, 153.....	xxxiii, 136
Harman v. Kelley, 14 Ohio, 502.....	xiv, 553	Harris v. Mills, 28 Illinois, 44.....	lxixi, 259
Harman v. Sanderson, 6 Smedes & M. 41.....	xiv, 373	Harris v. Moody, 30 New York, 295.....	lxixvi, 275
Harman v. Ohioago, 110 Illinois, 400.....	51, 698	Harris v. Morse, 49 Maine, 433.....	lxixvii, 269
Harman v. Hale, 1 Wash. 423.....	34, 616	Harris v. Mullins, 23 Georgia, 704.....	lxix, 269
Harman v. Harmon, 61 Maine, 237.....	14, 556	Harris v. Murray, 29 New York, 574.....	lxixvi, 265
Harman v. James, 7 Smedes & M. 111.....	xiv, 296	Harris v. Muskingum Mfg. Co., 4 Blackf. 267.....	lxix, 373
Harman v. Omaha, 17 Nebraska, 543.....	52, 420	Harris v. Pullman, 54 Illinois, 20.....	28, 436
Harman v. Salmon Falls Mfg. Co., 25 Me. 447.....	lviii, 713	Harris v. Rand, 4 New Hampshire, 289.....	lxix, 421
Harmony v. Bingham, 12 N. Y. (3 Kernan), 39.....	lxii, 142	Harris v. Reynolds, 13 California, 514.....	lxixii, 690
Harned v. Churchman, 4 Louisiana An. 319.....	i, 573	Harris v. Roberts, 12 Nebraska, 631.....	41, 779
Harnor v. Dipple, 21 Ohio St. 72.....	27, 496	Harris v. Ross, 56 Missouri, 59.....	56, 421
Harney v. Dutcher, 15 Missouri, 86.....	lv, 131	Harris v. Rutledge, 19 Iowa, 262.....	lxixvii, 441
Harney v. Owen, 4 Blackford, 337.....	xxx, 663	Harris v. Simpson, 4 Littlel, 165.....	xiv, 161
Harney ada. Commonwealth, 2 Cushing, 562.....	lxixiii, 679	Harris v. Social Mfg. Co., 5 Rhode Island, 123.....	5, 549
Harpend v. Haigh, 39 California, 189.....	2, 433	Harris v. Social Mfg. Co., 9 Rhode Island, 89.....	11, 234
Harper v. Archer, 4 Smedes & M. 90.....	lxiii, 473	Harris ada. State, 3 Arkansas, 576.....	lxixvi, 499
Harper v. Baker, 3 T. B. Monroe, 423.....	xvi, 113	Harris ada. State, 39 Indiana, 263.....	66, 189
Harper v. Bibb, 34 Mississippi, 472.....	lxix, 397	Harris ada. State, 3 Jones L. 136.....	lxixvii, 277
Harper v. Biess, 3 Watts, 471.....	lxixvii, 397	Harris v. Stevens, 31 Vermont, 75.....	lxixii, 337
Harper v. Crain, 56 Ohio St. 235.....	53, 583	Harris v. Taylor, 3 Sneed, 536.....	lxixv, 576
Harper v. Indianapolis & St. L. R. R. Co., 67 Mis- souri, 567.....	4, 383	Harris v. Ticevan, 53 Georgia, 123.....	31, 269
Harper v. Little, 2 Greenleaf, 14.....	xi, 25	Harris v. Tumbidge, 53 New York, 62.....	26, 336
Harper ada. State, 26 Ohio St. 73.....	35, 586	Harris v. Tyson, 69 Georgia, 699.....	28, 125
Harper ada. State, 6 Ohio State, 607.....	lxvii, 363	Harris v. Tyson, 24 Penn. State, 347.....	lxix, 681
Harral v. Harral, 56 N. J. Eq. 189 (12 Stew.) 279.....	51, 17	Harris v. Waite, 51 Vermont, 421.....	31, 694
Harral v. Levery, 50 Connecticut, 46.....	47, 608	Harris v. Woodruff, 124 Massachusetts, 255.....	28, 689
Harratt v. Harratt, 7 New Hampshire, 196.....	xxvi, 730	Harrison v. Bulley, 59 Massachusetts, 629.....	lxvii, 65
Harral v. State, 29 Mississippi, 702.....	lxix, 95	Harrison v. Burdick, 1 Strobhart's Law, 553.....	lxix, 576
Harrall v. Hill, 19 Arkansas, 102.....	lxixiii, 202	Harrison v. City Fire Ins. Co., 9 Allen, 531.....	lxixv, 721
Harrall v. Miller, 25 Mississippi, 700.....	lxixii, 154	Harrison v. Close, 3 Johnson, 443.....	32, 444
Harrison v. Connecticut R. L. Co., 129 Mass. 500.....	37, 357	Harrison v. Collins, 56 Pennsylvania State, 198.....	27, 699
Harrison ada. State, 75 Maine, 263.....	46, 423	Harrison v. Commonwealth, 79 Virginia, 274.....	23, 694
Harrison v. First Bryan Bap. Church, 69 Ga. 196.....	36, 117	Harrison v. Crowder, 6 Smedes & M. 464.....	xiv, 229
Harrington v. Connors, 21 Pickering, 263.....	xxxviii, 741	Harrison v. Edwards, 12 Vermont, 642.....	lxixvi, 364
Harrington v. Edwards, 17 Wisconsin, 585.....	lxixiv, 788	Harrison v. Findley, 23 Indiana, 295.....	lxixv, 496
Harrington v. Fuller, 18 Maine, 377.....	lxixvi, 719	Harrison v. Harrison, 2 Gratian, 2.....	lxixv, 365

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Gray v. State, 78 Indiana, 68.....	41, 545	Green v. Watson, 75 Georgia, 471.....	58, 479
Gray v. Stevens, 28 Vermont, 1.....	lxv, 216	Green v. Wardwell, 17 Illinois, 278.....	lxvii, 366
Gray v. Wahn, 2 Serg. & R. 233.....	vii, 642	Green v. Wilding, 59 Iowa, 679.....	44, 696
Gray v. West, 83 North Carolina, 442.....	53, 462	Green v. Winter, 1 Johns. Ch. 27.....	vii, 478
Graydon, Swanwick & Co. v. Patterson & Co., 13 Iowa, 258.....	lxvii, 439	Green v. Young, Adm'r, 8 Greenleaf, 14.....	lxvii, 218
Grayson v. Veeche, 12 Martin, 688.....	lxiii, 384	Green Bay & M. C. Co. v. Hewitt, 55 Wis. 98.....	42, 701
Grayson v. Williams, Walker, 298.....	xii, 568	Greenbaum v. King, 4 Kansas, 332.....	lxvii, 173
Greaser ada. State, 28 Minnesota, 426.....	41, 296	Greenawalt v. Kreider, 3 Penn. State, 364.....	lxv, 639
Greathouse v. Brown, 8 T. B. Monroe, 280.....	lxvii, 67	Greenby v. Willocks, 2 Johnson, 1.....	lxii, 379
Great Works M. & M. Co. ada. State, 20 Mo. 41.....	lxvii, 38	Greencastle v. Martin, 74 Indiana, 449.....	39, 98
Great Western R. R. Co. v. Bacon, 30 Illinois 347.....	lxviii, 199	Greene v. Dennis, 6 Connecticut, 293.....	lxvi, 58
Great Western R. R. Co. v. Holm, 27 Ill. 198.....	lxviii, 236	Greene v. Greene, 2 Gray, 361.....	lxii, 484
Great Western Turnpike Road Co. v. Loomis, 32 New York, 127.....	lxviii, 311	Greene v. Greene, 1 Ohio, 638.....	lxiii, 643
Grealey v. Dixon, 21 Florida, 413.....	58, 673	Greene v. Keene, 14 Rhode Island, 358.....	51, 400
Grealey v. St. Paul, M. & M. R'y Co., 28 Minnesota, 138.....	53, 16	Greene v. Linton, 7 Porter, 133.....	lxvii, 707
Grealey v. Thurston, 4 Greenleaf, 479.....	lxvi, 285	Greene v. Minneapolis & St. L. Ry. Co., 31 Minnesota, 248.....	47, 788
Grealey v. Waterhouse, 19 Maine, 9.....	lxvii, 730	Greene v. Mumford, 5 Rhode Island, 472.....	lxviii, 79
Greely v. Bartlett, 1 Greenleaf, 172.....	x, 54	Greene v. Tallman, 20 New York, 191.....	lxv, 324
Green v. Adams, 59 Vermont, 602.....	59, 761	Greenfield Bank v. Leavitt, 17 Pickering, 1.....	lxviii, 268
Green v. Arnold, 11 Rhode Island, 364.....	23, 466	Greenfield v. People, 85 New York, 75.....	39, 636
Green v. Borough of Reading, 9 Watts, 382.....	lxvii, 127	Greenfield Sav. Bank v. Stowall, 123 Mass. 196.....	25, 67
Green v. Boston & L. R. Co., 128 Mass. 221.....	35, 370	Greenhow v. Harris, 6 Munford, 472.....	viii, 751
Green v. Bridge Creek, 38 Wisconsin, 449.....	20, 18	Greenhow v. James, 80 Va.....	636, 548, 603
Green v. Brooks, 23 Michigan, 48.....	9, 74	Greenleaf v. Ill. Cent. R. R. Co., 29 Iowa, 14.....	4, 181
Green v. Broyles, 3 Humphreys, 167.....	lxviii, 156	Greenleaf v. Ludington, 15 Wisconsin, 558.....	lxviii, 698
Green v. Caldwell, 1 Dev. & Bat. L. 321.....	lxviii, 567	Greenleaf v. Quincy, 12 Maine, 11.....	lxviii, 148
Green v. Garrington, 16 Ohio State, 548.....	xcii, 103	Greenlee v. Gaines, 13 Alabama, 198.....	lxviii, 49
Green v. Chilton, 57 Mississippi, 568.....	34, 483	Greeno v. Munson, 9 Vermont, 37.....	lxviii, 606
Green v. Collins, 86 New York, 246.....	40, 531	Greenough v. Greenough, 11 Penn. State, 489.....	li, 567
Green v. Clay, 10 Allen, 90.....	lxviii, 622	Green Ridge R. R. Co. v. Brinkman, 64 Md. 62.....	54, 755
Green v. Covilland, 10 California, 317.....	lxv, 725	Greensboro v. Ehrenreich, 80 Alabama, 672.....	60, 139
Green v. Cox, 10 Allen, 90.....	lxviii, 622	Greensboro Bank v. Chambers, 30 Gratt. 203.....	32, 661
Green v. Crighton, 10 Smodes & M. 159.....	lxviii, 742	Greensdale ada. State, 106 Indiana, 364.....	55, 759
Green v. Disbrow, 79 New York, 1.....	35, 496	Greensline v. Borchard, 50 Michigan, 434.....	45, 81
Green v. Dodge, 6 Ohio, 80.....	lxv, 736	Greensup v. Stoker, 12 Illinois, 24.....	lii, 474
Green v. Drummond, 31 Maryland, 71.....	1, 14	Greenville & C. R. v. Woodsides, 5 Rich. L. 145.....	lv, 708
Green v. Green, 16 Indiana, 253.....	lxix, 428	Greenway v. Cannon, 3 Humphreys, 177.....	lxviii, 161
Green v. Green, 34 Kansas, 740.....	53, 256	Greenwall v. Haydon, 78 Kentucky, 323.....	39, 234
Green v. Green, 69 New York, 553.....	23, 233	Greenwood v. Curtis, 6 Massachusetts, 328.....	lv, 148
Green v. Greensboro F. Col. 83 N. C. 449.....	35, 579	Greenwood v. Ligon, 10 Smodes & M. 615.....	lxviii, 775
Green v. Hamilton, 16 Maryland, 317.....	lxvii, 295	Greenwood v. Louisville, 13 Bush, 226.....	26, 263
Green v. Harrison, 6 Jones Eq., 253.....	lxviii, 415	Greenwood v. Murdock, 9 Gray, 30.....	lxix, 273
Green v. Hewitt, 97 Illinois, 113.....	37, 102	Greenwood v. State, 6 Bart. 567.....	32, 539
Green v. Holway, 101 Massachusetts, 213.....	3, 339	Greer v. Caldwell, 14 Georgia, 207.....	lxviii, 563
Green v. Hollingsworth, 5 Dana, 173.....	lxv, 680	Greer v. Chartier R. Co., 96 Pennsylvania 84.....	301, 42, 548
Green v. Irving, 54 Mississippi, 450.....	28, 360	Greer v. McCrackin, Peck, 301.....	lxv, 758
Green v. Johnson, 2 Hawks, 309.....	xi, 763	Greer v. State, 50 Indiana, 267.....	19, 709
Green v. Kellum, 23 Penn. State, 254.....	lxvii, 332	Greer v. Wright, 6 Grattan, 184.....	lii, 111
Green v. Kemp, 13 Massachusetts, 515.....	vii, 169	Gregg v. Bigham, 1 Hill, 299.....	lxvii, 181
Green v. Kornegay, 4 Jones' Law, 66.....	lxvii, 261	Gregg v. Bostwick, 33 California, 220.....	lxvii, 637
Green v. Lake, 54 Mississippi, 540.....	28, 378	Gregg v. Crawford, 4 Alabama, 180.....	lxvii, 739
Green v. Miller, 6 Johnson, 39.....	v, 184	Gregg v. James, Breese, 143.....	lxii, 151
Green v. Palmer, 15 California, 411.....	lxvii, 492	Gregg v. Massachusetts Med. Soc'y, 111 Mass. 185.....	15, 24
Green ada. People, 7 Colorado, 237.....	49, 351	Gregg v. Palmer, 46 Illinois, 398.....	lxv, 412
Green v. Pettingill, 47 New Hampshire, 375.....	lxviii, 444	Gregg v. Sanford, 24 Illinois, 17.....	lxvii, 719
Green v. Phillips, 25 Gratt. 752.....	21, 323	Gregory Ex parte, 20 Tex. Ct. App. 210.....	54, 516
Green v. Ramage, 18 Ohio, 428.....	li, 456	Gregory v. Bridgeport, 41 Connecticut, 76.....	19, 465
Green v. Raymond, 58 Texas, 80.....	44, 601	Gregory v. Brooks, 35 Connecticut, 437.....	lxv, 278
Green v. Sargeant, 23 Vermont, 468.....	lxvi, 88	Gregory v. Brown, 4 Bibb 23.....	vii, 731
Green v. Soranage, 19 Iowa, 461.....	lxvii, 447	Gregory v. Ford, 14 California, 136.....	lxviii, 639
Green v. Spencer, 3 Missouri, 316.....	lxvi, 672	Gregory v. German Bank, 3 Colorado, 322.....	25, 780
Green v. Sperry, 16 Vermont, 390.....	lxiii, 519	Gregory v. Gregory, 78 Maine, 187.....	57, 722
Green v. State, 28 Alabama, 190.....	29, 739	Gregory v. Hooker, 1 Hawks, 394.....	lx, 646
Green v. State, 66 Alabama, 40.....	41, 744	Gregory v. King, 58 Illinois, 169.....	11, 56
Green v. State, 21 Florida, 403.....	58, 670	Gregory v. Lites, 9 B. Monroe, 43.....	lxviii, 418
Green v. State, 20 Maryland, 123.....	45, 542	Gregory v. State, 94 Indiana, 384.....	48, 163
		Gregory v. State, 26 Ohio State, 510.....	29, 774
		Gregory ada. State, 83 Missouri, 123.....	53, 563
		Gregory v. Taber, 19 California, 397.....	lxviii, 219

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Hardy v. Merrill, 86 New Hampshire, 227.....	32, 441	Harrington v. Harrington, 13 Gray, 513.....	lxiv, 648
Hardy v. Pilcher, 57 Mississippi, 18.....	34, 432	Harrington v. Inhab. of Lincoln, 4 Gray, 843.....	lxiv, 36
Hardy v. Thomas, 23 Mississippi, 644.....	lvii, 182	Harrington v. Miles, 11 Kansas, 468.....	15, 265
Hardy v. Tilton, 68 Maine, 195.....	28, 34	Harrington v. O'Reilly, 9 Smedes & M. 215.....	xlviii, 704
Hare v. Fury, 3 Yeaton, 13.....	11, 328	Harrington ada. People, 43 California, 185.....	10, 206
Hare v. Gibson, 33 Ohio State, 33.....	30, 508	Harrington v. Sharp, 1 G. Greene, 131.....	xlviii, 365
Hare v. Marsh, 61 Wisconsin, 438.....	50, 141	Harrington v. Stees, 22 Illinois, 52.....	25, 290
Harger v. Thomas, 44 Penn. State, 128.....	lxixiv, 422	Harrington v. Watson, 11 Oregon, 143.....	50, 405
Harger v. Worrall, 69 New York, 270.....	25, 206	Harris, Ex parte, 23 Alabama, 87.....	22, 539
Hargous v. Ahlen, 3 Dando, 406.....	xiv, 461	Harris v. Alcock, 10 Gill & J. 235.....	xxxiii, 150
Hargrave v. Penrod, Breesa, 401.....	xii, 201	Harris v. Board of Supervisors, 108 Ill. 445.....	44, 302
Hargreaves v. Kimberly, 26 W. Va. 787.....	53, 121	Harris v. Bridges, 57 Georgia, 407.....	24, 405
Haring v. Kauffman, 2 Beasley Ch., 367.....	lxixviii, 102	Harris v. Brooks, 21 Pickering, 195.....	xxxii, 264
Harker v. Conrad, 12 Serg. & R. 301.....	xiv, 691	Harris v. Carmody, 131 Massachusetts, 51.....	41, 100
Harker v. Dement, 9 Gill, 7.....	11, 670	Harris v. Carson, 7 Leigh, 632.....	xxx, 519
Harker v. Smith, 41 Ohio St. 236.....	52, 80	Harris v. Chap, 1 Massachusetts, 308.....	11, 27
Harkins, Ex parte, 6 Alabama, 63.....	xii, 38	Harris v. Clark, 3 N. Y. (3 Conn.), 68.....	11, 358
Harkinson's Appeal, 78 Pennsylvania St. 196.....	21, 9	Harris v. Columbiana etc. Ins. Co., 12 Ohio, 116.....	11, 409
Harkness v. Sears, 26 Alabama, 498.....	lxii, 742	Harris v. Commonwealth, 31 Virginia, 240.....	50, 609
Harkrader v. Clayton, 84 Mississippi, 883.....	31, 369	Harris v. Ellis, 30 Texas, 4.....	lxiv, 252
Harian, Estate of, 24 California, 182.....	lxixiv, 58	Harris v. Frink, 49 New York, 24.....	10, 218
Harian v. Bernie & Mayer, 21 Arkansas, 217.....	lxixvi, 426	Harris v. Gillingham, 6 New Hampshire, 9.....	lxixii, 701
Harian v. Brown, 3 Gill, 671.....	xii, 426	Harris v. Gray, 49 Georgia, 585.....	15, 604
Harian v. Harlan, 15 Penn. State, 507.....	lxiii, 612	Harris v. Hamblin & St. L. R. Co., 20 Mis- souri, 233.....	50, 111
Harian v. Peck, 23 California, 515.....	lxci, 683	Harris v. Harris, 7 Iredell's Law, 111.....	lxii, 322
Harian v. Read, 3 Ohio, 269.....	xvii, 694	Harris v. Hill, 7 Arkansas, 422.....	lxvi, 265
Harie v. McCoy, 7 J. J. Marshall, 318.....	xxxii, 407	Harris v. Hopkins, 43 Michigan, 273.....	28, 189
Harley v. Hale, 26 Indiana, 198.....	44, 235	Harris v. Horner, 1 Dev. & B. Eq. 486.....	xxx, 120
Harlow v. Drew, 21 Maine, 480.....	lxixviii, 276	Harris v. Huntington, 2 Tyler, 129.....	14, 726
Harlow v. Wiggins, 21 Maine, 480.....	lxixviii, 276	Harris v. Jex, 55 New York, 421.....	10, 220
Harlow v. St. Louis M. L. I. Co., 84 Minn. 426.....	28, 358	Harris v. Lynn, 25 Kansas, 251.....	27, 262
Harmon v. Gertman, Harper's Law, 430.....	lxviii, 666	Harris v. Miller, Meigs, 193.....	lxixiii, 120
Harmon v. Kelley, 14 Ohio, 602.....	xiv, 523	Harris v. Mills, 23 Illinois, 44.....	lxixii, 209
Harmon v. Sanderson, 6 Smedes & M. 41.....	xiv, 272	Harris v. Moody, 30 New York, 208.....	lxixvii, 275
Harmon v. Obispo, 110 Illinois, 400.....	51, 698	Harris v. Morse, 40 Maine, 433.....	lxixvi, 209
Harmon v. Hale, 1 Wash. 423.....	34, 516	Harris v. Mullins, 23 Georgia, 704.....	lxixix, 239
Harmon v. Harmon, 61 Maine, 227.....	14, 556	Harris v. Murray, 26 New York, 674.....	lxixvii, 242
Harmon v. James, 7 Smedes & M. 111.....	xiv, 296	Harris v. Muskingum Mfg. Co., 4 Blackf. 267.....	xxxix, 272
Harmon v. Omaha, 17 Nebraska, 542.....	52, 420	Harris v. Pullman, 24 Illinois, 20.....	28, 436
Harmon v. Salmon Falls Mfg. Co., 35 Me. 447.....	lviii, 718	Harris v. Rand, 4 New Hampshire, 209.....	lxixvi, 421
Harmony v. Bingham, 12 N. Y. (3 Kansas), 69.....	lxiii, 142	Harris v. Reynolds, 13 California, 514.....	lxixii, 699
Harned v. Churchman, 4 Louisiana An. 319.....	1, 573	Harris v. Roberts, 12 Nebraska, 631.....	41, 779
Harnes v. Dipple, 31 Ohio St. 72.....	27, 496	Harris v. Ross, 26 Missouri, 59.....	54, 421
Harnes v. Dutcher, 15 Missouri, 89.....	14, 131	Harris v. Rutledge, 19 Iowa, 303.....	lxixviii, 441
Harnes v. Owen, 4 Blackford, 337.....	xxx, 662	Harris v. Simpson, 4 Little, 165.....	xiv, 101
Harnes ada. Commonwealth, 2 Oushing, 582.....	lxviii, 679	Harris v. Social Mfg. Co., 8 Rhode Island, 128.....	5, 549
Harpending v. Haight, 20 California, 180.....	2, 422	Harris v. Social Mfg. Co., 9 Rhode Island, 90.....	11, 224
Harper v. Archer, 4 Smedes & M. 99.....	lxiii, 472	Harris ada. State, 3 Arkansas, 576.....	lxixvi, 409
Harper v. Baker, 3 T. B. Monroe, 423.....	xvi, 112	Harris ada. State, 29 Indiana, 263.....	46, 169
Harper v. Bibb, 24 Mississippi, 672.....	lxix, 307	Harris ada. State, 8 Jones L. 136.....	lxixviii, 277
Harper v. Blinn, 3 Watts, 471.....	lxixvii, 367	Harris v. Stevens, 31 Vermont, 73.....	lxixii, 237
Harper v. Cain, 26 Ohio St. 328.....	28, 589	Harris v. Taylor, 3 Sneed, 536.....	lxixvi, 276
Harper v. Indianapolis & St. L. R. Co., 67 Mis- souri, 567.....	4, 263	Harris v. Tinsman, 23 Georgia, 183.....	21, 242
Harper v. Little, 2 Greenleaf, 14.....	21, 26	Harris v. Tumbidge, 23 New York, 52.....	26, 290
Harper ada. State, 26 Ohio St. 78.....	25, 506	Harris v. Tyson, 63 Georgia, 629.....	26, 126
Harper ada. State, 6 Ohio State, 607.....	lxvii, 363	Harris v. Tyson, 24 Penn. State, 347.....	lxix, 681
Harral v. Harral, 26 N. J. Eq. 129 (12 Stew.) 279.....	51, 17	Harris v. Wahe, 61 Vermont, 421.....	21, 604
Harral v. Levery, 60 Connecticut, 46.....	47, 606	Harris v. Woodruff, 124 Massachusetts, 255.....	26, 409
Harratt v. Harratt, 7 New Hampshire, 196.....	lxixvi, 730	Harrison v. Bulley, 99 Massachusetts, 629.....	lxixvi, 63
Harral v. State, 20 Mississippi, 702.....	lxixx, 26	Harrison v. Buckley, 1 Strobhart's Law, 525.....	lxixvii, 573
Harrall v. Hill, 19 Arkansas, 102.....	lxviii, 202	Harrison v. City Fire Ins. Co., 9 Allen, 221.....	lxixv, 721
Harrall v. Miller, 26 Mississippi, 700.....	lxixii, 154	Harrison v. Close, 2 Johnson, 448.....	21, 444
Harrison v. Connecticut R. L. Co., 129 Mass. 890.....	37, 357	Harrison v. Collins, 26 Pennsylvania State, 128.....	27, 609
Harrison ada. State, 75 Maine, 523.....	46, 423	Harrison v. Commonwealth, 79 Virginia, 274.....	53, 604
Harrison v. First Bryan Bap. Church, 63 Ga. 126.....	36, 117	Harrison v. Crowder, 6 Smedes & M. 464.....	lxixv, 699
Harrington v. Comm'rs, 22 Pickering, 262.....	lxixiii, 741	Harrison v. Edwards, 12 Vermont, 642.....	lxixvi, 264
Harrington v. Edwards, 17 Wisconsin, 595.....	lxixiv, 769	Harrison v. Findley, 23 Indiana, 266.....	lxixv, 696
Harrington v. Fuller, 18 Maine, 277.....	lxixvi, 719	Harrison v. Harrison, 2 Graham, 1.....	lxixv, 208

Harrison v. Harrison, 30 Alabama, 639.....	lv, 237	Hartleb v. McLane's Adm'r., 44 Penn. St. 510.....	lv, 464
Harrison v. Hieks, 1 Porter, 623.....	xvii, 638	Hartley v. Froeh, 6 Tenn., 308.....	lv, 773
Harrison v. Lana, 5 Leigh, 414.....	xvii, 607	Hartley v. McAnulty, 4 Yeates, 96.....	ii, 306
Harrison v. Laverty, 8 Martin, 213.....	xiii, 283	Hartley ada. People, 21 California, 885.....	lxviii, 789
Harrison v. Martinsville & F. R. R., 16 Ind. 505.....	lxix, 447	Hartley and Minor's Appeal, 63 Penn. St. 215.....	xci, 207
Harrison v. Maxwell, 2 Noté & McO. 347.....	x, 611	Hartman v. Aveline, 63 Indiana, 344.....	30, 217
Harrison v. Mayor of Vicksburg, 3 Sm. & M. 581.....	xii, 633	Hartman v. Ogborn, 54 Penn. St. 120.....	xviii, 679
Harrison v. McHenry, 9 Georgia, 164.....	iii, 435	Hartnett v. Wandell, 60 New York, 346.....	19, 154
Harrison v. Missouri P. R. Co., 74 Missouri, 364.....	41, 318	Hartnutt's Appeal, 85 Penn. St. 433.....	97, 607
Harrison v. New Orleans, 33 Louisiana An. 222.....	59, 273	Hartsook v. Reddick, 6 Blackford, 255.....	lxviii, 141
Harrison v. New Orleans & P. R. Co., 34 Louisiana An. 463.....	44, 438	Harts v. Rector, 13 Missouri, 497.....	iii, 187
Harrison v. Pender, Busbee's Law, 78.....	lvii, 573	Hartwell v. Alabama G. Life Ins. Co., 33 La. An. 1353.....	59, 294
Harrison v. People, 60 New York, 518.....	10, 517	Hartwell v. Camman, 2 Stockton's Ch. 123.....	lxiv, 443
Harrison v. Sawtel, 10 Johnson, 342.....	vi, 337	Hartwell ada. Commonwealth, 123 Mass. 418.....	35, 301
Harrison v. Smith, 63 Missouri, 210.....	53, 571	Hartwell v. Root, 19 Johnson, 345.....	x, 323
Harrison v. State, 34 Alabama, 67.....	lx, 450	Hartwell v. Walker, 4 Louisiana An. 457.....	1, 577
Harrison v. State, 23 Maryland, 468.....	lxix, 688	Hartwell v. Saunders, 49 Mo. 433.....	8, 136
Harrison v. State, 20 Texas Ct. App. 367.....	54, 629	Harvey v. Alexander, 1 Randolph, 212.....	x, 519
Harrison v. Taylor, 33 Missouri, 211.....	lxviii, 159	Harvey v. Childs, 23 Ohio St. 219.....	79, 287
Harrison v. Wyne, 34 Connecticut, 1.....	lxiii, 151	Harvey v. Chouteau, 14 Missouri, 687.....	lv, 130
Harrison v. Willis, 7 Hask. 35.....	19, 604	Harvey v. Connecticut & P. R., 134 Mass. 421.....	96, 673
Harrison v. Wright, 100 Indiana, 518.....	50, 805	Harvey v. Kelly, 41 Mississippi, 490.....	lxviii, 287
Harris v. Williams, 3 Jones' Law, 463.....	lxvii, 253	Harvey v. Nelson, 31 La. Ann. 434.....	33, 223
Harrod v. Myers, 21 Arkansas, 862.....	lxvii, 409	Harvey v. Pika, N. O. Term Rep. 62.....	vii, 636
Harrod v. Norris, 11 Martin, 297.....	xiii, 380	Harvey v. Potter, 19 La. An. 254.....	lxviii, 633
Harrow v. Farrow, 7 R. Monroe, 128.....	xiv, 60	Harvey v. Rose, 26 Arkansas, 3.....	7, 565
Harry v. Graham, 1 Dev. & Bat. 78.....	xvii, 226	Harvey v. Spaulding, 16 Iowa, 367.....	lxix, 505
Harshey v. Blackmar, 20 Iowa, 161.....	lxix, 630	Harvey v. S. S. M. Co., 1 Nevada, 530.....	xx, 510
Hart v. Boller, 15 Serg. & R. 163.....	xvi, 536	Harvey v. Sullens, 46 Missouri, 147.....	9, 491
Hart v. Brand, 1 A. K. Marshall, 189.....	x, 715	Harvey v. Thomas, 10 Watts, 63.....	lxviii, 141
Hart v. Chicago, R. I. & P. R. Co., 56 Iowa, 166.....	41, 93	Harvey v. Thorpe, 28 Alabama, 390.....	lxv, 344
Hart v. Dorman, 3 Florida, 445.....	1, 285	Harvey v. Tobey, 15 Pickering, 90.....	lxv, 435
Hart v. Fitzgerald, 3 Massachusetts, 509.....	iii, 78	Harwell v. Lively, 30 Georgia, 315.....	lxvii, 640
Hart v. Gregg, 10 Watts, 185.....	lxvii, 168	Harwell v. Wornham, 2 Humphreys, 624.....	lxviii, 672
Hart v. Hampton, 7 T. B. Monroe, 361.....	xviii, 186	Harwood ada. Commonwealth, 4 Gray, 41.....	lxiv, 49
Hart v. Hart, 30 Mississippi, 621.....	lxviii, 668	Harwood v. People, 26 New York, 190.....	lxix, 175
Hart v. Hawkins, 3 Bibb, 503.....	vi, 666	Harwood v. Smethurst, 5 Dutch, 195.....	lxix, 307
Hart v. Lindsey, 17 New Hampshire, 235.....	iii, 597	Hasbrouck v. Milwaukee, 13 Wisconsin, 37.....	lxix, 713
Hart v. Mayor, etc., of Albany, 9 Wendell, 871.....	xxiv, 165	Hascall v. Whitmore, 19 Maine, 103.....	lxviii, 730
Hart v. N. Orleans etc. R. R. Co., 1 Rob. 178.....	lxvii, 689	Hascall ada. People ex rel Lemt, 23 N. Y. 188.....	lxviii, 175
Hart v. Reed, 1 R. Monroe, 166.....	lxv, 179	Haskell v. Haskell, 3 Greenleaf, 187.....	xi, 54
Hart v. Remmelger etc. R. R. Co., 8 N. Y. 37.....	lx, 447	Haskell v. Mitchell, 53 Maine, 463.....	lxix, 711
Hart v. Roper, 6 Ireland's Eq. 349.....	ii, 425	Haskett v. Flint, 5 Blackford, 69.....	lxviii, 493
Hart v. Skinner, 16 Vermont, 138.....	xiii, 500	Haskill v. Andros, 4 Vermont, 609.....	lxix, 645
Hart v. Smith, 15 Alabama, 607.....	1, 161	Haskins v. Lombard, 16 Maine, 140.....	lxviii, 645
Hart v. State, 40 Alabama, 32.....	lxviii, 723	Haskins v. Royster, 70 N. C. 601.....	16, 780
Hart v. State, 15 Texas Ct. App. 302.....	49, 188	Haskins v. Young, 2 Dev. & Bat. L. 527.....	lxix, 436
Hart v. Stickney, 41 Wisconsin, 630.....	27, 728	Haslen v. Kean, N. O. Term Rep. 279.....	vii, 713
Hart v. Tallmadge, 2 Day, 381.....	ii, 105	Haslem v. Lockwood, 37 Connecticut, 500.....	9, 350
Hart v. Western R. R. Co., 13 Metcalf, 90.....	lxvi, 719	Haslet v. Street, 2 M'Cord, 310.....	lxviii, 734
Hart v. Western Union Tel. Co. 66 Cal. 672.....	56, 119	Has v. Philadelphia and S. M. S. & Co., 88 Penn. St. 269.....	57, 463
Hart v. Wills, 63 Iowa, 56.....	35, 255	Has v. Plauts, 56 Wisconsin, 105.....	43, 690
Hart v. Withers, 1 Penrose & W. 265.....	xci, 382	Hassam v. Day, 39 Mississippi, 323.....	lxviii, 684
Hartman v. Hartman, 14 Pickering, 181.....	lxv, 372	Hassam v. Griffin, 18 Johnson, 43.....	ix, 184
Hartfield v. Roper, 21 Wendell, 615.....	lxix, 273	Hassam v. St. Louis Perp. Ins. Co., 7 La. An. 11.....	lv, 591
Hartford Bank v. Hart, 3 Day, 491.....	iii, 274	Hassinger v. Michigan C. R. R. Co., 48 Mich. 205.....	49, 470
Hartford v. Brady, 114 Massachusetts, 466.....	19, 377	Hassinger v. Newman, 63 Indiana, 124.....	43, 64
Hartford v. State, 36 Indiana, 461.....	49, 185	Hastings v. Dickinson, 7 Massachusetts, 153.....	v, 34
Hartford ada. State, 80 Connecticut, 80.....	47, 622	Hastings v. Lovejoy, 140 Massachusetts, 261.....	54, 462
Hartford v. Talcott, 49 Connecticut, 625.....	40, 189	Hastings v. Lovering, 2 Pickering, 214.....	lxiii, 430
Hartford v. West Middle District, 45 Conn. 463.....	39, 687	Hastings v. Lusk, 23 Wendell, 410.....	lxix, 330
Hartford Co. Comm'rs v. Hamilton, 60 Md. 340.....	45, 739	Hastings v. Stetson, 126 Massachusetts, 329.....	30, 683
Hartford F. Ins. Co. v. Walsh, 54 Ill. 164.....	5, 115	Hastings v. Weber, 142 Massachusetts, 232.....	56, 671
Hartford Fire Ins. Co. v. Ross, 23 Ind. 179.....	lxix, 452	Harwell v. Parsons, 15 California, 366.....	lxvii, 490
Hartford P. Ins. Co. v. Harmer, 2 Ohio St. 452.....	lix, 684	Hatch v. Atkinson, 56 Maine, 394.....	xvi, 464
Hartford & N. H. R. R. v. Jackson, 34 Conn. 514.....	lxiii, 177	Hatch v. Bartle, 45 Penn. State, 166.....	lxix, 484
Hartford etc. R. R. Co. v. Croswell, 5 Hill (N. Y.), 383.....	xi, 354	Hatch v. Barnum, 23 Vermont, 153.....	7, 9
Hartigan ada. State, 23 Vermont, 607.....	lxviii, 609	Hatch v. Cohen, 84 North Carolina, 602.....	27, 630

Roman letters [xlix] refer to volumes of *American Dec*

Hardy v. Merrill, 56 New Hampshire, 327.....	32, 441	
Hardy v. Plicher, 57 Mississippi, 18.....	3-2, 432	
Hardy v. Summers, 10 Gill & J. 316.....	xxxvii, 167	
Hardy v. Thomas, 23 Mississippi, 544.....	lvii, 152	
Hardy v. Tilson, 68 Maine, 195.....	2-3, 3-4	
Hare v. Fury, 3 Yeates, 13.....	xi, 358	
Hare v. Gibson, 32 Ohio State, 23.....	3-3, 598	
Hare v. Marsh, 61 Wisconsin, 435.....	5-3, 141	
Harger v. Thomas, 44 Penn. State, 128.....	lxxiv, 422	
Harger v. Worrall, 69 New York, 370.....	2-5, 206	
Hargous v. Abdon, 3 Denio, 406.....	xiv, 461	
Hargrave v. Penrod, Breese, 401.....	xii, 201	
Hargreaves v. Kimberly, 26 W. Va. 787.....	5-3, 121	
Haring v. Kaufman, 2 Beasley Ch., 397.....	lxxviii, 102	
Harker v. Conrad, 12 Serg. & R. 301.....	xiv, 691	
Harker v. Dement, 9 Gill, 7.....	lii, 670	
Harker v. Smith, 41 Ohio St. 238.....	5-2, 80	
Harkins, Ex parte, 6 Alabama, 63.....	xii, 38	
Harkinson's Appeal, 78 Pennsylvania St. 194.....	2-1, 9	
Harkness v. Sears, 26 Alabama, 493.....	lxvii, 742	
Harkreader v. Clayton, 56 Mississippi, 283.....	3-1, 369	
Harlan, Estate of, 24 California, 123.....	lxxv, 68	
Harlan v. Bernie & Mayer, 23 Arkansas, 217.....	lxvi, 423	
Harlan v. Brown, 2 Gill, 478.....	xii, 436	
Harlan v. Harlan, 15 Penn. State, 807.....	lii, 612	
Harlan v. Peck, 23 California, 515.....	xvi, 653	
Harlan v. Read, 3 Ohio, 285.....	xvii, 594	
Harle v. McCoy, 7 J. J. Marshall, 318.....	xxiii, 407	
Harley v. Hales, 86 Indiana, 196.....	4-4, 286	
Harlow v. Drew, 21 Maine, 499.....	xxxviii, 276	
Harlow v. Wiggins, 21 Maine, 499.....	xxxviii, 276	
Harlow v. St. Louis M. L. I. Co., 84 Minn. 425.....	2-3, 258	
Harman v. Gertman, Harper's Law, 430.....	xviii, 656	
Harman v. Kelley, 14 Ohio, 503.....	xiv, 523	
Harman v. Sanderson, 6 Smedes & M. 41.....	xiv, 273	
Harman v. Chicago, 110 Illinois, 400.....	5-1, 698	
Harman v. Hale, 1 Wash. 423.....	3-4, 616	
Harmon v. Harmon, 61 Maine, 227.....	1-4, 556	
Harmon v. James, 7 Smedes & M. 111.....	xiv, 296	
Harmon v. Omaha, 17 Nebraska, 543.....	5-3, 420	
Harmon v. Salmon Falls Mfg. Co., 25 Me. 447.....	lviii, 712	
Harmony v. Bingham, 12 N. Y. (2 Kernan), 96.....	lxii, 142	
Harned v. Churchman, 4 Louisiana An. 219.....	1, 573	
Harnes v. Dipple, 31 Ohio St. 73.....	2-7, 696	
Harney v. Dutcher, 15 Missouri, 62.....	iv, 121	
Harney v. Owen, 4 Blackford, 337.....	xxx, 623	
Harney ada. Commonwealth, 2 Oushting, 922.....	lxviii, 679	
Harpending v. Haight, 39 California, 129.....	2, 423	
Harper v. Archer, 4 Smedes & M. 99.....	lxiii, 473	
Harper v. Baker, 3 T. B. Monroe, 423.....	xvi, 112	
Harper v. Bibb, 24 Mississippi, 673.....	lxix, 397	
Harper v. Elean, 3 Watts, 471.....	lxvii, 367	
Harper v. Orata, 26 Ohio St. 238.....	2-3, 598	
Harper v. Indianapolis & St. L. R. R. Co., 47 Mo- court, 567.....	4, 263	
Harper v. Little, 2 Greenleaf, 14.....	xi, 26	
Harper ada. State, 25 Ohio St. 78.....	2-3, 598	
Harper ada. State, 6 Ohio State, 607.....	lxvii, 263	
Harrai v. Harrai, 26 N. J. Eq. 129 (12 Stew.) 279.....	5-1, 17	
Harrai v. Levery, 50 Connecticut, 46.....	4-7, 608	
Harrott v. Harrott, 7 New Hampshire, 196.....	lxvi, 730	
Harrai v. State, 39 Mississippi, 702.....	lxix, 96	
Harrell v. Hill, 19 Arkansas, 103.....	lxviii, 202	
Harrell v. Miller, 26 Mississippi, 700.....	lxviii, 154	
Harrigan v. Connecticut R. L. Co., 129 Mass. 380.....	3-7, 397	
Harriman ada. State, 75 Maine, 502.....	4-6, 623	
Harrimon v. First Bryan Bap. Church, 63 Ga. 186.....	3-4, 117	
Harrington v. Comm'rs, 23 Pickering, 263.....	xxviii, 741	
Harrington v. Edwards, 17 Wisconsin, 598.....	lxix, 768	
Harrington v. Fuller, 18 Maine, 277.....	lxix, 719	

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports

- Hays v. Paul, 51 Penn. State, 134.....lxviii, 569
 Hays ad. State, 50 Missouri, 34.....11, 402
 Hays v. Wood, 4 Randolph, 273.....xv, 754
 Haythorn v. Rushforth, 4 Harrison (N. J.), 160.....xxviii, 540
 Hayward v. Barker, 22 Vermont, 629.....36, 703
 Hayward v. Grant, 13 Minnesota, 165.....xviii, 228
 Hayward v. Howe, 12 Gray, 49.....lxix, 734
 Hayward v. Leonard, 7 Pickering, 181.....xix, 269
 Hayward v. Middleton, 3 McCord, 131.....xv, 615
 Hayward v. Miller, 94 Illinois, 349.....34, 239
 Hayward v. National Ins. Co., 53 Missouri, 181.....14, 400
 Hayward v. Sedgley, 14 Maine, 439.....xxxi, 64
 Hayworth v. Worthington, 5 Blackford, 361.....xxv, 126
 Hazard v. Caswell, 33 New York, 359.....45, 198
 Hazard v. Day, 14 Allen, 487.....xviii, 730
 Hazard v. Israel, 1 Binney, 490.....11, 438
 Hazard ad. State, 2 Rhode Island, 474.....1x, 96
 Hazeltine v. Case, 46 Wisconsin, 391.....33, 715
 Hazeltine v. Edmand, 35 Kansas, 203.....57, 187
 Hazleton Coal Co. v. Ryerson, 1 Spencer, 139.....xl, 317
 Hazleton v. Putnam, 3 Pinney, 107 (3 Chand. 117).....lv, 158
 Hazleton v. Week, 42 Wisconsin, 661.....35, 736
 Hazlett v. Sinclair, 76 Indiana, 488.....40, 254
 Hazard v. Shelton, 15 Alabama, 63.....xlviii, 129
 Head v. Gervais, Walker, 431.....xii, 577
 Head v. Hughes, 1 A. K. Marshall, 372.....x, 743
 Headrick ad. State, 3 Jones' Law, 375.....lxvii, 249
 Heald v. Davis, 11 Cushing, 318.....lix, 147
 Heald v. Sargent, 15 Vermont, 506.....xl, 694
 Healey v. Gray, 63 Maine, 489.....28, 80
 Healey v. Toppan, 45 New Hampshire, 243.....lxixvi, 159
 Healey, In re, 53 Vermont, 694.....38, 713
 Health Dep't of N. Y. v. Purdon, 99 N. Y. 237.....59, 23
 Healy v. Bateman, 2 Rhode Island, 454.....1x, 94
 Healy v. Rowan, 5 Gratian, 414.....lii, 94
 Heard v. Dubuque C. Bank, 3 Nebraska, 10.....30, 811
 Heard v. Eldridge, 109 Massachusetts, 238.....13, 687
 Heard v. Fairbanks, 5 Metcalf, 111.....xxviii, 394
 Heard v. Horton, 1 Denio, 165.....xliii, 659
 Heard v. Lodge, 30 Pickering, 53.....xxvii, 197
 Heard v. Pierce, 8 Cushing, 336.....liv, 757
 Hearn v. Cannon, 4 Hunt, 30.....15, 701
 Hearn v. Kiehl, 38 Penn. State, 147.....lxxx, 472
 Hearn ad. State, 12 Missouri, 365.....11, 167
 Heaton v. Cincinnati & F. W. R. R., 16 Ind. 273.....lxix, 430
 Heath v. Bates, 49 Connecticut, 343.....44, 234
 Heath v. Bishop, 4 Richardson's Eq. 48.....lv, 654
 Heath v. Frackleton, 30 Wisconsin, 330.....xci, 405
 Heath v. Goalin, 80 Missouri, 310.....50, 505
 Heath v. Page, 63 Pennsylvania State, 106.....3, 533
 Heath v. Portsmouth Sav. Bank, 46 New Hampshire, 78.....lxixviii, 194
 Heath ad. State, 30 Louisiana An. 173.....xvi, 390
 Heath v. Wells, 8 Pickering, 139.....xvi, 383
 Heath v. Williams, 25 Maine, 309.....xliii, 265
 Heaton v. Angier, 7 New Hampshire, 307.....xxviii, 353
 Heaton v. Hodges, 14 Maine, 66.....xxx, 731
 Heaverin v. Donnell, 7 Smedes & M. 244.....xliv, 302
 Hebrew Cong. ad. State, 31 Louisiana An. 205.....33, 217
 Hebron G. R. Co. v. Harvey, 90 Indiana, 123.....46, 199
 Heburn v. Warner, 112 Massachusetts, 371.....17, 86
 Hecht v. Dettman, 56 Iowa, 673.....41, 131
 Hecht v. Spears, 27 Arkansas, 239.....11, 784
 Heck v. Shamer, 4 Serg. & R. 249.....viii, 700
 Heckle v. Lurvey, 101 Massachusetts, 344.....3, 365
 Hector v. State, 3 Missouri, 165.....xvii, 454
 Hedden v. Griffin, 136 Massachusetts, 238.....49, 25
 Hedden v. Roberts, 134 Massachusetts, 33.....45, 276
 Hedderich v. Smith, 103 Indiana, 303.....53, 509
 Hedderich v. State, 101 Indiana, 564.....51, 785
 Hedenberg v. Hedenberg, 46 Connecticut, 30.....33, 19
 Hedge v. Clapp, 23 Connecticut, 262.....lviii, 424
 Hedge v. Drew, 13 Pickering, 141.....xvii, 414
 Hedges v. Price, 2 West Virginia, 192.....xciv, 507
 Hedges v. Wallace, 2 Bush, 442.....xvii, 497
 Heebner v. Eagle Insurance Co., 10 Gray, 131.....lxix, 308
 Heeg v. Licht, 80 New York, 579.....36, 654
 Heenan v. Nash, 8 Minnesota, 407.....lxixiii, 790
 Heeney v. Sprague, 11 Rhode Island, 456.....23, 508
 Heeter v. Glasgow, 79 Pennsylvania State, 79.....21, 46
 Hefferlin v. Sinsinderfer, 3 Kansas, 401.....lxixv, 698
 Hefferman v. Burt, 7 Iowa, 330.....lxix, 446
 Hefferman v. Porter, 6 Cold. 391.....xviii, 459
 Hefflin v. McMinn, 3 Stewart, 492.....xx, 58
 Heffron v. Jayne, 39 Indiana, 463.....13, 281
 Hefflin v. Bingham, 56 Alabama, 566.....28, 778
 Heffner v. Dawson, 63 Illinois, 403.....14, 123
 Heffner v. Vandolah, 57 Illinois, 390.....11, 39
 Heffner v. Vandolah, 63 Illinois, 483.....14, 106
 Hegeman v. Western R. R., 13 N. Y. 2.....lxiv, 317
 Hegerich v. Kiddle, 99 New York, 358.....52, 25
 Heichew v. Hamilton, 4 G. Greene, 317.....lxii, 122
 Heidelberg v. Lynn, 5 Wharton, 430.....xxiv, 568
 Heighe v. Little, 63 Maryland, 301.....52, 510
 Heil v. Glandtling, 49 Penn. State, 463.....lxixii, 537
 Hei & Lauer's Appeal, 40 Penn. State, 463.....lxix, 600
 Heilig v. Lemly, 74 North Carolina, 360.....21, 499
 Heilner v. Union County, 7 Oregon, 83.....33, 703
 Helm v. First National Bank, 43 Indiana, 167.....13, 308
 Helman v. Phoenix M. L. Ins. Co., 17 Minn. 153.....10, 154
 Helm v. Davidson, 96 New York, 175.....48, 613
 Helmbuckle v. Zugbaum, 5 Montana, 344.....51, 59
 Helmsman v. Newman, 55 Georgia, 363.....21, 279
 Helmsman's Appeal, 96 Pennsylvania State, 113.....42, 533
 Helm v. Carron, 11 Smedes & M. 361.....xlix, 65
 Helm v. McOughan, 23 Mississippi, 17.....lxvi, 598
 Helmsell v. Farmers' and Mechanics' Nat. Bank,
 69 Pennsylvania State, 155.....33, 746
 Helmsell v. Mayor etc. of Baltimore, 66 Md. 126.....57, 308
 Helmsrodt v. Hackett, 34 Michigan, 263.....27, 529
 Helms v. Markland, 2 Rawle, 274.....xvi, 446
 Helster v. Fortner, 3 Binney, 40.....lv, 417
 Helzer v. Helzer, 71 Indiana, 526.....30, 308
 Heland v. City of Lowell, 3 Allen, 407.....lxixi, 679
 Helbing v. Sves Ins. Co., 54 California, 186.....35, 73
 Heldt v. State, 30 Nebraska, 482.....57, 835
 Helfenstein's Estate, 77 Pennsylvania State, 228.....18, 449
 Helfrich v. Commonwealth, 33 Penn. State, 68.....lxix, 579
 Helfrid ad. State, 2 Nott & McCord, 233.....x, 591
 Hellams v. Abercrombie, 15 South Carolina, 110.....40, 694
 Hellen v. Crawford, 44 Penn. State, 106.....lxixiv, 421
 Heller v. Sedalia, 53 Missouri, 159.....14, 444
 Helm v. Boome, 6 J. J. Marshall, 381.....xvii, 78
 Helm v. First Nat. Bank, 43 Indiana, 167.....13, 308
 Helm v. Van Vleet, 1 Blackford, 342.....xii, 248
 Helm v. Wilson, 4 Missouri, 41.....lxviii, 336
 Helme v. Philadelphia Life Ins. Co., 61 Pennsylv-
 vania State, 107.....c, 621
 Helmetag v. Miller, 76 Alabama, 183.....52, 216
 Helms v. Franciscus, 2 Bland's Ch. 544.....xx, 408
 Helms v. Wayne Agricultural Co., 73 Indiana, 325.....38, 147
 Helphensine v. Vincennes Nat. Bk., 66 Ind. 822.....33, 86
 Helwig v. Jordan, 53 Indiana, 21.....21, 129
 Hemingway v. Coleman, 49 Connecticut, 290.....44, 243
 Hemingway v. Soales, 42 Mississippi, 1.....2, 286
 Hemingway v. Soales, 42 Mississippi, 1.....xvii, 428
 Hemmeker v. State, 12 Missouri, 453.....11, 173
 Hemmenway v. Stone, 7 Massachusetts, 58.....v, 37
 Hemmenway v. Wheeler, 14 Pickering, 408.....xv, 411
 Hemmich v. High, 2 Watts, 159.....lxvii, 296

Roman letters [xlx] refer to volumes of American Dec

Hatch v. Douglas, 48 Connecticut, 116.....	40, 154	I
Hatch v. Dwight, 17 Massachusetts, 389.....	ix, 145	I
Hatch v. Hatch, 9 Massachusetts, 307.....	vi, 67	I
Hatch v. Hyde, 14 Vermont, 25.....	xxxix, 303	E
Hatch v. Mutual L. Ins. Co., 120 Mass. 580.....	xi, 541	E
Hatch v. Potter, 3 Gilman, 728.....	xliii, 88	II
Hatch v. Spofford, 22 Connecticut, 483.....	lviii, 433	II
Hatch v. State, 8 Texas Ct. App. 416.....	34, 751	H
Hatch v. Straight, 3 Connecticut, 31.....	viii, 123	H
Hatch v. Tucker, 13 Rhode Island, 501.....	34, 707	H
Hatchett v. St'r Compromise, 12 La. An. 783.....	lxviii, 723	Ha
Hatfield v. St. Paul & D. R. R. Co., 33 Minn. 130.53, 14		Ha
Hathaway v. Bennett, 10 N. Y. (6 Selden) 108.....	lxi, 739	Ha
Hathaway v. Burr, 31 Maine, 567.....	xxxviii, 273	Ha
Hathaway v. Brayman, 43 New York, 323.....	1, 524	Ha
Hathaway v. Johnson, 55 New York, 83.....	14, 186	Ha
Hathaway v. Michigan C. R. Co., 51 Mich. 393.....	47, 569	Ha
Hathaway v. State Ins. Co., 64 Iowa, 229.....	52, 438	Ha
Hathcock ada. State, 30 South Carolina, 412.....	47, 643	Ha
Hathorn v. King, 8 Massachusetts, 371.....	v, 106	Haw
Hathorn v. Stinson, 10 Maine, 234.....	xxv, 228	Haw
Hathorne v. Stinson, 12 Maine, 183.....	xxviii, 167	Haw
Hat Sweet M't Co. v. Reimohl, 103 N. Y. 187.....	55, 783	Haw
Hattaway ada. State, 3 Nott & McC. 112.....	x, 530	Haw
Hatter v. Greenlee, 1 Porter, 323.....	xxvi, 370	Haw
Hatton v. Robinson, 14 Pickering, 412.....	xxv, 415	Hay
Hatfield v. Gidden, 7 Watts, 182.....	xxxi, 760	Hay
Haughabough v. Donald, 3 Brevard, 97.....	v, 548	Hay
Haugh's Appeal, 103 Pennsylvania State, 43.....	48, 193	Hayde
Haughy v. Hart, 62 Iowa, 26.....	49, 138	Hayde
Haughy v. Strang, 2 Porter, 177.....	xxvii, 648	Hayde
Hann v. State, 13 Texas, 383.....	44, 706	Hayde
Hause v. Judson, 4 Dana, 7.....	xix, 377	Hayder
Hanser v. Tate, 25 North Carolina, 81.....	39, 689	Hayder
Hansman v. Nye, 63 Indiana, 435.....	36, 199	Hayden
Hause ada. State, 43 Indiana, 105.....	13, 384	Haydoc
Haven v. Brown, 7 Greenleaf, 421.....	xxii, 306	Hayes
Haven v. Foster, 9 Pickering, 113.....	xix, 363	Hayes
Haven v. Hobbs, 1 Vermont, 336.....	xviii, 678	Hayes
Haven v. Low, 2 New Hampshire, 13.....	ix, 36	Hayes
Haven v. New Hamp. Asylum, 13 N. H. 538. xxxviii, 612		Hayes
Haven v. Winnistimmet Co., 11 Allen, 377.....	lxxxvii, 723	Hayes
Havens v. Home Ins. Co., 111 Indiana, 90.....	66, 680	Hayes
Haverhill Bridge Prop. v. County Comm'rs, 103		Hayes
Massachusetts, 120.....	4, 518	Hayes
Haverhill L. Co. v. Prescott, 43 N. Hamp. 547.....	lxxx, 123	Hayes
Hawe v. State, 11 Nebraska, 537.....	38, 375	Hayes
Hawes ada. Commonwealth, 13 Bush, 697.....	36, 243	Haymond
Hawes v. Dunton, 1 Bailey's Law, 146.....	xix, 663	Hayner
Hawes v. Humphrey, 9 Pickering, 350.....	ix, 461	Hayner
Hawes v. Knowles, 114 Massachusetts, 513.....	19, 383	Haynes
Hawker v. Baltimore & O. R. R. Co., 15 West		Haynes
Virginia, 638.....	36, 636	Haynes
Hawkes v. Pike, 105 Massachusetts, 560.....	7, 554	Haynes
Hawthorn v. Thompson, 98 Mass. 77.....	xviii, 137	Haynes
Hawkins v. Ball's Administrator, 13 B. Mon. 315. lxviii, 755		Haynes
Hawkins v. Commonwealth, 14 B. Monroe, 366.....	lxi, 147	Haynes
Hawkins v. Garland, 76 Virginia, 142.....	44, 158	Haynes
Hawkins v. Governor, 1 Arkansas, 570.....	lxiii, 346	Haynes
Hawkins v. Great Western R. R. Co., 17 Mich-		Haynes
gan, 57.....	xxvii, 179	Haynes
Hawkins v. Hatton, 1 Nott & McC. 318.....	ix, 700	Haynes
Hawkins v. Hill, 15 California, 499.....	lxxvi, 499	Haynie
Hawkins v. Hoffman, 6 Hill (N. Y.), 586.....	xii, 767	Hays
Hawkins v. Johnson, 105 Indiana, 29.....	55, 169	Hays
Hawkins v. Mims, 36 Arkansas, 145.....	38, 30	Hays
Hawkins v. Nelson, 40 Alabama, 553.....	xxi, 493	Hays
Hawkins v. Pemberton, 51 New York, 196.....	10, 556	Hays
Hawkins v. Providence etc. R. R. Co., 119 Mass-		Hays
achusetts, 566.....	30, 333	Hays

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports

<i>Hersey v. Board of Supervisors of Milwaukee Co.</i> , 16 Wisconsin, 185.....lxvii, 713	<i>Hicks v. Goodie</i> , 12 Leigh, 479.....xxvii, 671
<i>Hersey v. Elliot</i> , 67 Maine, 326.....xl, 80	<i>Hicks v. Hotchkiss</i> , 7 Johns. Ch. 297.....xl, 479
<i>Hersey v. Venable</i> , 24 Maine, 9.....xli, 364	<i>Hicks v. Lovell</i> , 64 California, 14.....49, 671
<i>Hersh v. Ringwalt</i> , 3 Yeates, 508.....ii, 303	<i>Hicks v. Martin</i> , 9 Martin, 47.....xiii, 304
<i>Hersfield v. Clafin</i> , 25 Kansas, 168.....37, 237	<i>Hicks v. Parham</i> , 3 Haywood, 224.....lx, 743
<i>Hershey v. Clark</i> , 35 Arkansas, 17.....37, 1	<i>Hicks v. Pope</i> , 8 Louisiana, 554.....xxviii, 143
<i>Hershall v. Bushnell</i> , 37 Conn. 36.....9, 209	<i>Hicks v. Randolph</i> , 3 Bank. 352.....27, 709
<i>Hersom v. Henderson</i> , 21 New Hampshire, 234.....xlii, 185	<i>Hicks v. Skinner</i> , 71 N. C. 539.....17, 16
<i>Harvey v. Moseley</i> , 7 Gray, 479.....lxvi, 515	<i>Hicks ada. State</i> , 2 Blackford, 336.....xx, 113
<i>Hestonville Pass. R'y Co. v. Connell</i> , 86 Penn. St. 530.....32, 473	<i>Hicks ada. State</i> , 9 Yerges, 438.....xxx, 423
<i>Hess v. State</i> , 5 Ohio, 5.....xxii, 707	<i>Hilde & L. I. Co. ada. Commonwealth</i> , 113 Mas- sachusetts, 136.....17, 72
<i>Hess's Appeal</i> , 43 Penn. State, 73.....lxviii, 561	<i>Hidden v. Cozens</i> , 2 Rhode Island, 401.....lx, 93
<i>Hesseltine v. Stockwell</i> , 80 Maine, 237.....i, 627	<i>Hieatt v. Morris</i> , 10 Ohio St. 523.....lxviii, 285
<i>Hester v. Wilkinson</i> , 6 Humphreys, 215.....xlv, 303	<i>Hiesburgh, Town of, v. Sumner</i> , 9 Vermont, 23.....xxxi, 589
<i>Heth v. Baum</i> , 13 Ireland's Law, 304.....lvii, 563	<i>Hier v. Abrahams</i> , 83 New York, 519.....37, 303
<i>Heth v. Fond du Lac</i> , 63 Wisconsin, 228.....53, 279	<i>Hiestand v. Kuns</i> , 8 Blackford, 345.....xvii, 421
<i>Heth v. Richmond etc. R. R. Co.</i> , 4 Gratian, 493.....i, 88	<i>Hiestler v. Green</i> , 48 Penn. State, 96.....lxvii, 500
<i>Heth v. Woodbridge</i> , 6 Randolph, 606.....xviii, 761	<i>Higbee v. Rice</i> , 5 Massachusetts, 344.....lv, 63
<i>Hetherington v. Sterry</i> , 28 Kansas, 426.....42, 169	<i>Higdon's Will</i> , 6 J. J. Marshall, 444.....xxii, 84
<i>Hettick v. Wilson</i> , 13 Ohio State, 138.....lxix, 237	<i>Higginbotham v. Cornwell</i> , 8 Gratian, 63.....lvii, 129
<i>Hewartsmaette v. Morris</i> , 101 New York, 63.....54, 657	<i>Higginbottom v. Short</i> , 25 Mississippi, 160.....lvii, 159
<i>Hewitt v. State</i> , 6 Harris & J. 95.....xiv, 259	<i>Higgins v. Brown</i> , 20 Maine, 323.....xxvii, 54
<i>Hewes v. Jordan</i> , 29 Maryland, 472.....17, 573	<i>Higgins v. Carlton</i> , 23 Maryland, 115.....xxii, 606
<i>Hewitt v. Buck</i> , 17 Maine, 147.....xxiv, 243	<i>Higgins v. Dewey</i> , 107 Massachusetts, 424.....9, 63
<i>Hewison v. City of New Haven</i> , 24 Conn. 136.....xvi, 718	<i>Higgins v. Emmons</i> , 5 Connecticut, 76.....xiii, 41
<i>Hewison v. New Haven</i> , 27 Connecticut, 475.....9, 342	<i>Higgins v. Johnson</i> , 14 Arkansas, 209.....lx, 544
<i>Hewitt v. Anderson</i> , 56 California, 476.....39, 65	<i>Higgins v. Johnson's Heirs</i> , 20 Texas, 399.....lxz, 394
<i>Hewitt v. Pioneer Press Co.</i> , 23 Minn. 178.....23, 680	<i>Higgins v. Kusterer</i> , 41 Michigan, 518.....32, 199
<i>Hewitt v. Watertown F. I. Co.</i> , 55 Iowa, 228.....39, 174	<i>Higgins v. McCabe</i> , 126 Massachusetts, 15.....39, 642
<i>Hexter v. Webb</i> , 101 New York, 277.....54, 703	<i>Higgins v. Reed</i> , 8 Iowa, 298.....lxvii, 305
<i>Hey v. Commonwealth</i> , 22 Grant. 946.....34, 799	<i>Higgins v. Watervliet T. Co.</i> , 46 New York, 23.....7, 209
<i>Hey v. Philadelphia</i> , 51 Pennsylvania State, 44.....22, 733	<i>High v. Neima</i> , 14 Alabama, 260.....lxviii, 109
<i>Heyder v. Excelsior R. L. Assn.</i> , 42 N. J. Eq. 403, 59, 49	<i>Highberger v. Stiffler</i> , 21 Maryland, 336.....lxviii, 589
<i>Heyer v. Lee</i> , 40 Michigan, 233.....29, 537	<i>Highland T. Co. v. McKean</i> , 10 Johnson, 154.....vi, 242
<i>Heyer v. Pruyn</i> , 7 Paige, 466.....xxiv, 355	<i>High v. Bacon</i> , 126 Massachusetts, 10.....39, 639
<i>Heyman v. Corvill</i> , 44 Michigan, 228.....38, 273	<i>High v. Robbins</i> , 26 Missouri, 163.....lxvii, 113
<i>Heyneman v. Dannenberg</i> , 6 California, 376.....lxv, 519	<i>High v. United States</i> , Morris, 407.....xliii, 111
<i>Heyward ada. State</i> , 2 Nott & McO. 312.....x, 694	<i>Hightower v. Slaton</i> , 54 Georgia, 108.....21, 273
<i>Heywood v. Heywood</i> , 43 Maine, 229.....lxvi, 277	<i>Hightower v. Thornton</i> , 8 Georgia, 484.....xlii, 413
<i>Heywood v. Ferrin</i> , 10 Pickering, 228.....xx, 518	<i>Higler v. People</i> , 44 Michigan, 269.....38, 267
<i>Heywood v. Tilton</i> , 76 Maine, 225.....46, 373	<i>Higley v. First Nat. Bank</i> , 26 Ohio St. 78.....29, 739
<i>Hibbs v. Williams</i> , 73 Missouri, 214.....37, 438	<i>Higley v. Gilmer</i> , 3 Montana, 90.....35, 489
<i>Hibbard v. Clark</i> , 56 New Hampshire, 155.....22, 442	<i>Higley v. Smith</i> , 1 D. Chipman, 400.....xli, 701
<i>Hibbard v. Eastman</i> , 47 New Hampshire, 507.....xxii, 467	<i>Hillands v. Commonwealth</i> , 111 Penn. St. 1.....56, 235
<i>Hibbard v. Russell</i> , 16 New Hampshire, 410.....xli, 733	<i>Hilborn v. Bucknam</i> , 78 Maine, 432.....57, 616
<i>Hibbard v. Smith</i> , 67 California, 547.....56, 726	<i>Hilbourne v. County of Suffolk</i> , 120 Mass. 285.....21, 523
<i>Hibbitts v. Jack</i> , 97 Indiana, 870.....49, 478	<i>Hilderbrand v. People</i> , 56 New York, 294.....15, 426
<i>Hibernia Bank ada. People</i> , 51 California, 243.....21, 704	<i>Hildreth v. Griffin</i> , 2 Speers' Law, 116.....xlii, 269
<i>Hibernia Nat. Bank v. Lacombe</i> , 54 N. Y. 267.....38, 518	<i>Hildreth v. McIntire</i> , 1 J. J. Marshall, 228.....xix, 61
<i>Hibernia R. R. Co. v. De Camp</i> , 47 N. J. L. 518.....54, 197	<i>Hildreth v. Tomlinson</i> , 2 G. Greene, 390.....i, 519
<i>Hibernia T. Corp. v. Henderson</i> , 8 Serg. & R. 219.....xi, 593	<i>Hildreth v. Troy</i> , 101 New York, 234.....54, 606
<i>Hilborn v. Fletcher</i> , 66 Maine, 209.....22, 563	<i>Hildreth ada. State</i> , 9 Ireland's Law, 439.....ii, 264
<i>Hickerson v. Benson</i> , 8 Missouri, 8.....xi, 115	<i>Hildreth ada. State</i> , 9 Ireland's Law, 440.....ii, 269
<i>Hickerson v. Benson</i> , 8 Missouri, 11.....xi, 118	<i>Hileman v. Bouslaugh</i> , 13 Penn. State, 344.....xlii, 674
<i>Hickey v. Hinesdale</i> , 8 Michigan, 267.....lxvii, 450	<i>Hiles v. Hanover F. I. Co.</i> , 65 Wisconsin, 656.....56, 627
<i>Hickey v. Morrell</i> , 103 New York, 484.....55, 824	<i>Hill v. Baker</i> , 23 Iowa, 302.....7, 129
<i>Hickey v. Trafts</i> , 89 New York, 204.....52, 19	<i>Hill v. Bell</i> , Phill. Law, 123.....xxii, 583
<i>Hickling ada. State</i> , 12 Vroom, 208.....32, 198	<i>Hill v. Bishop</i> , 25 Illinois, 349.....lxix, 289
<i>Hickman v. Caldwell</i> , 4 Rawle, 376.....xxvii, 274	<i>Hill v. Board of Aldermen</i> , 73 North Carolina, 65, 21, 481
<i>Hickman v. Cantrell</i> , 9 Yerges, 172.....xxx, 326	<i>Hill v. Boston</i> , 123 Massachusetts, 244.....23, 329
<i>Hickman v. Griffin</i> , 6 Missouri, 37.....xxiv, 124	<i>Hill v. Caverly</i> , 7 New Hampshire, 215.....xxvi, 739
<i>Hickman v. Grimes</i> , 1 A. K. Marshall, 86.....x, 714	<i>Hill v. Crosby</i> , 2 Pickering, 496.....xlii, 446
<i>Hickok v. Coates</i> , 2 Wendell, 419.....xx, 632	<i>Hill v. Ely</i> , 8 Serg. & R. 363.....ix, 376
<i>Hickok v. Hine</i> , 23 Ohio St. 523.....13, 265	<i>Hill v. Felton</i> , 47 Georgia, 456.....15, 643
<i>Hickox v. City of Cleveland</i> , 8 Ohio, 643.....xxii, 730	<i>Hill v. Freeman</i> , 73 Alabama, 200.....49, 46
<i>Hickox v. Nungatuck R. R. Co.</i> , 21 Conn. 261.....lxviii, 143	<i>Hill v. Harris</i> , 10 B. Monroe, 120.....i, 542
<i>Hicks v. Coleman</i> , 25 California, 128.....lxvii, 103	<i>Hill v. Higdon</i> , 5 Ohio State, 243.....lxvii, 299
<i>Hicks v. Farmers' Ins. Co.</i> , 71 Iowa, 119.....60, 781	<i>Hill v. Hill</i> , Coxe, 261.....i, 206
	<i>Hill v. Hill</i> , 49 Maryland, 469.....32, 271

Hem—Her

TABLE OF

Roman letters [xlix] refer to volumes of American Dec.

Hemphill v. City of Boston, 8 Cushing, 196.....	lv, 749	I
Hemphill v. Hemphill, 2 Devereux's Law, 291.....	xxi, 331	E
Hempstead v. Dickson, 20 Illinois, 193.....	lxxi, 260	E
Hempstead v. Johnston, 18 Arkansas, 123.....	lxv, 458	H
Hempstead v. Watkins, 6 Arkansas, 317.....	xlii, 696	H
Hempstead v. Weed, 20 Johnson, 64.....	xi, 244	H
Henbeck v. State, 13 Alabama, 523.....	75, 650	H
Henck v. Todhunter, 7 Harris & J. 275.....	xvi, 300	H
Hendelitte v. Thurman, 23 Gratt. 466.....	12, 696	H
Hendershott v. Ottumwa, 46 Iowa, 638.....	26, 182	H
Henderson v. Blackburn, 104 Illinois, 327.....	44, 780	H
Henderson v. Bondurant, 39 Missouri, 369.....	xxiii, 281	
Henderson v. Brown, 1 Caines, 92.....	ii, 164	He
Henderson v. Cardwell, 9 Baxter, 389.....	40, 93	He
Henderson v. Commonwealth, 8 Grattan, 708.....	lv, 160	He
Henderson v. Green, 34 Iowa, 437.....	ii, 149	He
Henderson v. Hackney, 23 Georgia, 363.....	lxviii, 539	He
Henderson v. Haley, Use of Woodlief, 11 S. & M. 9.....	xlix, 41	He
Henderson v. Jones, 10 Serg. & R. 322.....	xiii, 676	He
Henderson v. Lewis, 9 Serg. & R. 379.....	xi, 733	He
Henderson v. Lynd, 2 Martin, 57.....	v, 726	Hep
Henderson v. Martin, 19 Arkansas, 477.....	lxx, 606	Hep
Henderson v. Mayhew, 2 Gill, 393.....	xii, 434	Hep
Henderson v. McDuffee, 5 New Hampshire, 38.....	xx, 557	Hep
Henderson v. Mitchell, 1 Bailey's Eq. 113.....	xxi, 896	Hep
Henderson v. Overton, 2 Yeager, 394.....	xiv, 462	Hep
Henderson v. Ownby, 26 Texas, 647.....	42, 661	Hep
Henderson v. Palmer, 71 Illinois, 579.....	22, 117	St
Henderson v. Plekati, 4 T. B. Monroe, 54.....	xvi, 130	Hepp
Henderson v. Pitman, 20 Georgia, 738.....	lxv, 649	He
Henderson v. San A. & M. G. R. R., 17 Tex. 860.....	lxvii, 675	Herba
Henderson v. Simmons, 23 Alabama, 291.....	lxx, 560	Herb
Henderson v. Smith, 26 West Virginia, 822.....	53, 129	Herb
Henderson v. Stanford, 105 Mass. 804.....	7, 581	Herb
Henderson v. State, 70 Alabama, 23.....	45, 73	Eq.
Henderson v. Thornton, 27 Mississippi, 448.....	lxv, 70	Hardi
Henderson v. Waggoner, 2 Lea, 123.....	31, 661	Herkin
Henderson v. Western M. & F. Ins. Co., 10 Rob-		Herkin
inson (La.), 164.....	xliii, 176	Herma
Henderson & N. R. R. v. Dickerson, 17 B. Mon. 173.....	lxvi, 148	Herma
Hendrick v. Davis, 27 Georgia, 167.....	lxviii, 736	Herma
Hendricks v. Comstock, 12 Indiana, 238.....	lxiv, 205	Herma
Hendricks v. Judah, 2 Caines, 25.....	ii, 213	Herma
Hendricks v. Mount, 2 Southard, 738.....	viii, 623	Herma
Hendricks v. Robinson, 56 Mississippi, 694.....	31, 322	Herma
Hendricks v. Spring Valley M. and Lx. Co., 28		Herma
California, 190.....	41, 227	Her v. H
Hendricks v. Stark, 27 New York, 104.....	xxiii, 549	Herriek v.
Hendrickson v. Cardwell, 9 Baxter, 389.....	40, 93	Herriek v.
Hendrickson v. People, 10 N. Y. (6 Selden), 12.....	lxi, 721	Minne
Hendrickson v. St. L. & I. M. R. Co., 34 Mo. 126.....	lxvii, 76	Herriek v.
Hendrie v. Berkowitz, 27 California, 113.....	xxix, 251	Herriek v.
Hendrix v. McBeth, 61 Indiana, 473.....	28, 690	Herriek v.
Hendrix v. Seaborn, 25 South Carolina, 481.....	66, 620	Herriek v.
Hendy v. Dinkhoff, 27 California, 3.....	46, 107	Herriman v.
Henck v. Smith, 10 Oregon, 249.....	45, 143	Herrin v. E
Henespin v. Gethsemane Brotherhood, 27 Min-		Herring v. C
nesota, 460.....	38, 298	Herring v. E
Heney v. Dennis, 23 Indiana, 423.....	47, 378	Herring v. S
Henkel v. Detroit, 49 Michigan, 249.....	43, 464	Herring v. W
Henly v. Franklin, 3 Cold. 472.....	xxi, 296	Herring v. W
Henly v. Henning, 7 Baxter, 524.....	32, 568	Herring v. W
Hennen v. Gilman, 20 Louisiana An. 241.....	lxvi, 396	Herrington v.
Hennequin v. Clews, 77 New York, 427.....	33, 641	Herrman v. A
Hennessey v. Old C. & N. R. Co., 101 Massachu-		Herrman v. A
setts, 540.....	c, 127	Harrod v. Bla
Hennessey v. State, 23 Ohio St. 339.....	13, 253	Herron v. Ke
Hennessey v. Western Bank, 6 Watts & Berg. 300.....	xi, 560	Herron v. Ma
Hennessey v. Wheeler, 69 New York, 271.....	25, 188	Herron v. Peo
Henning v. State, 106 Indiana, 386.....	54, 756	Heney v. Ben

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports

Hodges v. New Eng. Screw Co., 1 R. I. 312.....	III, 694	Holcomb v. Winchester, 22 Connecticut, 467.....	52, 698
Hodges v. Parker, 17 Vermont, 242.....	xliv, 331	Holcomb v. Wyckoff, 25 New Jersey, 25.....	19, 215
Hodge v. Powell, 96 North Carolina, 64.....	60, 401	Holden v. Crawford, 1 Alaska, 290.....	xv, 709
Hodges v. Williams, 96 North Carolina, 231.....	59, 242	Holden v. Fitchburg R. Co., 129 Mass. 268.....	37, 343
Hodgin v. Toole, 70 Iowa, 21.....	59, 425	Holden v. James, 11 Massachusetts, 395.....	vi, 174
Hodgkins ada. State, 19 Maine, 155.....	xxvi, 742	Holden v. Peace, 4 Iredell's Eq. 223.....	xiv, 514
Hodgson v. Barrett, 33 Ohio St. 63.....	31, 627	Holden v. Putnam F. Ins. Co., 46 New York, 1... 7, 237	
Hodgson v. Lovell, 25 Iowa, 97.....	xv, 775	Holden v. Shattuck, 34 Vermont, 336.....	lxxx, 694
Hodgson v. Payson, 3 Harris & J. 339.....	v, 439	Holder v. Lafayette etc. R. R. Co., 71 Ill. 104.....	32, 89
Hodsdon v. Guardian Life Ins. Co., 97 Mass. 144, xciii, 73		Holderbaugh v. Turpin, 75 Indiana, 84.....	39, 194
Hodsdon v. Wilkins, 7 Greenleaf, 113.....	xx, 347	Holdridge v. Allin, 2 Root, 139.....	i, 63
Hoe v. Sanborn, 21 New York, 552.....	lxxxviii, 163	Holsman v. Fort, 3 Strobhart's Eq. 66.....	ii, 665
Hoeger v. Chicago, M. & St. P. R'y Co., 63 Wisconsin, 100.....	53, 271	Holford v. Alexander, 12 Alabama, 290.....	xlvi, 253
Hohne v. Truglio, 1 Colorado, 161.....	xc, 703	Holladay v. Marsh, 3 Wendell, 142.....	xx, 678
Hoen v. Simmons, 1 California, 119.....	III, 291	Holland v. Barnes, 53 Alabama, 83.....	25, 595
Hoer v. Furman, 1 Penn. State, 296.....	xliv, 129	Holland v. Beard, 59 Mississippi, 161.....	42, 360
Hofer v. Hodge, 52 Michigan, 372.....	50, 256	Holland v. Hatch, 11 Indiana, 497.....	lxxi, 363
Hoff v. Baldwin, 12 Martin, 692.....	xiii, 385	Holland v. Mayor etc. Baltimore, 11 Md. 126.....	lxix, 156
Hoffar v. Dement, 6 Gill, 132.....	xvii, 626	Holland v. State, 83 North Carolina, 634.....	35, 587
Hoffbauer v. Delhi & N. W. R. Co., 53 Iowa, 342.....	53, 278	Holland v. Wheaton, 6 Louisiana, 443.....	xxvi, 451
Hoffman v. Atina Ins. Co., 22 N. Y. 406.....	lxxxviii, 337	Hollen v. Davis, 59 Iowa, 444.....	44, 698
Hoffman v. Anthony, 6 Rhode Island, 262.....	lxxv, 701	Hollenbeck v. Winnebago Co., 96 Illinois, 148.....	35, 151
Hoffman v. Armstrong, 48 New York, 201.....	8, 537	Holler v. State, 57 Indiana, 57.....	10, 74
Hoffman v. Bartholmeas, 63 Georgia, 759.....	36, 129	Holley v. Adams, 16 Vermont, 206.....	xiii, 508
Hoffman v. Chamberlain, 40 N. J. Eq. (13 Stew.) 663.....	53, 783	Holley v. Hawley, 39 Vermont, 525.....	xciv, 359
Hoffman v. Hoffman, 46 New York, 30.....	7, 399	Holley v. Holley, Little's Sel. Ca. 506.....	xii, 242
Hoffman v. Kuhn, 57 Mississippi, 746.....	34, 491	Holley v. Mix, 3 Wendell, 260.....	xx, 708
Hoffman v. Mackall, 5 Ohio State, 124.....	lxiv, 637	Holley v. Young, 68 Maine, 215.....	28, 40
Hoffman v. Neuhaus, 30 Texas, 633.....	xxviii, 492	Hollida v. Hunt, 70 Illinois, 109.....	32, 63
Hoffman v. New York C. & H. R. R. Co., 87 New York, 25.....	41, 337	Hollida v. Shoop, 4 Maryland, 466.....	lix, 86
Hoffman v. Noble, 8 Metcalf, 68.....	xxxix, 711	Holliday v. Rheem, 18 Penn. State, 468.....	lvii, 636
Hoffman v. People, 116 Illinois, 587.....	56, 793	Holliday v. Ward, 19 Penn. State, 485.....	lvii, 671
Hoffman v. Strohecker, 7 Watts, 86.....	xxxii, 740	Holliman v. Carroll's Adm'r, 27 Texas, 23.....	lxxxiv, 606
Hoffman S. O. Co. v. Cumberland C. & I. Co., 16 Maryland, 466.....	lxxvii, 311	Hollingsworth v. Germania Ins. Co., 45 Ga. 294.....	12, 579
Hoffman v. Union Ferry Co., 47 New York, 176... 7, 436		Hollingsworth v. McDonald, 2 Harris & J. 230.....	iii, 548
Hofmire v. Hofmire, 7 Paige, 60.....	xxiii, 611	Hollingsworth v. Napier, 3 Calnes, 123.....	ii, 298
Hogan v. Curtin, 28 New York, 162.....	42, 244	Hollingsworth v. Shaw, 19 Ohio St. 430.....	9, 411
Hogan v. Grosvenor, 10 Metcalf, 54.....	xliii, 414	Hollingsworth v. Swedenborg, 49 Indiana, 378.....	19, 687
Hogan v. Jaques, 19 N. J. Eq. 123.....	xxvii, 644	Hollis v. Burns, 100 Pennsylvania St. 206.....	45, 379
Hogan v. Mannors, 23 Kansas, 551.....	33, 199	Hollis v. Francota, 5 Texas, 126.....	ii, 798
Hogan v. Reynolds, 21 Alabama, 56.....	lvi, 236	Hollis v. Meux, 69 California, 635.....	58, 574
Hogan v. State, 30 Wisconsin, 428.....	11, 575	Hollis v. Staley, 3 Bart. 167.....	27, 739
Hogan v. Stone, 1 Alabama, 496.....	xxxv, 39	Hollister v. Abbott, 21 New Hampshire, 443.....	lxiv, 343
Hoge v. Hoge, 1 Watts, 163.....	xxvi, 52	Hollister v. Goodale, 8 Connecticut, 332.....	xi, 674
Hogue v. Penn, 3 Bush, 663.....	xxvi, 274	Hollister v. Nowlen, 19 Wendell, 234.....	xxxii, 468
Hogg v. Beerman, 41 Ohio St. 61.....	52, 71	Hollister v. Union Co., 9 Connecticut, 436.....	lxv, 36
Holles v. United States, 3 MacArthur, 370.....	36, 106	Hollister and Smith v. Judges of Dist. Ct. of Lucas County, 8 Ohio State, 201.....	lxx, 108
Holt v. Hodge, 6 New Hampshire, 104.....	lxv, 451	Hollister Bank of Buffalo, In the Matter of, 27 New York, 393.....	lxxxiv, 398
Holt v. Holt, 42 New Jersey Eq., 398.....	59, 43	Holloway v. Griffith, 32 Iowa, 409.....	7, 208
Holt v. Stratton Mills, 64 New Hampshire, 109... 20, 119		Holloway v. Memphis etc. R. R. Co., 23 Tex. 465, lxvii, 68	
Holt v. Underhill, 9 New Hampshire, 436.....	xxiii, 390	Holloway v. Sherman, 12 Iowa, 282.....	lxxix, 537
Holt v. Underhill, 10 New Hampshire, 230.....	xxiv, 148	Hollowell v. Skinner, 4 Iredell's Law, 165.....	xi, 421
Holt v. Holt, 63 New Hampshire, 475.....	56, 530	Holly v. Atlanta Street R. R., 61 Georgia, 215.....	34, 87
Hoke v. Field, 10 Bush, 144.....	19, 58	Holly v. Boston Gaslight Co., 8 Gray, 123.....	lxix, 239
Hoke v. Henderson, 4 Doreaux's Law, 1.....	xxv, 677	Holly v. Huggeford, 8 Pickering, 73.....	lix, 308
Holbert v. Edens, 5 Lea, 204.....	40, 26	Holly Springs Bank v. Pinson, 53 Mississippi, 421, 38, 330	
Holbert v. State, 9 Tex. Ct. App. 219.....	35, 738	Holly Springs S. & I. Co. v. Supervisors, 53 Mississippi, 231.....	24, 698
Holbrook v. Baker, 6 Greenleaf, 309.....	xvii, 236	Hollyway ada. State, 41 Iowa, 200.....	20, 588
Holbrook v. Chamberlin, 116 Massachusetts, 155, 17, 146		Holman, Ex parte, 23 Iowa, 88.....	4, 189
Holbrook v. Connor, 60 Maine, 578.....	11, 212	Holman v. Price, 84 North Carolina, 88.....	37, 614
Holbrook v. Finney, 4 Massachusetts, 568.....	iii, 243	Holmes v. Broughton, 10 Wendell, 75.....	lxv, 638
Holbrook v. Lackey, 13 Metcalf, 123.....	xli, 726	Holmes v. Burton, 9 Vermont, 222.....	xxxi, 621
Holbrook v. Tobey, 66 Maine, 410.....	22, 581	Holmes v. Charlestown M. F. I. Co., 10 Met. 211, xlii, 428	
Holbrook v. Union & S. R. R., 12 N. Y. 236.....	lxiv, 502	Holmes v. DeCamp, 1 Johnson, 34.....	iii, 398
Holbrook v. Wight, 24 Wendell, 169.....	xxxv, 607	Holmes v. Evans, 43 Mississippi, 247.....	12, 372
Holcomb ada. State, 68 Iowa, 107.....	56, 653	Holmes v. Halde, 74 Maine, 28.....	63, 567
		Holmes v. Hall, 8 Michigan, 66.....	lxxvii, 444

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Holmes v. Holmes, 37 Connecticut, 378.....	9, 324
Holmes v. Holmes, 6 Louisiana, 463.....	xxvi, 483
Holmes v. Hunt, 123 Massachusetts, 506.....	23, 381
Holmes v. Mather, Eng.....	16, 384
Holmes v. Mattoon, 111 Illinois, 27.....	53, 602
Holmes v. McCray, 51 Indiana, 358.....	19, 735
Holmes v. Mitchell, 2 Murphree, 228.....	v, 637
Holmes v. National Bank, 18 South Carolina, 31.....	44, 588
Holmes v. Ramsen, 20 Johnson, 239.....	xi, 269
Holmes v. Ramsen, 4 Johns. Ch. 460.....	viii, 581
Holmes v. Richet, 56 California, 307.....	36, 84
Holmes v. Schofield, 4 Blackford, 171.....	xxix, 364
Holmes v. Simons, 3 Denmansure, 143.....	iv, 608
Holmes ad. State, 23 La. An. 765.....	28, 110
Holmes ad. State, 56 Iowa, 588.....	41, 121
Holmes v. Tremper, 20 Johnson, 29.....	xi, 238
Holmes v. Trumper, 22 Michigan, 427.....	7, 661
Holmes v. Wakefield, 12 Allen, 580.....	xx, 171
Holmes v. Williams, 1 Root, 335.....	i, 49
Holmes v. Williams, 10 Paige, 334.....	xi, 250
Holman v. State, 2 Texas Ct. App. 610.....	25, 439
Holst v. Roe, 29 Ohio St. 240.....	48, 459
Holst v. State, 23 Texas Ct. App. 1.....	59, 770
Holt v. Baldwin, 46 Missouri, 265.....	2, 615
Holt v. Barton, 43 Mississippi, 711.....	2, 640
Holt v. Cumming, 103 Pennsylvania St. 212.....	48, 199
Holt v. Green, 73 Pennsylvania State, 198.....	13, 737
Holt v. Inhabitants of Penobscot, 56 Maine, 15.....	xvii, 429
Holt v. Parsons, 23 Texas, 9.....	xxvi, 49
Holt v. Rice, 54 New Hampshire, 398.....	20, 138
Holt v. Robinson, 21 Alabama, 108.....	lvi, 240
Holt v. Ross, 54 New York, 472.....	13, 615
Holt ad. State, 27 Missouri, 340.....	xxii, 273
Holt ad. State, 30 North Carolina, 749.....	47, 544
Holt v. Walker, 26 Maine, 107.....	xiv, 98
Holt v. Westcott, 43 Maine, 445.....	lxix, 74
Holt v. Wood, 23 Texas, 474.....	xxvi, 72
Holton v. Brown, 18 Vermont, 224.....	xvi, 148
Holts v. Dick, 42 Ohio State, 23.....	51, 791
Holtzman v. Hoy, 118 Illinois, 534.....	59, 390
Holyoke v. Haskins, 5 Pickering, 20.....	xvi, 372
Holmes v. N. O. & Carrollton R. R. Co., 28 Louisiana An. 125.....	58, 177
Homan v. Stanley, 56 Pennsylvania St. 464.....	5, 289
Horne v. Richards, 4 Call, 441.....	ii, 574
Horne Insurance Co. v. Green, 19 N. Y. 518.....	xxv, 361
Horne Ins. Co. v. Holway, 55 Iowa, 371.....	39, 179
Horne Ins. Co. v. N. W. P. Co., 23 Iowa, 223.....	7, 183
Horne L. I. Co. v. Dunn, 20 Ohio State, 178.....	5, 642
Horne M. F. Ins. Co. v. Garfield, 60 Illinois, 124.....	14, 27
Horne Sav. Bank v. Traube, 75 Missouri, 190.....	43, 402
Horne v. Commonwealth, 106 Penn. St. 221.....	51, 621
Horne v. Fish, 1 Pickering, 435.....	xi, 318
Horne v. Perkins, 124 Massachusetts, 631.....	26, 677
Horne v. Wallis, 11 Massachusetts, 309.....	vi, 169
Horne v. Dana, 12 Massachusetts, 190.....	vii, 85
Horne v. Smyth, 16 Maine, 177.....	xxviii, 650
Horne ad. State, 17 Missouri, 379.....	lvii, 269
Homestead Cases, 31 Texas, 677.....	noviii, 583
Homestead Cases, 32 Grant, 205.....	12, 507
Hone v. Henriques, 13 Wendell, 240.....	xxvii, 204
Honeyman v. Oregon & O. R. R. Co., 13 Or. 283.....	57, 20
Honore's Ex'r v. Bakewell, 6 B. Monroe, 67.....	xlili, 147
Honnet v. Honnet, 23 Arkansas, 154.....	34, 39
Honzik v. Delagias, 65 Wisconsin, 494.....	54, 634
Hoober v. Bidwell, 16 Ohio, 509.....	xviii, 386
Hood v. Adams, 124 Massachusetts, 451.....	20, 687
Hood v. Fahnestock, 8 Watts, 459.....	xxiv, 437
Hood v. Fahnestock, 1 Penn. State, 470.....	xliv, 149
Hood v. Hartshorn, 100 Massachusetts, 117.....	1, 89
Hood v. Hood, 11 Allen, 126.....	xxvii, 709
Hood v. Nesbit, 2 Dallas, 137; 8 C., 1 Yemassee, 114.....	i, 208
Hood v. State, 56 Indiana, 263.....	26, 21
Hood v. State, 56 Indiana, 263.....	26, 21
Hooe v. Marquand, 4 Call, 418.....	ii, 579
Hooe v. Orley, 1 Washington (Va.), 19.....	i, 428
Hook v. Pratt, 78 New York, 371.....	34, 339
Hooker v. Cummings, 20 Johnson, 90.....	xi, 269
Hooker v. Eagle Bank, 30 New York, 83.....	xxvii, 321
Hooker v. Miller, 37 Iowa, 613.....	18, 11
Hooker v. New Haven etc. Co., 14 Conn. 142.....	xxvii, 477
Hooker v. Smith, 19 Vermont, 151.....	xvii, 679
Hooker v. Vandewater, 4 Denio, 242.....	xvii, 238
Hook v. Anderson, 58 Alabama, 238.....	29, 745
Hoope's Appeal, 60 Pennsylvania, 220.....	2, 602
Hooper v. Chicago & North. Ry Co., 27 Wm. 82.....	2, 439
Hooper v. Columbia & G. R. Co., 21 R. Co., 21 R. C. 541.....	52, 681
Hooper v. Day, 19 Maine, 66.....	xxvii, 724
Hooper v. Hobson, 67 Maine, 273.....	xxix, 709
Hooper v. Pair, 3 Porter, 401.....	xxix, 228
Hooper v. Welch, 43 Vermont, 169.....	5, 267
Hooper v. Wells, Fargo & Co., 27 Cal. 11.....	xxvii, 211
Hooper v. Wilkinson, 15 Louisiana An. 497.....	xxvii, 194
Hoopes v. Strasburger, 27 Maryland, 380.....	11, 538
Hoome T. D. & E. Co. v. O'Brien, 137 Mass. 424.....	54, 323
Hooser v. Hays, 10 B. Monroe, 73.....	i, 549
Hoover ad. State, 4 Dev. & Bat. Law, 365.....	xxvii, 337
Hope v. Deadrick, 8 Humphreys, 1.....	xvii, 537
Hope v. People, 53 New York, 418.....	38, 469
Hope v. Wilkinson, 14 Lea, 21.....	52, 149
Hope M. I. Co. v. Flynn, 39 Missouri, 463.....	xx, 423
Hopkins v. Atlantic & St. L. R. R., 35 N. H. 9.....	lxvii, 257
Hopkins v. Beedle, 1 Calnes' Cases, 347.....	ii, 121
Hopkins v. Commonwealth, 50 Penn. State, 9.....	xxviii, 518
Hopkins ad. Commonwealth, 133 Mass. 351.....	43, 327
Hopkins v. Forsyth, 14 Penn. State, 34.....	lii, 513
Hopkins v. Hawkeye Ins. Co., 67 Iowa, 202.....	42, 41
Hopkins v. Hopkins, 4 Strobbart's Eq. 207.....	lii, 659
Hopkins v. Towne, 4 B. Monroe, 124.....	xxvii, 497
Hopkins v. Upshur, 20 Texas, 89.....	xxv, 375
Hopkinson v. Sears, 14 Vermont, 494.....	xxvii, 328
Hoppin v. Buffum, 9 Rhode Island, 512.....	11, 222
Hoppin v. Jencks, 9 Rhode Island, 428.....	5, 297
Hopps v. People, 31 Illinois, 388.....	xxvii, 231
Hopson v. Brunswinkel, 24 Texas, 607.....	lxvii, 126
Horah v. Long, 4 Dev. & Bat. Law, 274.....	xxvii, 328
Horan ad. State, 33 Minnesota, 394.....	50, 393
Horan v. Wahrenberger, 9 Texas, 318.....	lviii, 145
Hord v. Baugh, 7 Humphreys, 876.....	xvi, 34
Hord v. Commonwealth, 4 Leigh, 674.....	xxvi, 209
Hord v. Walker, 2 Little, 22.....	xxv, 39
Horder v. Horder, 23 Kansas, 391.....	33, 107
Horn v. Bray, 51 Indiana, 635.....	19, 749
Horn v. Cole, 51 New Hampshire, 287.....	12, 111
Horn v. Nash, 1 Iowa, 204.....	lxvii, 437
Horn v. New Lots, 83 New York, 159.....	38, 429
Horn v. Ross, 20 Georgia, 210.....	xxv, 621
Horn ad. State, 70 Missouri, 466.....	25, 67
Horn v. Volcano Water Co., 13 California, 68.....	lxvii, 809
Hornbeck v. State, 25 Ohio St. 277.....	25, 628
Hornbrooks v. Lucas, 24 West Virginia, 422.....	43, 27
Horne v. State, 27 Georgia, 80.....	xxii, 49
Horne v. State, 1 Kansas, 42.....	lxvii, 49
Horne ad. State, 22 North Carolina, 508.....	53, 448
Horne v. Doe ex d. State B't, 1 Indiana, 120.....	xviii, 385
Horne v. Watson, 79 Penn. St. 243.....	21, 36
Hornbath v. Barr, 8 Serg. & R. 34.....	xi, 602
Hornby ad. State, 8 Robinson (La.), 584.....	21, 306
Hornby ad. State, 8 Robinson (La.), 583.....	21, 314
Horr v. Barber, 11 California, 393.....	lxv, 70

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Horton v. Wright, Kirby, 3.....i, 8
Horskins v. Williamson, T. U. P. Charlton, 145.....iv, 703
Horsley v. Gerth, 3 Gratian, 471.....xlv, 303
Horsley v. Graeme, 2 Gratian, 471.....xlv, 303
Horst v. Wagner, 43 Iowa, 373.....37, 255
Horstman v. Gerker, 49 Penn. St. 283.....lxxxviii, 501
Horstman v. Kaufman, 97 Penn. St. 147.....39, 802
Horton v. Champlin, 12 Rhode Island, 530.....34, 723
Horton v. Cook, 10 Watts, 124.....xxxvi, 151
Horton v. Critchfield, 18 Illinois, 133.....lxv, 701
Horton v. Maffa, 14 Minnesota, 289.....6, 223
Horton v. Mayor and City Council, 4 Lea, 39.....40, 1
Horton v. Morgan, 19 New York, 170.....lxv, 311
Horton v. Smith, 5 Alabama, 73.....xli, 623
Horwitz v. Equitable Mut. Ins. Co., 40 Mo. 537, xciii, 321
Hosey v. Braeher, 8 Porter, 559.....xxxiii, 299
Hosball v. Hosball, 51 Maryland, 72.....34, 298
Hosler v. Hall, 2 Indiana, 568.....lv, 469
Hoskins v. Helm, 4 Little, 306.....xiv, 133
Hoskins v. Litchfield and Wife, 21 Ill. 137.....lxxxviii, 515
Hoskins v. Paul, 4 Halsted, 110.....xvii, 455
Hoskins v. People, 84 Illinois, 87.....25, 433
Hoskins v. Tarrence, 5 Blackford, 417.....xxxv, 129
Hosley v. Brooks, 20 Illinois, 115.....lxxi, 253
Hosmer v. Sargent, 3 Allen, 97.....lxxxv, 683
Hosmer v. Wilson, 7 Michigan, 394.....lxiv, 716
Hosier v. Strull, Taylor (N. O.), 122; 2 Hayw. 179.....i, 583
Hotchkins v. Barnes, 34 Connecticut, 27.....xci, 713
Hotchkins v. Higgins, 22 Connecticut, 205.....53, 582
Hotchkins v. Ladd, 26 Vermont, 593.....lxxxvi, 679
Hot Springs R. R. v. Tripp, 43 Arkansas, 495.....48, 65
Hotz's Estate, 33 Penn. State, 423.....lxxx, 490
Houck v. Graham, 104 Indiana, 195.....55, 727
Houck v. Wachter, 34 Maryland, 265.....6, 333
Houde v. Fulton, 29 Wisconsin, 296.....9, 568
Houde v. Fulton, 34 Wisconsin, 608.....17, 463
Hougan v. Milwaukee & St. P. R. R. Co., 35 Iowa, 558.....14, 602
Hough v. Stone Life Ins. Co., 57 Illinois, 512.....11, 18
Hough v. Birge, 11 Vermont, 190.....xxxiv, 682
Hough v. City Fire Insurance Co., 29 Conn. 10.....lxvii, 561
Hough v. Cook County Land Co., 73 Ill. 23.....34, 230
Hough v. Hovey, 35 Maryland, 131.....11, 484
Hough v. Hunt, 2 Ohio, 495.....xv, 569
Hough v. Martin, 2 Dev. & Bat. Eq. 279.....xxxiv, 403
Houghton v. President etc. Delaware Sta. Co., 23 New York, 219.....44, 370
Houghton v. Ball, 19 Missouri, 84.....lx, 331
Houghton v. Ely, 26 Wisconsin, 181.....7, 62
Houghton v. First Nat. Bank, 26 Wis. 663.....7, 107
Houghton v. Houghton, 14 Indiana, 505.....lxxvii, 69
Houghton v. Mtg. etc. Fire Ins. Co., 8 Metcalf, 114, xii, 459
Houghton v. Page, 2 New Hampshire, 42.....ix, 30
Hove v. Adams & Co., 43 Penn. State, 261.....lxxxvi, 688
Hove v. Alexander, 105 Indiana, 109.....53, 189
Hove v. Board of Comm'rs, 60 Indiana, 530.....28, 637
Hove v. Fuller, 13 Vermont, 105.....lxxxvii, 588
Hoveada State, 65 North Carolina, 315.....6, 744
Hove v. Vinton Nat. Bk., 43 Ohio State, 246.....54, 613
Hovessal v. Gibbs, 1 Bailey's Eq. 422.....xxiii, 136
Houser v. Bolton, 10 Iredell's Law, 369.....ii, 391
Houser v. Chicago R. I. & P. R. R. Co., 30 Iowa, 230.....46, 66
Houser v. Irvine, 3 Watts & Serg. 245.....lxxxviii, 768
Houser v. Lamont, 55 Penn. St. 311.....xciii, 755
Houser v. Reynolds, 1 Haywood, 114.....i, 551
Houser v. Tully, 63 Pennsylvania State, 82.....1, 390
Houston v. Aycock, 5 Sneed, 406.....lxviii, 131
Houston v. Blackman, 65 Alabama, 639.....41, 756
Houston v. Delonch, 65 Alabama, 364.....xlv, 689

Houston v. Dyche, Meigs, 76.....xxxiii, 139
Houston v. Gilbert, 3 Brevard, 63.....v, 543
Houston v. Houston, 3 McCord, 491.....xv, 647
Houston ada. State, 78 Alabama, 576.....56, 59
Houston v. Townsend, 1 Delaware Ch. 416.....xii, 109
Houston v. Williams, 13 California, 24.....lxxviii, 565
Houston etc. R. Co. v. Adams, 49 Texas, 748.....39, 116
Houston etc. R. Co. v. Willie, 63 Texas, 312.....37, 756
Houston and T. O. R. Co. v. Burke, 55 Texas, 323, 40, 806
Houston and T. O. R. Co. v. Clemmons, 55 Tex. 58, 40, 799
Houston and T. O. R. Co. v. Moore, 49 Texas, 31, 30, 96
Houston and T. O. R. Co. v. Symphkins, 54 Tex. 615, 33, 633
Houston & T. O. R. Co. v. Hill, 63 Texas, 381.....51, 642
Houton v. Holliday, 2 Murphey, 111.....v, 582
Houx v. Seat, 26 Missouri, 173.....lxxii, 308
Hoverson v. Noker, 60 Wisconsin, 511.....59, 331
Hovey v. Chase, 59 Maine, 304.....lxxxiii, 514
Hovey v. Hobson, 53 Maine, 431.....lxxxix, 705
Hovey v. Morrill, 61 New Hampshire, 9.....60, 315
Hovey v. Rubber T. P. Co., 57 New York, 112.....15, 470
Hovey v. Sebring, 94 Michigan, 222.....9, 122
How v. Kane, 2 Finney, 531 (2 Chand. 223).....lv, 182
Howard's Will, 5 T. B. Monroe, 199.....xvii, 80
Howard v. Cannon, 11 Richardson's Eq. 33.....lxxxv, 736
Howard v. Daly, 61 New York, 362.....19, 285
Howard v. Durand, 26 Georgia, 346.....xcii, 767
Howard v. Emerson, 110 Massachusetts, 320.....14, 606
Howard v. Gould, 28 Vermont, 523.....lxvii, 728
Howard v. Grover, 28 Maine, 97.....xlviii, 473
Howard v. Hoey, 23 Wendell, 350.....lxxxv, 672
Howard v. Huffman, 3 Head, 562.....lxv, 783
Howard v. Kennedy, 4 Alabama, 592.....lxxxix, 307
Howard v. Kimball, 65 North Carolina, 178.....6, 739
Howard v. Lee, 25 Connecticut, 1.....lxv, 559
Howard v. Mississippi V. Bank, 28 La. An. 737.....36, 106
Howard v. North, 5 Texas, 390.....ii, 799
Howard v. Reedy, 39 Georgia, 122.....lxxxv, 68
Howard v. Richards, 2 Nevada, 123.....20, 530
Howard v. Steamship Co., 83 N. O. 158.....35, 571
Howard v. Thompson, 21 Wendell, 519.....xxxiv, 238
Howard v. Williams, 1 Bailey's Law, 575.....xci, 463
Howard Ins. Co. v. Halsey, 8 N. Y. (4 Selden), 371, lx, 473
Howatt v. Davis, 5 Munford, 34.....vii, 631
Howe v. Bass, 2 Massachusetts, 330.....liii, 89
Howe v. Butterfield, 4 Cushing, 302.....i, 736
Howe v. Hartness, 11 Ohio State, 449.....lxxxviii, 312
Howe v. Hayward, 108 Massachusetts, 54.....12, 306
Howe v. Lawrence, 1 Zabriakie, 714.....lxvii, 190
Howe v. Lawrence, 9 Cushing, 553.....lvii, 66
Howe v. Mitchell, 17 Maine, 85.....lxxxv, 231
Howe v. O'Mally, 1 Murphey, 237.....li, 693
Howe v. Pike, 41 Maine, 340.....lxvi, 249
Howe ada. State, 25 Ohio State, 689.....18, 321
Howe v. Wayman, 12 Missouri, 160.....xlix, 126
Howe v. Wilson, 21 Missouri, 45.....60, 236
Howe Machine Co. v. Bryson, 44 Iowa, 159.....34, 735
Howe Machine Co. v. Sloan, 57 Penn. St. 498.....39, 379
Howe, Matter of, 1 Paige's Ch. 124.....xix, 395
Howell v. Ashmore, 1 Stockton, 89.....lvii, 371
Howell v. Cobb, 2 Coldwell, 104.....lxxxviii, 591
Howell v. Crane, 12 Louisiana An. 126.....lxviii, 765
Howell v. Fountain, 3 Georgia, 176.....xlv, 415
Howell v. Harvey, 5 Arkansas, 270.....lxxxix, 376
Howell v. Howell, 7 Iredell's Law, 491.....lxviii, 768
Howell v. Knickerbocker L. I. Co., 44 N. Y. 276.....4, 678
Howell v. McCrie, 36 Kansas, 636.....59, 584
Howell v. Sevier, 1 Lea, 380.....37, 771
Howell v. State, 71 Georgia, 224.....51, 259
Howes v. Barker, 3 Johnson, 506.....lii, 536
Howeth v. Anderson, 25 Texas, 557.....lxxxviii, 238

Roman letters [xlix] refer to volumes of American

Holmes v. Holmes, 37 Connecticut, 273.....	9, 23
Holmes v. Holmes, 6 Louisiana, 463.....	xxvi, 46
Holmes v. Hunt, 123 Massachusetts, 506.....	83, 38
Holmes v. Mather, Eng.....	16, 38
Holmes v. Mattoon, 111 Illinois, 37.....	53, 60
Holmes v. McCray, 51 Indiana, 358.....	19, 73
Holmes v. Mitchell, 2 Murphay, 228.....	v, 52
Holmes v. National Bank, 18 South Carolina, 31.....	44, 55
Holmes v. Remsen, 30 Johnson, 239.....	xi, 26
Holmes v. Remsen, 4 Johns. Ch. 400.....	viii, 58
Holmes v. Richet, 55 California, 307.....	38, 5
Holmes v. Schofield, 4 Blackford, 171.....	xxix, 36
Holmes v. Simons, 3 Demasure, 142.....	iv, 60
Holmes ad. State, 28 La. An. 765.....	26, 11
Holmes ad. State, 56 Iowa, 588.....	41, 12
Holmes v. Trumper, 30 Johnson, 39.....	xi, 23
Holmes v. Trumper, 23 Michigan, 427.....	7, 66
Holmes v. Wakefield, 12 Allen, 580.....	xx, 17
Holmes v. Williams, 1 Root, 335.....	i, 4
Holmes v. Williams, 10 Paige, 396.....	xi, 25
Holoman v. State, 2 Texas Ct. App. 610.....	28, 43
Holt v. Roe, 39 Ohio St. 340.....	48, 45
Holt v. State, 23 Texas Ct. App. 1.....	59, 77
Holt v. Baldwin, 46 Missouri, 363.....	2, 51
Holt v. Barton, 43 Mississippi, 711.....	2, 64
Holt v. Cumming, 103 Pennsylvania St. 312.....	48, 19
Holt v. Green, 73 Pennsylvania State, 196.....	13, 73
Holt v. Inhabitants of Penobscot, 56 Maine, 15.....	xvi, 42
Holt v. Parsons, 23 Texas, 9.....	xxvi, 41
Holt v. Rice, 54 New Hampshire, 398.....	20, 138
Holt v. Robinson, 21 Alabama, 106.....	lvi, 24
Holt v. Ross, 54 New York, 472.....	13, 61
Holt ad. State, 27 Missouri, 340.....	xxii, 273
Holt ad. State, 90 North Carolina, 749.....	47, 54
Holt v. Walber, 36 Maine, 107.....	xiv, 96
Holt v. Westcott, 43 Maine, 445.....	lxix, 74
Holt v. Wood, 23 Texas, 474.....	xxvi, 72
Holton v. Brown, 18 Vermont, 234.....	xlv, 148
Holts v. Dick, 48 Ohio State, 23.....	51, 791
Holtzman v. Hoy, 118 Illinois, 534.....	59, 390
Holyoke v. Haskins, 5 Pickering, 30.....	xvi, 372
Holrab v. N. O. & Carrollton R. R. Co., 38 Louis- iana An. 125.....	58, 177
Homan v. Stanley, 66 Pennsylvania St. 464.....	5, 389
Home v. Richards, 4 Call, 441.....	ii, 574
Home Insurance Co. v. Green, 19 N. Y. 512.....	xxv, 361
Home Ins. Co. v. Holway, 55 Iowa, 571.....	39, 179
Home Ins. Co. v. N. W. P. Co., 32 Iowa, 238.....	7, 183
Home L. I. Co. v. Dunn, 20 Ohio State, 175.....	5, 642
Home M. F. Ins. Co. v. Garfield, 60 Illinois, 134.....	14, 27
Home Sav. Bank v. Traube, 75 Missouri, 199.....	42, 402
Homer v. Commonwealth, 106 Penn. St. 221.....	51, 521
Homer v. Fish, 1 Pickering, 436.....	xi, 213
Homer v. Perkins, 124 Massachusetts, 431.....	26, 677
Homer v. Wallis, 11 Massachusetts, 360.....	vi, 109
Homes v. Dana, 13 Massachusetts, 190.....	vii, 55
Homes v. Smyth, 16 Maine, 177.....	xxiii, 650
Homes ad. State, 17 Missouri, 379.....	lvii, 269
Homestead Cases, 31 Texas, 677.....	xxviii, 553
Homestead Cases, 22 Grant, 266.....	12, 507
Hone v. Henriques, 13 Wendell, 240.....	xxvii, 304
Honeyman v. Oregon & C. R. R. Co., 13 Or. 322.....	57, 20
Honore's Ex'r v. Bakewell, 6 B. Monroe, 67.....	xliii, 147
Honnett v. Honnett, 33 Arkansas, 154.....	34, 29
Honsik v. Delaglas, 65 Wisconsin, 494.....	54, 634
Hooten v. Bidwell, 16 Ohio, 809.....	xlvii, 366
Hood v. Adams, 124 Massachusetts, 451.....	26, 687
Hood v. Fahnestock, 8 Watts, 499.....	xxiv, 489
Hood v. Fahnestock, 1 Penn. State, 470.....	xliv, 147
Hood v. Hartshorn, 100 Massachusetts, 117.....	1, 89

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Humphrey v. Case, 8 Connecticut, 101.....	xx, 95	Hunt v. Wright, 47 New Hampshire, 398.....	xxiii, 488
Humphrey v. Douglass, 10 Vermont, 71.....	xxviii, 177	Hunter v. Anthony, 8 Jones' L. 385.....	lxxx, 333
Humphrey v. Douglass, 11 Vermont, 22.....	xxiv, 668	Hunter v. Blanchard, 18 Illinois, 313.....	lxviii, 547
Humphrey v. Ellis, 6 Gratian, 509.....	lii, 133	Hunter v. Bryan, 2 Murphy, 178.....	v, 528
Humphrey ada. People, 23 Michigan, 471.....	9, 94	Hunter v. Bryson, 5 Gill & J. 483.....	xv, 313
Humphrey ada. State, 32 Vermont, 569.....	lxviii, 605	Hunter v. Commonwealth, 7 Gratian, 641.....	lvi, 121
Humphrey v. Taylor, 45 Wisconsin, 251.....	36, 738	Hunter v. Commonwealth, 79 Penn. St. 503.....	xi, 53
Humphreys v. Gullow, 13 New Hamp. 385.....	xxviii, 499	Hunter v. Farren, 127 Massachusetts, 481.....	34, 423
Humphreys v. McCall, 9 California, 59.....	lxx, 621	Hunter v. Fulcher, 5 Randolph, 126.....	xvi, 738
Humphries v. Bicknell, 2 Littlell, 296.....	xiii, 268	Hunter v. Giddings, 97 Massachusetts, 41.....	xxiii, 54
Humphries v. Chastain, 5 Georgia, 166.....	lxviii, 247	Hunter v. Hatton, 4 Gill, 115.....	xlv, 117
Humphries v. Davis, 100 Indiana, 274.....	59, 788	Hunter v. Hempstead, 1 Missouri, 67.....	xiii, 408
Humphry v. Beeson, 1 G. Greene, 199.....	lxviii, 370	Hunter v. Lawrence's Adm'r, 11 Gratian, 111.....	lxii, 649
Hun v. Cary, 82 New York, 65.....	37, 546	Hunter v. Moore, 44 Arkansas, 184.....	51, 589
Hundley v. Lyons, 8 Munford, 343.....	vii, 685	Hunter v. Moul, 98 Pennsylvania State, 13.....	42, 619
Hundley v. Webb, 3 J. J. Marshall, 644.....	xx, 189	Hunter v. Postlethwaite, 5 Martin, 236.....	xii, 334
Huner v. Doolittle, 3 G. Greene, 76.....	liv, 489	Hunter v. Randall, 62 Maine, 463.....	16, 499
Hunaker v. Borden, 5 California, 266.....	lxiii, 130	Hunter v. Sparlock, 3 Louisiana, 97.....	xxii, 168
Hunnicutt v. State, 18 Tex. Ct. App. 499.....	51, 330	Hunter v. State, 1 Head, 160.....	lxviii, 164
Hunt v. Adams, 5 Massachusetts, 358.....	iv, 68	Hunter v. State, 18 Texas Ct. App. 444.....	51, 319
Hunt v. Amidon, 4 Hill (N. Y.), 345.....	xi, 283	Hunter ada. State, 5 Iredell's Law, 369.....	xliv, 41
Hunt v. Bass, 2 Devereux's Eq. 292.....	xxiv, 374	Hunter v. Supervisors, 33 Iowa, 378.....	11, 132
Hunt v. Bates, 7 Rhode Island, 217.....	lxviii, 592	Hunter v. United States, 1 Pinney, 91.....	xxxix, 277
Hunt v. Boyler, 1 J. J. Marshall, 494.....	xix, 116	Hunter v. Watson, 12 California, 363.....	lxviii, 543
Hunt v. Boonville, 65 Missouri, 630.....	27, 299	Hunter v. Wetzel, 87 New York, 375.....	15, 508
Hunt v. Breeding, 12 Serg. & R. 37.....	xiv, 665	Hunter v. Wetzel, 84 New York, 542.....	38, 544
Hunt v. Bridgman, 2 Pickering, 681.....	xiii, 498	Huntington v. Asher, 96 New York, 604.....	48, 632
Hunt v. Butterworth, 21 Texas, 133.....	lxviii, 223	Huntington v. Hall, 36 Maine, 501.....	lviii, 768
Hunt v. Chamberlain, 3 Halsted, 336.....	xiv, 427	Huntington v. Jewett, 25 Iowa, 249.....	xv, 788
Hunt v. Commonwealth, 13 Gratian, 757.....	lxx, 443	Huntington v. Lyman, 1 D. Chipman, 438.....	xii, 716
Hunt ada. Commonwealth, 4 Metcalf, 111.....	xxviii, 246	Huntington v. Shultz, Harper's Law, 482.....	lxviii, 609
Hunt v. Columbian Insurance Co., 55 Maine, 300.....	xxii, 522	Huntington v. Winchell, 8 Connecticut, 48.....	xx, 94
Hunt v. Crane, 33 Mississippi, 609.....	lxix, 381	Huntley v. Mathias, 90 North Carolina, 101.....	47, 516
Hunt v. Elliott, 80 Indiana, 245.....	41, 794	Huntley ada. State, 3 Iredell's Law, 418.....	xi, 418
Hunt v. Field, 1 Stockton, 36.....	lvii, 365	Huntley v. Whittier, 105 Massachusetts, 391.....	7, 638
Hunt v. Gray, Jr., 35 New Jersey, 227.....	16, 232	Huntoon v. Dow, 29 Vermont, 215.....	lxx, 404
Hunt v. Haskell, 24 Maine, 339.....	xiii, 387	Huntsville Bank v. Hill, 1 Stewart, 301.....	xxviii, 39
Hunt v. Haselton, 5 New Hampshire, 216.....	xx, 675	Huntt v. Townsend, 31 Maryland, 336.....	c, 63
Hunt v. Hunt, 4 New Hampshire, 494.....	xxvii, 438	Hurd v. Case, 33 Illinois, 45.....	lxxxviii, 249
Hunt v. Hunt, 72 New York, 217.....	28, 129	Hurd v. Kelly, 78 New York, 599.....	34, 567
Hunt v. Hunt, 14 Pickering, 274.....	xv, 400	Hurd v. Sibley, 10 New Hampshire, 108.....	xxiv, 143
Hunt v. Hunt, 3 Metcalf, 175.....	xxviii, 130	Hurt v. Hires, 11 Vroom, 681.....	29, 283
Hunt v. Jennings, 5 Blackford, 195.....	xxviii, 465	Hurlbert v. Hicks, 17 Vermont, 193.....	xliv, 329
Hunt v. Johnson, 44 New York, 27.....	4, 631	Hurlbert ada. People, 24 Michigan, 44.....	9, 108
Hunt v. Jones, 12 Rhode Island, 265.....	34, 635	Hurley v. Brown, 28 Massachusetts, 545.....	xxvi, 671
Hunt v. Jucka, 1 Haywood, 173.....	i, 555	Hurley v. Morgan, 1 Dev. & Bat. L. 425.....	xxviii, 579
Hunt v. Loucks, 38 California, 372.....	xxix, 404	Hurley ada. People, 60 California, 74.....	44, 58
Hunt v. Lowell Gas Light Co., 8 Allen 189.....	lxxxv, 697	Hurst v. Hill, 8 Maryland, 399.....	lxviii, 708
Hunt v. Morris, 6 Martin, 676.....	xii, 499	Hurst v. Lithgow, 2 Yeates, 24.....	i, 326
Hunt v. Morris, 7 Halsted, 175.....	xxii, 483	Hurst v. Robinson, 13 Missouri, 82.....	liii, 134
Hunt v. Mullanphy, 1 Missouri, 608.....	xiv, 300	Hurt v. Clarke, 56 Alabama, 19.....	28, 751
Hunt v. Nevers, 15 Pickering, 500.....	xxvi, 616	Hurt v. State, 25 Mississippi, 378.....	lx, 238
Hunt v. Orwig, 17 B. Monroe, 73.....	lxvi, 144	Husband v. Epling, 81 Illinois, 172.....	25, 272
Hunt v. Peaks, 5 Cowen, 475.....	xv, 475	Husband v. Husband, 67 Indiana, 563.....	33, 107
Hunt v. Purdy, 82 New York, 488.....	37, 587	Huse v. Flint, 29 Iowa, 501.....	4, 244
Hunt v. Rogers, 7 Allen, 469.....	lxxxviii, 704	Huse v. Hamblin, 29 Iowa, 501.....	4, 244
Hunt v. Roylance, 11 Cushing, 117.....	lx, 140	Huse v. McDaniels, 29 Iowa, 501.....	4, 244
Hunt v. School District, 14 Vermont, 300.....	xxix, 225	Huson v. Dale, 19 Michigan, 17.....	2, 86
Hunt v. Smith, 17 Wendell, 179.....	xxxi, 296	Hussey v. Elrod, 2 Alabama, 339.....	lxxxvi, 429
Hunt v. Standart, 15 Indiana, 33.....	lxvii, 79	Hussey v. Ryan, 64 Maryland, 428.....	54, 772
Hunt v. State, 49 Georgia, 255.....	15, 677	Hussey v. Sibley, 66 Maine, 192.....	22, 557
Hunt v. State, 3 Tex. Ct. App. 116.....	36, 126	Hussey ada. State, 60 Maine, 410.....	11, 206
Hunt v. Tate, 3 Alabama, 713.....	lxiii, 559	Hussey v. Thornton, 4 Massachusetts, 405.....	lii, 224
Hunt v. Thompson, 3 Scammon, 179.....	lxxxvi, 538	Huskey v. Maples, 2 Coldwell, 26.....	lxxxviii, 689
Hunt v. Thurman, 15 Vermont, 336.....	xi, 683	Huston v. Curi, 8 Texas, 239.....	lxviii, 119
Hunt v. Turner, 9 Texas, 385.....	lx, 167	Huston v. Mitchell, 14 Serg. & R. 307.....	xvi, 508
Hunt v. Wadleigh, 26 Maine, 271.....	xiv, 108	Huston v. Williams, 3 Blackf. 170.....	xxv, 84
Hunt v. Wickwire, 10 Wendell, 102.....	xv, 545	Hutchcraft v. Strout's Heirs, 1 T. B. Monroe, 306.....	xv, 109
Hunt v. Wilkinson, 2 Call, 49.....	i, 534	Hutchings v. Miner, 46 New York, 486.....	7, 389
Hunt v. Winfield, 36 Wisconsin, 154.....	17, 482	Hutchings v. Western & Atlantic R. R. 25 Ga. 61.....	lxxi, 154

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49, to American Reports.

Hutchins v. Brachett, 22 New Hampshire, 222.....xlvi, 245	Illinois Cent. R. Co. v. Green, 81 Illinois, 19.....25, 255
Hutchins v. Flinn, 2 Texas, 473.....xlvi, 659	Illinois Cent. R. Co. v. Handy, 63 Miss. 609.....54, 545
Hutchins v. Gorlish, 52 New Hampshire, 285.....13, 19	Illinois Cent. R. Co. v. Jewell, 46 Ill. 92.....xli, 269
Hutchins v. Johnson, 12 Connecticut, 376.....xxx, 623	Illinois Cent. R. Co. v. Kanouse, 30 Ill. 272.....lxviii, 307
Hutchins v. Kimmell, 21 Michigan, 136.....18, 164	Illinois Cent. R. Co. v. McOlellan, 54 Ill. 58.... 5, 63
Hutchins v. Masterson, 46 Texas, 551.....26, 268	Illinois Cent. R. Co. v. Mitchell, 68 Ill. 471.....12, 594
Hutchins v. Olcott, 4 Vermont, 549.....xlv, 634	Illinois Cent. R. Co. v. Read, 37 Ill. 624.....lxviii, 269
Hutchins v. Sprague, 4 New Hampshire, 469.....xvii, 439	Illinois Cent. R. Co. v. Smyser, 33 Ill. 354.....lxviii, 301
Hutchinson v. Bank of Wheeling, 41 Penn. St. 43.....lxix, 596	Illinois Central R. Co. v. Slatten, 54 Ill. 133.... 5, 109
Hutchinson v. Chase, 39 Maine, 506.....lxviii, 645	Illinois Cent. R. Co. v. Sutton, 43 Ill. 438.....xviii, 61
Hutchinson ada. Commonwealth, 1 Mass. 7.....ii, 1	Illinois Cent. R. Co. v. Welch, 52 Illinois, 183.... 4, 525
Hutchinson v. Concord, 41 Vermont, 271.....xviii, 584	Illinois Cent. R. Co. v. Whittemore, 43 Ill- nois, 420.....xviii, 138
Hutchinson v. Ford, 9 Bush, 318.....15, 711	Illinois Cent. R. Co. v. Willenborg, 117 Ill. 203.....57, 663
Hutchinson v. Forehand, 100 Massachusetts, 136.... 1, 94	Illinois etc. Trustees v. People, 12 Ill. 245.....11, 428
Hutchinson v. Forehand, 100 Mass. 136.....xviii, 62	Illinois & St. L. R. Co. v. Ogil, 33 Illinois, 627.....25, 343
Hutchinson v. Horn, 1 Indiana, 363.....1, 470	Illinois & St. L. R. Co. v. Switzer, 117 Ill. 200.....57, 675
Hutchinson v. Kelly, 1 Robinson (Va.), 125.....xxxix, 350	Illinois D. & S. R. Co. v. Ervin, 118 Ill. 292.....59, 369
Hutchinson v. Lord, 1 Wisconsin, 286.....lx, 361	Illinois F. I. Co. v. Fix, 53 Illinois, 151.....5, 38
Hutchinson v. Perley, 4 California, 33.....lx, 678	Illinois M. I. Co. v. Andes Ins. Co., 67 Ill. 322.....16, 628
Hutchinson v. Sandt, 4 Rawie, 234.....lxvi, 157	Illinois M. F. I. Co. v. Arohdson, 22 Ill. 234.....25, 313
Hutchinson v. Schinmelfeder, 40 Penn. St. 206.....lxix, 592	Illinois R. R. ada. State, 37 Illinois, 64.....lxviii, 226
Hutchinson v. Sprague, 4 New Hampshire, 469.....xvii, 439	Isley v. Merriam, 7 Cushing, 243.....lv, 72
Hutchinson v. State, 63 Alabama, 3.....24, 1	Isley v. Nichols, 12 Pickering, 270.....xviii, 425
Hutchinson v. Western Ins. Co., 21 Missouri, 97.....lxiv, 212	Isley v. Stubbs, 9 Massachusetts, 65.....vi, 29
Hutchinson v. Wetmore, 2 California, 310.....lvi, 337	Imboden v. Hunter, 23 Arkansas, 622.....lxix, 118
Huthmacher v. Harris, 38 Penn. State, 491.....lxix, 503	Imlay v. Union Branch R. Co., 25 Conn. 269.....lxviii, 326
Hutton v. Mayor N. Y. City, 9 N. Y. (3 Selden), 163.....lx, 626	Imler v. Springfield, 65 Missouri, 119.....17, 646
Hutton v. Merrifield, 61 Indiana, 34.....19, 722	Inches v. Dickinson, 2 Allen, 71.....lxix, 708
Hutton v. Camden, 10 Vroom, 122.....23, 203	Independent M. I. Co. v. Agnew, 34 Pa. St. 96.....lxix, 638
Hutton ada. Commonwealth, 5 Gray, 69.....lxvi, 353	Indiana Bank v. Anderson, 14 Iowa, 544.....lxviii, 268
Hutton v. State, 23 Tex. Ct. App. 386.....59, 776	Indiana, B. and West. Ry. Co. v. Eberle, 119 In- diana, 543.....59, 225
Hutton v. Williams, 35 Alabama, 503.....lxvii, 297	Indiana, B. and West. Ry. Co. v. Greene, 106 In- diana, 279.....55, 736
Hyatt v. Allen, 56 New York, 563.....15, 449	Ind. Cent. R. Co. v. Mundy, 21 Ind. 43.....lxviii, 339
Hyatt v. Boyle, 5 Gil & J. 110.....xv, 276	Ind. C. R. Co. v. Hudson, 13 Indiana, 335.....lxiv, 254
Hyatt v. James, 2 Bush, 463.....A.....xviii, 506	Ind. etc. R. Co. v. Davis, 20 Ind. 6.....lxviii, 303
Hyatt v. Wood, 4 Johnson, 150.....iv, 268	Ind. & Cin. R. Co. v. Guard, 24 Ind. 228.....lxviii, 257
Hyde v. Barney, 17 Vermont, 280.....xlv, 236	Ind. & Cin. R. Co. v. McClure, 28 Ind. 270.....lxviii, 407
Hyde v. La. State Ins. Co., 2 Martin, N. S., 410.....xiv, 196	Indianapolis v. Emmelman, 108 Ind. 630.....58, 66
Hyde v. Mississippi etc. Ins. Co., 19 La. 543.....lxix, 466	Indianapolis v. Kingsbury, 101 Ind. 209.....51, 749
Hyde v. Noble, 13 New Hampshire, 494.....lxviii, 506	Indianapolis, B. and W. West. Ry. Co. v. Hart- ley, 67 Illinois, 439.....16, 624
Hyde v. Planters' Bank, 17 Louisiana, 580.....lxvii, 621	Indianapolis, B. and West. Ry. Co. v. Toy, 31 Illinois, 474.....23, 57
Hyde v. State, 16 Texas, 445.....lxvii, 630	Indianapolis, Peru and Chicago Ry. Co. v. Phe- ner, 109 Indiana, 179.....53, 367
Hyde v. Stone, 9 Cowen, 230.....xviii, 501	Indianapolis ada. State, 30 Ind. 375.....25, 223
Hyde v. Stone, 7 Wendell 354.....xviii, 503	Indianapolis etc. R. Co. v. Cox, 29 Ind. 260.....xv, 649
Hyde v. Wabash, St. L. & P. R. Co., 61 Iowa, 441.....47, 620	Indianapolis etc. R. Co. v. Jones, 29 Ind. 405.....xv, 654
Hyde v. Wolf, 4 Louisiana, 234.....xviii, 494	Indianapolis etc. R. Co. v. Rutherford, 29 In- diana, 63.....xviii, 226
Hydes v. Joyce, 4 Bush, 464.....xvii, 311	Ingalls v. Ellis, 9 Metcalf, 1.....xviii, 269
Hyland v. Blodgett, 9 Oregon, 166.....49, 799	Ingalls v. Harick, 108 Massachusetts, 251.....11, 369
Hyndman v. Hyndman, 19 Vermont, 9.....xvi, 171	Ingallsbee v. Wood, 23 New York, 377.....lxviii, 499
Hynes v. McDermott, 62 New York, 41.....57, 638	Ingell v. Noonay, 2 Pickering, 321.....xviii, 434
Hynes v. McDermott, 61 New York, 451.....45, 677	Ingersoll v. Ingersoll, 46 Penn. St. 243.....lxviii, 509
Hynson v. Dunn, 5 Arkansas, 296.....xii, 100	Ingersoll v. Lewis, 11 Penn. State, 212.....11, 638
Hypes v. Griffin, 69 Illinois, 134.....31, 71	Ingersoll v. Martin, 58 Maryland, 67.....43, 332
Hyrne v. Erwin, 23 South Carolina, 236.....55, 15	Ingersoll ada. People, 58 New York, 1.....17, 179
Iaaga v. Bomleux, 15 Gratian, 83.....lxvii, 189	Ingles v. Hammond, 19 Ohio, 267.....111, 439
I. & G. N. Ry. Co. v. Folliard, 66 Texas, 603.....59, 633	Ingles v. Bosworth, 5 Pickering, 406.....xvi, 413
Iddings v. Iddings, 7 Serg. & R. 111.....x, 480	Inglish v. Breneman, 5 Arkansas, 377.....xii, 94
Id v. Stanton, 15 Vermont, 685.....xl, 603	Inglish v. Breneman, 9 Arkansas, 122.....lxviii, 735
Iack v. Anderson, 57 California, 251.....49, 115	Ingold ada. State, 4 Jones' Law, 215.....lxvii, 283
Ihl v. Forty-second St. etc. R. R. Co., 47 N. Y. 217.....7, 480	Ingraham v. Bookius, 9 Serg. & R. 226.....xi, 739
Ilt v. Bradt, 27 Iowa, 121.....xix, 645	Ingraham v. Geyer, 13 Massachusetts, 146.....vii, 132
Illinois Bank v. Sloc, 16 Louisiana, 538.....xxxv, 223	Ingraham v. Wilkinson, 4 Pickering, 268.....xvi, 343
Illinois Cent. Ins. Co. v. Wolf, 37 Illinois, 264.....lxviii, 251	Ingram v. Balk, 2 Strobhart's Law, 207.....xviii, 301
Illinois Cent. R. R. Co. v. Adams, 43 Ill. 474.....xviii, 85	
Illinois Cent. R. R. Co. v. Buckner, 26 Ill. 296.....lxviii, 263	
Illinois Cent. R. R. Co. v. Coppeland, 24 Ill. 332.....lxvii, 749	
Illinois Cent. R. R. Co. v. Cox, 21 Illinois, 20.....lxvi, 268	
Illinois Cent. R. R. v. Dickerson, 37 Illinois, 55.....lxix, 394	
Illinois Cent. R. R. Co. v. Frankenberg, 54 Ill. 68.... 5, 62	
Illinois Cent. R. Co. v. Godfrey, 71 Illinois, 506.....22, 112	

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Ingram v. Kirkpatrick, 6 Iredell's Eq. 463.....li, 428
 Ingram v. Little, 14 Georgia, 173.....lviii, 549
 Ingram v. Morgan, 4 Humphreys, 66.....xl, 626
 Ingram v. Rankin, 47 Wisconsin, 408.....33, 723
 Ingram v. Robbins, 23 New York, 409.....lxxxviii, 303
 Ingram v. State, 20 Alabama, 247.....lxxxiv, 723
 Ingwersen v. Rankin, 47 N. J. L. 13.....54, 109
 Inhabitants of —. See Name of Town, City,
 County, etc.
 Inhabitants of Deerfield v. Arms, 17 Pick. 41.....lxviii, 376
 Inhabitants of Deerfield v. Arms, 20 Pick. 460.....xxxi, 223
 Inhabitants of Freedom v. Weed, 40 Maine, 263.....lxiii, 670
 Inhab. of Hancock v. Haxard, 13 Oushing, 113.....li, 171
 Inhabitants of Milford v. Holbrook, 9 Allen, 17.....lxxxv, 726
 Inhab. of Orono v. Wedgewood, 44 Maine, 49.....lxix, 81
 Inhab. of Potham v. Aldrich, 8 Gray, 515.....lxix, 206
 Inhab. of Phillips v. Kingsfield, 19 Me. 275.....xxxi, 720
 Inhab. of Porter v. Stanley, 47 Maine, 515.....lxix, 501
 Inhab. of Saco v. Wentworth, 37 Maine, 165.....lviii, 726
 Inhab. of S. Berwick v. Huntress, 53 Me. 80.....lxxxvii, 535
 Inhab. of School Dist. in Winthrop v. Benson,
 21 Maine, 381.....li, 613
 Inhab. of Warren v. Inhab. of Thomaston, 43
 Maine, 406.....lxix, 69
 Inlces v. American Exchange Bank, 11 Md. 173.....lxix, 190
 Inman v. Funk, 7 B. Monroes, 538.....xlvi, 536
 Inman v. Tripp, 11 Rhode Island, 520.....23, 520
 In matter of —. See Name of Party.
 Immediacy v. Merchants' Nat. Bank, 139 Mas-
 sachusetts, 533.....53, 710
 Innis v. Templeton, 26 Penn. St. 262.....40, 643
 Innis v. McCrummin, 13 Martin, 425.....xiii, 379
 Innis v. Miller, 10 Martin, 289.....xiii, 330
 Innis v. Steamer Senator, 1 California, 450.....iv, 305
 Innis v. Steamer Senator, 4 California, 5.....lx, 577
 In re —. See Name of Party.
 Insurance Co. v. Commonwealth, 87 Penn-
 sylvania St. 173.....30, 323
 Insurance Co. v. Hope, 58 Illinois, 76.....li, 48
 Insurance Co. v. Ins. Co., 26 Ohio St. 11.....43, 413
 Insurance Co. v. O'Maley, 22 Penn. St. 400.....23, 729
 Insurance Co. v. Pyle, 44 Ohio St. 19.....58, 751
 Insurance Co. v. Williams, 30 Ohio St. 594.....43, 474
 Insurance Co. of N. America v. Commonwealth,
 87 Penn. St. 173.....30, 323
 Ins. Co. of N. A. v. McDowell, 50 Illinois, 120.....xcix, 497
 Insurance Oil Tank Co. v. Scott, 33 Louisiana
 Ann. 946.....39, 298
 Inslee v. Flagg, 2 Dutcher, 308.....lxix, 530
 Instone v. Frankfort Bridge Co., 2 Bibbs, 576.....v, 538
 International Bank v. Franklin Co., 65 Mo. 105.....27, 261
 International Bank v. German Bank, 71 Mo. 123-34, 468
 International Bank v. Jones, 119 Illinois, 407.....59, 507
 International G. N. Railway Co. v. Hassell, 63
 Texas, 256.....50, 523
 International G. N. R'y Co. v. Terry, 63 Tex. 290-59, 529
 Intoxicating Liquor Cases, 25 Kansas, 751.....37, 264
 Iowa Lumber Co. v. Foster, 49 Iowa, 25.....31, 140
 Iowa Seed Co. v. Dorr, 70 Iowa, 481.....59, 446
 Ireland v. Emerson, 73 Indiana, 1.....47, 264
 Ireland v. Elliott, 5 Iowa, 478.....lxviii, 715
 Irish v. Cloyes, 5 Vermont, 30.....xxx, 446
 Irish v. Milwaukee & St. P. R'y Co., 19 Minn. 274-18, 240
 Irish v. Newell, 63 Illinois, 196.....14, 79
 Irish v. Smith, 8 Serg. & R. 673.....xl, 648
 Iron R. R. Co. v. Fink, 41 Ohio St. 321.....52, 84
 Iron R. R. Co. v. Mowery, 36 Ohio St. 412.....38, 537
 Irons v. Kentner, 51 Iowa, 88.....53, 119
 Irons v. McQueen, 27 Penn. State, 196.....lxvii, 458
 Irons v. Webb, 12 Vreona, 203.....53, 123
 Irvin v. Nashville, C. & St. L. R. Co., 23 Ill. 103.....24, 116
 Irvin v. Turnpike Co., 2 Penrose & Watts, 496.....xxiii, 58
 Irvine v. Adams, 48 Wisconsin, 428.....33, 517
 Irvine v. Bull, 4 Watts, 237.....lxxxviii, 708
 Irvine v. McRee, 5 Humphreys, 554.....xiii, 428
 Irvine v. Wood, 51 New York, 224.....16, 603
 Irwin v. Backus, 25 California, 514.....lxxxv, 128
 Irwin v. Hubbard, 49 Indiana, 260.....19, 679
 Irwin v. Ivers, 7 Indiana, 208.....lxiii, 499
 Irwin v. New Orleans, St. L. & O. R. R. Co., 94
 Illinois, 105.....34, 208
 Irwin v. Nixon, 11 Penn. State, 419.....li, 559
 Irwin v. Phillips, 5 California, 140.....lxiii, 113
 Irwin v. Sherrill, Taylor (N. C.), 1.....i, 574
 Irwin v. Sprigg, 6 Gill, 200.....lxvi, 607
 Isaac v. Swift, 10 California, 71.....lxix, 698
 Isaacs v. Edwards, 7 Humphreys, 463.....lxvi, 26
 Isaacs v. Clark, 12 Vermont, 622.....lxxxvi, 372
 Isaacs v. Third Avenue R. R. Co., 47 N. Y. 122.....7, 418
 Isaacson v. New York C. & H. R. R. Co., 94 New
 York, 278.....46, 143
 Isbell v. N. Y. & N. H. R. R., 27 Connecticut, 263-lxxi, 78
 Iselt & Brewster v. Lucas, 17 Iowa, 503.....lxxxv, 572
 Iselt v. Stuart, 80 Illinois, 404.....27, 124
 Isham v. Eggleston, 2 Vermont, 270.....lxix, 714
 Isham v. Morgan, 9 Connecticut, 374.....lxiii, 261
 Isle R. M. Co. v. Hartin, 37 Michigan, 332.....26, 520
 Israel v. Israel, 30 Maryland, 120.....xvii, 671
 Iverson v. Loberg, 26 Illinois, 179.....lxix, 364
 Ives v. Bosley, 35 Maryland, 263.....6, 411
 Ives v. Orem, 5 Penn. State, 118.....lxviii, 421
 Ives v. Gilbert, 1 Root, 89.....i, 36
 Ives v. Hamard, 4 Rhode Island, 14.....lxvii, 509
 Ives v. Jones, 3 Iredell's Law, 538.....xl, 421
 Ives v. Mills, 37 Illinois, 73.....lxxxvii, 238
 Ivey v. Lalland, 42 Mississippi, 444.....2, 606
 Ivey v. Lalland, 42 Mississippi, 444.....xviii, 478
 Ivin's Appeal, 106 Penn. St. 176.....51, 516
 Ivory v. Bank St., 26 Missouri 478.....lxxxviii, 150
 Isard v. Bodine, 3 Stockton's Ch. 403.....lxix, 566
 Jacaway v. Dula, 7 Yerger, 82.....lxviii, 492
 Jack v. Hudnall, 25 Ohio St. 265.....16, 236
 Jack v. Weissneth, 115 Illinois, 106.....56, 129
 Jackman v. Hallock, 1 Ohio, 218.....lxiii, 627
 Jackson v. Adams, 9 Massachusetts, 484.....vi, 94
 Jackson v. Alexander, 3 Johnson, 484.....xiii, 517
 Jackson v. Bard, 4 Johnson, 220.....iv, 257
 Jackson v. Bowen, 1 Calmes, 358.....li, 193
 Jackson v. Blanshan, 2 Johnson, 222.....xiii, 426
 Jackson v. Blanshan, 6 Johnson, 54.....v, 156
 Jackson v. Brownell, 1 Johnson, 227.....xiii, 326
 Jackson v. Brownson, 7 Johnson, 237.....v, 236
 Jackson v. Bryan, 3 J. J. Marshall, 208.....xx, 143
 Jackson v. Bull, 10 Johnson, 148.....vi, 221
 Jackson v. Burgott, 10 Johnson, 457.....vi, 249
 Jackson v. Catlin, 2 Johnson, 248.....xiii, 415
 Jackson v. Chicago & N. W. R'y Co., 21 Iowa, 176.....7, 120
 Jackson v. Churchhill, 7 Cowen, 267.....lxviii, 514
 Jackson v. Cleveland, 15 Michigan, 94.....xc, 266
 Jackson v. Com'l Fk, 2 Robinson (La.), 128.....lxxxviii, 204
 Jackson ada. Commonwealth, 11 Bush, 679.....21, 225
 Jackson v. Cullum, 2 Blackford, 228.....lxviii, 150
 Jackson v. Davis, 5 Cowen, 123.....xv, 451
 Jackson v. Delancy, 13 Johnson, 536.....vii, 403
 Jackson v. Demont, 9 Johnson, 55.....vi, 259
 Jackson v. Dickinson, 15 Johnson, 209.....viii, 236
 Jackson v. Dunlap, 1 Johnson's Cases, 114.....i, 100
 Jackson v. Fitz Simmons, 10 Wendell, 9.....lxiv, 198
 Jackson v. French, 3 Wendell, 337.....xx, 699
 Jackson v. Given, 3 Johnson, 127.....v, 203

Roman letters [xlix] refer to volumes of Ameri

Hutchins v. Brachett, 23 New Hampshire, 303.....	1
Hutchins v. Filings, 3 Texas, 473.....	xli
Hutchins v. Gerrish, 23 New Hampshire, 305.....	1
Hutchins v. Johnson, 13 Connecticut, 376.....	x
Hutchins v. Kimmell, 31 Michigan, 126.....	1
Hutchins v. Masterson, 46 Texas, 551.....	2
Hutchins v. Olcott, 4 Vermont, 549.....	xx
Hutchins v. Sprague, 4 New Hampshire, 469.....	xv
Hutchinson v. Bank of Wheeling, 41 Penn. St. 42.....	lxx
Hutchinson v. Chase, 39 Maine, 506.....	lxi
Hutchinson ada. Commonwealth, 1 Mass. 7.....	
Hutchinson v. Concord, 41 Vermont, 271.....	xvii
Hutchinson v. Ford, 9 Bush, 318.....	1
Hutchinson v. Forehand, 100 Massachusetts, 136.....	
Hutchinson v. Forehand, 100 Mass. 136.....	xcv
Hutchinson v. Horn, 1 Indiana, 363.....	
Hutchinson v. Kelly, 1 Robinson (Va.), 123.....	xxxi
Hutchinson v. Lord, 1 Wisconsin, 296.....	1
Hutchinson v. Parley, 4 California, 33.....	1
Hutchinson v. Sandt, 4 Rawle, 234.....	xxv
Hutchinson v. Schmalzeder, 40 Penn. St. 306.....	lxx
Hutchinson v. Sprague, 4 New Hampshire, 469.....	xvi
Hutchinson v. State, 63 Alabama, 3.....	34
Hutchinson v. Western Ins. Co., 21 Missouri, 97.....	lxv
Hutchinson v. Wetmore, 2 California, 310.....	lv
Huthmacher v. Harris, 39 Penn. State, 491.....	lxx
Hutson v. Mayor N. Y. City, 9 N. Y. (Selden), 163.....	lii
Hutson v. Merrifield, 51 Indiana, 24.....	19
Hutton v. Camden, 10 Vroom, 122.....	23
Hutton ada. Commonwealth, 5 Gray, 89.....	lxvi
Hutton v. State, 23 Tex. Ct. App. 366.....	59
Hutton v. Williams, 35 Alabama, 503.....	lxvii
Hyatt v. Allen, 56 New York, 553.....	15
Hyatt v. Boyle, 5 Gill & J. 110.....	xxv
Hyatt v. James, 3 Bush, 463.....	A.....xlii
Hyatt v. Wood, 4 Johnson, 150.....	lv
Hyde v. Barney, 17 Vermont, 260.....	xliv
Hyde v. La. State Ins. Co., 3 Martin, N. H., 410.....	xiv
Hyde v. Mississippi etc. Ins. Co., 10 La. 543.....	xxix
Hyde v. Noble, 13 New Hampshire, 494.....	xxviii
Hyde v. Planters' Bank, 17 Louisiana, 560.....	xxvii
Hyde v. State, 16 Texas, 445.....	lxvii
Hyde v. Stone, 9 Cowen, 250.....	xviii
Hyde v. Stone, 7 Wendell 354.....	xxii
Hyde v. Wabash, 84 L. & P. R. Co., 61 Iowa, 441, 47.....	
Hyde v. Wolf, 4 Louisiana, 234.....	xxiii
Hydes v. Joyce, 4 Bush, 464.....	xvii
Hyland v. Blodgett, 9 Oregon, 168.....	42
Hyndman v. Hyndman, 19 Vermont, 9.....	xvii
Hynes v. McDermott, 22 New York, 41.....	27
Hynes v. McDermott, 21 New York, 451.....	43
Hynson v. Dunn, 5 Arkansas, 396.....	xli
Hynes v. Griffin, 59 Illinois, 124.....	31
Hynes v. Erwin, 23 South Carolina, 238.....	55
Isaacs v. Bonheur, 15 Gratian, 83.....	lxvii
I. & G. N. E'y Co. v. Folliard, 66 Texas, 603.....	59
Iddings v. Iddings, 7 Serg. & R. 111.....	x
Ide v. Stanton, 15 Vermont, 685.....	xi
Iock v. Anderson, 27 California, 251.....	40
Ihl v. Forty-second St. etc. R. R. Co., 47 N. Y. 317.....	7
Ill v. Bradli, 27 Iowa, 121.....	xcix
Illinois Bank v. Sloc, 16 Louisiana, 538.....	xxv
Illinois Cent. Ins. Co. v. Wolf, 37 Illinois, 364.....	lxvii
Illinois Cent. R. R. Co. v. Adams, 42 Ill. 474.....	xli
Illinois Cent. R. R. Co. v. Buckner, 28 Ill. 296.....	lxxii
Illinois Cent. R. R. Co. v. Copeland, 24 Ill. 333.....	lxvii
Illinois Cent. R. R. Co. v. Cox, 21 Illinois, 20.....	lxxi
Illinois Cent. R. R. v. Dickerson, 27 Illinois, 55.....	lxix
Illinois Cent. R. R. Co. v. Frankenberg, 54 Ill. 88.....	5
Illinois Cent. R. Co. v. Godfrey, 71 Illinois, 800.....	22

Jarecki v. Philharmonic Soc'y, 79 Penn. 84. 403.....	xi, 78
Jarrigan v. Fleming, 43 Mississippi, 710.....	5, 514
Jarrard v. Harper, 42 Illinois, 457.....	xvii, 84
Jarvis v. Brooks, 27 New Hampshire, 57.....	lii, 359
Jarvis v. Davis, 14 B. Monroe, 434.....	lxi, 186
Jarvis v. Hatheway, 3 Johnson, 180.....	lii, 473
Jarvis v. Robinson, 21 Wisconsin, 530.....	xiv, 580
Jarvis v. Wilson, 44 Connecticut, 90.....	33, 18
Jasch v. Jacob, 50 Indiana, 135.....	19, 699
Jeanney v. Thorne, 2 Barbour's Ch. 40.....	xiv, 434
Jefferson Co. Comm'n v. Lindeberger, 3 Mont. 231.....	35, 462
Jefferson Ins. Co. v. Cothel, 7 Wendell, 73.....	xvii, 567
Jeffersonville v. Louisville & T. S. F. Co., 27 Indiana, 100.....	lxxxix, 495
Jeffersonville R. R. Co. v. Ootton, 29 Ind. 498.....	xv, 656
Jeffersonville R. R. Co. v. Rogers, 28 Ind. 1.....	xvii, 276
Jeffersonville R. R. Co. v. Rogers, 28 Ind. 116.....	16, 103
Jeffrey v. Bigelow, 13 Wendell, 518.....	xviii, 476
Jeffrey v. Ficklin, 3 Arkansas, 237.....	xxxvi, 456
Jeffries v. Evans, 6 B. Monroe, 119.....	xliii, 158
Jeffries ada. Commonwealth, 7 Allen, 548.....	lxxxviii, 712
Jefte v. York, 4 Cushing, 371.....	1, 791
Jellison v. Goodwin, 43 Maine, 267.....	lxix, 63
Jemison v. Southwestern R. R., 75 Ga. 444.....	58, 476
Jenason v. Garden, 23 Illinois, 199.....	lxxxii, 306
Jenkins v. Atkins, 1 Humphreys, 394.....	xxxiv, 648
Jenkins v. Bacon, 111 Massachusetts, 373.....	15, 33
Jenkins v. Charleston, 3 South Carolina, 393.....	7, 14
Jenkins v. Clement, 1 Harper's Eq. 72.....	xiv, 696
Jenkins v. Eichelberger, 4 Watts, 121.....	lxviii, 691
Jenkins v. Frink, 30 California, 586.....	lxxxix, 134
Jenkins v. Gillespie, 10 Smedes & M. 31.....	xviii, 738
Jenkins v. Jenkins, 63 Indiana, 415.....	36, 229
Jenkins v. Jenkins' Heirs, 3 Dana, 102.....	lxvi, 437
Jenkins v. Kalren, 13 Gray, 330.....	lxix, 596
Jenkins v. Long, 19 Indiana, 29.....	lxxxii, 374
Jenkins v. Lykes, 19 Florida, 148.....	45, 19
Jenkins v. McCurdy, 48 Wisconsin, 626.....	33, 641
Jenkins v. McNeill, 27 Kansas, 532.....	41, 423
Jenkins v. Motlow, 1 Sneed, 248.....	lx, 154
Jenkins v. Putnam, 1 Bay, 8.....	1, 594
Jenkins v. Richardson, 6 J. J. Marshall, 441.....	xvii, 82
Jenkins v. Spooner, 5 Cushing, 419.....	lii, 739
Jenkins v. State, 53 Georgia, 33.....	31, 255
Jenkins ada. State, 84 North Carolina, 512.....	37, 648
Jenkins ada. State, 14 Richardson's Law, 215.....	xiv, 132
Jenkins v. Steenka, 19 Wisconsin, 126.....	lxxxviii, 675
Jenkins v. Tumples, 39 Georgia, 655.....	lxix, 483
Jenkins v. Waldron, 11 Johnson, 114.....	vi, 359
Jenkins v. Walter, 8 Gill & Johnson, 215.....	xxix, 539
Jenks v. Frits, 7 Watts & Berg, 201.....	xlii, 227
Jenne v. Sutton, 14 Vroom, 257.....	39, 678
Jennens v. Bean, 10 New Hampshire, 266.....	xxxiv, 152
Jennens v. Jennes, 24 Indiana, 355.....	lxxxvii, 336
Jennens v. Wendell, 51 New Hampshire, 63.....	12, 48
Jennings, ex parte, 6 Cowen, 518.....	lxvi, 447
Jennings v. Camp, 13 Johnson, 94.....	vii, 367
Jennings v. Carter, 3 Wendell, 446.....	xx, 635
Jennings v. Collins, 99 Massachusetts, 29.....	xvii, 687
Jennings ada. Commonwealth, 121 Mass. 47.....	23, 249
Jennings v. Orider, 3 Bush, 323.....	xvii, 467
Jennings v. Flanagan, 5 Dana, 217.....	xxx, 683
Jennings v. Gage, 13 Illinois, 610.....	lvi, 476
Jennings v. Grays, 3 Rawle, 168.....	xxviii, 111
Jennings v. Ins. Co. of Penn., 4 Binney, 344.....	v, 404
Jennings v. Johnson, 17 Ohio, 154.....	xliv, 451
Jennings v. Lyons, 39 Wisconsin, 553.....	30, 57
Jennings v. Melroy, 42 Arkansas, 238.....	48, 61
Jennings ada. State, 31 Missouri, 185.....	51, 236
Jennings v. Webster, 8 Paige, 502.....	lxiv, 722
Jennison v. Haggood, 7 Pickering, 1.....	lxix, 399
Jennison v. Stafford, 1 Cushing, 165.....	lxviii, 694
Jericho ada. State, 40 Vermont, 121.....	xvii, 327
Jerome v. Bigelow, 66 Illinois, 422.....	16, 597
Jerome v. Bosc, 7 Johnson's Ch. 315.....	xi, 494
Jerome v. Smith, 48 Vermont, 230.....	21, 125
Jersey City v. Riker, 9 Vroom, 225.....	20, 296
Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291.....	40, 625
Jersey City ada. State, 2 Vroom, 575.....	lxxxvi, 249
Jesse v. Parker, 6 Gratton, 57.....	lii, 102
Jessup v. Bridge, 11 Iowa, 572.....	lxxxix, 513
Jessup v. Carnegie, 80 New York, 441.....	26, 643
Jessup v. Johnston, 3 Jones' Law, 335.....	lxvii, 243
Jesp v. City Bank of Racine, 15 Wis. 604.....	lxxxii, 703
Jeter v. Penn, 28 Louisiana An. 230.....	20, 93
Jewell v. Chicago, 84 P. & M. R. Co., 54 Wis. 610.....	41, 68
Jewell v. Lea, 14 Allen, 145.....	xvii, 744
Jewell v. Mahood, 44 New Hampshire, 474.....	lxxxiv, 90
Jewell v. Wright, 30 New York, 259.....	lxxxvi, 373
Jewett v. Gage, 55 Maine, 538.....	xvii, 615
Jewett v. Lincoln, 14 Maine, 116.....	xxxvi, 35
Jewett v. Miller, 10 N. Y. (6 Selden), 402.....	lxv, 751
Jewett v. New Haven, 35 Connecticut, 268.....	9, 393
Jewett v. Palmer, 7 Johnson's Ch. 65.....	xi, 401
Jewett v. Partridge, 12 Maine, 243.....	lxviii, 173
Jewett v. Stockton, 3 Yerges, 462.....	lxiv, 594
Jewett v. Warren, 12 Massachusetts, 309.....	vii, 74
J. G. v. H. G., 33 Maryland, 401.....	3, 123
Jilson v. Gilbert, 26 Wisconsin, 637.....	7, 100
Jils, Ex parte, 64 Missouri, 205.....	27, 218
Jocelyn v. Donnel, 1 Peck, 274.....	xiv, 753
Jochem v. Robinson, 66 Wisconsin, 638.....	57, 298
Joekers v. Borgman, 29 Kansas, 109.....	44, 626
Joe v. State, 6 Florida, 591.....	lxv, 579
Joehal v. Easton, 11 Missouri, 118.....	lxvii, 142
Joest v. Williams, 42 Ind. 565.....	13, 377
Johannes v. Phenix Ins. Co., 66 Wisconsin, 20.....	57, 248
John v. City Nat. Bank, 63 Alabama, 529.....	34, 39
John v. Farmers' etc. Bank, 2 Blackford, 267.....	xx, 119
John v. Hunt, 1 Blackford, 224.....	xii, 246
John ada. State, 8 Iredell's Law, 330.....	lxix, 396
John ada. State, 5 Jones' Law, 163.....	lxix, 777
John Hancock M. L. I. Co. v. Patterson, 103 Indiana, 582.....	53, 599
Johns v. Church, 12 Pickering, 657.....	lxviii, 651
Johns v. Hodges, 60 Maryland, 215.....	45, 722
Johns v. State, 78 Indiana, 333.....	41, 577
Johns v. State, 19 Indiana, 421.....	lxxxii, 408
Johnson v. Albany etc. R. Co., 54 N. Y. 416.....	13, 607
Johnson v. Allen, 78 Alabama, 387.....	56, 34
Johnson v. Arnwine, 13 Vroom, 461.....	36, 537
Johnson v. Atlantic & St. L. R. R., 35 N. H. 569.....	lxix, 599
Johnson v. Baker, 38 Illinois, 98.....	lxxxvii, 298
Johnson v. Baker, 3 Murphy, 318.....	lx, 505
Johnson v. Ball, 1 Yerges, 290.....	lxvii, 451
Johnson v. Barber, 5 Gilman, 425.....	1, 416
Johnson v. Beasley, 65 Missouri, 250.....	27, 276
Johnson v. Berlitzheimer, 84 Illinois, 54.....	25, 427
Johnson v. Blasdale, 1 Smedes & M. 17.....	xl, 85
Johnson v. Bloodgood, 1 Johnson's Cases, 51.....	1, 83
Johnson v. Boston Tow Boat Co., 125 Mass. 309.....	46, 453
Johnson v. Boyer, 3 Watts, 276.....	lxxxvii, 363
Johnson v. Bounthea, 3 Hill (S. C.) 15, 1 Riley, 9.....	xxx, 347
Johnson v. Brailsford, 2 Nott & McLeod, 373.....	x, 601
Johnson v. Brook, 21 Mississippi, 17.....	lxvii, 547
Johnson v. Brown, 2 Humphreys, 237.....	lxxxvii, 556
Johnson v. Bruner, 61 Penn. State, 58.....	6, 613
Johnson v. Buck, 35 New Jersey, 338.....	10, 243
Johnson v. Burden, 40 Vermont, 567.....	lxiv, 436
Johnson v. Byerly, 3 Head, 194.....	lxv, 764

Roman letters [xlii] refer to volumes of Ames

Jackson v. Goss, 13 Johnson, 518.....	x
Jackson v. Harder, 4 Johnson, 202.....	x
Jackson v. Hansen, 7 Cowen, 223.....	x
Jackson v. Hart, 12 Johnson, 77.....	v
Jackson v. Hathaway, 15 Johnson, 447.....	v
Jackson v. Henry, 10 Johnson, 185.....	v
Jackson v. Hudson, 3 Johnson, 375.....	v
Jackson v. Hney, 10 Lea, 184.....	4
Jackson v. Jackson, 73 Kentucky, 390.....	3
Jackson v. Jackson, 26 Mississippi, 674.....	lx
Jackson v. Jackson, 51 Vermont, 253.....	3
Jackson v. Jennings, 13 Richardson's Eq. 172.....	xci
Jackson v. Johnson, 5 Cowen, 74.....	x
Jackson v. Johnson 84 Georgia, 511.....	lxxxi
Jackson v. King, 4 Cowen, 207.....	x
Jackson v. King, 5 Cowen, 237.....	x
Jackson v. Kisselbrack, 10 Johnson, 236.....	v
Jackson v. Kniffen, 3 Johnson, 31.....	ii
Jackson v. Lawton, 10 Johnson, 52.....	v
Jackson v. LeGrange, 19 Johnson, 398.....	i
Jackson v. Loomis, 4 Cowen, 168.....	xi
Jackson v. Love, 63 North Carolina, 406.....	33
Jackson v. Marshall, 1 Murphey, 223.....	iii
Jackson v. Mass. Mut. I. Co., 23 Pick. 418.....	xxxiv
Jackson v. Matsdorf, 11 Johnson, 91.....	vi
Jackson v. Mayo, 11 Massachusetts, 147.....	vi
Jackson v. McAliley, 1 Speers' Eq. 203.....	xi
Jackson v. McCall, 10 Johnson, 377.....	vi
Jackson v. McChesney, 7 Cowen, 360.....	xvii
Jackson v. McKenny, 3 Wendell, 233.....	xx
Jackson v. Merrill, 6 Johnson, 185.....	v
Jackson v. Moore, 13 Johnson, 513.....	vii
Jackson v. Morse, 16 Johnson, 197.....	viii
Jackson v. Morse, 18 Johnson, 441.....	ix
Jackson v. Murray, 5 T. B. Monroe, 184.....	xvii
Jackson v. Murray, 1 Cowen, 156.....	xiii
Jackson v. Myers, 3 Johnson, 338.....	lii
Jackson v. Nashville C. & St. L. R. R., 13 Lea,	
491.....	49,
Jackson v. Newman, 59 Mississippi, 385.....	49,
Jackson v. Osborn 3 Wendell, 555.....	xx
Jackson ada. People 3 Denio, 101.....	xlv
Jackson v. People, 9 Michigan, 111.....	lxvii
Jackson v. Pixley, 9 Cushing, 490.....	lvii
Jackson v. Ramsay, 3 Cowen, 75.....	xv
Jackson v. Rendleman, 100 Illinois, 379.....	39,
Jackson v. Rice, 3 Wendell, 180.....	xx
Jackson v. Robinson, 1 Yeates, 101.....	i
Jackson v. Rutland etc. R. R. Co., 25 Va. 150.....	lx
Jackson v. Rutledge, 3 Lea, 626.....	31, 6
Jackson v. Schuts, 18 Johnson, 174.....	ix, 1
Jackson v. Sebring, 16 Johnson, 515.....	viii, 3
Jackson v. Second Ave. R. R. Co., 47 N. Y. 274... 7, 4	
Jackson v. Sharp, 9 Johnson, 163.....	vi, 2
Jackson v. Shepard, 7 Cowen, 83.....	xvii, 5
Jackson ada. State, 73 Maine, 91.....	46, 3
Jackson ada. State, 17 Missouri, 544.....	lx, 2
Jackson ada. State, 80 Missouri, 174.....	56, 4
Jackson ada. State, 78 North Carolina, 263.....	94, 4
Jackson v. Stockbridge, 29 Texas, 394.....	xlv, 2
Jackson v. Still, 11 Johnson, 201.....	vi, 3
Jackson v. Staats, 11 Johnson, 337.....	vi, 37
Jackson v. Stackhouse, 1 Cowen, 122.....	xiii, 51
Jackson v. Stanley, 10 Johnson, 133.....	vi, 31
Jackson v. St. Louis I. M. & S. R'y Co., 87 Missouri,	
422.....	56, 46
Jackson v. Topping, 1 Wendell, 383.....	xix, 51
Jackson v. Town, 4 Cowen, 509.....	xv, 40
Jackson v. Tracer, 64 Iowa. 469.....	52, 44
Jackson v. Vanderheyden, 17 Johnson, 167.....	viii, 37

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Johnston v. Humby, Taylor (N. C.), 306.....	l, 580	Jones v. Hughes, 5 Serg. & R. 292.....	lx, 264
Johnston v. Kimball T., 39 Michigan, 187.....	33, 373	Jones v. Inh. of Waltham, 4 Onshing, 220.....	l, 769
Johnston v. Lewis, 1 Rice's Eq. 40.....	xxxiii, 74	Jones v. Janney, 8 Watts & Serg. 436.....	xiii, 209
Johnston v. Mitchell, 1 A. K. Marshall, 228.....	x, 727	Jones v. Johnson, 3 Watts & Serg. 276.....	xxxviii, 769
Johnston v. Quarles, 3 Louisiana, 90.....	xxix, 163	Jones v. Jones, 1 Bland's Ch. 443.....	xviii, 227
Johnston v. Spear, 22 Penn. St. 227.....	37, 678	Jones v. Jones, 6 Connecticut, 111.....	xvi, 36
Johnston v. Wallace, 53 Mississippi, 331.....	94, 699	Jones v. Jones, 18 Maine, 308.....	xxxvi, 723
Johnston v. Wilson, 2 New Hampshire, 203.....	lx, 50	Jones v. Jones, 26 Maryland, 447.....	xi, 406
Johnstown Cheese Mfg. Co. v. Veghte, 69 New York, 18.....	25, 126	Jones v. Jones, 48 Maryland, 291.....	36, 406
Johnstown I. Co. v. Cambria I. Co., 33 Pa. St. 241.....	lxvii, 783	Jones v. Jones, 18 N. J. Eq. 33.....	xx, 627
Joice v. Taylor, 6 Gill & J. 84.....	xxv, 325	Jones v. Jones, 2 Overton, 2.....	v, 648
Joint School District ada. State, 65 Wis. 631.....	56, 653	Jones v. Jones, 12 Penn. State, 250.....	ii, 611
Joliet v. Harwood, 86 Illinois, 110.....	79, 17	Jones v. Jones, 66 Wisconsin, 210.....	57, 268
Joliet v. Seward, 86 Illinois, 402.....	79, 36	Jones v. Jones's Heirs, 15 Texas, 463.....	lxv, 174
Joliet I. Co. v. Scioto F. R. Co., 82 Ill. 594.....	25, 341	Jones v. Judkins, 4 Dev. & Bat. Law, 454.....	xxxiv, 263
Joliet v. Varley, 85 Illinois, 58.....	lxix, 342	Jones v. Keith, 37 Texas 289.....	14, 623
Jolliffe v. Hite, 1 Call, 201.....	i, 619	Jones v. Knox, 46 Alabama, 53.....	7, 623
Jolliffe v. Madison Mutual Ins. Co., 29 Wis. 111.....	90, 36	Jones v. Leonard, 50 Iowa, 106.....	83, 116
Jolly v. Baltimore E. Society, 1 Harris & G. 295.....	xviii, 298	Jones v. Lewis, 8 Iredell's Law, 79.....	xxvii, 229
Jolly ada. State, 3 Dev. & Bat. Law, 110.....	xxix, 656	Jones v. Loving, 55 Mississippi, 109.....	36, 608
Jonakin v. Holland, 7 Georgia, 589.....	i, 414	Jones v. McGuirk, 61 Illinois, 282.....	xxix, 696
Jones, In re, 103 New York, 621.....	57, 775	Jones v. McKee, 3 Penn. State, 498.....	xiv, 661
Jones' Appeal, 8 Watts & Serg. 143.....	xiii, 223	Jones v. McNarrin, 63 Maine, 534.....	36, 66
Jones v. Bacon, 66 Maine, 34.....	23, 1	Jones v. Mason, 5 Randolph, 577.....	xvi, 761
Jones v. Bangs, 40 Ohio State, 139.....	48, 664	Jones v. Matthews, 8 Lea, 51.....	41, 633
Jones v. Bank of Tennessee, 8 R. Monroe, 124.....	xvi, 540	Jones v. Mechanic's Bank, 29 Maryland, 287.....	xvi, 632
Jones v. Berkshire, 15 Iowa, 248.....	lxviii, 412	Jones v. Mechanic's F. I. Co., 26 New Jersey, 29.....	13, 406
Jones v. Blackidge, 9 Kansas, 563.....	19, 503	Jones v. Morgan, 39 Georgia, 310.....	xxix, 458
Jones v. Blanton, 6 Iredell's Eq. 115.....	ii, 415	Jones v. Morgan, 90 New York, 4.....	43, 131
Jones v. Board of Registrars, 56 Mississippi, 766.....	31, 265	Jones v. Moore, 5 Binney, 573.....	vi, 628
Jones v. Boston, 104 Massachusetts, 75.....	6, 194	Jones v. Moseley, 40 Mississippi, 251.....	22, 227
Jones v. Boston Mill Corp., 4 Pickering, 507.....	xvi, 256	Jones v. Nellis, 41 Illinois, 463.....	lxviii, 228
Jones v. Bragg, 33 Missouri, 237.....	lxixiv, 49	Jones v. Newhall, 115 Massachusetts, 244.....	15, 97
Jones v. Brown, 54 Iowa, 74.....	37, 185	Jones v. Nichols, 46 Arkansas, 207.....	55, 678
Jones v. Burnham, 67 Maine, 53.....	74, 10	Jones v. Pacific W. L. & E. Co., 13 Nevada, 229.....	36, 306
Jones v. Burr, 5 Strobhart's Law, 147.....	lxi, 699	Jones v. People, 6 Colorado, 492.....	45, 626
Jones v. Call, 86 North Carolina, 337.....	60, 416	Jones v. Percival, 5 Pickering, 465.....	xvi, 415
Jones v. Caswell, 3 Johnson's Cases, 29.....	ii, 124	Jones v. Perkins, 29 Mississippi, 139.....	lxiv, 126
Jones v. Com'l Bk of Columbus, 5 Howard, 43.....	xxv, 419	Jones v. Perry, 10 Yarger, 59.....	xxx, 429
Jones v. Commonwealth, 1 Bush, 34.....	lxixix, 605	Jones v. Peterman, 3 Serg. & R. 542.....	viii, 672
Jones v. Cooper, 2 Atkins, 54.....	xvi, 678	Jones v. Pitcher, 3 Stewart & P. 125.....	xxiv, 716
Jones v. Costigan, 12 Wisconsin, 677.....	lxviii, 771	Jones v. Planters' Bank, 5 Humphreys, 612.....	xiii, 471
Jones v. Council Bluffs Branch of the State Bank of Iowa, 34 Ill. 313.....	lxixv, 306	Jones v. Plater, 2 Gill, 125.....	xii, 408
Jones v. Crittenden, 1 Car. Law Repos. 285.....	vi, 631	Jones v. Reid, 12 West Virginia, 280.....	79, 458
Jones v. Darnall, 103 Indiana, 569.....	53, 645	Jones v. Rice, 18 Pickering, 440.....	xxix, 612
Jones v. Detroit Chair Co., 38 Mich. 22.....	31, 214	Jones v. Richmond, 18 Gratt. 517.....	xxviii, 696
Jones v. Dexter, 120 Massachusetts, 290.....	39, 459	Jones v. Robbins, 29 Maine, 351.....	i, 696
Jones v. Dorr, 19 Indiana, 264.....	lxvii, 406	Jones v. Roberts, 6 Call, 127.....	ii, 578
Jones v. Earl, 37 California, 630.....	xxix, 326	Jones v. Robertson, 116 Illinois, 543.....	56, 796
Jones v. Everman, 15 R. Monroe, 631.....	lxix, 521	Jones v. Robinson, 11 Arkansas, 504.....	liv, 212
Jones v. Finch, 37 Mississippi, 461.....	lxv, 73	Jones v. Scanlan, 6 Humphreys, 126.....	xliv, 309
Jones v. Florence M. Co., 66 Wisconsin, 268.....	57, 269	Jones v. Sevier, 1 Littell, 50.....	xiii, 218
Jones v. Fredenburg, 66 Georgia, 505.....	42, 86	Jones v. Shorter, 1 Georgia, 294.....	xliv, 649
Jones v. Fuller, 19 South Carolina, 66.....	45, 761	Jones v. Sims, 9 Porter, 236.....	xxxiii, 212
Jones v. George, 56 Texas, 149.....	42, 699	Jones v. Sinclair, 2 New Hampshire, 212.....	ix, 75
Jones v. George, 61 Texas, 245.....	48, 260	Jones v. State, 7 Missouri, 81.....	xxxvii, 129
Jones v. Gibson, N. O. Term Rep. 41.....	vii, 690	Jones v. State, 30 Mississippi, 653.....	lxiv, 175
Jones v. Goodwin, 26 California, 493.....	2, 473	Jones v. State, 13 Texas, 168.....	lxii, 659
Jones v. Granite Mills, 126 Massachusetts, 84.....	36, 651	Jones v. State, 51 Wisconsin, 718.....	34, 659
Jones v. Greaves, 26 Ohio St. 2.....	90, 722	Jones ada. State, 50 New Hampshire, 369.....	3, 242
Jones v. Hardy, 10 Gill & J. 404.....	xxxii, 120	Jones ada. State, 83 North Carolina, 606.....	35, 596
Jones v. Hays, 3 Iredell's Eq. 503.....	lxiv, 78	Jones ada. State, 95 North Carolina, 698.....	59, 222
Jones v. Henry, 84 North Carolina, 220.....	37, 624	Jones ada. State, 4 Halsted, 267.....	xvii, 453
Jones v. Holiday, 11 Texas, 412.....	lxii, 457	Jones ada. State, 1 McMullan's Law, 236.....	xxxvi, 227
Jones v. Hook, 2 Randolph, 303.....	xiv, 783	Jones ada. State ex rel. Leal, 19 Indiana, 264.....	lxviii, 406
Jones v. Honey, 4 Maryland, 206.....	lix, 81	Jones v. Steamship Cortes, 17 California, 457.....	lxix, 162
Jones v. Howard, 8 Metcalf, 377.....	xli, 625	Jones v. Syer, 63 Maryland, 211.....	36, 266
Jones v. Higgins, 1 Devereux's L. 228.....	xvii, 567	Jones v. Taylor, 7 Texas, 240.....	lvi, 46
		Jones v. Tevis, 4 Littell, 25.....	xiv, 96
		Jones v. Thayer, 12 Gray, 443.....	lxiv, 602

Roman letters [xlix] refer to volumes of Am

Johnson v. Caruley, 10 N. Y. (6 Selden), 570.....	
Johnson v. Catlin, 27 Vermont, 87.....	
Johnson v. Caulkins, 1 Johnson's Cases, 116.....	
Johnson v. Cawthorn, 1 Dev. & Bat. Eq. 32.....	
Johnson v. Coleman, 23 Wisconsin, 482.....	
Johnson v. Commercial Bank, 27 West Va. 343.....	
Johnson v. Concord R. R. Corp., 46 N. H. 213. lxx	
Johnson v. Cooper, 2 Yerges, 524.....	
Johnson v. Corpenning, 4 Iredell's Eq. 216.....	
Johnson v. Cunniff, 16 N. J. Eq. 97.....lx	
Johnson v. Cushing, 15 New Hampshire, 296.....	
Johnson v. Cutler, 105 Massachusetts, 447.....	
Johnson v. Dalton, 1 Cowen, 543.....	
Johnson v. Davenport, 19 Johnson, 134.....	
Johnson v. Duncan, 3 Martin, 530.....	
Johnson v. Ellison, 4 T. B. Monroe, 526.....	
Johnson v. Evans, 6 Gill, 155.....	
Johnson v. Fall, 6 California, 339.....	
Johnson v. Farwell, 7 Greenleaf, 370.....	
Johnson v. Fletcher, 54 Mississippi, 628.....	
Johnson v. Frier, 4 Yerges, 48.....	
Johnson v. Frieble, 29 Maryland, 76.....	
Johnson v. Gorham, 6 California, 195.....	
Johnson v. Haines, 2 Ohio, 58.....	
Johnson v. Halloway, 43 Penn. State, 446.....lxx	
Johnson v. Hanson, 6 Alabama, 351.....	
Johnson v. Harris, 3 Blackford, 287.....x	
Johnson v. Hart, 6 Watts & Serg. 219.....	
Johnson v. Harvey, 84 New York, 363.....	
Johnson v. Hedrick, 23 Indiana, 129.....	
Johnson v. Hervey, 70 Maine, 74.....	
Johnson v. Hollifield, 79 Alabama, 423.....	
Johnson v. Howard, 41 Vermont, 123.....xv	
Johnson v. Hubbell, 2 Stockton's Ch. 323.....lx	
Johnson v. Hudson River R. R. Co., 20 N. Y. 65.....lx	
Johnson v. Hulings, 103 Pennsylvania St. 498.....4	
Johnson v. Humboldt Ins. Co., 91 Illinois, 92.....5	
Johnson v. Innesburgh, 47 Vermont, 28.....	
Johnson v. Ivey, 4 Cold. 608.....xc	
Johnson v. Jackson, 56 Georgia, 236.....2	
Johnson v. Jackson, 27 Mississippi, 498.....1	
Johnson v. Jennings' Adm'r, 10 Grd. 1.....	
Johnson v. Johnson, 7 Allen, 196.....lxxx	
Johnson v. Johnson, 11 California, 200.....lx	
Johnson v. Johnson, 2 Hill Ch. 277.....xx	
Johnson v. Johnson, 106 Indiana, 475.....5	
Johnson v. Johnson, 114 Illinois, 621.....5	
Johnson v. Johnson, 30 Missouri, 72.....lxv	
Johnson v. Jones, 44 Illinois, 142.....xc	
Johnson v. Jordan, 2 Metcalf, 234.....lxv	
Johnson v. Kimbro, 3 Head, 557.....lx	
Johnson v. Lewis, 13 Connecticut, 203.....xxx	
Johnson v. Lightsey, 34 Alabama, 169.....lxvi	
Johnson v. Lines, 6 Watts & Serg. 80.....3	
Johnson v. Lowry, 47 Georgia, 560.....11	
Johnson v. Lusk, 6 Cold. 113.....xvii	
Johnson v. Martin, 11 Louisiana An. 27.....lxv	
Johnson v. Martinus, 4 Halsted, 144.....xvi	
Johnson v. McGrew, 11 Iowa, 151.....lxvii	
Johnson v. McLane, 7 Blackford, 501.....xlii	
Johnson v. Meeker, 96 New York, 93.....48	
Johnson v. Mehahey, 43 Penn. State, 308.....lxviii	
Johnson v. Miller, 47 Indiana, 376.....17	
Johnson v. Miller, 63 Iowa, 529.....50	
Johnson v. Miller, 69 Iowa, 562.....58	
Johnson v. Mitchell, 50 Texas, 212.....32	
Johnson v. Moor, 2 Root, 252.....	
Johnson v. Morris, 2 Halsted, 6.....xi	
Johnson v. Nat. Bank, 74 New York, 329.....39	
Johnson v. Noble, 13 New Hampshire, 286.....lxviii	

Kean v. Connelly, 25 Minnesota, 222.....33, 458
 Kean v. Davis, 1 Zabrickia, 683.....xlvii, 182
 Kean v. Hoffecker, 2 Harrington, 108.....xxix, 336
 Kean v. Newell, 1 Missouri, 754.....xiv, 321
 Kean ada. State, 10 New Hampshire, 247.....xxiv, 162
 Keane v. Cannovan, 21 California, 291.....lxxxi, 178
 Kearley v. Duncan, 1 Head, 397.....lxviii, 739
 Kearney v. Farrell, 28 Connecticut, 317.....lxviii, 677
 Kearney v. Smith, 3 Yerger, 127.....xxiv, 550
 Kearney v. Tanner, 17 Serg. & R. 94.....xvii, 648
 Keasy v. City of Louisville, 4 Dana, 154.....xxix, 396
 Keating v. Cincinnati, 38 Ohio St. 141.....43, 421
 Keating v. Price, 1 Johnson's Cases, 21.....i, 92
 Keating v. Spink, 3 Ohio State, 108.....lxi, 214
 Keaton v. Banks, 10 Ireland's Law, 261.....ii, 393
 Keaton v. Cobb, 1 Devereux Eq. 439.....xviii, 596
 Keaton v. Scott, 26 Georgia, 692.....lxxi, 196
 Keaton v. Thompson's Lessee, 2 Swan, 132.....lviii, 55
 Keats v. Hugo, 115 Mass. 204.....18, 80
 Keddle v. Moore, 2 Murphey, 41.....v, 518
 Kee v. Vassar, 2 Ireland's Eq. 553.....xi, 442
 Keffler v. Grayson, 76 Virginia, 517.....44, 171
 Keegan v. Western R. R., 8 N. Y. 175.....lx, 476
 Keeler v. Farnett, 21 Vermont, 539.....lxi, 71
 Keeler v. Niagara Fire Ins. Co., 16 Wis. 623.....lxxiv, 714
 Keeler ada. People, 90 New York, 463.....58, 49
 Keeler v. Taylor, 53 Penn. St. 467.....xci, 221
 Keelay v. Boston & M. R. R. Co., 67 Maine, 163.....74, 19
 Keen v. Coleman, 39 Penn. State, 290.....lxxx, 324
 Keen v. Hartman and Wife, 48 Penn. St. 467.....lxxvi, 606
 Keen v. Hartman and Wife, 48 Penn. St. 467.....lxxviii, 472
 Keen v. James, 36 N. J. Eq. (12 Stew.) 597.....51, 29
 Keenan v. Commonwealth, 44 Penn. St. 55.....lxxiv, 414
 Keenan v. Southworth, 110 Mass. 474.....14, 613
 Keeney v. Home Ins. Co., 71 New York, 236.....27, 60
 Keene v. Kimball, 16 Gray, 545.....lxxvii, 426
 Keene v. Lizardi, 8 Louisiana, 431.....xxv, 197
 Keene v. Lizardi, 8 Louisiana, 431.....xxvi, 478
 Keener v. Harrod, 4 Maryland, 63.....lvi, 706
 Keener v. State, 18 Georgia, 194.....lxiii, 269
 Keep v. Sanderson, 2 Wisconsin, 43.....lx, 404
 Keeter v. Smith, 23 Georgia, 445.....lxxix, 303
 Keeton v. Audaley, 19 Missouri, 362.....lxi, 560
 Keffe v. Milwaukee & St. P. R. R. Co., 21 Min-
 nesota, 207.....18, 393
 Keger v. Miles, 1 Mart. & Yerg. 426.....xvii, 519
 Keighler v. Savage Mfg. Co., 12 Maryland, 383.....lxxi, 600
 Kehr v. Snyder, 114 Illinois, 313.....55, 866
 Keil v. Healey, 84 Illinois, 104.....25, 434
 Keim v. Home M. F. & M. Ins. Co., 42 Mo. 38.....xviii, 291
 Keiser v. Lovett, 85 Indiana, 240.....44, 10
 Keiser v. Smith, 71 Alabama, 481.....46, 342
 Keith v. Globe Ins. Co., 53 Illinois, 518.....4, 634
 Keith v. Goodwin, 31 Vermont, 268.....lxviii, 345
 Keith v. Granite Mills, 126 Mass. 90.....30, 666
 Keith v. Johnson, 1 Dana, 604.....xxv, 167
 Keith v. Miles, 39 Mississippi, 442.....lxxvii, 686
 Keith v. Pinkham, 43 Maine, 501.....lxix, 80
 Keith v. Wilson, 6 Missouri, 435.....xxv, 443
 Keiwer v. Meyer, 63 Indiana, 587.....30, 306
 Keisher v. Putnam, 60 New Hampshire, 30.....49, 304
 Kellenbeck v. State, 10 Maryland, 431.....lxix, 166
 Keller's Appeal, 8 Penn. State, 298.....xlix, 516
 Keller v. Auble, 58 Penn. St. 610.....xxviii, 397
 Keller v. Corpus Christi, 50 Texas, 614.....32, 613
 Keller v. Hicks, 22 California, 457.....lxxxi, 78
 Keller v. Holderman, 11 Michigan, 248.....lxviii, 737
 Keller v. Johnson, 11 Indiana, 337.....lxxi, 355
 Keller v. Rhoads, 39 Penn. State, 513.....lxxx, 539
 Keller v. State, 11 Maryland, 635.....lxix, 226

Keller v. State, 12 Maryland, 322.....lxix, 596
 Keller v. Webb, 125 Massachusetts, 88.....78, 209
 Kelley v. Bowker, 11 Gray, 428.....lxxi, 726
 Kelley v. Caplice, 23 Kansas, 474.....53, 179
 Kelley v. Hemmingway, 13 Illinois, 604.....lvi, 474
 Kelley v. Jones, 50 Maine, 455.....lxxix, 623
 Kelley v. Madison, 43 Wisconsin, 638.....28, 576
 Kelley v. Munson, 7 Massachusetts, 319.....v, 47
 Kelley v. People, 55 New York, 565.....14, 342
 Kelley v. Silver Spring Co., 12 R. I. 112.....34, 618
 Kelley v. Smith, 27 Maine, 237.....xvi, 596
 Kelley v. Vigna, 112 Illinois, 242.....54, 238
 Kelley v. Whitney, 45 Wisconsin, 110.....20, 697
 Kellogg v. Adams, 51 Wisconsin, 138.....37, 815
 Kellogg v. Chicago & N. W. R. R. Co., 26 Wis-
 consin, 223.....7, 96
 Kellogg v. Churchhill, 2 New Hampshire, 412.....ix, 104
 Kellogg v. Curtis, 69 Maine, 212.....31, 272
 Kellogg v. Fancher, 23 Wisconsin, 21.....xxix, 66
 Kellogg v. Gilbert, 10 Johnson, 220.....vi, 296
 Kellogg v. Krauser, 14 Serg. & R. 157.....xvi, 469
 Kellogg v. Larkin, 3 Pinney, 123, 3 Chand. 128.....lvi, 164
 Kellogg v. Lavender, 15 Nebraska, 266.....48, 329
 Kellogg v. Lovely, 46 Michigan, 121.....41, 151
 Kellogg v. Mallin, 50 Missouri, 496.....11, 426
 Kellogg v. Page, 44 Vermont, 356.....8, 263
 Kellogg v. Robinson, 6 Vermont, 274.....xxvii, 559
 Kellogg v. Sweeney, 46 New York, 291.....vi, 339
 Kellogg v. Turpie, 23 Illinois, 265.....34, 163
 Kellow v. Central Iowa R'y Co., 68 Iowa, 470.....56, 629
 Kelly v. Abbott, 63 Wisconsin, 307.....53, 268
 Kelly v. Altman, 34 Arkansas, 184.....30, 6
 Kelly v. Austin, 46 Illinois, 156.....xviii, 243
 Kelly v. Bemis, 4 Gray, 83.....lxiv, 59
 Kelly v. Benedict, 5 Robinson (La.) 122.....lxxix, 639
 Kelly v. Bradford, 3 Bibb, 317.....vi, 656
 Kelly v. Crapo, 45 New York, 86.....6, 38
 Kelly v. Davis, 49 New Hampshire, 176.....6, 499
 Kelly v. Drew, 12 Allen, 107.....20, 138
 Kelly v. Evans, 3 Penrose & Watts, 287.....xxiv, 226
 Kelly v. Gillespie, 12 Iowa, 53.....lxxix, 516
 Kelly v. Gilman, 29 New Hampshire, 285.....lxi, 648
 Kelly v. Harrison, 2 Johnson's Cases, 29.....1, 154
 Kelly v. Johnson, 128 Massachusetts, 530.....35, 308
 Kelly v. Kelly, 9 Alabama, 908.....xlv, 469
 Kelly v. Kelly, 18 Nevada, 49.....51, 733
 Kelly v. Kelly, 6 Randolph, 176.....xviii, 719
 Kelly v. McGrath, 70 Alabama, 75.....45, 75
 Kelly v. Neely, 12 Arkansas, 657.....lvi, 268
 Kelly v. Paria, 10 Vermont, 261.....lxxviii, 199
 Kelly v. People, 115 Illinois, 583.....56, 194
 Kelly v. Pittsburgh, 83 Pennsylvania St. 170.....27, 639
 Kelly v. Rambert, Harper's Law, 65.....xviii, 642
 Kelly v. Renfro, 9 Alabama, 235.....xlv, 441
 Kelly v. Reynolds, 39 Michigan, 464.....33, 418
 Kelly v. Riley, 106 Massachusetts, 339.....8, 336
 Kelly v. State, 75 Alabama, 21.....51, 422
 Kelly ada. State, 76 Maine, 331.....49, 629
 Kelsey's Appeal, 113 Pa. St. 119.....57, 444
 Kelsey v. Remer, 43 Connecticut, 139.....21, 638
 Kelsie v. Lane, 23 Kansas, 218.....42, 158
 Kelton v. Bevins, Cooke, 90.....v, 870
 Kelton v. Taylor, 11 Lea, 264.....47, 284
 Kember v. Southern R. Co., 23 La. An. 126.....3, 719
 Kemple v. Dresser, 1 Moton, 371.....lxxv, 264
 Kemp v. Cook, 18 Maryland, 130.....lxxix, 681
 Kemper v. Kemper, 1 Dev. 401.....lxxv, 636
 Kemper v. Cohn, 47 Arkansas, 519.....58, 776
 Kempton v. Halliwell, 24 Georgia, 62.....lxxi, 112
 Kenan v. Holloway, 16 Alabama, 53.....1, 168

Roman letters [xlix] refer to volumes of Am

Jones v. Tincher, 15 Indiana, 308.....	11
Jones v. Towne, 58 New Hampshire, 463.....	
Jones v. Townsend, 21 Florida, 431.....	
Jones v. Wagner, 66 Pennsylvania St. 439.....	
Jones v. Walker, 13 B. Monroe, 163.....	
Jones v. Waltham, 4 Cushing, 299.....	
Jones v. Ward, 3 Jones' Law, 24.....	
Jones v. Westhambree, 4 Strobhart's Law, 50.....	
Jones v. Westcott, 3 Brevard, 186.....	
Jones v. Western V. R. R., 27 Vt. 399.....	
Jones v. Wight, 4 Seammson, 336.....	xx
Jones v. Witherspoon, 7 Jones' Law, 555.....	lxx
Jones v. Young, 1 Dev. & B. Law, 333.....	xx
Jones v. Zollcoffer, N. C. Term Rep. 212.....	
Jones v. Zollcoffer, 2 Hawks, 633.....	
Jones & Mackay v. Martin, 26 Texas, 57.....	lx
Jones Mfg. Co. v. M. Mut. F. I. Co., 3 Cushing, 53.....	
Jones S. & P. O. v. Ocas, 26 Kansas, 399.....	4
Jonesboro etc. Turnpike Co. v. Brown, 3 Baxter, 490.....	3
Jeppling v. Dooley, 1 Yerger, 239.....	xx
Jordan v. Alabama G. S. R. R. Co., 74 Ala. 85.....	4
Jordan v. Bradshaw, 17 Arkansas, 106.....	h
Jordan v. Corey, 3 Indiana, 395.....	l
Jordan v. Dobbins, 123 Massachusetts, 169.....	2
Jordan v. Dyer, 34 Vermont, 104.....	lxx
Jordan v. Fall River R. R. Co., 5 Cushing, 69.....	
Jordan v. Hanson, 49 New Hampshire, 199.....	4
Jordan v. Hovey, 72 Missouri, 574.....	3
Jordan v. Jordan, 4 Greenleaf, 178.....	xv
Jordan v. Jordan, 10 Lee, 124.....	4
Jordan v. Meredith, 3 Yeates, 318.....	l
Jordan v. National S. & L. Bank, 74 N. Y. 467.....	36
Jordan v. Osgood, 109 Massachusetts, 457.....	11
Jordan ada. People, 66 California, 10.....	5
Jordan v. Phelps, 3 Cushing, 545.....	
Jordan v. Porterfield, 19 Georgia, 139.....	lxii
Jordan v. Sharlock, 84 Pennsylvania St. 366.....	24
Jordan v. Stevens, 51 Maine, 78.....	lxxxi
Jordan v. Thomas, 34 Mississippi, 72.....	lxix
Jordan v. Thornton, 2 English, 234.....	xliv
Jordan v. Wyatt, 4 Gratian, 151.....	xlvii
Jordt v. State, 31 Texas, 571.....	xviii
Joseph v. Bidwell, 28 La. An. 363.....	28
Joseph v. Randolph, 71 Alabama, 499.....	46
Joelin v. Grand Rapids Ice Co., 50 Michigan, 516.....	45
Jenett v. Wagoner, 2 Bibb, 269.....	v
Jourdan v. Jourdan, 9 Serg. & R. 268.....	xi
Journey v. Hunt, Coxe, 235.....	i
Joy v. Hull, 4 Vermont, 455.....	xxiv
Joyce v. Duplessis, 15 Louisiana An. 243.....	lxvii
Joyce v. Maine Insurance Co., 45 Maine, 153.....	lxix
Joyce v. McAvey, 31 California, 273.....	lxxix
Joyner v. Joyner, 6 Jones Eq. 322.....	lxxiii
Judah v. Dyott, 3 Blackford, 394.....	xrv
Judd ada. Commonwealth, 2 Massachusetts, 329.....	lii
Judge v. Braswell, 13 Bush, 69.....	26
Judge ada. Flake, 2 Speers' Law, 436.....	xiii
Judge v. Hibbard, 44 Vermont, 597.....	8
Judge ada. People, 27 Michigan, 406.....	15
Judge ada. People, 21 Michigan, 577.....	4
Judge v. State, 58 Alabama, 406.....	29
Judge ada. State, 23 La. An. 29.....	8
Judge ada. State, 28 La. An. 905.....	26
Judge ada. State, 28 La. An. 43.....	58
Judge of Probate v. Claggett, 36 N. H. 331.....	lxvii
Judkins v. Walker, 17 Maine, 38.....	xxv
Judson v. Kelava, Minor, 71.....	xii
Judson v. Rosale Galena Co., 9 Paige, 596.....	lxviii
Judson v. Thatcher, 65 New York, 525.....	14, 3

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures (49) to American Reports.

Kilburn v. Woodworth, 5 Johnson, 37.....iv, 321
 Kilbuck ada. People ex rel. Brewster, 15 Ill. 492.....lx, 789
 Kiley v. Kansas, 69 Missouri, 102.....33, 491
 Kiley v. Kansas, 87 Missouri, 103.....54, 443
 Kilio v. Castleberry, 38 Georgia, 512.....xv, 406
 Kilgore v. Dempsey, 25 Ohio St. 413.....18, 306
 Kilgore v. Grevemberg, 10 Louisiana An. 689.....lxiii, 597
 Kilgore v. Wood, 56 Maine, 150.....xvi, 440
 Kilhoffer v. Herr, 17 Serg. & R. 319.....xvii, 658
 Killam v. Schoepe, 26 Kansas, 310.....40, 313
 Killian v. Ashley, 24 Arkansas, 511.....xci, 519
 Killian ada. Commonwealth, 109 Mass. 345.....12, 714
 Killion v. Power, 51 Penn. St. 429.....xci, 127
 Killips v. Putnam Ins. Co., 28 Wisconsin, 472.....9, 506
 Killman v. State, 2 Tex. Ct. App. 228.....28, 432
 Killmar v. N. Y. Cent. & H. R. R. Co., 100
 New York, 385.....53, 194
 Killough v. Alford, 33 Texas, 457.....5, 249
 Kilmer v. Smith, 77 New York, 236.....33, 613
 Kilpatrick v. Kilpatrick, 23 Mississippi, 124.....lv, 79
 Kilpatrick v. Penrose F. B. Co., 49 Pennsylvania
 State, 118.....lxviii, 497
 Kimball v. Aetna Ins. Co., 9 Allen, 540.....lxix, 786
 Kimball v. Ballard, 19 Wisconsin, 601.....lxviii, 705
 Kimball v. Billings, 55 Maine, 147.....xcii, 581
 Kimball v. Bladell, 5 New Hampshire, 533.....xxii, 476
 Kimball v. City of Bath, 38 Maine, 212.....lxi, 243
 Kimball v. Cochecho R. R., 27 New Hamp. 448.....lix, 387
 Kimball ada. Commonwealth, 24 Pick. 359.....xxv, 326
 Kimball v. Cunningham, 4 Massachusetts, 502.....lii, 230
 Kimball v. Cushman, 103 Massachusetts, 194.....4, 623
 Kimball v. Donald, 20 Missouri, 577.....lxiv, 269
 Kimball v. Flak, 39 New Hampshire, 110.....lxv, 213
 Kimball v. Harman, 34 Maryland, 407.....6, 340
 Kimball v. Huntington, 10 Wendell, 675.....xxv, 590
 Kimball v. Jenkins, 11 Florida, 111.....lxix, 237
 Kimball v. Kimball, 44 New Hampshire, 123.....lxviii, 131
 Kimball v. Morton, 1 Halstead's Ch. 38.....xlii, 624
 Kimball v. Myers, 21 Michigan, 276.....4, 487
 Kimball v. Norton, 59 New Hampshire, 1.....47, 171
 Kimball v. Redding, 31 New Hampshire, 352.....lxiv, 333
 Kimball v. Rosendale, 42 Wisconsin, 407.....24, 421
 Kimball v. Rutland & B. R. Co., 26 Vt. 347.....lxii, 567
 Kimball v. Sattley, 53 Vermont, 285.....45, 614
 Kimball v. Springfield Fire and Marine Insurance
 Company, 9 Allen, 540.....lxix, 786
 Kimball v. Thompson, 4 Cushing, 441.....1, 799
 Kimball v. Union Water Co., 44 California, 173.....13, 157
 Kimball v. Wilson, 3 New Hampshire, 96.....xiv, 342
 Kimball & A. M. Co. v. Vroman, 35 Michigan, 310. 24, 558
 Kimberly v. Patchin, 19 New York, 330.....lxv, 334
 Kimbro v. Lamb, 4 Humphreys, 96.....xi, 628
 Kimbro v. Lytle, 10 Yerges, 417.....xxxi, 585
 Kimms v. Boston F. C. Sav. Bk., 141 Mass. 23.....55, 441
 Kimm v. Weltpert, 46 Missouri, 532.....3, 541
 Kimmel v. Kimmel, 3 Serg. & R. 336.....viii, 655
 Kinard v. Hiers, 3 Richardson's Eq. 423.....lv, 643
 Kincaannon v. Carroll, 9 Yerges, 11.....xxx, 391
 Kincaid v. Eaton, 96 Massachusetts, 139.....xciii, 142
 Kinchole v. Holmes, 7 B. Monroe, 5.....xiv, 41
 Kincaid's Appeal, 66 Pennsylvania State, 411.....5, 377
 Kincaid v. Hardin, 53 Iowa, 430.....36, 236
 Kinchole v. Priest, 89 Missouri, 240.....58, 117
 King, Matter of, 2 Devereux's Law, 341.....xxi, 335
 King v. Baldwin, 17 Johnson, 384.....viii, 415
 King v. Bardeau, 6 Johnson's Ch. 38.....x, 312
 King v. Betterson, 13 Rhode Island, 117.....43, 13
 King v. Blackmore, 72 Pennsylvania State, 347.....13, 634
 King v. Burdett, 28 West Virginia, 601.....57, 687
 King v. Chase, 15 New Hampshire, 9.....xli, 675

King v. Cohorn, 6 Yerges, 75.....xxvii, 458
 King v. Cook, T. U. P. Charlton, 286.....iv, 715
 King v. Crowell, 61 Maine, 244.....14, 580
 King v. Cushman, 41 Illinois, 31.....lxix, 368
 King v. Davenport, 96 Illinois, 305.....38, 89
 King v. Dedham Bank, 15 Massachusetts, 447.....viii, 112
 King v. Donahue, 110 Massachusetts, 155.....14, 689
 King v. Fleming, 73 Illinois, 21.....29, 131
 King v. Fowler, 11 Pickering, 302.....xxii, 370
 King v. Gilson, 32 Illinois, 348.....lxviii, 309
 King v. Green, 2 Stewart, 133.....xix, 46
 King v. Haley, 86 Illinois, 106.....79, 14
 King v. Haney, 46 California, 560.....13, 217
 King v. Harman's Heirs, 6 Louisiana, 607.....xxvi, 458
 King v. Harrington, 2 Alaska, 33.....xvi, 676
 King v. Henkle, 80 Alabama, 505.....60, 719
 King v. Hunter, 65 North Carolina, 603.....6, 754
 King v. Jarman, 35 Arkansas, 190.....37, 11
 King v. Jefferson C. S. Board, 71 Missouri, 628.....36, 469
 King v. Kerr's Adm'rs, 5 Ohio, 154.....xxii, 777
 King v. Kinsey, 1 Iredell's Eq. 187.....xxvi, 46
 King v. King, 1 Watts & Serg. 305.....xxvii, 459
 King v. Lane, 7 Missouri, 241.....lxviii, 187
 King v. Mason, 42 Illinois, 233.....lxix, 426
 King v. Miller, 4 Halstead's Ch. 589.....lv, 246
 King v. Moore, 6 Alabama, 160.....xii, 44
 King v. N. Y. Cent. etc. R. R. Co., 66 N. Y. 181.....33, 37
 King v. Patterson, 49 New Jersey Law, 417.....60, 623
 King v. Phillips, 95 North Carolina, 245.....50, 238
 King ada. People, 27 California, 507.....lxviii, 36
 King v. Reynolds, 67 Alabama, 239.....43, 107
 King v. Richards, 6 Wharton, 418.....xxvii, 489
 King v. Robinson, 33 Maine, 114.....lv, 614
 King v. Root, 4 Wendell, 113.....xci, 108
 King v. Sarria, 69 New York, 24.....25, 128
 King v. Scoggin, 92 North Carolina, 90.....53, 419
 King v. State Bank, 9 Arkansas, 185.....xiv, 739
 King v. State Mut. F. Ins. Co., 7 Cushing, 1.....lv, 683
 King v. State, 58 Mississippi, 737.....38, 344
 King v. State, 4 Texas Ct. App. 54.....39, 169
 King v. Steiren, 44 Penn. State, 90.....lxix, 419
 King v. St. Louis Gaslight Co., 34 Mo. 341.....lxix, 66
 King v. Summit, 73 Indiana, 312.....26, 148
 King v. Thompson, 87 Pennsylvania State, 268.....39, 364
 King v. Upton, 4 Greenleaf, 387.....xvi, 269
 King v. Vaughan, 8 Yerges, 69.....xxix, 104
 King v. Winans, 71 North Carolina, 469.....17, 11
 King v. Woodruff, 23 Connecticut, 86.....ix, 628
 King v. Young, 76 Maine, 76.....49, 588
 King of Prussia v. Kuepper's, 22 Missouri, 520.....lxvi, 639
 King Philip Mills v. Slater, 12 R. I. 83.....34, 628
 King William Justices v. Munday, 2 Leigh, 165.....xci, 604
 Kingman v. Glover, 3 Richardson's Law, 37.....xiv, 758
 Kingman v. Holmquist, 36 Kansas, 735.....59, 604
 Kingsbury v. Burnside, 58 Illinois, 310.....11, 67
 Kingsbury v. Dedham, 13 Allen, 186.....xx, 191
 Kingsbury v. Flowers, 65 Alabama, 479.....39, 14
 Kingsbury v. Taylor, 29 Maine, 508.....1, 607
 Kingsbury v. Whitaker, 32 Ia. An. 1055.....36, 278
 Kings Co. F. I. Co. v. Stevens, 87 N. Y. 287.....41, 261
 Kingland v. Forrest, 18 Alabama, 519.....lii, 228
 Kingale v. Holtbrook, 45 New Hamp. 213.....lxviii, 173
 Kingale v. Lake Shore & M. S. R. Co., 125 Mas-
 sachusetts, 51.....38, 309
 Kingale ada. People, 2 Cowen, 622.....xiv, 629
 Kingston v. Wharton, 2 Serg. & R. 206.....vi, 628
 Kingston Bank v. Kington, 40 New York, 361.....6, 516
 Kingston etc. Co. ada. People, 23 Wendell, 128.....xxv, 581
 Kinley v. Fitzpatrick, 4 Howard (Miss.), 52.....xxiv, 108
 Kinloch v. Hamlin, 2 Hill Ch. 19.....xxvii, 442

Roman letters [xlix] refer to volumes of Ames

Kendall v. Boston, 118 Massachusetts, 234.....	
Kendall v. Camden, 47 New Jersey Law, 64.....	
Kendall v. Clark, 10 California, 17.....	
Kendall v. Commonwealth, 113 Mass. 210.....	
Kendall v. Field, 14 Maine, 30.....	
Kendall v. Galvin, 15 Maine, 131.....	xix
Kendall v. Grice, 1 Mackey, 279.....	
Kendall ada. People, 23 Wendell, 399.....	xxx
Kendall v. Russell, 5 Dana, 501.....	1
Kendrick v. Eggleston, 56 Iowa, 128.....	1
Keningsberger v. Wingate, 31 Texas, 42.....	xv
Keniston v. Little, 30 New Hampshire, 312.....	li
Keniston v. State, 63 New Hampshire, 37.....	1
Kenley v. Hudson, 90 Illinois, 493.....	3
Kennard v. Burton, 26 Maine, 29.....	xi
Kennebec Bank v. Tuckerman, 5 Greenleaf, 130.....	xv
Kennebec Purchase v. Laboree, 2 Greenleaf, 275.....	
Kennebec Purchase v. Springer, 4 Mass. 416.....	
Kennebec Purchase v. Tiffany, 1 Greenleaf, 219.....	
Kennedy v. Baltimore Ins. Co., 3 Harris & J. 367.....	
Kennedy v. Bradbury, 66 Maine, 107.....	xc
Kennedy v. Geddes, 8 Porter, 263.....	xxxi
Kennedy v. Geddes, 3 Alabama, 681.....	xxxv
Kennedy v. House, 41 Penn. State, 32.....	lxx
Kennedy v. Johnson, 2 Bibb, 12.....	1
Kennedy v. Johnston, 65 Pennsylvania St. 451.....	1
Kennedy v. Kennedy, 2 Bibb, 464.....	
Kennedy v. Kennedy, 43 Penn. State, 413.....	lxxx
Kennedy v. Knight, 21 Wisconsin, 340.....	xv
Kennedy v. Mayor, 73 New York, 365.....	39
Kennedy v. Mayor, 66 Maryland, 614.....	57
Kennedy v. McFadon, 3 Harris & J. 194.....	1
Kennedy v. McKay, 14 Vroom, 228.....	39
Kennedy v. Shea, 110 Massachusetts, 147.....	14
Kennedy v. Standard S. Ref., 125 Mass. 90.....	28
Kennedy v. State, 107 Indiana, 144.....	57
Kennedy ada. State, 76 North Carolina, 251.....	72
Kennedy v. Wachamuth, 12 Serg. & R. 171.....	xiv
Kennedy v. Ware, 1 Penn. State, 445.....	xlv
Kenner v. Caldwell, 1 Bailey's Eq. 149.....	xii
Kenner v. Harding, 63 Illinois, 264.....	28
Kennerty v. Shepley, 15 Missouri, 640.....	lvii
Kennerty v. Eliwan P. Co., 21 S. C. 226.....	53
Kennerty v. Eliwan P. Co., 17 S. C. 411.....	43
Kenneth v. S. O. R. Co., 15 Rich. Law, 294.....	xviii
Kennedy ada. Commonwealth, 12 Metcalf, 236.....	xvi
Kenny v. Dow, 10 Martin, 577.....	xiii
Kenny v. Greer, 13 Illinois, 432.....	liv
Kenny v. McLaughlin, 5 Gray, 3.....	lvii
Kenniston v. Mex. Co. M. Ins. Co., 14 N. H. 341.....	xi
Kennon v. Dickins, Conference Rep. 367.....	ii
Kennon v. Ficklin, 6 B. Monroe, 414.....	xlv
Kennon v. Gilmer, 6 Montana, 237.....	51
Kennon v. McRoberts, 1 Washington, 96.....	1
Kenny v. Clarkson, 1 Johnson, 286.....	lii
Kensington Bank v. Patten, 14 Penn. State, 479.....	liii
Kent v. Dunham, 142 Massachusetts, 216.....	56
Kent v. Gerhard, 12 Rhode Island, 92.....	34
Kent v. Judkins, 63 Maine, 160.....	lxxvii
Kent v. Kent, 62 New York, 590.....	26
Kent v. Kentland, 62 Indiana, 291.....	30
Kent v. Lawson, 12 Indiana, 675.....	lxiv
Kent v. L. V. L. Ins. Co., 26 Indiana, 294.....	lxix
Kent v. Lyon, 4 Florida, 474.....	lv
Kent v. State, 22 Minnesota, 41.....	21
Kent v. Welch, 7 Johnson, 238.....	v
Kent v. Whitney, 9 Allen, 62.....	lxxv
Kenton Ins. Co. v. Shea, 6 Bush, 174.....	xix
Kentucky Bank v. Clark, 4 Missouri, 82.....	xviii
Kentucky Bank v. Hancock, 6 Dana, 204.....	xxii

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Knight v. Wilder, 2 Oushing, 199.....	xlviii, 660	Krause v. Bittel, 3 Rawle, 199.....	xlii, 113
Knighton v. Tuff, 19 Missouri, 531.....	..ii, 174	Krause v. Commonwealth, 23 Penn. St. 418.....	39, 763
Knisely v. Williams, 3 Grant, 265.....	xvi, 193	Krause v. Dorrance, 10 Penn. State, 462.....	..ii, 496
Knitell v. Cushing, 67 Texas, 354.....	44, 598	Kraut v. Crawford, 18 Iowa, 549.....	lxxxvii, 414
Knoch v. State, 55 Wisconsin, 349.....	43, 704	Krazberger v. Rofter, 91 Missouri, 404.....	60, 262
Knorr v. Home Ins. Co., 25 Wisconsin, 143.....	3, 26	Krebs v. O'Grady, 23 Alabama, 726.....	lviii, 313
Knott v. Carpenter, 3 Head, 543.....	lxxxv, 779	Kreiter v. Bomberger, 62 Pennsylvania St. 60.....	72, 750
Knott v. Bailey, 54 Mississippi, 235.....	28, 348	Krens v. Peeler, 4 Jones' Law, 226.....	lxvii, 286
Knott v. Preble, 60 Illinois, 326.....	xcix, 514	Kroeger v. Pittsbn, 101 Pennsylvania St. 311.....	47, 719
Knott's ad. State, 2 Spec's Law, 692.....	xlii, 395	Kromer v. Helm, 75 New York, 674.....	31, 491
Knowles v. Atlantic & St. L. R. Co., 36 Maine, 55.1st	234	Krouskop v. Shonts, 51 Wisconsin, 304.....	37, 617
Knowles v. Dow, 23 New Hampshire, 387.....	iv, 163	Krudler v. Ellison, 47 New York, 36.....	7, 408
Knowles v. Harris, 5 Rhode Island, 403.....	lxxiii, 77	Krueger v. Ferrant, 29 Minnesota, 385.....	43, 323
Knowles v. Lawton, 18 Georgia, 476.....	lxiii, 290	Kube ad. State, 20 Wisconsin, 217.....	xxi, 360
Knowles v. Lord, 4 Wharton, 500.....	xxxiv, 525	Kuenzi & Co. v. Elvers, Bojé & Co., 14 La. An. 361.1xxiv	434
Knowles v. Peck, 42 Connecticut, 368.....	19, 542	Kuhn v. Stansfield, 26 Maryland, 310.....	xxii, 661
Knowlton v. Bendley, 17 New Hampshire, 458.....	lxiii, 609	Kuhtman, Ex parte, 3 Richardson's Eq. 287.....	iv, 648
Knowlton v. Culver, 3 Finney, 243 (1 Chand. 314).....	..ii, 156	Kunkel v. Spooner, 9 Maryland, 463.....	lxvi, 339
Knowlton v. Erie R'y Co., 19 Ohio State, 260.....	2, 395	Kunkle v. Franklin, 13 Minn. 127.....	xxvii, 226
Knowlton v. McMahon, 13 Minnesota, 398.....	xxvii, 236	Kuns v. Troy, 104 New York, 344.....	56, 568
Knowlton v. Sanford, 23 Maine, 148.....	..ii, 649	Kuntzman v. Weaver, 20 Penn. State, 422.....	lx, 746
Knowlton v. Smith, 36 Missouri, 507.....	lxxxviii, 183	Kupfer v. Bank of Galena, 24 Illinois, 338.....	lxxxv, 300
Knowlton v. Williams, 5 Wisconsin, 308.....	lxviii, 65	Kurs v. Brush, 13 Iowa, 371.....	lxxxi, 436
Knox v. Campbell, 1 Penn. State, 356.....	xiv, 139	Kurtz v. Frank, 76 Indiana, 594.....	40, 375
Knox v. Chadbourne, 26 Maine, 180.....	lxviii, 467	Kurtz v. Hibner, 55 Illinois, 814.....	3, 638
Knox v. Clifford, 26 Wisconsin, 651.....	20, 38	Kusterer v. Beaver Dam, 56 Wisconsin, 471.....	43, 726
Knox v. Dixon's Widow, 4 Louisiana, 466.....	xxiii, 486	Kuts v. McCube, 23 Wisconsin, 632.....	xxix, 66
Knox v. Knox, 50 Wisconsin, 172.....	48, 467	Knykondall v. McDonald, 15 Missouri, 416.....	lvii, 212
Knox v. Protection Ins. Co., 9 Connecticut, 430.....	xxv, 23	Kyle v. Evans, 3 Alabama, 461.....	lxxxvii, 708
Knox v. Rives, 14 Alabama, 246.....	lxiii, 97	Kyle v. Harvey, 26 West Virginia, 716.....	59, 326
Knox v. Steele, 15 Alabama, 615.....	liv, 181	Kyle v. Kavanagh, 103 Massachusetts, 326.....	4, 560
Knox v. Thompson, 1 Littell, 350.....	lxiii, 246	Kyle v. Laurens R. R., 10 Richardson's L. 262.....	lxix, 231
Knox v. Tucker, 46 Maine, 373.....	lxxxvii, 233	Kyle v. Wells, 17 Penn. State, 268.....	iv, 558
Knox v. Webster, 18 Wisconsin, 406.....	lxxxvi, 779	Labadie v. Hawley, 61 Texas, 177.....	48, 73
Knox County Bank v. Doty, 8 Ohio State, 586.....	lxxxv, 479	Labbe's Heirs v. Abat, 2 Louisiana, 683.....	xxii, 151
Knoxville v. Bird, 13 Lea, 121.....	47, 236	Laborde v. Consol. Am'n, 4 Rob. (La.) 130.....	xxxix, 617
Knoxville Nat. Bank v. Clarke, 51 Iowa, 264.....	33, 129	Labrie v. Manchester, 59 New Hampshire, 120.....	47, 179
Koeh v. Branch, 44 Missouri, 543.....	c, 324	Lacefield v. State, 24 Arkansas, 378.....	30, 8
Koeh v. Briggs, 14 California, 256.....	lxxiii, 651	Lacey v. Davis, 4 Michigan, 140.....	lxvi, 594
Koeh v. Mathers, 25 Penn. State, 89.....	lxv, 685	Lacey v. Giboney, 26 Missouri, 330.....	lxxxviii, 146
Koosamak v. Marak, 54 Texas, 301.....	38, 623	Lackawanna & B. R. R. Co. v. Chesworth, 62	
Kooslept v. Hook's Lessee, 10 Maryland, 173.....	lxix, 133	Pennsylvania State, 383.....	xxi, 166
Koshler v. Ball, 3 Kansas, 160.....	lxxxiii, 451	Lackawanna & B. R. R. Co. v. Dock, 62 Pennsylv-	
Koehring v. Muscumminghoff, 61 Missouri, 469.....	21, 402	nia State, 379.....	xxi, 166
Kosmer v. Oberly, 56 Indiana, 264.....	36, 34	Lacoste v. Duffy, 49 Texas, 767.....	36, 122
Kohl v. Lindley, 39 Illinois, 198.....	lxxxix, 294	Lacoste v. Harper, 3 Louisiana An. 368.....	lxviii, 449
Kohler v. Smith, 2 California, 597.....	lvi, 369	La Croix v. County Comm'rs, 60 Conn. 331.....	47, 648
Kohlhauser v. State, 39 Mississippi, 548.....	lxxxvii, 689	Lacroix v. Menard, 3 Martin, N. S., 339.....	xv, 161
Kohn v. Koshler, 26 New York, 323.....	43, 628	La Crosse & M. R. R. v. Vanderpool, 11 Wis. 119.1xxxviii	691
Kohn v. Packard, 3 Louisiana, 326.....	lxiii, 453	Lacy v. Weaver, 49 Indiana, 373.....	19, 683
Kohn v. Schooner Renaissance, 5 La. An. 26.....	..iii, 577	Ladd's Will, 60 Wisconsin, 187.....	56, 365
Kohn v. Washer, 64 Texas, 131.....	53, 745	Ladd v. Baker, 26 New Hampshire, 76.....	lvii, 365
Kohn v. Watkins, 26 Kansas, 691.....	40, 336	Ladd v. Griswold, 4 Gilman, 25.....	lxvi, 443
Konigsmacher v. Kimmel, 1 Penrose & Watts, 207.xxi	374	Ladd v. Hildebrandt, 27 Wisconsin, 136.....	9, 448
Kouvalinka v. Schlegel, 104 New York, 125.....	58, 694	Ladd v. Kenney, 2 New Hampshire, 346.....	ix, 77
Koonce v. Dist. of Columbia, 4 Mackay, 339.....	54, 278	Ladd v. King, 1 Rhode Island, 234.....	..ii, 624
Koontz v. Chicago, R. I. & P. R. R. Co., 65 Iowa,		Ladd v. New Bedford R. R. Co., 119 Mass. 412.....	30, 331
226.....	54, 5	Ladd v. Wiggin, 25 New Hampshire, 421.....	lxix, 651
Koombs v. Hannibal B. & I. Co., 49 Mo. 126.....	xxvii, 325	Ladue v. Detroit & M. R. R., 13 Mich. 390.....	lxxxvii, 739
Kopper v. Dyer, 59 Vermont, 477.....	59, 743	Ladue v. Griffith, 26 New York, 364.....	lxxxii, 300
Korah v. City of Ottawa, 22 Illinois, 121.....	lxxxiii, 255	Lady Sup'r of Mont'ry v. McNamara, 3 Barb. Ch.	
Kortright v. Cady, 21 New York, 343.....	lxxxviii, 145	375.....	lxix, 184
Kottman, In Matter of, 3 Hill, 363.....	xxvii, 330	La Farge v. Richert, 5 Wendell, 187.....	xxi, 399
Kounts v. Kennedy, 63 Pennsylvania St. 187.....	3, 541	Lafargue v. Harrison, 70 California, 390.....	56, 416
Kounts v. Kirkpatrick, 73 Pennsylvania St. 376.....	13, 687	Lafayette v. James, 23 Indiana, 240.....	47, 140
Kowing v. Manley, 49 New York, 192.....	10, 346	Lafayette etc. Railroad Co. v. Huffman, 26 In-	
Kraft v. Wicks, 4 Gill & Johnson, 332.....	lxiii, 569	diana, 287.....	xxii, 218
Kramer v. Sandford, 4 Watts & Serg. 328.....	xxxix, 92	Lafayette Plank Road Co. v. New Albany and	
Kramer v. Lott, 60 Penn. State, 495.....	lxxxviii, 556	Salem R. R. Co., 13 Indiana, 90.....	lxix, 246
Kraus v. Thompson, 30 Minnesota, 64.....	44, 182	Laffan v. Naglee, 9 California, 603.....	lxix, 693

Roman letters [xliz] refer to volumes of A

- Kinloch v. T'On, 1 Hill Ch. (S. C.) 190.....
 Kinnsaid v. Williams, 8 Leigh, 400.....
 Kinne v. Kinne, 9 Connecticut, 102.....
 Kinneen v. Wells, 144 Massachusetts, 497.....
 Kinney v. Central R. R. Co., 31 New Jersey, 513.....
 Kinney v. C. R. R., 32 New Jersey L. 407.....
 Kinney v. Commonwealth, 30 Gratt. 858.....
 Kinney v. McDermot, 55 Iowa, 674.....
 Kinney ada. State, 44 Connecticut, 153.....
 Kinney v. Whiton, 44 Connecticut, 262.....
 Kinney's Executors v. Harvey, 2 Leigh, 70.....
 Kinnier v. Kinnier, 45 New York, 535.....
 Kinsler v. McCanta, 4 Richardson's Law, 46.....
 Kinsman v. Kinsman, 1 Root, 180.....
 Kinyon v. Stanton, 44 Wisconsin, 479.....
 Kinyon v. Wohlford, 17 Minnesota, 239.....
 Kinzie v. Trustees of Chicago, 2 Scammon, 187.....
 Kip v. Norton, 12 Wendell, 127.....
 Kirby v. Boylston M. Ass'n, 14 Gray, 249.....
 Kirby v. Bruns, 45 Missouri, 234.....
 Kirby v. Citizens' R'y Co., 48 Maryland, 168.....
 Kirby v. Commonwealth, 77 Virginia, 681.....
 Kirby v. Harrison, 2 Ohio State, 326.....
 Kirby v. Mills, 78 North Carolina, 124.....
 Kirby v. Schoonmaker, 3 Barbour's Ch. 46.....
 Kirby v. State, 9 Yerger, 383.....
 Kirchner v. Myers, 35 Ohio St. 85.....
 Kirk's Appeal, 57 Penn. St. 243.....
 Kirk v. Atlanta & C. A. L. R. Co., 94 North
 Carolina, 625.....
 Kirk v. Dodge County M. L. Co., 39 Wis. 138.....
 Kirk v. Murphy, 16 Texas, 654.....
 Kirk ada. State, 44 Indiana, 401.....
 Kirkaldie v. Larrabee, 51 California, 455.....
 Kirke ada. State, 12 Florida, 278.....
 Kirkham v. Sharp, 1 Wharton, 323.....
 Kirklan v. Brown, 4 Humphreys, 174.....
 Kirkland v. Dinamore, 62 New York, 171.....
 Kirkland v. Lott, 2 Scammon, 13.....
 Kirkland v. Lowe, 33 Mississippi, 423.....
 Kirkland v. Narramore, 145 Massachusetts, 51.....
 Kirkland v. Randon, 8 Texas, 10.....
 Kirkland v. Way, 3 Richardson's L. 4.....
 Kirkman v. Handy, 11 Humphreys, 406.....
 Kirkpatrick v. Black, 10 Watts, 329.....
 Kirkpatrick v. Buford, 21 Arkansas, 268.....
 Kirkpatrick v. Downing, 58 Missouri, 32.....
 Kirkpatrick v. Eagle Lodge, 26 Kansas, 384.....
 Kirkpatrick v. McCullough, 3 Humphreys, 171.....
 Kirksey v. Bates, 7 Porter, 529.....
 Kirksey v. Pryor, 13 Alabama, 190.....
 Kirksey v. Fike, 27 Alabama, 383.....
 Kirksey v. Florida & Ga. P. Road Co., 7 Fla. 23.....
 Kirkwood v. Gordon, 7 Richardson's Law, 474.....
 Kirkwood v. Miller, 5 Sneed, 455.....
 Kirland v. State, 43 Indiana, 146.....
 Kirsted v. Orange & A. R. Co., 69 N. Y. 343.....
 Kirtland v. Hotchkiss, 42 Connecticut, 426.....
 Kirtley v. Deck, 2 Munford, 10.....
 Kirwan v. Latour, 1 Harris & J. 289.....
 Kisler v. Kisler, 2 Watts, 323.....
 Kisling v. Shaw, 33 California, 425.....
 Kister v. Reeser, 98 Pennsylvania St. 1.....
 Kisten v. Hildebrand, 9 B. Monroe, 73.....
 Kistler v. Hereth, 75 Indiana, 177.....
 Klasecker v. Monn, 36 Penn. State, 313.....
 Mitchell v. Vanadar, 1 Blackford, 356.....
 Kitchen v. Hartford F. Ins. Co., 57 Mich. 135.....
 Kitchen v. Lee, 11 Paige, 107.....
 Kitchen v. Pridden, 3 Jones' Law, 49.....

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Knight v. Wilder, 2 Oshing, 199.....xviii, 680
 Knighton v. Tuffi, 13 Missouri, 531.....ii, 174
 Knisely v. Williams, 3 Grant, 265.....xvi, 193
 Knittel v. Cushing, 67 Texas, 354.....44, 598
 Knoll v. State, 55 Wisconsin, 249.....42, 704
 Knorr v. Home Ins. Co., 25 Wisconsin, 143.....3, 26
 Knott v. Carpenter, 3 Head, 542.....lxv, 779
 Knott v. Bailey, 64 Mississippi, 235.....28, 348
 Knotts v. Preble, 50 Illinois, 225.....xcix, 514
 Knotts ada. State, 2 Speer's Law, 682.....xli, 395
 Knowles v. Atlantic & St. L. R. Co., 38 Maine, 55.lxi, 234
 Knowles v. Dow, 22 New Hampshire, 387.....lv, 163
 Knowles v. Harris, 5 Rhode Island, 402.....lxviii, 77
 Knowles v. Lawton, 18 Georgia, 476.....lxiii, 290
 Knowles v. Lord, 4 Wharton, 500.....xxxiv, 525
 Knowles v. Peck, 42 Connecticut, 396.....19, 542
 Knowlton v. Bradley, 17 New Hampshire, 456.....xlii, 609
 Knowlton v. Culver, 3 Pinney, 243 (1 Chand. 214).....li, 156
 Knowlton v. Erie Ry Co., 19 Ohio State, 260.....2, 395
 Knowlton v. McMahon, 13 Minnesota, 268.....xvii, 236
 Knowlton v. Sanford, 22 Maine, 148.....li, 649
 Knowlton v. Smith, 36 Missouri, 507.....lxxxviii, 163
 Knowlton v. Williams, 5 Wisconsin, 308.....lxviii, 65
 Knox v. Campbell, 1 Penn. State, 366.....xlv, 139
 Knox v. Chadbourne, 26 Maine, 160.....lxviii, 487
 Knox v. Clifford, 36 Wisconsin, 651.....29, 28
 Knox v. Dimon's Widow, 4 Louisiana, 486.....xxiii, 498
 Knox v. Knox, 68 Wisconsin, 173.....48, 487
 Knox v. Protection Ins. Co., 9 Connecticut, 490.....xxv, 33
 Knox v. Rives, 14 Alabama, 249.....xviii, 97
 Knox v. Steele, 18 Alabama, 615.....lv, 181
 Knox v. Thompson, 1 Little, 380.....xlii, 346
 Knox v. Tucker, 48 Maine, 373.....lxvii, 233
 Knox v. Webster, 18 Wisconsin, 406.....lxxxvi, 779
 Knox County Bank v. Doty, 9 Ohio State, 506.....lxv, 479
 Knoxville v. Bird, 12 Lea, 121.....47, 326
 Knoxville Nat. Bank v. Clarke, 51 Iowa, 264.....33, 129
 Koch v. Branch, 44 Missouri, 542.....c, 324
 Koch v. Briggs, 14 California, 256.....lxviii, 651
 Koch v. Malhorn, 25 Penn. State, 59.....lxiv, 635
 Kocotsek v. Marak, 54 Texas, 201.....28, 623
 Koechle v. Hook's Lessee, 10 Maryland, 173.....lxix, 133
 Koshlar v. Ball, 2 Kansas, 160.....lxviii, 451
 Koehring v. Muesmingshoff, 61 Missouri, 408.....21, 402
 Koerner v. Oberly, 58 Indiana, 264.....26, 34
 Kohl v. Lindley, 39 Illinois, 198.....lxvix, 234
 Kohler v. Smith, 2 California, 597.....lvi, 369
 Kohlshammer v. State, 39 Mississippi, 545.....lxvii, 639
 Kohn v. Koshlar, 36 New York, 363.....48, 628
 Kohn v. Packard, 3 Louisiana, 224.....xxiii, 453
 Kohn v. Schooner Renaissance, 5 La. An. 26.....li, 577
 Kohn v. Washer, 64 Texas, 131.....53, 748
 Kohn v. Watkins, 26 Kansas, 601.....40, 336
 Konigsmacher v. Kimmel, 1 Penrose & Watts, 207.xxi, 374
 Konvalinka v. Schlegel, 104 New York, 125.....58, 494
 Koonen v. Dist. of Columbia, 4 Mackay, 339.....54, 278
 Kooten v. Chicago, R. I. & P. R. R. Co., 65 Iowa, 224.....54, 5
 Kooten v. Hannibal R. & L. Co., 42 Mo. 126.....xvii, 325
 Kopper v. Dyer, 59 Vermont, 477.....59, 742
 Korah v. City of Ottawa, 22 Illinois, 121.....lxviii, 255
 Kortright v. Cady, 21 New York, 343.....lxviii, 145
 Kottman, In Matter of, 2 Hill, 263.....xvii, 390
 Kounts v. Kennedy, 63 Pennsylvania Sta. 187.....3, 541
 Kounts v. Kirkpatrick, 73 Pennsylvania Sta. 376.....13, 637
 Kowing v. Manley, 49 New York, 192.....10, 346
 Kraft v. Wiskey, 4 Gill & Johnson, 332.....xlii, 569
 Kramer v. Sandford, 4 Watts & Serg. 328.....xxxix, 92
 Kramer v. Lott, 60 Penn. State, 495.....lxxxviii, 556
 Kraus v. Thompson, 20 Minnesota, 64.....44, 182
 Krause v. Betail, 3 Rawle, 199.....xlii, 113
 Krause v. Commonwealth, 33 Penn. Sta. 413.....39, 762
 Krause v. Dorrance, 10 Penn. State, 462.....ii, 499
 Kraut v. Crawford, 18 Iowa, 549.....lxxxvii, 414
 Krazberger v. Rotter, 91 Missouri, 404.....68, 262
 Krebs v. O'Grady, 23 Alabama, 726.....lviii, 313
 Kreiter v. Bomberger, 62 Pennsylvania Sta. 69.....22, 750
 Krens v. Peeler, 4 Jones' Law, 226.....lxvii, 296
 Kroege v. Pitonira, 101 Pennsylvania Sta. 211.....47, 718
 Kromer v. Helm, 75 New York, 574.....31, 491
 Krouskop v. Shonta, 51 Wisconsin, 204.....37, 617
 Krudler v. Ellison, 47 New York, 26.....3, 498
 Krueger v. Ferrant, 29 Minnesota, 265.....43, 223
 Kube ada. State, 20 Wisconsin, 217.....xci, 360
 Kuensel & Co. v. Elvers, Bojé & Co., 14 La. An. 361.lxxxiv, 434
 Kuhn v. Stansfield, 28 Maryland, 210.....xci, 681
 Kuhlman, Ex parte, 3 Richardson's Eq. 287.....lv, 648
 Kunkel v. Spooner, 9 Maryland, 463.....lxvi, 333
 Kunkle v. Franklin, 13 Minn. 147.....xvii, 226
 Kuns v. Troy, 104 New York, 266.....58, 592
 Kuntzman v. Weaver, 20 Penn. State, 422.....lxv, 749
 Kupfer v. Bank of Geneva, 24 Illinois, 223.....lxxxv, 369
 Kurx v. Brush, 13 Iowa, 371.....lxviii, 436
 Kurts v. Frank, 76 Indiana, 594.....40, 275
 Kurts v. Hiltner, 55 Illinois, 814.....2, 696
 Kusterer v. Beaver Dam, 56 Wisconsin, 471.....43, 726
 Kuts v. McOuba, 22 Wisconsin, 638.....lxix, 613
 Knykendall v. McDonald, 15 Missouri, 618.....lvii, 212
 Kyle v. Evans, 3 Alabama, 461.....lxxxvii, 705
 Kyle v. Harvey, 25 West Virginia, 718.....53, 228
 Kyle v. Kavanagh, 103 Massachusetts, 256.....4, 269
 Kyle v. Laurens R. R., 10 Richardson's L. 262.....lxix, 331
 Kyle v. Wells, 17 Penn. State, 268.....lv, 658
 Labadie v. Hawley, 61 Texas, 177.....45, 273
 Labbe's Heirs v. Abat, 3 Louisiana, 593.....xli, 151
 Laborde v. Consol. Am'n, 4 Rob. (A.) 190.....xxix, 517
 Labrie v. Manchester, 59 New Hampshire, 129.....47, 179
 Lacey v. State, 24 Arkansas, 278.....56, 8
 Lacey v. Davis, 4 Michigan, 140.....lxvi, 594
 Lacey v. Giboney, 36 Missouri, 320.....lxxxviii, 145
 Lackawanna & B. R. R. Co. v. Chesworth, 62 Pennsylvania State, 282.....xci, 166
 Lackawanna & B. R. R. Co. v. Deak, 62 Pennsylv-
 nia State, 379.....xci, 166
 Lacoste v. Duffy, 49 Texas, 767.....59, 123
 Lacoste v. Harper, 3 Louisiana An. 266.....lxviii, 449
 La Croix v. County Comm'rs, 50 Conn. 221.....47, 648
 Lacrotz v. Menard, 3 Martin, N. S. 339.....xv, 161
 La Crosse & M. R. R. v. Vanderpool, 11 Wm. 119.lxxxviii, 691
 Lacy v. Weaver, 49 Indiana, 273.....19, 683
 Ladd's Will, 60 Wisconsin, 187.....54, 265
 Ladd v. Baker, 26 New Hampshire, 76.....lvii, 265
 Ladd v. Griswold, 4 Gilman, 25.....lxvi, 443
 Ladd v. Hildebrandt, 27 Wisconsin, 135.....2, 448
 Ladd v. Kenney, 2 New Hampshire, 249.....lx, 77
 Ladd v. King, 1 Rhode Island, 254.....li, 628
 Ladd v. New Bedford R. R. Co., 119 Mass. 612.....29, 321
 Ladd v. Wiggins, 25 New Hampshire, 621.....lxix, 551
 Ladue v. Detroit & M. R. R., 13 Mich. 269.....lxxxvii, 789
 Ladue v. Griffith, 25 New York, 264.....lxviii, 269
 Lady Sup'r of Mont' v. McNamara, 3 Barb. Ch.
 376.....xliix, 194
 La Farge v. Richard, 5 Wendell, 187.....xci, 209
 Lafargue v. Harrison, 70 California, 599.....59, 416
 Lafayette v. James, 22 Indiana, 240.....47, 169
 Lafayette etc. Railroad Co. v. Huffman, 28 In-
 diana, 287.....xci, 218
 Lafayette Plank Road Co. v. New Albany and
 Salem R. R. Co., 13 Indiana, 90.....lxix, 246
 Laffan v. Nagle, 9 California, 662.....lxix, 693

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Laffin v. Buffalo & S. W. R. R. Co., 106 New York, 138.....	69, 433	Lancaster v. Miahler, 100 Penn. St. 634.....	45, 423
Laffin v. Willard, 16 Pickering, 64.....	xvii, 639	Lancaster v. State, 53 Alabama, 398.....	25, 625
Laffin & R. P. Co. v. Sinsheimer, 46 Md. 315.....	94, 623	Lancaster v. State, 3 Cold. 340.....	xcii, 229
Laffin & R. P. Co. v. Sinsheimer, 46 Md. 411.....	30, 473	Lancaster Bank v. Woodward, 18 Penn. St. 387.....	lvii, 613
La Frombois v. Jackson, 8 Cowen, 583.....	xviii, 463	Lancaster Co. Bank v. Moore, 78 Penn. St. 407.....	31, 24
Lagow v. Badollet, 1 Blackford, 416.....	xii, 258	Lancaster F. Ins. Co. v. Lenheim, 89 Penn. St. 497.....	33, 773
La Grange C. Inst. v. Anderson, 63 Ind. 367.....	30, 294	Lancaster N. Bank v. Taylor, 100 Mass. 18.....	xviii, 70
Lagrange v. Marie, 5 Louisiana An. 278.....	lii, 589	Lancaster Nat. Bank v. Taylor, 100 Mass. 18.....	1, 71
Lahy v. Holland, 8 Gill, 445.....	l, 705	Lancaster T. Co. v. Rogers, 2 Penn. State, 114.....	xlii, 179
Laing v. Colder, 8 Penn. State, 479.....	xlix, 533	Lance's Appeal, 55 Pennsylvania State, 16.....	xcvii, 723
Laing v. McKee, 13 Michigan, 124.....	lxxxvii, 738	Lance v. Hunter, 73 North Carolina, 175.....	21, 464
Laird v. Conn. & Pam. R. R., 55 N. H. 373.....	90, 215	Lance v. Lance, 5 Jones' Law, 413.....	lxxxi, 885
Laird v. Eichold, 10 Indiana, 313.....	lxxi, 323	Lancey v. Clark, 64 New York, 209.....	31, 604
Laird v. Wilder, 9 Bush, 131.....	15, 707	Lancey v. Clifford, 54 Maine, 487.....	xcii, 561
Laird v. Winters, 27 Texas, 440.....	lxxxvii, 630	Land v. Williams, 13 Smedes & M. 302.....	ii, 117
Lake v. Columbus Insurance Co., 13 Ohio, 48.....	xiii, 188	Lander v. Seaver, 33 Vermont, 114.....	lxxvi, 158
Lake v. Milliken, 63 Maine, 240.....	16, 456	Landers v. Watertown F. Ins. Co., 66 N. Y. 414.....	40, 554
Lake v. Reed, 59 Iowa, 238.....	4, 209	Landis v. Campbell, 79 Missouri, 433.....	49, 239
Lakeman v. Butler, 17 Pickering, 436.....	xviii, 311	Landis v. Roth, 109 Penn. St. 621.....	58, 747
Lakeman v. Pollard, 43 Maine, 463.....	lxix, 77	Landis v. State, 70 Georgia, 652.....	48, 588
Lake Erie & W. R. Co. v. Fir, 88 Indiana, 381.....	45, 464	Landon v. Humphrey, 9 Connecticut, 290.....	xcviii, 333
Lake Shore & M. S. R. Co. v. Foster, 104 Ind. 293, 54, 319		Landrigan v. State, 31 Arkansas, 50.....	25, 647
Lake Shore & M. S. R. R. Co. v. Perkins, 25 Michigan, 329.....	13, 275	Landrum v. Hatcher, 11 Richardson's L. 54.....	lxx, 237
Lake Superior I. Co. v. Erickson, 39 Michigan, 422, 33, 423		Landry v. Bangson, 17 Louisiana, 83.....	xcvii, 606
Lake View v. Rose Hill C. Ass., 70 Ill. 191.....	23, 71	Lane's Appeal, 105 Pennsylvania St. 49.....	51, 106
Lakin v. Willamette V. & C. R. R. Co., 13 Or. 436, 57, 25		Lane v. Baughman & S. R. R. Co., 17 O. St. 642, xcvi, 683	
Lalor v. Chicago B. & Q. R. R. Co., 83 Ill. 401.....	4, 616	Lane v. Borland, 14 Maine, 77.....	xcvii, 33
Lamar v. McNamee, 10 Gill & J. 116.....	xcviii, 153	Lane v. Bryant, 9 Gray, 245.....	lxix, 263
Lamar v. Simpson, 1 Richardson's Eq. 71.....	xlii, 245	Lane ad. Commonwealth, 113 Mass. 498.....	18, 509
Lamar Ins. Co. v. McLaughlin, 54 Illinois, 513.....	5, 169	Lane v. Dorman, 3 Scammon, 238.....	xcvii, 543
Lamb v. Camden & A. R. R. & T. Co., 48 New York, 271.....	7, 327	Lane v. Dudley, 2 Murphy, 119.....	v, 623
Lamb v. Danforth, 59 Maine, 323.....	8, 426	Lane v. Ewing, 31 Missouri, 75.....	lxxxvii, 639
Lamb v. Day, 8 Vermont, 407.....	xxx, 479	Lane v. Gluckauf, 28 California, 298.....	lxxxvii, 121
Lamb v. Durant, 12 Massachusetts, 54.....	vii, 31	Lane v. King, 8 Wendell, 584.....	xvii, 105
Lamb v. Lamb, 1 Speers' Eq. 289.....	xi, 618	Lane v. LeVillan, 4 Arkansas, 76.....	xcvii, 709
Lamb v. Lathrop, 13 Wendell, 95.....	xcviii, 174	Lane v. Maine M. F. I. Co., 12 Maine, 44.....	xcviii, 159
Lamb v. Old Colony R. R. Co., 140 Mass. 79.....	54, 449	Lane v. Manning, 8 Yerger, 435.....	xcix, 125
Lambert v. Sandford, 2 Blackford, 137.....	xviii, 149	Lane v. Winthrop, 1 Bay, 116.....	i, 699
Lambert v. People, 76 New York, 230.....	33, 293	Lanfair v. Blossman, 1 Louisiana An. 148.....	xiv, 70
Lambert ad. People, 5 Michigan, 349.....	lxix, 49	Lanfair v. Mayor, 4 Louisiana, 97.....	xcviii, 477
Lamberton v. Windom, 13 Minnesota, 232.....	xc, 301	Lanfair v. Mastier, 18 Louisiana An. 437.....	lxxxix, 638
Lambeth v. North Carolina R. R. Co., 68 North Carolina, 494.....	8, 508	Lanfair v. Sumner, 17 Massachusetts, 110.....	ix, 119
Lambeth v. Turnbull, 5 Robinson (La.), 264.....	xxxix, 536	Lang v. Brown, 31 Alabama, 179.....	lv, 244
Lambier ad. People, 5 Denio, 9.....	xviii, 273	Lang v. Scott, 1 Blackford, 405.....	xii, 387
Lamborn v. Watson, 6 Harris & J. 252.....	xiv, 275	Lang v. Waring, 25 Alabama, 638.....	lx, 633
Lamm v. Port Deposit H. Ass., 49 Md. 233.....	33, 246	Langabier v. Fairbury etc. R. R. Co., 64 Ill. 243.....	16, 599
Lamme v. Gregg, 1 Metcalfe (Ky.), 444.....	lxxi, 489	Langan v. Atkinson, 35 Kansas, 318.....	57, 105
Lammert v. Lidwell, 62 Missouri, 198.....	31, 411	Langdon v. Baxter Nat. Bk., 57 Vermont, 1.....	52, 113
Lammot v. Gist, 2 Harris & G. 433.....	xviii, 295	Langdon v. Doud, 6 Allen, 423.....	lxxxvii, 642
Lammott v. Ewers, 106 Indiana, 310.....	55, 746	Langdon v. Langdon, 25 Vermont, 678.....	ix, 399
Lamotte Co. Nat. Bank v. Bingham, 50 Vt. 105.....	28, 490	Langdon v. Lockett, 6 Alabama, 727.....	xii, 70
Lamont v. Skimmon, 3 Wisconsin, 545.....	lxii, 606	Langdon v. Roane, 6 Alabama, 518.....	xii, 60
Lamont v. Washington & G. R. Co., 2 Mackay, 502.....	47, 268	Lange v. Benedict, 73 New York, 12.....	29, 80
L'Amoureux v. Crosby, 2 Paige Ch. 423.....	xcii, 655	Lange v. Wagner, 82 Maryland, 310.....	30, 399
L'Amoureux v. Gould, 7 N. Y. (3 Selden), 249.....	lvii, 524	Langenberg v. Kroeger, 48 California, 167.....	17, 418
Lamos v. Seall, 6 New Hampshire, 413.....	xxv, 468	Langford v. Owsley, 2 Bibb, 215.....	iv, 659
L'Amoureux v. Vandenberg, 7 Paige, 316.....	xxxii, 635	Langhammer v. Hallowsay, 42 Penn. State, 446, lxxxvii, 686	
Lamparter v. Walbaum, 45 Illinois, 444.....	xcii, 225	Langley v. Palmer, 30 Maine, 467.....	i, 634
Lampson v. Fletcher, 1 Vermont, 168.....	xviii, 676	Langston v. Bates, 84 Illinois, 524.....	23, 406
Lampton v. Preston, 1 J. J. Marshall, 454.....	xix, 104	Langworthy v. Connelly, 14 Nebraska, 240.....	45, 117
Lamson v. Clarkson, 113 Massachusetts, 343.....	18, 498	Langworthy v. Smith, 2 Wendell, 587.....	xx, 682
Lamson v. Patch, 5 Allen, 586.....	lxxxii, 765	Lanier v. Auld, 1 Murphy, 138.....	lii, 699
Lamy v. Burr, 36 Missouri, 85.....	lxxxviii, 135	Lanier v. McCabe, 2 Florida, 32.....	xviii, 173
Lancaster v. Baltzell, 7 Gill & Johnson, 468.....	xcviii, 233	Lanier v. Trigg, 6 Smedes & M. 641.....	xiv, 293
Lancaster v. Dolan, 1 Rawie, 231.....	xviii, 625	Lanigan v. Killa, 97 Pennsylvania St. 120.....	39, 797
		Laning v. New York Cent. R. R. Co., 49 N. Y. 521, 10, 417	
		Lanman v. Crocker, 97 Indiana, 163.....	49, 437
		Lanning v. Christy, 30 Ohio St. 115.....	27, 431
		La Norris v. State, 13 Texas Ct. App. 23.....	44, 699

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Landis v. Carpenter , 9 Wisconsin, 540.....lxvii, 281	Law v. Stokes , 33 New Jersey L. 249.....xx, 622
Landis v. Fleet , 2 Johnson's Cases, 3.....i, 142	Lawler v. Androscooggin R. R. Co. , 62 Me. 443.....16, 406
Landis v. Gaine , 2 Johnson, 300.....lii, 422	Lawrence, Ex parte , 4 Cowen, 417.....xv, 386
Landis v. Smith , 4 Wendell, 9.....xxi, 69	Lawrence v. Beaubien , 2 Bailey, 623.....xxiii, 158
Land's Appeal , 95 Pennsylvania St. 279.....40, 646	Lawrence v. Burnham , 4 Nevada, 361.....xxvii, 540
Landis, In re , 9 Michigan, 324.....lxix, 85	Lawrence v. Clark , 9 Dana, 257.....xxv, 133
Lantry v. Lantry , 51 Illinois, 458.....2, 310	Lawrence v. Combs , 37 New Hampshire, 331.....lxvii, 333
Lantz ada. State , 23 Kansas, 728.....32, 215	Lawrence v. Cooke , 56 Maine, 157.....xxvi, 443
Lantz v. Worthington , 4 Penn. State, 153.....xiv, 682	Lawrence v. Ely , 38 New York, 42.....xxvii, 768
La page v. State , 87 New Hampshire, 245.....24, 69	Lawrence v. Fast , 30 Illinois, 338.....lxvii, 274
Lapeere v. Sun Mutual Ins. Co. , 8 La. An. 1.....lviii, 698	Lawrence v. Green , 70 California, 417.....59, 428
Lapeere v. Looker , 23 Kansas, 534.....33, 196	Lawrence v. Hagerman , 56 Illinois, 68.....8, 674
Lapham v. Curtis , 5 Vermont, 371.....xxvi, 310	Lawrence v. Haynes , 5 New Hampshire, 23.....xx, 554
Lapham v. Whipple , 8 Metcalf, 69.....xii, 487	Lawrence v. Hodges , 28 North Carolina, 672.....53, 456
Laplace v. Smith , 13 Louisiana, 61.....xxdii, 555	Lawrence Hunt , 10 Wendell, 80.....xxv, 530
Large v. Keen's Creek Draining Co. , 30 Indiana, 263.....xv, 696	Lawrence v. Kitteridge , 21 Connecticut, 877.....lvi, 326
Larison v. State , 49 N. J. L. 256.....60, 606	Lawrence v. Knap , 1 Root, 243.....i, 42
Larkin v. Bank of Montgomery , 9 Porter, 434.....xxdii, 294	Lawrence v. Mabry , 2 Devereux's L. 473.....xvi, 246
Larkin v. County of Saginaw , 11 Michigan, 88.....lxviii, 63	Lawrence v. Parker , 1 Massachusetts, 121.....ii, 19
Larkin v. Hardenbrook , 90 New York, 333.....43, 176	Lawrence v. Pullman's P. O. Co. , 144 Mass. 1.....59, 86
Larkin ada. State , 49 New Hampshire, 38.....6, 458	Lawrence v. Schmidt , 35 Illinois, 440.....lxv, 371
Larkins v. Eckwurz , 42 Ala. 323.....xxv, 651	Lawrence v. Smith , 45 New Hampshire, 533.....lxvii, 128
Larmore v. Crown Point I. Co. , 101 N. Y. 381.....54, 718	Lawrence v. State , 1 Humphreys, 223.....xxiv, 644
Larned v. Andrews , 106 Massachusetts, 435.....8, 346	Lawrence v. Winona eta. R. R. Co. , 15 Minnesota, 390.....2, 136
Larned v. Buffinton , 3 Massachusetts, 544.....lii, 183	Lawrence Manuf. Co. v. Lowell H. Mills , 129 Massachusetts, 335.....37, 362
Larned v. Wheeler , 140 Massachusetts, 390.....54, 483	Lawson v. Chicago , 84 P. M. & O. Ry Co. 64 Wisconsin, 447.....54, 634
Larrabee v. Fairbanks , 24 Maine, 363.....xli, 389	Lawson v. Hicks , 28 Alabama, 379.....lxvii, 49
Larrabee v. Lewis , 67 Georgia, 581.....44, 735	Lawson v. Jeffries , 47 Mississippi, 686.....12, 340
Larrabee v. Talbot , 5 Gill, 426.....xvi, 637	Lawson v. Jordan , 19 Arkansas, 397.....lxv, 696
Larrabee v. Van Alstyne , 1 Johnson, 307.....lii, 333	Lawson v. Lovejoy , 8 Greenleaf, 405.....xxdii, 626
Larson v. Berquist , 34 Kansas, 334.....55, 249	Lawson v. Menasha W. Co. , 59 Wis. 353.....43, 626
Larson v. Reynolds and Packard , 13 Iowa, 879.....lxviii, 444	Lawson v. Miller , 44 Alabama, 616.....4, 147
Laribet v. Forgy , 2 Louisiana An. 524.....xvi, 554	Lawson v. Morrison , 2 Dallas, 266.....i, 296
La Rue v. Gilkyson , 4 Penn. State, 375.....xiv, 700	Lawson v. Powell , 21 Georgia, 681.....lxv, 336
Lary v. Cleveland eta. R. R. Co. , 78 Ind. 323.....41, 572	Lawson v. State , 30 Alabama, 65.....lvi, 122
Lary v. Young , 13 Arkansas, 401.....lviii, 332	Lawson v. State , 10 Arkansas, 28.....i, 226
Lasale v. Holbrook , 4 Paige Ch. 169.....xxv, 624	Lawson ada. State , 7 Arkansas, 391.....xvi, 298
Lasalle v. Barnett , 1 Blackford, 150.....xii, 217	Lawson's Ex. v. Lawson , 16 Gratt. 230.....lxv, 702
Leah v. Lambert , 15 Minnesota, 416.....2, 142	Lawton v. Adams , 39 Georgia, 273.....lxv, 89
Leah ada. State , 1 Harrison (N. J.), 330.....xxdii, 297	Lawton v. Fitchburg R. R. Co. , 8 Oushing, 230.....lv, 753
Leapeyre v. McFarland , N. O. Term. Rep. 187.....vii, 705	Lawton v. Gordon , 34 California, 36.....xci, 670
Leason v. Vance , 8 California, 271.....lxviii, 322	Lawton v. Rivers , 2 McCord, 445.....xlii, 741
Leamy v. Fontaine , 4 Hening & M. 144.....iv, 510	Lawyer v. Smith , 8 Michigan, 411.....lxvii, 469
Leatham v. Sumner , 69 Illinois, 233.....31, 79	Lay ada. Commonwealth , 12 Bush, 283.....23, 718
Leathrop v. Bampton , 21 Illinois, 17.....lxviii, 141	Lay v. Gibbons , 14 Iowa, 377.....lxvii, 467
Leathrop v. Clapp , 40 New York, 328.....c, 493	Lay v. Shanhut , 6 Minnesota, 273.....lxix, 446
Leathrop v. Comm'l B't of Scioto , 8 Dana, 114.....xxdii, 481	Lascar v. Nat. U. Bank , 22 Maryland, 78.....36, 326
Leathrop v. Cook , 14 Maine, 414.....xxxi, 63	Lascar v. Porter , 87 Penn. St. 513.....36, 360
Leathrop v. Lawson , 5 Louisiana An. 238.....lii, 586	Lasell v. Lasell , 12 Vermont, 443.....xxvii, 328
Leathrop v. Middleton , 23 California, 267.....lxviii, 112	Lasell v. Pinnick , 1 Tyler, 247.....iv, 723
Letimer v. Union Pacific R'y , 43 Missouri, 105.....xxvii, 378	Lesler v. Horan , 55 Iowa, 75.....39, 167
Letimore v. Davis , 14 Louisiana, 161.....xxdii, 581	Lesler v. Westcott , 26 New York, 146.....lxviii, 404
Letterett v. Cook , 1 Iowa, 1.....lxviii, 428	Lee v. Lee , 90 Massachusetts, 468.....xxvi, 772
Leub v. Faine , 46 Iowa, 550.....26, 163	Lee v. White , 4 Sneed, 73.....lxvii, 589
Leuer v. Bandow , 43 Wisconsin, 556.....28, 571	Leabo ada. State , 84 Missouri, 168.....54, 91
Laughlin v. Chicago & N. E'y Co. , 38 Wis. 204.....9, 493	Leach v. Fobes , 11 Gray, 506.....lxvii, 733
Laughlin v. Lorenz's Ad. , 48 Penn. State, 278.....lxvii, 692	Leach v. Forney , 21 Iowa, 271.....lxviii, 574
Laughlin v. State , 18 Ohio, 99.....ii, 444	Leach v. French , 69 Maine, 380.....31, 296
Lauman v. Lebanon V. R. R. , 30 Penn. St. 42.....lxvii, 685	Leach v. Hale , 21 Iowa, 69.....7, 112
Lauder v. Chicago , 111 Illinois, 291.....53, 625	Leach v. Hannibal and St. J. R. R. Co. , 26 Missouri, 27.....54, 406
Launt v. People , 113 Illinois, 137.....55, 405	Leach v. Leach , 4 Indiana, 628.....lxviii, 642
Leaurisni v. Corquette , 26 Mississippi, 177.....lvii, 200	Leach v. Marsh , 47 Maine, 548.....lxvii, 503
Lausman v. Drabos , 10 Nebraska, 172.....35, 468	Leach v. Perkins , 17 Maine, 462.....xxv, 368
Leaslett v. Lippincott , 6 Serg. & R. 336.....ix, 440	Leach v. Pine , 41 Illinois, 65.....lxviii, 375
Lavahe ada. State , 26 Minnesota, 526.....37, 415	Leach ada. State , 7 Connecticut, 452.....xxviii, 116
Laverone v. Mangianti , 41 California, 138.....10, 269	Leach ada. State , 60 Maine, 58.....xi, 172
Lavery v. Snethen , 68 New York, 523.....23, 184	
Lavery v. Crooke , 52 Wisconsin, 612.....38, 768	
Law v. Commonwealth , 75 Virginia, 363.....40, 750	

Roman letters [xix] refer to volumes of *Ames*

<i>Leache v. State</i> , 23 Texas Ct. App. 279.....	i
<i>Leadbetter v. Atlas Ins. Co.</i> , 13 Maine, 365.....	x3
<i>Leakey v. Maupin</i> , 10 Missouri, 368.....	x3
<i>Learned v. Tillotson</i> , 97 New York, 1.....	4
<i>Leary v. Boston & A. R. R.</i> , 139 Mass. 680.....	5
<i>Leas v. Walls</i> , 101 Penn. St. 57.....	4
<i>Leathers v. Commercial Ins. Co.</i> , 2 Bush, 298.....	x4
<i>Leavenworth v. Delafield</i> , 1 Calnes, 573.....	1
<i>Leavenworth Co. Comm'rs v. Miller</i> , 7 Kans. 479.....	1
<i>Leavitt v. Jones</i> , 54 Vermont, 633.....	4
<i>Leavitt v. Lamprey</i> , 13 Pickering, 236.....	xxi
<i>Leavitt v. Metcalf</i> , 3 Vermont, 342.....	xi
<i>Leavitt v. Morrow</i> , 6 Ohio State, 71.....	lxv
<i>Leavitt v. Palmer</i> , 3 N. Y. (3 Comst.) 19.....	19
<i>Leavitt v. Peck</i> , 3 Connecticut, 135.....	vii
<i>Leavitt v. Putnam</i> , 3 N. Y. (3 Comst.), 404.....	13
<i>Lebanon Mut. Ins. Co. v. Hoover</i> , 113 Penn- sylvania St. 531.....	51
<i>Lebanon, Town of, v. Comm'rs</i> , 3 Ohio, 60.....	xxxi
<i>Le Baron v. East Boston Ferry Company</i> , 11 Allen, 312.....	lxixvi
<i>LeBlanc v. Senglar</i> , 12 Martin, 463.....	xii
<i>LeBreton v. Houshat</i> , 3 Martin, 60.....	v
<i>Leclat v. Merchants' Ins. Co.</i> , 16 Alabama, 177.....	1
<i>Leclat v. Salles</i> , 3 Porter, 115.....	xxix
<i>Lecky ad. Commonwealth</i> , 1 Watts, 66.....	xxvi
<i>LeClereq v. Trustees of Gallipolis</i> , 7 Ohio, 217.....	xxviii
<i>Ledden v. Colby</i> , 14 New Hampshire, 33.....	x1
<i>Ledyard v. Butler</i> , 9 Paige, 132.....	xxvii
<i>Ledyard v. Hibbard</i> , 48 Michigan, 421.....	42
<i>Lee v. Abba</i> , 3 Root, 239.....	1
<i>Lee v. Alexander</i> , 9 B. Monroe, 25.....	xviii
<i>Lee v. Ashbrook</i> , 14 Missouri, 378.....	lv
<i>Lee v. Boardman</i> , 3 Massachusetts, 236.....	lii
<i>Lee v. Cato</i> , 27 Georgia, 637.....	lxviii
<i>Lee v. Davis</i> , 1 A. K. Marshall, 397.....	x
<i>Lee v. Feamster</i> , 21 West Virginia, 108.....	45
<i>Lee v. Figg</i> , 37 California, 333.....	xxix
<i>Lee v. Fontaine</i> , 10 Alabama, 798.....	xliv
<i>Lee v. Giles</i> , 1 Bailey's Law, 446.....	x1
<i>Lee v. Kingsbury</i> , 13 Texas, 66.....	lxii
<i>Lee v. Lake</i> , 14 Michigan, 12.....	10
<i>Lee v. Lee</i> , 31 Georgia, 25.....	lxvii
<i>Lee v. Lee's Executor</i> , 4 M'Cord, 123.....	xvii
<i>Lee v. Lindell</i> , 23 Missouri, 263.....	lxiv
<i>Lee v. Mathews</i> , 10 Alabama, 663.....	xliv
<i>Lee v. Murphy</i> , 23 Grantan, 799.....	12
<i>Lee v. O'Call</i> , 7 J. J. Marshall, 146.....	xxiii
<i>Lee v. Pembroke Iron Co.</i> , 57 Maine, 481.....	2
<i>Lee v. Perry</i> , 3 M'Cord, 683.....	xv
<i>Lee v. Smith</i> , 42 Ohio St. 438.....	51
<i>Lee v. Smith</i> , 24 Missouri, 304.....	54
<i>Lee v. State</i> , 28 Arkansas, 260.....	7
<i>Lee v. State</i> , 64 Georgia, 203.....	37
<i>Lee ad. State</i> , 23 Minnesota, 407.....	31
<i>Lee v. Stone</i> , 5 Gill & J. 1.....	xxii
<i>Lee v. Stewart</i> , 3 Leigh, 76.....	xxi
<i>Lee v. Tillotson</i> , 24 Wendell, 337.....	xxv
<i>Lee v. Union R. R. Co.</i> , 12 Rhode Island, 282.....	34
<i>Lee v. Woolsey</i> , 19 Johnson, 319.....	x
<i>Lee Bank v. Spencer</i> , 6 Metcalf, 306.....	xxix
<i>Lee's Administratrix v. Lee</i> , 21 Missouri, 531.....	lxiv
<i>Lee's Adm'r v. Emsad</i> , 1 Metcalf (K.), 636.....	lxii
<i>Leeman v. State</i> , 26 Arkansas, 436.....	37
<i>Lefebvre v. Dufreit</i> , 51 Wisconsin, 236.....	37
<i>Lefevre's Appeal</i> , 80 Pennsylvania State, 12.....	8
<i>LeFevre v. LeFevre</i> , 4 Sarz. & R. 247.....	411

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports

- Le Roy v. Mayor of New York*, 20 Johnson, 430.....xi, 369
Leroy v. Rogers, 30 California, 229.....lxix, 88
Leiber v. Wabash Nav. Co., 14 Illinois, 85.....lvi, 494
Lesbey v. Gardner, 3 Watts & Serg. 314.....xxviii, 764
Lesley v. Rosson, 30 Miss. 388.....lxvii, 679
Lesnard v. Strann, 63 Wisconsin, 112.....51, 715
Lester v. Howard Bank, 33 Maryland, 538.....3, 211
Lester v. Mahan, 25 Alabama, 445.....lx, 630
Lester v. Mayor of Baltimore, 29 Md. 415.....xvii, 542
Letcher v. Bates, 6 J. J. Marshall, 574.....xvii, 92
Letcher v. Steffen, 89 Illinois, 545.....51, 104
Levaroni v. Miller, 34 California, 231.....xci, 692
Levering v. Union T. & Ins. Co., 42 Mo. 8th.....xvii, 330
Levi v. Booth, 33 Maryland, 306.....42, 333
Levi v. Lynn and Boston R. R. Company, 11 Al-
 len, 300.....lxixv, 713
Levi v. Latham, 15 Nebraska, 809.....43, 781
Lewicki v. Walker, 15 Louisiana An. 245.....lxvii, 181
Levison ada. People, 16 California, 98.....lxvii, 507
Lewy, Ex parte, 43 Arkansas, 42.....51, 558
Lewy v. Bank of America, 24 Louisiana An. 230.....13, 124
Lewy v. Bondy, 15 Louisiana An. 873.....lxvii, 198
Lewy v. Boas, 2 Bailey, 217.....lxvii, 134
Lewy v. Cadet, 17 Serg. & R. 128.....xvii, 650
Lewy v. Lewy, 78 Pennsylvania St. 507.....71, 35
Lewy v. Peabody Ins. Co., 10 West Virginia, 580.....27, 588
Lewy v. Peters, 9 Serg. & R. 128.....xi, 679
Lewy v. Shurman, 6 Arkansas, 153.....xiii, 600
Lewy ada. State, 23 Minnesota, 104.....53, 678
Lewys I. R. v. Bolton, 48 Maine, 451.....lxvii, 236
Lewellen v. Garrett, 58 Indiana, 442.....26, 74
Lewis, Succession of, 10 Louisiana An. 738.....lxvii, 600
Lewis v. Adams, 70 California, 403.....xiv, 423
Lewis v. Atkinson, 15 Iowa, 361.....lxixvii, 417
Lewis v. Avery, 3 Vermont, 287.....xxx, 469
Lewis v. Bakewell, 6 Louisiana An. 368.....liv, 561
Lewis v. Baltimore & O. R. R. Co., 28 Md. 588.....17, 521
Lewis v. Bank of Kentucky, 13 Ohio, 123.....xli, 469
Lewis v. Brackenridge, 1 Blackford, 220.....xii, 228
Lewis v. Brehme, 33 Maryland, 412.....3, 190
Lewis v. Bruton, 74 Alabama, 317.....49, 616
Lewis v. Buck, 7 Minnesota, 104.....lxvii, 73
Lewis v. Campen, 14 Michigan, 458.....19, 245
Lewis v. Chadbourne, 54 Maine, 494.....xcii, 683
Lewis v. Claiborne, 5 Yerger, 369.....xxvi, 270
Lewis v. Coffee Co., 77 Alabama, 190.....54, 55
Lewis v. Commissioners, 16 Kansas, 162.....22, 275
Lewis v. Calherton, 11 Serg. & R. 48.....xiv, 607
Lewis v. Davis, 3 Missouri, 123.....xcvii, 698
Lewis v. Flint & P. M. R. Co., 54 Michigan, 55.....52, 790
Lewis v. Gray, 1 Massachusetts, 297.....li, 31
Lewis v. Harvey, 18 Missouri, 747.....lx, 226
Lewis v. Hawley, 3 Day, 498.....x, 121
Lewis v. Headley, 36 Illinois, 433.....lxixvii, 237
Lewis v. Herndon, 3 Littell, 268.....xiv, 68
Lewis v. Hoover, 1 J. J. Marshall, 800.....xix, 120
Lewis v. Hubbard, 1 Lea, 436.....27, 775
Lewis v. Johns, 34 California, 98.....lxixv, 46
Lewis v. Jones, 1 Penn. State, 336.....xlv, 138
Lewis v. Jones, 17 Penn. State, 262.....lv, 550
Lewis v. Keeling, 1 Jones' Law, 299.....lxii, 168
Lewis v. Kirk, 36 Kansas, 497.....43, 173
Lewis v. Lewis, 9 Missouri, 128.....lxvii, 540
Lewis v. Lewis, 13 Penn. State, 79.....lxii, 443
Lewis v. Love's Hair, 2 B. Monroe, 245.....lxixvii, 161
Lewis v. Ludwick, 6 Cold, 368.....xviii, 454
Lewis v. Lusk, 36 Mississippi, 696.....lxvii, 153
Lewis v. McCabe, 49 Connecticut, 140.....44, 217
Lewis v. Mobley, 4 Dev. & Bat. L. 323.....lxixv, 379
Lewis v. New York & C. Co., 143 Mass. 369.....53, 135
Lewis v. Payn, 8 Cowen, 71.....lxviii, 437
Lewis v. Phillips, 17 Indiana, 158.....lxix, 457
Lewis v. Prenatt, 24 Indiana, 68.....lxixvii, 321
Lewis v. Ross, 37 Maine, 230.....lx, 49
Lewis v. Rountree, 79 North Carolina, 122.....28, 308
Lewis v. Scofield, 26 Connecticut, 422.....lxviii, 604
Lewis v. Schenck, 18 New Jersey Eq. 428.....20, 632
Lewis v. Seabury, 74 New York, 409.....30, 311
Lewis v. Smith, 9 New York (5 Selden), 582.....lx, 708
Lewis v. 7 Spencer, West Virginia, 628.....23, 619
Lewis v. State, 20 Alabama, 54.....lxviii, 118
Lewis v. State, 73 Georgia, 164.....53, 535
Lewis v. State, 96 New York, 71.....43, 607
Lewis ada. State, 2 Hawks, 98.....xi, 741
Lewis ada. State, 19 Kansas, 260.....27, 113
Lewis ada. State, 48 Iowa, 578.....30, 407
Lewis ada. State, 73 North Carolina, 122.....21, 461
Lewis v. Stein, 16 Alabama, 214.....1, 177
Lewis v. St. Louis etc. R. R. Co., 39 Missouri, 456.....21, 386
Lewis v. Tilton, 64 Iowa, 220.....53, 426
Lewis v. Tipton, 10 Ohio State, 83.....lxix, 408
Lewis v. Whittemore, 5 New Hampshire, 364.....xcii, 498
Lewis v. Woods, 4 Howard (Mass.), 86.....lxixv, 119
Lewis v. Woodworth, 2 N. Y. (3 Comst.), 512.....1, 319
Lewiston Falls Bank v. Leonard, 43 Maine, 144.....lxix, 46
Lexington, City of, v. McQuillan, 9 Dana, 513.....lxix, 189
Lexington, City of, v. Milton, 12 B. Monroe, 212.....liv, 588
*Lexington Life & M. F. Ins. Co. v. Page & Rich-
 ardson*, 17 B. Monroe, 412.....lxvi, 268
Lexington & Ohio R. R. Co. v. Applegate, 8
 Dana, 269.....lxixvii, 497
Lexington & O. R. R. Co. v. Bridges, 7 R. Mon. 588.....xvi, 588
Libbey ada. Commonwealth, 11 Metcalf, 64.....xiv, 189
Libbey v. Telford, 48 Maine, 316.....lxixvii, 229
Libby v. Berry, 74 Maine, 296.....43, 594
Libby ada. State, 44 Maine, 469.....lxix, 117
Libby ada. State ex rel. Hodgdon, 24 N. H. 221.....lxixvii, 229
Libhart v. Wood, 1 Watts & Serg. 265.....lxixvii, 461
Lacey v. Lacey, 7 Penn. State, 261.....lxviii, 612
Lichtenhaler v. Thompson, 13 Serg. & R. 127.....xv, 581
Lichtenstein, Ex parte, 67 California, 264.....54, 713
Lichtenstein v. Mells, 2 Oregon, 464.....34, 508
Lick v. Madden, 2 California, 208.....lxv, 175
Lick v. O'Donnell, 3 California, 69.....lxviii, 282
Liddel v. McVicker, 6 Halsted, 44.....xix, 305
Liddle v. Needham, 30 Michigan, 147.....33, 389
Lide v. Hadley, 36 Alabama, 637.....lxixv, 336
Lide v. Thomas, 2 Brevard, 334.....iv, 521
Liebbe v. Knapp, 79 Missouri, 22.....49, 513
Liebschutz v. Moore, 70 Indiana, 143.....36, 128
Lieper's Appeal, 26 Penn. State, 420.....lxixvii, 247
Ligget v. Smith, 3 Watts, 321.....lxixvii, 369
Lightner v. Steinagel, 33 Illinois, 874.....lxixv, 228
Lighty v. Shorb, 3 Penrose & Watts, 24.....lxixv, 234
Ligonia v. Burton, 3 Greenleaf, 108.....xi, 46
Ligonier v. Ackerman, 46 Indiana, 529.....15, 229
Likensfield v. Likensfield, 22 Kentucky, 369.....56, 508
Lile v. Hopkins, 12 Smedes & M. 269.....li, 111
Liles v. Fleming, 1 Devereux's L. 123.....lxviii, 586
Liles v. State, 30 Alabama, 24.....lxviii, 108
Lille v. Hoyt, 5 Hill (N. Y.), 395.....xi, 266
Lillis v. St. Louis etc. R. Co., 64 Mo. 464.....27, 265
Lima v. Cemetery Ass'n, 42 Ohio State, 126.....51, 609
Limekiller v. Hannibal & St. J. R. R. Co., 33 Kan-
 sas, 83.....52, 623
Lime Rock Bank v. Mallett, 34 Maine, 547.....lvi, 673
Lime Rock Bank v. Plimpton, 17 Pickering, 189.....lxviii, 398
Limestone Bank v. Penick, 2 T. B. Monroe, 98.....xv, 128
Linard v. Crossland, 10 Texas, 469.....lx, 513
Linawever ada. State, U 3 Head, 51.....lxixv, 797

Roman letters [xli:] refer to volumes of Ameri

Linck v. Kelley, 25 Indiana, 276.....	lxv
Lincoln v. Alexander, 52 California, 482.....	2
Lincoln v. Davis, 63 Michigan, 375.....	5
Lincoln v. Purcell, 2 Head, 143.....	lxvi
Lincoln v. Wright, 23 Penn. State, 78.....	lx
Lincoln etc. Bank v. Page, 9 Massachusetts, 155.....	1
Lincoln etc. Bank v. Richardson, 1 Greenleaf, 79....	
Lind v. Adams, 10 Iowa, 396.....	lxvii
Lindell v. Liggett, 1 Missouri, 433.....	xi
Lindell v. McLaughlin, 20 Missouri, 26.....	lxviii
Lindell v. Bokas, 60 Missouri, 249.....	21
Lindeman v. Lindsey, 60 Pennsylvania State, 93....	8
Lindeman v. Rosenfield, 67 Indiana, 346.....	33
Lindethall ada. State, 5 Eich. Law, 237.....	lvii
Lindley v. Cross, 31 Indiana, 106.....	xci
Lindley v. Union Ins. Co., 65 Maine, 368.....	20
Lindley ada. State, 51 Iowa, 343.....	33
Lindsey v. Armfield, 3 Hawks, 548.....	xiv
Lindsey v. Hill, 66 Maine, 313.....	23
Lindsey v. McCormack, 3 A. K. Marshall, 429.....	xli
Lindsey v. Smith, 78 North Carolina, 236.....	24
Lindsey v. Winona & St. P. R. Co., 29 Minn. 411....	43
Lindsey v. Lindsey, 50 Illinois, 79.....	xix
Lindsey v. McClelland, 18 Wisconsin, 461.....	lxviii
Liness v. Heston, 44 Illinois, 113.....	xlii
Linsweaver v. Stagle, 64 Maryland, 465.....	54
Linsfield v. Old Colony R. R. Corp. 10 Oush. 563....	lvii
Linsinger v. Ritchey, 56 Penn. St. 465.....	xviii
Lining v. Geddes, 1 McCord Ch. 304.....	xvi
Link v. Doerfer, 43 Wisconsin, 391.....	24
Linkenhoker v. Detrick, 51 Virginia, 44.....	59
Linkhaw ada. State, 60 North Carolina, 214.....	12
Link Co. v. Farris, 52 Missouri, 75.....	14
Link v. Ross, 10 Ohio, 413.....	lxvii
Link v. State Bank, 1 Seamon, 67.....	xv
Link v. Wright, 18 Texas, 317.....	lx
Linneard's Appeal, 93 Pennsylvania State, 313.....	39
Linnehan v. Rollins, 137 Massachusetts, 123.....	50
Linnehan v. Sampson, 126 Massachusetts, 506....	30
Linnay v. State, 6 Texas, 1.....	lv
Linscott v. McIntire, 15 Maine, 301.....	lxviii
Linschmeier v. Gourley, 56 Penn. St. 166.....	xiv
Linsley v. Bushnell, 15 Connecticut, 226.....	lxviii
Linsley v. Hubbard, 44 Connecticut, 108.....	26
Linthicum v. Ocan, 64 Maryland, 439.....	54
Linton v. Bute, 7 Penn. State, 39.....	xvii
Linton v. Crosby, 56 Iowa, 386.....	41
Linton v. Hart, 25 Penn. State, 123.....	lxiv
Linton v. Walker, 8 Florida, 144.....	lxvi
Lints v. Thompson, 1 Head, 456.....	lxviii
Lipes v. State, 15 Lea, 125.....	54
Lipman's Appeal, 30 Penn. State, 180.....	lxviii
Lippincott v. Allander, 37 Iowa, 460.....	1
Lippincott v. Barker, 2 Binney, 174.....	lv
Lippincott v. Insurance Co., 3 Louisiana, 546.....	lxviii
Lippitt v. Huston, 8 Rhode Island, 415.....	xiv
Lipcomb v. Grace, 26 Arkansas, 231.....	7
Lipcomb v. Postell, 38 Mississippi, 476.....	lxviii
Lipsky v. Borgmann, 53 Wisconsin, 256.....	38
Lisa v. Lindell, 21 Missouri, 127.....	lxiv
Liscomb ada. People, 60 New York, 559.....	19
Lisher v. Pierson, 3 Wendell, 345.....	xi
Lisloff v. Hart, 25 Mississippi, 245.....	lvii
Lister v. Allen, 31 Maryland, 543.....	c
Litchfield's Appeal, 28 Connecticut, 127.....	lxviii
Litchfield v. White, 7 N. Y. (3 Selden), 438.....	lvii
Litowich v. Litowich, 19 Kansas, 451.....	27
Littener v. Goldman, 72 New York, 506.....	28
Littell v. Zunk, 2 Alabama, 256.....	lxvii
Little v. Barlow, 26 Georgia, 423.....	lxvi

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Lloyd v. Wayne C. Judge, 56 Michigan, 236.....	56, 373	Long v. Colburn, 11 Massachusetts, 97.....	vi, 160
Lloyd v. West Branch Bank, 15 Penn. State, 172.....	liii, 581	Long v. Constant, 19 Missouri, 320.....	lxi, 559
Lobdell v. Baker, 1 Metcalf, 193.....	xxxv, 358	Long v. Dooley, 4 Haywood, 128.....	ix, 754
Lobdell v. Bullitt, 13 Louisiana, 348.....	xxviii, 567	Long v. Hickingsbottom, 25 Mississippi, 772.....	lxiv, 118
Lobdell v. Simpson, 2 Nevada, 274.....	xx, 537	Long v. Long, 77 North Carolina, 304.....	24, 449
Locke's Appeal, 72 Penn. St. 491.....	13, 716	Long v. Merrill, N. C. Term Rep. 112.....	vii, 700
Locke v. Alexander, 2 Hawks, 155.....	xi, 730	Long v. Morrison, 14 Indiana, 865.....	lxvii, 72
Locke v. Coleman, 2 T. B. Monroe, 12.....	xv, 118	Long v. Mulford, 17 Ohio State, 484.....	xxvii, 638
Locke v. Central, 4 Colorado, 65.....	34, 66	Long v. Neville, 36 California, 455.....	xov, 199
Locke v. Homer, 131 Massachusetts, 93.....	41, 199	Long v. State, 56 Indiana, 183.....	26, 19
Locke v. Lewis, 124 Massachusetts, 1.....	96, 631	Long v. State, 22 Texas Ct. App. 194.....	58, 633
Locke v. Stearns, 1 Metcalf, 560.....	xxxv, 358	Long ada. State, 95 North Carolina, 522.....	59, 263
Lockwood v. Sides, 57 Indiana, 360.....	96, 88	Long v. Straus, 107 Indiana, 94.....	57, 87
Lockhart v. Van Alstyne, 31 Michigan, 78.....	18, 156	Long v. Taxing District, 7 Lea, 134.....	40, 55
Lockhart v. Cooper, 87 North Carolina, 149.....	42, 514	Long v. Towl, 42 Missouri, 545.....	xxvii, 355
Lockhart v. House, 43 Indiana, 105.....	13, 384	Long v. Wier, 2 Rich. Eq. 253.....	lxvi, 51
Lockhart v. Van Alstyne, 31 Michigan, 78.....	18, 156	Longfellow v. Quimby, 29 Maine, 196.....	lxviii, 625
Lockhart v. West & A. R. R., 73 Georgia, 472.....	54, 683	Longueville v. Western Am. Co., 51 Iowa, 553.....	33, 146
Lockhart v. Wyatt, 10 Alabama, 221.....	xlv, 481	Long Island R. R. Co., Matter of, 19 Wend. 37.....	xxvii, 429
Lockridge v. Baldwin, 20 Texas, 303.....	xxx, 385	Longworth v. Screven, 2 Hill, 368.....	lxviii, 381
Lockridge v. Biggsstaff, 2 Duval, 221.....	lxviii, 498	Loockerman v. McElair, 6 Gill, 177.....	lxvi, 664
Lockridge v. Lockridge, 3 Dana, 23.....	xxviii, 52	Look v. Dean, 108 Massachusetts, 116.....	11, 323
Lockwood v. Barnes, 3 Hill (N. Y.), 128.....	xxviii, 620	Loomis v. Bragg, 50 Connecticut, 223.....	47, 638
Lockwood v. Bates, 1 Delaware Ch. 436.....	xli, 121	Loomis v. Lane, 39 Penn. State, 242.....	lxvii, 625
Lockwood v. Beckwith, 6 Michigan, 168.....	lxvii, 69	Loomis v. Marshall, 13 Connecticut, 69.....	xxx, 696
Lockwood v. Bull, 1 Cowen, 322.....	xlii, 639	Loomis v. People, 67 New York, 322.....	23, 123
Lockwood ada. Commonwealth, 105 Mass. 223.....	19, 699	Loomis ada. People, 8 Wendell, 396.....	lxvii, 33
Lockwood v. Merchant's Nat. Bank, 9 R. I. 308.....	11, 253	Loomis v. Terry, 17 Wendell, 496.....	xxxvi, 306
Lockwood v. Mitchell, 19 Ohio, 448.....	liii, 438	Loomis v. Hogan, 9 N. Y. (5 Selden), 435.....	lxi, 683
Lockwood v. Mitchell, 7 Ohio State, 287.....	lxx, 78	Looney v. McLean, 129 Massachusetts, 32.....	37, 295
Lockwood v. N. Y. Cent. R. R. Co., 49 New York, 263.....	10, 306	Looney v. State, 19 Texas Ct. App. 520.....	38, 646
Lockwood v. Nye, 3 Swan, 518.....	lviii, 73	Loop v. Litchfield, 43 New York, 351.....	1, 512
Lockwood v. Stradley, 1 Delaware Ch. 296.....	xli, 97	Lord v. Bourne, 63 Maine, 368.....	18, 234
Lockwood v. Thorne, 11 N. Y. (1 Kernan), 170.....	lxii, 81	Lord v. Chadbourne, 43 Maine, 429.....	lxvi, 291
Lockwood Co. v. Lawrence, 77 Maine, 297.....	52, 763	Lord v. Colley, 6 New Hampshire, 99.....	xxv, 448
Lockyear ada. State, 95 North Carolina, 633.....	59, 287	Lord v. Dall, 12 Massachusetts, 115.....	vii, 38
Lodge v. Patterson, 3 Watts, 74.....	xxvii, 236	Lord v. Devendorf, 54 Wisconsin, 491.....	41, 58
Lodge v. Rimmon, 2 Penrose & W. 439.....	xxviii, 96	Lord v. Grow, 29 Penn. State, 86.....	lxxx, 504
Lodge v. White, 30 Ohio St. 569.....	27, 492	Lord v. Hardie, 82 North Carolina, 241.....	33, 682
Loeb v. Astion, 63 Indiana, 175.....	42, 494	Lord v. Jones, 24 Maine, 432.....	lxii, 391
Loeb v. Peters, 63 Alabama, 243.....	35, 17	Lord v. Litchfield, 36 Connecticut, 116.....	4, 41
Loeb v. Pierpoint, 66 Iowa, 469.....	43, 123	Lord v. Lord, 58 New Hampshire, 7.....	42, 505
Loewer v. Humphrey, 41 Ohio St. 378.....	52, 86	Lord v. Ocean Bank, 30 Penn. State, 384.....	lix, 728
Loftand v. Ewing, 5 Littell, 42.....	xv, 41	Lord v. Shaler, 3 Connecticut, 132.....	viii, 160
Loftand v. Maull, 1 Delaware Ch. 269.....	xii, 106	Lord v. State, 16 New Hampshire, 223.....	xii, 729
Loftis v. Cobb, 1 Jones' Law, 406.....	lxii, 173	Lord v. State, 20 New Hampshire, 404.....	ii, 231
Loftus v. Union F. Co., 84 New York, 455.....	38, 633	Lord v. Tiffany, 98 New York, 412.....	50, 629
Logan v. Camell, 88 Pennsylvania St. 228.....	32, 453	Lord v. Wormwood, 29 Maine, 282.....	1, 586
Logan v. Driscoll, 19 California, 623.....	lxxxii, 90	Lorileux v. Keller, 5 Iowa, 196.....	lxviii, 696
Logan v. Mechanic's Bk., 13 Georgia, 201.....	lviii, 507	Lorillard v. Town of Monroe, 11 N. Y. 392.....	lxii, 120
Logan v. Moulder, 1 Arkansas, 315.....	lxxxiii, 538	Lorillard F. I. Co. v. McCulloch, 21 Ohio St. 176.....	8, 59
Logan v. Murray, 6 Serg. & R. 175.....	lx, 422	Lorimer v. Lewis, 1 Morris, 253.....	lxxxix, 461
Logan v. Pontchartrain R. R., 11 Rob. (La.) 94.....	lxiii, 199	Loring v. Small, 50 Iowa, 271.....	32, 136
Logan v. Pyne, 63 Iowa, 524.....	72, 261	Lorman v. Benson, 8 Michigan, 18.....	lxvii, 435
Logan v. Steele, 1 Bibb, 583.....	lv, 659	Lorton v. State, 7 Missouri, 65.....	lxvii, 179
Logan v. Sumter, 23 Georgia, 242.....	lxviii, 758	Lorry ada. State, 7 Bart. 95.....	32, 553
Logansport v. Dick, 70 Indiana, 68.....	34, 166	Loose v. Buchanan, 51 New York, 476.....	10, 622
Logansport v. Justice, 74 Indiana, 378.....	59, 79	Loose v. Clute, 51 New York, 494.....	10, 638
Logansport v. Uhl, 99 Indiana, 531.....	49, 109	Loose v. Dunkin, 7 Johnson, 70.....	v, 248
Logne v. Commonwealth, 38 Penn. State, 265.....	lxxx, 481	Lot v. Thomas, 1 Pennington, 407.....	ii, 354
Lohman v. People, 1 N. Y. (1 Comst.) 279.....	lxix, 340	Lothrop v. Adams, 133 Massachusetts, 471.....	43, 528
Londonderry v. Chester, 2 New Hampshire, 268.....	ix, 61	Lothrop v. Arnold, 26 Maine, 138.....	lxiii, 256
Long v. Allen, 2 Florida, 403.....	1, 281	Lothrop v. Thayer, 128 Massachusetts, 469.....	59, 286
Long v. Bank of Cynthia, 1 Littell, 280.....	lxiii, 234	Lott v. New Orleans C. & I. R. R. Co., 37 La. An. 337.....	55, 509
Long v. Baugus, 2 Ireland's Law, 290.....	lxxxviii, 694	Loud ada. Commonwealth, 3 Metcalf, 328.....	lxxxvii, 126
Long v. Battle Creek, 20 Michigan, 323.....	33, 384	Louden v. Blythe, 16 Penn. State, 532.....	lv, 627
Long v. Beeber, 106 Pennsylvania St. 466.....	51, 532	Louden v. Blythe, 27 Penn. State, 22.....	lxvii, 443
Long v. Buchanan, 27 Maryland, 802.....	xvii, 633	Louden Savings Fund Soc. v. Hagerstown Sav. Bank, 36 Penn. State, 692.....	lxxxviii, 306
Long v. Burnett, 12 Iowa, 28.....	lxxxii, 420		

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Loughran v. Ross, 45 New York, 792.....	6, 173
Loughridge ada. People, 1 Nebraska, 11.....	xviii, 335
Louisiana v. Taylor, 27 Louisiana An. 383.....	31, 561
Louisiana v. Holmes, 23 Louisiana An. 785.....	36, 140
Louisiana Bank v. Satterfield, 14 La. An. 80.....	lxiv, 437
Louisiana Nat. Bank v. Citizens Bank, 28 La. An. 129.....	36, 22
Louisiana State Lot. Co. v. Richoux, 23 La. An. 743.....	6, 602
Louisville v. Anderson, 79 Kentucky, 334.....	43, 230
Louisville v. Commonwealth, 1 Duval, 235.....	lxix, 634
Louisiana v. Holmes, 23 Louisiana An. 785.....	36, 110
Louisville v. Louisville R. Mill Co., 3 Bush, 414.....	xvii, 243
Louisville v. Kevin, 10 Bush, 549.....	12, 73
Louisville & F. R. R. v. Milton, 14 B. Monroe, 78.....	lviii, 647
Louisville and N. A. R. R. Co. v. State ex rel. McCarty, 25 Indiana, 177.....	lxix, 308
Louisville & N. R. R. Co. v. Buckner, 3 Bush, 277.....	6, 463
Louisville & N. R. R. v. Collins, 2 Duval, 114.....	lxix, 456
Louisville & N. R. R. Co. ada. Commonwealth, 80 Kentucky, 361.....	44, 475
Louisville & N. R. Co. v. Wilburn, 6 Bush, 574.....	xix, 600
Louisville & N. R. R. Co. v. Garrett, 3 Lea, 438.....	41, 640
Louisville & N. R. Co. v. Goodnight, 10 Bush, 532.....	19, 30
Louisville & N. R. Co. v. Hays, 11 Lea, 323.....	47, 391
Louisville & N. R. Co. v. Kelly, 23 Indiana, 271.....	47, 149
Louisville & N. R. Co. v. Siskings, 5 Bush, 1.....	xvii, 230
Louisville & N. R. R. Co. v. State, 3 Head, 533.....	lxix, 773
Louisville & N. R. Co. v. Weaver, 9 Lea, 26.....	43, 654
Louisville & N. R. R. v. County C. of D. 1 Head, 637.....	lxii, 424
Louisville Bank v. First Nat. Bank & Bank, 101.....	33, 691
Louisville, City of, v. Hyatt, 3 B. Monroe, 177.....	xxvi, 594
Louisville etc. R. R. Co. v. Commonwealth, 13 Bush, 393.....	36, 205
Louisville etc. R. R. Co. v. Hodges, 9 Bush, 645.....	15, 740
Louisville, C. & L. R. R. Co. v. Commonwealth, 80 Kentucky, 143.....	44, 463
Louisville, C. & L. R. R. Co. v. Goets, 79 Ky. 443.....	43, 327
Louisville, C. & L. R. R. Co. v. Sullivan, 61 Kentucky, 624.....	50, 126
Louisville, E. & S. L. R. R. Co. v. McVay, 36 Indiana, 321.....	69, 770
Louisville, N. & G. S. R. R. Co. v. Guinan, 11 Lea, 90.....	47, 279
Louisville, N. & G. S. R. R. Co. v. Harris, 9 Lea, 120.....	43, 602
Louisville, N. & G. S. R. R. Co. v. Kahnberger, 16 Lea, 280.....	57, 222
Louisville, N. O. & O. Ry. Co. v. Richardson, 66 Indiana, 43.....	32, 24
Louisville, N. A. & O. Ry. Co. v. Summer, 106 Indiana, 55.....	55, 719
Louisville, N. A. & O. Ry. Co. v. Thompson, 107 Indiana, 443.....	57, 129
Louisville, N. O. & T. R. R. Co. v. Courcy, 63 Mississippi, 563.....	56, 826
Louisville N. O. & T. R. R. Co. v. Dickson, 63 Mississippi, 280.....	56, 800
Lounsbury v. Protection Ins. Co. 8 Conn. 429.....	xvi, 606
Louthan v. Commonwealth, 79 Virginia, 126.....	52, 636
Louville v. Menard, 1 Gilman, 39.....	xii, 161
Love v. Camp, 6 Iredell's Eq. 309.....	ii, 419
Love v. Fairfield, 13 Missouri, 300.....	liii, 148
Love v. Masouer, 6 Bush, 24.....	32, 622
Love v. Miller, 63 Indiana, 294.....	21, 193
Love v. Moynahan, 16 Illinois, 277.....	lxiii, 306
Love v. Payne, 73 Indiana, 80.....	33, 111
Love v. Robertson, 7 Texas, 6.....	lvi, 41
Love v. Sierra H. L. W. & M. Co., 23 Cal. 639.....	xvi, 602
Love v. Watkins, 40 California, 547.....	6, 624
Love v. Wells, 25 Indiana, 503.....	lxix, 375
Lovajoy v. Albee, 33 Maine, 414.....	lv, 639
Lovajoy v. Boston & L. R. Co., 125 Mass. 79.....	33, 305
Lovajoy v. Irelan, 17 Maryland, 525.....	lxix, 687
Lovajoy v. Whipple, 16 Vermont, 373.....	xvii, 157
Loveland v. Burke, 120 Massachusetts, 139.....	21, 507
Lovell v. Minot, 20 Pickering, 118.....	lxix, 306
Lovell v. Nelson, 11 Allen, 101.....	lxix, 706
Lovell v. Quitman, 83 New York, 377.....	42, 254
Lovett v. Pike, 41 Maine, 340.....	lxvi, 268
Lovewell v. Westchester F. I. Co., 124 Mass. 413.....	36, 671
Loving v. Pairo, 10 Iowa, 263.....	lxix, 106
Lovington v. St. Clair, 64 Illinois, 84.....	16, 616
Low's Case, 4 Greenleaf, 439.....	xvi, 271
Low v. Central Pac. R. Co. 22 California, 52.....	36, 639
Low v. Elwell, 121 Massachusetts, 309.....	32, 272
Low v. Grand Trunk R'y Co., 72 Maine, 213.....	39, 332
Low v. Knowlton, 26 Maine, 129.....	xv, 169
Low v. Mumford, 14 Johnson, 426.....	vii, 469
Low v. Perkins, 10 Vermont, 533.....	lxix, 327
Low v. Pew, 108 Massachusetts, 347.....	11, 287
Low v. Tibbotts, 72 Maine, 92.....	39, 328
Lowber v. Wilmer's Appeal, 8 Watts & Sang. 287.....	xvii, 303
Lowder v. State, 63 Alabama, 143.....	35, 9
Love v. Beckwith, 14 B. Monroe, 124.....	lviii, 699
Love v. Bliss, 24 Illinois, 183.....	lxvi, 742
Love v. Boteler, 4 Harris & McH. 348.....	1, 429
Love v. Bryant, 30 Georgia, 523.....	lxix, 473
Love v. Lowry, 4 Ohio, 77.....	xix, 685
Love v. McDonald, 3 A. K. Marshall, 354.....	xix, 193
Love v. Miller, 3 Grantan, 205.....	xvii, 189
Love ada. State, 21 West Virginia, 783.....	46, 279
Lovell v. Boston, 111 Massachusetts, 454.....	15, 39
Lovell v. Boston etc. Corp., 23 Pickering, 24.....	lxix, 39
Lovell v. Daniels, 2 Gray, 161.....	lxii, 448
Lovell v. Redding, 9 Greenleaf, 55.....	xviii, 545
Lovell v. Robinson, 16 Maine, 287.....	lxix, 671
Lovell, City of, v. Parker, 10 Metcalf, 208.....	lxix, 426
Lovell, City of, v. Spaulding, 4 Oshing, 277.....	1, 775
Lowenberg v. Jones, 55 Mississippi, 636.....	51, 279
Lowery v. Manhattan R'y Co., 99 N. Y. 128.....	53, 12
Lowery v. Scott, 24 Wendell, 263.....	lxix, 287
Lowery v. Steward, 25 New York, 229.....	lxix, 346
Lowery v. Western Union Tel. Co., 80 N. Y. 129.....	12, 121
Lowndes v. Chiselm, 2 McCord's Ch. 426.....	xvi, 687
Lowndale v. Hunnaker, 3 Oregon, 101.....	lxix, 465
Lowmore v. Barry, 19 Alabama, 129.....	lv, 126
Lowrie, In re 8 Colorado, 429.....	54, 622
Lowrey v. Murrell, 2 Porter, 280.....	lxix, 681
Lowry v. Bradley, 1 Speer's Eq. 1.....	lxix, 149
Lowry v. Cady, 4 Vermont, 504.....	lxix, 686
Lowry v. Erwin & Robinson (La.), 122.....	lxix, 626
Lowry v. Fisher, 3 Bush, 70.....	xvii, 475
Lowry v. Hall, 2 Watts & Serg. 129.....	lxix, 426
Lowry v. Howard, 25 Indiana, 170.....	9, 676
Lowry v. McMillan, 25 Mississippi, 147.....	lxix, 129
Lowry v. McMillan, 8 Penn. State, 127.....	lxix, 681
Lowry v. O'Bryan, 4 Richardson's Eq. 248.....	lvii, 727
Lowry v. Pinson, 2 Bailey, 324.....	lxix, 149
Lowry v. Polk Co., 61 Iowa, 80.....	32, 114
Lowry v. Rainwater, 70 Missouri, 128.....	35, 439
Lowther v. Chappell, 8 Alabama, 293.....	xiii, 364
Loy v. Home Ins. Co., 24 Minnesota, 215.....	51, 346
Loy v. Steamboat F. X. Anbury, 29 Ill. 412.....	lxix, 289
Loyd v. Malone, 23 Illinois, 43.....	lxix, 179
Loyd v. Wight, 20 Georgia, 574.....	lxix, 689
Loza v. State, 1 Texas Ct. App. 428.....	36, 416
Lu bert v. Chauviteau, 3 California, 463.....	lviii, 415
Lucas v. Bishop, 15 Lea, 163.....	54, 429

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports

<i>Lucas v. Government Nat. Bank</i> , 78 Penn St. 223, 21, 17	<i>Lyman v. Godney</i> , 114 Illinois, 338.....55, 371
<i>Lucas v. Hickman</i> , 2 Stewart, 111.....xix, 44	<i>Lyman v. Hale</i> , 11 Connecticut, 177.....xxvii, 728
<i>Lucas v. Ins. Co.</i> , 23 West Virginia, 258.....45, 383	<i>Lyman v. Lyman</i> , 32 Vermont, 78.....lxvii, 151
<i>Lucas v. Lockhart</i> , 10 Smedes & M. 465.....xlvi, 766	<i>Lyman v. White River Bridge Co.</i> , 2 Alabama, 355.....xvi, 708
<i>Lucas v. Lucas</i> , 30 Georgia, 191.....lxvii, 642	<i>Lymburne ada. State</i> , 1 Brevard, 397.....xii, 629
<i>Lucas v. Milwaukee & St. P. R. Co.</i> , 33 Wis. 41, 14, 735	<i>Lynns ada. State</i> , 26 Ohio State, 400.....39, 773
<i>Lucas v. New Bedford & T. R. R. Co.</i> , 6 Gray, 64, lxvi, 406	<i>Lynch v. Allen</i> , 4 Dev. & Bat. Law, 62.....xxiii, 671
<i>Lucas v. Parsons</i> , 24 Georgia, 640.....lxvi, 147	<i>Lynch v. Baxter</i> , 4 Texas, 431.....xii, 738
<i>Lucas v. Watson</i> , 3 Devereux's Law, 398.....xix, 268	<i>Lynch v. Commonwealth</i> , 83 Penn. St. 189.....52, 448
<i>Lucas v. White Line T. Co.</i> , 70 Iowa, 541.....59, 449	<i>Lynch v. Commonwealth</i> , 6 Watts, 495.....xxxi, 490
<i>Lucas County v. Hunt</i> , 5 Ohio State, 488.....lxvii, 393	<i>Lynch v. Commonwealth</i> , 16 Serg. & R. 368.....xvi, 583
<i>Lucas v. Carley</i> , 34 Wendell, 451.....xxv, 637	<i>Lynch v. Fallon</i> , 11 Rhode Island, 311.....33, 458
<i>Lucas v. Dorchester M. F. Ins. Co.</i> , 105 Mass. 297... 7, 522	<i>Lynch v. Mayor</i> , 76 New York, 60.....32, 271
<i>Lucas v. Emery</i> , 4 Watts, 336.....xxviii, 735	<i>Lynch v. Merchants Nat. Bank</i> , 23 W. Va. 854.....46, 529
<i>Lucht v. Behrens</i> , 23 Ohio State, 231.....22, 378	<i>Lynch v. Metropolitan R. R. Co.</i> , 80 N. Y. 77.....43, 141
<i>Ludick v. Mehta</i> , 3 Nevada, 93.....xciii, 576	<i>Lynch ada. People</i> , 51 California, 15.....31, 677
<i>Ludwick v. Townsend</i> , 3 Texas, 79.....xlix, 723	<i>Lynch v. Postlethwaite</i> , 7 Martin, 69.....xii, 495
<i>Ludwick ada. Commonwealth</i> , 90 Mass. 431.....xvi, 769	<i>Lynch v. Smith</i> , 104 Massachusetts, 82.....6, 180
<i>Ludden v. Leavitt</i> , 9 Massachusetts, 104.....vi, 45	<i>Lynchburg v. Norfolk & W. R. R. Co.</i> , 30 Va. 237, 56, 582
<i>Luddington v. Bell</i> , 77 New York, 253.....33, 601	<i>Lynchburg F. I. Co. v. West</i> , 76 Virginia, 575.....44, 177
<i>Ludeke v. Sutherland</i> , 87 Illinois, 481.....39, 66	<i>Lyned v. Pickett</i> , 7 Minnesota, 184.....lxviii, 79
<i>Ludlam v. Ludlam</i> , 26 New York, 356.....lxix, 193	<i>Lyned v. Budd</i> , 2 Paige's Ch. 191.....xxi, 84
<i>Ludlow v. Brown</i> , 1 Johnson, 1.....lii, 277	<i>Lyned v. McGregor</i> , 13 Allen, 182.....xx, 180
<i>Ludlow v. Gill</i> , N. Chipman, 23.....i, 694	<i>Lynde v. Melvin</i> , 11 Vermont, 683.....xxiv, 717
<i>Ludlow v. Johnson</i> , 3 Ohio, 833.....xvii, 609	<i>Lyne v. Guardian</i> , 1 Missouri, 410.....xiii, 809
<i>Ludlow v. Stinson</i> , 3 Calnes' Cases, 1.....li, 251	<i>Lyne ada. Commonwealth</i> , 143 Mass. 877.....56, 700
<i>Ludlow v. Van Camp</i> , 2 Hallett, 113.....xi, 629	<i>Lyne v. State</i> , 5 Porter, 236.....xxx, 587
<i>Ludwick v. Orell</i> , 2 Yeates, 464.....i, 302	<i>Lyons Appeal</i> , 31 Penn. State, 41.....lxvii, 731
<i>Ludwick v. Fahr</i> , 7 Fredell's Law, 423.....lxviii, 333	<i>Lyons v. Baltimore & O. R. Co.</i> , 60 Maryland, 404, 45, 741
<i>Ludwig v. Jersey City Ins. Co.</i> , 48 N. Y. 379.....8, 556	<i>Lyons v. Gridley</i> , Walker, 548.....xii, 591
<i>Ludwig v. Fuller</i> , 17 Maine, 162.....xxv, 245	<i>Lyons Steamboat v. King</i> , 12 Missouri, 272.....xix, 138
<i>Luske v. Chicago, M. and St. P. R. Co.</i> , 39 Wisconsin, 127.....48, 493	<i>Lyons v. Bolling</i> , 9 Alabama, 463.....xlv, 444
<i>Luske v. Chicago, M. & St. P. Ry. Co.</i> , 63 Wis. 91, 53, 268	<i>Lyons v. Bolling</i> , 14 Alabama, 783.....xlvi, 129
<i>Lusky v. Bundy</i> , 9 New Hampshire, 298.....xxiii, 339	<i>Lyons v. Briggs</i> , 14 Rhode Island, 223.....51, 379
<i>Lusk v. State</i> , 49 Alabama, 39.....39, 269	<i>Lyons v. Culbertson</i> , 83 Illinois, 83.....35, 349
<i>Luskus v. Freund</i> , 27 Kansas, 664.....41, 429	<i>Lyons v. Hunt</i> , 11 Alabama, 255.....xvii, 216
<i>Luscomb v. Aldrich</i> , 8 New Hampshire, 31.....xxviii, 381	<i>Lyons v. Jerome</i> , 26 Wendell, 486.....xxvii, 271
<i>Lusk v. Fletcher</i> , 39 Arkansas, 325.....43, 279	<i>Lyons v. King</i> , 11 Metcalf, 411.....xiv, 219
<i>Lusk v. Inhab. of Tyngsborough</i> , 11 Cushing, 563, lix, 180	<i>Lyons v. McGuffey</i> , 4 Penn. State, 126.....xlv, 678
<i>Lusk v. Lund</i> , 1 New Hampshire, 39.....viii, 29	<i>Lyons v. Mitchell</i> , 36 New York, 235.....xciii, 509
<i>Lundy v. Central Pac. R. R. Co.</i> , 64 Cal. 191.....56, 100	<i>Lyons v. Traveler's Ins. Co.</i> , 55 Michigan, 141.....54, 354
<i>Lungstrass v. German Ins. Co.</i> , 48 Missouri, 301... 8, 100	<i>Lyons ada. State</i> , 81 North Carolina, 600.....31, 518
<i>Luning v. State</i> , 2 Finney, 218, 1 Chand. 178.....li, 153	<i>Lyons's Adm'r v. Cleveland & T. R. R.</i> , 7 Ohio St. 336, lxx, 75
<i>Lunn v. Gage</i> , 37 Illinois, 19.....lxvii, 233	<i>Lyons v. Holmes</i> , 11 South Carolina, 429.....32, 483
<i>Lunsford v. State</i> , 1 Texas Ct. App. 448.....28, 414	<i>Lyons v. Miller</i> , 6 Grattan, 427.....lii, 129
<i>Lunsford v. Turner</i> , 5 J. J. Marshall, 104.....xx, 249	<i>Lyons v. Providence W. Ins. Co.</i> , 13 R. I. 367.....43, 38
<i>Lupton v. Marie</i> , 6 Wendell, 77.....xvi, 256	<i>Lyons v. Providence Washington Ins. Co.</i> , 14 Rhode Island, 109.....51, 364
<i>Lupton ada. State</i> , 64 Missouri, 415.....27, 253	<i>Lyons & Co. v. Hill & Co.</i> , 45 N. H., 49.....lxviii, 139
<i>Lurton v. Gilliam</i> , 1 Boammon, 577.....xxiii, 430	<i>Mabire v. Canal Bank</i> , 11 Louisiana, 83.....xxx, 710
<i>Luscomb v. Ballard</i> , 5 Gray, 403.....lxvi, 374	<i>Mable v. Stainback</i> , 1 Martin (N. C.), 76.....i, 545
<i>Luse v. Isthmus Transit R'y Co.</i> , 6 Oregon, 125... 25, 586	<i>Mabry v. Matheny</i> , 10 Smedes & M. 323.....xlvi, 753
<i>Lusk v. McDaniel</i> , 13 Fredell's Law, 435.....lvii, 566	<i>Mace v. Dutton</i> , 3 Indiana, 309.....lii, 516
<i>Lusk v. Hotchkiss</i> , 37 Connecticut, 219.....9, 314	<i>Machias Hotel Co. v. Coyle</i> , 35 Maine, 408.....lviii, 713
<i>Luster v. Middlecott</i> , 3 Grattan, 54.....lvi, 129	<i>Mac— See Mo—</i>
<i>Luter v. Hunter</i> , 30 Texas, 689.....xviii, 494	<i>Macdonough v. Elam</i> , 1 Louisiana, 469.....xx, 294
<i>Luther v. Arnold</i> , 8 Richardson's L. 24.....lxii, 422	<i>Macdonough v. Maguire</i> , 35 California, 374.....xv, 99
<i>Lux v. Hoff</i> , 47 Illinois, 425.....xv, 502	<i>Mack v. Parks</i> , 8 Gray, 517.....lxix, 267
<i>Lybe's Appeal</i> , 106 Pennsylvania State, 626.....51, 542	<i>Mack v. Parsons</i> , Kirby, 155.....i, 17
<i>Lycoming v. Union</i> , 15 Penn. State, 168.....lii, 575	<i>Mack v. Patchin</i> , 42 New York, 167.....i, 508
<i>Lycoming F. Ins. Co. v. Jackson</i> , 83 Illinois, 302... 25, 386	<i>Mackason's Appeal</i> , 42 Penn. State, 430.....lxviii, 517
<i>Lycoming F. I. Co. v. Schwenk</i> , 95 Penn. St. 89... 40, 629	<i>Mackay v. Collins</i> , 2 Nott & McCord, 126.....x, 586
<i>Lycoming Ins. Co. v. Schreffler</i> , 42 Pa. St. 188, lxviii, 501	<i>Mackay v. Peterson</i> , 29 Minnesota, 298.....43, 211
<i>Lyerty v. Wheeler</i> , 11 Fredell's Law, 388.....liii, 414	<i>Mackie v. Cairns</i> , 5 Cowen, 547.....xv, 477
<i>Lyerty v. Wheeler</i> , Busbee's Eq. 367.....lx, 596	<i>Mackie v. Davis</i> , 2 Washington, 719.....i, 488
<i>Lyons v. Diggins</i> , 6 Harris & J. 364.....xiv, 281	<i>Mackie v. Smith</i> , 5 Louisiana An. 717.....lii, 618
<i>Lyons v. McOran</i> , 1 Bailey's Law, 7.....xix, 648	<i>Mackin v. Boston & A. R. R.</i> , 135 Mass. 201.....46, 456
<i>Lyons v. State</i> , 41 Texas, 173.....19, 39	<i>Mackin v. People</i> , 115 Illinois, 312.....56, 167
<i>Lyman v. Edgerton</i> , 29 Vermont, 208.....lxx, 415	<i>Mackinley v. Hewitt</i> , 3 Wharton, 369.....xxxi, 623
<i>Lyman v. Fink</i> , N. Pickering, 231.....xxviii, 268	<i>Mackinley v. McGregor</i> , 3 Wharton, 369.....xxxi, 623

Mac-Man

TABLE (

Roman letters [xliz] refer to volumes of American D

Macley v. Harvey, 90 Illinois, 535.....	32, 35
MacLeod v. Skiles, 81 Missouri, 595.....	51, 254
Macklin v. Crutcher, 6 Bush, 401.....	xcix, 680
Macklot v. Dubreuil, 9 Missouri, 473.....	xliii, 550
Macley v. Love et Ux, 25 California, 367.....	lxxxv, 133
Macomber v. Godfrey, 108 Massachusetts, 219.....	11, 349
Macomber v. Nichols, 34 Michigan, 212.....	23, 522
Macon v. Patty, 57 Mississippi, 378.....	34, 451
Macon & A. R. R. Co. v. Mayes, 49 Georgia, 355.....	75, 678
Macon & W. R. R. Co. v. McConnell, 31 Ga. 133.....	lxxvi, 685
Macpero v. Pedesclaux, 22 Louisiana An. 227.....	9, 727
Mactier's Adm'rs v. Frith, 6 Wendell, 103.....	xxi, 262
Macv v. Combs, 15 Indiana, 469.....	lxxvii, 103
Madan v. Sherard, 73 New York, 339.....	29, 153
Madden v. Barnes, 45 Wisconsin, 135.....	30, 703
Madden v. Chesapeake & O. Ry Co., 28 West Vir- ginia, 610.....	57, 695
Maddox v. Brown, 71 Maine, 423.....	26, 336
Maddox v. Cunningham, 68 Georgia, 431.....	45, 500
Maddox v. Goddard, 15 Maine, 518.....	xxxiv, 604
Maddox v. Neal, 45 Arkansas, 121.....	55, 540
Maddox v. Rowe, 23 Georgia, 431.....	lxxviii, 535
Maddox v. State, 33 Georgia, 581.....	lxxix, 307
Maddox v. Sullivan, 2 Richardson's Eq. 4.....	xliv, 234
Maddox v. White, 4 Maryland, 71.....	lix, 67
Madigan v. McCarthy, 108 Massachusetts, 376.....	11, 371
Madison, City of v. Ross, 3 Indiana, 236.....	lv, 481
Mad River etc. R. R. Co. v. Barber, 5 Ohio St. 541.....	lxvii, 312
Maeck v. Nason, 21 Vermont, 115.....	lii, 41
Maeis v. Bicknell, 7 California, 261.....	lxxviii, 257
Magee v. Badger, 34 New York, 247.....	xc, 691
Magee ada. Commonwealth, 8 Penn. State, 240.....	xliz, 509
Magee v. Holland, 3 Dutcher, 85.....	lxxii, 341
Magee v. Keegan, 35 Mississippi, 244.....	lxxii, 123
Magee v. Magee, 51 Illinois, 500.....	xcix, 571
Magee v. McNeill, 41 Mississippi, 17.....	xc, 354
Magee v. O'Neill, 19 South Carolina, 170.....	45, 765
Magee v. Scott, 9 Onahing, 148.....	lv, 49
Magee v. Young, 40 Mississippi, 164.....	xc, 322
Maggrath v. Church, 1 Calnes, 198.....	li, 173
Maghee v. Camden & A. R. R. Co., 45 N. Y. 514.....	6, 124
Magie v. Stoddard, 25 Connecticut, 563.....	lxxviii, 375
Magill v. Hinsdale, 6 Connecticut, 464.....	xvi, 70
Magill v. Kaufman, 4 Serg. & R. 317.....	viii, 713
Magowan ada. Commonwealth, 1 Met. (Ky.), 368.....	lxxi, 490
Magnin v. Dinmore, 62 New York, 35.....	20, 442
Magnin v. Dinmore, 70 New York, 410.....	26, 608
Magrath v. Magrath, 103 Massachusetts, 577.....	4, 579
Magruder v. Colston, 44 Maryland, 349.....	22, 47
Magruder v. Gage, 33 Maryland, 344.....	3, 177
Maguire, In re, 57 California, 604.....	40, 125
Magwire v. Marks, 28 Missouri, 193.....	lxxv, 121
Mahady v. Bushwick R. Co., 61 New York, 148.....	43, 661
Mahala v. State, 10 Yerges, 532.....	xxxi, 591
Mahan v. Brown, 13 Wendell, 261.....	xxviii, 461
Maher v. Ashmead, 30 Penn. State, 344.....	lxxii, 708
Maher v. Millers, 61 Georgia, 558.....	34, 104
Maher v. People, 10 Michigan, 212.....	lxxxi, 781
Maher v. State, 53 Georgia, 448.....	21, 269
Maher v. State, 1 Porter, 265.....	xvi, 379
Mahler v. Newbaur, 39 California, 168.....	xci, 571
Mahon v. Columbus, 58 Mississippi, 310.....	38, 327
Mahone, Ex parte, 30 Alabama, 49.....	lxxviii, 111
Mahone v. Mahone, 19 California, 626.....	lxxxi, 94
Mahone v. Manchester & L. R. R. Co., 111 Mas- sachusetts, 72.....	15, 9
Mahoney v. Fitzpatrick, 133 Mass. 151.....	45, 502
Mahoney v. Libbey, 123 Massachusetts, 20.....	25, 6
Mahoney v. Young, 3 Dana, 568.....	xxviii, 114
Mahorne v. Hoot, 9 Smodes & M. 267.....	xiviii, 706

Mann v. Central V. R. Co., 55 Vermont, 484.....43, 628
 Mann v. Lewis, 3 West Virginia, 215.....c, 747
 Mann v. Mann, 14 Johnson, 1.....vii, 416
 Mann v. McDowell, 3 Penn. State, 337.....xiv, 649
 Mann ada. People, 75 New York, 481.....31, 482
 Mann ada. People, 97 New York, 530.....49, 556
 Mann v. Robinson, 19 W. Va. 49.....42, 72
 Mann v. Taylor, 4 Jones' Law, 372.....lxix, 750
 Mann v. White River L. & B. Co., 46 Mich. 38.....41, 141
 Mann & Wheeler v. Birchard & Page, 40 Vt. 326.....xciv, 398
 Mannors v. Mannors, 1 Green's Ch. 384.....xxv, 512
 Mannors v. Phila. Library Co., 83 Penn. St. 165.....39, 741
 Manning v. Albee, 14 Allen, 7.....xcii, 736
 Manning v. Craig, 3 Green's Ch. 436.....xii, 739
 Manning v. Johnson, 26 Alabama, 446.....lxii, 732
 Manning v. Keyes, 9 Rhode Island, 234.....11, 249
 Manning v. Manning, 79 North Carolina, 283.....38, 324
 Manning v. Mitcheison, 69 Georgia, 447.....47, 764
 Manning ada. People, 8 Cowen, 297.....xviii, 451
 Manning v. San Antonio Club, 63 Texas, 168.....51, 639
 Manning v. Shotwell, 3 Southard, 584.....viii, 623
 Manning v. Wells, 9 Humphreys, 746.....ii, 688
 Mannville Co. v. Worcester, 138 Mass. 89.....52, 261
 Manny v. Harris, 3 Johnson, 24.....iii, 386
 Mansfield v. Mansfield, 6 Connecticut, 559.....xvi, 76
 Mansfield v. Edwards, 136 Massachusetts, 15.....49, 1
 Mansfield C. & C. Co. v. McEnery, 91 Pennsylvania St. 185.....36, 663
 Manson v. Phoenix Ins. Co., 64 Wisconsin, 26.....54, 673
 Manual ada. State, 72 North Carolina, 301.....21, 455
 Manufacturers' Bank v. Gore, 15 Mass. 75.....viii, 83
 Manufacturers' Bank v. Winship, 5 Pickering, 11.xvi, 369
 Manufacturers' Ins. Co. v. Loud, 99 Mass. 146.....xvii, 715
 Manufacturers' Nat. Bank v. Barnes, 65 Ill. 69.....16, 676
 Manufacturers' N. B'k v. Dickerson, 13 Vroom, 448.32, 237
 Manufacturers' Nat. Bank v. Thompson, 129 Massachusetts, 438.....37, 376
 Manufacturers' & M. B'k v. Follett, 11 E. I. 98.....23, 418
 Manuf. & Mech. B'k v. B'k of Pa., 7 Watts, 336.....xiii, 240
 Manufacturing Co. v. Morrissey, 40 Ohio St. 148.....48, 669
 Manville v. Gay, 1 Wisconsin, 260.....ix, 379
 Manville v. Western U. Tel. Co., 37 Iowa, 214.....18, 8
 Maple v. Kussart, 83 Pa. St. 349.....xc, 214
 Maple v. Railroad Co., 40 Ohio St. 313.....48, 685
 Maples v. Medina, 1 Murphy, 219.....iii, 687
 Maples v. New York & N. H. R. R. Co., 28 Connecticut, 587.....9, 434
 Maples v. Tunis, 11 Humphreys, 108.....liii, 779
 Maples v. Wightman, 4 Connecticut, 376.....x, 149
 Mapstick v. Range, 9 Nebraska, 390.....31, 415
 Marable v. Jordan, 5 Humphreys, 417.....xiii, 441
 Maraman v. Trunnell, 3 Met. (Ky.) 146.....lxvii, 167
 Marburger v. Potz, 16 Penn. State, 9.....iv, 479
 Marburg v. Cole, 49 Maryland, 402.....33, 266
 Marburg v. Marburg, 26 Maryland, 8.....xc, 84
 March v. Eastern R. R. Co., 40 New Hamp. 548.lxxvii, 732
 March v. Leckie, 13 Iredell's Law, 172.....iv, 431
 Marcy v. Amazeen, 61 New Hampshire, 131.....60, 320
 Marcy v. Barnes, 16 Gray, 161.....lxvii, 405
 Marcy v. Crawford, 16 Connecticut, 549.....xii, 158
 Marcy v. Stone, 8 Cushing, 4.....liv, 736
 Marietigui v. La. Ins. Co., 8 Louisiana, 65.....xxviii, 129
 Marigny v. Home M. I. Co., 13 La. An. 538.....lxvi, 511
 Marigny v. Bemy, 3 Martin, N. S., 607.....xv, 172
 Marine B'k of Chicago v. Chandler, 27 Ill. 526.....lxvii, 249
 Marine Nat. Bank v. Nat. City Bank, 59 N. Y. 67.17, 305
 Marion v. Chicago, R. I. & Pac. R. Co. 59 Ia. 428.....44, 637
 Marion v. State, 20 Nebraska, 233.....57, 825
 Markham v. Brown, 37 Georgia, 277.....xcii, 73
 Markham v. Brown, 8 New Hampshire, 623.....xxxi, 209

Markham v. Buckingham, 21 Iowa, 494.....lxviii, 590
 Markham v. Merrett, 7 Howard (Minn.), 437.....xl, 76
 Markham v. O'Connor, 83 Georgia, 183.....31, 249
 Markham ada. People, 64 California, 137.....49, 709
 Markham v. Russell, 13 Allen, 873.....xc, 169
 Markins ada. People, 95 Indiana, 464.....48, 733
 Markland v. Crump, 1 Dev. & B. 94.....cxvii, 230
 Markle v. Hatfield, 2 Johnson, 458.....iii, 446
 Marks Ex parte, 64 California, 39.....49, 694
 Marks's Appeal, 34 Penn. State, 36.....lxv, 631
 Marks v. Borum, 1 Bart. 87.....23, 764
 Marks v. First Nat. Bank, 49 Alabama, 550.....56, 630
 Marks v. Morris, 3 Munford, 407.....v, 481
 Mariatt v. Levee Steam C. P. Co., 10 La. 883.....xxix, 468
 Marler v. State, 67 Alabama, 55.....42, 86
 Marler ada. State, 3 Alabama, 43.....xxvii, 396
 Marling v. Marling, 9 West Virginia, 79.....27, 536
 Mariborough B. R. R. v. Arnold, 9 Gray, 189.....lxix, 379
 Marmaduke, Ex parte, 91 Missouri, 228.....60, 299
 Maroney v. Old Colony etc. Ry Co., 106 Massachusetts, 183.....8, 396
 Marquette H. & O. R. Co., v. Harlow, 37 Michigan, 554.....23, 598
 Marquette H. & O. R. Co. v. Kirkwood, 45 Michigan, 51.....49, 458
 Marquette H. & O. R. Co. v. Spear, 44 Mich. 109.38, 243
 Marr v. Given, 23 Maine, 55.....xxxix, 600
 Marr v. Hanna, 7 J. J. Marshall, 643.....xxiii, 449
 Marr v. Lewis, 31 Arkansas, 203.....23, 553
 Marr v. Peay, 3 Murphey, 84.....v, 521
 Marsan v. French, 61 Texas, 173.....48, 273
 Marsellis v. Thalheimer, 3 Paige's Ch. 25.....xvi, 66
 Marsh's Appeal, 69 Pennsylvania St. 30.....8, 306
 Marsh v. Armstrong, 20 Minnesota, 61.....18, 355
 Marsh v. Billings, 7 Cushing, 323.....liv, 727
 Marsh v. Colby, 39 Michigan, 636.....33, 439
 Marsh v. Fairbury etc. R. R. Co., 64 Ill. 414.....16, 564
 Marsh v. Hall, 9 Rhode Island, 218.....11, 245
 Marsh v. Jones, 21 Vermont, 378.....lii, 67
 Marsh v. Marsh, 3 Jones' Law, 77.....lxiv, 598
 Marsh v. Marsh, 1 McCarter, 318.....lxviii, 251
 Marsh v. Marsh, 16 N. J. Eq. 391.....lxviii, 251
 Marsh v. Marshall, 19 New Hampshire, 301.....xlix, 184
 Marsh v. Muir, 1 Brevard, 134.....ii, 648
 Marsh v. Pier, 4 Rawle, 373.....xxvi, 131
 Marsh v. Scarboro, 3 Dev. Eq. 551.....xxvii, 248
 Marsh v. Small, 3 Louisiana An. 402.....xlvi, 488
 Marsh v. Stephenson, 7 Ohio State, 264.....lxix, 72
 Marsh v. Steele, 9 Nebraska, 36.....31, 406
 Marshall v. American Express Co., 7 Wis. 1.....lxviii, 251
 Marshall v. Buchanan, 35 California, 264.....xov, 80
 Marshall v. Carson, 38 N. J. Eq. 260.....48, 329
 Marshall v. Chicago etc. Ry. Co., 48 Illinois, 475.xov, 561
 Marshall v. Christmas, 3 Humphreys 618.....xxix, 199
 Marshall v. Cohen, 44 Georgia, 489.....9, 170
 Marshall v. Colbert, 5 Leigh, 146.....xxvii, 599
 Marshall ada. Commonwealth, 11 Pickering, 360.....xxii, 377
 Marshall v. Cook, 38 Illinois, 44.....lxviii, 223
 Marshall v. Craig, 1 Bibb, 379.....iv, 647
 Marshall v. Davis, 1 Wendell, 108.....xix, 463
 Marshall v. Flak, 6 Massachusetts, 24.....iv, 76
 Marshall v. Greenfield, 8 Gilt & J. 349.....xxix, 559
 Marshall v. Haney, 4 Maryland, 498.....lix, 93
 Marshall v. Jones, 11 Maine, 54.....xxv, 399
 Marshall v. Means, 12 Georgia, 61.....lv, 444
 Marshall v. Meech, 51 New York, 140.....16, 673
 Marshall v. Mitchell, 35 Maine, 271.....lviii, 697
 Marshall v. Pinkham, 83 Wisconsin, 673.....38, 756
 Marshall v. Roberts, 18 Minnesota, 406.....16, 301
 Marshall v. Spediker, 25 Texas, 460.....lxviii, 594

Roman letters [xlix] refer to volumes of American D

Marshall v. State, 6 Nebraska, 120.....	29, 363
Marshall v. Stephens, 8 Humphreys, 189.....	xlvii, 601
Marshall v. Sumner, 69 New Hampshire, 328.....	47, 194
Marshall v. Tenant, 2 J. J. Marshall, 158.....	xix, 128
Marshall v. Trumbull, 28 Connecticut, 183.....	lxviii, 667
Marshall v. Wellwood, 9 Vroom, 329.....	20, 394
Marshall v. Winslow, 11 Maine, 58.....	xv, 264
Marshalltown v. Blum, 58 Iowa, 184.....	43, 115
Marston v. Brashaw, 18 Michigan, 81.....	c, 152
Marston v. Hobbs, 3 Massachusetts, 433.....	liii, 61
Marston v. Marston, 17 New Hampshire, 808.....	xlili, 611
Marston v. Seabury, 2 Pennington, 702.....	lv, 409
Marston v. Swett, 66 New York, 306.....	23, 43
Martin, Ex parte, 13 Arkansas, 198.....	lviii, 321
Martin, Ex parte, 7 Nevada, 140.....	8, 707
Martin, Ex parte, 5 Yerger, 456.....	xxvi, 276
Martin v. Atkinson, 7 Georgia, 226.....	l, 403
Martin v. Bell, 9 Richardson's Eq. 42.....	lxx, 200
Martin v. Bigelow, 3 Aikens, 184.....	xvi, 696
Martin v. Black, 9 Paige, 641.....	xxxviii, 574
Martin v. Bright's Heirs, 4 J. J. Marshall, 491.....	xx, 226
Martin v. Biles, 5 Blackford, 35.....	xxii, 52
Martin ada. Bobo, 1 Speers' Law, 26.....	21, 587
Martin v. Boyd, 11 New Hampshire, 365.....	xxv, 501
Martin v. Branch Bank, 15 Alabama, 587.....	l, 147
Martin v. Branch, 6 Georgia, 21.....	l, 308
Martin v. Carlin, 19 Wisconsin, 454.....	lxxviii, 696
Martin v. Clarke, 8 Rhode Island, 339.....	8, 586
Martin ada. Commissioners, 4 Michigan, 857.....	lxix, 338
Martin v. Dix, 52 Mississippi, 63.....	24, 661
Martin v. Dwelly, 6 Wendell, 9.....	xxi, 245
Martin v. Fales, 18 Maine, 23.....	xxxvi, 693
Martin v. Fishing Ins. Co., 30 Pickering, 899.....	xxii, 220
Martin v. Franklin Fire Ins. Co., 9 Vroom, 140.....	20, 372
Martin v. Funk, 75 New York, 134.....	31, 446
Martin v. Good, 14 Maryland, 398.....	lxxiv, 545
Martin v. Hamlin, 18 Michigan, 364.....	c, 181
Martin v. Hamlin, 4 Strobhart's Law, 198.....	liii, 673
Martin v. Hardesty, 27 Alabama, 458.....	lxii, 773
Martin v. Hodge, 47 Arkansas, 378.....	58, 763
Martin v. Jackson, 27 Penn. State, 504.....	lxvii, 489
Martin v. Jeté, 13 Louisiana, 501.....	xxii, 120
Martin v. Lewis, 30 Gratt. 672.....	32, 682
Martin v. Maner, 10 Richardson's L. 271.....	lxx, 223
Martin v. Martin, 7 Maryland, 368.....	li, 364
Martin v. Martin, 1 Vermont, 91.....	xxviii, 675
Martin v. Mathlot, 14 Serg. & R. 214.....	xvi, 491
Martin v. Mayo, 10 Massachusetts, 137.....	vi, 103
Martin v. McCord, 5 Watts, 493.....	xxx, 342
Martin v. Merritt, 57 Indiana, 34.....	26, 45
Martin v. Michael, 23 Missouri, 50.....	lxvi, 656
Martin v. Miller, 4 Missouri, 47.....	xxviii, 342
Martin v. New Orleans, 39 La. An. 397.....	58, 194
Martin v. Olliver, 9 Humphreys, 561.....	lxix, 717
Martin v. Parker, 14 Minnesota, 13.....	c, 188
Martin v. Payne, 9 Johnson, 387.....	vi, 288
Martin v. Pensacola & G. R. R. Co., 8 Fla. 370.....	lxviii, 713
Martin v. Pope, 6 Alabama, 533.....	xli, 66
Martin v. Potter 11 Gray, 37.....	lxxi, 689
Martin v. Ranslett, 5 Richardson's L. 541.....	lvii, 770
Martin v. Reeves, 3 Martin, N. S., 22.....	xv, 154
Martin v. Robson, 65 Illinois, 129.....	16, 578
Martin v. Searey, 3 Stewart, 50.....	xx, 64
Martin v. Smith, 5 Binney, 16.....	vi, 395
Martin v. State, 63 Mississippi, 605.....	56, 813
Martin v. State Ins. Co., 15 Vroom, 485.....	43, 397
Martin ada. State, 14 Lea, 92.....	52, 167
Martin ada. State, 65 North Carolina, 508.....	39, 711
Martin ada. State, 30 Wisconsin, 216.....	11, 567
Martin v. Stillwell, 13 Johnson, 378.....	vii, 374

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

<i>Mast v. Pearce</i> , 58 Iowa, 579.....	43, 125	<i>Maxwell v. Harrison</i> , 3 Georgia, 61.....	lii, 384
<i>Masters v. Varner</i> , 5 Gratian, 168.....	114	<i>Maxwell v. Maxwell</i> , 31 Maine, 184.....	1, 657
<i>Masterton v. Mayor of Brooklyn</i> , 7 Hill (N. Y.), 61.....	xlii, 38	<i>Maxwell v. McAtee</i> , 9 B. Monroe, 30.....	xlviii, 409
<i>Masterson v. N. Y. C. R. Co.</i> , 84 New York, 247.....	38, 510	<i>Maxwell v. Moore</i> , 4 Blackford, 445.....	xxx, 666
<i>Mastin v. Gray</i> , 19 Kansas, 458.....	27, 149	<i>May v. Armstrong</i> , 3 J. J. Marshall, 260.....	xx, 137
<i>Matach v. Hughes</i> , 7 Oregon, 39.....	33, 696	<i>May v. Breed</i> , 7 Cushing, 15.....	liv, 700
<i>Matchin v. Matchin</i> , 6 Penn. State, 332.....	xvii, 466	<i>May v. Buckeye Mut. Ins. Co.</i> , 25 Wia, 231.....	3, 76
<i>Mateer v. Brown</i> , 1 California, 221.....	lii, 303	<i>May v. Cassidy</i> , 7 Arkansas, 376.....	xvii, 292
<i>Matheny v. Mason</i> , 73 Missouri, 677.....	39, 541	<i>May v. Frazee</i> , 4 Littell, 391.....	xiv, 199
<i>Mathew v. Am. Ex. Co.</i> , 138 Massachusetts, 55.....	52, 238	<i>May v. Hanson</i> , 5 California, 360.....	lxiii, 136
<i>Mathew v. Bush</i> , 16 Johnson, 233.....	viii, 313	<i>May v. Little</i> , 3 Iredell's Law, 27.....	xxxvii, 707
<i>Mathew v. Chapman</i> , 40 Connecticut, 382.....	16, 46	<i>May v. May</i> , 7 Florida, 207.....	lxvii, 431
<i>Mathew v. Phelps</i> , 2 Root, 160.....	i, 65	<i>May v. May</i> , 9 Nebraska, 16.....	31, 399
<i>Mathew ada. People</i> , 4 Wendell, 229.....	xii, 122	<i>May v. Parker</i> , 12 Pickering, 34.....	xxii, 393
<i>Mathew v. Trinity Church</i> , 3 Serg. & R. 509.....	viii, 663	<i>May v. Rice</i> , 108 Massachusetts, 150.....	11, 328
<i>Mathes v. Robinson</i> , 8 Metcalf, 269.....	xii, 505	<i>May v. Shumway</i> , 16 Gray, 86.....	lxvii, 401
<i>Matheson v. Equitable F. Ins. Co.</i> , 718 Mass. 209.....	19, 411	<i>May v. Smith</i> , Busbee's Eq. 136.....	lx, 594
<i>Mathews v. Case</i> , 61 Wisconsin, 491.....	50, 151	<i>May v. State</i> , 14 Ohio, 461.....	xiv, 548
<i>Mathews v. Chrisman</i> , 12 Smedes & M. 695.....	ii, 124	<i>May v. State Bank of N. Carolina</i> , 2 Rob. (Va.), 86.....	xi, 726
<i>Mathews v. Fogg</i> , 1 Richardson's L. 369.....	xlv, 267	<i>May v. Williams</i> , 61 Mississippi, 125.....	46, 80
<i>Mathews v. Kelsey</i> , 58 Maine, 56.....	4, 248	<i>Mayall v. Boston and Maine R. R.</i> , 19 N. H. 123.....	lii, 140
<i>Mathews v. Lawrence</i> , 1 Denio, 212.....	xliii, 685	<i>Mayberry v. Willoughby</i> , 5 Nebraska, 268.....	25, 491
<i>Mathewson v. Jones</i> , 30 Georgia, 306.....	lxvii, 647	<i>Maybin v. S. O. R. R.</i> , 3 Richardson's L. 240.....	lxiv, 732
<i>Mathias v. Sellers</i> , 86 Penn. St. 486.....	27, 723	<i>Mayer v. Mordecai</i> , 1 S. O. N. S. 383.....	7, 26
<i>Mathias v. Morgan</i> , 72 Georgia 517.....	53, 847	<i>Mayer v. Mutual I. Ins. Co.</i> , 38 Iowa, 304.....	18, 34
<i>Mathis v. Clark</i> , 2 Mill, 458.....	xii, 688	<i>Mayer v. Taylor</i> , 69 Alabama, 403.....	44, 522
<i>Matson v. Farm Buildings I. Co.</i> , 73 N. Y. 310.....	29, 149	<i>Mayer & Co. v. McLure</i> , 36 Mississippi, 369.....	lxvii, 191
<i>Matter of —</i> . See name of party.		<i>Mayes ada. People</i> , 66 California, 537.....	56, 139
<i>Matteson v. Ellsworth</i> , 33 Wisconsin, 483.....	14, 766	<i>Mayes v. People</i> , 106 Illinois, 306.....	46, 636
<i>Matteson v. N. Y. Central R. R. Co.</i> , 35 New York, 487.....	xcj, 67	<i>Mayes v. State</i> , 64 Mississippi, 329.....	60, 58
<i>Matthews v. Allen</i> , 16 Gray, 594.....	lxvii, 430	<i>Mayfield v. Moore</i> , 53 Illinois, 428.....	5, 52
<i>Matthews v. Alexandria</i> , 63 Missouri, 115.....	30, 776	<i>Mayhew v. Boyd</i> , 5 Maryland, 102.....	lix, 101
<i>Matthews v. Cox</i> , 70 New York, 239.....	26, 683	<i>Mayhew v. Henderson</i> , 2 Gill, 333.....	xii, 434
<i>Matthews v. Copley Co.</i> , 53 Mississippi, 715.....	24, 715	<i>Mayhew v. Norton</i> , 17 Pickering, 357.....	xxxvii, 300
<i>Matthews v. Douthitt</i> , 27 Alabama, 273.....	lxii, 768	<i>Maynard v. Beardsley</i> , 7 Wendell, 560.....	xxii, 596
<i>Matthews v. Milton</i> , 4 Yerger, 576.....	xxvi, 247	<i>Maynard v. Boston & M. R. R.</i> , 115 Mass. 458.....	13, 119
<i>Matthews v. Skinker</i> , 62 Missouri, 329.....	21, 428	<i>Maynard v. F. F. Ins. Co.</i> , 34 California, 48.....	xc, 679
<i>Matthews v. State</i> , 9 Lea, 123.....	42, 667	<i>Maynard v. Maynard</i> , 10 Mass. 456.....	vi, 146
<i>Matthews v. State</i> , 55 Alabama, 187.....	28, 698	<i>Maynard v. Vinton</i> , 59 Michigan, 139.....	60, 276
<i>Matthews v. Warner</i> , 29 Grant, 570.....	26, 396	<i>Mayne v. Baldwin</i> , 1 Halsted Ch. 454.....	xiv, 399
<i>Matthewson v. Perry</i> , 37 Connecticut, 435.....	9, 339	<i>Mayo v. Ah Loy</i> , 32 California, 477.....	xcj, 595
<i>Matthey v. Gally</i> , 4 California, 62.....	ix, 595	<i>Mayo v. Carrington</i> , 4 Call, 472.....	ii, 580
<i>Mattingly v. Read</i> , 3 Met. (Ky.) 524.....	lxix, 566	<i>Mayor v. Meigs</i> , 1 McArthur, 53.....	29, 578
<i>Mattison v. Marks</i> , 31 Michigan, 421.....	18, 197	<i>Mayor v. Musgrave</i> , 48 Maryland, 272.....	30, 458
<i>Mattison v. Mattison</i> , 1 Strobhart's Eq. 387.....	xvii, 541	<i>Mayor v. Morgan</i> , 7 Martin, N. S., 1.....	xviii, 232
<i>Mattocks v. Lyman</i> , 15 Vermont, 98.....	xvii, 138	<i>Mayor and Aldermen v. Maberry</i> , 6 Humph. 368.....	xiv, 315
<i>Mattox v. Bays</i> , 4 Dana, 461.....	xxx, 694	<i>Mayor etc. v. Baldwin</i> , 57 Alabama, 61.....	29, 713
<i>Mattox v. Helm</i> , 5 Littell, 185.....	xv, 64	<i>Mayor etc. v. Crowell</i> , 11 Vroom, 207.....	29, 224
<i>Mattox v. Mattox</i> , 2 Ohio, 233.....	xv, 547	<i>Mayor etc. v. Harwood</i> , 32 Maryland, 471.....	3, 161
<i>Mauch Chunk v. Kline</i> , 100 Pa. St. 119.....	45, 364	<i>Mayor etc. v. Kelly</i> , 98 New York, 467.....	50, 636
<i>Maught v. Getzendanner</i> , 65 Maryland, 527.....	57, 352	<i>Mayor etc. v. Radecke</i> , 49 Maryland, 217.....	33, 236
<i>Maulding v. Scott</i> , 13 Arkansas, 58.....	1vi, 298	<i>Mayor etc. v. Willison</i> , 50 Maryland, 136.....	35, 307
<i>Mauney v. Coft</i> , 80 North Carolina, 300.....	30, 80	<i>Mayor etc. of Baltimore v. Marriott</i> , 9 Md. 160.....	lxvi, 326
<i>Maupin's Ex'r v. Dulaney's Devises</i> , 5 Dana, 589.....	xxx, 699	<i>Mayor etc. of Baltimore v. Porter</i> , 18 Md. 284.....	lxix, 696
<i>Mauran v. Smith</i> , 8 Rhode Island, 192.....	5, 764	<i>Mayor etc. of Baltimore v. Root</i> , 8 Md. 95.....	lxii, 692
<i>Maurice v. Worden</i> , 54 Maryland, 233.....	39, 384	<i>Mayor etc. of Baltimore v. State ex rel. Board of Police of Baltimore</i> , 15 Maryland, 376.....	lxiv, 672
<i>Maurv v. Coleman</i> , 24 Alabama, 381.....	ix, 478	<i>Mayor of Baltimore v. B. & O. R. R.</i> , 6 Gill, 288.....	lxviii, 531
<i>Maurv v. Ranger</i> , 38 Ia. An. 485.....	58, 197	<i>Mayor of Baltimore v. Lefferman</i> , 4 Gill, 425.....	xiv, 145
<i>Maute v. Gross</i> , 56 Penn. St. 250.....	xciv, 62	<i>Mayor of Brooklyn ada. People</i> , 4 N. Y. 419.....	iv, 366
<i>Mau-sau-mau-ne-kah v. U. S.</i> , 1 Pinney, 124.....	xxxix, 279	<i>Mayor of Columbia v. Beasley</i> , 1 Humph. 232.....	xxxiv, 646
<i>Mavrich v. Grier</i> , 3 Nevada, 52.....	xciii, 373	<i>Mayor of Frederick v. Groshon</i> , 30 Md. 436.....	xcvi, 591
<i>Maxham v. Day</i> , 16 Gray, 213.....	lxvii, 409	<i>Mayor of Jersey City ada. State</i> , 2 Vroom, 575.....	lxviii, 240
<i>Maxmillan v. Mayor</i> , 62 New York, 160.....	20, 468	<i>Mayor of Memphis v. Wright</i> , 6 Yerger, 437.....	xxvii, 489
<i>Maxon v. Perrott</i> , 17 Michigan, 332.....	xcvii, 191	<i>Mayor of Mobile v. Ealava</i> , 9 Porter, 577.....	xxxiii, 325
<i>Maxwell, Ex parte</i> 37 Alabama, 362.....	lxix, 62	<i>Mayor of Mobile ada. State</i> , 5 Porter, 279.....	xxx, 604
<i>Maxwell v. Allen</i> , 78 Maine, 32.....	57, 763	<i>Mayor of Mobile v. Yuille</i> , 3 Alabama, 137.....	xxxvi, 441
<i>Maxwell v. Brown</i> , 39 Maine, 98.....	lxiii, 605	<i>Mayor etc. of Monroe v. Hoffman</i> , 29 Ia. An. 651.....	29, 345
<i>Maxwell v. Evans</i> , 80 Indiana, 596.....	46, 234	<i>Mayor of New Orleans v. Ripley</i> , 5 Louisiana, 121.....	xxv, 178
<i>Maxwell v. Goetschins</i> , 11 Vroom, 383.....	29, 242	<i>Mayor etc. of New York v. Mable</i> , 13 N. Y. 151.....	lxv, 826

May-McCl

TABLE OF C

Roman letters [xlix] refer to volumes of American Decision

Mayor of New York ad. People, 28 Wend. 232.....xxv, 669	McC
Mayor of N. Y. v. H. F. Ins. Co., 39 N. Y. 45.....c, 400	Mc
Mayor of Phila. v. Randolph, 4 Watts & S. 511.....lxix, 102	McC
Mayor etc. of Rome v. Omberg, 28 Georgia, 46.....lxix, 748	McC
Mayor etc. of Savannah v. Hussey, 21 Ga. 80.....lxvii, 452	McC
Mayor of Savannah v. Cullens, 28 Ga. 331.....xcv, 398	McC
Mayor & City Council of Baltimore v. Reynolds, 20 Maryland, 1.....lxixiii, 538	McC
Mayor & City Council v. O'Donnell, 53 Md. 110.....76, 395	McC
Mayrant v. Richardson, 1 Nott & McCord, 347.....lx, 707	McC
Mays v. Hassell, 4 Stewart & Porter, 222.....lxiv, 750	McC
Mays v. Manuf. Nat. Bank, 64 Penn. St. 11.....3, 573	McC
Mayton v. Texas & Pac. R. R. Co., 63 Texas, 77.....51, 637	McC
Mazonson v. Foote, 1 Atkins, 282.....xv, 679	McC
Maxwell v. Evans, 90 Indiana, 596.....46, 234	McC
Maxwell v. Gotschling, 11 Vroom, 383.....29, 242	McC
McAfee ad. Commonwealth, 108 Mass. 458.....11, 383	McC
McAfee v. Covington, 71 Georgia, 272.....51, 263	McC
McAfee v. Keiro, 7 Smedes & M. 780.....xlv, 331	McC
McAfee v. Conover & Lessee, 7 Ohio St. 99.....lx, 57	McC
McAlexander v. Wright, 3 T. B. Monroe, 189.....xvi, 93	McC
McAllister v. Brooks, 22 Maine, 80.....xxxviii, 282	McC
McAllister ad. Commonwealth, 1 Watts, 307.....xvii, 70	McC
McAllister v. Hoffman, 16 Serg. & R. 147.....xvi, 536	McC
McAllister v. Marshall, 6 Binney, 338.....vi, 458	McC
McAllister v. New England Mut. Ins. Co., 101 Massachusetts, 558.....3, 404	McC
McAllister v. Scribo, 7 Yerger, 277.....xxvii, 504	McC
McAllister v. Smith, 17 Illinois, 328.....lxv, 651	McC
McAllister v. State, 17 Alabama, 434.....liii, 180	McC
McAllister v. Tate, 11 Richardson's Law, 509.....lxixiii, 119	McC
McAlpin v. Lee, 12 Connecticut, 129.....xxx, 609	McC
McAlpin v. Powell, 70 New York, 126.....26, 575	McC
McAnally, Ex parte, 53 Alabama, 495.....23, 646	McC
McAndrew v. Whitlock, 52 New York, 40.....11, 657	McC
McAndrews v. Collier, 13 Vroom, 189.....36, 508	McC
McAneer v. Epperson, 54 Texas, 220.....38, 625	McC
McAnnulty v. McAnnulty, 130 Illinois, 26.....60, 553	McC
McArthur v. Carrie's Adm'r, 32 Alabama, 75.....lxx, 529	McC
McArthur v. Johnson, Phill. Law, 317.....xciii, 593	McC
McArthur v. Luce, 43 Michigan, 435.....38, 204	McC
McArthur v. Saginaw, 58 Michigan, 357.....55, 687	McC
McArthur v. Schenck, 31 Wisconsin, 673.....11, 643	McC
McAulay v. Birkhead, 13 Iredell's Law, 28.....lv, 427	McC
McAulay v. Western v. R. R., 33 Vt. 311.....lxviii, 627	McC
McAuley v. Wilson, 1 Devereux's Eq. 276.....xviii, 587	McC
McAusland v. Pundt, 1 Nebraska, 211.....xciii, 353	McC
McAvoy v. Medina, 11 Allen, 543.....lxxxvii, 733	McC
McBain v. Austin, 16 Wisconsin, 87.....lxxxii, 705	McC
McBain v. McBain, 15 Ohio State, 337.....lxxxvi, 478	McC
McBean v. Chandler, 9 Helak 349.....24, 308	McC
McBee v. Fulton, 47 Maryland, 403.....28, 465	McC
McBratney v. Chandler, 23 Kansas, 692.....31, 213	McC
McBrayer v. Hardin, 7 Iredell's Eq. 1.....liii, 389	McC
McBride v. Ellis, 9 Richardson's Law, 313.....lxvii, 553	McC
McBride v. Longworth, 14 Ohio St. 349.....lxxxiv, 283	McC
McBride ad. State, 4 Missouri, 303.....xxix, 636	McC
McCabe v. Bellows, 7 Gray, 148.....lxvi, 467	McC
McCafferty v. Spuyten Duyvil etc. R. R. Co., 61 New York, 178.....19, 267	McC
McCaffrey v. Woodin, 65 New York, 459.....22, 644	McC
McCagg v. Hescock, 34 Illinois, 476.....lxxxv, 327	McC
McCall v. Cohen, 16 South Carolina, 445.....42, 641	McC
McCall v. Corning, 3 Louisiana An. 409.....xlvi, 454	McC
McCall v. Davis, 56 Penn. St. 431.....xciv, 92	McC
McCall v. McCall, 4 Richardson's Eq. 447.....lvii, 733	McC
McCall v. Parker, 13 Metcalf, 372.....xlvi, 735	McC
McCall v. Phoenix M. L. Ins. Co., 9 W. Va. 237.....27, 558	McC
McCall ad. State, 4 Alabama, 643	McC
McCallie v.	McC

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

McClure v. Herring, 70 Missouri, 18.....	35, 404	McCoy v. Bixbee's Adm'r, 6 Ohio, 310.....	xxvii, 258
McClure v. Miller, 1 Bailey's Eq. 107.....	xli, 522	McCoy v. California Pac. R. R. Co., 40 Cal. 532... 6,	623
McClure v. Philadelphia W. & B. R. R. Co., 31		McCoy v. Chillicothe, 3 Ohio, 370.....	xviii, 607
Maryland, 532.....	6, 345	McCoy v. Curtice, 9 Wendell, 17.....	xxiv, 113
McClure v. Richardson, Rice's Law, 215.....	xxxiii, 105	McCoy ada. Commonwealth, 8 Watts, 153.....	xxvii, 445
McClure v. Watertown F. I. Co., 90 Penn. St. 277.35,	656	McCoy v. Danley, 20 Penn. State, 85.....	lvii, 680
McClure & Co. v. Cox, B. & Co., 32 Ala. 617.....	lxx, 552	McCoy v. Galloway, 3 Ohio, 282.....	xvii, 591
McClures v. Hammond, 1 Bay, 99.....	l, 598	McCoy v. Herbert, 9 Leigh, 548.....	xxviii, 256
McClurg v. Howard, 45 Missouri, 365.....	c, 378	McCoy v. Lemon, 11 Richardson's L. 165.....	lxx, 246
McClurg v. Lecky, 3 Penrose & Watts, 83.....	xxiii, 64	McCoy v. McKown, 26 Mississippi, 487.....	lix, 264
McClurg v. Price, 59 Penn. St. 420.....	xviii, 356	McCoy v. Morrow, 18 Illinois, 519.....	lviii, 579
McCluskey v. Gerhauser, 2 Nevada, 47.....	xc, 512	McCoy v. Scott, 2 Rawle, 222.....	lix, 646
McCobb v. Richardson, 24 Maine, 82.....	xli, 374	McCoy v. State, 25 Texas, 53.....	lviii, 24
McColum v. Hubbard, 13 Alabama, 282.....	xlvi, 56	McCoy ada. State, 34 Missouri, 531.....	lxxvii, 129
McColum v. Smith, Meigs, 342.....	xxxiii, 147	McCoy ada. State, 8 Robinson (La.), 545.....	xli, 309
McColman v. Wilkes, 3 Strobhart's Law, 465.....	li, 637	McCready v. Brisbane, 1 Nott & McC. 104.....	lx, 676
McCombs v. Krug, 81 Indiana, 327.....	42, 135	McCready v. McCready, 5 Iowa, 232.....	lviii, 702
McComb v. Reed, 28 California, 281.....	lxxvii, 115	McCready v. Ramson, 19 Alabama, 430.....	liv, 194
McComb v. Thompson, 2 Minnesota, 139.....	lxxii, 84	McCrea v. Port Royal R. R. Co., 3 S. O. 381.....	16, 729
McCombs v. McKennan, 2 Watts & Serg. 216.....	lxxvii, 505	McCrea v. Purmort, 16 Wendell, 480.....	xxx, 102
McConihe v. N. Y. & E. R. R., 20 New York, 495.lxxv,	420	McCrea v. Marsh, 13 Gray, 211.....	lxxi, 748
McConnell v. Reed, 4 Sammon, 117.....	xxxviii, 124	McCready v. Guardians, 9 Serg. & R. 94.....	xi, 687
McConnell v. Kibbe, 33 Illinois, 175.....	lxxv, 285	McCready v. Sexton, 29 Iowa, 356.....	4, 214
McConnell v. Kibbe, 43 Illinois, 12.....	xvii, 93	McCready v. Gaines, 55 Texas, 485.....	40, 518
McConnell v. Blood, 123 Massachusetts, 47.....	25, 12	McCready v. Claffin, 37 Maryland, 435.....	li, 542
McConnell v. Brillhart, 17 Illinois, 354.....	lxv, 661	McCready v. Sutherland, 23 Maryland, 471.....	lxxvii, 578
McConnell v. Denver, 35 California, 365.....	xv, 107	McCrillis v. Carlton, 37 Vermont, 139.....	lxxvii, 700
McConnell v. Dunlap, Hardin, 41.....	lii, 723	McCrillis v. Wilson, 34 Maine, 286.....	lvi, 658
McConnell v. Kitchens, 20 South Carolina, 430.....	47, 845	McCrillis ada. State, 4 Kansas, 250.....	xvii, 169
McConnell v. Maxwell, 3 Blackford, 419.....	xxvi, 428	McCue v. Commonwealth, 73 Penn. St. 185.....	21, 7
McConnell v. Merrill, 53 Vermont, 149.....	38, 663	McCue v. Klein, 60 Texas, 168.....	48, 280
McConnell v. Scott, 15 Ohio, 401.....	xiv, 583	McCue v. Smith, 9 Minnesota, 252.....	lxxvii, 106
McConnell v. Sherwood, 84 New York, 522.....	38, 537	McCue v. Wapello Co., 56 Iowa, 698.....	41, 134
McConnell v. State, 22 Texas Ct. App. 354.....	53, 647	McCulloch v. Hopper, 47 N. J. L. 189.....	54, 146
McConico v. Curzen, 2 Call. 358.....	l, 540	McCulloch v. Hutchinson, 7 Watts, 434.....	xxvii, 776
McCool v. Grand Rapids, 58 Michigan, 41.....	55, 655	McCulloch v. Scott, 13 B. Monroe, 172.....	lvi, 641
McCoon v. Smith, 3 Hill, 147.....	xxxviii, 623	McCulloch v. Dashiell, 1 Harris & G. 96.....	xviii, 271
McCord v. Oakland Quicksilver Mining Co., 64		McCullough v. Porter, 4 Watts & Serg. 177.....	xxxix, 66
California, 134.....	49, 686	McCullough v. Shonsman, 105 Penn. St. 169.....	51, 194
McCord v. McCord, 77 Missouri, 166.....	46, 9	McCullough v. Wall, 4 Richardson's Law, 68.....	liii, 718
McCord ada. State, 8 Kansas, 232.....	12, 469	McCully v. Clarke, 40 Penn. State, 399.....	lxxx, 594
McCorkle v. Binn, 5 Binney, 340.....	vi, 420	McCumber ada. People, 18 New York, 515.....	lxvii, 518
McCorkle v. Doby, 1 Strobhart's Law, 396.....	lxvii, 560	McCune v. Norwich O. G. Co., 30 Conn. 521.....	lxxix, 278
McCormack v. Obannon, 3 Munford, 484.....	v, 509	McCune ada. State, 5 Rhode Island, 60.....	lxx, 176
McCormack v. Patchin, 53 Missouri, 33.....	14, 440	McCune's Devises v. House, 8 Ohio, 144.....	xxxii, 438
McCormick, Petition of, 21 Wisconsin, 492.....	1, 197	McCurdy v. Breathitt, 5 T. B. Monroe, 232.....	xvii, 68
McCormick's Appeal, 57 Penn. St. 54.....	xxviii, 191	McCurley v. McCurley, 60 Maryland, 185.....	45, 717
McCormick v. Burt, 95 Illinois, 263.....	35, 163	McCurley v. Stockbridge, 62 Maryland, 422.....	50, 229
McCormick v. Brown, 36 California, 180.....	xv, 170	McCurry v. Hooper, 12 Alabama, 823.....	xlvi, 289
McCormick ada. Commonwealth, 130 Mass. 61.....	39, 423	McCuaker v. McEvey, 9 Rhode Island, 523.....	li, 298
McCormick v. Dist. of Columbia, 4 Mackey, 596.....	54, 234	McCutchen v. McGahay, 11 Johnson, 281.....	vi, 373
McCormick v. Holbrook, 22 Iowa, 487.....	xvii, 400	McCutcheon v. Homer, 43 Michigan, 483.....	38, 213
McCormick v. Horan, 81 New York, 86.....	37, 479	McDade v. Burch, 7 Georgia, 539.....	l, 407
McCormick v. Kansas City St. J. & C. R. R. Co.,		McDaniel v. Baca, 2 California, 326.....	lvi, 239
70 Missouri, 359.....	35, 431	McDaniel v. Colvin, 16 Vermont, 300.....	xlvi, 512
McCormick v. Littler, 85 Illinois, 62.....	28, 610	McDaniel v. Correll, 19 Illinois, 226.....	lxviii, 587
McCormick v. McClure, 6 Blackford, 466.....	xxxix, 441	McDaniel v. Edwards, 7 Iredell's Law, 406.....	lxvii, 331
McCormick v. Miller, 102 Illinois, 208.....	40, 577	McDaniel v. Marygold, 2 Iowa, 500.....	lxv, 796
McCormick v. Penn. Ct. R. R. Co., 99 N. Y. 65.....	52, 6	McDaniel v. State, 8 Smedes & M. 401.....	xlvi, 92
McCormick v. Rusch, 15 Iowa, 127.....	lxxviii, 401	McDaniels v. Bank of Rutland, 29 Vermont, 230.....	lxx, 406
McCormick v. Sarson, 45 New York, 265.....	6, 80	McDaniels v. Robinson, 28 Vermont, 316.....	lxii, 574
McCormick v. Wheeler, Mellick & Co., 36 Illi-		McDaniels v. Robinson, 28 Vermont, 387.....	lxvii, 720
nols, 114.....	lxxv, 388	McDaniels v. McDaniels, 40 Vermont, 363.....	xciv, 408
McCourt v. Eckstein, 22 Wisconsin, 153.....	xciv, 594	McDermot v. Lawrence, 7 Serg. & R. 439.....	x, 468
McCurdy v. Rogers, 21 Wisconsin, 197.....	xcii, 468	McDermott's Appeal, 106 Penn. St. 358.....	51, 526
McCurry v. King's Heirs, 3 Humphreys, 267.....	xxxix, 165	McDermott ada. Commonwealth, 123 Mass. 440.....	25, 136
McCurtis v. Bates, 29 Ohio St. 419.....	23, 758	McDermott v. Evening Journal, 14 Vroom, 488.....	39, 606
McCoun v. Delany, 3 Bibb, 46.....	vi, 635	McDermott v. Evening Journal, 15 Vroom, 430.....	43, 396
McCown v. Schrimpf, 21 Texas, 22.....	lxxviii, 221	McDermott v. Hannibal & St. J. R. Co., 73 Mis-	
McCoy v. Beard, 2 Hawke, 377.....	xi, 773	souri, 516.....	39, 398

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures (43) to American Reports.

- McDermott v. State, 13 Ohio State, 228lxviii, 444
 McDonald v. Allen, 37 Wisconsin, 10319, 754
 McDonald v. Badger, 23 California, 383lxviii, 383
 McDonald v. Black, 30 Ohio, 188lv, 448
 McDonald v. Boring, 43 Michigan, 39428, 139
 McDonald v. Bradshaw, 3 Georgia, 248xvii, 325
 McDonald v. Chicago & N. W. R. R. Co., 36
 Iowa, 124xv, 114
 McDonald v. Crandall, 43 Illinois, 231xvii, 112
 McDonald v. Eggleston, 26 Vermont, 184lx, 303
 McDonald v. Gray, 11 Iowa, 508lxviii, 509
 McDonald v. Hewitt, 15 Johnson, 949viii, 241
 McDonald v. Ingraham, 30 Mississippi, 369xvii, 166
 McDonald v. Leewright, 31 Missouri, 28lxviii, 631
 McDonald v. McDonald, 5 Jones' Eq. 311lxv, 434
 McDonald v. Mallory, 77 New York, 54533, 684
 McDonald v. Massachusetts G. H., 130 Mass. 43131, 589
 McDonald v. Mayor, 68 New York, 2323, 144
 McDonald v. Nelson, 3 Cowen, 139xiv, 431
 McDonald v. Prescott, 3 Nevada, 109xv, 517
 McDonald v. Seafie, 11 Penn. State, 261ii, 586
 McDonald v. Simpson, 4 Arkansas, 592xxviii, 45
 McDonald v. Snelling, 14 Allen, 390xvii, 768
 McDonald v. State, 61 Alabama, 27960, 158
 McDonald ada. State, 1 McCord, 592x, 601
 McDonald v. Walton, 1 Missouri, 732xiv, 318
 McDonald v. Wilkie, 13 Illinois, 21lv, 433
 McDowell v. Battle House Co., 67 Alabama, 9042, 89
 McDouough v. Elam, 1 Louisiana, 489xx, 284
 McDouough v. Gilman, 3 Allen, 264lxviii, 72
 McDouough v. Templeman, 1 Harris & J. 86ii, 510
 McDougall v. Page, 65 Vermont, 13748, 602
 McDowell v. Chambers, 1 Strobhart's Eq. 247xiv, 530
 McDowell v. Caldwell, 3 McCord's Ch. 42xvi, 685
 McDowell v. Cook, 6 Smiles & M. 430xiv, 389
 McDowell v. Gen. Mat. Ins. Co., 7 La. An. 684lvi, 619
 McDowell v. Goldsmith, 6 Maryland, 519lx, 305
 McDowell v. Goodwyn, 3 Mill, 441xii, 636
 McDowell v. Mordock, 1 Nott & McC. 237lx, 684
 McDowell v. Potter, 8 Penn. State, 129xlix, 503
 McDowell v. Simms, Bushe's Eq. 120lvii, 595
 McDowell v. Simpson, 3 Watts, 129xvii, 328
 McDuffie v. Portland & R. R. Co., 23 New
 Hampshire, 48013, 72
 McDuffie v. McIntyre, 11 South Carolina, 58137, 500
 McDuffie ada. State, 34 New Hampshire, 523lxix, 516
 McDillery v. Shipley, 3 Maryland, 25lvi, 703
 McDillery v. McKensie, 3 Porter, 31xvii, 643
 McElhenny v. Wythe, 3 Strobhart's Law, 284xlix, 643
 McKelroy v. Albany, 65 Georgia, 38738, 721
 McKelroy v. Bixby, 36 Vermont, 264lxviii, 684
 McKelroy v. Nashua etc. R. R. Corp., 4 Osm. 400l, 734
 McKelroy v. Seery, 61 Maryland, 39048, 110
 McKelvin v. Mudd, 44 Alabama, 484, 106
 McKelvey v. Hayter, 3 Porter, 148xvii, 645
 McEntee v. New Jersey S. Co., 45 New York, 346, 28
 McEntire v. Durham, 7 Iredell's Law, 151xiv, 513
 McEwan v. Zimmer, 38 Michigan, 76831, 322
 McEwan v. Jeffersonville, Mad. & Ind. R. R. Co.,
 33 Indiana, 3695, 216
 McEwan v. Welles, 1 Root, 2021, 39
 McFadden v. Commonwealth, 23 Penn. St. 12lxii, 308
 McFadden v. Haley, 3 Bay, 4571, 683
 McFadden v. Johnson, 73 Penn. St. 23813, 681
 McFaddin v. David, 73 Indiana, 44541, 587
 McFarland v. Feiberg, 7 Ohio, Pt. 1, 194xxviii, 632
 McFarland v. Newman, 9 Watts, 65xxiv, 497
 McFarland v. State, 68 Wisconsin, 40060, 867
 McFarland v. State Bank, 4 Arkansas, 44xvii, 761
 McFarland v. Stewart, 3 Watts, 111xvii, 109
 McFarland v. Stone, 17 Vermont, 168xlv, 328
 McFarlane v. Clark, 39 Michigan, 4433, 246
 McFarlane v. Moore, 1 Overton, 174lii, 729
 McFee v. S. C. Ins. Co., 2 McCord, 638xiii, 737
 McFee's Lessee v. Moore's Heirs, 104 Ohio, 684xv, 314
 McGahan v. Carr, 6 Iowa, 331lxvii, 421
 McGaffin v. Cohoes, 74 New York, 28730, 327
 McGar v. Williams, 26 Alabama, 469lxii, 739
 McGary v. Hastings, 39 California, 2982, 426
 McGary v. Loomis, 63 New York, 10426, 510
 McGee v. Anderson, 1 B. Monroe, 127xxvii, 579
 McGee v. Campbell, 7 Watts, 548xxvii, 723
 McGee v. McGee, 8 Georgia, 266lxii, 497
 McGee v. Metcalf, 13 Smiles & M. 531ii, 129
 McGee v. Porter, 14 Missouri, 611lv, 129
 McGee v. Prouty, 9 Metcalf, 547xviii, 499
 McGee v. Sodunsky, 5 J. J. Marshall, 128xx, 281
 McGee v. Wallis, 37 Mississippi, 63834, 424
 McGhee v. Hill, 4 Porter, 170xxvii, 277
 McGhee v. State, 63 Mississippi, 77233, 369
 McGhee v. Hill, 4 Little, 244xv, 124
 McGill v. Dist. of Columbia, 4 Madry, 7954, 292
 McGill v. Rowand, 3 Penn. State, 451xv, 684
 McGilvery v. Stackpole, 36 Maine, 283lx, 245
 McGinness ada. State, 30 North Carolina, 27730, 36
 McGinnis ada. Commonwealth, 3 Cushing, 3121, 732
 McGinnis v. Cook, 57 Vermont, 3152, 113
 McGinnis v. State, 9 Humphreys, 43xvii, 697
 McGinty ada. State, 41 Mississippi, 435xviii, 264
 McGirr v. Aaron, 1 Penrose & W. 42xvi, 361
 McGlynn ada. State, 20 California, 288lxviii, 118
 McGoon v. Irvin, 1 Pinney, 226xlv, 499
 McGoon v. Shirk, 54 Illinois, 4085, 123
 McGough v. Ins. Bank of Columbus, 2 Ga. 282xvi, 282
 McGovern v. Knox, 21 Ohio St. 8678, 89
 McGovern v. Lewis, 56 Penn. St. 231lxviii, 89
 McGowan's Appeal, 31 Penn. State, 76lx, 728
 McGowan ada. Commonwealth, 4 Bibb, 62vii, 737
 McGowan v. Hill, 16 South Carolina, 63842, 639
 McGowan v. McGowan, 14 Gray, 112lxvii, 683
 McGowan v. Manifee, 7 T. B. Monroe, 214xviii, 178
 McGowan v. People, 104 Illinois, 10044, 87
 McGowan v. People's M. F. I. Co., 54 Va. 21141, 683
 McGowan ada. People, 77 Illinois, 64426, 264
 McGowan ada. State, 30 Connecticut, 245li, 436
 McGowan v. Stark, 1 Nott & McCord, 287lx, 712
 McGowan v. West, 7 Missouri, 589xxviii, 426
 McGowin v. Remington, 13 Penn. State, 81ii, 684
 McGrath v. Rugee, 30 Wisconsin, 40650, 478
 McGrath v. Barnes, 13 South Carolina, 26330, 687
 McGrath v. Clark, 56 New York, 3415, 473
 McGrath v. Merwin, 113 Massachusetts, 42717, 119
 McGrath v. N. Y. Cent. etc. R. R. Co., 80 New
 York, 49817, 628
 McGrath v. Seagrave, 3 Allen, 443lxviii, 727
 McGraw v. Baltimore & O. R. Co., 18 West Vir-
 ginia, 36141, 628
 McGray v. City of Lafayette, 12 Rob. (La.) 674xviii, 292
 McGregor v. Balch, 14 Vermont, 428xxviii, 221
 McGregor v. Kilgore, 6 Ohio, 328xxvii, 289
 McGregor v. Wait, 10 Gray, 71lxvii, 299
 McGuinness v. Boyle, 123 Massachusetts, 87023, 123
 McGuire, Matter of, 57 California, 60440, 126
 McGuire v. Grant, 1 Dutcher, 398lxvii, 49
 McGuire v. Kouns, 7 T. B. Monroe, 266xviii, 187
 McGuire v. People, 44 Michigan, 28830, 289
 McGuire v. Smock, 43 Indiana, 113, 239
 McGuire v. Spence, 91 New York, 30842, 688
 McGuire v. Stevens, 42 Mississippi, 7242, 689
 McGuire v. State, 35 Mississippi, 264lxviii, 124

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

McGinnigle v. McKee, 77 Penn. St. 81.....	18, 428	McKinney v. Springer, 3 Indiana, 59.....	liv, 470
McHale ada. Commonwealth, 97 Penn. St. 397.....	39, 808	McKinnon v. McDonald, 4 Jones' Equity, 1.....	lxvii, 574
McHenry v. Day, 13 Iowa, 445.....	lxvii, 438	McKinnon v. McEwan, 48 Michigan, 106.....	42, 458
McHenry v. Ridgely, 2 Seamon, 309.....	xxv, 110	McKinstry v. Davis, 3 Cowen, 339.....	xv, 203
McIlhugh v. Schuykill Co., 67 Penn. St. 391.....	5, 445	McKinzie v. Hill, 51 Missouri, 303.....	11, 450
McIlvaine v. Harris, 20 Missouri, 457.....	lxiv, 198	McKison ada. Commonwealth, 8 Serg. & R. 430.....	xi, 630
McIlvaine v. Lantz, 100 Penn. St. 586.....	45, 400	McKleroy & Bradford v. Southern Bank of Ken- tucky, 14 Louisiana An. 458.....	lxvii, 438
McIlvaine v. Smith, 42 Missouri, 45.....	xcvii, 295	McKnight v. Devlin, 32 New York, 399.....	11, 715
McIlwraith v. Hollander, 73 Missouri, 106.....	39, 484	McKnight v. Dunlop, 5 N. Y. (1 Selden), 637.....	lv, 370
McIlwain v. Hazleton, 19 Wisconsin, 567.....	lxviii, 701	McKnight v. Gordon, 13 Rich. Eq. 222.....	xciv, 164
McIndoe v. Norman, 26 Wisconsin, 538.....	7, 98	McKnight v. Grant Parish, 30 La. An. 361.....	31, 226
McIntire v. McLeurin, 2 Humphreys, 71.....	xxvii, 300	McKnight v. Knisely, 25 Indiana, 336.....	lxvii, 364
McIntire v. Norwich Ins. Co., 102 Mass. 230.....	3, 458	McKone v. Michigan Cent. R. Co., 37 Mich. 601.....	47, 596
McIntire v. Oliver, 2 Hawks, 309.....	xi, 760	McKowen v. McDonald, 43 Penn. St. 441.....	lxviii, 576
McIntire v. Preston, 5 Gilman, 48.....	lxviii, 321	McKyring v. Bull, 16 New York, 297.....	lxix, 696
McIntire ada. State, 1 Jones' Law, 1.....	lix, 568	McLain v. Carson's Ex'r, 4 Arkansas, 164.....	xxvii, 777
McIntire v. Ward, 5 Binney, 236.....	vi, 417	McLain v. Matlock, 7 Indiana, 625.....	lxv, 748
McIntire v. Young, 6 Blackford, 496.....	xxxix, 443	McLain v. State, 10 Yerger, 241.....	xxxii, 573
McIntire v. Zanesville C. & M. Co., 9 Ohio, 203.....	xxxix, 438	McLane v. Curran, 133 Massachusetts, 531.....	43, 535
McIntosh v. Hambleton, 35 Georgia, 94.....	lxviii, 276	McLanahan v. Brandon, 1 Martin, N. S., 331.....	xiv, 188
McIntosh v. Lytle, 26 Minnesota, 336.....	37, 410	McLanahan v. Reeside, 9 Watts, 508.....	xxxvii, 136
McIntyre v. Carver, 2 Watts & Serg. 393.....	xxxvii, 519	McLanahan v. Wyant, 1 Penrose & W. 96.....	xvi, 363
McIntyre v. Kline, 30 Mississippi, 361.....	lxiv, 163	McLaren v. Hutchinson, 22 California, 187.....	lxviii, 59
McIntyre v. Park, 11 Gray, 102.....	lxvi, 690	McLaren v. Kehler, 23 La. An. 80.....	8, 592
McJilton v. Love, 13 Illinois, 436.....	liv, 419	McLaren v. Watson's Ex'r, 26 Wendell, 425.....	xxxvii, 260
McJimsey v. Traverse, 1 Stewart, 244.....	xviii, 43	McLaughlin, Ex parte, 41 California, 211.....	10, 273
McKain v. Love, 3 Hill (S. C.), 506.....	xxvii, 401	McLaughlin v. Corry, 77 Penn. St. 109.....	18, 433
McKay ada. People, 46 Michigan, 439.....	41, 189	McLaughlin v. McLaughlin, 4 Ohio State, 506.....	lxiv, 603
McKeage v. Hanover F. Ins. Co., 81 N. Y. 38.....	37, 471	McLaughlin v. Nash, 14 Allen, 136.....	xcii, 741
McKean v. Mitchell, 35 Penn. State, 269.....	lxviii, 335	McLaughlin v. Shepherd, 32 Maine, 143.....	lii, 648
McKean v. Reed, Littell's Sel. Ca. 395.....	xii, 318	McLaughlin ada. State, 15 Kansas, 228.....	32, 264
McKean ada. State, 36 Iowa, 343.....	14, 530	McLaughlin v. Walte, 5 Wendell, 404.....	xxi, 233
McKecknie v. Ward, 58 New York, 541.....	17, 281	McLaughlin v. Winner, 63 Wisconsin, 120.....	53, 273
McKee v. Carcelon, 60 Maine, 165.....	12, 200	McLaurin v. Salmon, 11 B. Monroe, 96.....	lii, 563
McKee v. Judd, 12 New York (2 Kernan), 622.....	lxiv, 515	McLean v. Bovee, 24 Wisconsin, 285.....	1, 188
McKee v. Nelson, 4 Cowen, 355.....	xv, 384	McLean v. Equitable L. A. Soc., 100 Ind. 127.....	50, 779
McKee v. Phoenix Insurance Co., 28 Mo. 383.....	lxv, 129	McLean v. Hardin, 3 Jones' Eq. 294.....	lxix, 740
McKee ada. State, 1 Bailey's Law, 651.....	xxi, 499	McLean v. Hosea, 14 Alabama, 194.....	lxviii, 94
McKee v. Wilcox, 11 Michigan, 353.....	lxviii, 743	McLean Co. Ex'r v. Flagg, 31 Illinois, 290.....	lxviii, 224
McKeen v. Northampton, 49 Penn. St. 519.....	lxviii, 515	McLean Co. C. Co. v. Lennon, 91 Ill. 561.....	33, 64
McKellar v. Detroit, 67 Michigan, 158.....	58, 357	McLeary v. McLeary, 65 Maine, 173.....	20, 683
McKelly v. Molhenny, 4 Watts, 317.....	xxviii, 711	McLellan v. Cox, 36 Maine, 55.....	lxviii, 736
McKelway v. Armour, 2 Stockton's Ch. 115.....	lxiv, 445	McLellan v. Hayford, 72 Maine, 410.....	39, 343
McKenna v. Hammond, 3 Hill's Law, 331.....	xxx, 366	McLellan v. Jenness, 43 Vermont, 183.....	5, 270
McKenna v. Phillips, 6 Wharton, 571.....	xxvii, 438	McLellan v. Longfellow, 32 Maine, 494.....	liv, 590
McKenzie's Appeal, 41 Connecticut, 607.....	19, 625	McLellan v. Young, 54 Georgia, 399.....	21, 276
McKenzie v. Branch Bank at Montgomery, 23 Alabama, 606.....	lxv, 369	McLemore v. Pinkston, 31 Alabama, 366.....	lxviii, 167
McKenzie v. Nevius, 22 Maine, 138.....	xxviii, 291	McLendon v. Jones, 8 Alabama, 298.....	xlii, 640
McKeon v. Bisbee, 9 California, 137.....	lxx, 642	McLennon v. Richardson, 15 Gray, 74.....	lxvii, 353
McKeon v. McDermott, 22 California, 667.....	lxviii, 86	McLeod v. Bertachy, 33 Wisconsin, 176.....	14, 755
McKeon v. See, 51 New York, 300.....	10, 659	McLeod v. Board, 30 Texas, 238.....	xciv, 301
McKeown v. Johnson, 1 McCord, 578.....	x, 698	McLeod v. Evans, 66 Wisconsin, 401.....	57, 287
McKeown v. Stanton, 50 Wisconsin, 297.....	34, 850	McLeod v. Jones, 105 Massachusetts, 403.....	7, 630
McKey v. Garth, 2 Robinson (Va.), 33.....	xl, 725	McLeod v. Pearce, 2 Hawks, 110.....	xi, 742
McKibbin v. Martin, 64 Penn. St. 352.....	3, 588	McLeod ada. People, 1 Hill, 377 (25 Wend. 483).....	xxvii, 390
McKie ada. Commonwealth, 1 Gray, 61.....	lxii, 410	McLeran v. Shartzer, 5 California, 70.....	lxviii, 84
McKim v. Aulbach, 130 Massachusetts, 481.....	39, 470	McLoon v. C. M. Ins. Co., 100 Mass. 473.....	xxvii, 116
McKim v. King, 68 Maryland, 502.....	49, 340	McLoon v. Commercial Mut. Ins. Co., 709 Mas- sachusetts, 472.....	1, 129
McKim v. McKim, 12 Rhode Island, 462.....	34, 694	McLoon ada. Commonwealth, 5 Gray, 91.....	lxvi, 354
McKindly v. Dunham, 55 Wisconsin, 515.....	49, 740	McLoud v. Selby, 10 Connecticut, 390.....	xxvii, 680
McKinley v. Chicago etc. R. R. Co., 44 Iowa, 514.....	34, 718	McLure v. Benceni, 2 Iredell's Eq. 513.....	xl, 437
McKinney v. Brights, 16 Penn. State, 399.....	lv, 512	McLure v. Lancaster, 24 South Carolina, 373.....	58, 259
McKinney v. Clarke, 2 Swan, 321.....	lviii, 59	McLure v. Melton, 24 South Carolina, 559.....	58, 273
McKinney v. Griggs, 5 Bush, 401.....	xvii, 360	McMahan v. Bowe, 114 Massachusetts, 140.....	19, 327
McKinney v. Harter, 7 Blackford, 385.....	xlili, 96	McMahan v. Geiger, 73 Missouri, 145.....	39, 490
McKinney v. Jones, 7 Texas, 598.....	lviii, 83	McMahan v. Green, 12 Alabama, 71.....	xlvi, 243
McKinney v. Monongahela Nav. Co., 14 Pa. St. 65.....	liiii, 517	McMahan v. Green, 34 Vermont, 69.....	lxix, 683
McKinney v. People, 2 Gilman, 540.....	xlili, 65	McMahan v. McMahan, 13 Penn. State, 376.....	liii, 441
McKinney v. Pinokari, 2 Leigh, 149.....	xxi, 601		

Roman letters [xlix] refer to volumes of American Decis

McMahon v. Morrison, 16 Ind. 172.....	lxix, 418	B
McMahon v. McMahon, 105 Illinois, 536.....	44, 819	N
McMahon v. Armstrong, 3 Stewart & P. 151.....	xxiii, 304	N
McMahon v. Fawcett, 2 Randolph, 514.....	xiv, 796	N
McMahon v. Mayor etc., of Savannah, 66 Georgia, 217.....	42, 65	N
McMahon v. Palmer, 102 New York, 178.....	55, 796	M
McMahon v. Sloan, 12 Penn. State, 223.....	11, 601	M
McMahon v. Smith, 47 Connecticut, 221.....	36, 67	M
McMahon ada. State, 53 Connecticut, 407.....	55, 140	M
McMannus v. Lee, 43 Missouri, 206.....	xcvii, 386	M
McMartin v. Bingham, 27 Iowa, 234.....	1, 265	M
McMaster v. Ina Co. of N. A., 55 N. Y. 222.....	14, 239	M
McMasters v. Penn. R. R. Co., 69 Penn. St. 374.....	8, 264	M
McMechan v. Griffling, 3 Pickering, 149.....	xv, 198	M
McMechen v. McMechen, 17 West Virginia, 683.....	41, 682	M
McMeekin v. Edmonds, 1 Hill Ch. 283.....	xxvi, 203	M
McMichael v. McDermott, 17 Penn. State, 363.....	lv, 560	M
McMillan v. Birch, 1 Binney, 178.....	11, 426	M
McMillan v. Bull's Head Bank, 32 Indiana, 11.....	2, 323	M
McMillan v. Hyatt, 9 California, 365.....	lxx, 655	M
McMillan v. Malloy, 10 Nebraska, 228.....	33, 471	M
McMillan v. Mason, 8 Cold. 263.....	xcviii, 401	M
McMillan v. Maysville & L. R. R., 15 B. Mon. 218.....	lxi, 181	M
McMillan v. Mich. S. & N. I. R. R. 16 Mich. 79.....	xciii, 208	M
McMillan v. Richards, 9 California, 365.....	lxx, 655	M
McMillan v. Ritchie, 3 T. B. Monroe, 348.....	xvi, 107	M
McMillan v. Solomon, 42 Alabama, 356.....	xciv, 654	M
McMillan v. Sprague, 4 Howard (Mass.), 647.....	xxxv, 412	M
McMillan v. Union Ins. Co., Rice's Law, 248.....	xxxiii, 112	M
McMillan v. Vanderlip, 12 Johnson, 163.....	vii, 299	M
McMoline v. Storey, 4 Dev. & Bat. Law, 189.....	xxxiv, 374	M
McMorris v. Herndon, 2 Bailey's Law, 56.....	xxi, 515	M
McMorris v. Webb, 17 South Carolina, 538.....	43, 629	M
McMullen v. Wenner, 16 Serg. & R. 18.....	xvi, 543	M
McMurray v. Noyes, 72 New York, 523.....	28, 180	M
McMurray v. Shuck, 6 Bush, 111.....	xcix, 662	M
McMurray v. Taylor, 30 Missouri, 263.....	lxxvii, 611	M
McNair, Ex parte, 13 Nebraska, 195.....	42, 765	M
McNair v. Lot, 34 Missouri, 285.....	lxxiv, 78	M
McNair v. Ragland, 2 Devereux's Eq. 43.....	xxii, 728	M
McNairy v. Bell, 1 Yerger, 502.....	xxiv, 454	M
McNally ada. State, 34 Maine, 210.....	lvi, 650	M
McNamara v. Clintonville, 62 Wisconsin, 207.....	51, 722	M
McNamara v. Dwyer, 7 Paige, 239.....	xxiii, 627	M
McNary v. Chamberlain, 34 Connecticut, 384.....	xxd, 732	M
McNaught v. McClaghry, 42 New York, 23.....	1, 497	M
McNaughten v. Partridge, 11 Ohio, 223.....	xxxviii, 731	M
McNealey v. Hart, 8 Iredell's Law, 492.....	xlix, 404	M
McNealey v. Hart, 10 Iredell's Law, 63.....	11, 377	M
McNeill v. Call, 19 New Hampshire, 403.....	11, 188	M
McNeill v. Dixon, 1 A. K. Marshall, 365.....	x, 740	M
McNeill v. Kendall, 128 Massachusetts, 245.....	33, 373	M
McNeill v. Tenth Nat. Bk., 46 New York, 325.....	7, 341	M
McNeill v. McNeill, 36 Alabama, 109.....	lxxvi, 320	M
McNelly v. Patchin, 23 Missouri, 40.....	lvi, 638	M
McNedledge v. Galbraith, 8 Serg. & R. 43.....	xi, 572	M
McO'Brien ada. State, 24 Missouri, 403.....	lxix, 435	M
McPadden v. N. Y. Cent. R. R. Co., 44 N. Y. 476.....	4, 705	M
McPherson, In re, 104 New York, 306.....	56, 602	M
McPherson v. Acker, McA. & Mack, 180.....	48, 749	M
McPherson v. Cunliff, 11 Serg. & R. 422.....	xiv, 649	M
McPherson v. Chebanee, 114 Illinois, 46.....	55, 837	M
McPherson v. Foster, 43 Iowa, 48.....	22, 215	M
McPherson v. McPherson, 11 Iredell's L. 391.....	liii, 416	M
McPherson v. Parker, 30 California, 455.....	lxxix, 129	M
McPherson ada. State, 70 North Carolina, 239.....	16, 769	M
McPherson v. Talbott, 10 Gill & J. 499.....	xxxii, 191	M
McPherson v. Walters, 16 Alabama, 714.....	1, 200	M
McPike ada. Commonwealth, 3 Cushing, 181.....	1, 727	M

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Meeker v. Harris, 19 California, 278.....	lxix, 215
Meeks v. Southern Pac. R. Co., 56 California, 513, 38, 67	
Meeks v. Thompson, 8 Grattan, 134.....	lvi, 134
Meerhouse ada. State, 34 Missouri, 344.....	lxxvi, 109
Megehe v. Draper, 21 Missouri, 510.....	lxiv, 245
Megerle v. Aabo, 27 California, 322.....	lxxvii, 76
Meibus v. Dodge, 38 Wisconsin, 300.....	36, 6
Meikley v. Parsons, 66 Iowa, 63.....	55, 261
Meier v. McCrill, 4 Kansas, 250.....	xvi, 169
Meier v. Penn. R. R. Co., 64 Penn. St. 225.....	3, 561
Meighen v. Strong, 6 Minnesota, 177.....	lxxx, 441
Meigs' Appeal, 62 Pennsylvania State, 28.....	1, 373
Melly v. Wood, 71 Pennsylvania State, 488.....	10, 719
Meincke v. Falk, 55 Wisconsin, 427.....	42, 722
Meincke v. Falk, 61 Wisconsin, 623.....	50, 127
Meiswinkle v. Jung, 30 Wisconsin, 361.....	11, 672
Meichoir v. McCarty, 31 Wisconsin, 252.....	11, 605
Meldrum v. Snow, 9 Pickering, 441.....	xx, 489
Melisset's Appeal, 17 Penn. State, 449.....	lv, 573
Melvin v. Collins, 41 California, 663.....	10, 279
Melhop v. Doane, 31 Iowa, 397.....	7, 147
Mella v. Simmons, 45 Wisconsin, 334.....	30, 746
Melledge v. Boston Iron Co., 5 Cushing, 158.....	ii, 59
Mellen v. Goldsmith, 47 Wisconsin, 573.....	32, 781
Mellen v. Moore, 68 Maine, 390.....	28, 77
Mellen v. Morrill, 128 Massachusetts, 545.....	30, 695
Mellick v. De Seelhorst, Breese, 221.....	xii, 172
Mellon v. Croghan, 3 Martin, N. S. 423.....	xv, 163
Melson v. Dickson, 63 Georgia, 682.....	36, 128
Melton v. McDonald, 2 Missouri, 45.....	xxii, 437
Melton v. Watkins, 24 Alabama, 433.....	ix, 481
Melvin v. Easley, 1 Jones' Law, 386.....	lxii, 171
Melvin v. Lamar Ins. Co., 80 Illinois, 446.....	22, 199
Melvin v. Lisenby, 73 Illinois, 63.....	22, 141
Melvin v. Melvin, 58 New Hampshire, 569.....	42, 605
Melvin v. Went, 36 Ohio State, 184.....	38, 572
Melvin v. Proprietors, 5 Metcalf, 15.....	xxxviii, 384
Melvin v. Whiting, 10 Pickering, 236.....	xx, 524
Memphis v. Adams, 9 Helak, 518.....	24, 331
Memphis v. Bataille, 8 Helak, 524.....	24, 285
Memphis v. Easley, 6 Baxt, 533.....	39, 532
Memphis v. Laski, 9 Helak, 511.....	24, 327
Memphis v. Woodward, 12 Helak, 499.....	27, 750
Memphis & O. R. R. Co. v. Whitfield, 44 Miss. 466.....	7, 699
Memphis & L. R. R. Co. v. State, 9 Lea, 218.....	42, 673
Memphis & L. R. R. Co. v. Stringfellow, 44 Arkansas, 322.....	51, 598
Memphis & O. R. P. Co. v. McCool, 83 Ind. 392.....	43, 71
Memphis Bell Tel. Co. v. Hunt, 16 Lea, 456.....	57, 237
Memphis G. L. Co. v. State, 6 Cold. 310.....	xcviii, 462
Memphis, Mayor of, v. Wright, 6 Yerger, 497.....	xxvii, 489
Menagh v. Whitwell, 62 New York, 146.....	11, 683
Menard v. Scudder, 7 Louisiana An. 395.....	lvi, 610
Mendel v. Wheeling, 28 West Virginia, 233.....	57, 665
Mendenhall v. Lenwall, 5 Blackford, 125.....	xxxiii, 458
Mendenhall v. Parish, 8 Jones' Law, 105.....	lxxviii, 269
Mendenhall v. Stockel, 47 Maryland, 453.....	26, 481
Meneely v. Meneely, 62 New York, 427.....	20, 489
Menges v. Dentler, 33 Penn. State, 436.....	lxxv, 616
Menges v. Frick, 73 Pennsylvania State, 137.....	13, 731
Menges v. Oyster, 4 Watts & Serg. 20.....	xxxix, 56
Mentz v. Armenia F. Ins. Co., 79 Penn. St. 478.....	21, 80
Mentz v. Hamman, 5 Wharton, 150.....	xxxiv, 546
Meranman's Heirs v. Caldwell's H., 8 B. Mon. 32.....	xlvi, 537
Merced Mining Co. v. Fremont, 7 Cal. 317.....	lxviii, 262
Mercein v. People, 25 Wendell, 64.....	lxxv, 653
Mercein ada. People, 3 Hill (New York), 399.....	xxxviii, 644
Mercer v. Stark, Walker, 451.....	xii, 583
Mercer v. Walmaley, 5 Harris & J. 27.....	ix, 496
Merceson v. Bergen, 3 Green Law, 244.....	xxix, 684
Merchants' and M. Bank v. Hewitt, 3 Iowa, 63.....	lxvi, 49
Merchants' & M. Bank v. Hibbard, 48 Michigan, 118.....	42, 463
Merchants' and Mechanics' Bank ada. People, 78 New York, 269.....	34, 532
Merchants' and Manufacturers' Bank of Pittsburgh v. Watson, 46 Penn. St. 310.....	lxxiv, 549
Merchants' & M. T. Co. v. Story, 50 Maryland, 4.....	33, 293
Merchants' & M. T. Co. v. Asso. F. Ins. Co., 53 Maryland, 448.....	36, 428
Merchants' B'k v. Birch, 17 Johnson, 25.....	viii, 367
Merchants' B'k v. Central B'k, 1 Georgia, 418.....	xliv, 665
Merchants' B'k v. Easley, 44 Missouri, 286.....	c, 287
Merchants' Bank v. Griswold, 72 New York, 472.....	28, 159
Merchants' B'k v. Harrison, 39 Missouri, 433.....	xcii, 285
Merchants' B'k v. Marine B'k, 3 Gill, 96.....	xlili, 300
Merchants' B'k v. Rawls, 7 Georgia, 191.....	1, 394
Merchants' D. & T. Co. v. Cornforth, 3 Colorado, 280.....	25, 787
Merchants' D. & T. Co. v. Moore, 88 Illinois, 136.....	34, 541
Merchants' etc. Ins. Co. v. Shillito, 15 Ohio State, 559.....	lxxvi, 491
Merchants' etc. Ins. Co. v. Curran, 45 Missouri, 142.....	c, 361
Merchants' Ins. Co. v. DeWolf, 33 Penn. State, 45.....	lxxv, 577
Merchants' Ins. Co. v. Morrison, 62 Illinois, 242.....	14, 93
Merchants' Mut. Ins. Co. v. Lacroix, 35 Tex. 249.....	14, 370
Merchants' N. B'k v. N. Eagle B'k, 101 Mass. 281.....	c, 120
Merchants' Nat. Bank v. Comstock, 55 N. Y. 24.....	14, 168
Merchants' Nat. Bank v. Goodman, 109 Pennsylvania State, 422.....	53, 720
Merchants' Nat. Bank v. Hanson, 33 Minn. 40.....	53, 5
Merchants' Nat. Bank v. Hall, 83 N. Y. 338.....	38, 454
Merchants' Nat. Bank v. Weeks, 53 Vermont, 115.....	38, 661
Merchants' W. B. Am'n v. Wood, 64 Miss. 661.....	60, 76
Mercler v. Mercler, 50 Georgia, 546.....	15, 697
Meredith, Ex parte, 33 Gratt. 119.....	36, 771
Meredith v. Andrea, 7 Iredell's Law, 5.....	xiv, 604
Meriden Britannia Co. v. Parker, 39 Conn. 450.....	12, 401
Meriden Britannia Co. v. Zingsen, 48 N. Y. 247.....	8, 549
Merkle v. Bennington T., 58 Michigan, 156.....	55, 666
Merklein v. Trapnell, 34 Penn. State, 42.....	lxxv, 634
Merrell v. Campb. II, 49 Wisconsin, 535.....	35, 785
Merriam v. Bayley, 1 Cushing, 77.....	xlivii, 591
Merriam ada. Commonwealth, 14 Pick. 518.....	xxv, 420
Merriam v. Hartford etc. R. R. Co., 20 Conn. 354.....	lii, 344
Merriam v. Hassam, 14 Allen, 516.....	xcii, 736
Merriam v. Middlesex M. F. I. Co., 21 Pick. 162.....	xxxii, 253
Merriam v. Mitchell, 13 Maine, 439.....	xliz, 514
Merriam v. Wilkins, 6 New Hampshire, 432.....	xxv, 472
Merriam v. Wolcott, 3 Allen, 258.....	lxxx, 69
Merrick v. Merrick, 37 Ohio St., 126.....	41, 493
Merrifield v. Lombard, 13 Allen, 16.....	xc, 173
Merrifield v. Worcester, 110 Mass. 216.....	14, 592
Merrihew ada. State, 47 Iowa, 112.....	29, 464
Merrill v. Agricultural Ins. Co., 73 N. Y. 452.....	29, 184
Merrill ada. Commonwealth, 14 Gray, 415.....	lxxvii, 336
Merrill v. Eastern R. R. Co., 139 Mass. 238.....	52, 705
Merrill v. Harris, 26 New Hampshire, 142.....	lviii, 359
Merrill v. Ithaca & O. R. R. Co., 16 Wend. 586.....	xxx, 130
Merrill v. Kenyon, 48 Connecticut, 314.....	40, 174
Merrill v. Lake, 16 Ohio, 373.....	xlvi, 377
Merrill v. Merrill, 6 Greenleaf, 463.....	xiv, 247
Merrill v. Moore's Heirs, 7 Howard, 271.....	xi, 60
Merrill v. New Eng. M. L. I. Co., 103 Mass. 245.....	4, 548
Merrill v. North Yarmouth, 78 Maine, 200.....	57, 794
Merrill v. Sherburne, 1 New Hampshire, 199.....	viii, 82
Merrill v. St. Louis, 83 Missouri, 244.....	53, 576
Merrill v. Suffolk Bank, 31 Maine, 57.....	1, 649
Merrills v. Swift, 18 Connecticut, 257.....	xlvi, 315
Merrills v. Tariff Mfg. Co., 10 Conn. 384.....	xxvii, 682

Roman letters [xliv] refer to volumes of American Decis

Merrimac Mining Co. v Levy, 54 Penn. St. 227....	xcviii, 697	M
Merritt v. Brinkerhoff, 17 Johnson, 306.....	viii, 404	M
Merritt v. Clason, 13 Johnson, 103.....	vii, 285	
Merritt v. Day, 9 Vroom, 32.....	30, 362	M
Merritt v. Duncan, 7 Heisk. 156.....	19, 612	M
Merritt v. Earle, 29 New York, 118.....	lxvii, 292	
Merritt v. Glidden, 39 California, 559.....	2, 479	M
Merritt v. Horne, 5 Ohio State, 307.....	lxvii, 298	
Merritt v. Hosmer, 11 Gray, 276.....	lxvi, 713	M
Merritt v. Johnson, 2 Southard, 455.....	viii, 610	M
Merritt v. Johnson, 7 Johnson, 473.....	v, 289	M
Merritt v. Portchester, 71 New York, 309.....	27, 47	M
Merritt v. Scott, 6 Georgia, 563.....	1, 365	M
Merritt v. Todd, 23 New York, 28.....	lxix, 243	M
Merritt v. Yates, 71 Illinois, 636.....	22, 128	M
Merrithew v. Garvin, 2 Porter, 199.....	xxvii, 650	M
Merry v. Bostwick, 13 Illinois, 398.....	liv, 434	M
Merryfield v. Wilson, 14 Texas, 224.....	lxv, 117	M
Merryman v. Euler, 59 Md. 588.....	43, 584	M
Mervin v. Chicago, 45 Illinois, 133.....	xcii, 204	M
Mervin v. People, 26 Michigan, 298.....	12, 314	M
Messenger v. Dannie, 137 Massachusetts, 197.....	50, 295	M
Messenger v. Pennsylvania R. R. Co., 36 New Jer-		
sey, 407.....	13, 457	M
Messenger v. Pennsylvania R. R. Co., 8 Vroom,		
531.....	18, 754	M
Messer v. Woodman, 22 New Hampshire, 172.....	liii, 241	M
Messler v. Amery, 1 Yeates, 533.....	i, 316	M
Messinger ad. Commonwealth, 1 Binney, 273.....	ii, 441	M
Metallio Comp. Co. v. Fitchburgh R. R. Co., 106		
Massachusetts, 277.....	12, 689	M
Metcalf v. Gilmore, 59 New Hampshire, 417.....	47, 217	M
Metcalf v. Metcalf, 19 Alabama, 319.....	liv, 190	M
Metcalfe v. Conner, Littell's S. C. 497.....	xii, 340	M
Methodist Church v. Remington, 1 Watts, 218.....	xxvi, 61	M
Methodist E. Church of Hoboken v. Hoboken,		
33 New Jersey L. 13.....	xxvii, 696	M
Methodist Prot. Church v. Mayor of Baltimore,		
6 Gill, 391.....	lxviii, 540	M
Methvin v. Methvin, 15 Georgia, 97.....	lx, 664	M
Metropolitan L. I. Co. v. McTagua, 49 New Jer-		
sey L. 587.....	60, 661	M
Metz v. Anderson, 23 Illinois, 463.....	lxvi, 704	M
Metz v. Buffalo etc. R. R. Co., 58 N. Y. 61.....	17, 201	M
Metzger v. Post, 15 Vroom, 74.....	43, 341	M
Metzler v. Kilgore, 3 Peurose & Watts, 245.....	xxiii, 76	M
Metts v. Bright, 4 Dev. & Bat. L. 173.....	xxxii, 683	M
Meurer, Will of, 44 Wisconsin, 393.....	28, 591	M
Meux v. Anthony, 11 Arkansas, 411.....	lii, 274	M
Mewhirter v. Hatten, 42 Iowa, 388.....	20, 618	M
Mexican Mill v. Yellow J. S. M. Co., 4 Nev. 40.....	xxvii, 510	M
Meyer v. Chicago etc. Ry Co., 24 Wisconsin, 566.....	1, 307	M
Meyer v. Fogg, 7 Florida, 292.....	lxviii, 441	M
Meyer v. Kinser, 12 California, 247.....	lxviii, 538	M
Meyer v. Knickerbocker Life Ins. Co., 73 New		
York, 516.....	29, 300	M
Meyer v. Meyer, 23 Iowa, 339.....	xcii, 432	M
Meyer v. Morgan, 51 Mississippi, 21.....	24, 617	M
Meyer v. Phillips, 97 New York, 485.....	49, 538	M
Meyer v. Roberts, 46 Arkansas, 80.....	55, 567	M
Meyer v. Stone, 46 Arkansas, 210.....	55, 577	M
Meyers v. Baker, 120 Illinois, 567.....	60, 580	M
Meyers v. Chicago, R. I. & P. R. Co., 57 Iowa, 555.....	43, 50	M
Michael v. Bacon, 49 Missouri, 474.....	8, 138	M
Michael v. Baker, 12 Maryland, 156.....	lxvi, 593	M
Michael v. Dunkle, 84 Indiana, 544.....	43, 100	M
Michael v. Morey, 26 Maryland, 239.....	20, 106	M
Michaels v. N. Y. Cent. R. R. Co., 30 N. Y. 564.....	lxviii, 415	M
Michener v. Cavender 38 Penn. State, 334.....	lxix, 496	M
Mickle v. Planters' Bank, 4 Howard (Miss.), 130.....	xxvii, 112	M

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Miller v. Baschore, 83 Penn. St. 356.....	24, 187	Miller v. Poage, 56 Iowa, 85.....	41, 82
Miller v. Baynard, 2 Houst. 559.....	lxxxiii, 168	Miller v. Reed, 27 Penn. State, 244.....	lxvii, 459
Miller v. Beates, 3 Serg. & R. 430.....	viii, 658	Miller v. Roberts, 18 Texas, 16.....	lxvii, 688
Miller v. Bingham, 1 Iredell's Eq. 423.....	xxxvi, 58	Miller v. Rutland etc. R. R. Co., 40 Vt. 399.....	xlv, 414
Miller v. Bledsoe, 1 Scammon, 630.....	xxiii, 37	Miller v. Schneider, 19 La. An. 300.....	xcii, 635
Miller v. Brinkerhoff, 4 Denio, 118.....	lxvii, 242	Miller v. S. C. Ins. Co., 2 McCord, 336.....	xiii, 734
Miller v. Brown, 3 Missouri, 127.....	xxiii, 693	Miller v. Smith, 26 Minnesota, 248.....	37, 407
Miller v. Brown, 47 Missouri, 504.....	4, 345	Miller v. Stagner, 3 B. Monroe, 53.....	xxxviii, 178
Miller v. Burch, 32 Texas, 208.....	5, 242	Miller v. State, 33 Mississippi, 358.....	lxix, 351
Miller v. Butler, 6 Cushing, 71.....	iii, 768	Miller ada. State, 93 North Carolina, 511.....	53, 469
Miller v. Commonwealth, 78 Kentucky, 18.....	39, 194	Miller ada. State, 1 Vroom, 368.....	lxxxvi, 188
Miller v. Conklin & Co., 17 Georgia, 430.....	lxiii, 248	Miller v. Steen, 30 California, 402.....	lxxxix, 124
Miller v. Consolidation Bank, 43 Pennsylvania St. 514.....	lxxxviii, 475	Miller v. Stevens, 100 Massachusetts, 518.....	xcviii, 123
Miller v. Davidson, 3 Gilman, 518.....	xliv, 715	Miller v. Stevens, 100 Massachusetts, 518.....	1, 139
Miller v. Elliott, 1 Indiana, 434.....	1, 475	Miller v. Surlis, 19 Georgia, 331.....	lxv, 592
Miller v. Estill, 5 Ohio State, 508.....	lxvii, 305	Miller v. Thatcher, 9 Texas, 452.....	lx, 172
Miller v. Ewer, 27 Maine, 509.....	xli, 619	Miller v. Tollison, 1 Harper's Eq. 145.....	xiv, 712
Miller v. Finley, 28 Michigan, 249.....	12, 306	Miller v. White, Taylor, N. C., 309.....	1, 581
Miller v. Fletcher, 27 Gratt. 403.....	21, 356	Miller v. Woods, 21 Ohio St. 435.....	8, 71
Miller v. Ford, 4 Richardson L. 376.....	lv, 687	Miller Tobacco Manufactory v. Commerce, 18 Vroom, 18.....	46, 750
Miller v. Gettysburg Bank, 8 Watts, 192.....	xxiv, 449	Millett v. People, 117 Illinois, 294.....	57, 869
Miller v. Goddard, 34 Maine, 102.....	lvi, 638	Miliken v. Chapman, 75 Maine, 306.....	46, 386
Miller v. Grice, 2 Richardson's L. 27.....	xliv, 271	Miliken v. City Council, 54 Texas, 388.....	38, 639
Miller v. Hackley, 5 Johnson, 375.....	lv, 572	Miliken v. Coombs, 1 Greenleaf, 343.....	2, 70
Miller v. Hannibal & St. J. R. Co., 90 N. Y. 430.....	43, 179	Milkin v. Shapleigh, 36 Missouri, 896.....	lxxxviii, 171
Miller v. Hanover, J. & S. R. Co., 87 Penn. St. 95.....	30, 319	Milken v. Pratt, 125 Massachusetts, 374.....	38, 241
Miller v. Hatch, 72 Maine, 481.....	39, 346	Millon v. Commonwealth, 1 B. Monroe, 310.....	xxxvi, 580
Miller v. Hayes, 34 Iowa, 496.....	11, 154	Millon v. Riley, 1 Dana, 339.....	xxv, 149
Miller v. Huller, 7 Serg. & R. 32.....	1, 413	Millon v. Withers, 1 B. Monroe, 310.....	xxxvi, 580
Miller v. Howell, 1 Scammon, 499.....	xxiii, 36	Milner v. Eglin, 64 Indiana, 197.....	31, 121
Miller v. Howry, 3 Penrose & Watts, 374.....	xxiv, 320	Mills v. Camp, 14 Connecticut, 219.....	xxxvi, 488
Miller v. Hughes, 1 A. K. Marshall, 181.....	2, 719	Mills v. Charleton, 29 Wisconsin, 400.....	9, 578
Miller v. Ina Co., 12 West Virginia, 116.....	29, 452	Mills v. Gilbreth, 47 Maine, 320.....	lxix, 457
Miller v. Kerr, 2 McCord, 285.....	xiii, 723	Mills v. Gleason, 11 Wisconsin, 470.....	lxxxviii, 721
Miller v. Kershaw, 1 Bailey's Eq. 479.....	xxiii, 183	Mills v. Goodsell, 5 Connecticut, 475.....	xiii, 99
Miller v. Lash, 85 North Carolina, 51.....	39, 678	Mills v. Graves, 39 Illinois, 453.....	lxxxvii, 314
Miller v. Laubach, 47 Penn. State, 154.....	lxxxvi, 621	Mills v. Hall, 9 Wendell, 315.....	xxiv, 160
Miller v. Law, 10 Richardson's Eq. 320.....	lxviii, 92	Mills v. Hoag, 7 Paige, 18.....	xxxi, 271
Miller v. Lea, 35 Md. 396.....	6, 417	Mills v. Howeth, 19 Texas, 257.....	lxx, 331
Miller v. Lynde, 2 Root, 444.....	1, 86	Mills v. Hyde, 19 Vermont, 69.....	xlv, 177
Miller v. Mackenzie, 43 Maryland, 404.....	20, 111	Mills v. Lee, 6 T. B. Monroe, 91.....	xvii, 118
Miller v. Mariners' Church, 7 Greenleaf, 51.....	xx, 341	Mills v. Lumpkin, 1 Georgia, 511.....	xliv, 677
Miller v. Marston, 35 Maine, 153.....	lvi, 694	Mills v. Mich. Cent. R. R. Co., 45 N. Y. 623.....	6, 189
Miller v. Martin, 16 Missouri, 508.....	lvii, 242	Mills v. Mills, 40 New York, 543.....	6, 536
Miller v. McNeil, 35 Penn. State, 217.....	lxxxviii, 333	Mills v. Newberry, 112 Illinois, 123.....	54, 213
Miller v. McKensie, 95 New York, 575.....	47, 85	Mills v. Rogers, 2 Littell, 217.....	xiii, 268
Miller v. McWilliams, 50 Alabama, 427.....	20, 297	Mills v. Stark, 4 New Hampshire, 512.....	xvii, 444
Miller v. Mayor, 47 Alabama, 163.....	11, 763	Mills v. Thornton, 26 Illinois, 300.....	lxxxix, 377
Miller v. Mercier, 3 Martin, N. S., 236.....	xv, 156	Mills v. Tukey, 22 California, 373.....	lxxxviii, 74
Miller v. Miller, 1 Green's Ch. 139.....	xxxii, 417	Mills v. Van Horn, 17 Ind. 245.....	lxxxix, 477
Miller v. Miller, Meigs, 484.....	xxxiii, 157	Mills v. Warner, 19 Vermont, 609.....	xlvii, 711
Miller v. Miller, 23 Maine, 22.....	lxxxix, 597	Millsbaugh v. McBride, 7 Paige, 509.....	xxxiv, 360
Miller v. Miller, 91 New York, 315.....	43, 669	Milroy v. Quinn, 69 Indiana, 406.....	35, 267
Miller v. Miller, MacA. & Mack, 109.....	48, 738	Milne v. Davidson, 5 Martin, N. S., 409.....	xvi, 189
Miller v. Miller, 9 Penn. State, 74.....	xlx, 545	Milne v. Moreton, 6 Binney, 353.....	vi, 466
Miller v. Miller, 3 Serg. & R. 266.....	viii, 651	Milton ada. Commonwealth, 12 B. Monroe, 212.....	lv, 623
Miller v. Miller, 1 J. J. Marshall, 169.....	xix, 69	Milton v. Haden, 32 Alabama, 30.....	lxx, 623
Miller v. Miller, 60 Pennsylvania, 16.....	6, 538	Milton, Town of, v. Story, 11 Vermont, 101.....	xxxiv, 671
Miller v. Miller, 7 Pickering, 133.....	xix, 264	Milwaukee Gas Light Co. ada. State, 29 Wis. 454.....	9, 596
Miller v. Morris, 55 Texas, 412.....	40, 814	Milwaukee v. Grom, 21 Wisconsin, 241.....	xcii, 473
Miller v. Munson, 34 Wisconsin, 579.....	17, 461	Milwaukee Ind. School v. Supervisor, 40 Wisconsin, 328.....	22, 709
Miller v. Mutual B. L. I. Co., 31 Iowa, 216.....	7, 122	Milwaukee Iron Co. v. Schubel, 29 Wis. 444.....	9, 591
Miller v. Newell, 20 South Carolina, 123.....	47, 833	Milwaukee and Minnesota R. R. Co. v. Milwaukee and West. R. R. Co., 20 Wis. 174.....	lxxxviii, 746
Miller v. Peoples, 60 Mississippi, 819.....	45, 423	Milwaukee and St. Paul R. R. v. Milwaukee and Minnesota R. R., 20 Wisconsin, 165.....	lxxxviii, 736
Miller v. Phoenix Ins. Co., 27 Iowa, 203.....	1, 282	Milwaukee Gas L. Co. v. Schooner, 23 Wis. 144.....	xcix, 126
Miller v. People, 52 New York, 304.....	11, 706	Milwaukee & C. R. Co. v. Hunter, 11 Wis. 100.....	lxxxviii, 698
Miller ada. People, 24 Michigan, 438.....	9, 131		
Miller v. Pittsburg & C. R. R., 40 Penn. St. 237.....	lxxx, 570		
Miller v. Plumb, 6 Cowen, 665.....	xvi, 486		

Roman letters [xlix] refer to volumes of American De

Mims v. Armstrong, 31 Maryland, 87.....	1, 22
Mims v. Armstrong, 42 Mississippi, 422.....	xvii, 472
Mims v. Lockett, 23 Georgia, 237.....	lxviii, 521
Mims v. West, 38 Georgia, 18.....	xcv, 379
Miner v. Austin, 45 Iowa, 221.....	24, 763
Miner v. Robinson, 1 D. Chipman, 392.....	xii, 694
Miner v. Phoenix Ins. Co., 27 Wis. 633.....	9, 479
Mineral Point Railroad Co. v. Keop, 22 Ill. 9.....	lxxiv, 124
Miners' Bank of Dubuque v. U. S. Morris, 482.....	xliii, 115
Miners' Ditch Co. v. Zellerbach, 37 Cal. 543.....	xcix, 30
Mink ada Commonwealth, 123 Mass. 422.....	25, 109
Mink v. State, 60 Wisconsin, 583.....	50, 386
Minke v. Hofeman, 87 Illinois, 450.....	29, 63
Minke v. McNamee, 30 Md. 294.....	xvii, 577
Minneapolis & St. L. R. R. Co. v. Bassett, 20 Minnesota, 535.....	18, 376
Mims v. Morse, 15 Ohio, 568.....	xlv, 590
Minor v. Cardwell, 37 Missouri, 350.....	xc, 390
Minor v. Chicago and N. W. R., 19 Wis. 40.....	lxxviii, 670
Minor v. Edwards, 12 Missouri, 137.....	xlix, 121
Minor v. Hill, 58 Indiana, 176.....	26, 71
Minor v. Natchez, 4 Smedes & M. 602.....	xliii, 488
Minor v. Rogers, 40 Connecticut, 512.....	16, 69
Minor v. Sharon, 112 Massachusetts, 477.....	27, 122
Minor v. Staples, 71 Maine, 316.....	36, 318
Minot v. Cartwright, 7 Metcalf, 348.....	xli, 444
Minot v. Manuf. Ins. Co., 7 Metcalf, 348.....	xli, 444
Minot v. Mitchell, 30 Indiana, 238.....	xcv, 685
Minot v. Paine, 99 Massachusetts, 101.....	xvii, 705
Minot v. Thacher, 7 Metcalf, 348.....	xli, 444
Minot v. West Roxbury, 112 Mass. 1.....	17, 52
Mins v. Armstrong, 37 Maryland, 87.....	c,
Minter v. Branch B'k at Mobile, 23 Alabama, 763.....	lviii, 315
Minter v. Pacific Railroad, 41 Missouri, 508.....	xvii, 288
Minturn v. Hays, 2 California, 590.....	lvi, 366
Minuse v. Cox, 5 Johns. Ch. 441.....	lx, 313
Miranda v. City Bank, 6 Louisiana, 740.....	xvii, 493
Mishler v. Commonwealth, 62 Penn. St. 55.....	1, 377
Misner v. Knapp, 13 Oregon, 135.....	57, 6
Mississippi & Tenn. R. R. Co. v. Devaney, 42 Mississippi, 535.....	2, 608
Mississippi Society v. Musgrove, 44 Miss. 830.....	7, 723
Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co., 58 Mississippi, 896.....	38, 348
Missouri Bank v. Matson, 26 Missouri, 243.....	lxiii, 208
Missouri Bank v. Wells, 12 Missouri, 361.....	li, 163
Missouri Bank v. White, 23 Missouri, 342.....	lxvi, 671
Missouri Furnace Co. v. Abend, 107 Ill. 44.....	47, 425
Missouri Pac. R'y Co. v. Tygard, 84 Mo. 263.....	54, 97
Missouri Valley L. Ins. Co. v. McCrum, 36 Kan- sas, 146.....	59, 537
Missouri Valley L. Ins. Co. v. Sturges, 18 Kan- sas, 83.....	26, 761
Mitchel v. McMullan, 3 Martin, 676.....	vi, 690
Mitchel v. Mitchell, 4 B. Monroe, 380.....	xli, 237
Mitchell v. Anderson, 1 Hill, 69.....	xvii, 158
Mitchell v. Beal, 8 Yerger, 134.....	xxix, 108
Mitchell v. Bell, Conference Rep. 17.....	li, 627
Mitchell v. Bowen, 8 Indiana, 197.....	lxv, 758
Mitchell v. Bromberger, 2 Nevada, 345.....	xo, 550
Mitchell v. Bunch, 2 Paige Ch. 608.....	xxii, 669
Mitchell v. Chambers, 43 Michigan, 150.....	38, 167
Mitchell v. Chicago and G. T. R'y Co., 51 Mich- igan, 236.....	38, 568
Mitchell v. Clarke, 71 California, 163.....	60, 529
Mitchell v. Commonwealth, 78 Kentucky, 204.....	39, 227
Mitchell ada Commonwealth, 3 Bush, 25.....	xvii, 122
Mitchell v. Deeds, 49 Illinois, 416.....	xv, 621
Mitchell v. Denson, 29 Alabama, 327.....	lxv, 403
Mitchell v. Dewitt, 26 Tex. Supp. 180.....	lxxviii, 561

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Moffatt v. Shepard, 2 Pinney, 66 (1 Chand.).....	lii, 141
Moffatt v. Thomson, 5 Richardson's Eq. 155.....	lvii, 737
Moffitt v. State, 2 Humphreys, 90.....	xxxvi, 301
Mohawk Bank v. Broderick, 13 Wendell, 133.....	xxvii, 192
Mohler's Appeal, 5 Penn. State, 413.....	xlvii, 413
Mohr ada. Commonwealth, 52 Penn. St. 243.....	xci, 153
Moliney v. Cook, 26 Penn. State, 342.....	lxvii, 419
Mohr, In re, 73 Alabama, 503.....	49, 63
Mohr v. Gault, 10 Wisconsin, 513.....	lxviii, 687
Moles v. Bird, 11 Massachusetts, 436.....	vi, 179
Moir v. Hopkins, 16 Illinois, 313.....	lxiii, 312
Moke v. Fellman, 17 Texas, 367.....	lxvii, 656
Mokelumne H. M. Co. v. Woodbury, 14 Cal. 424.....	lxviii, 658
Mollers v. Pa. Fire Ins. Co., 5 Rawle, 342.....	lxviii, 675
Moline Scale Co. v. Beed, 52 Iowa, 307.....	35, 272
Mollins ada. State, 38 La. An. 381.....	58, 181
Molony v. Dixon, 63 Iowa, 136.....	54, 1
Moltz ada. Commonwealth, 10 Penn. State, 537.....	li, 499
Molynaux v. Seymour, Fanning & Co., 30 G. 440.....	lxvi, 662
Mollison v. Eaton, 16 Minnesota, 426.....	16, 150
Monatt v. Parker, 30 La. An. 585.....	31, 229
Moncrief v. Goldsborough, 4 Harris & McH. 261.....	1, 407
Monday v. State, 33 Georgia, 672.....	lxix, 314
Mondon v. People, 103 New York, 211.....	57, 709
Monell v. Colden, 13 Johnson, 395.....	vii, 390
Monell v. Monell, 5 Johnson Ch. 283.....	ix, 278
Monk v. Horne, 38 Mississippi, 100.....	lxv, 94
Monk v. Packard, 71 Maine, 309.....	36, 315
Monongahela v. Fischer, 111 Penn. St. 9.....	56, 241
Monongahela Bridge Co. v. Kirk, 46 Pennsylvania State, 112.....	lxix, 527
Monongahela Nav. Co. v. Coon, 6 Penn. St. 379.....	lxvii, 474
Monroe v. Barclay, 17 Ohio St. 302.....	xciii, 620
Monroe v. Conner, 15 Maine, 178.....	xxii, 148
Monroe v. Huser, 1 Oregon, 188.....	lxv, 552
Monroe v. Smelly, 25 Texas, 588.....	lxviii, 541
Monroe v. State, 23 Texas, 210.....	lxvi, 53
Monroe v. West, 13 Iowa, 118.....	lxix, 524
Monroe Bank v. Widner, 11 Paige, 529.....	xlili, 768
Monroe Bank, Ex parte, 7 Hill, 177.....	xlii, 61
Monson v. Drakeley, 40 Connecticut, 562.....	16, 74
Monson v. Hawley, 30 Connecticut, 51.....	lxix, 233
Montague v. Allan, 78 Virginia, 592.....	49, 384
Montague v. Dent, 10 Richardson's L. 135.....	lxvii, 572
Montague v. Richardson, 24 Connecticut, 338.....	lxiii, 173
Montana v. Whitcomb, 1 Montana, 339.....	23, 740
Montandon v. Deas, 14 Alabama, 33.....	xlvi, 84
Montesquieu v. Hall, 4 Louisiana, 51.....	lxviii, 471
Montgomery's Appeal, 92 Pennsylvania St. 202.....	37, 670
Montgomery v. Board of Commissioners, 76 In- diana, 352.....	40, 250
Montgomery ada. Commonwealth, 11 Metcalf, 534.....	xiv, 227
Montgomery v. Edwards, 46 Vermont, 151.....	14, 618
Montgomery v. Gilmer, 33 Alabama, 116.....	lx, 562
Montgomery v. Henry, 1 Dallas, 49.....	1, 223
Montgomery v. Houston's Heirs, 4 J. J. Marsh. 488.....	xx, 223
Montgomery v. Kellogg, 43 Mississippi, 498.....	5, 508
Montgomery v. Kerr, 6 Cold. 199.....	xcviii, 450
Montgomery v. Koester, 35 La. An. 1091.....	48, 253
Montgomery v. McElroy, 3 Watts & Serg. 370.....	xxxviii, 771
Montgomery v. Middlemiss, 21 Cal. 103.....	lxix, 146
Montgomery v. Milliken, 5 Smedes & M. 151.....	xlili, 507
Montgomery v. Murphy, 19 Maryland, 578.....	lxix, 652
Montgomery v. Perkins, 2 Metcalfe (Ky.), 448.....	lxix, 419
Montgomery v. Scott, 9 South Carolina, 20.....	30, 1
Montgomery v. Ship Abby Pratt, 6 La. An. 410.....	liv, 562
Montgomery v. State, 80 Indiana, 338.....	41, 815
Montgomery Bank v. Walker, 9 Serg. & R. 229.....	xi, 709
Montgomery Co. v. Elston, 33 Indiana, 27.....	2, 327
Montgomery & E. R'y Co. v. Culver, 78 Ala. 878.....	51, 483
Montgomery & E. R. Co. v. Kolb, 73 Ala. 386.....	49, 54
Montgomery & E. R'y Co. v. Thompson, 77 Ala- bama, 448.....	54, 73
Montgomery S. R'y Co. v. Matthews, 77 Ala. 387.....	54, 69
Monticello v. Kendall, 72 Indiana, 91.....	37, 139
Monticello Sem. v. People, 106 Illinois, 336.....	46, 702
Montjoy v. Holden, Littell's Sel. Cas. 447.....	xii, 331
Montour v. Purdy, 11 Minnesota, 384.....	lxviii, 89
Montpeller v. East Montpeller, 29 Vt. 19.....	lxvii, 743
Montpeller Academy v. George, 14 La. 386.....	xxxiii, 585
Montpeller Bank v. Dixon, 4 Vermont, 567.....	xxiv, 646
Montros v. Doak, 7 Robinson (La.), 170.....	xii, 278
Montros v. State, 72 Georgia, 261.....	53, 848
Monument Nat. Bank v. Globe Works, 101 Mas- sachusetts, 57.....	3, 322
Moody v. Blake, 117 Massachusetts, 23.....	19, 394
Moody v. Brown, 34 Maine, 107.....	lvi, 640
Moody v. Burton, 27 Maine, 427.....	xlvi, 613
Moody v. Fleming, 4 Georgia, 115.....	lxviii, 210
Moody v. McClelland, 39 Alabama, 45.....	lxix, 770
Moody v. Rowell, 17 Pickering, 490.....	xxviii, 317
Moody v. State, 48 Alabama, 115.....	17, 29
Moody ada. State, 3 Haywood, 31.....	li, 616
Moody v. Van Dyke, 4 Binney, 31.....	v, 383
Moody v. Whitney, 33 Maine, 174.....	lx, 239
Moody v. Wright, 13 Metcalf, 17.....	xlvi, 706
Moore v. Allen, 35 Maine, 276.....	lxviii, 700
Moore v. Walt, 3 Wendell, 104.....	xx, 667
Mooney v. Maas, 22 Iowa, 380.....	xcii, 386
Moore v. Hawks, 2 Atkins, 380.....	lxvi, 725
Moore v. Richmond & A. R. R. Co., 78 Va. 745.....	49, 401
Moore v. Rollins, 36 California, 333.....	xov, 181
Mooney, Ex parte, 26 West Virginia, 36.....	53, 59
Mooney v. Howard Ins. Co., 138 Mass. 375.....	52, 277
Mooney v. Kenneth, 19 Missouri, 651.....	lx, 576
Mooney v. Maynard, 1 Vermont, 470.....	lxviii, 699
Mooney ada. State, 74 North Carolina, 96.....	21, 487
Moor v. Folsom, 14 Minnesota, 340.....	c, 227
Moor ada. State, Walker, 134.....	xli, 541
Moor v. Vearie, 32 Maine, 343.....	lii, 635
Moore's Appeal, 88 Pennsylvania St. 480.....	32, 469
Moore v. Adams, 8 Ohio, 372.....	xxxi, 723
Moore v. Anders, 14 Arkansas, 628.....	lx, 561
Moore v. Appleton, 34 Alabama, 147.....	lxviii, 448
Moore v. Armstrong, 10 Ohio, 11.....	xxvi, 63
Moore v. Bettis, 11 Humphreys, 67.....	liii, 771
Moore v. Byrum, 10 South Carolina, 462.....	36, 58
Moore v. Chapman, 2 Stewart, 466.....	xx, 56
Moore v. Chicago I. & B. R'y Co., 65 Iowa, 805.....	54, 26
Moore v. Christian, 56 Mississippi, 408.....	51, 375
Moore v. Church, 70 Iowa, 208.....	59, 439
Moore v. Clay, 24 Alabama, 235.....	lx, 461
Moore v. Commonwealth, 6 Metcalf, 243.....	lxix, 794
Moore ada. Commonwealth, 143 Mass. 136.....	59, 128
Moore v. Cross, 19 New York, 227.....	lxv, 398
Moore v. Davis, 49 New Hampshire, 48.....	6, 460
Moore v. Dunning, 29 Illinois, 130.....	lxviii, 301
Moore v. Ewing, Coxe, 144.....	1, 126
Moore v. Fall, 42 Maine, 450.....	lxvi, 297
Moore v. Fitchburg R. R. Corp., 4 Gray, 465.....	lxiv, 83
Moore v. Fitz Rauldolph, 6 Leigh, 176.....	xxix, 308
Moore v. Fletcher, 16 Maine, 63.....	xxxiii, 633
Moore v. Fox, 10 Johnson, 244.....	vi, 339
Moore v. Fuller, 6 Oregon, 272.....	25, 524
Moore v. Gadaden, 87 New York, 84.....	41, 352
Moore v. Green, 73 North Carolina, 394.....	21, 470
Moore v. Hegeman, 92 New York, 521.....	44, 408
Moore v. Hillebrand, 14 Texas, 312.....	lxv, 118
Moore v. Holcombe, 3 Leigh, 597.....	lxix, 683
Moore v. Hood, 9 Richardson's Eq. 311.....	lx, 210

Roman letters [xlix] refer to volumes of American D

Moore v. Jordan, 36 Kansas, 271.....	59, 550
Moore v. Kelley, 5 Vermont, 34.....	xxvi, 233
Moore v. Kendall, 2 Pinney, 99 (1 Chand. 33).....	lii, 145
Moore v. Kent, 37 Iowa, 20.....	18, 1
Moore v. Langdon, 2 Mackey, 127.....	47, 262
Moore v. Letchford, 35 Texas, 185.....	14, 363
Moore v. Looket, 2 Bibb, 67.....	iv, 633
Moore v. Lowrey, 26 Iowa, 336.....	xv, 790
Moore v. Luca, 29 Penn. State, 360.....	lxvii, 629
Moore v. Madden, 7 Arkansas, 530.....	xvii, 298
Moore v. Mayor, 73 New York, 238.....	29, 134
Moore v. Mayor & Com., 80 North Carolina, 154.....	30, 75
Moore v. Merrill, 17 New Hampshire, 75.....	xliii, 503
Moore v. Metrop. Nat. Bank, 85 New York, 41.....	14, 173
Moore v. Miller, 6 Oregon, 254.....	25, 518
Moore v. Monroe, 64 Iowa, 367.....	52, 444
Moore v. Moore's Devises, 4 Dana, 354.....	xxix, 417
Moore v. Moore, 4 Hawks, 388.....	xv, 523
Moore v. Moore, 47 New York, 467.....	7, 466
Moore v. Neil, 39 Illinois, 256.....	lxxxix, 303
Moore v. New York, 8 New York (4 Selden), 110.....	lix, 473
Moore v. Pennell, 82 Maine, 162.....	lxxxiii, 500
Moore v. Pennsylvania R. Co., 99 Penn. St. 301.....	44, 106
Moore v. Philbrick, 33 Maine, 102.....	lii, 642
Moore v. Pierson, 6 Iowa, 279.....	lxxi, 409
Moore v. Protection Ins. Co., 29 Maine, 97.....	xlviii, 514
Moore v. Quirk, 105 Massachusetts, 49.....	7, 499
Moore v. Sanborne, 2 Michigan, 519.....	lix, 209
Moore v. Sanders, 15 South Carolina, 440.....	40, 703
Moore v. Settle, 82 Kentucky, 187.....	56, 889
Moore v. Shenk, 3 Penn. State, 13.....	xiv, 613
Moore v. Shultz, 13 Penn. State, 96.....	liii, 446
Moore v. Skidmore, Littell's S. C. 453.....	xli, 333
Moore v. Smaw, 17 Cal. 199.....	lxxxix, 123
Moore v. Smith, 11 Richardson's Law, 569.....	lxxxiii, 122
Moore v. State, 12 Alabama, 764.....	xvii, 276
Moore v. State, 47 Maryland, 467.....	28, 483
Moore v. State, 48 Missouri, 147.....	12, 367
Moore v. State, 14 Vroom, 203.....	39, 558
Moore ada. State, 81 Connecticut, 479.....	lxxxiii, 159
Moore ada. State, 25 Iowa, 128.....	xv, 776
Moore ada. State, 11 Iredell's Law, 160.....	liii, 401
Moore ada. State, 19 Missouri, 363.....	lxi, 563
Moore ada. State, 74 Missouri, 413.....	41, 322
Moore ada. State, 63 New Hampshire, 9.....	56, 478
Moore ada. State, 26 New Hampshire, 448.....	lix, 354
Moore ada. State, 24 South Carolina, 150.....	58, 241
Moore v. Tanner's Adm'r, 5 T. B. Monroe, 42.....	xviii, 35
Moore v. Tarlton, 3 Alabama, 444.....	xxvii, 701
Moore v. Thomson, Buebe's Law, 221.....	lix, 550
Moore v. Turbevill, 2 Bibb, 602.....	v, 642
Moore v. Turpin, 1 Speer's Law, 32.....	xi, 589
Moore v. Vick, 2 Howard (Miss.), 746.....	xxiii, 301
Moore v. Virginia F. & M. I. Co., 28 Gratt. 508.....	26, 373
Moore v. Weber, 71 Pennsylvania State, 429.....	10, 708
Moore v. Williamson, 10 Richardson's Eq. 323.....	lxxxiii, 93
Moorehead v. Gilmore, 77 Pennsylvania St. 118.....	18, 435
Moorehouse v. Northrop, 33 Connecticut, 380.....	lxxxix, 211
Moorehouse v. People, 4 Denio, 518.....	xlvii, 273
Moorehouse v. Crangle, 36 Ohio State, 130.....	38, 564
Mootry v. Danbury, 45 Connecticut, 550.....	29, 703
Morales v. State, 1 Texas Ct. App. 494.....	28, 419
Morain v. Devlin, 132 Massachusetts, 87.....	42, 423
Moran v. Dawes, Hopkins' Ch. 363.....	xv, 550
Moran v. Goodwin, 130 Massachusetts, 158.....	39, 443
Mordcau v. Speight, 3 Devereux's Law, 438.....	xiv, 266
More v. Bagley, Breese, 94.....	xii, 144
More v. Bonnet, 40 California, 251.....	6, 621
Moreau v. Saffarano, 3 Sneed, 596.....	lxvii, 582
Morehead v. Jones, 2 B. Monroe, 219.....	xvii, 600

Morris v. Faurot, 21 Ohio St. 185.....	8, 45
Morris v. Foreman, 1 Dallas, 198.....	438
Morris v. Hookaday, 94 North Carolina, 298.....	55, 607
Morris v. Hogle, 37 Illinois, 180.....	lxxxvii, 243
Morris v. Hyde, 8 Vermont, 353.....	xxx, 478
Morris v. Joseph, 1 West Virginia, 256.....	xci, 266
Morris v. Kennedy, 23 Kansas, 408.....	33, 169
Morris v. Lake, 9 Smedes & M. 531.....	xviii, 734
Morris v. McMorris, 14 Mississippi, 441.....	7, 695
Morris v. Morris, 14 California, 76.....	lxxvii, 615
Morris v. Morvatt, 2 Paige's Ch. 588.....	xxii, 661
Morris v. Patchin, 24 N. Y. 394.....	lxxxii, 811
Morris v. Pearson, 79 North Carolina, 263.....	28, 315
Morris v. Peckman, 14 Gray, 230.....	lxxiv, 675
Morris v. Phelps, 5 Johnson, 49.....	iv, 323
Morris v. Scott, 21 Wendell, 261.....	xxxiv, 236
Morris v. State, 95 Indiana, 73.....	48, 700
Morris v. Tartin, 1 Dallas, 147.....	l, 243
Morris v. Wallace, 3 Penn. State, 319.....	xl, 623
Morris Canal Co. v. Emmett, 9 Paige's Ch. 168.....	xxxvii, 268
Morris Canal Co. v. Fisher, 1 Stock. Ch. 667.....	lxiv, 423
Morris & E. R. Co. v. Ayers, 5 Dutch, 303.....	lxxx, 215
Morris Turnpike Co. ada. State, 1 Southard, 165.....	vii, 879
Morrison v. Bailey and Burgess, 5 Ohio St. 13.....	lxiv, 632
Morrison v. Beckwith, 4 T. B. Monroe, 73.....	xvi, 186
Morrison v. Berry, 48 Michigan, 389.....	36, 446
Morrison v. Blodgett, 8 New Hampshire, 338.....	xxxix, 663
Morrison v. Caldwell, 5 T. B. Monroe, 426.....	xvii, 84
Morrison v. Davis, 20 Penn. State, 171.....	lvii, 698
Morrison v. Edgar, 16 Missouri, 411.....	lvii, 238
Morrison v. Hart, 2 Bibb, 4.....	lv, 663
Morrison v. Hinkson, 87 Illinois, 587.....	29, 77
Morrison v. Holt, 42 New Hampshire, 478.....	lxxx, 120
Morrison v. Kelly, 22 Illinois, 610.....	lxxiv, 169
Morrison v. Marquardt, 24 Iowa, 35.....	xvii, 444
Morrison v. McMillan, 4 Littell, 210.....	xiv, 115
Morrison v. Morrison, 143 Massachusetts, 361.....	56, 683
Morrison v. Orr, 3 Stewart & Porter, 49.....	xxiii, 219
Morrison v. Phillips & C. O. Co., 44 Wis. 406.....	28, 899
Morrison v. Porter, 25 Minnesota, 425.....	59, 331
Morrison v. Poyntis, 7 Dana, 307.....	xxxii, 92
Morrison v. Smith, 13 Missouri, 234.....	liii, 145
Morrison v. State, 17 Texas Ct. App. 24.....	56, 120
Morrison v. Ten. M. and F. Ins. Co., 18 Mo. 262.....	lix, 299
Morrison v. Thurman, 17 B. Monroe, 249.....	lxvi, 153
Morrison v. Whiteside, 17 Maryland, 462.....	lxxix, 661
Morrison v. Wilson, 13 California, 494.....	lxxvii, 593
Morris Run Coal Co. v. Barclay Coal Co., 63	
Pennsylvania State, 173.....	8, 159
Morrison v. Eastern R. Co., 136 Mass. 377.....	30, 696
Morrison v. Wiggins Ferry Co., 43 Missouri, 280.....	xvii, 402
Morrow v. Campbell, 7 Porter, 41.....	xxxi, 704
Morrow v. Hanson, 9 Georgia, 308.....	lv, 346
Morrow v. Wood, 4 Iowa, 77.....	lxvi, 123
Morrow v. Wood, 35 Wisconsin, 59.....	lv, 471
Morse v. Bellows, 7 New Hampshire, 549.....	xxviii, 373
Morse v. Buffalo F. Ins. Co., 30 Wisconsin, 534.....	li, 587
Morse v. Curtis, 140 Massachusetts, 112.....	54, 456
Morse v. Goddard, 13 Metcalf, 177.....	xiv, 728
Morse v. Gould, 11 New York (1 Kernan) 261.....	lxii, 103
Morse v. Crawford, 17 Vermont, 499.....	xliv, 249
Morse v. Garner, 1 Strobhart's Law, 514.....	lxvii, 565
Morse v. Green, 13 New Hampshire, 33.....	xxxviii, 471
Morse v. Home Ins. Co., U. S. Sup. Court.....	li3, 297
Morse v. Home Ins. Co., 30 Wisconsin, 496.....	li, 580
Morse v. Inan, 43 Illinois, 180.....	lxxxix, 417
Morse v. Rathburn, 42 Missouri, 594.....	xviii, 359
Morse v. Richmond, 41 Vermont, 435.....	xviii, 600
Morse v. Shattuck, 4 New Hampshire, 229.....	xvii, 419
Morse v. Walton, 6 Connecticut, 547.....	xvi, 73

Morse T. D. & M. Co. v. Morse, 103 Mass. 72.....	4, 513
Morthland v. Smith, 32 Missouri, 235.....	lxxvii, 136
Mortmain v. Lefaux, 6 Martin, 654.....	xii, 498
Morton v. Bailey, 1 Seamon, 213.....	xxvii, 767
Morton v. Barrett, 23 Maine, 357.....	xxxix, 578
Norton v. Cowell, 65 Maryland, 359.....	57, 331
Morton v. Fletcher, 2 A. K. Marshall, 127.....	xii, 364
Morton v. Jackson, 1 Smedes & M. 494.....	xi, 107
Morton v. Mut. L. I. Co., 105 Massachusetts, 141.....	7, 508
Morton v. Noble, 87 Illinois, 176.....	li, 7
Morton v. Preston, 18 Michigan, 60.....	c, 146
Morton v. Rainey, 82 Illinois, 215.....	25, 311
Morton v. Reynolds, 16 Vroom, 336.....	46, 778
Morton v. Sanders, 2 J. J. Marshall, 122.....	xix, 128
Morton v. Smith, 48 Wisconsin, 265.....	33, 811
Morton v. State, 27 Vermont, 310.....	lxv, 201
Morton v. Young, 55 Maine, 24.....	xvii, 568
Morville v. American T. Soc., 123 Mass. 129.....	25, 40
Mosby, Ex parte, 21 Texas, 566.....	xviii, 547
Mosby v. Wall, 23 Mississippi, 81.....	lv, 71
Moseley v. Buck, 2 Munford, 232.....	v, 508
Moseley v. Vanhooker, 6 Lea, 286.....	40, 37
Moseley v. Lane, 27 Alabama, 63.....	lxii, 793
Moseley v. Tutthill, 45 Alabama, 621.....	6, 710
Moses v. Arnold, 43 Iowa, 187.....	22, 239
Moses v. Boston & M. R. R., 32 N. H. 523.....	lxiv, 321
Moses v. Boston and Maine R. R., 24 N. Hamp. 71.....	lv, 222
Moses v. Eia, 43 New Hampshire, 587.....	lxxvii, 178
Moses v. Julian, 45 New Hampshire, 62.....	lxxvii, 114
Moses v. Mead, 1 Denio, 378.....	lxiii, 678
Moses v. Murgatroyd, 1 Johns. Ch. 119.....	vii, 478
Moses v. Norton, 36 Maine, 113.....	lxviii, 738
Moses v. Ross, 41 Maine, 360.....	lxvi, 269
Moses v. Trice, 21 Gratiot, 556.....	8, 609
Mosher v. Berry, 30 Maine, 83.....	i, 614
Mosher v. Griffin, 51 Illinois, 184.....	xxix, 541
Mosher v. Shear, 102 Illinois, 199.....	46, 573
Mosier's Appeal, 56 Pennsylvania State, 76.....	xxvii, 723
Mosness, Matter of, 39 Wisconsin, 509.....	20, 88
Moss' Appeal, 83 Pennsylvania State, 364.....	24, 164
Moss v. Bettie, 4 Helak, 661.....	13, 1
Moss v. Burlington, 60 Iowa, 438.....	46, 62
Moss v. Cully, 1 Oregon, 147.....	lxii, 301
Moss v. Culver, 64 Pennsylvania State, 414.....	3, 608
Moss v. Green, 10 Leigh, 251.....	xxxiv, 731
Moss v. McCall, 12 Alabama, 630.....	lxvi, 373
Moss v. Pacific R. R. Co., 49 Missouri, 167.....	8, 126
Moss v. Shear, 25 California, 28.....	lxxxv, 94
Moss v. State, 17 Arkansas, 327.....	lxv, 433
Moss v. State, 10 Missouri, 238.....	lxvii, 116
Mote v. Chicago etc. R. R. Co., 27 Iowa, 22.....	1, 212
Mothland v. Wheman, 3 Penrose & Watts, 186.....	lxxvii, 71
Motley v. Manuf. Ins. Co., 29 Maine, 237.....	i, 591
Mott v. Central Railroad, 70 Georgia, 680.....	48, 598
Mott v. Clark, 9 Penn. State, 399.....	xlx, 568
Mott v. Danforth, 6 Watts, 304.....	xxxix, 463
Mott v. Hieck, 1 Cowen, 513.....	lxiii, 560
Mott v. Pennsylvania R. R. Co., 30 Penn. St. 9.....	lxxvii, 664
Mott v. Robbins, 1 Hill (N. Y.), 21.....	xxxvii, 264
Mott ada. State, 16 Minnesota, 472.....	10, 153
Motte v. Dorrell, 1 McCord, 260.....	x, 673
Motte v. Schult, 1 Hill Ch. 146.....	xxvi, 194
Moulton v. Bowker, 115 Massachusetts, 36.....	15, 73
Moulton v. Hurd, 20 Illinois, 137.....	lxxi, 257
Moulton v. Kershaw, 59 Wisconsin, 318.....	48, 516
Moulton v. Libbey, 37 Maine, 472.....	lix, 57
Moulton v. Phillips, 10 Rhode Island, 218.....	14, 663
Moulton v. Scarborough, 71 Maine, 267.....	36, 308
Moulton v. St. Paul M. & M. Ry Co., 21 Minn. 85.....	47, 781
Mount v. Brown, 23 Mississippi, 508.....	lxix, 268

Roman letters [xlix] refer to volumes of American Dr

Mount v. Harris, 1 Smodes & M. 185.....	xl, 89
Mount v. Mount, 2 McCarter, 163.....	lxxvii, 276
Mount v. State, 30 Indiana, 29.....	46, 192
Mount v. State, 14 Ohio, 235.....	xlv, 542
Mount Moriah Cem. Assn. v. Comar, 81 Pennayl- vania St. 235.....	72, 743
Mount Pleasant v. Van Blee, 43 Michigan, 361.....	38, 193
Mount S. & J. T. Co. v. Looney, 1 Met. (Ky.), 550.....	lxxi, 491
Mount, State ex rel., v. Steele, 21 Indiana, 207.....	lxxxiii, 346
Mount Vernon v. Douchett, 2 Indiana, 586.....	lv, 467
Mount Vernon B'k v. Stone, 2 Rhode Island, 129.....	lvii, 709
Moutholly, Town of, v. Andover, 11 Va. 236.....	xxxiv, 635
Mouriquand v. Hart, 23 Kansas, 594.....	31, 200
Mouser v. Harding, 33 Indiana, 178.....	5, 195
Mowatt v. Carow, 7 Paige, 328.....	xxxii, 641
Mowatt v. Wright, 1 Wendell, 258.....	xix, 508
Mower v. Kip, 6 Paige Ch. 83.....	xxxix, 743
Mower v. Leicester, 9 Massachusetts, 247.....	vi, 63
Mower v. Watson, 11 Vermont, 836.....	xxxiv, 704
Mowers v. Peabody, 61 New York, 34.....	19, 244
Mowry v. Charleston I. & T. Co., 6 Rich. Law, 146.....	ix, 122
Mowry v. Miller, 3 Leigh, 561.....	xiv, 680
Moxley v. Ragan, 10 Bush, 158.....	19, 61
Moyer v. Lobengr, 4 Watts, 200.....	xxviii, 723
Moyneham v. Moore, 9 Michigan, 9.....	lxxvii, 468
Moylhan v. State, 70 Indiana, 126.....	36, 178
Muckenbush v. Holler, 29 Indiana, 139.....	xxi, 345
Mudd v. Harper, 1 Maryland, 110.....	lv, 644
Mueller v. State, 76 Indiana, 310.....	40, 245
Mugford v. Richardson, 6 Allen, 76.....	lxxxiii, 617
Mugler ada. State, 29 Kansas, 253.....	44, 634
Muh, Succession of, 38 Louisiana An. 294.....	48, 242
Muhlenbrink v. Comm'r, 13 Vroom, 264.....	36, 519
Muhling v. Sattler, 3 Met. (Ky.), 285.....	lxxvii, 172
Muir v. Craig, 3 Blackford, 293.....	xxv, 111
Muir v. Schenck, 3 Hill (N. Y.), 128.....	xxxviii, 633
Muldon v. Whitlock, 1 Cowen, 290.....	xiii, 533
Muldoon v. Riskey, 103 Pennsylvania St. 110.....	49, 117
Muldrow v. Norris, 2 California, 74.....	lvi, 313
Mulford v. Minch, 3 Stockton's Ch. 16.....	lxiv, 472
Mulford v. Shepard, 1 Seamon, 583.....	xxxiii, 432
Mulhall v. Quinn, 1 Gray, 105.....	lxi, 414
Mulholland v. Ellitson, 1 Coldwell, 307.....	lxxviii, 495
Mulholland ada. People, 82 New York, 324.....	37, 568
Mullan v. Phila. S. Co., 78 Pennsylvania St. 26.....	21, 2
Mullany v. Mullany, 3 Green's Ch. 16.....	xxxii, 238
Mullen v. Comm'r, 85 Pennsylvania St. 283.....	27, 650
Mullen v. Old Colony R. Co., 127 Mass. 86.....	34, 349
Mullen v. State, 45 Alabama, 43.....	6, 691
Mullen v. St. John, 57 New York, 567.....	15, 530
Mullen v. Stricker, 19 Ohio State, 135.....	2, 379
Mullen v. Wilson, 44 Penn. St. 413.....	lxxxiv, 461
Mullendore v. Werts, 75 Indiana, 431.....	39, 155
Mullens v. State, 83 Alabama, 42.....	60, 731
Muller v. Hilton, 13 Louisiana An. 1.....	lxxi, 504
Muller v. McKesson, 73 New York, 196.....	29, 123
Muller v. Lands, 31 Texas, 263.....	xxviii, 529
Muller v. Pondir, 55 New York, 325.....	14, 259
Muller v. Biviere, 59 Texas, 640.....	46, 291
Muller ada. People, 96 New York, 408.....	48, 635
Mulley v. Hamilton, 71 Georgia, 720.....	51, 288
Mulligan v. Curtis, 100 Massachusetts, 512.....	xxvii, 121
Mulligan v. Illinois Cent. R'y Co., 36 Iowa, 181.....	14, 514
Mulliken v. Winter, 2 Duval, 256.....	lxxxvii, 496
Mulvey v. Shawmut M. F. Insurance Co., 4 Allen, 116.....	lxxxi, 689
Mulry v. Mohawk Valley Ins. Co., 5 Gray, 541.....	lxvi, 380
Mulry v. Norton, 100 New York, 426.....	53, 206
Mulvehill v. Bates, 31 Minnesota, 364.....	47, 796
Mulvey v. State, 43 Alabama, 316.....	xxiv, 684

Murray v. Blatchford, 1 Wendell, 583.....	xix, 537
Murray v. Bogert, 14 Johnson, 318.....	vii, 466
Murray v. Clay, 9 Arkansas, 89.....	xvii, 731
Murray ada. Commonwealth, 4 Binney, 487.....	v, 413
Murray ada. Commonwealth, 11 Serg. & R. 73.....	xiv, 614
Murray v. Coster, 30 Johnson, 578.....	xi, 333
Murray v. Gulf O. & S. F. R. Co., 63 Tex. 407.....	51, 660
Murray v. Gouverneur, 3 Johns. Cases, 438.....	i, 177
Murray v. Hay, 1 Barbour's Ch. 59.....	xiii, 773
Murray v. Jennings, 42 Connecticut, 9.....	19, 527
Murray v. Judson, 9 New York (5 Selden), 73.....	ix, 516
Murray v. Kennedy, 15 Louisiana An. 385.....	lxvii, 189
Murray v. Marshall, 9 Colorado, 483.....	59, 153
Murray v. McShane, 23 Maryland, 217.....	36, 367
Murray v. New York L. I. Co., 96 New York, 614.....	4, 8, 668
Murray v. S. O. R. R., 10 Richardson's L. 237.....	lxx, 219
Murray v. S. O. R. Co., 1 McMillan's L. 385.....	xxxvi, 268
Murray v. State, 21 Tex. Ct. App. 630.....	57, 623
Murray ada. State 23 Wisconsin, 96.....	9, 469
Murray v. Ware, 1 Bfbb, 325.....	iv, 637
Murray v. Warner, 55 New Hampshire, 546.....	20, 237
Murray v. Windley, 7 Iredell's Law, 201.....	xvii, 394
Murrel v. Murrel, 2 Strobhart's Eq. 148.....	xlix, 664
Murrell v. Roberts, 11 Iredell's Law, 424.....	liii, 419
Murrell v. State, 46 Alabama, 89.....	7, 562
Muscatine v. Sterneman, 30 Iowa, 526.....	6, 685
Muscatine v. Sterneman, 30 Iowa, 526.....	6, 685
Muscogee Lumber Co. v. Hyer, 18 Fla. 698.....	43, 332
Muse v. Donelson, 2 Humphreys 166.....	xxxvi, 309
Muse v. Swayne, 3 Lea, 251.....	31, 607
Musgrove v. Bonser, 5 Oregon, 313.....	20, 737
Musick v. Dodson, 76 Missouri, 624.....	43, 780
Muskingum Bank v. Carpenter, 7 O. St. 121.....	xxviii, 616
Muskingum Valley T. Co. v. Ward, 13 Ohio, 120.....	xiii, 191
Musselman's Appeal, 62 Penn. State, 81.....	1, 353
Musselman v. Kahleman, 10 Penn. State, 364.....	ii, 493
Musselman v. Marquis, 1 Bush, 463.....	lxxxix, 637
Musselman v. McElhenney, 23 Indiana, 4.....	lxxxv, 445
Musselman v. Oakes, 19 Illinois, 81.....	lxviii, 583
Musser v. Johnson, 43 Missouri, 74.....	xcvii, 316
Mussey v. Holt, 24 New Hampshire, 248.....	iv, 234
Mussey v. Perkins, 26 Vermont, 690.....	lxxxvi, 688
Mussey v. Scott, 7 Oushing, 215.....	lv, 719
Musina v. Goldthwaite, 34 Texas, 125.....	7, 281
Mustard v. Wohlford's Heirs, 15 Grattan, 329.....	lxvii, 209
Muster v. Chicago, M. & S. P. R. R. Co., 61 Wisconsin, 326.....	50, 141
Mutcha v. Pierce 49 Wisconsin, 231.....	35, 776
Mutual B. L. I. Co. v. Atwood, 24 Gratt. 497.....	18, 653
Mutual Ben. L. Ins. Co. v. Hillyard, 2 Vroom, 444.....	18, 741
Mutual Ben. L. I. Co. v. Robertson, 59 Ill. 123.....	14, 8
Mutual Ins. Co. v. Deale, 18 Maryland, 26.....	lxxxix, 673
Mutual L. I. Co. v. Allen, 138 Massachusetts, 24.....	52, 245
Mutual L. I. Co. v. French, 30 Ohio St. 240.....	37, 443
Mutual Loan & B. Am. v. Price, 16 Florida, 204.....	26, 703
Mutual Nat. Bank v. Rotgé, 28 La. An. 933.....	26, 126
Mutual Redemption Bank v. Hill, 56 Maine, 365.....	xcvi, 470
Mutual Safety Ins. Co. v. Cohen, 3 Gill, 459.....	xliii, 341
Myer v. Fegaly, 39 Penn. State, 429.....	lxxx, 534
Myer v. Grafflin, 21 Maryland, 250.....	c, 66
Myer v. Hart, 40 Michigan, 517.....	29, 563
Myer v. Hobbs, 57 Alabama, 175.....	29, 719
Myers v. Anderson, 1 Strobhart's Eq. 344.....	xvii, 537
Myers v. Baymore, 10 Penn. State, 114.....	xlix, 586
Myers v. Brownell, 2 Alaska, 407.....	xvi, 739
Myers v. Byrly, 45 Penn. State, 368.....	lxxiv, 497
Myers v. Dodd, 9 Indiana, 290.....	lxviii, 624
Myers v. Entriken, 6 Watts & Serg. 44.....	xi, 538
Myers v. Harvey, 3 Fennoes & W. 478.....	xliii, 60
Myers v. Hodges, 2 Watts, 281.....	xxvii, 319
Myers v. Kalamazoo B. Co., 54 Michigan, 215.....	52, 811
Myers v. Kaufman, 37 Georgia, 600.....	xev, 287
Myers v. Keystone M. L. I. Co., 27 P. St. 268.....	lxvii, 463
Myers v. Malcom, 6 Hill (New York), 203.....	xli, 744
Myers v. Melnrath, 101 Massachusetts, 366.....	3, 366
Myers v. Mott, 23 California, 368.....	lxxxix, 49
Myers v. Myers, 8 Louisiana An. 369.....	lxviii, 689
Myers v. Myers, 2 McCord's Ch. 214.....	xvi, 648
Myers ada. State, 82 Missouri, 558.....	52, 268
Myers v. Vanderbilt, 84 Pennsylvania St. 510.....	24, 227
Myzatt v. Wilcox, 45 New York, 306.....	6, 99
Mynard v. Syracuse etc. R. Co., 71 N. Y. 180.....	27, 26
Myrick v. Hasey, 27 Maine, 9.....	xvii, 583
Mytinger v. Springer, 3 Watts & Serg. 405.....	lxxxviii, 774
Nagel v. Missouri Pac. R. Co., 75 Mo. 653.....	42, 418
Nagle v. Allegheny V. R. Co., 58 Penn. St. 85.....	32, 413
Nagle v. Stroh, 4 Watts, 124.....	lxxxviii, 696
Naglee ada. People, 1 California, 232.....	lii, 312
Nadler v. Stanley, 10 Serg. & R. 450.....	xiii, 691
Najao v. Boston etc. R. R. Co., 7 Allen, 239.....	lxxxviii, 696
Nall v. Granger, 8 Michigan, 420.....	lxxxvii, 463
Nalley v. Hartford C. Co., 51 Conn. 694.....	50, 47
Nally v. Nally, 74 Georgia, 669.....	56, 459
Naltner v. Dolan, 108 Indiana, 800.....	56, 61
Nance v. Gregory, 6 Lea, 243.....	40, 41
Nantz v. McPherson, 7 T. B. Monroe, 597.....	lxviii, 218
Napier v. Gidore, 1 Speers' Eq. 215.....	xi, 613
Nash v. Church, 10 Wisconsin, 303.....	lxxxviii, 678
Nash v. Fugate, 24 Gratt. 202.....	18, 640
Nash v. Fugate, 33 Gratt. 535.....	34, 789
Nash v. Harrington, 2 Alabama, 9.....	xvi, 672
Nash v. Hermosilla, 9 California, 684.....	lxx, 676
Nash v. Lull, 102 Massachusetts, 60.....	3, 436
Nash v. Minneapolis M. Co., 24 Minnesota, 501.....	31, 349
Nash v. Mitchell, 71 New York, 199.....	27, 26
Nash v. Orr, 3 Brevard, 94.....	v, 547
Nash v. Page, 80 Kentucky, 539.....	44, 496
Nash v. Skinner, 12 Vermont, 219.....	lxxxvi, 336
Nash ada. State, 86 North Carolina, 690.....	41, 472
Nash v. Spofford, 10 Metcalf, 192.....	xliii, 436
Nash v. Tupper, 1 Calnes, 402.....	ii, 197
Nash v. Union Mutual Ins. Co., 43 Maine, 343.....	lxix, 66
Nashua Lock Co. v. Worcester & N. R. R. Co., 48 New Hampshire, 339.....	2, 242
Nashville Bank v. Henderson, 5 Yerger, 104.....	xxvi, 267
Nashville v. Brown, 9 Helak 1.....	24, 299
Nashville etc. R. R. Co. v. David, 6 Helak 261.....	19, 594
Nashville etc. R. R. Co. v. Starnes, 9 Helak 83.....	24, 296
Nashville & O. R. R. v. Elliott, 1 Cold. 611.....	lxxxviii, 806
Nashville & O. R. R. Co. v. Sprayberry, 3 Barr. 341.....	35, 706
Nashville, O. & St. L. R. R. Co. v. Whelan, 10 Lea, 741.....	43, 217
Nassau Bank v. Jones, 96 New York, 115.....	47, 14
Nason v. Blaisdell, 12 Vermont, 165.....	lxxxvi, 331
Natches v. Minor, 9 Sm. & M. 544.....	xlviii, 727
Natches v. Vandervelde, 31 Mississippi, 706.....	lxvi, 583
Natches Ins. Co. v. Stanton, 2 Smodes & M. 240.....	xii, 599
Nathan v. Shivers, 71 Alabama, 117.....	46, 309
National B't v. Armstrong, 66 Maryland, 113.....	59, 156
National Bank v. Bangs, 106 Massachusetts, 441.....	8, 349
National Bank v. Bruhn, 64 Texas, 871.....	53, 771
National Bank v. Lewis, 75 New York, 516.....	31, 464
National Bank v. Lewis, 80 Vermont, 623.....	28, 514
National B't v. Nat. M. Bkg. Assn. 55 N. Y. 211.....	14, 232
National Bank v. Peabody, 55 Vermont, 492.....	45, 623
National Bank v. Second Nat. Bank, 69 Ind. 479.....	35, 236
National Bank v. Smith, 66 New York, 271.....	25, 46
National Commercial Bank v. Mayor etc. of Mobile, 62 Alabama, 284.....	34, 15
National Commercial B't v. Miller, 77 Ala. 168.....	54, 50

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

National, Copper Co. v. Minn. M. Co., 87 Mich. 43.....	58, 333	Nell v. Kesse, 8 Texas, 23.....	11, 768
National, Ex. Bank v. Boglen, 36 West Vir- ginia, 554.....	53, 113	Nelson v. Brown, 13 Rhode Island, 681.....	43, 88
National Exchange Bank v. Hartford eta. R. R. Co., 8 Rhode Island, 375.....	5, 583	Nelson v. Fry, 16 Ohio State, 523.....	xvi, 110
National Ex. Bank v. Hartford eta. R. Co., 8 Rhode Island, 375.....	xvi, 337	Nelson v. Iowa Eastern R. Co., 21 Iowa, 124.....	33, 124
National Exchange Bank v. Watson, 13 Rhode Island, 81.....	43, 13	Nelligan v. Citizens' Bank, 21 La. An. 333.....	xvix, 734
National Filtering Oil Co. v. Citizens' Ins. Co. of Mo., 106 New York, 535.....	60, 473	Nellis v. Lathrop, 23 Wendell, 121.....	xxiv, 295
National F. Ins. Co. v. Crane, 16 Maryland, 360 lxxvii, 389		Nelms v. State, 13 Smedes & M. 500.....	lxi, 94
National Gold Bank v. McDonald, 51 Cal. 64.....	91, 697	Nelson v. Bostwick, 5 Hill (New York), 37.....	xi, 330
National eta. Ins. Co. v. Yeomans, 8 Rhode Island, 25.....	lxxvii, 610	Nelson v. Boyce, 7 J. J. Marshall, 401.....	xviii, 411
National Life Ins. Co. v. Haley, 78 Maine, 268.....	57, 807	Nelson v. Boynton, 3 Metcalf, 296.....	lxxvii, 146
National Loan & B. Soc. v. Lichtenwalner, 100 Penn. St. 100.....	45, 359	Nelson v. Brodback, 44 Missouri, 596.....	c, 238
National Mahaiwe Bank v. Peck, 127 Mass. 263.....	34, 368	Nelson v. Carrington, 4 Munford, 332.....	vi, 513
National Mechanics' Banking Assn. v. Conk- ing, 90 New York, 116.....	43, 146	Nelson v. Cheboygan N. Co., 44 Michigan, 7.....	38, 222
National Park B'k v. Fourth Nat. B'k, 46 N. Y. 77.....	7, 310	Nelson v. Clay's H'n, 7 J. J. Marshall, 122.....	xxvii, 297
National Pemberton Bank v. Longee, 108 Mas- sachusetts, 371.....	11, 287	Nelson v. Emerson, 1 Brevard, 48.....	xi, 608
National Pemberton Bank v. Porter, 128 Mas- sachusetts, 332.....	23, 235	Nelson v. First Bank, 48 Illinois, 36.....	xxv, 630
National Trust Co. v. Gleason, 77 N. Y. 400.....	33, 633	Nelson v. Iverson, 34 Alabama, 9.....	lx, 463
Neumberg v. Young, 15 Vroom, 331.....	43, 360	Nelson v. Johansen, 18 Nebraska, 180.....	53, 886
Neuacota v. Pearce, 46 Texas, 535.....	96, 379	Nelson v. Matthews, 3 Henning & M. 164.....	xi, 620
Nave v. Black, 90 Indiana, 308.....	46, 305	Nelson v. McGiffert, 3 Barbour's Ch. 128.....	xlix, 170
Nave v. H. N. I. Co., 37 Missouri, 430.....	30, 394	Nelson v. Morgan, 2 Martin, 256.....	v, 730
Navigation Co. v. Wilcox, 7 Jones' Law, 461.....	lxxviii, 360	Nelson v. Sims, 23 Mississippi, 323.....	lvii, 164
Navigation eta. Co. v. Richards, 57 Pennsylvania State, 143.....	xviii, 309	Nelson v. State, 57 Mississippi, 296.....	34, 444
Naylor, Ex parte 11 Rich. Eq. 259.....	lxxviii, 457	Nelson ada. State, 38 La. An. 943.....	56, 200
Naylor v. Dennis, 8 Pickering, 136.....	xix, 319	Nelson ada. State, 14 Richardson's Law, 169.....	xv, 130
Naylor v. Foodick, 4 Day, 146.....	iv, 187	Nelson v. Stewart, 54 Alabama, 115.....	25, 600
Naylor v. Throckmorton, 7 Leigh, 96.....	xxx, 493	Nelson v. Suffolk Ins. Co., 8 Oshing, 477.....	lv, 770
Neade v. Neade, 7 Johns. Ch. 1.....	xi, 360	Nelson v. Vermont & C. R. Co., 36 Vt. 717.....	lxii, 614
Neal ada. Commonwealth, 10 Mass. 128.....	vi, 106	Neran, Estate of, 35 California, 322.....	xov, 111
Neal v. Gillaspay, 56 Indiana, 451.....	96, 37	Nerbooth v. Althouse, 3 Watts, 427.....	lxxiv, 489
Neal v. Handley, 116 Illinois, 418.....	56, 784	Nesbitt v. Dallen, 7 Gill & Johnson, 494.....	lxxvii, 336
Neal v. Henry, Meigs, 17.....	lxxviii, 126	Nesbitt v. Trumbo, 39 Illinois, 110.....	lxxviii, 290
Neal v. Lewis, 3 Bay, 304.....	i, 640	Nesmith v. Drum, 8 Watts & Serg. 9.....	xlii, 300
Neal v. Saline County Court, 63 Missouri, 390.....	8, 108	Nettes v. S. O. R. R., 7 Richardson's L. 190.....	lxii, 400
Neal v. Sanderson, 2 Smedes & M. 673.....	xli, 600	Nettleton v. Gridley, 21 Connecticut, 531.....	lvj, 373
Neal v. Wilcox, 4 Jones' Law, 146.....	lxxvii, 326	Neu v. McKeshnia, 26 New York, 632.....	47, 39
Neale v. Newland, 4 Arkansas, 806.....	lxxviii, 42	Neusendorff v. Duryea, 69 New York, 557.....	36, 326
Neall v. Hill, 16 California, 145.....	lxxvi, 508	Neuzer v. O'Fallon, 18 Missouri, 277.....	lx, 313
Neally v. Wilhelm, 4 G. Greene, 340.....	lxi, 118	Nevada Water Co. v. Powell, 34 California, 160.....	xci, 685
Neaves v. North State M. Co., 90 N. O. 413.....	47, 839	Nevin v. Pullman P. O. Co., 106 Illinois, 223.....	46, 603
Nebraska Tel. Co. ada. State, 17 Neb. 126.....	52, 404	Nevins v. City of Peoria, 41 Illinois, 508.....	lxxix, 308
Needham v. Branson, 5 Iredell's L. 496.....	xliv, 45	Nevitt v. Bacon, 23 Mississippi, 213.....	lxvi, 600
Needles v. Burk, 51 Missouri, 569.....	51, 261	Nevitt v. Gillespie, 1 Howard, 108.....	lxvi, 603
Needles' Executor v. Needles, 7 Ohio St. 432.....	lxx, 85	New v. Nicoll, 73 New York, 127.....	39, 111
Neel v. State, 9 Arkansas, 289.....	i, 300	New v. Walker, 106 Indiana, 365.....	56, 49
Neelly v. Lancaster, 47 Arkansas, 175.....	58, 703	New Albany v. Meekin, 3 Indiana, 621.....	lvj, 523
Neelson v. Sanborn, 2 New Hampshire, 413.....	ix, 108	New Albany & S. R. v. McCormick, 10 Ind. 490.....	lxvi, 337
Neely v. Jones, 16 West Virginia, 632.....	37, 794	New Albany & S. R. v. Peterson, 14 Ind. 113.....	lxxvii, 39
Neely v. Morris, 3 Head, 593.....	lxxv, 763	New Albany & S. R. v. Tilton, 12 Ind. 8.....	lxxiv, 126
Neely v. Rood, 54 Michigan, 134.....	52, 803	Newall v. Humsey, 18 Maine, 292.....	lxxvii, 717
Neely ada. State, 74 North Carolina, 436.....	91, 496	Newall v. Wright, 3 Massachusetts, 136.....	xi, 96
Neft v. Horner, 63 Penn. St. 327.....	3, 555	Newark ada. State, 36 N. J. L. 478.....	lx, 604
Negley v. Farrow, 60 Maryland, 126.....	45, 715	New Bedford Ins. Co. v. Hathaway, 134 Mass. 69.....	45, 309
Negley v. Lindsay, 67 Penn. St. 217.....	5, 427	New Bedford T. Corp. v. Adams, 5 Mass. 176.....	v, 31
Negus v. Negus, 46 Iowa, 457.....	96, 157	Newbegin v. Langley, 39 Maine, 300.....	lxvii, 613
Neidefer v. Chastain, 71 Indiana, 363.....	36, 196	Newbert v. Cunningham, 60 Maine, 231.....	lxix, 613
Nell v. Case, 28 Kansas, 510.....	37, 259	Newbury Bank v. Sinclair, 60 N. H. 109.....	69, 387
Nell ada. State, 7 Ohio, Pt. 1, 122.....	lxxviii, 623	Newbit v. Statuck, 35 Maine, 315.....	lviii, 708
		Newbold v. J. M. Bradstreet, 57 Maryland, 36.....	66, 426
		Newbrau v. Snider, 1 West Virginia, 183.....	lxxviii, 607
		Newbrough v. Walker, 8 Gratian, 16.....	lvj, 127
		New Brunswick B'k v. Nelson, 3 Green's L. 337.....	lxix, 601
		New Brunswick eta. Co. v. Tiers, 4 Zab. 697.....	lxv, 394
		New Brunswick Rubber Co. v. Commissioners, 9 Vroom, 190.....	36, 309
		Newburgh T. Road v. Miller 5 Johns. Ch. 161.....	lx, 374
		Newburg v. Munshower, 29 Ohio St. 617.....	53, 709
		Newbury v. Brunswick, 2 Vermont, 151.....	lxix, 708
		Newby v. Perkins, 1 Dana, 440.....	lxv, 100
		Newby v. Skinner, 1 Dev. & Bat. Eq. 486.....	lxix, 307

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

New Castle Man. Co. v. Red Riv. R. Co., 1 Rob. (La.), 145.....	xxxvi, 686
Newcomb v. Cincinnati Ins. Co., 23 Ohio St. 362...10, 746	
Newcomb v. Hale, 90 New York, 336.....	43, 173
Newcomb v. Newcomb, 13 Bush, 544.....	26, 223
Newcomb v. Peck, 17 Vermont, 302.....	xlv, 340
Newcomb v. Raynor, 21 Wendell, 108.....	xxxiv, 219
Newcome v. Light, 58 Texas, 141.....	44, 6 4
Newcomer v. Kline, 11 Gill & J. 487.....	xxxvii, 74
Newcomer v. Orem, 3 Maryland, 271.....	lvi, 717
Newell v. Adams, 1 D. Chipman, 346.....	xii, 690
Newell v. Fisher, 11 Smedes & M. 431.....	xlix, 66
Newell v. Hamer, 4 Howard (Miss.), 684.....	xxxv, 415
Newell v. Mayberry, 3 Leigh, 260.....	xviii, 261
Newell v. Minneapolis L. & M. Ry Co., 35 Minnesota, 112.....	59, 303
Newell v. Nichols, 75 New York, 78.....	31, 424
Newell v. Randall, 23 Minnesota, 171.....	50, 563
Newell v. Whiteher, 53 Vermont, 589.....	58, 703
New England Commercial Bank v. Newport Steam Factory, 6 Rhode Island, 154.....	lxxv, 683
New England C. R. Co. v. B. & O. R., 11 Md. Sl. lxxix, 181	
New England Ex. Co. v. Maine C. R. R. Co., 87 Maine, 128.....	2, 31
New England T. Co. v. Eaton, 140 Mass. 833.....	54, 493
New Gloucester Tr. v. Bradbury, 11 Ma. 118.....	xxvi, 515
New Jersey Ex. Co. v. Nichols, 33 N. J. L. 434.....	xviii, 723
Newhall v. Central Pacific R. R. Co., 51 Cal. 345...21, 713	
Newhall v. Clark, 3 Cushing, 378.....	1, 741
Newhall v. Dunlap, 14 Maine, 180.....	xxxii, 45
Newhall v. Iveson, 3 Cushing, 598.....	liv, 790
Newhall v. Langdon, 39 Ohio St. 87.....	48, 426
Newhall v. Lynn F. C. Sav. Bank, 101 Mass. 428... 3, 367	
Newhall v. Vargas, 15 Maine, 314.....	xxxiii, 617
Newhall v. Vargas, 13 Maine, 83.....	xxix, 489
New Hampshire Bk v. Colcord, 15 N. Hamp. 119.xli, 688	
New Hampshire C. R. v. Johnson, 30 N. H. 260.lxiv, 300	
New Haven v. Fairhaven & W. R. R. Co., 28 Connecticut, 423.....	9, 399
New Haven v. Sargent, 28 Connecticut, 80.....	9, 260
New Haven & H. Co. v. Campbell, 128 Mass. 104...35, 350	
New Haven B. Co. v. Sargent, 59 Conn. 199.....	47, 633
New Hope eta. B. Co. v. Perry, 11 Illinois, 467.....	lii, 443
New Iberia v. Barrett, 31 Louisiana An. 719....33, 229	
New Ipswich Factory v. Batchelder, 3 N. H. 190...xiv, 246	
Newkirk v. Neild, 19 Indiana, 194.....	lxxxi, 383
Newlands ada. State, 7 Iowa, 242.....	lxxi, 444
Newlin v. Duncan, 1 Harrington, 304.....	lxv, 66
Newlin v. Osborne, 4 Jones' Law, 157.....	lxvii, 269
Newlin v. Osborne, 6 Jones' Law, 122.....	lxxii, 566
New London eta. Bank v. Lee, 11 Conn. 113.....	xxvii, 713
Newman v. Alvord, 51 New York, 126.....	10, 683
Newman v. Chapman, 2 Randolph, 98.....	xiv, 766
Newman v. Foster, 3 Howard (Miss.), 363.....	xxxiv, 96
Newman v. Hook, 27 Missouri, 207.....	xx, 373
Newman v. Kaufman, 26 Louisiana An. 865.....	26, 114
Newman v. Landrine, 1 McCarter, 291.....	lxxxi, 249
Newman v. McGregor, 5 Ohio, 349.....	lxiv, 233
Newman ada. State, 9 Nevada, 48.....	16, 2
Newman v. Tymeson, 13 Wisconsin, 172.....	lxxx, 735
Newman v. Waterman, 63 Wisconsin, 612.....	53, 810
Newmark v. Liverpool eta. Co., 30 Mo. 160.....	lxvii, 608
New Market Sav. Bank v. Gillet, 100 Ill. 254.....	39, 30
Newmeyer v. Missouri eta. R. R. Co., 53 Mo. 81...14, 394	
New Orleans v. Davidson, 30 La. An. 541.....	31, 228
New Orleans v. Dubarry, 33 La. An. 481.....	59, 273
New Orleans v. Eclipse Tow Boat Co., 33 La. An. 647.....	39, 279
New Orleans v. Finnerty, 27 La. An. 631.....	31, 569
New Orleans v. Kaufman, 29 La. An. 226.....	59, 236
New Orleans v. Mechanics' and T. Ins. Co., 20 La. An. 376.....	31, 233
New Orleans v. Stafford, 27 La. An. 417.....	31, 563
New Orleans ada. State, 33 La. An. 119.....	58, 163
New Orleans C. and B. Co. v. Briggs, 12 Rob. (La.), 175.....	lxiii, 224
New Orleans C. and B. Co. v. Beard, 16 Louisiana An. 345.....	lxxix, 588
New Orleans C. and B. Co. v. Templeton, 30 Louisiana An. 141.....	xxvi, 268
New Orleans, City of v. Halpin, 17 Louisiana An. 128.....	lxxvii, 563
New Orleans eta. R. R. Co. v. Kerr, 9 Rob. (La.) 122.....	xii, 233
New Orleans eta. R. R. Co. v. Statham, 42 Mississippi, 607.....	xxvii, 670
New Orleans F. & H. S. T. v. Ocean Dry Dock Co., 28 La. An. 173.....	26, 90
New Orleans, Jackson and Great Northern R. Co. v. Allbritton, 33 Mississippi, 242.....	lxv, 90
New Orleans J. & G. N. R. R. Co. v. Hunt, 36 Mississippi, 660.....	lxxiv, 726
New Orleans Nat. Bank v. Raymond, 29 La. An. 355.....	79, 236
New Orleans Nat. Bank v. Wells, 26 La. An. 736.....	26, 107
New Orleans P. Co. v. Brown, 26 La. An. 126...51, 5	
New Orleans eta. R. R. Co. v. Burke, 53 Mississippi 209.....	24, 690
New Orleans eta. R. R. Co. v. Harrison, 43 Mississippi, 112.....	12, 233
New Orleans eta. R. R. Co. v. Norwood, 62 Mississippi, 566.....	52, 191
New Orleans Sav. Bk v. Harper, 12 Rob. (La.), 231.lxiii, 236	
Newport M. M. Co. v. Starbird, 10 New Hampshire, 123.....	lxxiv, 146
Newsum v. Adams, 2 Louisiana, 153.....	xxii, 126
Newsum v. Anderson, 2 Iredell's Law, 42.....	lxxvii, 406
Newsum v. Cooke, 44 Mississippi, 353.....	7, 695
Newsum v. Jackson, 26 Georgia, 341.....	lxxi, 204
Newsum v. Thornton, 82 Alabama, 402.....	69, 743
Newsum v. Axon, 1 McCord, 609.....	x, 635
Newsum v. Douglass, 7 Harris & J. 417.....	xvi, 317
Newsum v. Lycan, 3 J. J. Marshall, 440.....	xx, 156
Newsum v. Newsum, 1 Leigh, 86.....	lix, 720
Newton v. Atchison, 31 Kansas, 151.....	47, 486
Newton v. Bushong, 22 Grattan, 628.....	12, 533
Newton v. Booth, 13 Vermont, 390.....	lxxvii, 596
Newton v. Bronson, 13 N. Y. (3 Kernan), 587.....	lxvii, 89
Newton v. Howe, 29 Wisconsin, 531.....	9, 616
Newton v. Kennedy, 31 Arkansas, 696.....	25, 523
Newton v. Mutual B. L. Ins. Co., 76 N. Y. 496...33, 333	
Newton v. Newton, 11 Rhode Island, 300.....	23, 476
Newton v. Porter, 69 New York, 123.....	25, 122
Newton v. Seaman's Friend Soc., 130 Mass. 91...39, 433	
Newton v. Snyder, 44 Arkansas, 42.....	51, 567
Newton ada. State, 1 G. Greene, 160.....	lxviii, 267
Newton v. State Bank, 14 Arkansas, 2.....	lxviii, 263
Newton v. Turner, 5 Louisiana, 46.....	lxv, 173
New York C. P. ada. People, 13 Wendell, 649.....	lxviii, 406
New York Fire Ins. Co. v. Bennett, 5 Conn. 574...xii, 109	
New York Fire Ins. Co. v. Ely, 5 Connecticut, 660.xii, 109	
New York Life Ins. Co. v. Flack, 3 Maryland, 241.lvi, 743	
New York & Ala. C. Co. v. Selma Sav. Bank, 51 Alabama, 305.....	23, 593
New York & B. D. Ex. Co. v. Traders' and M. Ins. Co., 123 Massachusetts, 377.....	42, 440
New York & H. R. R. Co. v. Kip, 46 N. Y. 546... 7, 596	
New York & N. H. R. R. Co. v. New Haven, 43 Connecticut, 279.....	19, 596

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

New York C. & St. L. Ry Co. v. Amer. 106 In- diana, 219.....	55, 734	Nickleson v. Stryker, 10 Johnson, 115.....	vi, 313
New York, L. E. & W. Ry Co. v. Haring, 47 N. J. L. 127.....	54, 123	Nicklin v. Betts Spring Co., 11 Oregon, 404.....	5-6, 477
New York, L. E. & W. R. R. Co. ada. People, 104 New York, 58.....	58, 485	Nicks v. Martindale, Harper's Law, 188.....	xviii, 647
New York, L. E. & W. R. R. Co. v. Steinbren- ner, 47 N. J. L. 151.....	54, 126	Nicoll v. Ogden, 29 Illinois, 323.....	lxviii, 311
New York, L. & W. R. Co., In re, 105 N. Y. 89.....	59, 478	Nicolet v. Insurance Co., 3 Louisiana, 204.....	xxvii, 438
New York L. Ins. Co. v. Clifton, 7 Bush, 179.....	3, 390	Niemeyer v. Wright, 75 Virginia, 339.....	4-6, 720
New York L. Ins. Co. v. Steatham, 93 U. S. 24.....	19, 513	Nightingale v. Chafee, 11 Rhode Island, 609.....	23, 531
New York, Mayor of v. 2nd Ave. R. Co., 103 New York, 571.....	55, 539	Nightingale v. Scannell, 6 California, 506.....	lxv, 735
New York, Mayor of, v. H. F. Ins. Co., 30 New York, 45.....	4	Nightingale v. Withington, 15 Mass. 273.....	viii, 181
New York, Mayor of, ada. People, 25 Wend. 253.....	xxv, 669	Niles v. Musky, 33 Michigan, 61.....	2-6, 679
New York & W. P. T. Co. v. Dryburg, 35 Penn. State, 398.....	lxviii, 336	Niles v. Ransford, 1 Michigan, 338.....	ii, 35
New York W. & G. Co. v. Loomis, 123 Mass. 431.....	23, 373	Nill v. Compere, 16 Indiana, 107.....	lxviii, 411
Niblett v. Nashville, 12 Heisk. 684.....	27, 755	Nimick v. Holmes, 25 Penn. State, 305.....	lxiv, 719
Nicolls v. Bagg, 47 Illinois, 47.....	xov, 463	Nimmo v. Commonwealth, 4 Henning & M. 57.....	iv, 489
Nieely v. Bayles, 4 Humphreys, 177.....	xi, 638	Nims v. Rood, 11 Vermont, 96.....	lxviii, 689
Niebol v. Bate, 7 Yerger, 308.....	lxvii, 605	Niminger v. Norwood, 73 Alabama, 277.....	4-7, 413
Niebol v. Lytle's Lessee, 4 Yerger, 486.....	lxvi, 240	Niolen v. Douglas, 3 Hill Ch. 443.....	xxx, 399
Niebol v. Ridley, 5 Yerger, 63.....	lxvi, 254	Nipp v. Diskey, 31 Indiana, 314.....	6-2, 134
Niebol v. State, 65 Wisconsin, 416.....	60, 870	Nisbet v. Patton, 4 Rawle, 120.....	lxvii, 123
Nieholas v. Purcell, 31 Iowa, 265.....	lxviii, 873	Nix v. Caldwell, 31 Kentucky, 293.....	5-6, 163
Nieholas v. Ward, 1 Head, 323.....	lxviii, 177	Nixon v. Bumpass, 5 Yerger, 16.....	lxvi, 269
Nieholay v. Kay, 6 Arkansas, 69.....	lxiii, 690	Nixon v. People, 3 Scammon, 267.....	lxviii, 307
Nieholts v. Allen, 130 Massachusetts, 311.....	39, 445	Nixon v. Nash, 13 Ohio State, 647.....	lxviii, 299
Nieholts v. Blakelock, 3 Day, 312.....	ii, 95	Nixon v. Porter, 34 Mississippi, 697.....	lxix, 403
Nieholts v. Bellows, 23 Vermont, 581.....	lv, 85	Nixon v. State, 3 Smedes & M. 497.....	xl, 603
Nieholts v. Boston, 36 Mass. 39.....	lxviii, 132	Nixon ada. State, 16 Vermont, 70.....	lxvi, 133
Nieholts v. City of Bridgeport, 23 Connecticut, 189.....	ix, 636	Nixon v. Vanhise, 3 Southern, 491.....	viii, 618
Nieholts ada. Commonwealth, 114 Mass. 236.....	19, 346	Noble v. Bullis, 23 Iowa, 569.....	lxviii, 442
Nieholts ada. Commonwealth, 10 Metcalf, 359.....	lxiii, 432	Noble v. Munkin, 74 Maine, 225.....	4-3, 281
Nieholts v. Day, 33 New Hampshire, 133.....	lxiv, 358	Noble v. Moses, 31 Alabama, 530.....	6-6, 173
Nieholts v. Dimler, 2 Vroom, 461.....	lxviii, 319	Noble v. Richmond, 31 Gratian, 371.....	5-1, 728
Nieholts v. Frothingham, 45 Maine, 230.....	lxviii, 539	Noble v. School Directors, 117 Illinois, 30.....	5-7, 323
Nieholts v. Kruba, 10 Wisconsin, 76.....	lxviii, 294	Noble v. Thompson Oil Co., 79 Penn. St. 354.....	3-1, 363
Nieholts v. Lee, 10 Michigan, 536.....	lxviii, 57	Noble v. Smith, 2 Johnson, 82.....	lxv, 39
Nieholts v. Luce, 24 Pickering, 103.....	lxv, 302	Nobleboro v. Clark, 68 Maine, 37.....	28, 29
Nieholts v. Michael, 25 New York, 354.....	lxviii, 269	Noblet v. Green, 2 Devereux's Law, 517.....	lxv, 247
Nieholts v. Minneapolis, 33 Minnesota, 430.....	53, 56	Noblesville & E. G. R. Co. v. Gauss, 76 Ind. 142.....	4-6, 224
Nieholts v. MacLean, 101 New York, 636.....	54, 730	Nodine v. Greenfield, 7 Paige, 544.....	lxviii, 393
Nieholts v. McCarthy, 33 Connecticut, 299.....	55, 105	Noel v. Drake, 28 Kansas, 385.....	4-2, 123
Nieholts v. Nieholts, 28 Vermont, 223.....	lxvii, 699	Noel v. Kinney, 106 New York, 74.....	6-6, 163
Nieholts v. Nieholts, 31 Vermont, 338.....	lxviii, 352	Noelke ada. People, 94 New York, 127.....	4-6, 128
Nieholts v. Parsons, 6 New Hampshire, 30.....	lxviii, 706	Nofsinger v. Ring, 71 Missouri, 149.....	3-6, 468
Nieholts v. Patten, 18 Maine, 231.....	lxviii, 713	Nogees v. Nogees, 7 Texas, 532.....	lxviii, 473
Nieholts ada. People, 62 New York, 473.....	ii, 734	Noice v. Brown, 19 Vroom, 328.....	2-9, 389
Nieholts v. Porter, 2 W. Va. 13.....	lxv, 500	Noice v. Brown, 10 Vroom, 133.....	23, 213
Nieholts v. Reynolds, 1 Rhode Island, 30.....	lxviii, 238	Nolan v. Brooklyn C. & N. R. Co., 57 N. Y. 62.....	4-1, 346
Nieholts v. Ruggles, 3 Day, 145.....	iii, 262	Nolan v. King, 97 New York, 565.....	4-3, 581
Nieholts v. School Directors, 93 Illinois, 61.....	34, 160	Nolan v. Manton, 46 New Jersey Law, 231.....	5-6, 423
Nieholts v. Sixth Ave. R. R. Co., 33 N. Y. 131.....	lxviii, 780	Nolan v. State, 55 Georgia, 531.....	2-1, 281
Nieholts ada. State, 36 Arkansas, 74.....	7, 600	Nolan v. Traber, 49 Maryland, 460.....	3-3, 277
Nieholts ada. State, 63 Indiana, 238.....	4-3, 66	Noland v. Ringgold, 3 Harris & J. 216.....	v, 626
Nieholson v. Barnes, 11 Nebraska, 483.....	38, 373	Noland v. Wickham, 9 Alabama, 169.....	lxv, 495
Nieholson v. Combs, 30 Indiana, 515.....	46, 229	Nolan v. Harden, 43 Arkansas, 207.....	5-1, 563
Nieholson v. Cox, 33 North Carolina, 44.....	3-5, 556	Nolen v. State, 14 Tex. Ct. App. 474.....	4-6, 267
Nieholson v. Leavitt, 6 N. Y. (2 Selden), 510.....	lxvii, 499	Noles v. State, 26 Alabama, 31.....	lxviii, 711
Nieholson v. N. Y. etc. R. R. Co., 23 Conn. 74.....	lxvi, 390	Nollin v. Blackwell, 2 Vroom, 170.....	lxviii, 204
Nieholson v. State, 18 Alabama, 639.....	lxv, 163	Noll v. Smith, 64 Indiana, 511.....	5-1, 121
Nieholson v. Taylor, 31 Penn. State, 128.....	lxviii, 738	Nolton v. Western R. R. Corp., 15 N. Y. 444.....	lxix, 633
Nieholson v. Withers, 2 McCord, 426.....	lxviii, 333	Nomaque v. People, Breese, 145.....	xl, 157
Nickerson v. Bridgeport H. Co., 46 Conn. 24.....	33, 1	Noonan v. Albany, 79 New York, 476.....	5-5, 546
Nickerson v. Gilliam, 29 Missouri, 456.....	lxviii, 583	Noonan v. Haley, 17 Wisconsin, 314.....	lxviii, 743
Nickerson v. Sheldon, 33 Illinois, 372.....	lxviii, 280	Noonan v. Kemp, 34 Maryland, 73.....	6, 307
Nickles v. Haskins, 15 Alabama, 619.....	1, 154	Noonan v. Orton, 34 Wisconsin, 399.....	1-7, 441
		Noonan v. Stillwater, 33 Minnesota, 136.....	5-3, 23
		Norcross v. Griffiths, 65 Wisconsin, 599.....	5-6, 606
		Norcross v. Rodgers, 30 Vermont, 586.....	lxviii, 333
		Norcross v. Ins. Comp's, 17 Penn. State, 429.....	lv, 571
		Norcross v. Thoma, 51 Maine, 503.....	lxviii, 607
		Norcum v. Sheahan, 21 Missouri, 25.....	lxviii, 214
		Norden v. Jones, 33 Wisconsin, 606.....	14, 723

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Nordest v. Cromwell, 70 North Carolina, 634.....	16, 787
Nordest v. Riddick, 3 Devereux's Law, 231.....	xlii, 717
Norfolk, Owen v. Bk of Va., 2 Gratian, 544.....	xliv, 269
Norman v. Haisst, 8 Watts & Serg. 171.....	xi, 493
Norris v. Androssogga R. R. Co., 30 Maine, 273.....	liiii, 621
Norris v. Blair, 30 Indiana, 90.....	10, 138
Norris v. Breed, 7 Cushing, 15.....	liv, 709
Norris v. Corkill, 32 Kansas, 409.....	49, 489
Norris v. Edwards, 90 North Carolina, 323.....	47, 596
Norris v. Farmers' & T. Co., 6 California, 590.....	lxv, 638
Norris v. Hume, 2 Leigh, 334.....	xxi, 651
Norris v. Ins. Co. N. America, 3 Yeates, 84.....	ii, 309
Norris v. Litchfield, 35 New Hampshire, 271.....	lxix, 646
Norris v. Milwaukee Dock Co., 21 Wis. 120.....	xci, 464
Norris v. Norris' Adm'r, 9 Dana, 317.....	xxxv, 128
Norris v. School District, 12 Maine, 298.....	xxviii, 183
Norris v. State, 95 Ind. 12.....	63, 709
Norris v. State, 3 Humphreys, 333.....	xxxix, 175
Norris v. State, 25 Ohio State, 217.....	18, 291
Norris ada. State, 1 Haywood, 429.....	i, 564
Norris v. Taylor, 49 Illinois, 17.....	xov, 568
Norris v. Wait, 2 Richardson's Law, 148.....	xliv, 283
Norris v. Watson, 22 New Hampshire, 364.....	iv, 180
Norristown v. Fitzpatrick, 94 Penn. St. 121.....	39, 771
North v. Belden, 13 Connecticut, 376.....	xxxv, 83
North v. Mallet, 2 Haywood, 151.....	ii, 622
North v. Mendel, 78 Georgia, 400.....	54, 879
North v. Mudge & Co., 13 Iowa, 496.....	lxxxi, 441
North v. New York P. & B. R. Co., 99 Massachusetts, 220.....	xvii, 742
North v. North, 1 Barbour's Ch. 341.....	xliii, 778
North Am. Bank v. Wheeler, 28 Conn. 433.....	lxxdii, 683
North American Building Association v. Sutton, 35 Penn. State, 463.....	lxxviii, 349
North America Ins. Co. v. Burroughs, 69 Pennsylvania State, 43.....	8, 313
North American Ins. Co. v. Commonwealth, 87 Pennsylvania State, 173.....	30, 303
North America Ins. Co. v. McDowell, 50 Ill. 120.....	xcix, 497
North American Ins. Co. v. Throop, 22 Michigan, 146.....	7, 632
Northampton Bk v. Baillet, 8 Watts & S. 311.....	xlii, 297
Northampton Nat. Bank v. Kidder, 106 New York, 221.....	60, 443
North Balt. B. Ass'n v. Caldwell, 25 Md. 420.....	10, 67
North Bank v. Abbot, 13 Pickering, 465.....	xxv, 334
North Bank v. Brown, 50 Maine, 214.....	lxxix, 609
North Canal St. Road, 10 Watts, 351.....	xxxvi, 185
North Carolina Univ. v. Foy, 1 Murphy, 58.....	lii, 672
North Carolina S. L. Ins. Co. v. Williams, 91 North Carolina, 69.....	49, 637
Northern Central Ry Co. v. Husson, 101 Pennsylvania State, 1.....	47, 690
North Chicago O. & N. Y. Co. v. Lake View, 105 Illinois, 207.....	44, 798
North-Eastern R. R. Co. ada. State, 9 Richardson's L. 247.....	lxvii, 551
Northern Bk of Ky. v. Squires, 8 La. An. 318.....	liiii, 682
Northern C. R. Co. v. State, 39 Maryland, 420.....	xvii, 548
Northern C. R. Co. v. State, 31 Maryland, 357.....	c, 69
Northington Ex parte, 37 Alabama, 496.....	lxxix, 67
North Lebanon Railroad Co. v. McGrann, 33 Pennsylvania State, 530.....	lxxv, 624
North Missouri R. R. Co. v. Akers, 4 Kansas, 453.....	xvii, 183
North Missouri R. R. Co. v. Maguire, 49 Missouri, 490.....	2, 141
North Missouri R. R. Co. v. Stephens, 36 Missouri, 150.....	lxxviii, 138
North Pennsylvania Coal Co. v. Snowden, 42 Pennsylvania State 482.....	lxxii, 530
North Penn. Coal Co.'s Appeal, 45 Penn. State, 181.....	lxxiv, 697
North Pennsylvania R. R. Co. v. Adams, 54 Pennsylvania State, 94.....	xcvii, 677
North Penn. R. R. v. Helleman, 49 Penn. State, 60.....	lxxviii, 499
North Penn. R. R. v. Rehman, 49 Penn. State, 101.....	lxxviii, 491
North Presbyterian Church of Chicago v. Jevne, 33 Illinois, 214.....	lxxdii, 361
North Riv. M. Co. v. Shrewsbury Ch., 2 Zab. 424.....	lii, 268
Northrop v. Graves, 19 Connecticut, 548.....	i, 264
Northrop v. Hale, 78 Maine, 306.....	49, 613
Northrop v. Knowles, 52 Connecticut, 522.....	52, 613
Northrop v. Sanborn, 22 Vermont, 433.....	liv, 63
Northrop v. Speary, 1 Day, 23.....	ii, 42
Northrup v. Germania Fire Ins. Co., 48 Wis. 420.....	33, 815
Northrup v. Hill, 57 New York, 351.....	15, 501
Northrup v. Mississippi Val. Ins. Co., 47 Missouri, 435.....	4, 337
Northrup v. Railway P. Am. Co., 43 N. Y. 516.....	3, 726
Northrup ada. State, 48 Iowa, 583.....	36, 698
Northumberland Bk v. McMichael, 107 Penn. St. 160.....	51, 539
Northwestern Distilling Co. v. Brant, 69 Ill. 636.....	18, 621
Northwestern Ins. Co. v. Atkins, 3 Bush, 323.....	xvii, 232
Northwestern Iron Co. v. Etna Ins. Co., 23 Wisconsin, 160.....	xcix, 149
Northwestern Iron Co. v. Meade, 21 Wis. 474.....	xvii, 597
Northwestern Manuf. Co. v. Wayne C. Judge, 58 Michigan, 381.....	55, 609
Northwestern M. F. Ins. Co. v. Blankenship, 94 Indiana, 538.....	48, 188
Northwestern M. L. Ins. Co. v. Amerman, 119 Illinois, 329.....	58, 799
Northwestern M. L. Ins. Co. v. Hazlett, 105 Indiana, 212.....	55, 198
Northwestern U. P. Co. v. Shaw, 37 Wis. 656.....	19, 781
Northwestern Univ. v. People, 80 Illinois, 333.....	97, 189
North Whitehall v. Keller, 100 Pa. St. 105.....	45, 361
North Yarmouth v. Skillings, 45 Maine, 133.....	lxxi, 530
North Yarmouth v. West Gardiner, 58 Me. 207.....	4, 279
Norton v. Cook, 9 Connecticut, 314.....	xxii, 342
Norton v. Cowell, 65 Maryland, 359.....	57, 331
Norton v. Dawson, 19 La. An. 464.....	xcii, 54
Norton v. Derby Nat. Bk, 61 N. H. 569.....	60, 332
Norton v. Doherty, 3 Gray, 372.....	lxiii, 758
Norton v. Gale, 95 Illinois, 533.....	35, 173
Norton v. Hixon, 25 Illinois, 439.....	lxxix, 238
Norton v. Ladd, 5 New Hampshire, 203.....	xx, 573
Norton v. Larco, 30 California, 127.....	lxxix, 70
Norton v. Marden, 15 Maine, 45.....	lxxxi, 132
Norton v. Pettibone, 7 Connecticut, 319.....	xviii, 116
Norton v. Phoenix Mut. L. Ins. Co., 36 Connecticut, 503.....	4, 90
Norton v. Preston, 15 Maine, 14.....	lxxii, 128
Norton v. Sewall, 106 Massachusetts, 143.....	8, 296
Norton v. Shepard, 48 Connecticut, 141.....	40, 157
Norton v. Valentine, 14 Vermont, 239.....	lxxix, 230
Norton v. Webb, 36 Maine, 270.....	liiii, 748
Norton v. Winter, 1 Oregon, 47.....	xii, 297
Norvell v. Camm, 6 Munford, 233.....	viii, 742
Norvell v. Deval, 50 Missouri, 573.....	11, 413
Norvell ada. State, 2 Yarger, 24.....	xxiv, 498
Norway Plains Company v. Boston & Maine Railroad, 1 Gray, 262.....	121, 428
Norwich Fire Ins. Co. v. Boomer, 33 Ill. 443.....	4, 696
Norwood v. Byrd, 1 Richardson's Law, 138.....	xlii, 406
Norwood v. Faulkner, 22 South Carolina, 367.....	52, 717
Norwood v. Harness, 98 Indiana, 134.....	49, 798

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Noteholders Tenn. Bk v. Funding Board, 16	
Lea, 46	57, 211
Nott v. Downing, 6 Louisiana, 680	xlvi, 491
Nott v. Stoddard, 38 Vermont, 25	lxxxviii, 633
Nourse v. Prime, 4 Johnson's Ch. 490	viii, 606
Nourse v. Prime, 7 Johnson's Ch. 69	xi, 403
Nowell v. Tripp, 61 Maine, 428	14, 572
Nowell v. Wright, 3 Allen, 166	lxxx, 62
Nowlan v. Griffin, 68 Maine, 235	28, 45
Nowlan v. Colt, 8 Hill (New York), 461	xli, 758
Nowler v. Colt, 1 Ohio, 519	xlii, 640
Noyes v. Clark, 7 Paige, 179	xxxii, 630
Noyes v. Evans, 6 Vermont, 628	xxvii, 579
Noyes v. Northwestern Nat. Ins. Co., 64 Wisconsin, 415	54, 631
Noyes v. Shepherd, 30 Maine, 173	1, 625
Noyes v. Smith, 28 Vermont, 59	lxv, 222
Noyes v. Southworth, 55 Michigan, 173	54, 359
Noyes v. State, 46 Wisconsin, 250	32, 710
Noyes ada. State, 36 Connecticut, 80	4, 37
Nudd v. Montayne, 38 Wisconsin, 511	20, 25
Nugent v. Bates, 51 Iowa, 77	33, 117
Nugent v. Riley, 1 Metcalf, 117	xxxv, 355
Nugent v. Roland, 13 Martin, 659	xiii, 381
Nugent v. State, 4 Stewart & P. 72	lxiv, 746
Nugent v. Wolfe, 111 Penn. St. 471	56, 291
Nulton v. Clayton, 54 Iowa, 425	37, 213
Nunn v. Georgia R. E., 71 Georgia, 710	51, 284
Nunnery v. Carter, 5 Jones Eq. 370	lxxviii, 231
Nuesbaumer v. Becker, 87 Illinois, 281	29, 53
Nutt v. Wheeler, 30 Vermont, 436	lxxiii, 316
Nyoe's Estate, 5 Watts & Serg. 254	xi, 498
Nye v. Denny, 18 Ohio State, 246	xviii, 118
Nye v. Iowa City A. Wks, 51 Iowa, 129	33, 121
Nye v. Otis, 8 Massachusetts, 121	v, 79
Nye v. Van Huesen, 6 Michigan, 329	lxiv, 690
Oakes v. Moore, 24 Maine, 214	xli, 379
Oakes v. Spaulding, 40 Vermont, 347	xciv, 404
Oakland Cot. Man. Co. v. Jennings, 46 Cal. 175	13, 209
Oakland R. R. Co. v. Oakland, B. eta. R. R. Co., 45 California, 385	13, 181
Oakley v. Farrington, 1 Johnson's Cas. 129	i, 107
Oakley v. Hibbard, 1 Pinney, 674	xlv, 425
Oakley v. Hibbard, 2 Pinney, 21	lii, 159
Oakley v. Morton, 11 N. Y. (1 Kernan), 25	lxli, 49
Oaks v. Waller, 13 Vermont, 106	lxxvii, 583
O'Bannon v. Myers' Executors, 33 Ala. 551	lxxvi, 335
Obart v. Letson, 2 Harrison (N. J.), 78	xxxiv, 182
Obaugh v. Finn, 4 Arkansas, 110	lxxvii, 773
Ober ada. State, 53 New Hampshire, 459	13, 88
Obermyer v. Nichols, 6 Binney, 159	vi, 439
Oberndorf v. Union Bank, 31 Maryland, 126	1, 31
O'Brien v. Commonwealth, 9 Bush, 333	15, 715
O'Brien v. Barry, 106 Massachusetts, 300	8, 329
O'Brien v. Boston & W. R. R. Co., 15 Gray, 20	lxxvii, 347
O'Brien v. Boston & A. R. R. Co., 138 Mass. 387	52, 279
O'Brien v. Bound, 2 Speers' Law, 496	xlii, 384
O'Brien ada. Commonwealth, 119 Mass. 342	20, 325
O'Brien v. Elliot, 15 Maine, 125	xxxii, 137
O'Brien v. Frazer, 47 New Jersey Law, 349	54, 170
O'Brien v. Gilchrist, 34 Maine, 554	lvi, 676
O'Brien v. Norris, 16 Maryland, 122	lxxvii, 284
O'Brien v. St. Paul, 25 Minnesota, 333	33, 470
O'Brien v. Young, 85 New York, 428	47, 64
O'Bryan v. O'Bryan, 13 Missouri, 16	liii, 128
O'Byrne v. Mayor, 41 Georgia, 331	5, 532
Ocean Ins. Co. v. Francis, 2 Wendell, 64	xix, 549
O'Conley v. City of Natchez, 1 Smedes & M. 31	xi, 87
O'Connell v. Balt. eta. R. R. Co., 20 Md. 212	lxxiii, 549
O'Connell v. Duke, 29 Texas, 296	xciv, 282
O'Connell v. Lewiston, 65 Maine, 34	20, 679
O'Connell v. People, 87 New York, 377	41, 379
O'Connor, In re, 27 Wisconsin, 379	19, 785
O'Connor v. Chicago Milwaukee & St. Paul R'y Co., 27 Minnesota, 186	28, 298
O'Connor v. Fond Du Lac, A. & P. R. R. Co., 52 Wisconsin, 586	38, 754
O'Connor ada. State, 65 Missouri, 374	27, 221
O'Connor v. State, 64 Georgia, 135	37, 86
Odd Fellows' Hall v. Masser, 24 Penn. State, 507	lxiv, 673
Odd Fellows' M. A. Asso. v. James, 63 Cal. 586	49, 107
Oddie v. Nat. City Bank, 45 New York, 735	6, 169
Odell v. Culbert, 9 Watts & Serg. 66	xlii, 217
Odell v. Gray, 15 Missouri, 337	lv, 147
Odione v. New Eng. Ins. Co., 101 Mass. 551	2, 401
Odiorne's Appeal, 54 Pennsylvania State, 178	xcvii, 683
Odiorne v. Colley, 2 New Hampshire, 61	ix, 39
Odiorne v. Lyford, 9 New Hampshire, 508	lxxvii, 337
Odlin v. Gove, 41 New Hampshire, 465	lxxvii, 773
Odlin v. Stetson, 17 Maine, 244	xxxv, 249
O'Donnell v. Allegheny R. R., 59 Pa. St. 339	xcviii, 339
O'Donnell v. Leeman, 43 Maine, 158	lxix, 54
O'Donnell v. Mullin, 27 Penn. State, 199	lxvii, 453
O'Donnell v. Rodiger, 76 Alabama, 222	53, 323
O'Donnell v. Sweeney, 5 Alabama, 467	lxxix, 336
O'Donovan v. Chastard, 97 Indiana, 421	49, 463
Oertle, Estate of, 34 Minnesota, 273	57, 48
Oetgen v. Ross, 47 Illinois, 142	xov, 489
O'Fallon v. Boismann, 3 Missouri, 405	lxxvi, 679
O'Fallon v. Daggett, 4 Missouri, 943	lxxix, 649
Offerman v. Starr, 2 Penn. State, 394	lxv, 211
Officer v. Young, 5 Yerger, 320	lxviii, 289
Offutt v. Earlywine, 4 Blackford, 460	lxxxi, 49
Offutt v. John, 8 Missouri, 120	xi, 126
Offutt v. Offutt, 3 R. Monroe, 163	lxxviii, 123
O'Flaherty v. Union R. Co., 45 Missouri, 70	6, 243
Ogborn v. Francis, 15 Vroom, 441	43, 394
Ogburn v. Connor, 46 California, 346	13, 213
Ogden v. East River Ins. Co., 50 N. Y. 268	16, 492
Ogden v. Marshall, 8 N. Y. (4 Selden), 340	lx, 497
Ogden v. Peters, 21 New York, 23	lxxviii, 129
Ogden v. Raymond, 23 Connecticut, 378	lviii, 429
Ogden v. Riley, 2 Green's Law, 186	lxv, 613
Ogden v. State, 12 Wisconsin, 532	lxxviii, 754
Ogden v. Stock, 34 Illinois, 522	lxxxv, 332
Ogg v. Lansing, 35 Iowa, 495	14, 689
Ogle v. Brooks, 87 Indiana, 600	44, 778
Ogletree v. McQuagga, 67 Alabama, 560	42, 113
O'Gorman v. Fink, 57 Wisconsin, 649	46, 89
O'Hara v. Carpenter, 23 Michigan, 410	9, 89
O'Hara v. Dudley, 95 New York, 403	47, 53
O'Hear v. De Goesbriand, 33 Vermont, 593	lxxx, 629
Ohio eta. R. R. Co. v. Davis, 23 Indiana, 553	lxxxv, 677
Ohio eta. R. R. Co. v. McPherson, 25 Mo. 13	lxxxvi, 129
Ohio eta. R. R. Co. v. Muhling, 30 Illinois, 9	lxxxii, 288
Ohio eta. R. R. Co. v. Shanefelt, 47 Ill. 497	xov, 596
Ohio Life Ins. & T. Co. v. Merch. Ins. & T. Co., 11 Humph. 1	liii, 729
Ohio & M. R. Co. v. Collarn, 73 Indiana, 261	38, 136
Ohio & Mississippi R. Co. v. Dunbar, 20 Ill. 623	lxix, 229
Ohio & M. R'y Co. v. Lockey, 78 Illinois, 85	20, 239
Ohio & M. R'y Co. v. Selby, 47 Indiana, 471	17, 719
Ohio & M. R. Co. v. Swarthout, 67 Indiana, 557	32, 194
Ohio & Mississippi Railroad Co. v. Tindall, 13 Indiana, 396	lxxiv, 309
Ohio & Mississippi R'y Co. v. Yoba, 51 Ind. 121	19, 727
Ohio Falls Car Co. v. Menzies, 20 Indiana, 23	46, 126
Ohio Bank v. Lockwood, 13 W. Va. 382	31, 768
Oinson v. Heritage, 45 Indiana, 73	15, 309
Okie v. Spencer, 2 Wharton, 253	xcv, 283

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Olcott v. Little, 9 New Hampshire, 369.....xxvii, 357
 Olcott ada. People, 2 Johnson's Cas. 301.....l, 168
 Olcott v. Robinson, 21 New York, 180.....lxviii, 126
 Olcott v. Soles, 3 Vermont, 173.....xli, 585
 Olcott v. Thompson, 59 New Hampshire, 154.....47, 184
 Olcott v. Tioga R. R. Co., 20 New York, 210.....lxv, 393
 Olcott v. Tioga R. R. Co., 37 New York, 546.....lxixiv, 396
 Old Colony v. Miller, 125 Massachusetts, 1.....28, 194
 Old Colony R. R. Corp. v. Evans, 6 Gray, 25.....lxvi, 394
 Old Dominion Bank v. Dubuque & P. R. R. Co.,
 8 Iowa, 377.....lxixv, 302
 Oldham, In re, 89 North Carolina, 23.....45, 673
 Oldham v. Kerchner, 79 North Carolina, 106.....28, 302
 Oldham v. Ledbetter, 1 Howard, 43.....xxvi, 690
 Old South Soc. v. Crocker, 119 Mass. 1.....29, 239
 Olds v. Powell, 7 Alabama, 638.....xlii, 605
 Olds ada. People ex rel. Smith, 3 California, 167.....lviii, 396
 O'Leary v. Board of Ed., 93 New York, 1.....45, 156
 Olendorf v. Swartz, 5 California, 430.....lxlii, 141
 Olson v. Merrill, 20 Wisconsin, 463.....xcl, 428
 Olson v. State, 11 Nebraska, 376.....38, 368
 Olin v. Bate, 98 Illinois, 53.....38, 78
 Olyphant v. Dallas, 15 Texas, 138.....lxv, 149
 Oliver v. Berry, 83 Maine, 306.....lxixvii, 647
 Olive Cem. Co. v. Philadelphia, 93 Penn. St. 129.....39, 733
 Oliver, Information against, 21 S. C. 318.....53, 681
 Oliver v. Commonwealth, 101 Penn. St. 215.....47, 704
 Oliver v. Greene, 3 Massachusetts, 133.....lii, 86
 Oliver v. Holt, 11 Alabama, 574.....xlii, 229
 Oliver v. Houdlet, 13 Massachusetts, 237.....vii, 134
 Oliver v. Newburyport Ins. Co., 3 Mass. 37.....lii, 77
 Oliver v. Oliver, 4 Rawle, 141.....xxvi, 123
 Oliver v. Persons, 30 Georgia, 391.....lxixvi, 657
 Oliver v. Pray, 4 Ohio, 178.....xix, 596
 Oliver v. Snowden, 18 Florida, 323.....43, 338
 Oliver ada. State, 26 West Virginia, 423.....53, 79
 Oliver v. Worcester, 102 Massachusetts, 459.....3, 436
 Olmstead v. Camp, 23 Connecticut, 523.....lxixix, 221
 Olmstead v. Winsted Bank, 23 Conn. 278.....lxixv, 260
 Olney v. Angell, 5 Rhode Island, 196.....lxixii, 62
 Olney v. Fenner, 2 Rhode Island, 211.....lxvii, 711
 Olney v. Harvey, 50 Illinois, 453.....xcix, 530
 Olney v. Howe, 39 Illinois, 556.....31, 106
 Olney v. Wharf Co., 115 Illinois, 519.....54, 178
 Olson v. St. Paul F. & M. Ins. Co., 35 Minn. 432.....59, 333
 Omaha ada. State, 14 Nebraska, 265.....45, 108
 O'Maley v. Freeport, 96 Pennsylvania St. 24.....42, 227
 O'Malley v. Dorn, 7 Wisconsin, 236.....lxixiii, 403
 O'Mara v. Hudson R. R. Co., 33 New York, 448.....xviii, 61
 Omeivany v. Jagers, 2 Hill, 634.....xxvii, 417
 O'Neal v. Virginia & M. Bridge Co., 18 Md. 1.....lxixix, 669
 O'Neal v. Lodge, 3 Harris & McH. 433.....l, 377
 O'Neill v. Percival, 20 Florida, 337.....51, 634
 O'Neill v. Amest, 3 Dutcher, 291.....lxixii, 364
 O'Neill v. Bradford, 1 Pinney, 390.....xlii, 574
 O'Neill v. Henderson, 15 Arkansas, 236.....lx, 568
 O'Neill v. New Orleans, 30 La. An. 230.....31, 221
 O'Neill v. O'Neill, 18 South Carolina, 380.....44, 879
 O'Neill ada. State, 88 Vermont, 140.....56, 597
 Onstott v. Ream, 30 Indiana, 293.....xov, 696
 Ontario Bank v. Lightbody, 13 Wendell, 101.....xxvii, 179
 Onthank v. Lake Shore etc. R. Co., 71 N. Y. 194.....27, 35
 Ophir Silver M. Co. v. Carpenter, 4 Nev. 534.....xviii, 550
 Oppenheimer v. United States Ex. Co., 69 Illi-
 nols, 61.....18, 596
 Orange County Bank v. Brown, 9 Wendell, 85.....xlii, 129
 Orchard v. Williamson, 6 J. J. Marshall, 558.....xlii, 102
 Orcutt v. Carpenter, 1 Tyler, 250.....lv, 723
 Orcutt v. Moore, 124 Massachusetts, 48.....45, 278
 Ordinary of N. J. v. Thatchers, 12 Vroom, 403.....37, 225
 Ordinary v. Steedman, Harper's Law, 287.....xviii, 698
 Ordway v. Central Nat. Bank, 47 Md. 217.....38, 496
 Ordway v. Remington, 12 Rhode Island, 319.....34, 646
 Ordway v. Wilbur, 16 Maine, 263.....lxixiii, 663
 Orear v. McDonald, 9 Gill, 350.....lii, 708
 Oregon R'y & N. Co. v. Mosier, 14 Or. 519.....58, 321
 Oregon S. N. Co. v. Hale, 1 Wash. 283.....34, 303
 Oregon S. Co. v. Otis, 100 New York, 446.....53, 221
 Oregon, Territory of, v. Coleman, 1 Or. 191.....lxix, 554
 O'Reilly v. Guardian Mut. L. Ins. Co., 60 N. Y. 169.....19, 151
 O'Reilly v. People, 86 New York, 154.....46, 526
 Orem v. Wrightson, 51 Maryland, 34.....34, 326
 Oriental Bank v. Freeze, 18 Maine, 109.....lxixvi, 701
 Oriental Bank v. Haskins, 3 Metcalf, 332.....lxixvii, 149
 Orleans Bank v. Whittemore, 12 Gray, 469.....lxixviii, 605
 Orleans Nav. Co. v. Sch'r Amelia, 7 Martin, 571.....xli, 516
 Ormerod v. Dearman, 100 Pennsylvania St. 561.....45, 391
 Orman v. State, 22 Texas Ct. App. 604.....56, 693
 Ormes v. Dauchy, 82 New York, 443.....37, 683
 Ormsbee v. Boston P. R. R. Co., 14 R. I. 102.....51, 354
 Ormsbee v. Howe, 54 Vermont, 123.....41, 641
 Orndoff v. Turman, 2 Leigh, 200.....xlii, 608
 Orndorff v. Adams Exp. Co., 3 Bush, 194.....xvii, 207
 Orne v. Sullivan, 3 Howard, 161.....lxixviii, 74
 Orono, Inhab. of, v. Wedgewood, 44 Maine, 42.....lxix, 81
 O'Rourke v. Smith, 11 Rhode Island, 380.....33, 440
 Orr v. Bank of U. S., 1 Ohio, 36.....xlii, 588
 Orr v. Home Mutual Ins. Co., 13 La. An. 256.....lxixvii, 779
 Orrell v. People, 94 Illinois, 466.....34, 241
 Orrell ada. State, 1 Devereux's L. 139.....xvii, 563
 Orrock v. Commonw. Ins. Co., 21 Pick. 458.....lxixii, 271
 Orser v. Storms, 9 Cowen, 687.....xviii, 563
 Ort v. Fowler, 31 Kansas, 478.....47, 501
 Orton v. Orton, 7 Oregon, 478.....53, 717
 Ortwein v. Commonwealth, 76 Penn. St. 414.....18, 429
 Osawkee Tp. ada. State, 14 Kansas, 418.....19, 99
 Osborn v. Baird, 45 Wisconsin, 189.....39, 710
 Osborn v. Bell, 5 Denio, 370.....xlix, 278
 Osborn v. Byrne, 43 Connecticut, 155.....31, 641
 Osborn v. Cloud, 23 Iowa, 104.....xlii, 413
 Osborn v. Cook, 11 Cushing, 538.....lii, 158
 Osborn v. Farwell, 37 Illinois, 89.....39, 47
 Osborn v. Hart, 24 Wisconsin, 85.....1, 161
 Osborn v. Ordinary of Harris Co., 17 Ga. 123.....lxixii, 239
 Osborn v. Phelps, 19 Connecticut, 63.....lxixviii, 123
 Osborn & Co. v. Stanley, 35 Illinois, 102.....lxixvii, 347
 Osborne v. Baker, 34 Minnesota, 207.....57, 58
 Osborne v. Brennan, 3 Nott & McC. 427.....x, 614
 Osborne v. Endicott, 6 California, 149.....lxv, 496
 Osborne v. Knife F. R. Co., 32 Minnesota, 412.....59, 590
 Osborne v. Knox & L. R., 68 Maine, 49.....28, 16
 Osborne v. Morgan, 130 Massachusetts, 108.....39, 437
 Osborne v. Moss, 7 Johnson, 161.....v, 268
 Osburn v. Staley, 5 West Virginia, 85.....13, 649
 Osgood v. Bliss, 141 Massachusetts, 474.....55, 498
 Osgood v. Davis, 16 Maine, 146.....lxixviii, 708
 Osgood v. Franklin, 2 Johns. Ch. 1.....vii, 512
 Osgood v. Howard, 6 Greenleaf, 426.....xx, 322
 Osgood v. Lewis, 2 Harris & G. 498.....lxixviii, 317
 Osgood v. Manhattan Co., 3 Cowen, 612.....xv, 304
 O'Shea v. Collier W. L. O. Co., 42 Mo. 297.....xvii, 333
 Oslander v. Commonwealth, 2 Leigh, 780.....lxixv, 698
 Osmont v. McElrath, 68 California, 466.....58, 17
 Ostrander v. Brown, 18 Johnson, 39.....viii, 211
 O'Sullivan ada. People, 104 New York, 461.....58, 530
 Oswego Bank v. Doyle, 91 New York, 32.....43, 634
 Oswego S. F. v. Lendrum, 57 Iowa, 873.....47, 53
 Otey v. Moore, 17 Alabama, 290.....lii, 173
 Otis v. Gross, 96 Illinois, 612.....38, 167
 Otis v. Spencer, 102 Illinois, 622.....46, 617

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

People v. Supervisors, 67 New York, 109.....23, 94
 People v. Thatcher, 55 New York, 535.....14, 312
 People v. Tinder, 19 California, 536.....lxvii, 77
 People ada. Thomson, 34 Illinois, 60.....lxvii, 733
 People v. Treasurer Detroit, 8 Michigan, 14.....lxvii, 433
 People v. Troy, 73 New York, 33.....34, 500
 People v. Turner, 1 California, 143.....lxi, 395
 People v. Turner, 55 Illinois, 300.....8, 645
 People v. Tyler, 7 Michigan, 161.....lxiv, 703
 People v. U. S. Am., 23 Illinois, 30.....34, 155
 People v. Union Ins. Co., 15 Johnson, 253.....viii, 243
 People v. Van Cleave, 1 Michigan, 303.....lxi, 69
 People v. Vanderbilt, 29 New York, 306.....lxvii, 351
 People v. Vernon, 25 California, 49.....xv, 49
 People v. Vilas, 36 New York, 459.....xviii, 530
 People v. Walsh, 96 Illinois, 333.....36, 135
 People v. Wayne Circuit Court, 11 Mich. 303.....lxviii, 754
 People v. Wethoff, 51 Michigan, 303.....47, 537
 People v. West, 105 New York, 203.....60, 452
 People v. Wheeler, 60 California, 551.....44, 70
 People v. Williams, 4 Hill (N. Y.), 9.....xl, 258
 People v. Williams, 24 Michigan, 156.....9, 119
 People v. Wilson, 64 Illinois, 136.....16, 536
 People v. Woodward, 45 California, 253.....13, 175
 People v. Worthington, 21 Illinois, 171.....lxiv, 85
 People v. Wright, 33 Michigan, 744.....31, 331
 People ex rel. Barnes v. Starnes, 26 Illinois, 121.....lxv, 348
 People ex rel. Brewster v. Kiduff, 15 Illinois, 492.....lx, 769
 People ex rel. Dunn v. Boring, 8 Cal. 406.....lxviii, 331
 People ex rel. Lake v. Higgins, 3 Michigan, 233.....xl, 491
 People ex rel. Lent v. Hascall, 23 N. Y. 128.....lxviii, 176
 People ex rel. McKune v. Waller, 11 Cal. 49.....lx, 754
 People ex rel. McMillan v. Vischer, 9 Cal. 368.....lx, 655
 People ex rel. Polhemus v. Pratt, 26 Cal. 164.....lxvii, 110
 People ex rel. Smith v. Olds, 3 California, 167.....lviii, 396
 People ex rel. Smith v. Pease, 27 N. Y. 45.....lxvii, 243
 Peoples' Bank Appeal, 83 Pennsylvania St. 107.....39, 728
 Peoples' Bank v. Bogart, 51 New York, 101.....37, 431
 Peoples' Bank v. Brooks, 21 Maryland, 7.....1, 11
 Peoples' Bank v. Keech, 26 Maryland, 521.....x, 118
 Peoples' Bank v. Kurts, 90 Pennsylvania St. 344.....44, 112
 Peoples' Bank v. Legrand, 103 Penn. St. 309.....49, 138
 Peoples' Bank v. Skryock, 45 Maryland, 497.....30, 475
 Peoples' Ice Company v. Steamer Excelsior, 44
 Michigan, 229.....33, 246
 People's Ins. Co. v. Spencer, 53 Pa. St. 363.....xii, 217
 People for the Use of A. W. Neece ada. Seely
 37 Illinois, 173.....lxvii, 234
 Peoria v. Simpson, 110 Illinois, 294.....51, 663
 Peoria Bridge Ass'n v. Loomis, 20 Illinois, 236.....lxvii, 263
 Peoria, D. & E. Ry Co. v. Duggan, 109 Ill. 537.....50, 619
 Peoria & P. U. Ry Co. v. Chicago, R. I. & P. Ry
 Co., 109 Illinois, 135.....50, 606
 Pepper v. State ex rel. Harvey, 22 Ind. 359.....lxv, 450
 Pepper ada. State, 66 North Carolina, 239.....13, 637
 Pequanah Bridge v. Mathias, 7 N. H. 330.....xvi, 737
 Perdonal v. Hickey, 15 Johnson, 257.....lx, 210
 Percy v. Millendon, 6 Martin, N. S., 614.....xvii, 136
 Perouillet, Succession of, 23 Louisiana An. 294.....8, 536
 Perkins' Appeal, 106 Penn. St. 314.....54, 206
 Perkins v. Augusta I. & B. Co., 10 Gray, 312.....lxvii, 654
 Perkins v. Bailey, 99 Massachusetts, 61.....xvi, 639
 Perkins v. Cartmell, 4 Harrington, 270.....xiii, 753
 Perkins v. Catlin, 11 Connecticut, 213.....lxvii, 283
 Perkins v. Commonwealth, 7 Gratian, 651.....lvi, 123
 Perkins v. Corbin, 45 Alabama, 103.....6, 696
 Perkins v. Conant, 29 Illinois, 154.....lxvii, 305
 Perkins v. Dibble, 10 Ohio, 433.....lxvii, 97
 Perkins v. Eastern etc. R. R. Co., 29 Maine, 207.....1, 539
 Perkins v. Gay, 3 Serg. & R. 287.....viii, 653

Perkins v. Giles, 9 Leigh, 397.....lxviii, 269
 Perkins v. Gibson, 51 Mississippi, 639.....24, 644
 Perkins v. Gray, 55 Mississippi, 153.....30, 639
 Perkins v. Hackleman, 26 Mississippi, 41.....lx, 243
 Perkins v. Hays, Cooke, 163.....v, 689
 Perkins v. Inhabitants of Fayette, 68 Maine, 132.....23, 84
 Perkins v. Ladd, 114 Massachusetts, 420.....19, 374
 Perkins v. Lewis, 41 Alabama, 649.....xciv, 616
 Perkins v. Lockwood, 100 Massachusetts, 309.....1, 103
 Perkins v. Lyman, 11 Massachusetts, 76.....vi, 152
 Perkins v. Morse, 78 Maine, 17.....57, 739
 Perkins v. N. Y. Cent. & H. R. Co., 24 N. Y. 194.....lxvii, 231
 Perkins v. Perkins, 7 Connecticut, 598.....lxvii, 129
 Perkins v. Pina, 43 Maine, 141.....lxvi, 137
 Perkins v. Portland, S., and P. R. R., 47 Me. 573.....lxv, 557
 Perkins v. Proust, 47 New Hampshire, 237.....xviii, 449
 Perkins v. Rice, Little's S. O. 218.....xl, 285
 Perkins v. Rogers, 35 Indiana, 134.....9, 639
 Perkins v. State, 67 Indiana, 270.....33, 87
 Perkins v. Sterne, 23 Texas, 561.....lxvii, 71
 Perkins v. Towle, 43 New Hampshire, 220.....lxv, 149
 Perley v. Balch, 23 Pickering, 208.....lxvii, 85
 Perley v. Chandler, 6 Massachusetts, 486.....lv, 159
 Perley v. Eastern Railroad Co., 86 Mass. 614.....xvi, 645
 Perley v. Mimbegon Co., 23 Michigan, 132.....30, 637
 Perminster v. Kelly, 18 Alabama, 716.....lv, 177
 Perminster v. McDaniel, 1 Hill (S. O.), 297.....lxvi, 179
 Pernam v. Wood, 2 Massachusetts, 203.....xi, 43
 Perre v. Castro, 14 California, 519.....lxvii, 444
 Perrot v. King, 20 La. Ann. 1308.....31, 249
 Perrin v. Keane, 19 Maine, 255.....lxvii, 739
 Perrin v. Noyes, 29 Maine, 304.....lxvii, 633
 Perrin v. Protection Ins. Co., 11 Ohio, 149.....lxvii, 728
 Perrine v. Bergen, 2 Green's Law, 255.....lxvii, 39
 Perrine v. Chessman, 6 Halsted, 174.....lxv, 669
 Perrine v. Perrine, 1 Halsted, 133.....x, 259
 Perry's Appeal, 23 Penn. State, 43.....lx, 63
 Perry v. Aldrich, 18 New Hampshire, 242.....lxviii, 608
 Perry v. City of Worcester, 6 Gray, 544.....lxv, 431
 Perry v. Dickson, 105 Penn. St. 53.....51, 181
 Perry v. Dickson, 85 New York, 345.....33, 602
 Perry v. Green, 4 Harrison (N. J.), 61.....lxviii, 595
 Perry v. Harrington, 2 Metcalf, 208.....lxvii, 85
 Perry v. Hensley, 14 B. Monroe, 474.....lxv, 194
 Perry v. House of Refuge, 63 Maryland, 52.....52, 495
 Perry v. Lorillard F. Ins. Co., 61 New York, 214.....19, 273
 Perry v. New Orleans etc. R. Co. 55 Ala. 412.....23, 749
 Perry v. O'Hanlon, 11 Missouri, 595.....lxv, 109
 Perry v. Patterson, 5 Hampshire, 153.....lxv, 624
 Perry v. Phipps, 10 Iredell's Law, 269.....xi, 337
 Perry v. Price, 1 Missouri, 694.....lxv, 316
 Perry v. Roberts, 30 Indiana, 244.....xv, 609
 Perry v. Smith, 4 Yerges, 223.....lxvii, 231
 Perry ada. State, 5 Jones' Law, 9.....lxv, 709
 Perry v. Torrance, 8 Ohio, 521.....lxvii, 725
 Perry Ins. & T. Co. v. Foster, 55 Ala. 502.....23, 779
 Perryman v. McCall, 86 Alabama, 408.....61, 738
 Perryman, Ex Parte, 25 Alabama, 79.....lx, 494
 Person v. Barlow, 25 Mississippi, 174.....lxvii, 121
 Person v. Chase, 37 Vermont, 642.....lxviii, 639
 Person v. Grier, 64 New York, 124.....23, 35
 Persons v. Jones, 12 Georgia, 371.....lxvii, 476
 Persons v. McKibben, 5 Indiana, 251.....lxv, 85
 Peru and I. R. R. v. Haskell, 10 Ind. 408.....lxv, 325
 Peabine v. Shepperson, 17 Gratt. 672.....xciv, 608
 Peterborough Nat. Bank v. Childs, 130 Mass. 229.....43, 599
 Peterborough Nat. Bank v. Childs, 130 Mass. 229.....43, 599
 Peters v. Allison, 1 B. Monroe, 228.....lxvii, 574
 Peters v. Farnsworth, 15 Vermont, 155.....xl, 671
 Peters v. Henry, 6 Johnson, 121.....v, 259

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Peters v. Hobbs, 25 Arkansas, 67.....xci, 539
 Peters v. Jamestown Bridge Co., 5 Cal. 334.....lxiii, 134
 Peters v. Lake, 66 Illinois, 206.....16, 593
 Peters v. League, 13 Maryland, 58.....lxvi, 622
 Peters v. New Orleans etc. R. R., 16 La. An. 223.....lxix, 578
 Peters v. Phillips, 19 Texas, 70.....lxix, 319
 Peters v. R. R. Co., 42 Ohio St. 375.....51, 814
 Peters v. Ryland, 30 Penn. State, 497.....lx, 746
 Peters v. Siders, 126 Massachusetts, 135.....30, 671
 Peters v. Stewart, 45 Connecticut, 103.....29, 663
 Peters v. Westborough, 19 Pickering, 364.....xxxi, 142
 Petersburg v. Applegate, 28 Gratt. 321.....76, 267
 Petersburg v. Mappin, 14 Illinois, 198.....lvi, 801
 Peterson v. Stone, 119 Massachusetts, 465.....20, 335
 Peterson v. Chemical Bank, 32 N. Y. 21.....lxxxviii, 296
 Peterson v. Brown, 17 Nevada, 172.....45, 457
 Peterson v. Haffner, 59 Indiana, 130.....70, 21
 Peterson v. Johnson, 22 Wisconsin, 21.....xciv, 581
 Peterson v. Lark, 24 Missouri, 541.....lxix, 441
 Peterson v. Mississippi V. Ins. Co., 24 Iowa, 494.....xv, 748
 Peterson v. Orr, 12 Georgia, 464.....lviii, 481
 Peterson v. Roach, 33 Ohio St. 374.....30, 607
 Peterson v. Seutman, 37 Maryland, 140.....11, 534
 Peterson v. Taylor, 15 Georgia, 483.....lx, 705
 Peterson v. Union National Bank, 52 Pa. St. 206.....xci, 146
 Peterson v. Whitebreast C. & M. Co., 50 Iowa, 673.....33, 143
 Pettibon v. Hipple, 90 Illinois, 420.....32, 31
 Petition of —. See name of petitioner.
 Petrie v. Clark, 11 Serg. & R. 377.....xiv, 636
 Petties v. Prout, 3 Gray, 503.....lxiii, 778
 Pettes v. Marsh, 15 Vermont, 454.....xl, 689
 Pettibone v. Griswold, 4 Connecticut, 158.....x, 106
 Pettibone v. Phelps, 13 Connecticut, 445.....xxiv, 83
 Pettibone v. Stevens, 15 Connecticut, 19.....xxviii, 57
 Pettie ada. State, 80 North Carolina, 367.....30, 88
 Pettigrew v. Barcum, 11 Maryland, 434.....lxix, 212
 Pettigrew v. Evansville, 25 Wisconsin, 223.....3, 50
 Pettigill v. Rideout, 6 New Hampshire, 454.....xxv, 473
 Pettigill v. Moss, 3 Minnesota, 223.....lxvii, 747
 Pettigill v. Porter, 3 Allen, 1.....lxxxv, 671
 Pettit v. Shepherd, 5 Paige's Ch. 493.....xxviii, 437
 Petts v. Leon, 11 Georgia, 151.....lvi, 419
 Petty v. Fleishel, 31 Texas, 169.....xviii, 524
 Petty v. Hannum, 2 Humphreys, 102.....xxvi, 303
 Petty v. Overall, 43 Alabama, 145.....xciv, 634
 Petty v. Petty, 4 B. Monroe, 215.....xxxix, 501
 Peverly v. Boston, 136 Massachusetts, 366.....49, 37
 Peyer v. Cole, 11 Oregon, 39.....50, 451
 Peyer v. Mayor, 70 New York, 497.....26, 624
 Peyton v. Smith, 4 McCord, 476.....xvii, 758
 Pfeiffer v. Sheboygan etc. R. R. Co., 18 Wisconsin, 185.....lxxvi, 751
 Pfeiffer v. Maltby, 54 Texas, 454.....38, 631
 Pfister v. Central P. R. R. Co., 70 California, 169.....59, 404
 Phadenbauer v. Germania L. Ins. Co., 7 Holck. 567.....19, 623
 Phalan v. Clark, 19 Connecticut, 421.....1, 253
 Phares v. State, 3 West Virginia, 567.....c, 777
 Phares v. Stewart, 9 Porter, 336.....lxiii, 317
 Pharr v. Collins, 35 La. An. 939.....48, 251
 Phelley v. Steamb't David Tatam, 33 Mo. 461.....lxxxiv, 57
 Phelan v. Hutchinson, Phill. Eq. 116.....xciii, 602
 Phelan v. Moss, 67 Pennsylvania St. 59.....5, 402
 Phelps v. Borland, 103 New York, 406.....57, 755
 Phelps v. Brewer, 9 Cushing, 390.....lviii, 86
 Phelps v. Call, 7 Iredell's Law, 263.....xvii, 327
 Phelps v. Garrow, 8 Paige, 323.....lxxxv, 688
 Phelps v. Goddard, 1 Tyler, 60.....lv, 720
 Phelps v. Jepson, 1 Root, 46.....1, 33
 Phelps v. McNelly, 66 Missouri, 584.....27, 378
 Phelps v. Northup, 56 Illinois, 156.....8, 681
 Phelps v. Nowlen, 72 New York, 39.....28, 93
 Phelps v. Palmer, 15 Gray, 499.....lxxvii, 378
 Phelps v. Phelps, 72 Illinois, 545.....22, 149
 Phelps v. Racy, 60 New York, 10.....19, 140
 Phelps v. Rooney, 9 Wisconsin, 70.....lxxvi, 244
 Phelps v. Sheldon, 13 Pickering, 50.....xxiii, 659
 Phelps ada. State, 11 Vermont, 116.....lxxxiv, 672
 Phelps v. Stearns, 4 Gray, 105.....lxiv, 61
 Phelps v. Sullivan, 140 Massachusetts, 36.....54, 449
 Phelps v. Vischer, 50 New York, 69.....10, 423
 Phelps v. Walther, 78 Missouri, 330.....47, 112
 Phenix Ins. Co. v. Lamar, 106 Indiana, 513.....55, 764
 Phifer v. Carolina Central Railroad Company, 69 North Carolina, 311.....45, 657
 Phifer v. Cox, 21 Ohio St. 248.....8, 56
 Philadelphia v. Scott, 81 Pennsylvania St. 80.....27, 738
 Philadelphia and Reading R. R. Co. v. Hummel, 41 Penn. State, 375.....lxxxv, 467
 Philadelphia & R. R. Co. v. Adams, 69 Pennsylvania St. 31.....33, 728
 Philadelphia & R. R. Co. v. Anderson, 94 Pennsylvania St. 351.....39, 787
 Philadelphia & R. R. Co. v. Ervin, 69 Pennsylvania St. 71.....33, 728
 Philadelphia & R. R. Co. v. Hendrickson, 80 Pennsylvania St. 182.....21, 97
 Philadelphia and S. R. R. v. Lewis, 33 Pa. St. 33.....lxv, 574
 Philadelphia etc. R. R. Co., Case of, 6 Wharton, 25.....lxxxvi, 208
 Philadelphia etc. R. R. v. Cowell, 36 Pa. St. 329.....lx, 128
 Philadelphia etc. R. R. Co. v. Hagan, 47 Penn. State, 244.....lxxxvi, 541
 Philadelphia etc. R. R. Co. v. Sparen, 47 Penn. State, 300.....lxxxvi, 544
 Philadelphia etc. R. R. Co. ada. State, 45 Md. 361.....51, 511
 Philadelphia, City of, v. Girard's Heirs, 45 Penn. State, 9.....lxxxvi, 470
 Philadelphia C. P. R'y Co. v. Henrico, 92 Pennsylvania St. 431.....37, 689
 Philadelphia Fire and Life Insurance Co. v. Mills, 41 Penn. State, 241.....lxxxiv, 437
 Philadelphia I. & S. Co. v. Davis, 111 Penn. St. 697.....56, 305
 Philadelphia, Mayor of, v. Randolph, 4 Watts & Serg. 514.....lxxxix, 108
 Phila. Sav. Institution, Case of, 1 Wharton, 461.....xxx, 226
 Philadelphia, W. & R. R. Co. v. Hoedfish, 62 Maryland, 300.....56, 223
 Philadelphia, W. & B. R. Co. v. Hogeland, 66 Maryland, 149.....59, 138
 Philadelphia, W. & B. R. Co. v. Larkin, 47 Maryland, 155.....28, 443
 Philadelphia, W. & B. R. Co. v. Lehman, 86 Maryland, 209.....40, 415
 Philadelphia, W. & B. R. Co. v. Woolpyer, 64 Pennsylvania St. 365.....3, 596
 Philbrick v. Preble, 18 Maine, 265.....lxxxvi, 718
 Philico v. Sanford, 17 Texas, 227.....lxvii, 654
 Philomath College v. Hartless, 6 Oregon, 158.....25, 510
 Philpot v. Taylor, 75 Illinois, 309.....20, 241
 Phillips v. Berick, 16 Johnson, 138.....viii, 299
 Phillips v. Commonwealth, 2 Duval, 328.....lxxxvii, 498
 Phillips v. Morrison, 3 Bibb, 106.....vi, 638
 Phillips v. State ex rel. Harter, 5 Ohio St. 122.....lxiv, 635
 Phillips v. Allen, 41 Penn. State, 481.....lxxxii, 484
 Phillips v. Brigham, 26 Georgia, 617.....lxvi, 227
 Phillips v. Clark, 4 Met. (Ky.) 348.....lxxxviii, 471
 Phillips v. Coffee, 17 Illinois, 164.....lxvii, 357
 Phillips v. Davis, 2 Sneed, 530.....lxvi, 479
 Phillips v. Dickerson, 28 Illinois, 11.....23, 607

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Phillips v. Dugan, 21 Ohio St. 466..... 8, 66
 Phillips v. Elwell, 14 Ohio State, 240.....lxixiv, 373
 Phillips v. Graves, 30 Ohio St. 371..... 5, 675
 Phillips v. Green, 3 A. K. Marshall, 7.....xiii, 124
 Phillips v. Gregg, 10 Watts, 158.....xxvii, 158
 Phillips v. Hall, 8 Wendell, 610.....lxiv, 108
 Phillips v. Harris, 3 J. J. Marshall, 122.....xix, 166
 Phillips v. Hofer, 1 Penn. State, 62.....lxiv, 111
 Phillips v. Johnson, 7 Martin, 226.....xii, 506
 Phillips v. Kingfield, 19 Maine, 375.....xxvii, 760
 Phillips v. Lamar, 27 Georgia, 228.....lxviii, 731
 Phillips v. Louisiana Equit. L. Ins. Co., 26 La. An. 404..... 21, 549
 Phillips v. Meyers, 52 Illinois, 67..... 25, 295
 Phillips v. Phillips, 19 Georgia, 261.....lxv, 591
 Phillips v. Phillips, 48 Penn. State, 178.....lxixvi, 577
 Phillips v. Porter, 3 Arkansas, 18.....xxvii, 443
 Phillips v. Potter, 7 Rhode Island, 269.....lxviii, 568
 Phillips v. Reibohrt, 17 Indiana, 120.....lxix, 463
 Phillips v. Ronald, 3 Bush, 244.....lxvii, 216
 Phillips v. Runnels, Morris, 331.....xliii, 109
 Phillips v. Scott, 43 Missouri, 96.....xxvii, 369
 Phillips v. Smith, 1 Carolina Law Repos. 475.....vi, 542
 Phillips v. State, 9 Humphreys, 246.....xlix, 709
 Phillips ada. State, 63 Texas, 290..... 51, 646
 Phillips v. Thompson, 3 Johns. Ch. 418.....vii, 535
 Phillips v. Thorn, 84 Indiana, 84..... 43, 85
 Phillips v. Tudor, 10 Gray, 78.....lxix, 306
 Phillips v. Waterhouse, 69 Iowa, 196..... 58, 220
 Phillips v. Winslow, 18 B. Monroe, 431.....lxviii, 729
 Phillips' Academy v. Davis, 11 Massachusetts, 113.vi, 162
 Phillips' Devisees v. Beall, 9 Dana, 1.....xxviii, 518
 Phillips, Inhab. of, v. Kingfield, 19 Maine, 375.xxvii, 760
 Phillipsburg Bank v. Fulmer, 2 Vroom, 82.....lxixvi, 193
 Phillipsen v. Bates, 3 Missouri, 116.....xxii, 444
 Philly v. Sanders, 11 Ohio State, 490.....lxviii, 316
 Phinney v. Baldwin, 16 Illinois, 108.....lxi, 62
 Phinney v. Tracey, 1 Penn. State, 173.....lxiv, 116
 Phinney v. Watta, 9 Gray, 269.....lxix, 238
 Phipps v. Jones, 30 Penn. State, 260.....lix, 708
 Phipps v. McFarlane, 3 Minnesota, 109.....lxixv, 743
 Phipps v. State, 23 Maryland, 380.....lxixv, 654
 Phoebe v. Boggess, 1 Gratian, 122.....xlii, 543
 Phoenix Bank v. Curtis, 14 Connecticut, 437.....lxixvi, 492
 Phoenix Bank ada. People, 24 Wendell, 431.....lxixv, 634
 Phoenix Fire Ins. Co. v. Gurnee, 1 Paige's Ch. 373.xix, 431
 Phoenix Ins. Co. v. Allen, 11 Michigan, 501.....lxviii, 756
 Phoenix Ins. Co. v. Church, 81 New York, 218..... 37, 494
 Phoenix Ins. Co. v. Commonwealth, 5 Bush, 68.....xvii, 331
 Phoenix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9.....lxixvi, 621
 Phoenix Ins. Co. v. Moog, 78 Alabama, 284..... 56, 31
 Phoenix Ins. Co. v. Tucker, 22 Illinois, 64..... 34, 106
 Phoenix Iron Co. ada. Commonwealth, 106 Penn-
 sylvania State, 111..... 51, 184
 Phoenix M. L. Ins. Co. v. Dunham, 46 Conn. 79..... 33, 14
 Phoenix M. L. Ins. Co. v. Holloway, 81 Conn. 311.50, 20
 Phyle v. Eiley, 15 Wendell, 248.....xxx, 55
 Phyle v. Wardell, 6 Paige's Ch. 262.....lxviii, 430
 Piazek v. White, 23 Kansas, 621..... 33, 211
 Pickard v. Parley, 45 New Hampshire, 186.....lxixvi, 153
 Pickens v. Davis, 124 Massachusetts, 252..... 45, 322
 Pickens v. Diecker, 21 Ohio State, 212..... 8, 55
 Pickens v. Rymer, 30 North Carolina, 232..... 47, 521
 Pickens v. Yarrowburgh's Adm'r, 26 Alabama, 417.lxi, 728
 Pickering ada. Commonwealth, 8 Gratian, 628.....lvi, 158
 Pickering v. Cording, 29 Indiana, 206..... 47, 145
 Pickering v. Day, 3 Houst. 474.....xov, 291
 Pickering v. Orange, 1 Scammon, 493.....lxviii, 35
 Pickering v. Stapler, 5 Serg. & R. 107.....lx, 236
 Pickett v. Marston, 66 Wisconsin, 465..... 60, 577
 Pickett v. Breckenridge, 22 Pickering, 297.....lxviii, 748
 Pickett v. Doe, 5 Smades & M. 470.....xliii, 323
 Pickett v. Ferguson, 45 Arkansas, 177..... 53, 545
 Pickett v. Peay, 3 Brevard, 545.....vi, 394
 Pickett v. School District, 25 Wisconsin, 681..... 2, 105
 Pickett ada. State, 11 Nevada, 255..... 21, 724
 Pickman v. Trinity Church, 123 Mass. 1..... 23, 1
 Pico v. Columbet, 12 California, 414.....lxviii, 539
 Pico v. Webster, 14 California, 202.....lxviii, 647
 Pico v. Biddle's Executor, 35 Missouri, 28.....lxixvi, 134
 Pidoock v. Potter, 68 Pennsylvania St. 242..... 8, 181
 Piedmont C. & I. Co. v. Green, 3 W. Va. 54.....xxviii, 739
 Piedmont & A. L. Ins. Co. v. Young, 58 Ala. 476..29, 779
 Piel v. Brayer, 30 Indiana, 332.....xov, 629
 Pier v. Heinrichshoffen, 67 Missouri, 163..... 39, 581
 Pierce v. Andrews, 6 Cushing, 4..... 21, 749
 Pierce v. Benjamin, 14 Pickering, 266.....lxv, 296
 Pierce v. Boston F. C. Sav. Bank, 129 Massachu-
 setts, 425..... 27, 371
 Pierce v. Carleton, 12 Illinois, 306.....lxv, 605
 Pierce v. Cate, 12 Cushing, 190.....lx, 176
 Pierce v. Cloud, 42 Penn. State, 102.....lxviii, 496
 Pierce ada. Commonwealth, 138 Mass. 108..... 52, 264
 Pierce v. Drew, 136 Massachusetts, 75..... 49, 7
 Pierce v. Dyer, 109 Massachusetts, 274..... 12, 716
 Pierce v. Fuller, 8 Massachusetts, 223.....v, 189
 Pierce v. George, 108 Massachusetts, 79..... 11, 249
 Pierce v. Guitard, 68 California, 68..... 56, 1
 Pierce v. Hill, 35 Michigan, 194..... 24, 541
 Pierce v. Jones, 8 South Carolina, 273..... 26, 226
 Pierce v. Keator, 70 New York, 419..... 26, 232
 Pierce v. Kimball, 9 Greenleaf, 54.....xxvii, 537
 Pierce v. Kneeland, 16 Wisconsin, 673.....lxixv, 726
 Pierce v. Lamson, 5 Allen, 60.....lxixvi, 732
 Pierce v. McKeehan, 3 Penn. State, 154.....lxv, 636
 Pierce v. Massenburg, 4 Leigh, 493.....lxvii, 333
 Pierce v. Milwaukee etc. R. R. Co., 24 Wis. 551..... 1, 283
 Pierce v. Naahua Ins. Co., 50 N. H. 267..... 9, 226
 Pierce v. New Bedford, 129 Massachusetts, 284..... 37, 267
 Pierce v. O'Brien, 129 Massachusetts, 214..... 37, 269
 Pierce v. People, 106 Illinois, 11..... 44, 623
 Pierce v. Pierce, 71 New York, 154..... 37, 22
 Pierce v. Pierce, 3 Pickering, 299.....lxv, 291
 Pierce v. Pierce, 64 Wisconsin, 72..... 54, 581
 Pierce v. Richer, 16 New Hampshire, 221.....xii, 729
 Pierce v. Ridley, 1 Baxter, 145..... 25, 769
 Pierce v. Robie, 29 Maine, 206.....lxvii, 614
 Pierce v. Seymour, 52 Wisconsin, 272..... 56, 727
 Pierce v. Swan Point Cemetery, 10 R. I. 227..... 14, 687
 Pierce v. Whitcomb, 48 Vermont, 127..... 21, 129
 Piercy v. Hedrick, 2 West Virginia, 498.....xxviii, 774
 Piercy v. Sabin, 10 California, 23.....lxix, 622
 Pierre v. Fernald, 26 Maine, 431.....lxvi, 873
 Pierson v. Grimes, 30 Indiana, 129.....xov, 623
 Pierson v. Armstrong, 1 Iowa, 268.....lxvii, 449
 Pierson v. Gale, 8 Vermont, 500.....lxix, 627
 Pierson v. Glean, 2 Green's Law, 30.....lxixv, 627
 Pierson v. Hooker, 3 Johnson, 66..... 21, 627
 Pierson v. People, 79 New York, 424..... 23, 224
 Pierson ada. People, 2 Scammon, 189.....lxviii, 45
 Pierson v. Post, 3 Calmes, 175..... 2, 264
 Pierson v. Smith, 9 Ohio State, 554.....lxixv, 426
 Piester v. Piester, 23 South Carolina, 130..... 53, 711
 Piggott v. Addicks, 3 G. Greene, 427.....lvi, 547
 Pigman v. State, 14 Ohio, 655.....lxixv, 556
 Pike v. Bacon, 21 Maine, 269.....lxviii, 229
 Pike v. Balch, 36 Maine, 202.....lxix, 249
 Pike v. Brittan, 71 California, 159..... 60, 527
 Pike v. Clarke, 40 New Hampshire, 9.....lxixvi, 663
 Pike v. Emerson, 5 New Hampshire, 292.....xli, 499

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [40] to American Reports.

- Pike v. Hayes, 14 New Hampshire, 19.....xl, 171
Pike v. McDonald, 33 Maine, 418.....liv, 597
Pike v. Miles, 23 Wisconsin, 164.....xcix, 148
Pike v. Monroe, 36 Maine, 339.....lviii, 751
Pike ada. State, 49 New Hampshire, 399.....c, 833
Pike v. Thomas, 4 Bibb, 496.....vii, 741
Pile v. Pile, 6 Lea, 608.....46, 80
Pillow v. Hardeman, 3 Humphreys, 538.....xxxix, 196
Pillbury v. Dugan's Adm'r, 9 Ohio, 117.....xxiv, 427
Pillbury v. Kingon, 33 New Jersey Eq. 237.....36, 556
Pillbury v. Locke, 33 New Hampshire, 96.....lxvi, 711
Pillbury v. Moore, 44 Maine, 154.....lxix, 91
Pinchard v. Pinchard, 23 Georgia, 31.....lviii, 481
Pinckney v. Hensgen, 2 Strobbart's Law, 250.....xlix, 693
Pinckney v. Western U. Tel. Co., 19 S. C. 71.....45, 765
Pinder v. Continental Ins. Co., 38 N. Y. 364.....xvii, 796
Pinder v. Kings County Ins. Co., 38 N. Y. 648.....xviii, 544
Piny v. Washburne, 1 Alaska, 364.....xv, 676
Pinkard v. Pinkard, 14 Texas, 356.....lxv, 139
Pinkerton v. Woodward, 33 California, 557.....xci, 637
Pinnoc v. Hart, 30 Missouri, 561.....lxixvi, 625
Pinnay v. Gleason, 5 Wendell, 368.....xci, 223
Pinoek v. Clough, 16 Vermont, 800.....xlii, 631
Pino v. Merchants' Mut. Ins. Co., 19 La. An. 214.....xci, 639
Pintard v. Davis, 1 Zabrickie, 633.....xlvii, 173
Piollet v. Summers, 106 Pennsylvania St. 95.....51, 496
Piper v. Manifea, 13 B. Monroe, 468.....liv, 547
Piper v. Pearson, 3 Gray, 130.....lxi, 438
Pipes v. Hardesty, 9 Louisiana An. 183.....lxi, 303
Pipkin v. James, 1 Humphreys, 328.....xxxiv, 633
Pipkin v. Ellison, 13 Iredell's Law, 61.....lv, 403
Piquegno v. Chicago & Grand Trunk R. R. Co.,
32 Michigan, 40.....56, 243
Pirle v. Penn, 3 Dana, 247.....xxviii, 70
Piscataqua Exchange Bank v. Carter, 30 N. H. 245.....li, 217
Pitche v. Barrows, 17 Pickering, 361.....xxviii, 306
Pitcher v. Livingston, 4 Johnson, 1.....iv, 229
Pitcher v. Patrick, Minor, 331.....xii, 84
Pitkin v. Brainard, 5 Connecticut, 451.....xlii, 79
Pitkin v. Flanagan, 23 Vermont, 160.....lvi, 61
Pitkin v. I. L. R. R., 2 Barbour's Ch. 221.....lvii, 320
Pitkin v. Noyes, 48 New Hampshire, 294.....xvii, 615
Pitkin v. Noyes, 49 New Hampshire, 304.....c, 218
Pitkin v. Pitkin, 7 Connecticut, 307.....xviii, 111
Pitman v. Kimer, 5 Blackford, 260.....xxxiii, 486
Pitman ada. State, 1 Brevard, 33.....ii, 648
Pitre v. Offutt, 21 La. An. 679.....xcix, 749
Pitt v. Congdon, 3 New York (3 Const.), 392.....li, 269
Pittcock v. O'Neil, 63 Pennsylvania St. 233.....c, 544
Pitte v. Brown, 49 Vermont, 96.....34, 114
Pitte v. Bullard, 3 Georgia, 5.....xlvii, 405
Pitte v. Foglesong, 37 Ohio St. 674.....41, 540
Pitte v. McWhorter, 3 Georgia, 5.....xlvii, 405
Pitte v. Mower, 18 Maine, 361.....xxxvi, 727
Pitte v. Shubert, 11 Louisiana, 296.....xcix, 718
Pitte v. State, 13 South Carolina, 130.....32, 508
Pittsburg & O. R. R. Co. v. Byers, 33 Penn. St. 21.....lxvii, 770
Pittsburg & O. R. R. Co. v. Pillow, 79 Pennsylv-
sylvania St. 510.....18, 434
Pittsburg eta. R. Co. v. Bumstead, 48 Ill. 221.....xcv, 539
Pittsburg eta. R'y v. Gilleland, 86 Penn. St. 448.....xciv, 98
Pittsburg eta. R'y Co. v. Hinds, 53 Penn. St. 512.....xci, 234
Pittsburg eta. R'y v. McClinton, 56 Pa. St. 445.....xciv, 97
Pittsburg eta. R. Co. v. Vining, 27 Indiana, 513.....xci, 269
Pittsburg R. R. Co. ada. Commonwealth, 24 Pa. St. 129.....lxvii, 373
Pittsburgh & O. R. R. Co. v. Andrews, 39 Md. 329.....17, 568
Pittsburgh v. Orler, 32 Penn. State, 54.....lx, 65
Pittsburgh & O. R. Co. v. Sentmeyer, 92 Pennsylv-
vania St. 276.....37, 684
Pittsburgh eta. R'y Co. v. Bingham, 29 Ohio St. 364.....23, 751
Pittsburgh eta. R'y Co. v. Heck, 80 Ind. 388.....19, 713
Pittsburgh eta. R'y Co. v. Nunn, 30 Ind. 141.....19, 708
Pittsburgh, A. & M. P. R'y Co. v. McCurdy, 114
Pennsylvania St. 554.....60, 363
Pittsburgh, C. & St. L. R. Co. v. Brown, 67 In-
diana, 45.....53, 73
Pittsburgh, C. & St. L. R'y Co. v. Heck, 80 Ind.
303.....19, 713
Pittsburgh, C. & St. L. R. Co. v. Hollowell, 65 In-
diana, 189.....32, 68
Pittsburgh, C. & St. L. R. Co. v. Jones, 86 In-
diana, 496.....44, 394
Pittsburgh, C. & St. L. R. Co. v. Kirk, 108 Ind. 309.....53, 676
Pittsburgh, C. & St. L. R. Co. v. Moore, 33 Ohio
St. 324.....31, 546
Pittsburgh, C. & St. L. R. Co. v. Morton, 61 In-
diana, 339.....32, 688
Pittsburgh, C. & St. L. R. Co. v. Vandyna, 57 In-
diana, 576.....26, 98
Pittsburgh, C. & St. L. R. Co. v. Yundt, 78 In-
diana, 373.....41, 596
Pittsburgh, F. W. & C. R. Co. v. Collins, 27 Penn-
sylvania St. 406.....30, 371
Pittsburg, F. W. & C. R. R. Co. v. Comm., 66
Pennsylvania St. 73.....c, 344
Pittsburgh, F. W. & C. R. Co. v. Haas, 84 Illi-
nois, 26.....26, 428
Pittsburgh, F. W. & C. R. R. Co. v. Baby, 38
Indiana, 294.....16, 111
Pittsburgh & L. E. R. R. Co. v. Jones, 111 Penn-
sylvania St. 304.....50, 269
Pittsburgh & R. Co. v. Taylor, 104 Penn. St. 806.....49, 599
Pittsburgh Bank v. Whitehead, 10 Watts, 397.....xxvii, 186
Pitzer v. Harmon, 3 Blackford, 112.....xlv, 738
Pixler v. Nichols, 3 Iowa, 106.....lxiv, 263
Pixley v. Clark, 35 New York, 580.....xci, 72
Pixley v. Western P. R. R. Co., 33 Cal. 163.....xci, 633
Pixley v. Winehall, 7 Cowen, 366.....xvii, 806
Pizano v. State, 20 Tex. Ct. App. 129.....54, 511
Place v. Langworthy, 13 Wisconsin, 639.....xxxix, 788
Place v. McIlvaine, 35 New York, 94.....xvii, 777
Plalsted v. Boston & K. S. N. Co., 27 Maine, 128.....xvi, 587
Planter's Bank v. Calvit, 3 Smedes & M. 143.....xii, 616
Planter's Bank v. George, 6 Martin, 670.....xii, 487
Planter's Bank v. Markham, 5 Howard, 397.....xxxvii, 163
Planter's Bank v. Neely, 7 Howard (Mia.), 80.....xi, 81
Planter's Bank v. Sharp, 4 Smedes & M. 78.....xlii, 476
Planter's Bank v. White, 3 Humphreys, 113.....xxxvi, 306
Planters' Ins. Co. v. Myers, 55 Mississippi, 479.....30, 581
Planters' Ins. Co. v. Sorrels, 1 Bart. 352.....35, 780
Plants ada. State, 25 West Virginia 119.....52, 211
Plath v. Minnesota F. M. F. Ins. Ass'n 23 Min-
nesota, 479.....35, 697
Plath ada. People, 100 New York, 690.....53, 236
Platt v. Harrison, 6 Iowa, 79.....lxii, 369
Platt v. Kirk, 44 Indiana, 401.....15, 239
Platt v. Johnson, 15 Johnson, 313.....viii, 323
Platt ada. People, 17 Johnson, 196.....viii, 363
Platt v. Fotts, 11 Iredell's Law, 268.....liii, 413
Platt v. Robins, 1 Johnson's Cases, 276.....110
Platt v. Scott, 6 Blackford, 339.....xxxix, 436
Platz v. Coboes, 69 New York, 219.....45, 269
Platto v. Cady, 13 Wisconsin, 461.....lxviii, 788
Pleasants ada. State, 6 Robinson (La.), 441.....xii, 871
Pleasants v. Pendleton, 6 Randolph, 473.....xviii, 738
Pleasants v. Rom, 1 Washington, 156.....1, 449
Pleasants v. Scott, 21 Arkansas, 370.....lxvii, 408
Pledger v. Ellerbe, 6 Richardson's Law, 266.....lx, 129
Plimpton v. Farmers' M. Ins. Co., 43 Vt. 497.....c, 397
Plowman v. Riddle, 14 Alabama, 169.....xlviii, 96

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Piomb v. Cattaraugus C. M. I. Co., 18 N. Y. 392.....lxviii, 526	Ponder v. Moseley, 2 Florida, 307.....xlvi, 194
Piome v. Seward, 4 California, 94.....lx, 509	Pons v. Kelley, 2 Haywood, 45.....li, 617
Plumer v. Harper, 3 New Hampshire, 68.....xiv, 333	Pontalba v. Phoenix Ass. Co., 3 Rob. (La.) 121.....xxviii, 205
Plumer v. Lord, 9 Allen, 485.....lxxxv, 773	Pontchartrain R. R. Co. v. Paulding, 11 La. 41.....xxx, 706
Plumer v. Smith, 5 New Hampshire, 583.....xxii, 478	Pool v. Alger, 11 Gray, 489.....lxii, 736
Plumleigh v. Dawson, 1 Gilman, 544.....xii, 199	Pool v. Lewis, 41 Georgia, 163.....v, 536
Plumley v. Birge, 124 Massachusetts, 87.....26, 645	Pool v. McCrary, 1 Georgia, 319.....xlv, 686
Plummerv. Dennett, 6 Greenleaf, 421.....xx, 316	Pool v. Morris, 29 Georgia, 374.....lxxiv, 68
Plummer v. Douglas & Watson, 14 Iowa, 68.....lxxxi, 456	Pool v. Tuttle, 11 Maine, 468.....xxvi, 639
Plummer v. Gheen, 3 Hawks, 66.....xiv, 572	Poole, In re, 2 McArthur, 583.....23, 636
Plummer v. Lane, 4 Harr. & McH. 73.....i, 336	Poole v. Cox, 9 Iredell's Law, 69.....xlix, 410
Plummer v. Newdigate, 2 Duval, 1.....lxxxvii, 479	Poole v. Gerrard, 6 California, 71.....lxv, 481
Plummer v. Rigdon, 78 Illinois, 222.....20, 261	Poole v. Hennessy, 39 Iowa, 193.....18, 44
Plummer v. State, 4 Tex. Ct. App. 310.....30, 165	Poole v. Symonds, 1 New Hampshire, 289.....viii, 71
Plymouth v. Painter, 17 Connecticut, 585.....xlv, 574	Poole v. Tolleson, 1 McCord, 199.....x, 663
Plymouth R. R. v. Colwell, 39 Penn. State, 337.....lxxx, 526	Pooley v. Whitmore, 10 Hale, 639.....27, 733
Poehls v. Kemper, 14 Louisiana An. 308.....lxxiv, 433	Poor v. Guilford, 10 New York (6 Selden), 273.....xli, 749
Pocock v. Redinger, 108 Indiana, 573.....58, 71	Poor v. Humboldt Ins. Co., 125 Massachusetts, 274, 28, 226
Poe v. Dorrab, 20 Alabama, 288.....lvi, 196	Poor v. Poor, 8 New Hampshire, 307.....xlix, 664
Poeppers v. Missouri, K. & T. R'y Co., 67 Mo. 715, 29, 518	Poor ada. State, 4 Dev. & Bat. L. 364.....lxxiv, 357
Pogue v. Joyner, 6 Arkansas, 341.....xlii, 633	Poore v. Price, 5 Leigh, 63.....xxvii, 589
Poggeness v. Mkt. F. L. & T. Ins. Co., 69 Ia. 157.....58, 215	Poorman v. Kilgore, 36 Penn. State, 365.....lxvii, 435
Polander v. Henderson, Walker, 176.....xii, 530	Poorman v. Mills, 35 California, 118.....xv, 80
Polander v. McCannan, 1 Devereux's Eq. 373.....xviii, 591	Poorman v. Mills, 39 California, 345.....9, 461
Polander v. Waddy, 6 Munford, 418.....viii, 740	Pope v. Askew, 1 Iredell's Law, 16.....xxxv, 729
Polack v. Mansfield, 44 California, 36.....13, 151	Pope v. Brandon, 2 Stewart, 401.....xx, 49
Polack v. Pioche, 35 California, 416.....xv, 115	Pope v. Burlington Sav. Bank, 54 Vermont, 294.....48, 781
Poland v. Brownell, 131 Massachusetts, 138.....41, 215	Pope v. Campbell, Hardin, 51.....li, 723
Poland v. Miller, 95 Indiana, 337.....48, 730	Pope v. Cole, 55 New York, 124.....14, 196
Poland v. O'Connor, 1 Nebraska, 80.....xciii, 327	Pope v. Nance, Minor, 299.....xli, 81
Polles Jury v. Haw, 3 Louisiana, 41.....xx, 294	Pope v. Nance, 1 Stewart, 354.....xviii, 60
Polk v. Faria, 9 Yeager, 309.....xxx, 400	Popham v. Cole, 66 New York, 69.....25, 23
Polk v. Frash, 61 Indiana, 308.....28, 669	Popkin v. Bumstead, 8 Massachusetts, 491.....v, 113
Polk v. Gallant, 2 Dev. & Bat. Eq. 326.....lxxiv, 410	Poposkey v. Munkivitz, 68 Wisconsin, 322.....66, 636
Polk v. Plummer, 2 Humphreys, 500.....lxxvii, 566	Poppen v. Holmes, 44 Illinois, 360.....xvii, 126
Polk v. Rose, 25 Maryland, 183.....lxxxix, 773	Porschel v. Porschel, 83 Kentucky, 83.....56, 669
Polk v. Spinks, 5 Cold. 431.....xviii, 426	Port v. Russell, 36 Indiana, 60.....10, 6
Polk v. State, 40 Arkansas, 483.....48, 17	Porter v. Allen, 3 Indiana, 1.....lxv, 739
Polk v. State, 19 Indiana, 170.....lxxxi, 382	Porter v. Briggs, 26 Iowa, 166.....18, 27
Polk County v. Syphe, 17 Iowa, 398.....lxxxv, 548	Porter v. Byrne, 10 Indiana, 146.....lxvii, 305
Poll ada. State, 1 Hawks, 443.....ix, 655	Porter v. Chandler, 27 Minnesota, 301.....38, 233
Pollard v. Lyman, 1 Day, 156.....ii, 63	Porter v. Chicago etc. R. R. Co., 20 Illinois, 407.....lxvii, 268
Pollard v. Lumpkin, 6 Grattan, 398.....lii, 128	Porter v. Curry, 50 Illinois, 819.....lxvii, 539
Pollard v. Phoenix Ins. Co., 63 Mississippi, 244.....56, 605	Porter v. Eiam, 25 California, 391.....lxxxv, 138
Pollard v. Shaeffer, 1 Dallas, 310.....i, 239	Porter v. Foster, 20 Maine, 391.....lxxxvii, 59
Pollard v. Slaughter, 22 North Carolina, 72.....53, 402	Porter v. Haley, 55 Mississippi, 66.....30, 802
Pollard v. Secary's Administrator, 28 Ala. 484.....lxv, 364	Porter v. Hannibal & St. J. R. Co., 71 Mo. 68.....38, 664
Pollard v. State, 53 Mississippi, 410.....24, 703	Porter v. Henderson, 11 Michigan, 26.....lxviii, 59
Pollack v. Gantt, 69 Alabama, 373.....64, 519	Porter v. Hill, 9 Massachusetts, 34.....vi, 23
Pollack v. Gilbert, 16 Georgia, 398.....lx, 732	Porter v. Hooper, 13 Maine, 25.....lxix, 689
Pollack v. Helm, 54 Mississippi, 1.....28, 342	Porter v. Jackson, 95 Indiana, 210.....48, 704
Pollack v. Louisville, 13 Bush, 221.....26, 260	Porter v. Liscom, 23 California, 430.....lxxviii, 76
Pollack v. Nat. Bank, 7 N. Y. (3 Selden), 274.....lvii, 520	Porter v. Milwaukee, 19 Wis. 694.....lxxxviii, 711
Pollack v. Sullivan, 63 Vermont, 507.....38, 702	Porter v. Noyes, 3 Greenleaf, 32.....xi, 39
Pollack v. U. S. M. A. Ass'n, 102 Penn. St. 230.....48, 304	Porter v. Parkins, 5 Massachusetts, 233.....iv, 69
Pollak ada. State, 4 Iredell's Law, 305.....xlii, 140	Porter v. Pierce, 22 New Hampshire, 278.....lv, 151
Polo Manuf. Co. v. Parr, 8 Nebraska, 379.....30, 830	Porter v. Purdy, 29 New York, 106.....lxxxvi, 283
Polley v. Anderson, 7 West Virginia, 202.....23, 613	Porter v. Robinson, 3 A. K. Marshall, 583.....xlii, 153
Pomeroy v. Lambeth, 1 Iredell's Eq. 65.....lxxvi, 33	Porter v. Rose, 12 Johnson, 209.....vii, 306
Pomeroy v. Mills, 3 Vermont, 279.....xlii, 207	Porter v. Sellar, 23 Penn. State, 424.....lxii, 341
Pomeroy v. Rocky Mountain L. & S. Inst., 9 Colorado, 295.....59, 144	Porter v. Southern Ex. Co., 4 S. C. 135.....16, 37
Pomeroy v. State, 94 Indiana, 96.....48, 146	Porter v. Williams, 9 N. Y. (3 Selden), 142.....li, 519
Pomeroy v. Trimper, 8 Allen, 398.....lxxxv, 714	Porter v. Woods, 3 Humphreys, 66.....lxix, 198
Pomeroy v. Winship, 12 Massachusetts, 513.....vii, 91	Porter, Inhabitants of, v. Stanley, 7 Mo. 515.....lxxv, 801
Pomphret ada. Commonwealth, 137 Mass. 554.....50, 310	Porter's Heirs v. Porter, 7 Howard (Maine), 106.....xi, 85
Pomroy v. Parmlee, 9 Iowa, 140.....lxxiv, 328	Porterfield v. Butler, 47 Mississippi, 165.....12, 329
Pond v. Cooke, 45 Connecticut, 126.....29, 668	Portis v. Hill, 14 Texas, 69.....lxv, 96
Pond v. Gibson, 5 Allen, 19.....lxxxi, 724	Portis v. Hill, 30 Texas, 529.....xxvii, 48
Pond v. Negus, 3 Massachusetts, 230.....lii, 151	Portis v. Parker, 8 Texas, 23.....lxvii, 96
	Portland v. Bangor, 65 Maine, 190.....30, 651

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Portland v. Richardson, 84 Maine, 46.....lxix, 720
 Portland Bank v. Stacey, 4 Massachusetts, 661.....lii, 253
 Portland Bank v. Stubbs, 6 Massachusetts, 423.....iv, 151
 Portland & E. R. R. Co. v. Inhab. of Deering, 78
 Maine, 67.....57, 784
 Portland & W. V. R. R. Co. v. Portland, 14
 Oregon, 188.....36, 299
 Port Madison L. Co. v. Batavian Flk, 71 Ia. 270.....60, 789
 Portsmouth v. Donaldson, 33 Penn. State, 302.....lxii, 782
 Portwood v. State, 29 Texas, 47.....xciv, 258
 Posey ad. Commonwealth, 4 Cal. 109.....ii, 560
 Posey v. Garth, 7 Missouri, 94.....xxvii, 183
 Posey ad. State, 17 Louisiana An. 262.....lxxvii, 525
 Poss v. Western Am. Co., 7 Lea, 704.....40, 68
 Post v. Carmalt, 2 Watts & Serg. 70.....xxviii, 484
 Post v. Chicago & N. W. R. Co., 14 Neb. 110.....45, 100
 Post v. Hampshire M. F. I. Co., 12 Metcalf, 555.....xlvi, 702
 Post v. Kearney, 2 New York (2 Const), 394.....ii, 503
 Post v. Looney, 111 Indiana, 75.....60, 677
 Post v. Mason, 21 New York, 539.....43, 689
 Post v. Munn, 1 Southard, 61.....vii, 870
 Post v. Toledo, O. & St. L. R. R. Co., 144 Mas-
 achusetts, 341.....59, 86
 Postens v. Postens, 3 Watts & Serg. 122.....xxviii, 722
 Poston v. Gillespie, 5 Jones' Eq. 258.....lxxv, 437
 Poston v. Jones, 2 Iredell's Eq. 260.....lxxviii, 683
 Pote's Appeal, 106 Penn. St. 574.....51, 540
 Potette v. State, 9 Barr, 261.....40, 90
 Pott v. Nathans, 1 Watts & Serg. 155.....xxvii, 486
 Potter v. Chicago etc. Ry Co., 20 Wis. 533.....xci, 444
 Potter v. Chicago etc. Ry Co., 21 Wis. 372.....xciv, 548
 Potter v. Cromwell, 40 New York, 267.....c, 485
 Potter v. Dillon, 7 Missouri, 228.....xxvii, 185
 Potter v. Gracie, 56 Alabama, 303.....29, 748
 Potter v. Greene, 9 Gray, 309.....lix, 290
 Potter v. Hall, 3 Pickering, 368.....xv, 226
 Potter v. Lansing, 1 Johnson, 215.....lii, 310
 Potter v. Mayo, 3 Greenleaf, 34.....xiv, 211
 Potter v. Merchants' Bank, 28 New York, 641.....lxxvi, 273
 Potter ad. People, 5 Michigan, 1.....lxxi, 763
 Potter ad. State, 63 Missouri, 212.....71, 440
 Potter v. Stephens M. Co., 127 Mass. 692.....34, 428
 Potter v. Warner, 21 Penn. St. 362.....36, 668
 Potter v. Washburn, 13 Vermont, 682.....xxvii, 615
 Pottmeyer ad. State, 33 Indiana, 402.....5, 224
 Potts v. Commonwealth, 4 J. J. Marshall, 302.....xx, 213
 Potts v. Dowdall, 3 Houst. 369.....11, 757
 Potts v. Gray, 3 Cold. 468.....xci, 294
 Potts v. House, 6 Georgia, 324.....i, 329
 Potts v. Imley, 1 Southard, 330.....vii, 603
 Potts v. New York & N. E. R. Co., 131 Mas-
 achusetts, 456.....41, 247
 Potts v. Rider, 3 Ohio, 70.....xvii, 581
 Potts v. Smith, 3 Rawle, 361.....xlv, 359
 Potts ad. State, 4 Haled, 26.....xvii, 449
 Poucher v. New York C. R. R. Co., 49 N. Y. 263.....10, 364
 Powell, Ex parte, 73 Alabama, 517.....49, 71
 Powell v. Bagg, 6 Gray, 441.....lix, 262
 Powell v. Biddle, 2 Dallas, 70.....i, 263
 Powell v. Board of Ed., 97 Illinois, 375.....37, 123
 Powell v. Cheshire, 70 Georgia, 357.....48, 572
 Powell v. Commonwealth, 114 Penn. St. 265.....60, 350
 Powell v. Clark, 6 Massachusetts, 355.....iv, 67
 Powell v. Devaney, 3 Oushing, 300.....i, 738
 Powell v. Gott, 13 Missouri, 458.....liii, 153
 Powell v. Imman, 8 Jones L. 436.....lxxii, 426
 Powell v. Matthias, 4 Iredell's Law, 83.....xi, 427
 Powell v. Mills, 30 Mississippi, 231.....lxiv, 158
 Powell v. North, 3 Indiana, 332.....lvi, 513
 Powell v. Pennsylvania R. R., 32 P. St. 414.....lxxv, 564
 Powell v. Powell, 5 Bush, 619.....xcvi, 373
 Powell v. Powell, 27 Georgia, 36.....lxviii, 724
 Powell v. Powell, 18 Kansas, 371.....26, 774
 Powell v. Sims, 5 West Virginia, 1.....13, 629
 Powell v. Thomas, 7 Missouri, 440.....lxxviii, 465
 Powell v. Waldron, 89 New York, 328.....42, 301
 Powell v. Williams, 14 Alabama, 476.....lxviii, 105
 Power v. Cassidy, 79 New York, 602.....35, 530
 Power v. Kindach, 58 Wisconsin, 639.....46, 462
 Power v. Ocean Ins. Co., 19 Louisiana, 38.....lxxvi, 665
 Power ad. Commonwealth, 7 Metcalf, 596.....xli, 465
 Powers v. Bears, 12 Wisconsin, 215.....lxxviii, 733
 Powers v. Briggs, 79 Illinois, 493.....22, 175
 Powers v. Council Bluffs, 45 Iowa, 632.....24, 792
 Powers v. Davenport, 7 Blackford, 497.....xlili, 100
 Powers v. Douglas, 53 Vermont, 471.....38, 699
 Powers v. Guardian F. & L. I. Co., 136 Mass. 108.....49, 30
 Powers v. Harlow, 53 Michigan, 507.....51, 154
 Powers v. Kueckhoff, 41 Missouri, 425.....xvii, 261
 Powers v. Shepard, 21 New Hampshire, 60.....lii, 168
 Powers v. Skinner, 34 Vermont, 374.....lxxx, 677
 Powers v. Southgate, 15 Vermont, 471.....xi, 691
 Powers ad. State, 10 Oregon, 145.....45, 128
 Poweshiek Co. v. Dennison, 36 Iowa, 344.....14, 621
 Pownal v. Taylor, 10 Leigh, 173.....xxiv, 728
 Prairie F. Co. v. Taylor, 69 Illinois, 440.....18, 621
 Prater v. Miller, 25 Alabama, 220.....ix, 621
 Prather v. City of Lexington, 13 B. Monroe, 599.....lvi, 598
 Pratt v. Am. Bell Tel. Co., 141 Mass. 225.....55, 465
 Pratt v. Bank of Bennington, 10 Vermont, 298.....lxxvii, 301
 Pratt v. Chase, 44 New York, 597.....4, 718
 Pratt v. Gardner, 2 Oushing, 63.....lxviii, 692
 Pratt v. Jones, 23 Vermont, 341.....lv, 80
 Pratt v. Langdon, 97 Massachusetts, 97.....xviii, 61
 Pratt v. Marrow, 45 Missouri, 404.....c, 261
 Pratt v. New York Cent. Ins. Co., 55 N. Y. 508.....14, 304
 Pratt v. Phillips, 1 Sneed, 543.....ix, 168
 Pratt v. Pierce, 36 Maine, 448.....lviii, 758
 Pratt v. Short, 79 New York, 437.....35, 531
 Pratt v. State, 35 Ohio State, 514.....25, 617
 Pratt v. Taunton Copper Co., 123 Mass. 110.....28, 27
 Pratt v. Thornton, 28 Maine, 355.....lxviii, 692
 Pratt v. Trustees of B. Soc'y, 93 Illinois, 475.....34, 187
 Pratt v. Wright, 13 Gratian, 175.....lxvii, 767
 Pratt ad. People ex rel. Polhemus, 28 Cal-
 ifornia, 186.....lxxvii, 110
 Pratte ad. State, 8 Missouri, 226.....xi, 140
 Pray v. Pierce, 7 Massachusetts, 381.....v, 69
 Pray v. Stebbins, 141 Massachusetts, 219.....55, 462
 Preble v. Longfellow, 46 Maine, 279.....lxxvii, 227
 Pregel v. Miller, 21 South Carolina, 385.....53, 684
 Prell v. McDonald, 7 Kansas, 428.....12, 423
 Prendergast v. Prendergast, 16 Ia. An. 219.....lxix, 575
 Prentice v. Knickerbocker L. I. Co., 77 N. Y. 483, 33, 651
 Prentiss v. Commonwealth, 5 Randolph, 697.....xvi, 782
 Prentiss, Matter of, 7 Ohio, Pt. 2, 129.....xxx, 303
 Prentiss v. Bliss, 4 Vermont, 513.....xlv, 631
 Prentiss v. Brewer, 17 Wisconsin, 635.....lxxvii, 730
 Prentiss v. Danielson, 5 Connecticut, 175.....xlii, 62
 Prentiss v. Shaw, 56 Maine, 437.....xcvi, 375
 Prentiss v. Sinclair, 5 Vermont, 149.....lxvi, 268
 Prescott v. Brown, 23 Maine, 305.....lxxix, 622
 Prescott v. Carr, 29 New Hampshire, 453.....lxi, 652
 Prescott v. Fellows, 41 N. H. 9.....lxxvii, 752
 Prescott v. Locke, 51 New Hampshire, 94.....12, 55
 Prescott v. State, 19 Ohio State, 184.....2, 388
 Prescott v. Trueman, 4 Massachusetts, 627.....lii, 246
 Prescott v. Union Ins. Co., 1 Wharton, 399.....xxx, 207
 Prescott v. White, 21 Pickering, 341.....lxxii, 266
 Prescott v. Williams, 5 Metcalf, 429.....lxxix, 608

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Prescott Bank v. Caverly, 7 Gray, 217.....lxvi, 473	Prince v. Quincy, 105 Illinois, 136.....44, 75
Pres. B'k of Chillicothe v. Mayor, 7 Ohio, 51.....xxx, 185	Prince v. Skillin, 71 Maine, 351.....36, 53
Pres't of Com'l Bank v. French, 21 Pick. 486.....xxiii, 230	Princeton B'k v. Croser, 2 Zabritskie, 323.....33, 254
Pres't of Connorsville v. Wadleigh, 7 Black. 102.....xii, 214	Pringle v. Dunkley, 14 Smodes & M. 18.....33, 110
Pres't of Mt. Vernon v. Douchett, 2 Ind. 585.....lv, 407	Pringle v. Dunn, 27 Wisconsin, 449.....19, 773
Pres't of Natchez v. Minor, 9 Sm. & M. 544.....xiviii, 727	Pringle v. Leverich, 97 New York, 151.....49, 522
Pres't and Corp. B'k of Mich. v. Niles, 1 Doug. 401.....xii, 575	Pringle v. McPherson, 2 Brevard, 279.....33, 713
President etc. v. Leonhardt, 66 Maryland, 70.....59, 158	Pringle v. Rhame, 10 Richardson's L. 73.....lxvii, 549
Presley v. Davis, 7 Richardson's Eq. 105.....lxii, 396	Pringle v. Samuel, 1 Littlel, 43.....xii, 214
Premier v. State, 19 Tex. Ct. App. 53.....53, 353	Pringle v. Witten, 1 Bay, 295.....1, 512
Premley v. Kemp, 16 South Carolina, 334.....42, 635	Printup v. Mitchell, 17 Georgia, 598.....lxiii, 233
Preston v. Bowers, 13 Ohio State, 1.....lxviii, 430	Prints v. People, 48 Michigan, 144.....36, 47
Preston v. Drew, 33 Maine, 538.....liv, 639	Pritchard v. Brown, 4 New Hampshire, 387.....xvii, 43
Preston v. Hill, 50 California, 43.....19, 647	Pritchard v. Citizen's Bank, 8 La. 120.....xviii, 132
Preston v. Hull, 23 Gratt. 600.....14, 153	Pritchard v. Hewitt, 51 Missouri, 547.....69, 265
Preston v. Preston, 4 Grattan, 85.....xivii, 717	Pritchard v. Howell, 1 Wisconsin, 131.....lx, 363
Preston v. Walker, 26 Iowa, 205.....xvii, 140	Pritchard v. Wallace, 4 Speed, 405.....lx, 254
Preston v. Witherspoon, 109 Indiana, 457.....55, 417	Pritchett v. Mitchell, 17 Kansas, 255.....22, 297
Preston v. Young, 46 Michigan, 103.....41, 143	Pritchett v. State, 25 Alabama, 20.....lxvii, 239
Pretyman v. Tazewell Co., 19 Illinois, 406.....lxvi, 230	Pritchett v. State, 3 Speed, 295.....lxii, 406
Prevett v. Marsh, 1 Stewart & Porter, 17.....xvi, 645	Privett v. Bickford, 26 Kansas, 25.....40, 381
Previtt v. Garrett, 6 Alabama, 128.....xii, 40	Prizer ada. State, 49 Iowa, 531.....31, 155
Pribble v. Kent, 10 Indiana, 335.....lxvii, 337	Probate Court v. Strong, 37 Vermont, 298.....lv, 159
Price v. Alexander, 2 G. Greene, 427.....iii, 536	Proctor v. Adams, 113 Massachusetts, 376.....18, 599
Price v. Baker, 41 Indiana, 572.....13, 346	Proctor v. Ferebee, 1 Ireland's Eq. 142.....xxvii, 34
Price v. Campbell, 3 Call, 110.....1, 535	Proctor v. Jennings, 6 Nevada, 83.....3, 259
Price v. Commonwealth, 33 Gratt. 519.....36, 797	Proctor v. McCall, 2 Bailey, 292.....lxvii, 128
Price ada. Commonwealth, 10 Gray, 472.....lxvii, 698	Proctor v. Owens, 18 Indiana, 21.....lxvii, 261
Price v. Courtney, 57 Missouri, 357.....54, 453	Proprietors v. Abbott, 14 New Hampshire, 187.....21, 184
Price v. Outts, 29 Georgia, 142.....lxvii, 82	Proprietors v. Day, 7 N. Hamp. 457.....xxviii, 269
Price v. De Peau, 1 Brevard, 432.....11, 680	Proprietors v. Nashua etc. B. R., 104 Mass. 1.....6, 121
Price v. Furman, 27 Vermont, 298.....lxvii, 194	Proprietors v. Newcomb, 7 Meadell, 278.....xxviii, 779
Price v. Hartshorn, 44 New York, 94.....4, 645	Proprietors v. Permit, 6 New Hampshire, 512.....xxvi, 207
Price v. Jones, 105 Indiana, 543.....53, 230	Proprietors v. Permit, 5 New Hampshire, 260.....xx, 599
Price v. Junkin, 4 Watts, 85.....xxviii, 685	Proprietors Mexican Mill v. Yellow J. S. M. Co., 4 Nevada, 40.....xxvii, 519
Price v. Lewis, 17 Penn. State, 51.....liv, 536	Prosser v. Leatherman, 4 Howard (Miss.) 237.....lxvii, 121
Price v. Lyons Bank, 33 New York, 55.....lxviii, 363	Prosser v. Luquer, 4 Hill (N. Y.), 426.....21, 239
Price v. McDonald, 1 Maryland, 403.....liv, 657	Prosser v. Warner, 47 Vermont, 667.....19, 12
Price v. Melver, 25 Texas, 769.....lxviii, 558	Protsman v. Indianapolis B. R., 9 Ind. 467.....lxvii, 439
Price v. Oswego & S. R'y Co., 50 New York, 213.....10, 475	Prouty v. Roberts, 6 Cushing, 12.....33, 761
Price v. Phoenix M. L. Ins. Co., 17 Minn. 467.....10, 166	Providence Bank v. Wilkinson, 4 R. I. 597.....lxv, 149
Price v. Poynter, 1 Bush, 357.....lxviii, 631	Providence Gas Co. v. Thurber, 3 R. I. 15.....lv, 521
Price v. Price, Cheves' Eq. 157.....xxiv, 608	Providence v. Miller, 11 Rhode Island, 372.....23, 499
Price v. Price, 75 New York, 944.....31, 463	Providence Institution etc. v. Boston, 101 Massa- chusetts, 575.....3, 47
Price v. Ralston, 2 Dallas, 60.....1, 290	Providence S. E. Co. v. Providence etc. S. Co., 23 Rhode Island, 245.....34, 89
Price v. State, 36 Mississippi, 531.....lxvii, 195	Providence Tool Co. v. Prader, 23 California, 694.....xii, 599
Price v. State, 18 Tex. Ct. App. 474.....51, 322	Providence W. Ins. Co. v. Adler, 65 Md. 162.....57, 214
Price ada. State, 12 Gill & J. 260.....xxvii, 81	Provis v. Cheves, 9 Rhode Island, 83.....xxvii, 267
Price v. Taylor, 26 Penn. State, 95.....lxv, 105	Pruden v. Alden, 23 Pickering, 124.....xxvii, 5
Price v. Towsey, 3 Littlel, 423.....xiv, 81	Pruden v. Paxton, 79 North Carolina, 448.....26, 332
Price v. Tyson, 3 Bland Ch. 392.....xxii, 279	Pruner v. Pendleton, 75 Virginia, 518.....40, 739
Price v. Watkins, 1 Dallas, 6.....1, 222	Prutman v. Baker, 30 Wisconsin, 644.....11, 599
Price v. Wiley, 19 Texas, 142.....lxv, 323	Pryor, In re, 28 Kansas, 73.....36, 747
Pride v. Boyce, Rice's Eq. 275.....xxviii, 78	Pryor v. Adams, 1 Call, 363.....1, 533
Prichard v. Thompson, 95 New York, 76.....47, 9	Pryor v. Downey, 50 California, 369.....19, 636
Pridexaux v. Mineral Point, 43 Wisconsin, 513.....28, 558	Pryor v. Stone, 19 Texas, 371.....lxv, 240
Pridgin v. Strickland, 8 Texas, 427.....lviii, 124	Puckett v. Smith, 5 Strobbart's Law, 26.....iii, 698
Priest v. Chouteau, 55 Missouri, 296.....55, 373	Pueblo & A. V. R. Co. v. Taylor, 6 Colo. 1.....45, 512
Priest v. Cone, 51 Vermont, 495.....31, 695	Puett v. Beard, 85 Indiana, 172.....44, 299
Priest v. Rice, 1 Pickering, 164.....xi, 156	Puffer v. Orange, 123 Massachusetts, 293.....32, 369
Priest v. Watkins, 3 Hill (N. Y.), 235.....xxviii, 584	Pugh v. Bell, 2 T. B. Monroe, 125.....xv, 162
Priest v. Watson, 75 Missouri, 310.....42, 409	Pugh v. Chemseldine, 11 Ohio, 109.....xxvii, 64
Priester v. Priester, Rich Eq. Cases, 26.....xxiii, 191	Pugh v. Good, 3 Watts & Serg. 55.....xxvii, 534
Priestly v. Northern I. & C. R. E., 26 Ill. 205.....lxix, 369	Pugh ada. State, 2 Haywood, 52.....1, 692
Prince v. Breton & L. R. Co., 101 Mass. 542.....c, 129	Puitt v. Comm. of Gaston Co., 94 N. C. 709.....35, 633
Prince v. Case, 10 Connecticut, 375.....xxvii, 675	Puldifer v. Page, 32 Maine, 404.....lv, 699
Prince v. Com'l Bank of Columbus, 1 Ala. 341.....xxiv, 773	Pullan v. State, 73 Alabama, 51.....54, 21
Prince v. Hazleton, 20 Johnson, 503.....xi, 307	
Prince v. Lynch, 38 California, 523.....xcix, 427	
Prince v. Ocean Insurance Co., 40 Maine, 451.....lxiii, 676	

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Pulliam v. Burlingame, 81 Missouri, 111.....	xi, 229
Pulliam v. Withers, 8 Dana, 98.....	xxviii, 479
Pullis v. Robison, 73 Missouri, 201.....	xxix, 497
Pullman P. O. Co. v. Barker, 4 Colorado, 344.....	34, 89
Pullman P. O. Co. v. Blum, 109 Illinois, 20.....	50, 601
Pullman P. O. Co. v. Reed, 75 Illinois, 126.....	30, 233
Pullman P. O. Co. v. Smith, 73 Illinois, 360.....	24, 258
Pullman P. O. Co. v. State, 64 Texas, 274.....	53, 758
Pullman P. O. Co. v. Taylor, 66 Indiana, 153.....	32, 57
Pumpelly v. Phelps, 40 New York, 59.....	c, 463
Pumphrey v. Mayor etc. of Baltimore, 47 Maryland, 145.....	29, 446
Punderson v. Brown, 1 Day, 93.....	ii, 53
Purple v. Besolite Fire Ins. Co., 17 Wis. 378.....	lxxiv, 754
Puroell v. English, 86 Indiana, 34.....	44, 255
Puroell v. Goshorn, 17 Ohio, 106.....	xliv, 448
Puroell v. McComber, 11 Nebraska, 209.....	38, 398
Puroell v. McFarland, 1 Iredell's Eq. 34.....	xxv, 734
Puroell's Administrator v. Mather, 35 Ala. 570.....	lxxvi, 307
Purchase ada. Commonwealth, 3 Pick. 521.....	xiii, 452
Purdy v. Comm'rs of Highways, 54 N. Y. 276.....	13, 581
Purdy v. Huntington, 42 New York, 334.....	1, 532
Purdy v. Rochester P. Co., 96 New York, 372.....	48, 632
Purdy ada. State, 36 Wisconsin, 213.....	17, 488
Puri v. Duvall, 5 Harris & J. 69.....	ix, 490
Purner v. Piercy, 40 Maryland, 212.....	17, 591
Purple v. Horton, 13 Wendell, 9.....	xxvii, 167
Pursley v. Hayes, 22 Iowa, 11.....	xviii, 350
Pursley v. Morrison, 7 Indiana, 356.....	lxiii, 424
Purvis v. Tunno, 1 Brevard, 259.....	ii, 664
Purvis v. Wilson, 5 Jones' Law, 22.....	lxix, 773
Pusey v. Adams, 6 B. Monroe, 384.....	xlv, 772
Putnam v. Bond, 100 Massachusetts, 58.....	1, 82
Putnam v. Broadway etc. R. Co., 55 N. Y. 108.....	14, 198
Putnam v. Crymes, 1 McKim's L. 9.....	xxxvi, 260
Putnam v. Douglass Co., 6 Oregon, 228.....	35, 527
Putnam v. Fisher, 82 Vermont, 181.....	36, 746
Putnam v. French, 63 Vermont, 402.....	38, 623
Putnam v. Home Ins. Co., 123 Mass. 234.....	35, 93
Putnam v. Man, 3 Wendell, 202.....	xx, 686
Putnam v. Russell, 17 Vermont, 54.....	xiii, 478
Putnam ada. State, 18 South Carolina, 175.....	44, 569
Putnam v. Sullivan, 4 Massachusetts, 45.....	iii, 308
Putnam v. Wise, 1 Hill (N. Y.), 234.....	xxxvii, 309
Putnam v. Wood, 3 Massachusetts, 451.....	lxi, 179
Putnam v. Wyley, 8 Johnson, 433.....	v, 346
Putney v. Day, 6 New Hampshire, 430.....	xxv, 470
Putney v. Farnham, 27 Wisconsin, 187.....	9, 459
Pye v. Petersen, 46 Tex. 312.....	33, 603
Pylant v. Reeves, 53 Alabama, 132.....	25, 605
Pyle v. Pennock, 2 Watts & Serg. 290.....	xxxvii, 517
Pyncheon v. Stearns, 11 Metcalf, 304.....	xiv, 207
Pyncheon v. Stearns, 11 Metcalf, 312.....	xiv, 210
Pyne v. Chicago, B. and Q. R. Co., 54 Ia. 223.....	37, 198
Quackenbush v. Kingland, 102 New York, 128.....	55, 771
Quackenbush v. Van Riper, 2 Green's Ch. 250.....	xxix, 716
Quaff v. Chicago and N. W. R. Co., 48 Wis. 513.....	33, 621
Quarrier v. Peabody Ins. Co., 10 W. Va. 507.....	37, 593
Quari v. Abbott, 102 Indiana, 233.....	53, 663
Quarries v. Littlepage, 2 Hemling & M. 400.....	lii, 637
Quarrel ada. State, 2 Bay, 150.....	i, 637
Quarry Co. v. Clements, 38 Ohio St. 587.....	43, 442
Quick v. Milligan, 108 Indiana, 419.....	58, 49
Quigley v. Central Pac. R. R. Co., 11 Nevada, 250.....	31, 737
Quigley v. Gorham, 5 California, 418.....	lxiii, 139
Quigley v. McKee, 12 Oregon, 22.....	53, 320
Quigley v. Mexico Southern R.R., 80 Missouri, 289.....	56, 503
Quinby v. Vanderbilt, 17 New York, 306.....	lxvii, 469
Quin v. Stearns, 26 Georgia, 223.....	lxvi, 204
Quincy v. Barker, 81 Illinois, 300.....	35, 278
Quincy v. Hall, 1 Pickering, 357.....	xi, 198
Quincy v. Jones, 76 Illinois, 231.....	30, 243
Quincy, City of, v. Warfield, 25 Illinois, 317.....	lxix, 330
Quinebaug Bk v. Leavens, 20 Connecticut, 87.....	i, 272
Quinn v. Green, 1 Iredell's Eq. 229.....	xxxvi, 46
Quinn v. Hard, 43 Vermont, 375.....	5, 284
Quinn v. Higgins, 63 Wisconsin, 664.....	53, 305
Quinn v. People, 71 New York, 561.....	27, 87
Quinn v. Power, 87 New York, 635.....	41, 392
Quinn v. Shields, 62 Iowa, 129.....	49, 141
Quinn v. State, 35 Indiana, 485.....	9, 754
Quintard v. Knoedler, 53 Connecticut, 486.....	55, 149
Quintini v. Board of Aldermen, 64 Minn. 483.....	60, 62
Quirk Jr. Holt, 99 Massachusetts, 164.....	xxvi, 725
Quitow v. State, 1 Tex. Ct. App. 47.....	28, 206
Quynn v. Whetcroft, 3 Harris & McH. 136.....	i, 375
Rabassa v. Orleans Nav. Co., 5 Louisiana, 461.....	xiv, 200
Rabe v. Fyler, 10 Smedes & M. 440.....	xviii, 769
Race v. Oldridge, 90 Illinois, 250.....	37, 27
Racine v. Crotensberg, 61 Wisconsin, 481.....	50, 140
Racine & M. E. R. Co. v. Farmers' L. & Trust Co., 49 Illinois, 331.....	xv, 586
Radcliff v. Mayor of Brooklyn, 4 N. Y. 196.....	liii, 267
Rae ada. People, 66 California, 423.....	56, 103
Rafferty v. N. Brun. F. I. Co., 3 Har. (N. J.) 480.....	xxxviii, 535
Rafferty v. People, 69 Illinois, 111.....	18, 601
Ragan v. Aiken, 9 Lea, 609.....	42, 684
Ragland v. Morton, 41 Ala. 344.....	xci, 516
Ragland v. Wood, 71 Alabama, 145.....	46, 305
Ragsdale v. Norwood, 38 Alabama, 21.....	lxix, 79
Ragsdale v. Williams, 8 Iredell's Law, 498.....	lxix, 406
Rahb v. Attrill, 106 New York, 423.....	60, 456
Railey v. Porter, 32 Missouri, 471.....	lxviii, 141
Railroad v. Norton, 24 Penn. State, 465.....	lxv, 673
Railroad Comm'rs v. Portland & O. C. R. R. Co., 63 Maine, 269.....	18, 206
Railroad Co. v. Carr, 38 Ohio State, 448.....	43, 426
Railroad Co. v. Furnace Co., 37 Ohio St. 321.....	41, 508
Railroad Co. v. Halloran, 53 Texas, 46.....	37, 744
Railroad Co. v. Shultz, 43 Ohio State, 270.....	54, 606
Railroad Co. ada. State, 24 West Virginia, 723.....	49, 290
Railroad Co. v. Walrath, 38 Ohio State, 461.....	43, 433
Railway Co. v. Hutchins, 32 Ohio State, 571.....	30, 629
Railway Co. v. Lawrence, 38 Ohio State, 41.....	43, 419
Railroad Co. v. Skinner, 19 Penn. State, 298.....	lvii, 654
Railway Co. v. Spangle, 44 Ohio State, 471.....	58, 633
Railway Co. v. Staley, 42 Ohio State, 118.....	52, 74
Railway Co. v. Valleley, 32 Ohio State, 245.....	30, 601
Rainbolt v. East, 56 Indiana, 538.....	30, 40
Rainbolt v. Eddy, 34 Iowa, 440.....	11, 128
Raines v. Barker, 13 Grattan, 128.....	lxvii, 762
Rainey v. Link, 3 Iredell's Law, 376.....	xi, 411
Rainey v. State, 8 Texas Ct. App. 62.....	34, 736
Rainey v. Yarrowburgh, 2 Iredell's Eq. 249.....	xxxviii, 631
Rains v. Hays, 6 Lea, 303.....	40, 30
Rains v. McNairy, 4 Humphreys, 266.....	xi, 651
Rains v. Simpson, 50 Texas.....	496, 32, 609
Rains v. St. Louis etc. R. Co., 71 Missouri, 164.....	34, 459
Rainwater v. Durham, 2 Nott & McO. 524.....	i, 637
Raisin v. Clark, 41 Maryland, 158.....	30, 66
Raisler v. Springer, 38 Alabama, 708.....	lxviii, 736
Raleigh Corp. of, v. Dougherty, 3 Humph. 11.....	xxxix, 149
Ralph v. Chicago & N. E. Ry Co., 32 Wisconsin, 177.....	14, 735
Ralston v. Barclay, 6 Martin, 649.....	xii, 463
Ralston v. Lahee, 8 Iowa, 17.....	lxiv, 291
Ralston v. Miller, 3 Randolph, 44.....	xv, 704
Ralston v. Wood, 15 Illinois, 159.....	lviii, 604
Ramaley v. Leland, 43 New York, 539.....	3, 728
Rambler v. Tryon, 7 Serg. & R. 90.....	i, 444
Rambo v. Metz, 5 Strobhart's Law, 108.....	lxii, 694

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Rambo v. Wyatt's Adm'r, 32 Alabama, 363.....	lxx, 544	Rapp v. Phoenix Ins. Co., 113 Illinois, 390.....	54, 487
Ramires ada. People, 56 Cal. 533.....	38, 73	Rash ada. State, 13 Iredale's Law, 382.....	iv, 429
Ramot v. Schotenfels, 15 Iowa, 457.....	lxxviii, 425	Rasor v. Qualls, 4 Blackford, 286.....	xxx, 698
Ramsay v. Bell, 3 Iredell's Eq. 209.....	xiii, 163	Rasure v. Hart, 18 Kansas, 340.....	36, 773
Ramsay v. Brailsford, 2 Desausure, 582.....	ii, 698	Ratcliff v. Bridger, 1 Robinson (La.), 67.....	xxxvi, 683
Ramsay v. Clark, 4 Humphreys, 244.....	xi, 645	Ratcliffe v. Anderson, 31 Gratt. 105.....	31, 716
Ramsay v. Gervais, 3 Bay, 145.....	i, 635	Rath ada. State, 13 Iredell's Law, 382.....	iv, 429
Ramsay v. Joyce, 1 McMullan's Eq. 236.....	xxxvii, 550	Rathbone v. Neal, 4 Louisiana An. 583.....	i, 879
Ramsay v. Marsh, 2 McCord, 253.....	xiii, 717	Rathbun v. Citizens' S. Co., 76 N. Y. 376.....	32, 321
Ramsden v. Boston & A. R. R. Co., 104 Mass. 117.....	6, 300	Ratliff v. Baldwin, 29 Indiana, 16.....	xxii, 339
Ramondell v. Edgerton, 8 Metcalf, 237.....	xii, 503	Ratliff v. Ellis, 2 Iowa, 59.....	lxxii, 471
Ramondell v. Fuller, 28 California, 37.....	lxxxvii, 108	Rauch v. Lloyd, 31 Penn. State, 368.....	lxix, 767
Ramsey's Appeal, 2 Watts, 228.....	xxvii, 801	Rausch v. Moore, 48 Iowa, 611.....	36, 412
Ramsey v. McCauley, 9 Texas, 106.....	lviii, 134	Ravenswood v. Flemings, 22 West Virginia, 82.....	46, 485
Ramsey v. Ramsey's Executor, 13 Grattan, 664.....	lxx, 438	Raver v. Webster, 3 Iowa, 502.....	lxvi, 85
Ramsey v. Stevenson, 5 Martin, 23.....	xii, 468	Rawdon v. Rapley, 14 Arkansas, 203.....	lviii, 379
Ranahan v. O'Neale, 6 Gill & J. 298.....	xxvi, 578	Rawlings v. Commonwealth, 1 Leigh, 881.....	lxix, 737
Rand, Estate of, 61 California, 468.....	44, 555	Rawlings v. Poindexter, 14 Snodden & M. 68.....	lxix, 125
Rand ada. Commonwealth, 7 Met. 475.....	xii, 453	Rawls v. American M. I. Insurance Co., 27 New York, 323.....	lxxxiv, 369
Rand v. Hale, 3 West Virginia, 485.....	6, 761	Rawls v. Doe ex dem. Kennedy, 28 Ala. 266.....	lviii, 399
Rand v. Hubbell, 115 Massachusetts, 451.....	15, 121	Rawson v. Holland, 59 New York, 611.....	37, 394
Rand v. Mather, 11 Cushing, 1.....	lix, 131	Rawson v. Inhabitants of School District No. 8, in Uxbridge, 7 Allen, 125.....	lxxxix, 679
Rand v. North Carolina, 65 North Carolina, 194.....	6, 741	Rawson v. Pennsylvania R. R. Co., 48 N. Y. 212.....	8, 543
Rand v. Sergeant, 23 Maine, 326.....	lxxxix, 635	Rawson v. Taylor, 30 Ohio St. 389.....	37, 484
Rand ada. State, 51 New Hampshire, 361.....	12, 127	Ray v. Adden, 50 New Hampshire, 62.....	9, 175
Randall v. Bacon, 49 Vermont, 20.....	94, 100	Ray v. Bank of Kentucky, 3 B. Monroe, 516.....	lxxxix, 679
Randall v. Chubb, 46 Michigan, 311.....	41, 165	Ray v. Burbank, 61 Georgia, 365.....	34, 208
Randall v. Eastern R. R. Co., 106 Mass. 276.....	8, 337	Ray v. City of Manchester, 46 N. H. 86.....	lxxxviii, 129
Randall v. Elwell, 63 New York, 321.....	11, 747	Ray v. Hill, 3 Strobhart's Law, 297.....	lxix, 647
Randall v. Johnson, 5 Mississippi, 317.....	42, 365	Ray v. McMurtry, 20 Indiana, 307.....	lxxxviii, 323
Randall v. Kehler, 60 Maine, 37.....	11, 169	Ray v. Roe, 2 Blackford, 298.....	lxviii, 109
Randall v. Marble, 69 Maine, 310.....	31, 361	Ray v. Simmons, 11 Rhode Island, 266.....	23, 447
Randall v. N. W. Tel. Co., 54 Wisconsin, 140.....	41, 17	Ray v. State, 1 G. Green, 316.....	lxviii, 379
Randall v. Proprietors, 6 New Hamp. 147.....	xxv, 483	Ray ada. State, 63 New Hampshire, 406.....	54, 539
Randall v. Roche, 1 Vroom, 230.....	lxxxii, 233	Ray ada. State, Rice's Law, 1.....	lxxxix, 69
Randall v. Smith, 63 Maine, 105.....	18, 300	Ray v. Sweeney, 14 Bush, 1.....	29, 398
Randall ada. State, 1 Strobhart's Law, 110.....	lxvii, 548	Ray v. Thompson, 43 Alabama, 434.....	lxix, 688
Randall v. Thornton, 43 Maine, 238.....	lxix, 56	Ray v. Thompson, 12 Cushing, 261.....	lix, 187
Randall v. Van Veichten, 19 Johnson, 60.....	x, 193	Ray v. Tubbs, 50 Vermont, 638.....	36, 539
Randlette v. Jenkins, 77 Maine, 114.....	59, 747	Ray v. Wright, 119 Massachusetts, 428.....	36, 339
Randolph v. Gwynne, 3 Halsted's Ch. 88.....	ii, 365	Raymer v. Sim, 3 Harris & McH. 451.....	i, 379
Randolph v. Harris, 28 California, 561.....	lxxxvii, 139	Raymond v. Bear, 13 Serg. & R. 318.....	xv, 608
Randolph v. Perry, 3 Porter, 376.....	xxvii, 659	Raymond v. Beaudard, 12 Johnson, 274.....	vii, 317
Randolph v. Ringgold, 10 Arkansas, 279.....	lii, 236	Raymond v. City of Lowell, 6 Cushing, 594.....	lxviii, 87
Randolph v. State, 82 Alabama, 627.....	60, 761	Raymond v. Fish, 51 Connecticut, 80.....	54, 6
Rands v. Redington, 13 New Hamp. 73.....	lxxxviii, 475	Raymond v. Green, 12 Nebraska, 215.....	41, 763
Raney v. McRae, 14 Georgia, 589.....	ix, 580	Raymond v. Hillhouse, 45 Connecticut, 467.....	39, 689
Rank v. Hill, 2 Watts & Serg. 56.....	lxxxvii, 483	Raymond v. Holborn, 23 Wisconsin, 67.....	lxix, 168
Rankin v. Charles, 19 Missouri, 490.....	lxi, 574	Raymond v. Leavitt, 46 Michigan, 447.....	41, 179
Rankin v. Darnell, 11 B. Monroe, 30.....	lii, 567	Raymond v. Roberts, 2 Atkins, 204.....	xvi, 690
Rankin v. Goddard, 54 Maine, 28.....	lxxxix, 718	Raymond v. Russell, 143 Massachusetts, 295.....	56, 137
Rankin v. Maxwell, 2 A. K. Marshall, 488.....	xii, 431	Raymond v. Smith, 1 Metcalf (Ky.), 65.....	lxxi, 439
Rankin v. Memphis etc. Packet Co., 9 Helak. 564.....	94, 339	Raymond v. State, 54 Mississippi, 563.....	28, 383
Rankin v. Merchants' & M. T. Co., 73 Ga. 223.....	54, 374	Raynolds v. Carter, 12 Leigh, 165.....	lxxxvii, 643
Rankin v. Rankin, 36 Illinois, 293.....	lxxxvii, 208	Raynor v. Nims, 37 Michigan, 34.....	26, 489
Rankin v. Sanders, 6 Howard (Miss.) 53.....	lxxxviii, 431	Raynsford v. Phelps, 43 Michigan, 342.....	38, 189
Rankin v. Simpson, 19 Penn. State, 471.....	lvii, 668	Ree v. Harrington, 58 Vermont, 181.....	56, 361
Rankin ada. State, 3 South Carolina, 438.....	16, 737	Ree v. McEachron, 13 Wendell, 465.....	lxviii, 671
Rankin's Heirs v. Rankin, 6 T. B. Monroe, 631.....	lxvii, 161	Ree v. Simmons, 141 Massachusetts, 561.....	55, 493
Ranlet v. Cook, 44 New Hampshire, 512.....	lxxxiv, 92	Ree v. Tucker, 51 Illinois, 110.....	lxix, 539
Ranlett v. Blodgett, 17 New Hampshire, 298.....	xlili, 603	Reed v. Amidon, 41 Vermont, 15.....	lxviii, 589
Ransom v. Boal, 29 Iowa, 68.....	4, 195	Reed v. Bank of Kentucky, 1 T. B. Monroe, 61.....	xv, 86
Ransom v. Chicago, St. P. M. & O. R'y Co. 63 Wisconsin, 178.....	51, 718	Reed v. Cambridge, 124 Massachusetts, 687.....	26, 696
Ransom v. Mack, 3 Hill (N. Y.), 587.....	lxxxviii, 602	Reed v. Case, 4 Connecticut, 168.....	x, 119
Rape v. Heaton, 9 Wisconsin, 328.....	lxvii, 269	Reed v. Cramer, 1 Green's Ch. 277.....	lxxxiv, 204
Rapelye v. Bailey, 3 Connecticut, 438.....	vi, 199	Reed v. Cutts, 7 Greenleaf, 186.....	lxix, 124
Rapelye v. Bailey, 5 Connecticut, 149.....	xiii, 49	Reed v. Gaillard, 2 Desausure, 522.....	ii, 696
Rapelye v. Prince, 4 Hill (N. Y.), 119.....	xi, 267	Reed v. Marsh, 5 B. Monroe, 8.....	xi, 29
Rapho & W. H. Townships v. Moore, 68 Pa. St. 404.....	8, 303		

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Read v. McNulty, 12 Rich. 448.....lxviii, 467
 Read v. Payne, 3 Call. 328.....li, 550
 Read v. Spaulding, 30 New York, 630.....lxixvi, 426
 Read v. Staton, 3 Haywood, 159.....lxix, 740
 Read v. Tuttle, 35 Connecticut, 28.....xov, 216
 Read v. Wilson, 23 Illinois, 377.....lxixiv, 159
 Reads v. Comm'l. Ina. Co., 3 Johnson, 323.....lii, 495
 Reads v. Livingston, 3 Johnson's Ch. 451.....viii, 520
 Readfield v. Shaver, 50 Maine, 36.....lxix, 522
 Reading v. Commonwealth, 11 Penn. State, 196.....li, 534
 Reading v. Price, 3 J. J. Marshall, 61.....lxix, 163
 Reading v. Weston, 7 Connecticut, 143.....xviii, 89
 Reading v. Weston, 8 Connecticut, 117.....lxix, 97
 Reading Sav. Bank ada. Commonwealth, 133 Massachusetts, 16.....lxix, 495
 Reading F. Ina. & T. Co., Appeal of, 113 Pennsylvania St. 204.....lxix, 448
 Ready v. Huebner, 46 Wisconsin, 692.....lxix, 749
 Real Estate Bank ada. State, 5 Arkansas, 565.....lxix, 109
 Real Estate T. O. v. Keach, 69 New York, 243.....lxix, 131
 Ream v. Watkins, 27 Missouri, 516.....lxix, 263
 Reando v. Misplay, 90 Missouri, 261.....lxix, 59, 13
 Reaper City Ina. Co. v. Brennan, 58 Illinois, 186.....li, 54
 Reapers' Bank v. Willard, 24 Illinois, 433.....lxixvi, 755
 Reardon v. San Francisco, 68 California, 492.....lxix, 109
 Rearich v. Swinehart, 11 Penn. State, 333.....li, 540
 Reaves v. Waterman, 3 Speers' Law, 197.....lxix, 364
 Rebban v. Mueller, 114 Illinois, 343.....lxix, 55, 569
 Receivers Bank of New Brunswick v. Neilson, 3 Green's Law, 337.....lxix, 691
 Recht v. Kelly, 53 Illinois, 147.....lxix, 301
 Rector v. Collins, 46 Arkansas, 187.....lxix, 571
 Rector v. Hart, 8 Missouri, 448.....lxix, 650
 Rector v. Mark, 1 Missouri, 288.....lxix, 500
 Rector v. Purdy, 1 Missouri, 186.....lxix, 494
 Rector v. Waugh, 17 Missouri, 13.....lxix, 251
 Rector etc. Christ P. E. Church v. Mack, 93 New York, 498.....lxix, 280
 Reddall v. Bryan, 14 Maryland, 444.....lxix, 580
 Reddick v. Jones, 6 Iredell's Law, 107.....lxix, 68
 Redding v. South Carolina R. R. Co., 3 South Carolina, 1.....lxix, 651
 Redfield v. Buck, 35 Connecticut, 323.....lxix, 241
 Redington v. Chase, 44 New Hampshire, 36.....lxix, 189
 Redington v. Woods, 45 California, 405.....lxix, 130
 Redmeers ada. State, 71 Missouri, 173.....lxix, 462
 Redfield v. Holland, F. Ina. Co., 56 N. Y. 354.....lxix, 424
 Redick v. Woolworth, 17 Nebraska, 260.....lxix, 410
 Redinger ada. People, 55 California, 290.....lxix, 32
 Redlich v. Banerice, 98 Illinois, 134.....lxix, 87
 Redlich v. Doll, 54 New York, 234.....lxix, 573
 Redion v. Barker, 4 Kansas, 445.....lxix, 180
 Redion v. Churchill, 73 Maine, 146.....lxix, 345
 Redman v. Hartford F. Ina. Co., 47 Wisconsin, 69.32, 751
 Redmond v. Bowles, 5 Sneed, 547.....lxix, 153
 Redmond v. Collins, 4 Devereux's, 430.....lxix, 308
 Redmond v. Dickerson, 1 Stockton's Ch. 507.....lxix, 418
 Redmond v. Liverpool, N. Y. & Phila. S. Co., 46 New York, 573.....lxix, 7, 390
 Redmond v. Phoenix F. Ina. Co., 51 Wis. 293.....lxix, 37, 630
 Redmond v. State, 36 Arkansas, 58.....lxix, 24
 Redpath v. Western U. Tel. Co., 112 Mass. 71.....lxix, 69
 Red River B. Co. v. Mayor, 1 Sneed, 176.....lxix, 143
 Red River B. Mills v. Wright, 30 Minn. 249.....lxix, 194
 Reese v. Allen, 5 Gilman, 230.....lxix, 236
 Reese v. Austin, 9 Missouri, 723.....lxix, 336
 Reese v. Blaisdell, 16 New Hampshire, 194.....lxix, 722
 Reese v. Buckley, 5 Watts & Serg. 517.....lxix, 631
 Reese v. Bullock, Little's S. C. 510.....lxix, 345
 Reese v. Carter, 3 Blackford, 376.....lxix, 423
 Reese ada. Commonwealth, 34 Penn. State, 275.....lxix, 681
 Reese v. Copeland, 50 Connecticut, 473.....lxix, 663
 Reese v. Cramer, 111 Pennsylvania State, 423.....lxix, 295
 Reese v. Crosthwait, 6 Iowa, 219.....lxix, 406
 Reese v. Emery, 8 Paige, 417.....lxix, 730
 Reese v. Golden, 38 Kansas, 633.....lxix, 49, 130
 Reese v. Harper, 25 Iowa, 87.....lxix, 774
 Reese v. Home Sav. Bank, 130 Massachusetts, 443.....lxix, 466
 Reese v. Lewis, 74 Indiana, 433.....lxix, 39, 83
 Reese v. Lukens, 44 Pennsylvania State, 200.....lxix, 435
 Reese v. Northfield, 13 Pickering, 94.....lxix, 663
 Reese v. Pierce, 36 Maine, 455.....lxix, 761
 Reese v. Prentiss, 1 New Hampshire, 174.....lxix, 86
 Reese v. Prun, 7 Johnson, 426.....lxix, 287
 Reese v. Randall, 29 New York, 358.....lxix, 305
 Reese v. Reed, 3 Head, 491.....lxix, 777
 Reese v. Reed, 62 Michigan, 117.....lxix, 54, 247
 Reese v. Rice, 2 J. J. Marshall, 44.....lxix, 123
 Reese v. Richardson, 98 Massachusetts, 216.....lxix, 158
 Reese v. Roark, 14 Texas, 339.....lxix, 127
 Reese v. Roberts, 26 Georgia, 394.....lxix, 210
 Reese v. Samuels, 23 Texas, 114.....lxix, 253
 Reese v. Shepardon, 3 Vermont, 130.....lxix, 697
 Reese v. State, 8 Tex. Ct. App. 40.....lxix, 34, 733
 Reese v. State, 11 Tex. Ct. App. 509.....lxix, 40, 795
 Reese ada. State, 35 Maine, 439.....lxix, 727
 Reese ada. State, 39 Vermont, 417.....lxix, 337
 Reese v. Taylor, 33 Iowa, 209.....lxix, 7, 180
 Reese v. United States Ex. Co., 48 N. Y. 462.....lxix, 5, 561
 Reese v. Upton, 10 Pickering, 823.....lxix, 545
 Reese v. Vaneleve, 3 Dutcher, 382.....lxix, 369
 Reese v. Van Ostrand, 1 Wendell, 424.....lxix, 639
 Reese v. Vaughan, 15 Missouri, 137.....lxix, 133
 Reese v. Wheaton, 7 Paige's Ch. 663.....lxix, 366
 Reese v. Williams, 5 Sneed, 580.....lxix, 137
 Reeder v. Barr, 4 Ohio, 448.....lxix, 763
 Reeder v. Sayre, 70 New York, 180.....lxix, 26, 567
 Reel v. Reel, 1 Hawks, 243.....lxix, 633
 Reels v. Knight, 8 Martin, N. S., 367.....lxix, 194
 Rees v. Conococheague Bank, 5 Randolph, 298.....lxix, 755
 Rees v. Eames, 20 Illinois, 283.....lxix, 267
 Rees v. Jackson, 64 Pennsylvania State, 486.....lxix, 3, 608
 Rees v. Lawless, Little's S. C. 184.....lxix, 295
 Rees v. Ludington, 13 Wisconsin, 376.....lxix, 741
 Rees v. Smith, 1 Ohio, 134.....lxix, 599
 Rees v. Bank of Commerce, 14 Maryland, 271.....lxix, 536
 Rees v. B't Montgomery Co., 31 P. St. 78.....lxix, 726
 Rees v. Jared, 15 Indiana, 143.....lxix, 88
 Rees v. Medlock, 27 Texas, 120.....lxix, 611
 Rees v. Rees, 90 Pennsylvania State, 69.....lxix, 35, 634
 Rees v. Steamer Mary Foley, 6 La. An. 71.....lxix, 587
 Reeside v. Knox, 2 Wharton, 233.....lxix, 247
 Reesides v. Reeside, 49 Penn. State, 323.....lxix, 503
 Reeves v. Booth, 2 Mill, 534.....lxix, 671
 Reeves v. Delaware L.W. & R. R., 30 P. St. 454.....lxix, 719
 Reeves v. Dougherty, 7 Yerges, 223.....lxix, 496
 Reeves v. Hogan, Cooke, 174.....lxix, 634
 Reeves v. Sebern, 16 Iowa, 234.....lxix, 513
 Ref. Prot. Dutch Church v. Motz, 7 Paige, 77.....lxix, 613
 Regan v. Baldwin, 126 Massachusetts, 435.....lxix, 30, 689
 Reg'ta University v. Williams, 9 Gill & J. 365.....lxix, 78
 Rehberg v. Mayor etc. of N. Y., 91 N. Y. 137.....lxix, 63, 607
 Rehill v. McTague, 114 Pennsylvania State, 62.....lxix, 64, 341
 Relohart v. Castator, 5 Binney, 109.....lxix, 402
 Reichert v. Geers, 98 Indiana, 73.....lxix, 49, 736
 Reich v. State, 53 Georgia, 73.....lxix, 21, 265
 Reid v. Boyd, 13 Texas, 241.....lxix, 61
 Reid v. Colcock, 1 Nott & McC. 582.....lxix, 12, 730
 Reid v. Edwards, 7 Porter, 506.....lxix, 730
 Reid v. Gray, 37 Penn. State, 506.....lxix, 444

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Reid v. Hood, 2 Nott & McQ. 198.....	x, 582	Reynolds v. Fleming, 30 Kansas, 108.....	46, 66
Reid v. Payne, 10 Johnson, 218.....	viii, 311	Reynolds v. French, 8 Vermont, 85.....	xxx, 484
Reid v. Reid, 3 Devereux's Law, 247.....	xvii, 570	Reynolds v. Harris, 14 California, 607.....	lxvii, 499
Reid v. State, 53 Alabama, 403.....	23, 627	Reynolds v. Ingalls, 11 Smodes & M. 248.....	lxix, 57
Reid v. Strider, 7 Grattan, 76.....	liv, 120	Reynolds v. McKinney, 4 Kansas, 94.....	lxix, 600
Reid ad. State, 1 Alabama, 611.....	xxxv, 44	Reynolds v. McMullen, 55 Michigan, 608.....	54, 328
Reid ad. State, 1 Dev. & Bet. L. 377.....	xviii, 573	Reynolds v. Moore, 9 Wendell, 35.....	lxv, 118
Reier v. Strauss, 54 Maryland, 278.....	39, 330	Reynolds v. Mutual Fire Ins. Co., 34 Md. 230.....	6, 337
Reif v. Paige, 55 Wisconsin, 496.....	43, 731	Reynolds v. Ocean Ins. Co., 23 Pickering, 191.....	xxxiii, 727
Reifmeyer v. Lee, 44 Iowa, 101.....	24, 733	Reynolds v. People, 53 Illinois, 479.....	25, 419
Reigart ad. State, 1 Gill, 1.....	xxxix, 628	Reynolds v. Pool, 84 North Carolina, 37.....	37, 607
Reilly v. Franklin Ins. Co. of St. Louis, 43 Wisconsin, 449.....	38, 582	Reynolds v. Reynolds, 1 Speers' Law, 253.....	xi, 539
Reilly ad. People, 50 Michigan, 334.....	45, 47	Reynolds v. Robinson, 33 New York, 183.....	37, 335
Reimer's Appeal, 100 Pennsylvania State, 128.....	45, 373	Reynolds v. Rowley, 3 Robinson (La.), 301.....	xxxviii, 233
Reimer v. Stuber, 30 Penn. State, 458.....	lix, 744	Reynolds v. Stansbury, 30 Ohio, 344.....	iv, 489
Reinders v. Koppelman, 63 Missouri, 482.....	30, 802	Reynolds v. Toppin, 15 Massachusetts, 378.....	viii, 119
Reinhart v. Miller, 22 Georgia, 402.....	lxviii, 506	Reynolds v. Tucker, 6 Ohio State, 514.....	lxvi, 338
Reis v. Lawrence, 63 California, 120.....	49, 83	Reynolds v. Viles, 8 Wisconsin, 471.....	lxix, 238
Reitenbach v. Reitenbach, 1 Rawls, 369.....	xviii, 638	Reynolds v. Wilson, 15 Illinois, 394.....	ix, 738
Reits v. Martin, 13 Indiana, 306.....	lxix, 215	Reynolds v. Witte, 13 South Carolina, 8.....	36, 679
Reit v. Rapp, 3 Watts & Serg. 21.....	xxxvii, 538	Rhame v. Rhame, 1 McCord's Ch. 197.....	xxvi, 537
Reife v. McComb, 3 Head, 558.....	lxix, 748	Rhawn v. Pearce, 110 Illinois, 359.....	51, 681
Reife v. Reife, 34 Alabama, 500.....	lxixii, 467	Rhee v. Fowlyth, 37 Penn. State, 583.....	lxixvii, 442
Reiffance L. Co. v. Western U. Tel. Co., 38 Texas, 394.....	44, 630	Rhee v. Hughes, 1 Alabama, 219.....	xxxix, 773
Reibert v. State, 63 Alabama, 467.....	25, 639	Rheinstrom v. Coss, 26 Wisconsin, 183.....	7, 48
Reimels v. Hall, 31 Vermont, 552.....	lxvii, 140	Rhind v. Hyndman, 54 Maryland, 587.....	39, 408
Reimick v. Atkinson, 11 New Hampshire, 256.....	xxxv, 493	Rhine v. Evans, 66 Pennsylvania State, 128.....	5, 364
Reimick v. Butterfield, 31 New Hamp. 70.....	lxiv, 316	Rhinehart v. Lanco, 14 Vroom, 311.....	36, 588
Remington v. Congdon, 2 Pickering, 210.....	xiii, 431	Rhodes v. Blackiston, 108 Massachusetts, 484.....	8, 338
Remsen v. Brinckerhoff, 26 Wendell, 335.....	xxxvii, 251	Rhodes v. Gaul, 4 Rawls, 404.....	lxviii, 237
Rendell v. Harriman, 75 Maine, 497.....	46, 421	Rhodes v. Anna, 75 Maine, 17.....	46, 354
Renou v. State, 2 Lea, 720.....	31, 626	Rhodes v. City of Cleveland, 10 Ohio, 158.....	xxxvi, 66
Renfro v. Heard, 14 Alabama, 23.....	xlvi, 82	Rhodes v. Cousins, 6 Randolph, 188.....	lxviii, 715
Renick v. Bank of West Union, 13 Ohio, 298.....	xlii, 203	Rhodes v. Dunbar, 37 Penn. St. 274.....	xxviii, 231
Renick v. Boyd, 99 Pennsylvania St. 555.....	44, 124	Rhodes v. Ijames, 7 Alabama, 574.....	xlii, 694
Renihan v. Dennis, 103 New York, 573.....	57, 770	Rhodes v. Leoda, 3 Stewart & Porter, 322.....	lxix, 744
Renison's Appeal, 94 Pennsylvania St. 147.....	39, 777	Rhodes v. Lindsey, 3 Ohio, 61.....	lxvii, 689
Reno, Ex parte, 66 Missouri, 288.....	27, 337	Rhodes v. McCormick, 4 Iowa, 598.....	lxviii, 663
Reno v. Hogan, 12 R. Monroe, 63.....	lv, 513	Rhodes v. Neal, 64 Georgia, 704.....	37, 63
Rena & Sar. R. R. Co. ad. People, 15 Wend. 113.....	xxx, 33	Rhodes v. Otis, 33 Alabama, 578.....	lxviii, 439
Republic Bank v. Carrington, 5 R. I. 615.....	lxixii, 63	Rhodes v. Ristley, N. Chipman, 44 (1 D. Chipman, 58) 1, 603	
Republican Valley R. R. Co. ad. State, 17 Nebraska, 647.....	52, 424	Rhodes ad. State, Phill. L. 453.....	xxviii, 76
Requa v. Rochester, 45 New York, 129.....	6, 52	Rhodes v. Vinson, 9 Gill, 189.....	ix, 683
Rever v. Korn, 14 Serg. & R. 267.....	xvi, 497	Rhodes v. Whitehead, 27 Texas, 304.....	lxixiv, 621
Reserve Mut. Ins. Co. v. Kane, 81 Penn. St. 154.....	23, 741	Rhymer's Appeal, 93 Pennsylvania State, 142.....	39, 739
Reske v. Reske, 51 Michigan, 541.....	47, 594	Rice v. Austin, 19 Minnesota, 103.....	13, 336
Republica v. Davis, 3 Yeates, 129.....	ii, 363	Rice v. Barnard, 20 Vermont, 479.....	1, 64
Republica v. Dennis, 4 Yeates, 267.....	ii, 402	Rice v. Boyer, 106 Indiana, 472.....	54, 83
Republica v. Newell, 3 Yeates, 407.....	ii, 381	Rice v. Buncie, 49 Missouri, 231.....	6, 129
Republica v. Oswald, 1 Dallas, 319.....	i, 246	Rice ad. Burnett, 1 Speers' Eq. 879.....	xxx, 336
Republica v. Passmore, 3 Yeates, 441.....	ii, 368	Rice v. Chase, 9 New Hampshire, 178.....	xxxii, 346
Remondie v. Byers, 23 Wisconsin, 650.....	38, 775	Rice v. Coolidge, 121 Massachusetts, 388.....	23, 279
Revalk v. Kraemer, 8 California, 68.....	lxviii, 304	Rice v. Courtis, 23 Vermont, 469.....	lxviii, 397
Revels ad. State, 34 Louisiana An. 361.....	44, 436	Rice v. Outler, 17 Wisconsin, 361.....	lxixiv, 747
Revere v. Powell, 61 Georgia, 30.....	34, 94	Rice v. Evansville, 106 Indiana, 7.....	54, 33
Revolving Scraper Co. v. Tuttle, 61 Iowa, 423.....	47, 816	Rice v. Garnhart, 24 Wisconsin, 683.....	17, 446
Rew v. Barker, 3 Cowen, 408.....	xiv, 515	Rice v. Gove, 23 Pickering, 188.....	xxxviii, 724
Rey v. Toney, 24 Missouri, 600.....	lxix, 444	Rice v. Hart, 118 Massachusetts, 201.....	19, 439
Reybold v. Dodd's Adm'r, 1 Harrington, 401.....	xxvi, 401	Rice v. King Philip Mills, 144 Massachusetts, 228.....	54, 89
Reyburn v. Brackett and Bassett, 2 Kan. 227.....	lxixiii, 487	Rice v. Manley, 66 New York, 83.....	23, 89
Reynolds, Matter of, 8 Rhode Island, 435.....	5, 615	Rice v. Maxwell, 13 Smodes & M. 269.....	lxii, 66
Reynolds v. Adams, 90 Illinois, 134.....	33, 15	Rice v. Nickerson, 9 Allen, 478.....	lxixv, 777
Reynolds v. Cleveland, 4 Cowen, 222.....	xv, 369	Rice v. Nixon, 97 Indiana, 97.....	69, 439
Reynolds ad. Commonwealth, 14 Gray, 87.....	lxixiv, 668	Rice v. Ragland, 10 Humphreys, 548.....	lxii, 737
Reynolds ad. Commonwealth, 120 Mass. 190.....	31, 510	Rice v. Railroad Co., 23 Ohio State, 389.....	39, 699
Reynolds v. Dechaums, 24 Texas, 174.....	lxixv, 101	Rice v. Roberts, 24 Wisconsin, 461.....	1, 136
Reynolds v. Ellis, 108 New York, 115.....	57, 701	Rice v. Shook, 27 Arkansas, 137.....	11, 708
		Rice v. Simmons, 2 Harrington (Del.), 417.....	xxxii, 708
		Rice v. Spotswood, 6 T. B. Monroe, 46.....	xvii, 118
		Rice v. Stearns, 3 Massachusetts, 228.....	lxii, 129

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Rice v. Tavernier, 6 Minnesota, 248.....	lxviii, 778	Richeson v. Ryan, 14 Illinois, 74.....	lvi, 488
Rice v. Thayer, 106 Massachusetts, 258.....	7, 516	Richie ada. State, 23 La. An. 327.....	98, 100
Rice v. Township of Sidney, 44 Michigan, 37.....	38, 237	Richmond v. Cradup, Meigs, 581.....	xxxiii, 184
Rice v. Wilburn, 31 Arkansas, 108.....	25, 549	Richmond v. Moore, 107 Illinois, 429.....	47, 445
Rice v. Wood, 113 Massachusetts, 133.....	18, 459	Richmond & D. R. Co. v. Anderson, 31 Gratt. 812.31, 750	
Rich v. Bolton, 46 Vermont, 84.....	14, 615	Richmond & D. R. Co. v. Medley, 75 Va. 499.....	40, 734
Rich v. Johnson, 3 Pinney, 88 (1 Chand. 19).....	lii, 144	Richmond, Duke of, v. Milne, 17 La. 312.....	xxxvi, 613
Rich v. Marsh, 4 Ireland's Eq. 396.....	xiv, 530	Richmond etc. R. R. Co. v. Sneed, 19 Gratt. 354.....	o, 670
Rich v. State Nat. Bank, 7 Nebraska, 301.....	29, 382	Richmond etc. R. R. Co. ada. State, 73 North	
Rich v. Zedleroff, 23 Wisconsin, 544.....	xxix, 81	Carolina, 537.....	21, 473
Richard v. Bent, 59 Illinois, 38.....	14, 1	Richmond F. & P. R. R. Co. v. Ashby, 79 Va. 130.52, 620	
Richard v. Brehm, 73 Pennsylvania St. 140.....	13, 733	Richmond Man. Co. v. Atlantic DeLaine Co., 10	
Richard's Appeal, 57 Penn. St. 106.....	xviii, 202	Rhode Island, 106.....	14, 658
Richards ada. Commonwealth, 18 Pick. 434.....	xxix, 608	Rickenbacker v. Zimmerman, 10 S. O. 110.....	30, 37
Richards v. Doyle, 36 Ohio St. 37.....	38, 550	Ricker v. Charter Oak L. Ins. Co., 27 Minn. 183.....	38, 299
Richards v. Fuqua, 28 Mississippi, 792.....	lxiv, 121	Ricker v. Cross, 5 New Hampshire, 570.....	xxii, 480
Richards v. Griggs, 16 Missouri, 416.....	lvii, 240	Ricker v. Freeman, 50 New Hampshire, 420.....	9, 267
Richards v. Grinnell, 63 Iowa, 44.....	50, 727	Ricker v. Kelly, 1 Greenleaf, 117.....	x, 38
Richards v. Hubbard, 69 New Hampshire, 158.....	47, 189	Rickets v. Dickens, 1 Murphey, 343.....	lv, 555
Richards v. Hunt, 6 Vermont, 261.....	xxvii, 545	Rickets v. Livingston, 3 Johnson's Cases, 97.....	l, 158
Richards v. Iowa Homestead Co., 44 Iowa, 304.....	24, 745	Rickets v. Simon, 9 Dana, 383.....	xxxv, 141
Richards v. Jackson, 31 Maryland, 250.....	1, 49	Rickets v. Unangst, 15 Penn. State, 90.....	liii, 673
Richards v. Leaning, 27 Illinois, 431.....	lxvii, 239	Ridabock v. Levy, 8 Paige, 197.....	xxxv, 682
Richards v. McMillan, 6 California, 419.....	lxv, 621	Riddle v. Brown, 20 Alabama, 412.....	lvi, 302
Richards v. Meeks, 11 Humphreys, 465.....	liv, 49	Riddle v. Dixon, 2 Penn. State, 372.....	xlv, 207
Richards ada. People, 67 California, 412.....	56, 716	Riddle v. Gage, 37 New Hampshire, 619.....	lxv, 151
Richards ada. People, 1 Michigan, 216.....	ii, 75	Riddle v. Littlefield, 63 New Hampshire, 503.....	16, 388
Richards v. Raymond, 92 Illinois, 612.....	34, 151	Riddle v. Proprietors, 7 Massachusetts, 169.....	v, 35
Richardson v. Borden, 42 Mississippi, 71.....	2, 695	Riddle v. Stevens, 22 Connecticut, 278.....	lxviii, 181
Richardson v. Boynton, 12 Allen, 136.....	xc, 141	Rider v. Gray, 10 Maryland, 282.....	lxix, 135
Richardson v. Briker, 7 Colorado, 58.....	49, 344	Rider v. Kelley, 22 Vermont, 268.....	lxvii, 176
Richardson v. Buswell, 10 Metcalf, 506.....	xlvi, 450	Rider v. Nelson and A. U. F., 7 Leigh, 154.....	xxx, 495
Richardson v. Cambridge, 2 Allen, 118.....	lxix, 767	Rider v. White, 65 New York, 54.....	92, 800
Richardson v. Carr, 4 Harrington, 142.....	xxv, 65	Ridgely v. Iglehart, 6 Gill & Johnson, 49.....	xxx, 322
Richardson v. Chickering, 41 N. H. 351.....	lxvii, 769	Ridgely ada. State, 2 Harris & McH. 120.....	i, 372
Richardson v. Clements, 89 Penn. St. 503.....	33, 794	Ridge way Budd & Co.'s Appeal, 15 Pa. 54. 177.....	liii, 586
Richardson ada. Commonwealth, 126 Mass. 34.....	30, 674	Ridgeway v. Potter, 114 Illinois, 457.....	58, 675
Richardson v. Cook, 37 Vermont, 599.....	lxviii, 622	Ridgway v. Farmers' Bank, 12 Serg. & R. 256.....	xiv, 681
Richardson v. Copeland, 6 Gray, 536.....	lxvi, 424	Ridgway v. Ingram, 50 Indiana, 145.....	10, 704
Richardson v. Eagle M. Works, 78 Indiana, 422.....	41, 584	Ridgway v. Mastins, 23 Ohio State, 294.....	13, 251
Richardson v. Emerson, 3 Wisconsin, 319.....	lxii, 694	Rife v. Geyer, 59 Penn. St. 393.....	xxviii, 351
Richardson v. Farmer, 36 Missouri, 35.....	lxviii, 129	Rigg v. Cook, 4 Gilman, 336.....	xvi, 468
Richardson v. Hobart, 1 Stewart, 500.....	xviii, 70	Rigg v. Wilton, 13 Illinois, 15.....	liv, 419
Richardson v. Hughtitt, 76 New York, 55.....	32, 267	Riggin v. Green, 80 North Carolina, 226.....	30, 77
Richardson v. Johnson, 41 Wisconsin, 100.....	22, 712	Riggin v. Patapeco Ins. Co., 7 Harris & J. 279.....	xvi, 302
Richardson v. Jones, 3 Gill & Johnson, 163.....	xxii, 293	Riggs ada. Commonwealth, 14 Gray, 376.....	lxvii, 333
Richardson v. Kier, 34 California, 63.....	xc, 681	Riggs v. Denniston, 3 Johnson's Cases, 198.....	ii, 145
Richardson v. Leavitt, 1 Louisiana An. 430.....	xiv, 90	Riggs v. Dickinson, 2 Scammon, 437.....	xxxv, 113
Richardson v. Maine Ins. Co. 6 Mass. 102.....	iv, 92	Riggs v. Horde, 25 Texas Supp. 456.....	lxviii, 584
Richardson v. Maine Ins. Co., 46 Maine, 394.....	lxv, 459	Riggs v. Martin, 5 Arkansas, 506.....	xii, 103
Richardson v. Marquesa, 59 Mississippi, 80.....	42, 353	Riggs v. Riggs, 135 Massachusetts, 238.....	46, 484
Richardson v. McKinson, Littell's S. O. 390.....	xii, 308	Riggs v. Roberts, 85 North Carolina, 151.....	39, 682
Richardson v. Noyes, 2 Massachusetts, 56.....	lii, 94	Riggs v. State, 3 Cold. 85.....	xc, 272
Richardson v. Pate, 93 Indiana, 423.....	47, 374	Riggs v. Waldo, 2 California, 496.....	lv, 388
Richardson v. Reed, 4 Gray, 441.....	lxiv, 77	Rigs v. Caga, 2 Humphreys, 360.....	xxxvii, 589
Richardson v. Rice, 9 Barr. 280.....	40, 92	Riker v. Hooper, 35 Vermont, 467.....	lxviii, 646
Richardson v. Rich, 104 Massachusetts, 158.....	6, 210	Riker v. Sprague Man. Co., 14 Rhode Island, 402.51, 413	
Richardson v. Richardson, 75 Maine, 870.....	40, 428	Riley v. City of Louisville, 2 Louisiana An. 965.....	xvii, 560
Richardson v. Richardson, 6 Ohio, 125.....	xxv, 745	Riley v. Griffin, 16 Georgia, 141.....	ix, 726
Richardson v. Richardson, 4 Porter, 467.....	xxx, 538	Riley v. Jameson, 3 New Hampshire, 23.....	xiv, 326
Richardson v. Sibley, 11 Allen, 65.....	lxvii, 700	Riley v. Quigley, 50 Illinois, 304.....	xxix, 516
Richardson v. Snider, 72 Indiana, 425.....	37, 168	Riley v. Riley, 3 Day, 74.....	li, 288
Richardson v. St. Joseph I. Co., 5 Blackf. 148.....	xxxiii, 460	Riley v. State Line S. Co., 29 La. An. 791.....	99, 348
Richardson ada. State, 38 New Hamp. 208.....	lxv, 173	Riley v. Whitthier, 49 New Hampshire, 145.....	6, 474
Richardson v. Strong, 18 Ireland's Law, 106.....	iv, 430	Rimer v. Dugan, 39 Mississippi, 477.....	lxvii, 687
Richardson v. Thomas, 13 Gray, 381.....	lxiv, 636	Rinehey v. Stryker, 23 New York, 45.....	lxvii, 334
Richardson v. Tobey, 121 Massachusetts, 467.....	23, 283	Rindge v. Baker, 67 New York, 209.....	18, 475
Richardson v. Vermont Central R. R., 25 Vt. 465.....	ix, 283	Rindskopf v. Malone, 9 Iowa, 540.....	lxvii, 367
Richardson v. Wyman, 63 Maine, 230.....	16, 459	Rindskopf v. De Buyter, 36 Michigan, 1.....	33, 246
Richard v. Scott, 7 Watts, 460.....	xxxii, 779	Rinehart v. Bills, 82 Missouri, 531.....	52, 388

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Riney v. Hill, 14 Missouri, 800.....lv, 119
 Ring v. Burt, 17 Michigan, 408.....xvii, 200
 Ring v. Ochoa, 77 New York, 86.....33, 574
 Ring v. Neale, 114 Massachusetts, 111.....19, 316
 Ringgold v. Barley, 8 Maryland, 186.....lx, 107
 Ringgold v. Ringgold, 1 Harris & G. 11.....xviii, 280
 Rion v. Gilly, 6 Martin, 417.....xii, 428
 Riordon v. Davis, 9 Louisiana, 238.....xxix, 448
 Ripka v. Pope, 8 Louisiana An. 61.....li, 879
 Ripka v. Sergeant, 7 Watts & Serg. 9.....xlii, 214
 Ripley v. Atina Insurance Co., 30 N. Y. 126.....lxxxvi, 362
 Ripley v. Berry, 8 Greenleaf, 24.....xvii, 201
 Ripley v. Crooker, 47 Maine, 370.....lxxiv, 491
 Ripley v. Davis, 15 Michigan, 75.....x, 262
 Ripley v. Gelston, 9 Johnson, 201.....vi, 271
 Ripley v. Severance, 6 Pickering, 674.....xvii, 297
 Rippey v. Miller, 1 Jones' Law, 472.....lxii, 177
 Risk's Appeal, 88 Penn. St. 289.....xci, 186
 Riser v. Snoddy, 7 Indiana, 442.....lxv, 740
 Risher v. Roush, 2 Missouri, 98.....xxii, 442
 Riskey v. Phoenix Bank, 63 New York, 212.....38, 421
 Rison v. Farr, 24 Arkansas, 161.....lxxvii, 62
 Ritchie v. Moore, 8 Munford, 382.....vii, 686
 Ritchie v. Sweet, 23 Texas, 223.....5, 245
 Ritter v. Parker, 8 Cushing, 145.....lv, 744
 Rittenhouse v. Ammerman, 64 Missouri, 197.....27, 215
 Rittenhouse v. Independent Line of Tel., 44 New York, 263.....4, 673
 Ritter v. Seannell, 11 California, 238.....lx, 775
 Rivanna Navigation Co. v. Dawson, 3 Grant. 19.xvi, 183
 River v. Thomas, 1 Lea, 642.....27, 784
 River R. Co. v. Behr, 77 Missouri, 91.....46, 6
 Rivers v. City Council of Augusta, 65 Ga. 276.....38, 787
 Rivers v. Rivers, 3 Demasura, 190.....iv, 609
 Rivers ada. State, 56 Iowa, 103.....43, 112
 Rives v. Dudley, 3 Jones' Eq. 126.....lxvii, 231
 Rix v. Adams, 9 Vermont, 233.....xxxi, 619
 Rix v. Johnson, 8 New Hampshire, 599.....xxii, 472
 Rixford v. Smith, 88 New Hampshire, 285.....13, 42
 Roach v. Gunter, 44 Alabama, 209.....4, 122
 Roach v. Karr, 18 Kansas, 629.....26, 788
 Roach v. Martin's Lessee, 1 Harrington, 542.....xxviii, 746
 Roach v. Rutherford, 4 Demasura, 128.....vi, 606
 Roach ada. State, 2 Haywood, 382.....ii, 626
 Roach v. Turk, 9 Heisk. 708.....24, 360
 Roads v. Symmes, 1 Ohio, 231.....xiii, 621
 Roath v. Driscoll, 20 Connecticut, 632.....lii, 222
 Roberts v. Wortham, 2 Devereux's Eq. 172.....xxii, 736
 Robb v. Mann, 11 Penn. State, 300.....li, 521
 Robb v. McDonald, 29 Iowa, 230.....4, 211
 Robbins v. Ayres, 10 Missouri, 638.....xviii, 125
 Robbins v. Bunn, 64 Illinois, 48.....5, 75
 Robbins v. Cheek, 23 Indiana, 228.....2, 248
 Robbins v. McKnight, 1 Halstead's Ch. 642.....xiv, 406
 Robbins v. Packard, 31 Vermont, 870.....lxxvi, 134
 Robbins v. Robbins, 100 Massachusetts, 180.....xvii, 91
 Robbins v. Robbins, 140 Massachusetts, 629.....54, 488
 Robbins ada. State, 6 Iredell's Law, 23.....xliv, 64
 Robbins v. Treadway, 2 J. J. Marshall, 540.....xix, 122
 Robbins, In re, 24 Minnesota, 98.....57, 40
 Robert v. Adams, 38 California, 223.....xxix, 413
 Robert v. Commercial Bank, 13 Louisiana, 628.....xxviii, 570
 Robert v. Sadler, 104 New York, 229.....58, 498
 Robert's Appeal, 88 Penn. St. 70.....xxviii, 312
 Roberts, Ex parte, 9 Nevada, 44.....16, 1
 Roberts v. Adams, 6 Porter, 321.....xxxi, 694
 Roberts v. Adams, 8 Porter, 297.....xxviii, 291
 Roberts v. Armstrong, 1 Bush, 263.....lxxxix, 624
 Roberts v. Beatty, 2 Peurose & Watts, 63.....xxi, 410
 Roberts v. Bourne, 28 Maine, 162.....lxxxix, 614

Roberts v. Burka, Little's 8. C. 411.....xii, 325
 Roberts v. Bye, 30 Penn. State, 375.....lxxii, 719
 Roberts v. Corbin & Co., 26 Iowa, 218.....xvii, 146
 Roberts v. Fisher, 43 New York, 128.....3, 629
 Roberts v. Griswold, 25 Vermont, 496.....lxxxiv, 641
 Roberts v. Hall, 37 Connecticut, 205.....9, 208
 Roberts v. Halstead, 9 Penn. State, 23.....xlix, 541
 Roberts v. Hughes, 61 Illinois, 120.....25, 279
 Roberts v. Jacks, 31 Arkansas, 597.....25, 284
 Roberts v. Jenkins, 21 New Hampshire, 116.....lii, 189
 Roberts v. Lana, 64 Maine, 108.....12, 242
 Roberts v. Liscomb, 86 North Carolina, 126.....41, 429
 Roberts v. Marston, 20 Maine, 275.....lxxxvii, 82
 Roberts v. McCarty, 9 Indiana, 16.....lxviii, 694
 Roberts v. McLean, 18 Vermont, 608.....xlii, 523
 Roberts v. McNesly, 7 Jones' Law, 506.....lxxxviii, 287
 Roberts v. Ogil, 30 Illinois, 459.....lxxxviii, 282
 Roberts v. Roberts, 13 Grattan, 639.....lx, 429
 Roberts v. Riley, 15 Louisiana An. 103.....lxxxvii, 128
 Roberts v. Roberts, 2 McCord, 208.....xxii, 721
 Roberts v. Robertson, 53 Vermont, 690.....28, 719
 Roberts v. Rogers, 28 Mississippi, 122.....lxii, 542
 Roberts v. Smith, 64 Texas, 94.....62, 744
 Roberts v. Smith, 58 Vermont, 422.....54, 567
 Roberts v. Stanton, 2 Munford, 129.....v, 483
 Roberts v. State, 14 Georgia, 8.....lxviii, 628
 Roberts v. State, 14 Missouri, 128.....lv, 87
 Roberts ada. State, 7 Halsted, 114.....xxi, 68
 Roberts ada. State, 1 Hawk, 342.....ix, 642
 Roberts ada. State, 66 Missouri, 224.....26, 728
 Roberts ada. State, 60 New Hampshire, 254.....47, 129
 Roberts v. Strang, Adriano & Co., 29 Ala. 598.....lxxxii, 729
 Roberts v. Swift, 1 Yeates, 209.....i, 285
 Roberts v. Thompson, 14 Ohio State, 1.....lxxxii, 422
 Roberts v. Thorn, 25 Texas, 728.....lxxxviii, 622
 Roberts v. Trawick, 17 Alabama, 58.....lii, 164
 Roberts v. Turner, 12 Johnson, 222.....vii, 311
 Roberts v. Wiggins, 1 New Hampshire, 72.....viii, 29
 Roberts v. Williams, 5 Wharton, 170.....lxxxiv, 549
 Robertson v. American H. Ass'n, 10 Md. 287.....lxix, 146
 Robertson v. Berry, 50 Maryland, 801.....26, 228
 Robertson v. Coleman, 141 Massachusetts, 221.....54, 471
 Robertson v. Crane, 27 Mississippi, 382.....lxii, 528
 Robertson v. Dodge, 28 Illinois, 141.....lxxxi, 287
 Robertson v. Dunn, 2 Murphy, 122.....v, 285
 Robertson v. Kennedy, 2 Dana, 420.....xvii, 422
 Robertson v. Pope, 1 Richardson's Law, 501.....xlv, 287
 Robertson v. Robinson, 65 Alabama, 618.....26, 2
 Robertson v. Robertson, 2 B. Monroe, 238.....lxxxviii, 148
 Robertson v. Smith, 11 Texas, 211.....lx, 224
 Robertson v. Smith, 12 Johnson, 489.....lx, 287
 Robertson v. Smith, Little's 8. C. 206.....xi, 284
 Robertson ada. State, 26 La. An. 612.....54, 221
 Robertson v. State, 2 Lea, 229.....xxxi, 622
 Robertson v. United Ins. Co., 2 Johnson's Ch. 229.....i, 126
 Robertson v. Western M. & F. I. Co., 19 La. 227.....lxxxvi, 672
 Robertson v. Wood, 18 Texas, 1.....lxv, 149
 Robertson v. Tetre Haute & I. R. Co., 78 Ind. ana, 77.....41, 222
 Robeson v. French, 12 Matton, 24.....xiv, 269
 Robeson v. Pittenger, 1 Green's Ch. 67.....lxxxii, 412
 Robeson v. Roberts, 20 Indiana, 128.....lxxxix, 228
 Robie v. Briggs, 59 Vermont, 442.....28, 727
 Robinson v. Lister, 20 Indiana, 142.....28, 674
 Robins v. McOtura, 100 New York, 222.....52, 124
 Robinson's Case, 121 Massachusetts, 276.....41, 229
 Robinson, Ex parte, 12 Nevada, 223.....26, 724
 Robinson v. Adams, 61 Maine, 298.....24, 477
 Robinson v. Ames, 20 Johnson, 146.....xi, 229
 Robinson v. Baker, 8 Cushing, 127.....ii, 4

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Robinson v. Barnett, 18 Florida, 602.....43, 327
 Robinson v. Barnett, 19 Florida, 670.....45, 34
 Robinson v. Black Diamond Coal Co., 57 California, 413.....46, 118
 Robinson v. Blakeley, 4 Richardson's Law, 593.....iv, 703
 Robinson v. Chamberlain, 34 New York, 389.....xc, 713
 Robinson v. Charleston, 2 Richardson's Law, 517.....xiv, 739
 Robinson v. Clark, 7 Jones' L. 562.....lxviii, 265
 Robinson v. Collier, 11 R. Monroe, 332.....lii, 572
 Robinson v. Cone, 22 Vermont, 213.....liv, 67
 Robinson v. Crowder, 4 McCord, 519.....xvii, 762
 Robinson v. Dart's Ex'r, Dudley's Eq. 138.....xxxi, 569
 Robinson v. Davis, 3 Stockton's Ch. 302.....lxix, 591
 Robinson v. Duvall, 79 Kentucky, 83.....42, 308
 Robinson v. Evansville, 57 Indiana, 334.....44, 770
 Robinson v. Frost, 54 Vermont, 105.....41, 838
 Robinson v. Garth, 6 Alabama, 204.....xli, 47
 Robinson v. Georges Ins. Co., 17 Maine, 131.....xxiv, 239
 Robinson v. Greenville, 42 Ohio St. 625.....51, 857
 Robinson v. Hamilton, 60 Iowa, 134.....46, 63
 Robinson v. Harbour, 42 Mississippi, 795.....xcvii, 501
 Robinson v. Harbour, 42 Mississippi, 797.....2, 671
 Robinson v. Holt, 39 New Hampshire, 567.....lxix, 233
 Robinson v. Huffman, 15 B. Monroe, 80.....lii, 177
 Robinson v. Hurley, 11 Iowa, 410.....lxix, 497
 Robinson v. Hutchinson, 26 Vermont, 36.....lx, 298
 Robinson v. International L. A. Soc., 42 N. Y. 54.....1, 400
 Robinson v. Jones, 8 Massachusetts, 536.....v, 114
 Robinson v. Justice, 2 Penrose & Watts, 19.....xii, 407
 Robinson v. Kanawha V. Bk. 44 Ohio St. 441.....58, 529
 Robinson v. Lyman, 11 Connecticut, 30.....xxv, 52
 Robinson v. Magee, 9 California, 81.....lxx, 638
 Robinson v. Mayor of Franklin, 1 Humph. 168.....xxiv, 625
 Robinson v. McDonald, 11 Texas, 385.....lxii, 480
 Robinson v. Nat. Bank, 81 New York, 388.....37, 508
 Robinson v. New York Cent. eta. R. R. Co., 68 New York, 11.....23, 1
 Robinson v. Parker, 3 Smedes & M. 114.....xli, 614
 Robinson v. Perry & Martin, 21 Georgia, 183.....lxviii, 455
 Robinson v. Pittsburgh & O. R. Co., 32 Pa. St. 334.....lxii, 792
 Robinson v. Randolph, 21 Florida, 629.....58, 692
 Robinson v. Reynolds, 1 Alaska, 174.....xv, 673
 Robinson v. Ring, 72 Maine, 140.....39, 308
 Robinson v. Robinson, 9 Gray, 447.....lxix, 301
 Robinson v. Sherman, 3 Gratian, 178.....xliv, 381
 Robinson v. Smith, 3 Paige Ch. 222.....xxiv, 212
 Robinson v. State, 1 Coldwell, 12C.....lxviii, 457
 Robinson v. State, 53 Maryland, 151.....36, 389
 Robinson v. State, 11 Tex. Ct. App. 403.....46, 790
 Robinson ada. State, 3 Dev. & Bat. L. 130.....xxii, 661
 Robinson ada. State, 20 West Virginia, 713.....43, 799
 Robinson v. Ward, 8 Johnson, 86.....v, 327
 Robinson v. Wilson, 15 Kansas, 595.....37, 372
 Robinson v. Wilson, 22 Vermont, 38.....lii, 77
 Robinson v. Woolpper, 1 Wharton, 179.....xxix, 44
 Roblon v. Walker, 82 Kentucky, 60.....56, 678
 Robson v. Miller, 12 South Carolina, 595.....39, 518
 Robson v. Swart, 14 Minnesota, 371.....c, 238
 Roby v. Labuzan, 21 Alabama, 60.....lvi, 237
 Roby ada. People, 53 Michigan, 577.....56, 270
 Roby v. West, 4 New Hampshire, 285.....xvii, 423
 Roche v. Brooklyn City & N. R. Co., 105 New York, 294.....59, 508
 Roche v. Ware, 71 California, 375.....60, 539
 Roche v. Washington, 19 Indiana, 83.....lxix, 576
 Rocheblave v. Potter, 1 Missouri, 561.....xiv, 305
 Rochester Bank v. Jones, 4 N. Y. (4 Comst.), 497.....iv, 290
 Rochester Bank v. Montooth, 1 Denio, 403.....xlili, 681
 Rochester, Town of, v. Alfred Bank, 13 Wla. 433.....lxx, 746
 Rochester v. Randall, 105 Massachusetts, 285.....8, 519
 Rochester W. L. Co. v. Rochester, 3 N. Y. 463.....liii, 316
 Rockafellow v. Baker, 41 Penn. State, 319.....lxix, 624
 Rockingham M. F. I. Co. v. Bosh, 39 Ma. 253.....lxiii, 618
 Rockford, R. I. eta. R. Co. v. Delaney, 82 Ill. 198.....25, 308
 Rockford, R. I. & St. L. R. Co. v. Sage, 65 Ill.—nota, 328.....10, 857
 Rockford v. Tripp, 83 Illinois, 247.....25, 331
 Rockhill v. Spraggs, 9 Indiana, 30.....lxviii, 607
 Rockmore v. Davenport, 14 Texas, 602.....lxv, 133
 Rockport v. Walden, 54 New Hampshire, 167.....39, 131
 Rock River Bk. v. Sherwood, 10 Wla. 230.....lxviii, 600
 Rockwell v. Hubbell, 3 Douglas, 197.....xiv, 246
 Roddy v. Cox, 29 Georgia, 298.....lxix, 64
 Rodemacher v. Mil. & St. P. R. R. Co., 41 Ia. 297.....39, 592
 Roderigas v. East River Inst., 63 New York, 460.....39, 555
 Roderigas v. East River Sav. Inst., 76 N. Y. 316.....32, 309
 Rodes v. Crockett, 2 Yerges, 346.....xxiv, 480
 Rodgers v. Burchard, 34 Texas, 441.....7, 293
 Rodgers v. Evans, 9 Georgia, 143.....lii, 300
 Rodgers v. Kline, 56 Mississippi, 808.....31, 369
 Rodgers v. McCluer, 4 Gratian, 81.....lxvii, 715
 Rodgers v. Niles, 11 Ohio State, 46.....lxviii, 290
 Rodgers v. People, 86 New York, 360.....49, 548
 Rodgers v. Stophel, 22 Penn. State, 111.....lxix, 778
 Rodliff v. Dallinger, 141 Massachusetts, 1.....55, 439
 Rodman v. Mich. Cent. R. R. Co., 55 Mich. 87.....54, 348
 Rodman v. Musselman, 12 Bush, 354.....23, 724
 Rodney v. Shankland, 1 Delaware Ch. 35.....xli, 70
 Rodney v. Wilson, 67 Missouri, 123.....39, 490
 Roehl v. Piesanica, 31 Texas, 48.....xcvii, 514
 Rogers, Ex parte, 10 Tex. Ct. App. 638.....28, 654
 Rogers v. Brent, 5 Gilman, 573.....1, 423
 Rogers v. Carey, 47 Missouri, 232.....4, 322
 Rogers v. Caswood, 1 Swan, 142.....lv, 730
 Rogers v. Collier, 2 Bailey, 581.....xxiii, 153
 Rogers v. Coleman, Hardin, 418.....lii, 733
 Rogers ada. Commonwealth, 7 Met. 306.....xli, 406
 Rogers v. Cox, 96 Indiana, 157.....49, 182
 Rogers v. Crow, 40 Missouri, 91.....xciii, 290
 Rogers v. Dickey, 1 Gilman, 636.....xli, 204
 Rogers v. Elliott, 59 New Hampshire, 201.....47, 192
 Rogers v. Evans, 3 Indiana, 574.....lvi, 537
 Rogers v. Gallagher, 49 Illinois, 183.....xv, 600
 Rogers v. Gilling, 30 Penn. State, 189.....lxix, 604
 Rogers v. Greenbush, 58 Maine, 360.....4, 226
 Rogers v. Highland, 60 Iowa, 504.....58, 230
 Rogers v. Huie, 1 California, 429.....lv, 308
 Rogers v. Huie, 2 California, 571.....lvi, 363
 Rogers v. Hurd, 4 Day, 57.....lv, 128
 Rogers v. Jones, 1 Wendell, 237.....lix, 490
 Rogers v. Judd, 5 Vermont, 237.....xxvi, 266
 Rogers v. Judd, 5 Vermont, 238.....xxvi, 301
 Rogers v. Ludlow M. Co., 144 Mass. 190.....59, 66
 Rogers v. Mulliner, 6 Wendell, 597.....xxii, 546
 Rogers v. People, 9 Colorado, 460.....59, 146
 Rogers ada. People, 18 New York, 9.....lxix, 484
 Rogers v. Phillips, 8 Arkansas, 368.....lxvii, 727
 Rogers v. Prattville Mfg. Co., 81 Alabama, 493.....60, 171
 Rogers v. Rogers, 53 Connecticut, 121.....55, 78
 Rogers v. Rogers, 4 Paige Ch. 516.....lxvii, 64
 Rogers v. Rogers, 3 Wendell, 503.....xi, 710
 Rogers v. Rogers, 53 Wisconsin, 24.....46, 756
 Rogers v. Rom, 4 Johns. Ch. 368.....viii, 575
 Rogers v. Salmon, 8 Paige, 559.....xxiv, 725
 Rogers v. Sample, 33 Mississippi, 310.....lxix, 349
 Rogers v. Saunders, 16 Maine, 93.....xxxi, 636
 Rogers v. Smith, 17 Indiana, 325.....lxix, 483
 Rogers ada. State, 18 Kansas, 78.....36, 754
 Rogers ada. State, 10 Nevada, 260.....21, 720
 Rogers v. Stewart, 5 Vermont, 215.....xxvi, 290

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Rogers v. Union C. Ins. Co., 111 Indiana, 343.....	60, 701
Rogers v. Union S. Co., 130 Massachusetts, 581.....	39, 478
Rogers v. Walker, 4 Haywood, 205.....	ix, 758
Rogers v. Walker, 6 Penn. State, 33.....	xvii, 470
Rogers v. Ward, 8 Allen, 387.....	lxxxv, 710
Rogers v. Watrous, 8 Texas, 62.....	lviii, 100
Rogers v. Western Union Tel. Co., 78 Ind. 169.....	41, 558
Rogers v. Wiley, 14 Illinois, 65.....	lvi, 491
Rogers v. Wilson, 1 Minor, 407.....	xii, 61
Rogers v. Woodruff, 23 Ohio State, 632.....	xiii, 376
Rohr v. Kindt, 3 Watts & Berg, 563.....	xxxix, 63
Rohrbach v. Germania F. Ins. Co., 83 N. Y. 47.....	20, 451
Rohrschneider v. Knickerbocker L. I. Co., 76 New York, 216.....	32, 290
Rokes v. Amazon Ins. Co., 51 Maryland, 513.....	34, 323
Rolette v. Rolette, 1 Pinney, 370, Barnett, 326.....	xl, 782
Roll v. Raguet, 4 Ohio, 400.....	xxii, 759
Roland v. State, 9 Tex. Ct. App. 277.....	35, 743
Rolland v. Commonwealth, 82 Penn. St. 306.....	32, 758
Rolland v. Commonwealth, 85 Penn. St. 66.....	37, 626
Rolle ada. State, 30 La. An. 691.....	31, 334
Rollins v. Ames, 2 New Hampshire, 349.....	ix, 79
Rollins v. State, 13 Missouri, 437.....	liii, 181
Rollins v. State, 23 Tex. Ct. App. 548.....	58, 659
Rollo v. Andes Ins. Co., 23 Gratt. 509.....	14, 147
Rome, Bank of, v. Village of Rome, 19 N. Y. 20.....	lxxv, 272
Rome, Mayor etc. of, v. Omberg, 28 Ga. 46.....	lxxiii, 748
Rondeau v. Pedesclaux, 3 Louisiana, 510.....	xxiii, 463
Roman v. Peters, 2 Robinson (La.), 497.....	xxxviii, 222
Rombach v. Piedmont and A. L. Ins. Co., 35 La. An. 233.....	48, 239
Rome R. R. v. Wimberly, 75 Georgia, 316.....	58, 468
Romig v. Erdman, 5 Wharton, 113.....	xxxiv, 533
Roma v. Meier, 47 Iowa, 607.....	29, 493
Rood v. State, 5 Nebraska, 174.....	25, 475
Rooks v. Moore, Busbee's Law, 1.....	lvii, 569
Roome v. Counter, 1 Halsted, 111.....	x, 390
Roosa v. Crist, 17 Illinois, 450.....	lxv, 679
Roosa v. Perkins, 9 Nebraska, 304.....	31, 409
Roosevelt v. Doherty, 129 Massachusetts, 301.....	37, 356
Root v. Chandler, 10 Wendell, 110.....	xxv, 546
Root v. Commonwealth, 98 Pennsylvania St. 170.....	42, 614
Root v. French, 13 Wendell, 670.....	xxviii, 482
Root v. Lowndes, 6 Hill (N. Y.) 518.....	xii, 702
Root v. McFerrin, 37 Mississippi, 17.....	lxxv, 49
Root v. Sherwood, 6 Johnson, 68.....	v, 191
Root v. Slinnook, 120 Illinois, 389.....	60, 556
Root v. Wagner, 30 New York, 9.....	lxxxvi, 348
Root v. Wright, 34 New York, 72.....	38, 495
Rootes v. Welford, 4 Munford, 215.....	vi, 510
Roper v. Clay, 18 Missouri, 333.....	lix, 314
Roper v. Roper, 5 Jones' Eq. 16.....	lxxv, 427
Roper v. Sangamon Lodge, 91 Illinois, 512.....	33, 60
Roper ada. State, 3 Devereux Law, 473.....	xix, 268
Rose v. Baltimore, 51 Maryland, 366.....	34, 307
Rose v. Bevan, 170 Maryland, 466.....	lxix, 170
Rose v. Brown, Kirby, 293.....	i, 22
Rose v. Coffield, 53 Maryland, 13.....	36, 389
Rose v. First Nat. Bk. 91 Missouri, 399.....	60, 258
Rose v. Hall, 26 Connecticut, 362.....	lxviii, 408
Rose v. Hayden, 35 Kansas, 106.....	57, 145
Rose v. Houston, 11 Texas, 324.....	lxii, 478
Rose v. Laffan, 2 Speers' Law, 424.....	xlvi, 376
Rose v. Mayor, 51 Maryland, 256.....	34, 307
Rose v. Mitchell, 6 Colorado, 102.....	45, 520
Rose v. Newman, 26 Texas, 131.....	lxxx, 646
Rose v. Park Bank, 20 Indiana, 94.....	lxxxiii, 306
Rose v. Smith, 4 Cowen, 17.....	xv, 331
Rose v. Story, 1 Penn. State, 190.....	xliv, 121
Ross v. Teeple, 16 Indiana, 27.....	lxxix, 403
Ross v. Treadway, 4 Nevada, 445.....	xxvii, 548
Ross v. Vertin, 46 Michigan, 457.....	41, 174
Rosellus v. Delachaise, 5 Louisiana An. 481.....	li, 597
Rosenbaum v. Weeden, 18 Gratt. 785.....	xxviii, 737
Rosenfeld v. Peoria, D. & E. Ry. Co., 103 Ind. 121.....	53, 508
Rosenfeld v. Haight, 53 Wisconsin, 269.....	40, 70
Rosenkrans v. Barker, 115 Illinois, 331.....	56, 169
Rosenkrans v. Snover, 19 New Jersey Eq. 420.....	xcvii, 668
Rosenmueller v. Lampe, 89 Illinois, 212.....	31, 74
Rosenstock v. Torrey, 32 Maryland, 169.....	3, 128
Rosh's Appeal, 89 Pennsylvania St. 463.....	8, 275
Rosier v. Hale, 10 Iowa, 470.....	lxxvii, 127
Ross v. Armstrong, 25 Texas Supp. 264.....	lxxviii, 674
Ross v. Bank of Burlington, 1 Alabama, 42.....	xv, 664
Ross v. Barclay, 18 Penn. State, 179.....	iv, 536
Ross v. Braydon, 2 Dana, 161.....	xxvi, 448
Ross v. Butler, 19 New Jersey Eq. 294.....	xcvii, 664
Ross v. Carpenter, 9 B. Monroe, 367.....	i, 512
Ross v. City of Madison, 1 Indiana, 281.....	lxviii, 361
Ross v. Clinton, 46 Iowa, 606.....	26, 169
Ross v. Draper, 55 Vermont, 404.....	45, 626
Ross v. Eddy, 66 Pennsylvania State, 451.....	5, 394
Ross v. Faust, 54 Indiana, 471.....	23, 698
Ross v. Fuller, 13 Vermont, 265.....	xxxvi, 248
Ross v. Grimbail, T. U. P. Charlton, 368.....	iv, 711
Ross v. Houston, 25 Minn. 691.....	lix, 331
Ross v. Hurd, 71 New York, 14.....	27, 1
Ross v. Luther, 4 Cowen, 158.....	xv, 361
Ross v. Mather, 51 New York, 108.....	10, 598
Ross v. Milne, 12 Leigh, 204.....	lxxviii, 646
Ross v. Norvell, 1 Washington, 14.....	i, 423
Ross v. Overton, 3 Call, 309.....	ii, 692
Ross v. Ross, 129 Massachusetts, 243.....	37, 321
Ross v. Singleton, 1 Delaware Ch. 149.....	xii, 86
Ross v. Smith, 19 Texas, 171.....	lxx, 337
Ross v. State, 55 Georgia, 192.....	21, 278
Ross v. State, 10 Tex. Ct. App. 452.....	38, 648
Ross ada. State, 4 Jones' Law, 315.....	lxix, 761
Ross ada. State, 76 North Carolina, 242.....	22, 679
Ross v. Sutton, 1 Bailey's Law, 126.....	lxix, 699
Ross v. Troy & B. R. Co., 40 Vermont, 364.....	24, 144
Ross v. Turner, 2 English 132.....	lxiv, 621
Ross v. Worthington, 11 Minnesota, 436.....	lxxxvii, 95
Ross and Company v. Innis, 35 Illinois, 467.....	lxxxv, 373
Rosser v. Depriest, 5 Grattan, 6.....	i, 94
Rosser v. Franklin, 6 Grattan, 1.....	ii, 97
Rosser v. Randolph, 7 Porter, 236.....	lxxxi, 712
Rosseter ada. Commonwealth, 2 Binney, 360.....	iv, 461
Rosmiter v. Rosmiter, 8 Wendell, 494.....	lxiv, 68
Rosman v. Townsend, 17 Wisconsin, 98.....	lxxxiv, 733
Rost v. Mayor, 15 Louisiana, 129.....	lxxxv, 196
Rostetter v. Grant, 18 Ohio St. 126.....	xxviii, 2
Rotch v. Hawes, 12 Pickering, 136.....	lxvii, 416
Roth v. B. R. St. L. R. R., 34 New York, 548.....	20, 736
Roth v. Roth, 194 Illinois, 35.....	44, 61
Rothmaler v. Myers, 4 Deansure, 215.....	vi, 612
Rothschild v. American C. Ins. Co., 74 Mo. 41.....	41, 389
Rothschild v. Griz, 31 Michigan, 190.....	18, 171
Rounds v. City of Bangor, 46 Maine, 541.....	lxxxiv, 469
Rounds v. Del. L. & W. R. R. Co., 64 N. Y. 129.....	21, 387
Roundtree v. Baker, 53 Illinois, 241.....	4, 587
Roundtree v. Brantley, 34 Alabama, 544.....	lxxxiii, 479
Roundtree v. Dennard, 59 Georgia, 690.....	37, 621
Rounsaville v. Kohlheim, 63 Georgia, 668.....	45, 306
Rouquier v. Rouquier, 5 Martin, N. S., 82.....	xvi, 126
Rouse v. Martin, 75 Alabama, 519.....	51, 663
Rouse v. Whitely, 25 New York, 176.....	lxxxii, 337
Routh v. Routh, 9 Robinson (La.) 234.....	xii, 386
Rover ada. State, 10 Nevada, 289.....	21, 748
Rowan v. State, 20 Wisconsin, 129.....	11, 569

Roman letters [xlx] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Rowland v. Anderson, 33 Kansas, 264.....	58, 529	Rush v. Vought, 55 Penn. St. 437.....	xviii, 769
Rowe v. Beckett, 30 Indiana, 154.....	xv, 676	Rush v. Wink, 31 Ohio State, 521.....	27, 523
Rowe v. Blanchard, 18 Wisconsin, 441.....	lxixvi, 783	Rushin v. Shields, 11 Georgia, 636.....	lvi, 436
Rowe v. Haines, 15 Indiana, 445.....	lxixvi, 101	Rushing ada. State, 69 North Carolina, 30.....	12, 641
Rowe v. Moses, 9 Richardson's L. 423.....	lxviii, 560	Rushville v. Adams, 107 Indiana, 476.....	57, 124
Rowe v. Portsmouth, 56 New Hampshire, 291.....	22, 464	Rusk v. Fenton, 14 Bush, 480.....	29, 413
Rowe v. Smith, 51 Connecticut, 265.....	50, 16	Russ v. Alpaugh, 118 Massachusetts, 359.....	19, 464
Rowe's Executors v. White, 16 N. J. Eq. 411.....	lxixiv, 169	Russell v. People's Sav. Bank, 39 Michigan, 671.....	33, 444
Rowell v. City of Lowell, 7 Gray, 100.....	lxvi, 464	Russell, In re, 51 Connecticut, 577.....	50, 58
Rowell v. Klein, 44 Indiana, 290.....	13, 235	Russell v. Abbott, 13 New Hampshire, 475.....	xl, 169
Rowell v. Railroad, 57 New Hampshire, 132.....	24, 59	Russell v. Annable, 109 Massachusetts, 72.....	12, 658
Rowland v. Gallatin, 75 Missouri, 134.....	49, 395	Russell v. Anthony, 21 Kansas, 450.....	30, 436
Rowland v. Garman, 1 J. J. Marshall, 76.....	xix, 54	Russell v. Ballard, 16 B. Monroe, 201.....	lxviii, 528
Rowland v. Wolfe, 1 Bailey's Law, 56.....	xix, 651	Russell v. Buckley, 4 Rhode Island, 536.....	lxx, 167
Rowlett v. Griese's Syndics, 8 Martin, 453.....	xiii, 296	Russell v. Carrington, 42 New York, 112.....	1, 498
Rowley v. Ball, 3 Cowen, 303.....	xv, 298	Russell v. Columbia, 74 Missouri, 480.....	41, 325
Rowley v. Bigelow, 12 Pickering, 307.....	xviii, 607	Russell v. Cowles, 15 Gray, 582.....	lxviii, 391
Roxborough v. Meadick, 6 Ohio State, 448.....	lxviii, 346	Russell v. Fabyan, 28 New Hampshire, 543.....	lxi, 639
Roy v. Roy's Executor, 16 Gratt. 418.....	lxixiv, 696	Russell v. Fallor, 1 Ohio State, 337.....	lix, 431
Roy v. Goings, 26 Illinois, 361.....	30, 151	Russell v. Falls, 3 Harris & McH. 457.....	l, 369
Roy v. Horaley, 6 Oregon, 382.....	25, 537	Russell v. Favler, 18 Louisiana, 585.....	xxxvi, 683
Royal B. P. Co. v. Sherrell, 93 New York, 331.....	45, 229	Russell v. Haddock, 3 Gilman, 233.....	xliv, 693
Royal B't of L. v. Grand J. B. etc. Co., 100 Mas-		Russell v. Hanley, 30 Iowa, 219.....	lxixix, 636
achusetts, 444.....	xviii, 115	Russell v. Harris, 38 California, 436.....	xcix, 421
Royal Ins. Co. v. Davies, 40 Iowa, 469.....	20, 581	Russell v. Hugunin, 1 Seamon, 562.....	xxxviii, 423
Royal Ins. Co. v. McCrea, 8 Lea, 531.....	41, 656	Russell v. Kelly, 44 California, 641.....	13, 169
Royal Ins. Co. v. Roedel, 78 Penn. St. 19.....	21, 1	Russell v. Lawton, 14 Wisconsin, 202.....	lxxx, 769
Royall v. Lessee of Lisle, 15 Georgia, 545.....	lx, 712	Russell v. Lannon, 39 Wisconsin, 870.....	20, 69
Royall v. Thomas, 23 Gratt. 130.....	26, 335	Russell v. Lowth, 21 Minnesota, 167.....	18, 369
Royce v. Guggenheim, 106 Massachusetts, 201.....	8, 322	Russell v. Lytle, 6 Wendell, 390.....	xcviii, 537
Roset v. McClellan, 48 Illinois, 345.....	xv, 551	Russell v. Maloney, 39 Vermont, 579.....	xv, 358
Rosenstein v. Orulabanks, 54 Michigan, 199.....	52, 806	Russell v. McCormick, 45 Alabama, 587.....	6, 707
Rubey v. Barnett, 12 Missouri, 1.....	xlix, 112	Russell v. Nicoll, 3 Wendell, 112.....	xx, 679
Rubey v. Huntman, 22 Missouri, 501.....	lxixii, 143	Russell ada. People, 49 Michigan, 617.....	43, 478
Rubottom v. Morrow, 24 Indiana, 202.....	lxixvii, 324	Russell v. Pistor, 7 New York (3 Selden), 171.....	lvii, 509
Rucker v. Abell, 6 B. Monroe, 566.....	xlvi, 406	Russell v. Pyland, 2 Humphreys, 131.....	xxxvi, 307
Rucker v. Donovan, 13 Kansas, 251.....	19, 84	Russell v. Richards, 10 Maine, 429.....	xxv, 254
Rucker v. Dooley, 49 Illinois, 377.....	xv, 614	Russell v. Richards, 11 Maine, 371.....	xxvi, 523
Rucker v. Robinson, 38 Missouri, 154.....	xc, 412	Russell v. Rogers, 9 Martin, 588.....	xiii, 298
Rudd v. Matthews, 79 Kentucky, 479.....	42, 231	Russell v. Rogers, 10 Wendell, 473.....	xv, 574
Ruddell v. Dillman, 73 Indiana, 518.....	26, 182	Russell v. Russell, 4 G. Greene, 26.....	lxi, 112
Ruddell v. Landers, 25 Arkansas, 238.....	xv, 719	Russell v. Russell, 36 New York, 581.....	xviii, 540
Ruddell v. Pfaltz, 72 Indiana, 533.....	37, 177	Russell v. Sunbury, 37 Ohio State, 372.....	41, 523
Ruddick v. Lloyd, 15 Iowa, 441.....	lxixiii, 423	Russell v. Turner, 7 Johnson, 189.....	v, 254
Rudy v. Commonwealth, 35 Pa. State, 165.....	lxixviii, 330	Russell v. Watt, 41 Mississippi, 602.....	xviii, 270
Rudy v. Ulrich, 69 Pennsylvania State, 177.....	8, 239	Russell v. Winne, 37 New York, 591.....	xviii, 758
Roe v. Mitchell, 2 Dallas, 58.....	1, 258	Rust v. Conrad, 47 Michigan, 449.....	41, 720
Ruff v. Bull, 7 Harris & J. 14.....	xvi, 290	Rust v. Gott, 9 Cowen, 169.....	xviii, 497
Ruffin v. Armstrong, 9 Hawks, 411.....	xi, 774	Rust v. Larue, 4 Littell, 412.....	xiv, 173
Ruffner v. McConnell, 17 Illinois, 212.....	lxviii, 362	Rust v. Ware, 6 Grattan, 50.....	lii, 100
Ruffners v. Lewis's Ex'rs, 7 Leigh, 720.....	xxx, 513	Ruston v. Ruston, 2 Dallas, 243, 2 Yeates, 60.....	1, 263
Rugely v. Sun Mut. Ins. Co., 7 Louisiana An. 379.....	lvi, 603	Ruth v. Rush, 46 Iowa, 648.....	26, 179
Ruggles v. Keeler, 3 Johnson, 263.....	lii, 482	Rutherford's Case, 72 Pennsylvania State, 62.....	13, 655
Ruggles v. Lawson, 13 Johns., 235.....	vii, 375	Rutherford v. Jones, 14 Georgia, 521.....	lx, 658
Ruggles ada. People, 8 Johns., 239.....	v, 335	Rutherford v. Newman, 8 Minnesota, 47.....	lxviii, 123
Rugh v. Ottenheimer, 6 Oregon, 231.....	23, 513	Rutherford v. Rutherford, 1 Denio, 33.....	xliii, 644
Ruhl v. Phillips, 48 New York, 125.....	8, 522	Rutherford ada. State, 1 Hawks, 457.....	lx, 658
Ruis v. Norton, 4 California, 353.....	lx, 618	Rutherford v. Tracy, 48 Missouri, 335.....	8, 104
Rung v. Shonesberger, 2 Watts, 23.....	xxvi, 95	Rutledge v. Fogg, 3 Cold. 654.....	xc, 299
Runkel v. Winemiller, 4 Harris & McH. 429.....	1, 411	Rutledge, Ex parte, 1 Harper's Eq. 65.....	xiv, 696
Runkle v. Johnson, 30 Ill. 328.....	lxixlii, 191	Rutter v. Blake, 2 Harris & J. 353.....	lii, 580
Runkle v. Meyer, 3 Yates, 518.....	li, 393	Ryan v. Bagaley, 50 Michigan, 179.....	45, 35
Runnels ada. Commonwealth, 10 Mass. 518.....	vi, 148	Ryan v. Brown, 18 Michigan, 196.....	c, 154
Runyan v. Merseresau, 11 Johnson, 534.....	vi, 333	Ryan v. Chicago & N. W. R. Co., 60 Illinois, 171.....	14, 32
Runyan v. Price, 15 Ohio State, 1.....	lxixvi, 459	Ryan v. Copes, 11 Richardson's L. 217.....	lxviii, 106
Runyan v. State, 57 Indiana, 80.....	26, 52	Ryan v. Curran, 64 Indiana, 345.....	31, 123
Runyon v. Bennett, 4 Dana, 598.....	xxix, 431	Ryan v. Dayton, 25 Connecticut, 188.....	lxv, 506
Ruohs v. Backer, 6 Heisk. 396.....	15, 598	Ryan v. Dox, 34 New York, 307.....	xc, 696
Ruohs v. Hooks, 3 Lea, 302.....	31, 642	Ryan v. Dunlap, 17 Illinois, 40.....	lxviii, 334
Rupp v. Sampson, 16 Gray, 398.....	lxviii, 416	Ryan v. Dunphy, 4 Montana, 356.....	47, 358

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Ryan v. Fowler, 94 New York, 410.....lxviii, 515
 Ryan v. Gilmer, 2 Montana, 517.....25, 744
 Ryan v. Harrow, 27 Iowa, 494.....1, 302
 Ryan v. M. K. & T. Ry Co., 65 Texas, 12.....57, 589
 Ryan v. New York Cent. R. R. 35 New York, 210 xol, 49
 Ryan ada. People, 88 New York, 142.....42, 238
 Ryan ada. State, 4 McCord, 16.....xvii, 702
 Ryan ada. State, 12 Nevada, 401.....28, 802
 York, 210.....xvi, 50
 Ryan v. Ulmer, 108 Pennsylvania State, 332.....56, 210
 Ryan v. Ward, 48 New York, 204.....8, 539
 Ryan v. Wilson, 87 New York, 471.....41, 384
 Ryan v. World Mut. L. Ins. Co., 41 Conn. 168.....19, 490
 Ryckman v. Gillis, 87 New York, 68.....15, 464
 Ryden v. Jones, 1 Hawks, 497.....ix, 660
 Ryder, Matter of, 11 Paige, 185.....xlii, 109
 Rye v. Peterson, 45 Texas, 312.....23, 608
 Rye v. Stockwell, 14 California, 134.....lxviii, 634
 Ryers, In re, 72 New York, 1.....26, 89
 Ryerson v. Brown, 35 Michigan, 333.....24, 564
 Ryerson v. Wheeler, 25 Wendell, 434.....xxxvii, 243
 Ryliner v. Felschert, 22 Illinois, 305.....34, 130
 Rubin v. Harkness, 4 New Hampshire, 415.....xvii, 437
 Saccharis v. Eureka & P. R. R. Co., 18 Nev. 155.....51, 737
 Sackett v. New Albany, 88 Indiana, 473.....45, 467
 Sackett v. Twining, 18 Penn. State, 199.....lvii, 699
 Saco, Inhab. of, v. Wentworth, 37 Me. 165.....lviii, 786
 Saco Nat. Bank v. Sanborn, 63 Maine, 240.....18, 294
 Saddle v. Lee, 66 Georgia, 45.....42, 62
 Safe Deposit Co. v. Pollock, 85 Penn. St. 391.....27, 660
 Safely v. Gilmore, 21 Iowa, 568.....lxviii, 692
 Safford v. Safford, 7 Paige, 259.....xxxii, 633
 Sage v. Hawley, 16 Connecticut, 106.....xii, 128
 Sager v. Portsmouth R. R. Co., 31 Maine, 236.....1, 659
 Sahlman v. Mills, 3 Strobhart's Law, 364.....11, 630
 Saint——— See St.———
 Saint——— v.——— See St.———
 Saint Clara Female Academy v. Sullivan, 116 Ill.
 375.....56, 776
 Sale v. First Reg. Bap. Church, 62 Iowa, 26.....49, 136
 Sale v. Saunders, 24 Mississippi, 24.....lvii, 187
 Salem v. Eastern R. R. Co., 98 Mass. 431.....xvi, 650
 Salem ada. People, 20 Michigan, 453.....4, 400
 Salem Bank v. Gloucester Bank, 17 Mass. 1.....ix, 111
 Salem etc. Corp. v. Ropes, 9 Pickering, 187.....xix, 363
 Saline Co. Comm'r v. Anderson, 20 Kan. 298.....27, 171
 Saline Co. Court ada. State, 48 Missouri, 390.....8, 108
 Saline Co. Subscription, In re, 45 Missouri, 52.....c, 237
 Salisbury v. Black, 6 Harris & J. 293.....xiv, 279
 Salisbury v. Harchenroder, 106 Mass. 468.....8, 354
 Salisbury v. Marine Co. of St. Louis, 23 Mo. 553.....lxvi, 687
 Salisbury v. Stainer, 19 Wendell, 159.....xxxii, 437
 Salle v. Light's Ex'rs, 4 Alabama, 700.....lxviii, 317
 Salle v. Arnold, 32 Missouri, 532.....lxviii, 144
 Salling v. McKinney, 1 Leigh, 42.....xix, 722
 Sally v. Sandifer, 2 Mill, 445.....xii, 687
 Salmon v. Bennett, 1 Connecticut, 535.....vii, 237
 Salmon v. Davis, 4 Binney, 375.....v, 410
 Salmon v. Del. etc. R. R. Co., 9 Vroom, 5.....20, 356
 Salmon v. Hoffman, 2 California, 138.....lvi, 322
 Salmon v. Richardson, 30 Connecticut, 360.....lxix, 256
 Salmond v. Price, 13 Ohio, 368.....xlii, 304
 Salomon v. Pioneer C. Co., 21 Florida, 274.....58, 687
 Salisbury v. Ellison, 7 Colorado, 167.....49, 347
 Salt Springs Nat. Bank v. Burton, 58 N. Y. 430.....17, 268
 Salt Springs Nat. Bank v. Wheeler, 48 N. Y. 422.....8, 564
 Salter v. Burt, 20 Wendell, 206.....xxxii, 530
 Salter v. Jones, 10 Vroom, 469.....23, 229
 Salter v. Williamson, 1 Green's Ch. 480.....xxiv, 513
 Saltmarsh v. Bown, 4 Porter, 283.....xix, 526
 Saltonstall v. Little, 90 Pennsylvania St. 422.....35, 683
 Saltonstall v. Riley, 28 Alabama, 164.....lxv, 324
 Salts v. Everett, 20 Wendell, 267.....xxxii, 541
 Salts v. Ocean Ins. Co., 12 Johnson, 167.....vii, 290
 Sammis v. McLaughlin, 25 New York, 647.....xci, 83
 Sammons v. Holloway, 21 Michigan, 163.....4, 468
 Samms v. Stewart, 20 Ohio, 69.....lv, 448
 Sampson v. Gassam, 6 Porter, 123.....xxx, 579
 Sampson ada. State, 12 South Carolina, 587.....32, 513
 Sampson v. Williamson, 6 Texas, 102.....iv, 763
 Samson v. Shaw, 101 Massachusetts, 146.....3, 327
 Samson v. Thornton, 3 Metcalf, 275.....xxxvii, 135
 Samuel v. Cheney, 135 Massachusetts, 273.....46, 467
 Samuel v. Dinkins, 12 Richardson's Law, 172.....lxv, 729
 Samuel ada. State, 3 Jones' Law, 74.....lxvi, 596
 Samuelson v. Cleveland I. M. Co., 69 Mich. 164.....43, 426
 Sanborn v. Colman, 6 New Hampshire, 14.....xxxii, 763
 Sanborn v. Fireman's Ins. Co., 16 Gray, 448.....lxvii, 419
 Sanborn v. Goodhue, 28 New Hampshire, 48.....lx, 398
 Sanborn v. Kittredge, 20 Vermont, 632.....1, 88
 Sanborn v. Morrill, 15 Vermont, 700.....x, 768
 Sanborn v. Neal, 4 Minnesota, 126.....lxvii, 688
 Sanborn v. Southard, 25 Maine, 409.....xvii, 295
 Sanderlin v. Baxter, 76 Virginia, 239.....44, 168
 Sanders v. Blain's Adm'rs, 6 J. J. Marshall, 448.....xii, 68
 Sanders ada. Commonwealth, 14 Gray, 394.....lxvii, 336
 Sanders v. Getchell, 76 Maine, 158.....49, 689
 Sanders v. Johnson, 6 Blackford, 50.....xxxvi, 644
 Sanders v. Martin, 2 Lea, 213.....31, 599
 Sanders v. Miller, 79 Kentucky, 517.....42, 227
 Sanders v. Morrison, 7 T. B. Monroe, 54.....xviii, 161
 Sanders v. Morrison's Ex'r, 2 T. B. Monroe, 109.....xv, 149
 Sanders v. Ochiltree, 5 Porter, 73.....xxx, 621
 Sanders v. Ruddle, 2 T. B. Monroe, 120.....xv, 148
 Sanders v. State, 85 Indiana, 318.....44, 29
 Sanders ada. State, 62 Indiana, 562.....30, 298
 Sanders ada. State, 68 Missouri, 262.....30, 728
 Sanders v. Vance, 7 T. B. Monroe, 209.....xviii, 167
 Sanders v. Young, 1 Head, 219.....lxviii, 176
 Sanderson v. Caldwell, 45 New York, 398.....6, 106
 Sanderson v. Frasier, 8 Colorado, 79.....54, 544
 Sanderson v. Jones, 6 Florida, 430.....lxvii, 217
 Sanderson v. Pennsylvania C. Co., 86 Pennsylv-
 vania St. 401.....27, 711
 Sanderson v. White, 18 Pickering, 328.....lxix, 391
 Sandford v. Catawissa, R. R., 24 Penn. St. 378.....lxiv, 667
 Sandford v. Dillaway, 10 Massachusetts, 52.....xi, 68
 Sandford v. Nichols, 13 Massachusetts, 236.....vii, 151
 Sands v. Codwise, 4 Johnson, 536.....iv, 368
 Sands v. Lynham, 27 Gratt. 231.....21, 368
 Sands v. Marburg, 36 Georgia, 534.....xci, 781
 Sands v. N. Y. L. Ins. Co., 50 New York, 628.....10, 626
 Sands ada. People, 1 Johnson, 78.....xi, 294
 Sands v. Richmond, 31 Gratt. 571.....31, 742
 Sands v. Robinson, 12 Sum. & M. 704.....xi, 133
 Sands v. Smith, 1 Nebraska, 108.....xcii, 331
 Sands v. Taylor, 5 Johnson, 336.....iv, 374
 Sanford v. Court of Common Pleas, 38 N. J. 72.....13, 422
 Sanford v. Eighth A. v. R. R., 23 New York, 343.....lxix, 296
 Sanford v. Howard, 29 Alabama, 624.....lxvii, 101
 Sanford v. Huxford, 32 Michigan, 313.....20, 647
 Sanford v. McLean, 3 Paige Ch. 117.....xxxii, 773
 Sanford v. Sanford, 68 New York, 67.....17, 265
 Sanford v. Wheeler, 13 Connecticut, 166.....xxxii, 389
 Sanford Mfg. Co. v. Wiggins, 14 New Hamp. 441.....xi, 198
 San Francisco v. Calderwood, 31 California, 585.....xci, 542
 San Francisco v. C. P. R. Co., 63 Cal. 467.....43, 98
 San Francisco v. Fulde, 37 California, 349.....xvix, 278
 San Francisco v. Lawton, 18 California, 468.....lxix, 167
 Sangamon R. R. Co. v. Morgan Co., 14 Ill. 163.....lvi, 497

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Sanger v. Dun, 67 Wisconsin, 615.....	32, 789	Sawyer v. Adams, 8 Vermont, 172.....	xxx, 491
Sangaloff v. Stitz, 64 Mississippi, 171.....	60, 49	Sawyer v. Broomart, 67 Iowa, 678.....	56, 371
Sankay v. McKelvey, 104 Pennsylvania St. 285.....	49, 675	Sawyer v. Brownell, 13 Rhode Island, 141.....	43, 19
Sankay ad. Commonwealth, 23 Penn. State, 380.....	ix, 91	Sawyer v. C. & N. W. Ry., 22 Wisconsin, 402.....	xcix, 40
Sanner v. Smith, 69 Illinois, 123.....	31, 70	Sawyer v. Come, 17 Gratt. 230.....	xcix, 445
Santa Clara F. Acad. v. Sullivan, 116 Ill. 375.....	56, 776	Sawyer v. Davis, 136 Massachusetts, 239.....	49, 27
Santa Clara M. Acad. v. Meredith, 40 Md. 380.....	53, 364	Sawyer v. Eastern-Steamboat Co., 46 Ma. 409.....	lxxiv, 463
Santo v. State, 2 Iowa, 165.....	lxiii, 487	Sawyer v. Elbert, 2 Noté & McO. 511.....	x, 633
Sarah v. State, 26 Mississippi, 367.....	lxi, 644	Sawyer v. Fellows, 6 New Hampshire, 107.....	xxv, 452
Saratoga eta. R. R. Co. v. Row, 24 Wendell, 74.....	xxxv, 598	Sawyer v. Gerrish, 70 Maine, 254.....	35, 323
Sarbocker v. State, 68 Wisconsin, 171.....	56, 624	Sawyer v. Hann. & St. J. R. R., 37 Mo. 240.....	xc, 383
Sargeant v. Danney, 14 Louisiana, 43.....	xxxiii, 573	Sawyer v. Hovey, 3 Allen, 531.....	lxxxi, 669
Sargeant v. Stryker, 1 Harrison, 464.....	xxxii, 404	Sawyer v. Jostya, 20 Vermont, 172.....	xlix, 708
Sargeant v. Adams, 3 Gray, 72.....	lxviii, 718	Sawyer v. Woodbury, 7 Gray, 498.....	lxvi, 518
Sargeant v. Appleton, 6 Massachusetts, 85.....	iv, 90	Sawyers v. Cator, 8 Humphreys, 284.....	lxvii, 686
Sargeant v. Currier, 49 New Hampshire, 210.....	6, 624	Saxton v. People, 23 N. Y. 608.....	lxxviii, 191
Sargeant v. Franklin Ins. Co. 8 Pickering, 80.....	xix, 306	Say v. Barnes, 4 Serg. & R. 113.....	viii, 679
Sargeant v. Graham, 5 New Hampshire, 440.....	xxii, 469	Sayers v. Wall, 26 Gratt. 354.....	xi, 303
Sargeant v. Metcalf, 5 Gray, 304.....	lxvi, 308	Sayles v. Sayles, 21 New Hampshire, 213.....	liii, 208
Sargeant v. Roberts, 1 Pickering, 337.....	xi, 185	Sayles v. Smith, 13 Wendell, 67.....	xxvii, 117
Sargeant v. Slack, 47 Vermont, 674.....	19, 136	Saylor v. Daniels, 37 Illinois, 331.....	lxxviii, 207
Sargeant v. Southgate, 5 Pickering, 313.....	xvi, 409	Saylor v. Bushong, 100 Penn. St. 23.....	45, 283
Sargeant v. Stearns, 23 California, 388.....	lxxviii, 118	Saylor v. Plaine, 31 Maryland, 158.....	i, 24
Sargeant v. Usher, 55 New Hampshire, 287.....	90, 208	Sayre v. Craig, 4 Arkansas, 10.....	lxxvii, 787
Sargeant v. Webster, 13 Metcalf, 497.....	xlvi, 743	Sayre v. Frick, 7 Watts & Serg. 263.....	lxii, 240
Sarry v. Municipality No. 2, 9 Louisiana An. 597.....	lxi, 221	Sayre v. Louisville U. B. A., 2 Duval, 152.....	lxxxv, 612
Sartain v. Hamilton, 13 Texas, 219.....	lxii, 824	Sayre v. Lucas, 2 Stewart, 289.....	xx, 23
Sartain v. State, 10 Texas Ct. App. 651.....	38, 649	Sayre v. Nichols, 7 California, 535.....	lxxviii, 289
Sascer v. Walker's Exrs, 5 Gill & J. 103.....	xiv, 373	Sayward v. Sayward, 7 Greenleaf, 210.....	xxii, 191
Sascer v. Whitley, 10 Maryland, 98.....	lxix, 126	Scales v. Alvin, 12 Alabama, 617.....	xlvi, 285
Satcher v. Satcher, 41 Alabama, 26.....	xcii, 496	Scales v. State, 47 Arkansas, 476.....	58, 788
Satterthwaite v. Doughty, Busbee's Law, 514.....	lix, 554	Scammon v. Citizens of Chicago, 25 Illinois, 694.....	lxix, 334
Satterthwaite v. Emley, 3 Green's Ch. 489.....	lxiii, 618	Scanlan v. Keith, 103 Illinois, 634.....	40, 634
Satterthwaite v. Hicks, Busbee's Law, 105.....	lvii, 577	Scanlan v. Wright, 13 Pickering, 693.....	xiv, 344
Sauer v. Schulenberg, 23 Maryland, 289.....	3, 174	Scarborough v. Harris, 1 Bay, 177.....	l, 696
Saul v. His Creditors, 5 Martin, N. S., 589.....	xvi, 213	Scarborough v. Watkins, 9 B. Monroe, 540.....	1, 283
Sauls v. Drexler's Syndics, 3 Martin, N. S., 615.....	xv, 173	Scarritt, In re, 76 Missouri, 545.....	43, 788
Saulsbury v. Ithaca, 64 New York, 27.....	46, 122	Scattergood v. Wood, 79 New York, 263.....	35, 515
Saulsby v. New York & W. S. Co., 84 N. C. 123.....	43, 736	Schaefer v. Marthaler, 24 Minnesota, 497.....	57, 72
Saunders v. Frost, 5 Pickering, 383.....	xvi, 394	Schaefer v. Osterbrink, 67 Wisconsin, 496.....	58, 675
Saunders v. Hatterman, 3 Ireland's Law, 21.....	lxxvii, 404	Schaefer v. Sandusky, 23 Ohio St. 246.....	31, 533
Saunders v. Houghton, 3 Ireland's Eq. 217.....	lvii, 581	Schaefer v. Farmers' & M. Bk. 58 Pa. 144.....	lxxviii, 363
Saunders v. Kelly, 108 New York, 12.....	59, 472	Schaferman v. O'Brien, 23 Maryland, 585.....	xcii, 708
Saunders v. Scott, 6 Ohio, 360.....	lxxvii, 263	Schatzill v. Bolton, 2 McCord, 478.....	lxiii, 748
Saunders ad. State, 19 Kansas, 127.....	27, 98	Schaub v. Clark, 1 Strobhart's Law, 289.....	lxvii, 554
Saunderson v. Ballance, 3 Jones' Eq. 222.....	lxvii, 218	Schefferling v. Huffman, 4 Ohio State, 241.....	lxii, 261
Sauve v. Toume, 9 Louisiana, 428.....	lxix, 452	Schelderer v. Travelers' Ins. Co., 68 Wis. 13.....	46, 618
Sauter v. N. Y. C. & R. R. Co., 66 New York, 80.....	23, 18	Scheffelin v. Stevens, 1 Winst. L. 106.....	lxxvii, 356
Sauvnet ad. State, 24 La. An. 119.....	13, 115	Schell v. Stein, 76 Penn. St. 398.....	18, 416
Savacool v. Boughton, 5 Wendell, 170.....	xi, 181	Schemmhorn v. Vanderheyden, 1 Johnson, 138.....	lii, 304
Savage v. Bangor, 40 Maine, 178.....	lxiii, 658	Schenck v. Conover, 2 Beasley, Ch. 220.....	lxxviii, 80
Savage v. Brewer, 16 Pickering, 453.....	lxviii, 255	Schenley v. Commonwealth, 36 Penn. State, 29.....	lxxviii, 389
Savage v. Dooley, 26 Connecticut, 411.....	lxxiii, 680	Schermer v. Neurath, 54 Maryland, 491.....	39, 307
Savage v. Everman, 70 Penn. St. 515.....	10, 676	Schleffelin v. Harvey, 6 Johnson, 170.....	v, 206
Savage v. Howard Ins. Co., 82 New York, 302.....	11, 741	Schleffelin v. Stewart, 1 Johns. Ch. 630.....	vii, 507
Savage v. Knight, 22 North Carolina, 406.....	53, 423	Schilling v. Abernethy, 113 Penn. St. 437.....	56, 288
Savage v. Lee, 90 North Carolina, 320.....	47, 823	Schindler v. Gates, 46 Maryland, 604.....	24, 286
Savage v. Murphy, 24 New York, 508.....	xc, 733	Schlenker v. Biale, 3 Scammon, 423.....	lxxviii, 109
Savage v. Pleasant, 5 Binney, 403.....	vi, 424	Schley v. Dixon, 24 Georgia, 273.....	lxix, 151
Savage Mfg. Co. v. Armstrong, 17 Maine, 34.....	xxxv, 227	Schmertz v. Shreve, 62 Penn. St. 457.....	1, 439
Savannah ad. State, T. U. P. Charlton, 235.....	iv, 708	Schmid v. Humphrey, 48 Iowa, 663.....	30, 414
Savannah, F. & W. Ry. Co. v. Gelger, 21 Fla. 686.....	58, 697	Schmidlapp v. Currie, 55 Mississippi, 587.....	30, 539
Savannah, Mayor eta. of, v. Oulson, 26 Ga. 334.....	xcv, 398	Schmidt v. Barker, 17 Louisiana An. 261.....	lxxvii, 557
Savannah Nat. Bank v. Hawkins, 101 Mass. 370.....	3, 373	Schmidt v. Blood, 9 Wendell, 258.....	lxiv, 163
Saviland v. Fidelity & C. Co., 67 Wis. 174.....	58, 853	Schmidt v. Kansas C. D. Co., 90 Mo. 264.....	59, 16
Savery v. Hays, 20 Iowa, 26.....	lxxix, 511	Schmidt v. M. & St. P. R. R. 23 Wisconsin, 186.....	xcix, 156
Savery v. Spaulding, 8 Iowa, 328.....	lxiv, 300	Schmidt v. Mitchell, 84 Illinois, 126.....	25, 446
Savings Bk. v. Albee, 63 New Hampshire, 128.....	54, 501	Schmidt v. Radcliff, 4 Strobhart's Law, 298.....	liii, 678
Savings Bank v. Hunt, 72 Missouri, 587.....	37, 449	Schmidt v. United Ins. Co., 1 Johnson, 249.....	lii, 319
Savage v. Marsh, 10 Metcalf, 594.....	lxiii, 451	Schmittler v. Simon, 101 New York, 654.....	54, 727

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [45] to American Reports.

- Schmidt v. Schmidt, 19 Wisconsin, 307.....lxviii, 681
 Schmeckler v. Gilbert, 13 Kansas, 104.....74, 765
 Schneckly v. Ragan, 7 Gill & Johna. 130.....xxviii, 195
 Schnee v. Schnee, 23 Wisconsin, 377.....xlix, 183
 Schneider v. Stone L. Ins. Co., 23 La. An. 1049.....38, 276
 Schneider v. Cochran, 9 Louisiana An. 328.....li, 304
 Schneider v. Evans, 25 Wisconsin, 361.....2, 54
 Schneider v. Haas, 14 Oregon, 174.....58, 236
 Schneider v. Provident L. I. Co., 24 Wb. 28.....1, 157
 Schneider v. Sanson, 23 Texas, 301.....54, 321
 Schnell v. City of Chicago, 38 Illinois, 323.....lxvii, 304
 Schnell v. Nell, 17 Indiana, 30.....lxix, 468
 Schneller, Curator etc. v. Vance, 8 La. 806.....lxviii, 140
 Schnorr's Appeal, 87 Penn. St. 136.....5, 415
 Schofield v. Homestead Co., 23 Iowa, 217.....7, 197
 Schomp v. Schenck, 11 Vroom, 186.....39, 219
 School District v. Boston H. & R. R. Co., 103
 Massachusetts, 533.....3, 502
 School District v. Fenn, 96 Penn. St. 606.....45, 627
 School District v. Gage, 59 Michigan, 484.....38, 431
 School Directors v. James, 2 Watts & Serg. 698.....lxvii, 586
 School District v. McCoy, 30 Kansas, 228.....46, 39
 School District v. Neil, 56 Kansas, 617.....59, 876
 School District v. Perkins, 21 Kansas, 538.....34, 447
 School District in Winthrop v. Benson, 31 Ma. 261, lii, 618
 School District No. 1 v. Dauchy, 26 Conn. 530.....lxviii, 371
 School Town v. Kendall, 72 Indiana, 81.....37, 139
 Schooler v. Ashurst, 1 Littell, 216.....xiii, 223
 Schooley v. Roman, 31 Maryland, 874.....c, 87
 Schoonhoven v. Gots, 20 Illinois, 40.....lxix, 247
 Schopman v. Boston etc. R. R. Co., 9 Cushing, 24.....lv, 41
 Schott v. Harvey, 105 Pennsylvania St. 222.....51, 501
 Schrader v. Decker, 9 Penn. State, 14.....xlix, 638
 Schreiber v. Board of Assessors, 37 La. An. 906.....55, 628
 Schreiner v. Miller, 67 Iowa, 81.....54, 639
 Schreppert v. Levy, 26 La. An. 671.....21, 558
 Schriber v. Kapp, 5 Watts, 321.....xxx, 287
 Schriver v. Mayer, 19 Penn. State, 87.....lvii, 634
 Schroeder v. Crawford, 94 Illinois, 237.....34, 236
 Schroeder v. Paterson, 4 Rhode Island, 516.....lxix, 163
 Schroeder v. Schweitzer L. T. V. G., 60 Cal. 467.....44, 61
 Schofield v. Furzen, 47 Penn. State, 194.....lxixvi, 633
 Schryver ada. People, 43 New York, 1.....1, 430
 Schuchardt v. Hall, 33 Maryland, 860.....11, 614
 Schuchardt v. People, 59 Illinois, 507.....39, 34
 Schumaker v. Dudley, 59 Alabama 167.....60, 124
 Schumaker v. Watson's Adm'r, 37 Alabama, 90.....lxixvi, 348
 Schutzen Band v. Agitations Verein, 44 Michigan, 313.....38, 370
 Schuler v. Ames, 16 Alabama, 73.....1, 163
 Schults v. Chicago & N. W. R. R. Co., 67 Wb. 618, 58, 681
 Schults v. Coon, 51 Wisconsin, 416.....27, 639
 Schults v. Ins. Co., 40 Ohio St., 217.....48, 676
 Schults v. Milwaukee, 49 Wisconsin, 354.....35, 779
 Schults v. Schults, 10 Gratian, 226.....lx, 235
 Schults v. Schults, 35 New York, 653.....xol, 88
 Schults v. State, 15 Texas Ct. App. 258.....49, 194
 Schults ada. State, 55 Iowa, 698.....39, 187
 Schum v. Penn. R. R. Co., 107 Penn. St. 8.....53, 468
 Schumaker v. Schmidt, 44 Alabama, 454.....4, 138
 Schurmeir v. St. Paul etc. R. R. Co., 8 Minnesota, 113.....lxixii, 770
 Schurmeir v. St. Paul & Pacific R. R. Co., 20
 Minnesota, 82.....lxixviii, 39
 Schuyler v. Smith, 51 New York, 308.....19, 609
 Schuykill Co. v. Copley, 67 Pennsylvania St. 398.....5, 441
 Schwartz v. Commonwealth, 27 Gratt. 1035.....31, 365
 Schwartz v. Gilmore, 45 Illinois, 454.....xol, 237
 Schwartz v. Kuhn, 10 Maine, 374.....lxv, 239
 Schwartz v. Thomas, 2 Washington, 167.....4, 479
 Schwarzbach v. Ohio V. P. U., 25 W. Va. 622.....53, 227
 Schwarzenbach v. Odorous Ex. App. Co. 65
 Maryland, 24.....57, 324
 Schweider v. Lang, 30 Minnesota, 264.....43, 288
 Schwerin v. McKie, 51 New York, 189.....16, 621
 Schwinger v. Raymond, 53 New York, 122.....38, 418
 Seabey v. Gibson, 17 Indiana, 572.....lxix, 588
 Seefeld v. R'y Co., 43 Ohio St., 371.....54, 946
 Seefeld v. State Nat. Bank, 9 Nebraska, 226.....31, 413
 Seefeld v. Tompkins, 65 Illinois, 159.....33, 119
 Scott v. Battle, 58 North Carolina, 124.....38, 604
 Scott v. Brown, 3 Jones' Law, 541.....lxvii, 38
 Scott v. Burton, 6 Texas, 382.....lv, 728
 Scott v. Bush, 25 Michigan, 618.....23, 21
 Scott v. Coleman, 5 Littell, 249.....37, 51
 Scott v. Commonwealth, 4 Met. (Ky.) 227.....lxixii, 621
 Scott ada. Commonwealth, 125 Mass. 228.....58, 8
 Scott v. Dickson, 103 Pennsylvania St. 6.....54, 119
 Scott v. Dunn, 1 Dev. & Bat. Eq. 421.....xxx, 174
 Scott v. Freeland, 7 Smodes & M. 450.....lxv, 301
 Scott v. Gallagher, 14 Serg. & R. 228.....xvi, 302
 Scott v. Gorton, 14 Louisiana, 111.....lxixii, 873
 Scott v. Gorton, 14 Louisiana, 118.....lxixii, 876
 Scott v. Grover, 58 Vermont, 459.....48, 644
 Scott v. Harmon, 109 Massachusetts, 227.....12, 699
 Scott v. Hill, 3 Missouri, 86.....xix, 698
 Scott v. Hix, 3 Speed, 122.....lxix, 439
 Scott v. Hunter, 46 Penn. State, 198.....lxixvi, 642
 Scott v. Kirbendall, 58 Illinois, 228.....33, 699
 Scott v. Kilmanning Coal Co., 59 Penn. St. 221.....36, 728
 Scott v. Libby, 2 Johnson, 225.....32, 42
 Scott v. Martin, 59 Michigan, 554.....54, 69
 Scott v. McAlpin, N. O. Term Rep. 125.....vii, 768
 Scott v. McMillan, 1 Littell, 308.....xix, 229
 Scott v. Moore, 41 Vermont, 205.....lxixvii, 621
 Scott v. Myatt, 26 Alabama, 409.....lx, 625
 Scott v. Nat. Bank, 73 Pennsylvania St. 671.....33, 711
 Scott v. Nelson, 3 Porter, 421.....lxix, 625
 Scott v. Nichols, 27 Mississippi, 94.....lxii, 625
 Scott v. Noble, 73 Pennsylvania St. 118.....33, 699
 Scott v. Onderdonk, 14 N. Y. (4 Kernan), 9.....lxixvi, 128
 Scott v. Perkins, 25 Maine, 22.....lxixvii, 629
 Scott v. Paries, 26 Ohio State, 62.....48, 42
 Scott v. Porter, 23 Pennsylvania State, 52.....39, 719
 Scott v. Price, 2 Serg. & R. 29.....vii, 629
 Scott v. Purcell, 7 Blackford, 66.....lxixvii, 629
 Scott v. Ranick, 1 B. Monroe, 63.....lxixv, 127
 Scott v. Richardson, 2 B. Monroe, 807.....lxixvii, 129
 Scott v. Rivers, 1 Stewart & Porter, 24.....xii, 629
 Scott v. Scott, 1 Bay, 504.....1, 229
 Scott v. Searles, 7 Smodes & M. 421.....lxv, 327
 Scott ada. State, 4 Iradell's Law, 400.....xix, 149
 Scott v. Watson, 46 Maine, 222.....lxixv, 627
 Scott v. Wells, 6 Watts & Serg. 227.....13, 629
 Scoville v. Kelsey, 46 Illinois, 344.....lxixv, 629
 Scoville v. Candfield, 14 Johnson, 229.....vii, 627
 Scow "M. Tuttle" v. Buck, 23 Ohio St. 622.....12, 225
 Scranton v. Clark, 39 New York, 228.....4, 629
 Scranton v. Hill, 103 Pennsylvania St. 373.....48, 211
 Screven v. Bostick, 2 McCord's Ch. 628.....lxvi, 624
 Screven v. Gregoria, 8 Richardson's Law, 128.....lxixv, 76
 Screven v. Joyner, 1 Hill's Ch. (N. C.) 222.....lxvi, 129
 Scribner v. Beach, 4 Denio, 442.....lxixv, 225
 Scribner v. Collier, 46 Michigan, 375.....29, 225
 Scribner v. Crane, 2 Paige's Ch. 147.....xol, 21
 Scribner v. Whitaker, 6 New Hampshire, 59.....lxixii, 773
 Scripps v. Kelly, 35 Michigan, 371.....34, 678
 Scripture v. Lowell Med. F. I. Co., 10 Cushing, 228, lxvi, 111
 Sorver v. Smith, 100 New York, 671.....53, 228
 Soraggs v. Gann, 8 Yeager, 179.....xix, 116

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures (49) to American Reports.

Borougham v. Wood, 15 Wendell, 545.....	xxx, 75
Boudder v. Bradford, 14 Pickering, 13.....	xrv, 355
Boudder v. Delashmutz, 7 Iowa, 39.....	lxvi, 428
Boudder v. Morris, 3 Pennington, 419.....	iv, 383
Boudder v. Trenton etc. Co., 1 Barton's Ch. 694.....	lxviii, 756
Boull v. Edwards, 13 Arkansas, 24.....	lvi, 394
Boull v. Reeves, 3 Green's Ch. 34.....	lxix, 694
Boull v. Reeves, 3 Green's Ch. 131.....	lxix, 708
Boull v. Kirkpatrick, 79 Pennsylvania St. 334.....	xi, 63
Boull v. Murray, 34 Missouri, 420.....	lxixvi, 116
Seabury v. Doe ex dem. Stewart, 23 Ala. 307.....	lviii, 354
Seagler ad. State, 1 Richardson's Law, 30.....	lxiii, 404
Seal v. Duffy, 4 Penn. State, 374.....	xiv, 691
Seale v. Gulf. O. & S. F. R'y Co., 65 Texas, 374.....	57, 603
Sealy v. State, 1 Georgia, 213.....	xlv, 641
Seale v. Edmondson, 73 Alabama, 335.....	49, 51
Seaman v. Ancherhmann, 51 Wisconsin, 673.....	37, 849
Seaman v. Mayor of N. Y., 80 New York, 339.....	34, 613
Seaman v. Riggs, 1 Green's Ch. 214.....	lxixiv, 300
Seaman v. Whitney, 34 Wendell, 350.....	lxixv, 618
Seamans v. Carter, 15 Wisconsin, 548.....	lxixii, 696
Searle v. Adams, 3 Kansas, 515.....	lxixix, 698
Searle v. Sawyer, 127 Massachusetts, 491.....	34, 425
Searle ad. Commonwealth, 3 Binney, 533.....	iv, 446
Sears v. Brink, 3 Johnson, 210.....	lii, 475
Sears v. Eastern R. R. Co., 14 Allen, 433.....	xcii, 780
Sears v. Giddly, 41 Michigan, 590.....	33, 168
Sears v. Hanks, 14 Ohio State, 336.....	lxixiv, 378
Sears v. Hotchkiss, 25 Connecticut, 171.....	lxv, 567
Sears v. Livermore, 17 Iowa, 237.....	lxixv, 564
Sears v. Warren Co., 36 Indiana, 367.....	16, 63
Sears v. West, 1 Murphey, 231.....	lii, 694
Seaton v. Marshall, 6 Bush, 429.....	xcix, 668
Seaton v. Scoville, 18 Kansas, 433.....	36, 779
Seaton v. Scoville, 18 Kansas.....	xi, 212
Seaver v. Phelps, 11 Pickering, 304.....	xcii, 572
Seaward v. Lord, 1 Greenleaf, 163.....	x, 50
Seawell v. Bank of Cape Fear, 3 Dev. L. 379.....	xcii, 723
Seawell v. Greenway, 23 Texas, 601.....	lxixv, 794
Seay v. Bacon, 4 Sneed, 99.....	lxvii, 601
Seay v. Bank of Tennessee, 3 Sneed, 558.....	lxvii, 579
Seay ad. State, 64 Missouri, 59.....	37, 306
Seay ad. State, 3 Stewart, 133.....	xx, 65
Sebastian v. Johnson, 72 Illinois, 323.....	32, 144
Second Nat. Bank v. Hill, 78 Indiana, 233.....	49, 239
Second Nat. Bank v. McGuire, 33 Ohio St. 396.....	31, 539
Second Nat. Bank v. Walbridge, 19 Ohio St. 419.....	2, 408
Second Nat. Bank v. Western Nat. Bank, 51 Maryland, 139.....	34, 300
Security Bank v. Nat. Bank, 67 New York, 439.....	33, 129
Security Co. v. Bryant, 83 Connecticut, 311.....	52, 899
Security F. Ins. Co. v. Kentucky M. Ins. Co., 7 Bush, 51.....	3, 301
Security Ins. Co. v. Fay, 23 Michigan, 467.....	7, 670
Security L. Ins. & A. Co. ad. People, 78 New York, 114.....	34, 523
Sechrist v. Beakin, 7 Watts & Serg. 403.....	lxiii, 251
Seegar v. State, 6 Harris & J. 109.....	xiv, 265
Seeger v. Pettit, 77 Pennsylvania State, 437.....	18, 463
Seekins v. Goodale, 61 Maine, 400.....	14, 568
Sealey v. Litchfield, 49 Connecticut, 134.....	44, 213
Sealy v. Pittsburgh, 63 Pennsylvania St. 360.....	32, 760
Sealey v. Westport, 47 Connecticut, 294.....	36, 70
Seeligson v. Lewis, 65 Texas, 315.....	57, 583
Seely v. Alden, 61 Penn. State, 302.....	a, 643
Seely v. People for the Use of A. W. Neese, 37 Illinois, 173.....	lxixi, 234
Seemiller v. Fuchs, 64 Maryland, 217.....	54, 766
Seemore v. Delashmutz, 11 Iowa, 174.....	lxvii, 130
Seguin v. Debon, 3 Martin, 6.....	v, 726
Seguin v. Maverick, 24 Texas, 535.....	lxixvi, 117
Seguin v. Peterson, 45 Vermont, 265.....	12, 194
Seibert v. Levan, 8 Penn. State, 393.....	lxix, 535
Seibert v. Price, 5 Watts & Serg. 438.....	xi, 526
Seldenbender v. Charles, 4 Serg. & R. 151.....	viii, 683
Seldensperger v. Spear, 17 Maine, 133.....	lxixv, 234
Selbert v. Brooklyn, 101 New York, 136.....	54, 664
Selfried v. Hays, 61 Kentucky, 377.....	56, 167
Selg v. Aard, 21 Gratt. 265.....	8, 606
Selm v. State, 65 Maryland, 566.....	39, 419
Selp v. Storch, 58 Penn. St. 210.....	xcii, 148
Selmas v. Woods, 3 Oaines, 48.....	li, 216
Selby v. Portland, 14 Oregon, 343.....	58, 307
Selchow v. Baber, 83 New York, 69.....	45, 169
Selden v. Oashman, 20 California, 56.....	lxixi, 81
Selden v. Washington, 17 Maryland, 379.....	lxixix, 698
Seldner v. Mount Jackson Nat. Bk. 68 Md. 498.....	59, 196
Self v. Dunn, 43 Georgia, 628.....	5, 544
Selleck v. French, 1 Connecticut, 32.....	vi, 187
Seller v. Corwin, 8 Ohio, 396.....	lxixiv, 301
Sellick v. Munson, 3 Alabama, 150.....	xvi, 636
Sellman v. Bowen, 3 Gill & Johnson, 80.....	lxixix, 537
Selma & G. R. R. Co., Ex parte, 45 Ala. 694.....	6, 723
Selma & M. R. Co. Bust & Foster, 43 Ala. 355.....	xciv, 694
Selma etc. R. R. Co. v. Tipton, 5 Ala. 787.....	lxixix, 344
Semple v. Vicksburg, 63 Mississippi, 62.....	53, 181
Sensenbrenner v. Mathews, 48 Wisconsin, 390.....	33, 809
Sequestration Cases, 30 Texas, 699.....	lxviii, 494
Sequin v. Peterson, 45 Vermont, 265.....	12, 194
Sere v. Armitage, 9 Martin, 304.....	lxixix, 311
Sergeant v. Stryker, 1 Har. 464.....	lxixii, 404
Sergeant v. Steinberger, 3 Ohio, 305.....	xv, 553
Serrill v. Penrose F. B. Co., 49 Pa. St. 118.....	lxixviii, 497
Sesengut v. Posey, 67 Indiana, 408.....	36, 26
Sessions v. Stevens, 1 Florida, 233.....	xvi, 339
Settle v. Allison, 8 Georgia, 301.....	lii, 396
Seventh Nat. Bank v. Cook, 73 Penn. St. 453.....	13, 731
Sever v. Russell, 4 Oushing, 513.....	1, 611
Savery v. Nickerson, 130 Massachusetts, 304.....	31, 514
Sevier v. Vicksburg & M. R. Co., 61 Miss. 2.....	48, 74
Sevier v. Wilson, 1 Peck, 146.....	lxixiv, 741
Sewall v. Boston Water Power Co., 4 Allen, 377.....	lxixii, 701
Sewall v. Ochoa, 75 New York, 48.....	31, 418
Sewall v. Sewall, 123 Massachusetts, 156.....	33, 399
Sewell v. Eaton, 6 Wisconsin, 490.....	lxix, 471
Sewell v. Harrington, 11 Vermont, 141.....	lxixiv, 678
Sezey v. Adkinson, 34 California, 346.....	xc, 698
Sexton v. Nevers, 30 Pickering, 451.....	lxixii, 235
Sexton ad. State, 3 Hawks, 194.....	xiv, 584
Seybel v. Nat. Currency Bank, 54 N. Y. 399.....	13, 583
Seybolt v. New York, L. E. & W. R. R. Co., 85 New York, 563.....	47, 78
Seymour v. Continental L. I. Co., 44 Conn. 339.....	36, 409
Seymour v. Delaney, 3 Cowen, 445.....	xv, 370
Seymour v. De Laney, Hopkins' Ch. 436.....	xiv, 538
Seymour v. Lewis, 3 Beasley Ch. 439.....	lxixviii, 108
Seymour v. Minburn, 17 Johnson, 169.....	viii, 399
Seymour ad. People, 16 California, 333.....	lxixvi, 523
Seymour v. Watson, 5 Blackford, 855.....	lxixvi, 524
Shackleton v. Sun Fire Office, 55 Michigan, 336.....	54, 37
Shackleton v. Fountain's Helm, 1 T. B. Mon. 293.....	xv, 111
Shackleton v. Handley, 1 A. K. Marshall, 436.....	x, 787
Shackleton v. Patrick, 1 Mill, 311.....	xi, 67
Shackleton v. Purket, 3 A. K. Marshall, 436.....	xi, 43
Shackleton v. Ward, 3 Alabama, 37.....	lxixvi, 48
Shaddock v. Clifton, 23 Wisconsin, 114.....	lxixv, 87
Shaddon v. Knots, 2 Swan, 358.....	lxixii, 6
Shader v. Railway P. A. Co., 66 New York, 441.....	33, 69
Shaefer v. Gates, 2 B. Monroe, 483.....	lxixviii, 396
Shaeffer v. Chambers, 2 Halstead's Ch. 548.....	lxixvii, 323

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Shaeffer v. Shaeffer, 54 Maryland, 679.....	39, 406
Shaefer v. Abalt, 45 Maryland, 171.....	39, 406
Shaefer v. Mumma, 17 Maryland, 331.....	lxix, 656
Shaefer v. Kintner, 1 Binney, 537.....	ii, 483
Shaffner v. Briggs, 35 Indiana, 55.....	16, 1
Shaffner v. Commonwealth, 73 Penn. St. 60.....	13, 649
Shaff v. Phoenix M. I. Co., 67 New York, 544.....	23, 139
Shain v. Martham, 4 J. J. Marshall, 578.....	xi, 233
Shaller v. Brand, 6 Binney, 435.....	vi, 483
Shalter and Ebling's Appeal, 43 Penn. St. 63.....	lxix, 523
Shamokin Valley R. R. Co. v. Livermore, 47 Penn. St. 465.....	lxix, 523
Shane v. Kansas City etc. R. R. Co., 71 Mo. 337.....	36, 480
Shanks v. Lancaster, 5 Gratian, 110.....	1, 108
Shanks v. Seamount, 24 Iowa, 131.....	xii, 466
Shannahan v. Commonwealth, 5 Bush, 463.....	8, 465
Shannon v. Comstock, 21 Wendell, 457.....	xxiv, 363
Shannon v. Hall, 73 Illinois, 354.....	23, 146
Shannon v. Kiny, 1 A. K. Marshall, 3.....	1, 705
Shannon ads. State, 36 Ohio St. 423.....	38, 599
Shannon v. White, 6 Richardson's Equity, 96.....	ix, 115
Shannon's Heirs v. Dillon, 3 B. Monroe, 355.....	xlvi, 364
Shapley v. Abbott, 43 New York, 443.....	1, 544
Share v. Anderson, 7 Serg. & R. 43.....	x, 431
Sharkey v. Mansfield, 30 New York, 337.....	63, 161
Sharkey v. McDermott, 21 Missouri, 647.....	66, 370
Sharlock v. Rivers, 13 Rich. L. 466.....	xxd, 245
Sharman v. Howell, 40 Georgia, 357.....	3, 576
Sharon v. Shaw, 3 Nevada, 399.....	xx, 546
Sharp v. Bailey, 14 Iowa, 387.....	lxix, 439
Sharp v. Cheatham, 38 Missouri, 498.....	57, 433
Sharp v. Emmet, 5 Wharton, 393.....	xxiv, 554
Sharp v. Johnson, 4 Hill (N. Y.) 93.....	xi, 359
Sharp v. Jones, 18 Indiana, 314.....	lxix, 389
Sharp v. Parks, 43 Illinois, 511.....	xv, 565
Sharp v. Tunes, 4 Halsted, 323.....	xvii, 479
Sharp v. Thompson, 100 Illinois, 447.....	39, 61
Sharp v. United States, 4 Watts, 21.....	xxviii, 676
Sharp v. Wickliffe, 3 Latell, 10.....	xiv, 37
Sharp, Petition of, 36 New York, 357.....	15, 415
Sharp's Ride Mfg. Co. v. Rowan, 34 Conn. 399.....	xxd, 729
Sharpe v. Bellis, 61 Pennsylvania St. 60.....	c, 615
Sharpe v. Ringley, 1 Hill, 373.....	xii, 643
Sharpe v. Gibson, 1 Harris & J. 447.....	ii, 539
Sharpless v. Mayor of Phila., 21 Pennsylvania St. 147.....	ix, 739
Sharpless ads. Commonwealth, 2 Serg. & R. 31.....	vii, 633
Shartzer v. State, 63 Maryland, 149.....	53, 501
Shattuck v. Hammond, 46 Vermont, 468.....	14, 631
Shattuck v. Lamb, 65 New York, 499.....	23, 656
Shattuck v. Myers, 13 Indiana, 47.....	lxiv, 236
Shattuck v. State, 51 Mississippi, 59.....	24, 624
Shaul v. Brown, 25 Iowa, 37.....	4, 151
Shaver v. Ingham, 38 Michigan, 629.....	55, 713
Shaver v. Shaver, 34 Iowa, 308.....	37, 194
Shaver v. White, 6 Munford, 110.....	viii, 730
Shaw, Ex parte, 7 Ohio State, 61.....	ix, 55
Shaw v. Atma Ins. Co., 49 Missouri, 878.....	8, 150
Shaw v. Barnes, 5 Penn. State, 12.....	xlvi, 399
Shaw v. Berry, 21 Maine, 478.....	lii, 633
Shaw v. Berry, 25 Maine, 379.....	lviii, 703
Shaw v. Beveridge, 3 Hill (N. Y.), 26.....	xxxviii, 616
Shaw v. Boyd, 5 Serg. & R. 308.....	ix, 368
Shaw v. Burney, 36 North Carolina, 331.....	41, 461
Shaw v. Carpenter, 34 Vermont, 158.....	41, 837
Shaw v. Clark, 49 Michigan, 294.....	63, 474
Shaw v. Clark, 6 Vermont, 507.....	xvii, 573
Shaw v. Coffin, 33 Maine, 254.....	4, 290
Shaw ads. Commonwealth, 4 Allen, 303.....	lxxi, 706
Shaw ads. Commonwealth, 4 Cushing, 364.....	1, 513
Shaw v. Coster, 3 Paige, 439.....	lxix, 639
Shaw v. Dudley, 70 Maine, 336.....	33, 313
Shaw v. Dwight, 27 New York, 344.....	lxix, 273
Shaw v. Flak, 21 Wisconsin, 363.....	xxv, 547
Shaw v. Halliban, 46 Vermont, 389.....	14, 639
Shaw v. Hill, 30 La. An. 531.....	xxvi, 439
Shaw v. Oswego I. Co., 10 Oregon, 371.....	45, 146
Shawada People, 67 Michigan, 403.....	53, 373
Shaw v. Poor, 6 Pickering, 86.....	xvii, 347
Shaw v. Rigby, 34 Indiana, 375.....	43, 34
Shaw v. S. C. R. R. Co., 3 Rich. Law, 422.....	lvii, 759
Shaw v. Shaw, 30 Maine, 94.....	lxix, 635
Shaw v. Smith, 49 Connecticut, 306.....	40, 179
Shaw v. Spencer, 100 Massachusetts, 363.....	1, 115
Shaw v. Spencer, 100 Massachusetts, 363.....	xxvii, 107
Shaw v. Spooner, 9 New Hampshire, 197.....	lxix, 243
Shaw v. Thompson, 16 Pickering, 194.....	xxvi, 639
Shaw v. Wilkins, 3 Humphreys, 647.....	lxix, 699
Shaw v. Williams, 37 Indiana, 158.....	44, 736
Shawhan v. Long, 36 Iowa, 459.....	xxvi, 164
Shawhan v. Van Nest, 35 Ohio St. 490.....	18, 313
Shawneetown v. Mason, 63 Illinois, 337.....	23, 383
Shay v. Thompson, 39 Wisconsin, 549.....	48, 539
Shca v. Donahue, 15 Lee, 160.....	54, 407
Shca v. Sixth Ave. R. R. Co., 63 New York, 190.....	36, 489
Shcafe v. People, 67 Illinois, 189.....	39, 49
Sheehan v. Collins, 30 Illinois, 336.....	lxix, 271
Sheely v. Edwards, 73 Alabama, 178.....	49, 43
Shean v. Shay, 43 Indiana, 375.....	13, 363
Shearman v. Angel, 1 Bailey's Eq. 351.....	lxix, 189
Shearman v. Niagara F. I. Co., 46 N. Y. 536.....	7, 399
Shearman v. State, 1 Texas Ct. App. 215.....	33, 493
Shecut v. McDowell, 3 Brevard, 36.....	v, 538
Shed v. Bretz, 1 Pickering, 401.....	xi, 201
Sheedy v. Rosch, 134 Massachusetts, 473.....	33, 691
Sheedy v. Second Nat. Bank, 63 Missouri, 17.....	21, 409
Sheehan's Case, 123 Massachusetts, 448.....	23, 374
Sheehan v. Good Samaritan Hosp., 30 Mo. 185.....	11, 413
Sheehy v. Oakley, 43 Iowa, 181.....	22, 238
Sheehy v. Adarene, 41 Vermont, 541.....	xxviii, 623
Sheeler v. Chesapeake & O. R. R. Co., 51 Va. 125.....	59, 654
Sheely v. Biggs, 3 Harris & J. 363.....	xx, 523
Sheets v. Oliver, 14 Louisiana, 448.....	xxxiii, 593
Sheets v. Hawk, 14 Serg. & R. 173.....	xvi, 476
Sheets v. Peabody, 6 Blackford, 120.....	xxxviii, 138
Sheets v. Peabody, 7 Blackford, 613.....	xxxix, 167
Sheffield v. Balmer, 33 Missouri, 474.....	14, 439
Sheffield v. Ladue, 16 Minnesota, 399.....	10, 146
Sheffill v. Van Dusen, 13 Gray, 394.....	lxix, 633
Sheffill v. Van Dusen, 15 Gray, 435.....	lxix, 377
Shelburne F. Nat. Bank v. Townsend, 103 Massachusetts, 177.....	3, 446
Shelby v. Alcorn, 36 Mississippi, 273.....	lxix, 169
Shelby v. Shelby, Cooks, 178.....	v, 636
Shelden v. Robinson, 7 New Hampshire, 187.....	xxvi, 738
Shelden v. Atlantic F. & M. I. Co., 36 N. Y. 499.....	lxix, 317
Sheldon v. Benham, 4 Hill (N. Y.) 129.....	xi, 371
Sheldon v. Carpenter, 4 N. Y. (4 Comst.), 379.....	iv, 381
Sheldon v. Connecticut Co., 35 Conn. 307.....	lxv, 545
Sheldon v. Hartford Fire Ins. Co., 23 Conn. 255.....	lviii, 439
Sheldon v. Horton, 43 New York, 69.....	3, 937
Sheldon v. Hudson River R. R. Co., 14 N. Y. 238.....	lxix, 153
Sheldon v. Kibbe, 3 Connecticut, 214.....	viii, 179
Sheldon v. Rice, 20 Michigan, 354.....	10, 138
Sheldon v. Rockwell, 9 Wisconsin, 148.....	lxix, 395
Sheldon v. Root, 16 Pickering, 357.....	xxviii, 399
Sheldon v. Sherman, 43 New York, 494.....	1, 399
Sheldon v. Skinner, 4 Wendell, 355.....	xxi, 161
Sheldon v. Steamship U. S., 18 California, 527.....	lxix, 193
Shelley v. Booths, 73 Missouri, 74.....	39, 431

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Shelton v. Adams*, 51 Vermont, 102..... 31, 679
Shelton v. Berry, 19 Texas, 154..... lxx, 326
Shelton v. Fels, Phil. Law, 178..... xciii, 588
Shelton v. Hamilton, 23 Mississippi, 498..... lvii, 149
Shelton v. Johnson, 4 Sneed, 672..... lxx, 265
Shelton v. Mayor of Mobile, 30 Alabama, 540..... lxxviii, 143
Shelton v. State, 53 Indiana, 331..... 21, 197
Shelton v. State, 2 Jones' Law, 360..... lxxiv, 587
Shelton v. Wade, 4 Texas, 143..... ii, 722
Shelton and Tuttle, Trustees, v. Hurd, 7 Rhode Island, 408..... lxxiv, 584
Shenk v. Pa. S. P. Co., 60 Penn. 109..... c, 541
Shenard v. Hawley, 1 Connecticut, 267..... vi, 244
Shenard v. Milwaukee Gas Light Co., 6 Wis. 539..... lxx, 479
Shenard v. Moffat, 2 Finney, 64..... lli, 141
Shenard v. Richards, 2 Gray, 424..... lxi, 473
Shenard v. Shenard, 7 Johns. Ch. 57..... xi, 296
Shenard v. Milwaukee Gaslight Co., 15 Wisconsin, 318..... lxxvii, 679
Shenard v. Mo. Pac. Ry. Co., 85 Missouri, 639..... 55, 390
Shenard v. Rhodes, 7 Rhode Island, 470..... lxxiv, 573
Shenard v. Whetstone, 51 Iowa, 457..... 33, 143
Shepherd v. Casaday, 20 Texas, 24..... lxx, 372
Shepherd v. Rand, 48 Maine, 244..... lxxvii, 225
Shepherd v. Butterfield, 4 Ouchling, 435..... i, 796
Shepherd v. Shepherd, 2 Richardson's Eq. 143..... xvi, 41
Shepherd v. Burkhalter, 13 Georgia, 443..... lviii, 823
Shepherd v. Chamberlain, 8 Gray, 225..... lxix, 248
Shepherd v. Adams, Commonwealth, 6 Binney, 323..... vi, 449
Shepherd v. Lanier, 5 Louisiana, 236..... xxv, 181
Shepherd v. McEvers, 4 Johns. Ch. 126..... viii, 561
Shepherd v. New Orleans, 6 Robinson (La.), 242..... xli, 269
Shepherd v. Sawyer, 3 Murphy, 25..... v, 517
Shepherd v. Turner, 3 McCord, 249..... xv, 631
Shepherd v. Young, 8 Gray, 169..... lxix, 248
Sheppard v. State, 1 Texas Ct. App. 522..... 28, 422
Sheppard v. Steele, 43 New York, 83..... 3, 680
Sheppard v. County Comm'rs, 59 Georgia, 335..... 27, 294
Sherban v. Commonwealth, 3 Watts, 212..... lxxiv, 460
Sherbourne v. Tuba County, 21 California, 113..... lxxxi, 151
Sherburne v. Shaw, 1 New Hampshire, 187..... viii, 47
Sherley v. Bartley, 4 Sneed, 58..... lxxvii, 597
Sherly v. Argensbright, 1 Helsk. 128..... 2, 690
Sheridan v. Bean, 8 Metcalf, 284..... xli, 507
Sheridan v. Brooklyn etc. R. R. Co., 26 New York, 30..... xciii, 690
Sheridan v. Medara, 2 Stockton's Ch. 489..... lxxiv, 464
Sheriffs v. Fugh, 23 Wisconsin, 273..... xciv, 600
Sherley v. Billings, 8 Bush, 147..... 8, 451
Sherlock v. Bainbridge, 41 Indiana, 25..... 13, 302
Sherlock v. Thayer, 4 Michigan, 265..... lxxvi, 539
Sherman v. Anderson, 27 Kansas, 333..... 41, 414
Sherman v. Bulok, 23 California, 241..... xxi, 877
Sherman v. Clark, 4 Nevada, 138..... xcvi, 516
Sherman v. Dill, 4 Yeates, 295..... ii, 408
Sherman v. Fall Riv. I. Co., 2 Allen, 594..... lxxix, 799
Sherman v. Hannibal & St. J. R. Co., 73 Mo. 62..... 37, 423
Sherman v. People, 10 Wendell, 295..... xxv, 563
Sherman v. Stanton, 1 Tyler, 260..... iv, 734
Sherman v. Story, 30 California, 222..... lxxix, 93
Sherman v. Williams, 113 Massachusetts, 481..... 18, 622
Shermer v. Shermer, 1 Washington, 208..... i, 460
Sherrod v. Nevins, 3 Indiana, 241..... li, 508
Sherrod v. Woodard, 4 Devereux Law, 260..... xlv, 714
Sherwin v. Sanders, 59 Vermont, 489..... 59, 750
Sherwood v. Agricultural Co., 73 New York, 447..... 29, 180
Sherwood v. Burr, 4 Day, 244..... iv, 211
Sherwood v. Culler, 2 Devereux Law, 260..... xlv, 714
Sherwood v. Dist. of Columbia, 3 Mackay, 278..... 51, 778
Sherwood v. Lafayette, 109 Indiana, 411..... 55, 414
Sherwood v. Reed, 25 Connecticut, 489..... xxi, 264
Sherwood v. Salmon, 5 Day, 439..... v, 137
Sherwood v. Sherwood, 45 Wisconsin, 257..... 34, 757
Sherwood v. Snow, 46 Iowa, 481..... 26, 155
Sherwood v. State, 15 Minnesota, 221..... 2, 116
Shewell v. Keen, 2 Wharton, 333..... lxx, 296
Shields v. Fuller, 4 Wisconsin, 102..... lxx, 293
Shields v. Jolly, 1 Richardson's Equity, 99..... xlii, 349
Shields v. Lonsar, 34 New Jersey, 484..... 3, 256
Shields v. State, 13 Missouri, 226..... llii, 167
Shields v. Yonge, 15 Georgia, 349..... lx, 606
Shifflet v. State, 20 Missouri, 415..... lxxiv, 190
Shilling v. Carson, 27 Md. 175..... xcii, 622
Shimer v. Mann, 99 Indiana, 190..... 56, 83
Shinborn v. State, 46 New Hampshire, 497..... lxxviii, 224
Shindelbeck v. Moon, 23 Ohio State, 264..... 34, 894
Shindler v. Houston, 1 N. Y. (1 Comst.), 261..... xlii, 316
Shinn v. Bodine, 60 Pennsylvania, 123..... c, 582
Shinn v. Roberts, 1 Spencer, 426..... xliii, 626
Shinn v. State, 64 Indiana, 13..... 31, 110
Shinn v. Zimmerman, 3 Zabrickie, 159..... lv, 260
Shipley v. Alexander, 3 Harris & J. 54..... v, 492
Shipley v. Fifty Associates, 101 Mass. 251..... 3, 344
Shipley v. Fifty Associates, 106 Mass. 194..... 8, 313
Shipley v. Ritter, 7 Maryland, 408..... lxi, 371
Shipman v. Clark, 4 Denio, 446..... xlvii, 264
Shipman v. Furnis, 69 Alabama, 555..... 44, 628
Shipp v. McCraw, 3 Murphy, 463..... lx, 611
Shippey v. Henderson, 14 Johnson, 173..... vii, 468
Shippey v. State, 10 Minnesota, 223..... lxxviii, 70
Shipply v. People, 86 New York, 375..... 46, 551
Shiras v. Olinger, 50 Iowa, 571..... 33, 126
Shirkey v. Hanna, 3 Blackford, 403..... xcvi, 426
Shirley v. Ayres, 14 Ohio, 207..... xlv, 546
Shirley v. Fearn, 23 Mississippi, 653..... lxix, 276
Shirley v. Welty, 19 Illinois, 623..... lxxi, 244
Shirliff v. Whitfield, 2 Brevard, 71..... lii, 701
Shisler v. Baxter, 109 Pennsylvania St. 443..... 58, 728
Shisler v. Vandike, 92 Pennsylvania St. 447..... 37, 708
Shivers v. Simmons, 54 Mississippi, 520..... 26, 373
Shivers v. Wilson, 5 Harris & J. 130..... ix, 497
Shobert, Ex parte, 70 California, 632..... 59, 433
Shook v. McChesney, 4 Yeates, 507..... ii, 415
Shoock v. Mills, 71 Indiana, 285..... 26, 196
Shoockley v. Davis, 17 Georgia, 177..... lxxii, 223
Shoe and L. Nat. Bank v. Dix, 129 Mass. 148..... 35, 69
Shoemaker v. Benedict, 11 N. Y. (1 Kernan), 175..... lxxii, 96
Shoemaker v. Mechanics' Bank, 59 Penn. 84.79, xcvi, 315
Shoemaker v. N. M. Bank of Balt., 31 Md. 268..... c, 73
Shoemaker v. State, 62 Iowa, 243..... 49, 146
Sholl v. German Coal Co., 118 Illinois, 427..... 59, 276
Short v. Baltimore C. P. Ry. Co., 50 Md. 72..... 23, 224
Short v. Home Ins. Co., 90 New York, 15..... 43, 126
Short v. Tinsley, 1 Metcalf (Ky.), 307..... lxxi, 489
Shorter v. People, 2 N. Y. (2 Comst.), 192..... d, 266
Shots v. Poe, 47 Maryland, 513..... 26, 425
Shotwell v. Hamblin, 23 Mississippi, 196..... lv, 83
Shotwell v. Lawson, 30 Mississippi, 27..... lxxiv, 146
Shouse v. Adams, Commonwealth, 16 B. Monroe, 265..... lxxii, 551
Showers v. Showers, 27 Penn. State, 485..... lxxvii, 427
Shown v. McMeekin, 9 Lea, 601..... 42, 699
Shreek v. Shreek, 23 Texas, 578..... 5, 261
Shreve v. Grimes, 4 Little, 220..... xlv, 117
Shreve v. Joyce, 35 New Jersey, 44..... 13, 417
Shreveport v. Levy, 26 La. An. 671..... 31, 553
Shreveport v. Red River & Coast Lms. St. La. An. 562..... 55, 504
Shrieve v. Stokes, 8 B. Monroe, 428..... xlviii, 498
Shriver v. Sioux City and St. Paul Ry. Co., 24 Minnesota, 506..... 31, 288

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Shaeffer v. Shaeffer, 54 Maryland, 679.....	39, 406
Shaefer v. Ahalt, 48 Maryland, 171.....	39, 406
Shaefer v. Mumma, 17 Maryland, 331.....	xxix, 656
Shaffer v. Kintner, 1 Binney, 537.....	ii, 428
Shaffer v. Briggs, 35 Indiana, 55.....	10, 1
Shaffer v. Commonwealth, 73 Penn. 89.....	13, 649
Shaff v. Phoenix M. I. Co., 67 New York, 544.....	23, 139
Shain v. Markham, 4 J. J. Marshall, 578.....	xx, 233
Shaller v. Brand, 6 Binney, 435.....	vi, 428
Shaller and Ehling's Appeal, 43 Penn. 59.....	63, 522
Shamokin Valley R. R. Co. v. Livermore, 47 Penn. State, 465.....	lxxvi, 522
Shane v. Kansas City etc. R. R. Co., 71 Mo. 237.....	36, 480
Shanks v. Lancaster, 5 Gratian, 119.....	i, 108
Shanks v. Seasmith, 24 Iowa, 131.....	xxii, 468
Shannahan v. Commonwealth, 8 Bush, 463.....	8, 465
Shannon v. Comstock, 31 Wendell, 457.....	xxiv, 363
Shannon v. Hall, 73 Illinois, 354.....	22, 146
Shannon v. Kiny, 1 A. K. Marshall, 8.....	1, 705
Shannon ada. State, 36 Ohio St. 423.....	38, 599
Shannon v. White, 6 Richardson's Equity, 96.....	ix, 115
Shannon's Heirs v. Dillon, 8 B. Monroe, 359.....	xviii, 394
Shapley v. Abbott, 43 New York, 443.....	1, 548
Share v. Anderson, 7 Serg. & R. 43.....	x, 431
Sharkey v. Mansfield, 90 New York, 237.....	43, 161
Sharkey v. McDermott, 51 Missouri, 647.....	60, 270
Sharlock v. Rivers, 13 Rich. L. 499.....	xxd, 345
Sharmen v. Howell, 40 Georgia, 257.....	2, 576
Sharon v. Shaw, 3 Nevada, 299.....	xx, 546
Sharp v. Bailey, 14 Iowa, 357.....	lxxxi, 689
Sharp v. Cheatham, 35 Missouri, 498.....	57, 433
Sharp v. Emmet, 5 Wharton, 292.....	xxiv, 554
Sharp v. Johnson, 4 Hill (N. Y.) 92.....	xi, 299
Sharp v. Jones, 19 Indiana, 314.....	lxxxi, 389
Sharp v. Parks, 43 Illinois, 511.....	xv, 565
Sharp v. Tease, 4 Halsted, 323.....	xvii, 479
Sharp v. Thompson, 100 Illinois, 447.....	59, 61
Sharp v. United States, 4 Watts, 21.....	xxviii, 576
Sharp v. Wickliffe, 3 Littlell, 10.....	xiv, 37
Sharp, Petition of, 56 New York, 357.....	15, 415
Sharp's Ride Mfg Co. v. Rowan, 34 Conn. 399.....	xxd, 728
Sharpe v. Bellin, 61 Pennsylvania St. 69.....	c, 613
Sharpe v. Bingley, 1 Hill, 373.....	xii, 643
Sharpe v. Gibson, 1 Harris & J. 447.....	ii, 589
Sharpless v. Mayor of Phila., 31 Pennsylvania State, 147.....	lix, 759
Sharpless ada. Commonwealth, 2 Serg. & R. 51.....	vii, 632
Sharrier v. State, 63 Maryland, 149.....	52, 501
Shattuck v. Hammond, 45 Vermont, 426.....	14, 631
Shattuck v. Lamb, 63 New York, 490.....	73, 556
Shattuck v. Myers, 13 Indiana, 47.....	lxxiv, 236
Shattuck v. State, 51 Mississippi, 59.....	24, 624
Shed v. Brown, 35 Iowa, 37.....	4, 151
Shaver v. Ingham, 35 Michigan, 689.....	55, 713
Shaver v. Shaver, 54 Iowa, 208.....	37, 194
Shaver v. White, 6 Munford, 110.....	viii, 730
Shaw, Ex parte, 7 Ohio State, 61.....	lxx, 55
Shaw v. Aetna Ins. Co., 49 Missouri, 579.....	8, 150
Shaw v. Barnes, 5 Penn. State, 12.....	xlvii, 399
Shaw v. Berry, 31 Maine, 678.....	lii, 628
Shaw v. Berry, 35 Maine, 279.....	lviii, 702
Shaw v. Beveridge, 3 Hill (N. Y.), 36.....	xxviii, 616
Shaw v. Boyd, 5 Serg. & R. 203.....	ix, 368
Shaw v. Burnay, 26 North Carolina, 251.....	41, 461
Shaw v. Carpenter, 54 Vermont, 155.....	41, 527
Shaw v. Clark, 49 Michigan, 254.....	63, 474
Shaw v. Clark, 5 Vermont, 507.....	xvii, 573
Shaw v. Coffin, 55 Maine, 254.....	4, 290
Shaw ada. Commonwealth, 4 Allen, 308.....	lxxxi, 706
Shaw ada. Commonwealth, 4 Cushing, 354.....	i, 313
Shaw v. Conter, 8 Paige, 339.....	xxiv, 689
Shaw v. Dudley, 70 Maine, 338.....	35, 313
Shaw v. Dwight, 27 New York, 244.....	lxxiv, 279
Shaw v. Fisk, 41 Wisconsin, 368.....	xv, 547
Shaw v. Halliban, 46 Vermont, 359.....	14, 628
Shaw v. Hill, 30 La. An. 531.....	xvii, 429
Shaw v. Oswego I. Co., 10 Oregon, 271.....	45, 146
Shawada. People, 37 Michigan, 403.....	58, 377
Shaw v. Poor, 6 Pickering, 85.....	xvii, 367
Shaw v. Right, 84 Indiana, 275.....	43, 36
Shaw v. S. C. R. R. Co., 5 Rich. Law, 422.....	lvii, 763
Shaw v. Shaw, 50 Maine, 94.....	lxxix, 605
Shaw v. Smith, 45 Connecticut, 304.....	40, 170
Shaw v. Spencer, 100 Massachusetts, 392.....	1, 113
Shaw v. Spencer, 100 Massachusetts, 392.....	xvii, 177
Shaw v. Spooner, 9 New Hampshire, 157.....	xxxi, 348
Shaw v. Thompson, 16 Pickering, 194.....	xxvi, 626
Shaw v. Wilkins, 3 Humphreys, 647.....	xxix, 698
Shaw v. Williams, 57 Indiana, 158.....	44, 736
Shawhan v. Long, 35 Iowa, 498.....	xxvi, 144
Shawhan v. Van Nest, 25 Ohio St. 490.....	18, 313
Shawneetown v. Mason, 33 Illinois, 337.....	25, 322
Shay v. Thompson, 59 Wisconsin, 569.....	45, 539
Shes v. Donahue, 15 Lea, 160.....	54, 407
Shes v. Sixth Ave. R. R. Co., 32 New York, 120.....	30, 459
Shes v. People, 37 Illinois, 189.....	79, 49
Sheehan v. Collins, 30 Illinois, 336.....	lxxi, 271
Shealy v. Edwards, 73 Alabama, 178.....	49, 43
Shean v. Shay, 43 Indiana, 275.....	13, 368
Shearman v. Angel, 1 Bailey's Eq. 351.....	xxiii, 168
Shearman v. Niagara F. I. Co., 46 N. Y. 526.....	7, 399
Shearman v. State, 1 Texas Ct. App. 215.....	58, 499
Shcut v. McDowell, 3 Broadard, 38.....	v, 136
Shed v. Brett, 1 Pickering, 401.....	xi, 301
Shedy v. Bosch, 134 Massachusetts, 473.....	84, 659
Shedy v. Second Nat. Bank, 63 Missouri, 17.....	21, 499
Sheehan's Case, 123 Massachusetts, 449.....	23, 374
Sheehan v. Good Samaritan Hosp., 50 Mo. 125.....	11, 613
Sheehy v. Oakley, 43 Iowa, 183.....	22, 238
Sheehy v. Adarens, 41 Vermont, 541.....	xviii, 623
Sheeler v. Chesapeake & O. R. R. Co., 51 Va. 129.....	59, 454
Sheely v. Biggs, 2 Harris & J. 393.....	31, 598
Sheets v. Culver, 14 Louisiana, 462.....	xxviii, 628
Sheets v. Hawk, 14 Serg. & R. 173.....	xvi, 496
Sheets v. Peabody, 6 Blackford, 120.....	lxxviii, 128
Sheets v. Peabody, 7 Blackford, 612.....	lxxix, 197
Sheffield v. Balmer, 53 Missouri, 474.....	14, 439
Sheffield v. Ladue, 16 Minnesota, 359.....	10, 146
Sheffill v. Van Dusen, 13 Gray, 304.....	lxxiv, 632
Sheffill v. Van Dusen, 15 Gray, 426.....	lxxvii, 377
Shelburne F. Nat. Bank v. Townsend, 128 Mas-	
sachusetts, 177.....	3, 446
Shelby v. Alcorn, 35 Mississippi, 273.....	lxxxi, 149
Shelby v. Shelby, Cooke, 179.....	v, 688
Shelden v. Robinson, 7 New Hampshire, 157.....	xxvi, 728
Shelden v. Atlantic F. & M. I. Co., 35 N. Y. 460.....	lxxiv, 317
Shelden v. Benham, 4 Hill (N. Y.) 129.....	xi, 271
Shelden v. Carpenter, 4 N. Y. (4 Conn.), 579.....	lv, 392
Shelden v. Connecticut Co., 25 Conn. 257.....	lxv, 625
Shelden v. Hartford Fire Ins. Co., 23 Conn. 235.....	lviii, 626
Shelden v. Horton, 43 New York, 92.....	3, 997
Shelden v. Hudson River R. R. Co., 14 N. Y. 222.....	lxvii, 135
Shelden v. Kibbe, 3 Connecticut, 214.....	vii, 176
Shelden v. Rice, 30 Michigan, 294.....	18, 138
Shelden v. Rockwell, 9 Wisconsin, 145.....	lxxvi, 366
Shelden v. Root, 16 Pickering, 557.....	xxviii, 366
Shelden v. Sherman, 43 New York, 494.....	1, 692
Shelden v. Skinner, 4 Wendell, 295.....	xxi, 161
Shelden v. Steamship U. S., 16 California, 527.....	lxxix, 193
Shelley v. Booths, 73 Missouri, 74.....	39, 451

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Shelton ad. State, 51 Vermont, 102..... 31, 679
 Shelton v. Berry, 19 Texas, 154.....lxix, 336
 Shelton v. Fels, Phill. Law, 178.....xcviii, 598
 Shelton v. Hamilton, 23 Mississippi, 496.....lvii, 149
 Shelton v. Johnson, 4 Sneed, 672.....lxix, 265
 Shelton v. Mayor of Mobile, 30 Alabama, 540.....lxviii, 143
 Shelton v. State, 53 Indiana, 331.....xli, 197
 Shelton ad. State, 2 Jones' Law, 260.....lxiv, 587
 Shelton v. Wade, 4 Texas, 148.....xlii, 722
 Shelton and Tuttle, Trustees, v. Hard, 7 Rhode Island, 408.....lxxxiv, 564
 Sheak v. Pa. S. P. Co., 60 Penn. 100.....c, 541
 Shepard v. Hawley, 1 Connecticut, 267.....vi, 344
 Shepard v. Milwaukee Gas Light Co., 6 Wis. 539.....lxix, 479
 Shepard v. Moffat, 3 Pinney, 66.....xlii, 141
 Shepard v. Richards, 2 Gray, 424.....lxi, 473
 Shepard v. Shepard, 7 Johns. Ch. 57.....xi, 296
 Shepard v. Milwaukee Gaslight Co., 15 Wisconsin, 318.....lxxxii, 679
 Shepard v. Mo. Pac. Ry Co., 85 Missouri, 639.....55, 390
 Shepard v. Rhodes, 7 Rhode Island, 470.....lxxxiv, 673
 Shepard v. Whetstone, 51 Iowa, 457.....33, 143
 Shephard v. Cassiday, 30 Texas, 24.....lxix, 573
 Shephard v. Rand, 48 Maine, 244.....lxxvii, 225
 Shephard v. Butterfield, 4 Cushing, 436.....l, 796
 Shephard v. Shepard, 2 Richardson's Eq. 142.....xvi, 41
 Shephard v. Burkhalter, 13 Georgia, 443.....lviii, 623
 Shephard v. Chamberlain, 6 Gray, 226.....lxix, 248
 Shephard ad. Commonwealth, 6 Binney, 223.....vi, 449
 Shephard v. Lanfear, 5 Louisiana, 236.....xv, 181
 Shephard v. McEvers, 4 Johns. Ch. 126.....viii, 661
 Shephard v. New Orleans, 6 Robinson (La.), 242.....xii, 269
 Shephard v. Sawyer, 3 Murphy, 26.....v, 617
 Shephard v. Turner, 2 McCord, 249.....xv, 631
 Shephard v. Young, 8 Gray, 103.....lxix, 242
 Sheppard v. State, 1 Texas Ch. App. 822.....28, 422
 Sheppard v. Steele, 43 New York, 63.....3, 660
 Sheppard v. County Comm'rs, 59 Georgia, 535.....27, 294
 Sheridan v. Commonwealth, 8 Watts, 512.....xxiv, 460
 Sherbourne v. Yuba County, 21 California, 113.....lxxxi, 151
 Sherburne v. Shaw, 1 New Hampshire, 187.....viii, 47
 Sherley v. Bartley, 4 Sneed, 66.....lxvii, 597
 Sherry v. Argenbright, 1 Helsk. 126.....2, 690
 Sheridan v. Bean, 8 Metcalf, 264.....xii, 607
 Sheridan v. Brooklyn etc. R. R. Co., 26 New York, 30.....xcviii, 490
 Sheridan v. Medara, 2 Stockton's Ch. 469.....lxiv, 464
 Sheriffs v. Fugh, 23 Wisconsin, 273.....xv, 600
 Sherley v. Billings, 6 Bush, 147.....8, 451
 Sherlock v. Bainbridge, 41 Indiana, 26.....13, 202
 Sherlock v. Thayer, 4 Michigan, 265.....lxvi, 539
 Sherman v. Anderson, 27 Kansas, 532.....41, 414
 Sherman v. Buick, 23 California, 241.....xvi, 677
 Sherman v. Clark, 4 Nevada, 138.....xvii, 516
 Sherman v. Dill, 4 Yeates, 295.....ii, 406
 Sherman v. Fall Riv. I. Co., 2 Allen, 694.....lxix, 799
 Sherman v. Hannibal & St. J. R. Co., 73 Mo. 62.....37, 423
 Sherman v. People, 10 Wendell, 299.....xv, 563
 Sherman v. Stanton, 1 Tyler, 200.....iv, 734
 Sherman v. Story, 30 California, 222.....lxxxix, 93
 Sherman v. Williams, 113 Massachusetts, 481.....18, 823
 Shermor v. Shermor, 1 Washington, 206.....i, 460
 Sherrard v. Novins, 3 Indiana, 241.....xi, 808
 Sherrod v. Woodard, 4 Devereux Law, 260.....xv, 714
 Sherwin v. Sanders, 59 Vermont, 469.....59, 750
 Sherwood v. Agricultural Co., 73 New York, 447.....29, 180
 Sherwood v. Burr, 4 Day, 244.....iv, 211
 Sherwood v. Collier, 3 Devereux Law, 260.....lxiv, 264
 Sherwood v. Dist. of Columbia, 3 Machay, 276.....51, 778
 Sherwood v. Lafayette, 109 Indiana, 411.....58, 414
 Sherwood v. Reed, 35 Connecticut, 499.....xxv, 264
 Sherwood v. Salmon, 5 Day, 439.....v, 147
 Sherwood v. Sherwood, 45 Wisconsin, 267.....26, 757
 Sherwood v. Snow, 46 Iowa, 481.....26, 155
 Sherwood ad. State, 15 Minnesota, 221.....2, 116
 Shewell v. Keen, 2 Wharton, 323.....xix, 266
 Shields v. Fuller, 4 Wisconsin, 102.....lxv, 293
 Shields v. Jolly, 1 Richardson's Equity, 92.....xlii, 349
 Shields v. Lonsar, 34 New Jersey, 492.....3, 256
 Shields ad. State, 13 Missouri, 226.....xlii, 167
 Shields v. Yonge, 15 Georgia, 249.....lx, 696
 Shidets ad. State, 20 Missouri, 415.....lxiv, 190
 Shilling v. Carson, 27 Md. 175.....xcii, 622
 Shimer v. Mann, 59 Indiana, 190.....56, 83
 Shinborn ad. State, 46 New Hampshire, 497.....lxxxviii, 224
 Shindelbeck v. Moon, 33 Ohio State, 264.....26, 594
 Shindler v. Houston, 1 N. Y. (1 Comst.), 261.....xix, 214
 Shinn v. Bodine, 60 Pennsylvania, 182.....c, 566
 Shinn v. Roberts, 1 Spencer, 426.....xlii, 636
 Shinn v. State, 64 Indiana, 13.....31, 116
 Shinn v. Zimmerman, 3 Zabrickie, 150.....lv, 269
 Shipley v. Alexander, 3 Harris & J. 84.....v, 422
 Shipley v. Fifty Associates, 101 Mass. 251.....3, 244
 Shipley v. Fifty Associates, 106 Mass. 194.....8, 313
 Shipley v. Ritter, 7 Maryland, 408.....lxi, 371
 Shipman v. Clark, 4 Denio, 446.....lxvii, 264
 Shipman v. Furniss, 69 Alabama, 556.....44, 639
 Shipp v. McCraw, 2 Murphy, 463.....lx, 611
 Shippey v. Henderson, 14 Johnson, 178.....vii, 469
 Shippey ad. State, 10 Minnesota, 223.....lxxxviii, 70
 Shipply v. People, 86 New York, 376.....46, 581
 Shiras v. Olinger, 50 Iowa, 571.....33, 126
 Shirkey v. Hanna, 2 Blackford, 402.....xxvi, 426
 Shirley v. Ayres, 14 Ohio, 207.....xiv, 546
 Shirley v. Fearn, 33 Mississippi, 663.....lxix, 376
 Shirley v. Welty, 19 Illinois, 623.....lxii, 244
 Shirriff v. Whitfield, 2 Brevard, 71.....xi, 701
 Shieler v. Baxter, 109 Pennsylvania St. 443.....58, 729
 Shieler v. Vandike, 92 Pennsylvania St. 447.....37, 708
 Shivers v. Simmons, 54 Mississippi, 620.....26, 373
 Shivers v. Wilson, 5 Harris & J. 120.....lx, 497
 Shobert, Ex parte, 70 California, 632.....59, 433
 Shock v. McChesney, 4 Yeates, 607.....ii, 415
 Shocky v. Mills, 71 Indiana, 293.....26, 196
 Shockley v. Davis, 17 Georgia, 177.....lxiii, 229
 Shoe and L. Nat. Bank v. Dix, 123 Mass. 146.....25, 49
 Shoemaker v. Benedict, 11 N. Y. (1 Kernan), 178.....lxii, 96
 Shoemaker v. Mechanics' Bank, 89 Penn. 84.73, xviii, 316
 Shoemaker v. N. M. Bank of Bk., 31 Md. 266.....c, 73
 Shoemaker ad. State, 62 Iowa, 243.....49, 146
 Sholl v. German Coal Co., 118 Illinois, 427.....59, 275
 Short v. Baltimore C. P. Ry Co., 60 Md. 73.....35, 222
 Short v. Home Ins. Co., 90 New York, 16.....43, 126
 Short v. Tinsley, 1 Metcalf (Ky.), 207.....lxii, 489
 Shorter v. People, 2 N. Y. (2 Comst.), 122.....d, 266
 Shots v. Poe, 47 Maryland, 512.....26, 425
 Shotwell v. Hamblin, 23 Mississippi, 186.....lv, 83
 Shotwell v. Lawson, 20 Mississippi, 27.....lxiv, 145
 Shouse ad. Commonwealth, 16 B. Monroe, 286.....lxiii, 561
 Showers v. Showers, 27 Penn. State, 465.....lxvii, 467
 Shown v. McMackin, 9 Lea, 601.....42, 699
 Shreak v. Shreak, 22 Texas, 578.....5, 263
 Shreve v. Grimes, 4 Littlell, 220.....xiv, 117
 Shreve v. Joyce, 26 New Jersey, 44.....12, 417
 Shreveport v. Levy, 26 La. An. 671.....31, 559
 Shreveport v. Red River & Coast Lm., 27 La. An. 562.....55, 504
 Shrieve v. Stokes, 3 B. Monroe, 426.....lxviii, 482
 Shriver v. Sioux City and St. Paul Ry Co., 24 Minnesota, 506.....31, 285

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [40] to American Reports.

- Shropshire v. Glascock, 4 Missouri, 636.....xxxi, 189
 Shufelt v. Shufelt, 9 Paige's Ch. 137.....xxvii, 361
 Shudin v. People, 63 New York, 229.....90, 423
 Shugart v. Egan, 63 Illinois, 56.....25, 369
 Shuler v. State, 105 Indiana, 298.....35, 211
 Shultz v. Young, 3 Iredell's Law, 385.....xi, 413
 Shulze's Appeal, 1 Penn. State, 351.....xlv, 126
 Shumway v. Holbrook, 1 Pickering, 114.....xi, 153
 Shumway v. Reed, 34 Maine, 360.....lvi, 679
 Shumway v. Rutter, 5 Pickering, 443.....xix, 340
 Shumway v. Stillman, 4 Cowan, 332.....xv, 374
 Shunk v. First Nat. Bank, 23 Ohio St. 303.....16, 763
 Shupe ada. State, 16 Iowa, 36.....lxxxv, 495
 Shurtliff v. Millard, 13 Rhode Island, 272.....34, 640
 Shurtliff v. Parker, 120 Massachusetts, 235.....39, 454
 Shurtliff v. Stevens, 51 Vermont, 501.....31, 698
 Shute v. Harder, 1 Yerger, 3.....xxiv, 427
 Shuttlesworth v. Hoghey, 6 Richardson's L. 269.....lx, 130
 Shute v. Fingar, 100 New York, 539.....53, 231
 Sibbald v. Bethlehem I. Co., 53 New York, 378.....33, 441
 Sibert v. Wilder, 16 Kansas, 174.....33, 360
 Sibley v. Aldrich, 33 New Hampshire, 653.....lxvi, 745
 Sibley v. Holden, 10 Pickering, 269.....xx, 221
 Sibley v. Howard, 3 Denio, 73.....xlv, 448
 Sibley v. Smith, 46 Arkansas, 273.....55, 594
 Sibley v. Spring, 13 Maine, 460.....xxviii, 121
 Sickle v. Pattison, 14 Wendell, 267.....xxviii, 327
 Sickles v. Mather, 20 Wendell, 73.....xxviii, 331
 Sickman v. Lapsley, 13 Serg. & R. 234.....xv, 596
 Sidenbard v. Ely, 90 New York, 257.....43, 163
 Sidenparkur v. Sidenparkur, 23 Maine, 461.....lxxxviii, 537
 Sides v. McOullough, 7 Martin, 654.....xii, 519
 Sidwell v. Evans, 1 Penrose & Watts, 353.....xii, 387
 Siegel v. Chidsey, 23 Penn. State, 279.....lxx, 124
 Siegel v. Robinson, 56 Pa. St. 19.....xxvii, 773
 Siebert v. Abbott, 61 Maryland, 276.....48, 101
 Siegfried v. Arnot, 96 Missouri, 300.....54, 424
 Siegfried v. Levan, 6 Serg. & R. 308.....ix, 427
 Sigourney v. Eaton, 14 Pickering, 414.....xxv, 414
 Sigourney v. Sibley, 21 Pickering, 101.....xxvii, 248
 Sigourney v. Sibley, 23 Pickering, 507.....xxviii, 763
 Sikes v. Paine, 10 Iredell's Law, 280.....ii, 389
 Silkmitter's Appeal, 45 Penn. State, 365.....lxxxiv, 494
 Silsbury v. McCoon, 6 Hill (New York), 426.....xii, 753
 Silsbury v. McCoon, 3 New York (3 Comst.), 379.....liii, 307
 Silvan v. Coffee, 30 Texas, 4.....lxx, 371
 Silver v. Frasier, 3 Allen, 362.....lxxxii, 662
 Silver v. Kansas City, St. L. and O. R. Co., 73 Missouri, 523.....47, 118
 Simar v. Canaday, 53 New York, 298.....13, 523
 Simmonds v. New York & N. E. R. R. Co., 50 Connecticut, 264.....52, 557
 Simmons v. Brown, 7 Rhode Island, 427.....lxxxiv, 569
 Simmons v. Brown, 5 R. I. 239.....lxxxii, 66
 Simmons v. Bull, 21 Alabama, 501.....lvi, 267
 Simmons v. Camden, 26 Arkansas, 276.....7, 630
 Simmons v. Cincinnati Sav. Soc., 31 Ohio St. 427.....37, 521
 Simmons v. Hill, 4 Harris & McH. 222.....i, 306
 Simmons v. Hendricks, 3 Iredell's Eq. 85.....lv, 439
 Simmons v. Mumford, 6 Rhode Island, 473.....lxxxii, 79
 Simmons v. New Bedford V. etc. S. Co., 97 Massachusetts, 361.....xxvii, 90
 Simmons v. State, 73 Georgia, 609.....54, 666
 Simmons v. State, 12 Missouri, 268.....xix, 151
 Simmons v. Taylor, 63 North Carolina, 148.....35, 56
 Simmons v. Thomas, 43 Mississippi, 31.....5, 470
 Simon v. Atlanta, 67 Georgia, 613.....44, 739
 Simon v. Brashear, 9 Robinson (Louisiana), 69.....xii, 321
 Simon v. Brown, 3 Yeates, 185.....ii, 368
 Simon v. Gratz, 3 Penrose & W. 412.....xxvii, 23
 Simonds v. Heard, 23 Pickering, 120.....xxiv, 41
 Simonds v. Henry, 20 Maine, 135.....liiii, 611
 Simonds v. Simonds, 103 Massachusetts, 672.....4, 574
 Simons v. Vulcan O. & M. Co., 61 Penn. State, 302.....c, 623
 Simonton Ex parte, 9 Porter, 350.....lxxxii, 339
 Simonton v. Clark, 65 North Carolina, 635.....6, 732
 Simonton v. Loring, 63 Maine, 164.....23, 29
 Simpson v. Ammons, 1 Binney, 175.....ii, 426
 Simpson v. Cagleton, 1 Allen, 109.....lxxxix, 707
 Simpson v. City Sav. Bank, 56 N. H. 466.....32, 421
 Simpson v. Cochran, 23 Iowa, 51.....xxvii, 419
 Simpson v. Davis, 119 Massachusetts, 269.....30, 324
 Simpson v. Feitz, 1 McCord's Ch. 212.....xvi, 668
 Simpson v. Garland, 73 Maine, 40.....33, 287
 Simpson v. Hand, 6 Wharton, 311.....lxxxvi, 232
 Simpson v. Loving, 3 Bush, 423.....xvii, 368
 Simpson v. McFarland, 13 Pickering, 427.....lxxxix, 668
 Simpson v. Montgomery, 25 Arkansas, 269.....xix, 269
 Simpson v. Nadeau, Conference Rep. 115.....ii, 624
 Simpson v. Pearson, 31 Indiana, 1.....xix, 677
 Simpson v. Seavey, 3 Greenleaf, 126.....xxii, 268
 Simpson v. Stockhouse, 9 Penn. State, 236.....xix, 524
 Simpson v. State, 59 Alabama, 1.....31, 1
 Simpson ada. State, 26 Minnesota, 63.....41, 269
 Simpson v. Turney, 5 Humphreys, 419.....xii, 443
 Simpson v. Watts, 6 Richardson's Eq. 361.....lxv, 362
 Simpson v. Welcome, 73 Maine, 426.....33, 289
 Simpson v. Westensberger, 26 Kansas, 758.....42, 135
 Simpson v. Wrenn, 50 Illinois, 222.....lxix, 521
 Sims v. Bardoner, 56 Indiana, 57.....44, 263
 Sims v. Boynton, 33 Alabama, 353.....lxx, 549
 Sims v. Campbell, 1 McCord's Ch. 23.....xvi, 526
 Sims v. Conger, 30 Mississippi, 221.....lxxxvii, 671
 Sims v. Cox, 40 Georgia, 76.....2, 609
 Sims v. Davis, Chever's Law, 1.....lxxxiv, 621
 Sims v. Glassner, 14 Alabama, 606.....lxxxvii, 129
 Sims v. Hutchins U. of T., 3 Simonds & M. 228.....xvii, 30
 Sims v. Lyles, 1 Hill (S. O.), 22.....lxxxvi, 126
 Sims v. McLure, 3 Richardson's Eq. 295.....lxx, 126
 Sims v. Rickets, 25 Indiana, 121.....3, 679
 Sims v. Sims, 26 Georgia, 168.....lxxxix, 499
 Sims v. Sims, 3 Porter, 449.....lxxxii, 269
 Sims v. Smith, 7 California, 145.....lxxxvii, 233
 Sims v. Smith, 30 Indiana, 446.....50, 36
 Sims v. State Ins. Co., 47 Missouri, 54.....4, 311
 Sinclair v. Board of Co. Comm., 23 Minn. 494.....23, 694
 Sinclair v. Healy, 40 Penn. State, 417.....lxxxix, 599
 Sinclair v. Jackson, 47 Maine, 102.....lxvii, 476
 Sinclair v. Hathaway, 37 Michigan, 69.....50, 327
 Sinclair v. Shawson, 44 Michigan, 123.....23, 226
 Sinclair v. Worthy, 1 Winst. L. 114.....lxxxiv, 357
 Siner's Appeal, 35 Penn. State, 267.....lxxxvii, 373
 Singery v. Thayer, 106 Pennsylvania St. 221.....54, 207
 Singer Manuf. Co., v. Cole, 4 Lea, 439.....46, 29
 Singer Manuf. Co. v. Domestic S. M. Co., 65 Georgia, 70.....15, 674
 Singer Manuf. Co. v. Graham, 5 Oregon, 17.....24, 573
 Singer Manuf. Co. v. Holdforth, 26 Illinois, 458.....39, 63
 Singer Manuf. Co. v. Rook, 94 Penn. St. 442.....24, 304
 Singery v. Swain's Adm'rs, 33 Penn. State, 122.....lxxx, 561
 Singery v. Carter, 1 Bailey's Law, 467.....xvi, 626
 Singleton v. Bremer, 4 McCord, 12.....lxxxvii, 699
 Singleton v. Carroll, 6 J. J. Marshall, 507.....xix, 55
 Singleton v. St. Louis Ins. Co., 66 Missouri, 68.....27, 321
 Singleton v. S. W. R. Co., 70 Georgia, 464.....45, 574
 Singstack v. Harding, 4 Harris & J. 126.....vii, 469
 Sinks v. Reese, 19 Ohio State, 308.....2, 397
 Sinnickson v. Johnson, 3 Harr. (N. J.), 129.....lxxxiv, 124
 Sinton v. Boyd, 19 Ohio State, 30.....2, 399
 Sinton v. Steamboat Roberts, 24 Indiana, 468.....7, 326

Roman letters [xliz] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Sioux C. & P. R. R. Co. v. Finlayson, 18 Nebraska, 578.....	49, 724	Small v. Howard, 123 Massachusetts, 151.....	35, 353
Sioux etc. R. Co. v. First N. Bank, 10 Neb. 558.....	35, 428	Small v. Robinson, 69 Maine, 488.....	31, 299
Sisson v. Cleveland and T. R. R., 14 Mich. 489.....	32, 223	Small v. Small, 4 Greenleaf, 230.....	xvi, 253
Sittler v. Gehr, 105 Pennsylvania State, 577.....	51, 207	Small v. Trickey, 41 Maine, 507.....	lxvi, 255
Sutton v. Macdonald, 25 South Carolina, 63.....	68, 484	Smalley v. Anderson, 2 T. R. Monroe, 54.....	xv, 121
Stakes v. State, 64 Miss. 644.....	68, 70	Smalley v. Greene, 23 Iowa, 241.....	35, 267
Skilling v. Bollman, 73 Missouri, 665.....	39, 537	Smalley v. Masten, 8 Michigan, 539.....	lxvii, 467
Skilman v. Lachman, 23 California, 198.....	lxixii, 96	Smalley v. Smalley, 70 Maine, 545.....	35, 353
Skilman v. Skilman, 2 McCarter, 478.....	lxixii, 279	Smalley v. Wight, 44 Maine, 442.....	lxix, 115
Skilton v. Winalow, 4 Gray, 441.....	lxiv, 77	Smallman v. Whiter, 87 Illinois, 545.....	79, 76
Skinner v. Conant, 2 Vermont, 453.....	xii, 554	Smallwood v. Norton, 20 Maine, 83.....	xxxvii, 30
Skinner v. Dayton, 19 Johnson, 513.....	x, 236	Smart v. King, Meigs, 149.....	xxxviii, 137
Skinner v. Dering, 3 Indiana, 558.....	liv, 463	Smart ada. State, 4 Rich. Law, 388.....	lv, 689
Skinner v. H. Adrick, 1 Root, 253.....	1, 43	Smart v. White, 73 Maine, 333.....	46, 354
Skinner v. Houstonite R. R. Co., 1 Oush. 478.....	xlviii, 616	Smedes v. Hooghtaling, 3 Caines, 46.....	ii, 220
Skinner v. Judson, 8 Connecticut, 528.....	xii, 691	Smiley v. Bell, 1 Mart. & Yerg. 378.....	xvii, 313
Skinner v. Moore, 2 Dev. & Bat. L. 136.....	xxx, 158	Smilie v. Biffe, 2 Penn. State, 82.....	xiv, 180
Skinner v. Finney, 19 Florida, 42.....	45, 1	Smily ada. State, 37 Ohio St. 30.....	41, 487
Skinner v. Raynack, 10 Nebraska, 323.....	35, 479	Smith, In re, 4 Nevada, 254.....	xxvii, 622
Skinner v. Shazmon, 44 Michigan, 86.....	33, 233	Smith v. Allen, 5 Allen, 464.....	lxixi, 790
Skinner v. Wilder, 38 Vermont, 115.....	lxixviii, 645	Smith v. Allen, 1 Barton, 43.....	xxi, 28
Skinner ada. People, 13 Illinois, 257.....	liv, 453	Smith v. Ashcraft, 25 Georgia, 123.....	lxixi, 123
Skipper v. Foster, 29 Alabama, 330.....	lxv, 405	Smith v. Ashley, 11 Metcalf, 367.....	xiv, 216
Skipper v. Stokes, 43 Alabama, 255.....	xiv, 646	Smith v. Babcock, 36 New York, 167.....	xviii, 420
Skipwith v. Cunningham, 8 Leigh, 271.....	xxxii, 642	Smith v. Bagwell, 19 Florida, 117.....	45, 17
Skofield v. Haley, 22 Maine, 164.....	xxxviii, 307	Smith v. Barham, 3 Devereux's Eq. 420.....	xv, 728
Skrine v. Simmons, 26 Georgia, 402.....	xci, 771	Smith v. Barrie, 56 Michigan, 314.....	56, 388
Slack v. Kirk, 67 Pennsylvania State, 380.....	5, 438	Smith v. Bartholomew, 1 Metcalf, 376.....	xxxv, 361
Slack v. Orillon, 11 Louisiana, 587.....	xxx, 724	Smith v. Beatty, 3 Iredell's Eq. 466.....	xii, 433
Slack v. Orillon, 13 Louisiana, 56.....	xxxviii, 551	Smith v. Bell, 1 Mart. & Y. 303.....	xvii, 796
Slade v. Etheridge, 13 Iredell's Law, 363.....	lvii, 557	Smith v. Benson, 9 Vermont, 158.....	xxxii, 614
Slaughter v. Favorite, 107 Indiana, 291.....	57, 106	Smith v. Bettger, 68 Indiana, 254.....	34, 266
Slater v. Jewett, 25 New York, 61.....	39, 627	Smith v. Bishop, 9 Vermont, 110.....	xxxii, 607
Slaten v. Des Moines V. R. Co., 29 Iowa, 148.....	4, 205	Smith v. Black, 9 Serg. & R. 143.....	xi, 686
Slaton v. Glover, 14 Alabama, 648.....	xxxviii, 118	Smith v. Blatchford, 3 Indiana, 184.....	lii, 504
Slaton v. St. Louis & N. O. F. Co., 91 Mo. 217.....	60, 215	Smith v. Mander, 74 Georgia, 418.....	54, 436
Slaughter v. Barnes, 3 A. K. Marshall, 413.....	xlii, 190	Smith v. Boston & M. R. R. Co., 120 Mass. 490.....	71, 538
Slaughter v. Commonwealth, 11 Leigh, 681.....	xxxvii, 638	Smith v. Brady, 17 New York, 173.....	lxixi, 442
Slaughter v. Cunningham, 24 Alabama, 290.....	lx, 463	Smith v. Braselton, 1 Holak, 44.....	2, 678
Slaughter v. Froman, 2 T. R. Monroe, 19.....	xvii, 23	Smith v. Brinker, 17 Missouri, 148.....	lviii, 265
Slaughter v. Green, 1 Randolph, 3.....	x, 488	Smith v. Brittain, 3 Iredell's Eq. 247.....	xlii, 178
Slaughter v. Slaughter, 23 Arkansas, 356.....	lxix, 111	Smith v. Brooklyn Savings Bk., 101 N. Y. 58.....	54, 653
Slawson v. Loring, 5 Allen, 340.....	lxixi, 750	Smith v. Brown, 3 Texas, 360.....	xlix, 748
Slodd v. Carey, 11 R. Monroe, 181.....	lii, 570	Smith v. Bryan, 5 Maryland, 141.....	lix, 104
Slee v. Bloom, 19 Johnson, 466.....	x, 273	Smith v. Bryson, Phill. Eq. 387.....	xviii, 610
Sleeper v. Laconia, 60 New Hampshire, 201.....	49, 311	Smith v. Burtis, 6 Johnson, 197.....	v, 218
Sleeper v. Pennsylvania R. Co., 100 Penn. St. 280.....	45, 330	Smith v. Burton, 3 Vermont, 233.....	xxvii, 203
Sleeper v. Pollard, 28 Vermont, 708.....	lxvii, 741	Smith v. Busby, 15 Missouri, 387.....	lvii, 207
Sleeper v. Union Ins. Co., 68 Maine, 265.....	36, 706	Smith v. Bythewood, Rice's Law, 245.....	xxxviii, 111
Sleeth v. Murphy, Morris, 321.....	xii, 233	Smith v. Canby, 9 R. Monroe, 192.....	lxviii, 420
Sleighter v. Harrington, N. O. Term Rep. 249.....	vii, 715	Smith v. Cansey, 23 Alabama, 655.....	lxv, 373
Slennor's Appeal, 58 Pennsylvania St. 186.....	xxviii, 243	Smith v. City Council, 23 Gratt. 226.....	36, 788
Slennor's Appeal, 58 Pennsylvania St. 186.....	xxviii, 255	Smith v. City Council of Rome, 19 Georgia, 80.....	lxixi, 266
Slifer ada. Com. ex rel. Bowman, 25 Pa. St. 33.....	lxiv, 680	Smith v. Clark, 21 Wendell, 83.....	xxxiv, 213
Slight v. Gutslaff, 28 Wisconsin, 675.....	17, 476	Smith v. Clewa, 105 New York, 283.....	59, 503
Sloan v. Campbell, 71 Missouri, 387.....	36, 493	Smith v. Columbia Ins. Co., 17 Penn. State, 263.....	lv, 546
Sloan v. Case, 10 Wendell, 370.....	xxv, 569	Smith v. Commonwealth, 14 Bush, 31.....	39, 402
Sloan v. Gilbert, 13 Bush, 51.....	33, 708	Smith v. Commonwealth, 54 Penn. St. 308.....	xviii, 686
Sloan v. Pac. R. R. Co., 61 Missouri, 24.....	31, 397	Smith ada. Commonwealth, 10 Allen, 448.....	lxixvii, 673
Sloan v. Wilson, 4 Harris & J. 322.....	vii, 673	Smith ada. Commonwealth, 2 Gray, 516.....	lxii, 478
Slocum v. Royal Ins. Co., 49 Penn. State, 14.....	lxixviii, 477	Smith v. Cooke, 31 Maryland, 174.....	c, 58
Slocumb v. De Lizardi, 21 Louisiana An. 255.....	xvix, 740	Smith v. Crane, 23 Minnesota, 144.....	53, 28
Slocum v. Seymour, 36 New Jersey, 138.....	13, 432	Smith v. Cranson's Executors, 5 Dana, 268.....	xxx, 688
Slocumb v. Breedlove, 8 Louisiana, 143.....	lxixviii, 135	Smith v. Outler, 10 Wendell, 589.....	xxv, 580
Slocumb v. Kythendall, 1 Beaumont, 187.....	lxixvii, 764	Smith v. Daniel, 2 McCord's Ch. 143.....	xvi, 641
Sloner v. People, 25 Illinois, 70.....	lxixvi, 786	Smith v. Davis, 1 Wisconsin, 447.....	lx, 308
Sloss ada. State, 25 Missouri, 291.....	lxix, 467	Smith v. De la Garza, 15 Texas, 150.....	lxv, 147
Slouey v. McMurray, 27 Missouri, 113.....	lxixi, 261	Smith v. Dennie, 6 Pickering, 262.....	xvii, 323
Small v. Clewley, 62 Maine, 158.....	16, 410	Smith v. Derr's Adm'rs, 34 Penn. State, 128.....	lxixv, 641
		Smith v. D'ibrell, 31 Texas, 230.....	xxviii, 686

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Smith v. Dickinson, 6 Humphreys, 261.....	xlv, 306	Smith v. Mariner, 5 Wisconsin, 351.....	lxviii, 71
Smith v. Donohue, 49 N. J. L. 548.....	60, 652	Smith v. Martin, 30 Indiana, 260.....	41, 686
Smith v. Dorsey, 38 Indiana, 451.....	10, 118	Smith v. Mayo, 9 Mass. 62.....	vi, 29
Smith v. Dudley, 1 Littell, 66.....	xiii, 222	Smith v. Mayor, 66 New York, 296.....	23, 53
Smith v. Durell, 16 New Hampshire, 344.....	xii, 732	Smith v. McAtee, 27 Maryland, 426.....	xxvi, 641
Smith v. Durrott, Sneed, 236.....	ii, 714	Smith v. McCall, 1 McQuid, 230.....	x, 656
Smith v. Eames, 3 Scammon, 76.....	xxvii, 515	Smith v. McConnell, 17 Illinois, 135.....	lxviii, 340
Smith v. Easton, 54 Maryland, 138.....	39, 356	Smith v. McLean, N. C. Term Rep. 72.....	vii, 693
Smith v. Eaton, 36 Maine, 298.....	lviii, 746	Smith v. McKenna, 7 Yergor, 477.....	xxvii, 519
Smith v. Edwards, 7 Humphreys, 106.....	xvi, 71	Smith v. McNair, 19 Kansas, 330.....	27, 117
Smith v. Estate of Steele, 25 Vermont, 427.....	ix, 276	Smith v. Mead, 3 Connecticut, 353.....	viii, 183
Smith v. Evans, 6 Binney, 102.....	vi, 436	Smith v. Morgan, 23 Missouri, 150.....	lxiv, 269
Smith v. Ferguson, 90 Indiana, 229.....	46, 216	Smith v. Marchand, 7 Serg. & R. 260.....	x, 465
Smith v. First N. Bank, 99 Massachusetts, 606.....	xcvii, 59	Smith v. Miller, 3 Halsted, 175.....	xv, 418
Smith v. Flint & P. M. E'y Co., 46 Michigan, 268.....	41, 161	Smith v. Miller, 43 New York, 171.....	3, 620
Smith v. Fly, 24 Texas, 345.....	lxvii, 109	Smith v. Mils. M. & F. Ins. Co., 11 La. 148.....	xxx, 714
Smith v. Foran, 43 Connecticut, 244.....	31, 647	Smith v. Mitchell, Rice's Law, 314.....	xxxiii, 119
Smith v. Fore, 10 Iredell's Law, 37.....	ii, 376	Smith v. Moberly, 10 R. Monroe, 303.....	xi, 543
Smith v. Forehand, 100 Massachusetts, 136.....	1, 94	Smith v. Moore, 7 South Carolina, 269.....	24, 479
Smith v. Forehand, 100 Massachusetts, 136.....	xcvii, 82	Smith v. Mundy, 18 Alabama, 182.....	xi, 321
Smith v. Fortescue, Busbee's Eq. 127.....	lvii, 693	Smith v. Myers, 109 Indiana, 1.....	58, 275
Smith v. Freyler, 4 Montana, 369.....	47, 368	Smith v. N. H. & N. R. R., 12 Allen, 531.....	xx, 166
Smith v. Gardner, 19 Oregon, 221.....	53, 242	Smith v. Nashua & Lowell R. R., 27 N. H. 66.....	lx, 354
Smith v. Gates, 3 Root, 632.....	i, 89	Smith v. Nat. L. Ins. Co., 103 Penn. 84, 177.....	49, 121
Smith v. Gerlach, 3 Texas, 424.....	lxvii, 657	Smith v. Nevitt, Walker, 370.....	xii, 671
Smith v. Ganton, 39 Texas, 365.....	19, 31	Smith v. Newbern, 70 North Carolina, 14.....	16, 795
Smith v. Godfrey, 28 New Hampshire, 379.....	lxi, 617	Smith v. New York & H. R. R. Co., 19 M. Y. 127.....	lxv, 395
Smith v. Gore, 23 Kansas, 488.....	53, 188	Smith v. Niles, 20 Vermont, 318.....	lxix, 789
Smith v. Granberry, 39 Georgia, 381.....	xcix, 464	Smith v. Oakes, 141 Massachusetts, 451.....	55, 487
Smith v. Greenlee, 2 Devereux's Law, 126.....	xcviii, 564	Smith v. O'Connor, 48 Penn. State, 212.....	lxxvi, 392
Smith v. Griffith, 3 Hill (N. Y.) 353.....	xcviii, 639	Smith v. Olds, 3 California, 167.....	lviii, 396
Smith v. Grim, 26 Penn. State, 95.....	lxvii, 400	Smith v. Oxford I. Co., 13 Vroom, 467.....	26, 535
Smith v. Hamilton, 30 Michigan, 433.....	4, 398	Smith v. Painter, 6 Serg. & R. 253.....	ix, 344
Smith v. Harkins, 3 Iredell's Equity, 613.....	xlv, 83	Smith v. Parsons, 1 Ohio, 236.....	xii, 698
Smith v. Haverhill M. F. I. Co., 1 Allen, 297.....	lxxix, 733	Smith v. Pendell, 19 Connecticut, 107.....	lxviii, 146
Smith v. Henry, 2 English, 207.....	lxv, 540	Smith v. People, 25 Illinois, 17.....	lxxvi, 789
Smith v. Hestonville M. & F. P. E'y Co., 28 Penn- sylvania State, 450.....	37, 706	Smith v. People, 53 New York, 111.....	13, 674
Smith v. Houston, 6 Ohio, 101.....	xxv, 741	Smith v. Perry, 18 Texas, 510.....	lxx, 285
Smith v. Hill, 45 Vermont, 90.....	19, 189	Smith v. Pettingill, 15 Vermont, 62.....	xi, 667
Smith v. Hood, 25 Penn. State, 218.....	lxiv, 682	Smith v. Philadelphia, 21 Pennsylvania 84, 26.....	22, 731
Smith v. Hornback, 4 Littell, 232.....	xiv, 122	Smith v. Philbrick, 10 Gray, 293.....	lxix, 315
Smith v. Hosmer, 7 New Hampshire, 426.....	xcviii, 354	Smith v. Pickett, 7 Georgia, 104.....	1, 263
Smith v. Hunt, 13 Ohio, 260.....	xlii, 301	Smith v. Plummer, 5 Wharton, 89.....	lxxiv, 639
Smith v. Huntington, 3 New Hampshire, 76.....	xiv, 331	Smith v. Pollon, 37 New York, 599.....	41, 408
Smith v. Hurd, 12 Metcalf, 371.....	lxvi, 690	Smith v. Poor, 40 Maine, 415.....	lxviii, 672
Smith v. Irwin, 37 Missouri, 169.....	xc, 375	Smith v. Potter, 27 Vermont, 304.....	lxv, 129
Smith v. James, 30 Wendell, 192.....	lxxxi, 627	Smith v. Poythress, 3 Florida, 96.....	lxviii, 178
Smith v. Jansen, 12 Nebraska, 125.....	41, 761	Smith v. Price, 30 Illinois, 26.....	lxxix, 294
Smith v. Johnston, 1 Penrose & Watts, 471.....	xxi, 404	Smith v. Race, 27 Illinois, 267.....	lxxxi, 229
Smith v. Jones, 66 Georgia, 338.....	42, 72	Smith v. Randall, 6 California, 47.....	lxv, 678
Smith v. Jones, 7 Leigh, 165.....	xxx, 496	Smith v. Rankin, 4 Yergor, 1.....	lxvi, 613
Smith v. Jones, 76 Maine, 138.....	49, 598	Smith v. Redus, 9 Alabama, 69.....	lxiv, 629
Smith v. Jordan, 13 Minnesota, 264.....	xcvii, 233	Smith v. Rice, 27 Missouri, 506.....	lxviii, 261
Smith v. Kelley, 27 Maine, 237.....	lxvi, 595	Smith v. Rochester, 22 New York, 463.....	44, 398
Smith v. Kelly, 23 Mississippi, 167.....	lv, 87	Smith v. Rogers, 34 Kansas, 140.....	36, 264
Smith v. Kemper, 4 Martin, 409.....	vi, 708	Smith v. Rollins, 11 Rhode Island, 464.....	23, 839
Smith v. Kendall, 9 Michigan, 241.....	lxxx, 83	Smith v. Ross, 17 Wisconsin, 227.....	lxxix, 739
Smith v. Kidd, 68 New York, 130.....	23, 157	Smith v. Ryan, 66 New York, 322.....	23, 69
Smith v. Kitchens, 61 Georgia, 156.....	21, 233	Smith v. Salomon, 1 Colorado, 174.....	xxi, 711
Smith v. Knight, 71 Illinois, 148.....	23, 94	Smith v. Sanford, 12 Pickering, 139.....	xxii, 419
Smith v. Lamb, 26 Illinois, 396.....	lxxix, 361	Smith v. Sawyer, 55 Maine, 139.....	xxii, 378
Smith v. Lathrop, 44 Penn. State, 336.....	lxxiv, 448	Smith v. Sharpe, Busbee's Law, 91.....	lvii, 674
Smith v. Lawrence, 38 California, 24.....	xcix, 344	Smith v. Sheldon, 25 Michigan, 42.....	24, 698
Smith v. Lawrence, 1 Haywood, 175.....	i, 536	Smith v. Shell, 23 Missouri, 215.....	23, 388
Smith v. Lawson, 18 West Virginia, 212.....	41, 688	Smith v. Shepard, 15 Pickering, 147.....	lxv, 429
Smith v. Lewis, 24 Connecticut, 624.....	lxviii, 180	Smith v. Sherwood, 4 Connecticut, 278.....	x, 167
Smith v. Lewis, 3 Johnson, 157.....	lii, 469	Smith v. Shultz, 1 Scammon, 490.....	lxxxi, 23
Smith v. Long, 40 Michigan, 553.....	29, 558	Smith v. Silences, 4 Iowa, 321.....	lxvi, 127
Smith v. Loyd, 11 Leigh, 512.....	lxxvii, 621	Smith v. Silver V. M. Co., 64 Maryland, 95.....	24, 769
		Smith v. Simmons, 103 Pennsylvania 24, 28.....	49, 119

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Smith v. Simons, 1 Root, 318.....	l, 48	Smith v. Wilcox, 24 New York, 363.....	lxxvii, 308
Smith v. Singleton, 3 McMullan's Law, 124.....	xxxix, 122	Smith v. Wiley, 23 Alabama, 366.....	lviii, 308
Smith v. Sloan, 27 Wisconsin, 285.....	19, 757	Smith v. Williams, 1 Murphey, 426.....	iv, 564
Smith v. Slocomb, 9 Gray, 36.....	lxix, 274	Smith v. Wilson, 17 Maryland, 460.....	lxxix, 608
Smith v. Smith, 12 California, 216.....	lxxviii, 533	Smith v. Winton, 1 Overton, 230.....	lxi, 758
Smith v. Smith, 4 Dutcher, 306.....	lxxviii, 49	Smith v. Wright, 1 Caines, 43.....	li, 163
Smith v. Smith, 26 Georgia, 184.....	xcl, 761	Smith v. Yaryan, 69 Indiana, 445.....	35, 233
Smith v. Smith, 21 Illinois, 944.....	lxxiv, 100	Smith v. Yale, 21 California, 180.....	lxxix, 167
Smith v. Smith, 3 Johnson, 236.....	lxi, 410	Smith v. Zent, 63 Indiana, 86.....	43, 61
Smith v. Smith, 1 Jones' L. 135.....	lix, 581	Smith ada. State, 12 Arkansas, 632.....	lvi, 267
Smith v. Smith, 4 Paige Ch. 432.....	lxvii, 75	Smith Bridge Co. v. Bowman, 41 Ohio 86, 37.....	52, 66
Smith v. Smith, 21 Penn. State, 367.....	lx, 51	Smith, Doe ex dem. v. Smith, 1 Jones' L. 135.....	lix, 581
Smith v. Smith, 3 Pickering, 621.....	xlii, 464	Smith T. v. Bell, 1 Mart. & Yerg. 302.....	lxvii, 708
Smith v. Smith, 1 Rhode Island, 366.....	lxi, 688	Smith, Will of, 22 Wisconsin, 543.....	38, 758
Smith v. Smith, 1 Texas, 621.....	xlvi, 121	Smith & Co. etc. v. Ewer & Peck, 23 Pa. St. 116.....	lx, 73
Smith v. Smith, 19 Wisconsin, 615.....	lxxviii, 707	Smiths v. Gray, 1 Humphreys, 491.....	xxiv, 664
Smith v. Smith, 23 Wisconsin, 176.....	xcix, 153	Smiths v. Isaac, 4 Richardson's L. 303.....	lxi, 738
Smith v. South Royalton Bank, 33 Vermont, 341, lxxvi, 179		Smithwick v. Ellison, 3 Iredell's Law, 236.....	lxxviii, 697
Smith v. Sparkman, 55 Mississippi, 649.....	36, 537	Smithwick v. Ward, 7 Jones' Law, 64.....	lxv, 453
Smith v. Stanley, 37 Maine, 11.....	lviii, 771	Smock v. Dade, 5 Randolph, 689.....	lxvi, 739
Smith v. Starr, 3 Wharton, 61.....	xxxi, 496	Smock v. Pearson, 68 Indiana, 408.....	34, 389
Smith v. State, 59 Georgia, 513.....	27, 393	Smoot v. Cook, 3 West Virginia, 172.....	c, 741
Smith v. State, 33 Maine, 48.....	liv, 607	Smoot v. Kelava, 23 Alabama, 659.....	lviii, 310
Smith v. State, 64 Maryland, 25.....	54, 783	Smoot v. Morehouse, 3 Alabama, 376.....	xlii, 644
Smith v. State, 20 Nebraska, 264.....	57, 632	Smother v. Hanks, 34 Iowa, 226.....	li, 141
Smith v. State, 12 Ohio State, 456.....	lxxx, 355	Smyley v. Head, 3 Richardson's Law, 560.....	xiv, 759
Smith v. State, 23 Texas, Ct. App. 387.....	59, 773	Smyley v. Reese, 83 Alabama, 89.....	35, 696
Smith v. State, 51 Wisconsin, 615.....	37, 645	Smyley v. Wilson, 3 Bailey, 421.....	xxiii, 149
Smith ada. State, 1 Bailey's Law, 263.....	xix, 679	Smyma Bank ada. State, 3 Houst. 96.....	lxxii, 698
Smith ada. State, 5 Day, 175.....	v, 123	Smyley v. Harris and Tuley, 21 Illinois, 66.....	lxxviii, 203
Smith ada. State, 6 Greenleaf, 622.....	xx, 324	Smyley ada. State, 4 Rhode Island, 100.....	51, 344
Smith ada. State, 3 Hawks, 378.....	xiv, 594	Smyley v. Tankersley, 20 Alabama, 312.....	lvi, 193
Smith ada. State, 54 Iowa, 104.....	37, 192	Snap and Francis v. People, 19 Illinois, 80.....	lxviii, 593
Smith ada. State, 11 Louisiana An. 633.....	lxvi, 208	Snavely v. Wagner, 3 Penn. State, 275.....	xiv, 640
Smith ada. State, 32 Maine, 369.....	liv, 678	Sneed v. Coleman, 7 Grattan, 300.....	lvi, 113
Smith ada. State, 78 Maine, 260.....	57, 803	Sneed v. Atherton, 6 Dana, 276.....	xxvii, 76
Smith ada. State, Meigs, 99.....	lxxviii, 133	Sneed v. Ewing, 5 J. J. Marshall, 400.....	xxii, 41
Smith ada. State, 26 Missouri, 226.....	lxxii, 204	Sneed v. Hooper, Cooke, 200.....	v, 691
Smith ada. State, 90 Missouri, 37.....	59, 4	Sneed v. State, 5 Arkansas, 431.....	xii, 108
Smith ada. State, 49 New Hampshire, 155.....	6, 690	Sneed v. White, 3 J. J. Marshall, 525.....	xx, 176
Smith ada. State, 104 New York, 491.....	58, 637	Snell v. Kirby, 3 Missouri, 21.....	lxxviii, 456
Smith ada. State, 2 Strobhart's Law, 77.....	lxvii, 539	Snell v. Snow, 13 Metcalf, 278.....	lxvi, 739
Smith v. St. Joseph, 55 Missouri, 456.....	17, 660	Snelling v. Utterback, 1 Bibb, 306.....	lv, 661
Smith v. St. Louis, K. C. & N. E. Co., 69 Mo. 32, 33, 494		Snethen v. Memphis Ins. Co., 3 La. An. 474.....	lxviii, 463
Smith v. St. Louis & S. F. R'y Co., 85 Mo. 418.....	55, 390	Snider v. Greathouse, 16 Arkansas, 73.....	lxiii, 84
Smith v. St. Paul & C. R'y Co., 32 Minnesota, 1.....	56, 530	Snider v. Lackmour, 3 Iredell's Eq. 260.....	lxxviii, 698
Smith v. Steele's Estate, 25 Vermont, 427.....	lx, 276	Snoddy v. Finch, 9 Richardson's Eq. 355.....	lxx, 216
Smith v. Stewart, 6 Johnson, 46.....	v, 136	Snoddy v. Howard, 51 Indiana, 411.....	19, 739
Smith v. Stewart, 21 Louisiana An. 67.....	xcix, 709	Snodgrass v. Andrews, 30 Mississippi, 473.....	lxiv, 169
Smith v. Stoddard, 10 Michigan, 148.....	lxxxi, 778	Snodgrass v. Branch Bk at Decatur, 25 Ala. 161.....	lx, 506
Smith v. Strahan, 16 Texas, 314.....	lxvii, 622	Snodgrass v. Reynolds, 79 Alabama, 462.....	56, 608
Smith v. Thompson, 7 Grattan, 112.....	liv, 126	Snow v. Alley, 144 Massachusetts, 546.....	59, 119
Smith v. Thompson, 55 Maryland, 5.....	39, 409	Snow v. Carr, 61 Alabama, 363.....	32, 3
Smith v. Thompson, 2 McArthur, 291.....	29, 621	Snow v. Chandler, 10 New Hampshire, 22.....	lxxiv, 146
Smith v. Townsend, 27 Maryland, 363.....	xcl, 637	Snow v. Columbian Ins. Co., 48 New York, 624.....	8, 575
Smith v. Titts, 1 Dev. & Bat. L. 241.....	lxxviii, 568	Snow v. Fitchburg R. R. Co., 136 Mass. 522.....	49, 69
Smith v. Tunno, 1 McCord's Ch. 443.....	xvi, 617	Snow v. Flannery, 10 Iowa, 318.....	lxxvii, 139
Smith v. Tupper, 4 Smedes & M. 261.....	lxiii, 489	Snow v. Gould, 74 Maine, 540.....	63, 694
Smith v. Turner, 4 Iredell's Eq. 433.....	lxvii, 363	Snow v. Houston R. R. Co., 8 Allen, 441.....	lxxviii, 739
Smith v. Ullman, 58 Maryland, 183.....	42, 329	Snow v. Lake, 20 Florida, 656.....	51, 625
Smith v. Vanderhoest, 1 McCord, 326.....	x, 674	Snow v. Parsons, 23 Vermont, 459.....	lxvii, 723
Smith v. Vincent, 15 Connecticut, 1.....	lxxviii, 58	Snow v. Perkins, 60 New Hampshire, 493.....	49, 333
Smith v. Walker, 38 California, 385.....	xcix, 415	Snow v. Schomacker Manuf. Co., 69 Ala. 111.....	64, 699
Smith v. Ward, 3 Root, 378.....	lx, 80	Snow v. Sheldon, 126 Massachusetts, 332.....	36, 694
Smith v. Washington G. L. Co., 21 Maryland, 12.....	c, 49	Snow v. Union Ins. Co., 119 Massachusetts, 592.....	26, 349
Smith v. Weed, 20 Wendell, 184.....	lxxii, 525	Snow v. Warner, 10 Metcalf, 132.....	lxiii, 417
Smith v. Wheeler, 7 Oregon, 49.....	33, 698	Snowden v. Noah, Hopkins Ch. 247.....	xiv, 547
Smith v. Wells, 7 Metcalf, 240.....	lxxix, 773	Snowden v. State, 12 Tex. Ct. App. 105.....	41, 699
Smith v. Whiting, 10 Penn. State, 39.....	lxvii, 573	Snowden v. Wiles, 19 Indiana, 10.....	lxxxi, 379
Smith v. Whiting, 12 Massachusetts, 6.....	xii, 26	Snowhill v. Reed, 49 New Jersey, L. 222.....	60, 624

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports

- Snyder v. Bross, 61 Illinois, 337.....xix, 551
 Snyder's App., 36 Penn. State, 166.....lxviii, 573
 Snyder v. Atlantic Mutual Ins. Co., 95 N. Y. 196.47, 29
 Snyder v. Findley, Coxe, 78.....i, 193
 Snyder v. Fulton, 34 Maryland, 128.....6, 314
 Snyder v. Laframboise, Bross, 343.....xii, 187
 Snyder v. Martin, 17 West Virginia, 278.....41, 670
 Snyder v. People, 26 Michigan, 106.....17, 302
 Snyder v. Riley, 6 Penn. State, 164.....xlvi, 453
 Snyder ad. Riley, 1 Speers' Law, 272.....xi, 603
 Snyder v. Robinson, 35 Indiana, 311.....9, 738
 Snyder v. Snyder, 6 Binney, 463.....vi, 493
 Snyder v. Studebaker, 19 Indiana, 463.....lxix, 418
 Snyder v. Summers, 1 Lea, 534.....27, 778
 Snyder v. Van Doran, 46 Wisconsin, 602.....32, 739
 Snyder v. Vaux, 2 Rawls, 423.....xii, 466
 Snyder v. Warford, 11 Missouri, 513.....xix, 94
 Snyder v. Warren, 3 Cowen, 518.....xiv, 619
 Snyder v. Wolford, 33 Minnesota, 178.....53, 23
 Society v. Morris Canal etc. Co., 1 Saxton, 187.....xii, 41
 Society for the Visitation of the Sick, etc., v.
 Commonwealth, 52 Pennsylvania St., 123.....xi, 139
 Sodlifer v. Applegate, 24 West Virginia, 411.....49, 252
 Soles v. Hickman, 29 Penn. State, 342.....lxix, 635
 Solinger v. Jewett, 25 Indiana, 479.....lxixvii, 373
 Solomon v. Bushnell, 11 Oregon, 277.....56, 475
 Solomon v. Bushnatt E'y Co., 103 N. Y. 437.....57, 780
 Solomon v. Peters, 27 Georgia, 251.....xvii, 69
 Solomons v. Jones, 3 Brevard, 54.....v, 638
 Solomons ad. State, 6 Yerger, 360.....xviii, 469
 Solverson v. Peterson, 64 Wisconsin, 198.....54, 607
 Somersfield v. State Ins. Co., 8 Lea, 547.....41, 663
 Somersby v. Buntin, 118 Massachusetts, 279.....19, 489
 Somers v. Schmidt, 24 Wisconsin, 417.....1, 191
 Somers v. Sloan, 3 Harrison (N. J.), 46.....lxvii, 637
 Somersat Co. M. F. I. Co. v. Usaw, 113 Pennsylv-
 vania State, 80.....56, 307
 Somersell v. Somersell, 3 Gill, 276.....xliii, 340
 Somersell ad. State, 21 Maine, 14.....xxxviii, 348
 Somerville v. Trueman, 4 Harris & McH. 43.....i, 389
 Somes v. Brewer, 3 Pickering, 184.....xiii, 406
 Somes v. White, 65 Maine, 542.....26, 718
 Sommers v. Johnson, 4 Vermont, 278.....xiv, 604
 Sommers v. Torrey, 5 Paige Ch. 54.....lxviii, 411
 Sommerville v. Horton, 4 Yerger, 541.....xvi, 242
 Sommerville ad. Commonw., 1 Virginia Cases, 163.v, 514
 Sonfield v. Thompson, 42 Arkansas, 46.....48, 49
 Sonneborn v. Ins. Co., 15 Vroom, 220.....43, 365
 Sonoma Co. B't v. Gove, 63 California, 365.....49, 62
 Soonhoven v. Gott, 20 Illinois, 46.....lxix, 247
 Soper v. Harvard College, 1 Pickering, 177.....xi, 159
 Soper ad. State, 16 Maine, 233.....xxxiii, 665
 So Belle v. Western U. Tel. Co., 55 Tex. Ch. App.
 308.....46, 805
 Sornberger v. Lee, 14 Nebraska, 183.....45, 106
 Sorey v. Bright, 1 Dev. & Bat. Eq. 113.....lxviii, 684
 Soule v. Atkinson, 18 California, 235.....lxix, 174
 Souther v. Codman, 14 Rhode Island, 119.....51, 364
 Souther v. Baymore, 7 Penn. State, 415.....xlvi, 518
 South v. South, 91 Indiana, 221.....46, 591
 South & N. Al. R. R. Co. v. Heinlein, 53 Ala. 606.23, 578
 South & N. Al. R. R. Co. v. Huffman, 76 Ala. 492.52, 349
 South & N. Al. R. R. Co. v. Wood, 66 Ala. 167.....41, 749
 South & N. Al. R. R. Co. v. Wood, 71 Ala. 215.....46, 309
 South & N. Al. R. R. Co. v. Wood, 74 Ala. 449.....49, 819
 South Bend v. Hardy, 96 Indiana, 577.....lxviii, 394
 South ad. State, 4 Dubois, 28.....lxix, 250
 South Berwick v. Hunters, 53 Maine, 89.....lxixvii, 535
 South Carolina Bank v. S. O. M. Co., 3 Strobb.
 Law, 190.....xix, 640
 South Carolina Railroad Co. v. Moore, 25 Ga. 286.lxxxiii, 778
 South Carolina Soc. v. Johnson, 1 McCord, 41.....x, 644
 Southard v. Hill, 44 Maine, 22.....lxix, 86
 Southard v. Perry, 21 Iowa, 498.....lxixix, 587
 Southerland v. Jackson, 30 Maine, 469.....i, 639
 Southern Bank v. Wood, 14 Louisiana An. 554.lxxxiv, 448
 Southern D. D. Co. v. Steamboat J. D. Percy.
 etc., 23 La. An. 39.....8, 288
 Southern Ex. Co. v. Caperton, 44 Alabama, 108.....4, 113
 Southern Ex. Co. v. Craft, 49 Mississippi, 626.....12, 4
 Southern Ex. Co. v. Crook, 44 Alabama, 468.....4, 149
 Southern Ex. Co. v. Finner, 59 Mississippi, 621.....42, 379
 Southern Ex. Co. v. Hood, 15 Rich. L. 66.....xvii, 141
 Southern Ex. Co. v. Hummelt, 54 Miss. 588.....23, 365
 Southern Express Co. v. Nowby, 26 Georgia, 635.....xci, 783
 Southern Express Co. v. Purcell, 27 Georgia, 168.xcxi, 83
 Southern Ex. Co. v. Van Meter, 17 Florida, 713.....33, 107
 Southern L. Ins. Co. v. Beecher, 9 Halek, 608.....24, 344
 Southern Life I. & T. Co. v. Lanier, 6 Florida, 110.lviii, 448
 Southern Loan Co. v. Morris, 2 Penn. State, 175.xliv, 138
 Southern R. R. v. Kendrick, 40 Miss. 374.....xc, 332
 Southern Steamship Co. v. Sparks, 23 Tex. 637.lxxv, 733
 Southwestern F. & O. P. Co. v. Stanard, 44 Mo. 71.....c, 255
 Southwestern R. R. Co. v. Southern etc. Tel. Co.,
 46 Georgia, 43.....12, 365
 Southwick v. Southwick, 97 Massachusetts, 327.xciii, 55
 Southworth v. Old Colony and N. R. Co., 108
 Massachusetts, 212.....7, 529
 Southworth v. Smith, 27 Connecticut, 255.....lxix, 72
 Souter v. Atwood, 24 Maine, 123.....lvi, 447
 Sowden v. Craig, 26 Iowa, 128.....xvii, 125
 Sowers v. Oyrrenius, 20 Ohio State, 28.....49, 418
 Sowle ad. Commonwealth, 9 Gray, 394.....lxix, 289
 Sowles and Wife v. Harvey, 30 Indiana, 217.....lxixvii, 315
 Soye v. McCallister, 18 Texas, 80.....lxviii, 637
 Spader v. Lawler, 17 Ohio, 371.....lxix, 463
 Spafford v. First Nat. Bank, 37 Iowa, 181.....18, 6
 Spalde v. Barrett, 27 Illinois, 299.....11, 17
 Spalte v. Poundstone, 57 Indiana, 822.....44, 773
 Spaulding v. Archibald, 52 Michigan, 365.....56, 253
 Spaulding v. Henshaw, 80 Kentucky, 58.....44, 463
 Spaulding v. Rosa, 71 New York, 40.....27, 7
 Spaulding v. Preston, 21 Vermont, 9.....i, 69
 Spaulding ad. State, 19 Connecticut, 233.....lxviii, 158
 Spangler v. Commonwealth, 16 Serg. & R. 68.....xvi, 548
 Spangler v. Jacoby, 14 Illinois, 297.....lxviii, 571
 Spangler v. Pugh, 21 Illinois, 85.....lxix, 77
 Spann v. Baltzell, 1 Florida, 301.....lxix, 346
 Sparhawk v. Salem, 1 Allen, 30.....lxix, 730
 Spark's Appeal, 89 Pennsylvania St. 144.....33, 749
 Sparks v. Commonwealth, 3 Bush, 111.....lxvii, 296
 Spartanburg & Union R. R. Co. v. DeGraffen-
 reid, 12 Rich. L. 675.....lxviii, 476
 Sparrunberger v. State, 53 Alabama, 451.....25, 643
 Sparrow v. Kohn, 189 Pennsylvania St. 289.....56, 736
 Spaulding v. Backus, 122 Massachusetts, 289.....23, 391
 Spaulding v. Chamberlin, 12 Vermont, 289.....lxixvii, 358
 Spaulding v. Chicago & N. W. R. Co., 30 Wb. 110.....51, 550
 Spaulding v. Thompson, 12 Indiana, 477.....lxix, 221
 Spaulding v. Wakefield, 53 Vermont, 690.....38, 793
 Spaulding v. Woodward, 53 New Hampshire, 67.126, 392
 Spawn v. Veeder, 4 Cowen, 503.....xv, 401
 Spear v. Carter, 1 Michigan, 19.....lxixviii, 688
 Spear v. Crawford, 14 Wendell, 20.....lxixvii, 613
 Spear v. Cummings, 23 Pickering, 224.....lxix, 53
 Spear v. Fuller, 8 New Hampshire, 174.....lxixviii, 394
 Spear v. Pratt, 2 Hill (N. Y.), 282.....lxixviii, 608
 Spears v. Shrophire, 11 Louisiana An. 559.....lxvi, 978
 Spears v. Toland, 1 A. K. Marshall, 202.....2, 728
 Specht v. Commonwealth, 8 Penn. State, 312.....xix, 517

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Speed v. May, 17 Penn. State, 81.....lv, 540
 Speed v. Hana, 1 T. B. Monroe, 14.....xv, 78
 Spear v. Barker, 4 Kansas, 373.....xvii, 175
 Spear v. Commonwealth, 23 Gratt. 835.....14, 164
 Spear v. Spear, 7 Indiana, 178.....lxii, 418
 Speers v. Fleck, 24 Missouri, 101.....lxxxiv, 74
 Speldien v. State, 3 Texas Ct. App. 156.....39, 126
 Spence v. McCoy, 6 Watts & Serg. 485.....xl, 579
 Spence v. Harvey, 23 California, 336.....lxxxiii, 69
 Spence v. Robbins, 6 Gill & Johnson, 507.....xxvi, 567
 Spencer v. Belt, & O. R. E. Co., 4 Mackey, 136.....54, 269
 Spencer v. Board of Registration, 1 McArthur, 169, 39, 582
 Spencer v. Blaisdell, 4 New Hampshire, 198.....xvii, 413
 Spencer v. Brookway, 1 Ohio, 229.....xlii, 615
 Spencer v. Brower, 32 Texas, 663.....5, 254
 Spencer v. Carr, 45 New York, 408.....6, 112
 Spencer v. Emata, 21 Maine, 619.....lxxxviii, 277
 Spencer v. Gelman, 27 California, 96.....xix, 243
 Spencer v. Hale, 20 Vermont, 314.....lxix, 309
 Spencer v. Joint School Dist., 15 Kansas, 259.....37, 208
 Spencer v. Milwaukee and Prairie du Chien R. Co., 17 Wisconsin, 467.....lxxxiv, 768
 Spencer v. Sloan, 108 Indiana, 183.....56, 26
 Spencer v. Williams, 2 Vermont, 209.....xix, 711
 Spencer ada. People's Ins. Co., 83 Pennsylvania St. 353.....xci, 217
 Spencer ada. State, 64 Missouri, 355.....37, 244
 Sperry's Appeal, 71 Pennsylvania St. 11.....10, 684
 Sperry v. Commonwealth, 9 Leigh, 623.....xxxiii, 261
 Sperry v. Pond, 6 Ohio, 287.....xxiv, 236
 Speyer v. Ihmala, 21 California, 230.....lxix, 187
 Spicer v. Earl, 41 Michigan, 191.....32, 153
 Spicer v. Rees, 5 Rawle, 119.....xxviii, 648
 Spiering v. Andree, 45 Wisconsin, 330.....30, 744
 Spigener v. O'Connor, 8 Richardson's L. 301.....lxiv, 755
 Spilman ada. Commonwealth, 134 Mass. 327.....26, 663
 Spindler v. Atkinson, 2 Maryland, 409.....lv, 758
 Spinetti v. Atlas S. Co., 80 New York, 71.....36, 579
 Spiro v. Paxton, 3 Lea, 75.....xli, 630
 Spitzer v. James, 23 Indiana, 202.....9, 334
 Spivey v. Morris, 18 Alabama, 254.....lii, 224
 Spivally v. Patten, 38 California, 136.....xix, 358
 Spodoff v. Hobbs, 29 Maine, 148.....xlvi, 521
 Spodoff v. True, 23 Maine, 283.....lv, 621
 Spooner v. Brooklyn C. R. E. Co., 54 N. Y. 230.....13, 570
 Spooner v. Dunn, 7 Indiana, 81.....lxiii, 414
 Spooner v. Fletcher, 3 Vermont, 133.....xci, 579
 Spooner v. Holmes, 103 Massachusetts, 503.....3, 481
 Spooner v. Manchester, 133 Massachusetts, 270.....43, 514
 Spooner v. Mattoon, 40 Vermont, 300.....xci, 395
 Spooner ada. People, 1 Denio, 343.....xlvi, 673
 Spoor v. Holland, 2 Wendell, 445.....xxiv, 37
 Spragg v. Shriver, 25 Penn. State, 282.....lxiv, 696
 Sprague v. Birchard, 1 Wisconsin, 457.....lx, 393
 Sprague v. Fletcher, 8 Oregon, 367.....34, 587
 Sprague v. Dodge, 48 Illinois, 142.....xv, 523
 Sprague v. Rhodes, 6 Rhode Island, 56.....lxix, 678
 Sprague v. Rooney, 23 Missouri, 493.....52, 283
 Sprague v. Smith, 29 Vermont, 421.....lx, 424
 Sprague v. Tripp, 13 Rhode Island, 38.....43, 11
 Spragues v. Hawley, 39 New York, 441.....c, 482
 Sprayberry v. Mark, 20 Georgia, 81.....lxxvi, 637
 Spry v. Meale, 28 Maryland, 497.....xci, 698
 Spring v. Bourland, 11 Arkansas, 698.....lv, 243
 Spring v. Chase, 22 Maine, 506.....xxxix, 596
 Spring v. Hyde Park, 137 Massachusetts, 554.....50, 334
 Spring v. High, 23 Maine, 408.....xxxix, 587
 Spring v. Tongue, 9 Massachusetts, 28.....vi, 21
 Spring Garden M. I. Co. v. Evans, 9 Md. 1.....lxvi, 20
 Spring Garden M. I. Co. v. Evans, 15 Md. 54.....lxvii, 555
 Springer v. Drosch, 23 Indiana, 486.....2, 328
 Springer v. Hall, 23 Missouri, 693.....53, 596
 Springer v. Toothaker, 43 Maine, 381.....lxix, 66
 Springfield, City of, v. Harris, 4 Allen, 494.....lxxxi, 715
 Springfield F. Ins. Co. v. Allen, 43 N. Y. 389.....3, 711
 Springle v. Morrison, 3 Littell, 52.....xiv, 41
 Sproat v. Donnell, 26 Maine, 185.....xiv, 103
 Sprott v. Reid, 3 G. Greene, 499.....lvi, 549
 Sproul v. Hemmingway, 14 Pickering, 1.....xxv, 350
 Sproule v. Winant's Heirs, 7 T. B. Monroe, 195.....xviii, 164
 Sprull v. Moore, 5 Iredell's Eq. 284.....lxix, 426
 Spurgeon v. McKivrain, 6 Ohio, 442.....xxvii, 268
 Squier v. Stockton, 5 Louisiana An. 120.....lii, 583
 Squire v. Harder, 1 Paige's Ch. 494.....xix, 446
 Squire v. Hollenbeck, 9 Pickering, 531.....xx, 506
 Squire v. N. Y. Cent. R. E. Co., 26 Mass. 239.....xviii, 163
 Squire v. Western Union Tel. Co., 26 Mass. 233.....xviii, 187
 Squires v. Riggs, 3 Carolina Law Repos. 274.....vi, 564
 Squires v. Squires, 23 Vermont, 208.....38, 688
 Steaden v. People, 23 Illinois, 432.....25, 333
 Steates v. Borough of Washington, 15 Vroom, 606.....43, 402
 Steats v. Ten Eyck, 3 Oakes, 111.....li, 554
 Stabler v. Commonwealth, 26 Penn. St. 318.....40, 628
 Stacey v. Miller, 14 Missouri, 478.....lv, 112
 Stache v. St. Paul F. & M. Ins. Co., 49 Wis. 80.....35, 773
 Stack v. Beach, 74 Indiana, 571.....39, 113
 Stack v. East St. Louis, 65 Illinois, 277.....28, 619
 Stackhouse v. Lafayette, 26 Indiana, 17.....lxix, 459
 Stackpole v. Arnold, 11 Massachusetts, 27.....vi, 150
 Stackpole v. Healy, 16 Massachusetts, 33.....viii, 121
 Stackpole v. Hennen, 6 Martin, N. S., 481.....xvii, 187
 Stacy v. Foss, 19 Maine, 335.....lxxvi, 755
 Stacy v. Ross, 27 Texas, 3.....lxxxiv, 604
 Stadtfeld v. Huntman, 92 Penn. St. 53.....27, 661
 Staff, In re, 63 Wisconsin, 285.....53, 285
 Stafford v. Bacon, 1 Hill (N. Y.), 523.....lxxvii, 266
 Stafford v. King, 30 Texas, 257.....xci, 304
 Stafford v. Providence, 10 Rhode Island, 567.....14, 710
 Stahl v. Berger, 10 Berg. & R. 170.....xli, 688
 Stainback v. Road & Co., 11 Grattan, 231.....lxii, 648
 Staines v. Shore, 16 Penn. State, 200.....lv, 692
 Stair v. State, 27 Missouri, 268.....56, 449
 Stair v. York National Bank, 25 Penn. St. 364.....xviii, 739
 Staley v. Jameson, 46 Indiana, 159.....15, 399
 St. Albans v. Bush, 4 Vermont, 68.....lxviii, 246
 St. Albans Bank v. Dillon, 30 Vermont, 123.....lxviii, 296
 St. Albans B'k v. Farmers' & M. B'k, 10 Vt. 141.....lxviii, 188
 St. Albans Bank v. Gilliland, 23 Wend. 311.....lxxxv, 696
 St. Andrew's B. L. Co. v. Mitchell, 4 Fla. 192.....lv, 249
 Stalbird v. Beattie, 26 New Hampshire, 455.....lxvii, 317
 Staloup ada. State, 1 Iredell's Law, 80.....lxxxv, 732
 Stalker v. McDonald, 6 Hill (N. Y.), 93.....xli, 289
 Stallings v. Corbett, 2 Speers' Law, 613.....xlii, 368
 Stallings v. Newman, 26 Alabama, 300.....lxii, 722
 Stamp v. Case, 41 Michigan, 367.....32, 156
 Stamps v. Commercial F. Ins. Co., 77 N. C. 200.....24, 442
 Stamper v. Griffin, 20 Georgia, 312.....lxv, 628
 Stamper v. Hooks, 22 Georgia, 603.....lxviii, 511
 Stamper v. Temple, 6 Humphreys, 113.....xli, 296
 Standard Oil Co. v. Combs, 26 Indiana, 179.....49, 156
 Standeford v. Devo, 21 Indiana, 404.....lxxxviii, 261
 Standish v. Parker, 2 Pickering, 20.....xlii, 398
 Standish v. Narragansett B. Co., 111 Mass. 512.....15, 66
 Standell v. Branch, Phill. Law, 206.....xviii, 592
 Stanford v. Lyon, 8 Vroom, 426.....18, 736
 Stanford v. Pruet, 27 Georgia, 243.....lxviii, 734
 Stanford v. Barry, 1 Atkins, 314.....xv, 691
 Staniford v. Barry, 1 Atkins, 321.....xv, 692
 Stanley's Appeal, 8 Penn. State, 431.....xlix, 530
 Stanley v. Brunswick etc. Corp., 13 Maine, 81.....xxix, 428

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Stanley v. Davenport, 54 Iowa, 463.....	37, 216	State v. Avery, 7 Connecticut, 205.....	xviii, 105
Stanley v. Earl, 5 Little, 231.....	xv, 66	State v. Bacon, 13 Oregon, 143.....	57, 8
Stanley v. Gaylord, 1 Oushing, 536.....	xlviii, 643	State v. Bacon, 41 Vermont, 528.....	xlviii, 616
Stanley v. Greenwood, 24 Texas, 224.....	lxvi, 106	State v. Bachelder, 5 Minnesota, 223.....	lxix, 410
Stanley ada. People, 47 California, 113.....	17, 401	State v. Bailey, 16 Indiana, 46.....	lxix, 405
Stanley v. State, 24 Ohio St. 165.....	15, 604	State v. Baker, 64 Missouri, 167.....	27, 214
Stanley ada. State, 66 North Carolina, 69.....	8, 488	State v. Baber, 74 Missouri, 292.....	41, 314
Stansell v. Roberts, 13 Ohio, 148.....	xlii, 183	State v. Baldwin, 1 Halstead's Ch. 454.....	xiv, 337
St. Anthony F. W. P. Co. v. King Bridge Co., 23 Minnesota, 186.....	23, 682	State v. Baller, 26 West Virginia, 90.....	53, 66
Stanton v. Allen, 5 Denio, 434.....	xlix, 282	State v. Baltimore & O. R. Co., 15 W. Va. 263.....	36, 803
Stanton v. Bell, 2 Hawks, 145.....	xi, 744	State v. Balt. and O. R. R. Co., 24 Md. 94.....	lxixvii, 600
Stanton v. Blossom, 14 Massachusetts, 116.....	vii, 193	State v. Balt. eta. R. R. Co., 12 Gill & J. 398.....	lxixviii, 317
Stanton v. Ellis, 12 New York (2 Kernan) 575.....	lxiv, 512	State v. Bk of Charleston, 3 McMull, L. 439.....	lxixix, 135
Stanton v. Haskin, 1 McArthur, 583.....	29, 612	State v. Bank of Maryland, 6 Gill & J. 265.....	lxvii, 561
Stanton v. Parker, 5 Robinson (La.), 108.....	lxix, 628	State v. Bank of Smyrna, 3 Houston, 99.....	lxixii, 639
Stanton v. Thomas, 24 Wendell, 70.....	lxv, 595	State v. Bantley, 44 Connecticut, 637.....	36, 426
Stanton v. Wilson, 3 Day, 37.....	lii, 265	State v. Barbour, 53 Connecticut, 76.....	55, 60
Staples v. Bradbury, 8 Greenleaf, 181.....	xliii, 494	State v. Barker, 4 Kansas, 324.....	lxvii, 173
Staples v. Bradley, 23 Connecticut, 167.....	ix, 630	State v. Barnett, 1 Jones' Law, 539.....	lxii, 188
Staples v. Franklin Bank, 1 Metcalf, 43.....	lxv, 345	State v. Barnett, 3 Kansas, 250.....	lxixvii, 471
Stapleton v. King, 23 Iowa, 28.....	11, 109	State v. Barrow, 14 Texas, 179.....	lxv, 109
Starbuck v. Dunkles, 10 Minnesota, 108.....	lxixviii, 68	State v. Barrows, 76 Maine, 401.....	49, 629
Starbuck v. Murray, 5 Wendell, 148.....	xxi, 172	State v. Bartlett, 43 New Hampshire, 224.....	lxix, 154
Stark v. State, 63 Indiana, 285.....	36, 214	State v. Barth, 25 South Carolina, 178.....	60, 490
Stark v. Boswell, 6 Hill (N. Y.), 405.....	xii, 752	State v. Beal, 63 Indiana, 345.....	34, 263
Stark v. Brown, 12 Wisconsin, 582.....	lxixvii, 762	State v. Beal, 37 Ohio State, 106.....	41, 490
Stark v. Cannady, 3 Little, 399.....	xiv, 76	State v. Beandel, 53 Connecticut, 586.....	55, 153
Stark v. Mather, Walker, 181.....	xii, 863	State v. Beck, 1 Hill (S. C.), 263.....	lxvii, 190
Stark v. Parker, 2 Pickering, 267.....	xlii, 425	State v. Beckwith, 1 Stewart, 318.....	lxviii, 46
Stark v. Sperry, 6 Lea, 411.....	46, 47	State v. Beckman, 3 Dutocher, 124.....	lxixii, 532
Starks v. Silkes, 8 Gray, 609.....	lxix, 270	State v. Beebe, 13 Kansas, 589.....	19, 83
Starweather v. American Bible Society, 73 Illinois, 50.....	22, 123	State v. Belden, 53 Wisconsin, 121.....	14, 748
Starweather v. Goodman, 48 Conn. 101.....	46, 182	State ada. Belding, 25 Arkansas, 218.....	lxix, 214
Starns ada. People, ex rel. Barnes, 35 Ill. 121.....	lxixv, 348	State v. Bell, 7 Baxter, 12.....	32, 549
Starr v. Leavitt, 2 Connecticut, 242.....	vii, 268	State v. Bell, 27 Maryland, 675.....	lxix, 638
Starr v. Light, 22 Wisconsin, 433.....	lxix, 55	State v. Beloit, 21 Wisconsin, 280.....	lxix, 474
Starr v. Richmond, 30 Illinois, 278.....	lxixvii, 189	State ada. Belote, 26 Mississippi, 96.....	lxixii, 163
Starr v. Robinson, 1 D. Chipman, 227.....	vi, 732	State v. Belton, 24 South Carolina, 128.....	58, 245
Starr v. Vanderheyden, 9 Johnson, 253.....	vi, 275	State v. Benedict, 11 Vermont, 236.....	lxixiv, 688
Starrett v. Wynn, 17 Serg. & R. 130.....	xvii, 654	State v. Benham, 23 Iowa, 154.....	lxix, 416
Start ada. State, 7 Iowa, 501.....	lxixv, 278	State ada. Bennett, Harper's Law, 803.....	lxixviii, 653
State v. Aaron, 1 Southard, 231.....	vii, 622	State v. Berdette, 73 Indiana, 185.....	38, 117
State v. Abbey, 29 Vermont, 60.....	lxvii, 754	State v. Berlin, 21 South Carolina, 298.....	58, 67
State v. Abrahams, 6 Iowa, 117.....	lxix, 399	State v. Berteloe, 6 Blackwood, 474.....	lxixix, 443
State v. Adams, 45 Iowa, 99.....	24, 760	State v. Berwick, 13 Rhode Island, 211.....	43, 26
State v. Addington, 2 Bailey, 516.....	lxixii, 150	State ada. Biggs, 29 Georgia, 723.....	lxixvi, 639
State v. Addy, 14 Vroom, 113.....	39, 647	State ada. Billard, 30 Texas, 267.....	lxixv, 317
State v. Ah Chew, 16 Nevada, 80.....	46, 438	State v. Bishop and Murray, 24 Maryland, 216.....	lxixvii, 608
State v. Ah Ohney, 14 Nevada, 79.....	35, 530	State v. Bishop, 51 Vermont, 297.....	31, 689
State v. Ah Sam, 15 Nevada, 27.....	37, 454	State v. Black, 1 Winet. L. 266.....	lxixvii, 436
State v. Alexander, 76 North Carolina, 231.....	22, 675	State ada. Black, 36 Georgia, 447.....	lxix, 773
State ada. Alford, 23 Georgia, 303.....	lxixi, 209	State ada. Blann, 26 Alabama, 263.....	lxixiv, 720
State v. Albee, 61 New Hampshire, 423.....	60, 325	State v. Bloom, 68 Indiana, 84.....	34, 247
State v. Allen, 1 Hawks, 6.....	ix, 616	State v. Board of Comm., 30 Indiana, 478.....	41, 821
State v. Allen, 1 McCord, 525.....	x, 687	State v. Board of Comm., 4 Nebraska, 827.....	19, 641
State ada. Allen, 40 Alabama, 334.....	lxix, 476	State v. Board of Ed., 63 Wisconsin, 234.....	63, 283
State v. Anderson, Coxe, 318.....	i, 207	State v. Book, 41 Iowa, 520.....	20, 609
State v. Anderson, 3 Overton, 8.....	v, 648	State v. Boon, 13 Iredell's Law, 244.....	lxvii, 553
State v. Anderson, 25 Minnesota, 65.....	33, 455	State v. Botkin, 71 Iowa, 57.....	60, 739
State ada. Anderson, 3 Head, 455.....	lxixv, 774	State v. Bot, 31 La. An. 663.....	32, 221
State v. Andrews, 29 Connecticut, 100.....	lxixvi, 593	State ada. Bower, 5 Missouri, 364.....	lxixii, 325
State ada. Anthony, Meigs, 268.....	lxixviii, 143	State v. Boyd, 2 Hill (S. C.), 268.....	lxixvii, 376
State v. Appling, 25 Missouri, 315.....	lxix, 469	State v. Brady, 40 California, 126.....	6, 604
State v. Archibald, 59 Vermont, 548.....	59, 755	State v. Brainerd, 56 Vermont, 532.....	48, 319
State v. Arledge, 2 Bailey, 401.....	lxixii, 145	State v. Branch, 68 North Carolina, 126.....	12, 633
State v. Armfield, 2 Hawks, 246.....	xi, 762	State v. Brannon, 55 Missouri, 63.....	17, 643
State v. Atchison, 3 Lea, 729.....	31, 663	State v. Bramfield, 31 Missouri, 151.....	51, 271
State v. Atherton, 50 Iowa, 180.....	32, 134	State v. Bridgman, 49 Vermont, 202.....	74, 271
		State v. Briggs, 9 Rhode Island, 261.....	11, 27

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

State v. Bright, 38 La. An. 1.....	58, 156	State ad. Collins, 33 Alabama, 434.....	lxviii, 436
State v. Broughton, 7 Iredell's Law, 96.....	xiv, 507	State v. Columbus G. L. & C. Co., 34 Ohio St. 573.....	32, 396
State v. Brown, 9 Bank. 53.....	46, 81	State v. Colvin, 11 Humphreys, 599.....	liv, 86
State v. Brown, 1 Devereux's Law, 137.....	xvii, 563	State v. Commercial Bank, 6 Smodes & M. 218.....	xiv, 380
State v. Brown, 1 Haywood, 100.....	1, 548	State v. Commercial Bank, 13 Smodes & M. 569.....	liii, 106
State v. Brown, 69 Indiana, 95.....	35, 210	State v. Commissioners, 2 Carolina L. Repor. 617.....	vi, 567
State v. Brown, 4 Rhode Island, 623.....	lxx, 168	State v. Commissioners of Roads, 1 MHI, 53.....	xli, 806
State v. Bruce, 3 Brevard, 264.....	vi, 578	State v. Commissioners, 9 Vroom, 190.....	36, 380
State v. Bruce, 48 Iowa, 530.....	36, 403	State v. Commissioners, 3 Zabriskie, 510.....	lvii, 409
State v. Bruce, 5 Oregon, 63.....	36, 734	State v. Common Pleas, 36 New Jersey, 72.....	13, 423
State v. Brunet, 26 Wisconsin, 412.....	7, 84	State v. Connor, 59 Iowa, 357.....	44, 696
State v. Buchanan, 5 Harris & Johnson, 317.....	ix, 534	State ad. Conner, 25 Georgia, 515.....	lxxi, 184
State v. Buckman, 8 New Hampshire, 203.....	xxix, 646	State ad. Conner, 4 Yarger, 137.....	xxvi, 317
State v. Buckner, 1 Phill. Law, 558.....	xviii, 83	State v. Conover, 4 Dutcher, 234.....	lxxviii, 54
State ad. Budd, 3 Humphreys, 483.....	xxix, 189	State v. Constantine, 43 Ohio St. 437.....	52, 833
State v. Burlington, 30 Kansas, 599.....	27, 193	State v. Cooke, 24 Minnesota, 247.....	31, 344
State v. Bundy, 24 South Carolina, 439.....	58, 263	State v. Coombs, 55 Maine, 477.....	xvii, 610
State v. Burgess, 34 Missouri, 321.....	lxix, 433	State v. Cooper, 3 Overton, 96.....	v, 636
State v. Burgoyne, 7 Lea, 173.....	46, 60	State v. Cooper, 1 Green's Law, 361.....	xiv, 490
State v. Burket, 2 MHI, 155.....	xii, 663	State v. Cooper, 2 Zabriskie, 52.....	li, 948
State v. Burnham, 9 New Hampshire, 34.....	xxxi, 317	State v. Corrigan O. St. Ry Co., 85 Mo. 363.....	55, 361
State v. Burnham, 86 Vermont, 445.....	48, 801	State v. Costa, 36 Missouri, 437.....	lxxviii, 148
State v. Burton, 45 Wisconsin, 150.....	35, 706	State v. Council, 9 Vroom, 430.....	36, 404
State v. Burton, 61 New Hampshire, 511.....	64, 332	State v. County Commissioners, 4 Neb. 537.....	19, 641
State v. Buzzell, 58 New Hampshire, 237.....	43, 586	State v. County Court, 51 Missouri, 350.....	11, 454
State v. Campbell, 29 Texas, 44.....	xvii, 251	State v. County Court, 50 Missouri, 317.....	11, 415
State ad. Campbell, 18 Indiana, 375.....	lxxxi, 363	State v. Covington, 94 North Carolina, 313.....	55, 690
State ad. Campbell, 9 Yarger, 333.....	xxx, 417	State v. Craige, 69 North Carolina, 475.....	45, 696
State v. Cardoso, 5 South Carolina, 71.....	28, 275	State v. Crank, 2 Bailey, 66.....	lxviii, 117
State v. Carver, 13 Richardson's Law, 498.....	xci, 245	State v. Crawford, 28 Kansas, 726.....	43, 183
State v. Carl, 43 Arkansas, 353.....	51, 565	State ad. Crawford, 2 Yarger, 60.....	xxiv, 467
State v. Carman, 83 Iowa, 150.....	56, 741	State v. Cright, 1 Brevard, 169.....	li, 656
State v. Carpenter, 68 Wisconsin, 165.....	64, 648	State v. Cross, 13 Iowa, 66.....	lxxix, 519
State v. Carr, 21 New Hampshire, 168.....	liii, 179	State v. Crotesau, 23 Vermont, 14.....	liv, 96
State v. Carroll, 38 Connecticut, 449.....	9, 409	State v. Crowley, 41 Wisconsin, 271.....	32, 719
State v. Carron, 18 Iowa, 372.....	lxxvii, 401	State ad. Culp, 1 Porter, 33.....	xxvi, 367
State v. Carver, 49 Maine, 583.....	lxvii, 475	State v. Culver, 65 Missouri, 607.....	27, 290
State v. Case, 23 North Carolina, 545.....	53, 471	State v. Cummings, 33 Connecticut, 260.....	lxxix, 206
State v. Cassidy, 22 Minnesota, 312.....	31, 765	State v. Curtis, 35 Connecticut, 374.....	xov, 263
State v. Oastlin, 3 Vermont, 530.....	xxviii, 230	State v. Ouster, 3 Hialek, 165.....	8, 8
State v. Cent. La. Ry Co., 71 Iowa, 410.....	60, 806	State v. Daley, 53 Vermont, 443.....	38, 694
State v. Chadbourne, 30 North Carolina, 479.....	36, 94	State v. Dame, 60 New Hampshire, 479.....	49, 331
State v. Chambers, 22 West Virginia, 779.....	46, 550	State v. Dame, 11 New Hampshire, 271.....	xxxv, 496
State v. Chambliss, Cheves' Law, 230.....	lxxiv, 593	State v. Danforth, 48 Iowa, 43.....	34, 357
State v. Champagne, 53 Vermont, 313.....	36, 754	State v. Dart, 39 Connecticut, 153.....	lxvii, 596
State v. Chancellor, 1 Strobhart's Law, 347.....	xvii, 557	State v. Davidson, 30 Missouri, 312.....	lxi, 603
State v. Chandler, 5 Louisiana An. 489.....	lii, 599	State v. Davidson, 30 Vermont, 377.....	lxxviii, 312
State v. Chandler, 34 Missouri, 371.....	lxix, 433	State v. Davis, 3 Brevard, 3.....	v, 639
State v. Chapin, 17 Arkansas, 561.....	lxv, 452	State v. Davis, 1 Iredell's Law, 125.....	xxxv, 736
State v. Charlton, 11 West Virginia, 332.....	27, 603	State v. Davis, 66 Missouri, 634.....	27, 387
State v. Chatburn, 63 Iowa, 659.....	56, 760	State v. Davis, 14 Nevada, 439.....	33, 563
State ad. Cheesum, 3 Blackford, 333.....	xliv, 771	State v. Davis, 30 North Carolina, 351.....	36, 86
State v. Chrisp, 35 North Carolina, 538.....	39, 713	State v. Davis, 13 Rhode Island, 493.....	34, 704
State v. Church, 5 Oregon, 375.....	36, 746	State v. Davis, 9 Vroom, 176.....	36, 367
State v. Clark, 26 New Hampshire, 176.....	lxii, 611	State ad. Davis, 15 Ohio, 72.....	xiv, 559
State v. Clarke, 54 Missouri, 17.....	14, 471	State ad. Davison, 4 Vermont, 236.....	lxiv, 596
State v. Clarke, 33 New Hampshire, 329.....	lxvi, 723	State v. Dayton, 3 Zabriskie, 49.....	liii, 270
State ad. Clarke, 6 Gill & Johnson, 288.....	xxvi, 575	State v. Dean, 49 Iowa, 73.....	31, 143
State v. Clayton, 27 Kansas, 442.....	41, 418	State v. Del. L. & W. R. Co., 48 N. J. L. 55.....	57, 543
State v. Cleaves, 59 Maine, 296.....	8, 423	State ad. Dement, 2 Head, 505.....	lxv, 747
State v. Clifford, 14 Nevada, 73.....	53, 696	State v. De Ranot, 34 La. An. 198.....	44, 426
State v. Clifton, 67 Missouri, 336.....	36, 506	State v. Deusting, 33 Minnesota, 109.....	53, 17
State ad. Coffee, 3 Yarger, 283.....	lxv, 570	State v. DeWitt, 2 MHI (S. C.), 282.....	lxvii, 371
State v. Cogswell, 3 Blackford, 54.....	xxviii, 379	State v. DeWolf, 2 Connecticut, 93.....	xx, 96
State v. Cooch, 12 Iredell's Law, 178.....	iv, 407	State ad. Dias, 7 Blackford, 30.....	lxxix, 448
State v. Coles, 19 Wisconsin, 129.....	lxxviii, 678	State v. Dick, 2 Winst. L. 45.....	lxxvi, 439
State v. Colgate, 31 Kansas, 511.....	47, 507	State v. Dillard, 5 Blackford, 365.....	lxv, 128
State v. Collins, 73 Missouri, 13.....	37, 417	State v. Dillard, 3 Iredell's Law, 102.....	lxviii, 708
State v. Collins, 70 North Carolina, 341.....	16, 771	State v. Dimick, 13 New Hampshire, 194.....	lxvii, 197
State v. Collins, 15 South Carolina, 373.....	46, 697	State v. Diskin, 34 La. An. 919.....	44, 448

Sny-Spe

TABLE OF

Roman letters [xlix] refer to volumes of American Decis

Snydacker v. Brosse, 51 Illinois, 357.....	xix, 551	S
Snyder's App., 36 Penn. State, 165.....	lxviii, 373	S
Snyder v. Atlantic Mutual Ins. Co., 95 N. Y. 126.47, 39		S
Snyder v. Findley, Coxe, 78.....	1, 193	S
Snyder v. Fulton, 34 Maryland, 123.....	6, 314	S
Snyder v. Laframboise, Brosse, 343.....	xii, 187	S
Snyder v. Martin, 17 West Virginia, 376.....	41, 670	S
Snyder v. People, 26 Michigan, 106.....	12, 302	S
Snyder v. Riley, 6 Penn. State, 164.....	xvii, 452	S
Snyder ada. Riley, 1 Speers' Law, 272.....	xi, 602	S
Snyder v. Robinson, 35 Indiana, 311.....	9, 738	S
Snyder v. Snyder, 6 Blaney, 483.....	vi, 493	S
Snyder v. Studebaker, 19 Indiana, 462.....	lxix, 415	S
Snyder v. Summers, 1 Lea, 534.....	27, 773	S
Snyder v. Van Doran, 46 Wisconsin, 602.....	33, 739	S
Snyder v. Vaux, 2 Rawle, 423.....	xxi, 466	S
Snyder v. Warford, 11 Missouri, 513.....	xlix, 94	S
Snyder v. Warren, 3 Cowen, 518.....	xiv, 519	S
Snyder v. Wolford, 33 Minnesota, 173.....	53, 22	S
Society v. Morris Canal etc. Co., 1 Saxton, 187.....	xxi, 41	S
Society for the Visitation of the Sick, etc., v.		S
Commonwealth, 53 Pennsylvania St., 125.....	xi, 139	S
Sodlitz v. Applegate, 24 West Virginia, 411.....	49, 252	S
Soles v. Hickman, 29 Penn. State, 342.....	lxvii, 635	S
Sollinger v. Jewett, 25 Indiana, 479.....	lxviii, 373	S
Solomon v. Bushnell, 11 Oregon, 277.....	50, 478	S
Solomon v. Manhattan R'y Co., 103 N. Y. 437.....	57, 780	S
Solomon v. Peters, 37 Georgia, 251.....	xcii, 69	S
Solomons v. Jones, 3 Brevard, 54.....	v, 638	S
Solomons ada. State, 6 Yerger, 360.....	xxvii, 469	S
Solverson v. Peterson, 64 Wisconsin, 198.....	54, 607	S
Somerfield v. State Ins. Co., 8 Lea, 547.....	41, 662	S
Somerby v. Buntin, 118 Massachusetts, 279.....	19, 459	S
Somers v. Schmidt, 24 Wisconsin, 417.....	1, 191	S
Somers v. Sloan, 2 Harrison (N. J.), 46.....	xxxv, 696	S
Somerset Co. M. F. I. Co. v. Usaw, 112 Pennsylv.		S
ania State, 80.....	56, 307	S
Somervell v. Somervell, 3 Gill, 276.....	xlvi, 340	S
Somerville ada. State, 21 Maine, 14.....	xxxviii, 948	S
Somerville v. Trueman, 4 Harris & McEl. 43.....	1, 389	S
Somes v. Brewer, 3 Pickering, 184.....	xiii, 406	S
Somes v. White, 65 Maine, 542.....	20, 718	S
Sommers v. Johnson, 4 Vermont, 278.....	xvii, 604	S
Sommers v. Torrey, 5 Paige Ch. 54.....	xxviii, 411	S
Sommerville v. Horton, 4 Yerger, 541.....	xxvi, 242	S
Sommerville ada. Commonw., 1 Virginia Cases, 163.v.	514	S
Sonfield v. Thompson, 42 Arkansas, 46.....	48, 49	S
Sonneborn v. Ins. Co., 15 Vroom, 220.....	43, 365	S
Sonoma Co. R'y v. Gove, 63 California, 365.....	49, 92	S
Soonhoven v. Gott, 20 Illinois, 46.....	lxvi, 247	S
Soper v. Harvard College, 1 Pickering, 177.....	xi, 159	S
Soper ada. State, 16 Maine, 293.....	xxxviii, 665	S
So Belle v. Western U. Tel. Co., 55 Tex. Ct. App.		S
308.....	46, 805	S
Sornberger v. Lee, 14 Nebraska, 183.....	45, 106	S
Sorrey v. Bright, 1 Dev. & Bat. Eq. 113.....	xxviii, 684	S
Soule v. Atkinson, 18 California, 225.....	lxix, 174	S
Souter v. Codman, 14 Rhode Island, 119.....	51, 364	S
Souter v. Baymore, 7 Penn. State, 415.....	xlvi, 513	S
South v. South, 91 Indiana, 221.....	46, 501	S
South & N. Al. R. R. Co. v. Henlein, 52 Ala. 606.23, 578		S
South & N. Al. R. R. Co. v. Huffman, 76 Ala. 492.52, 349		S
South & N. Al. R. R. Co. v. Wood, 66 Ala. 167.....	41, 749	S
South & N. Al. R. R. Co. v. Wood, 71 Ala. 215.....	46, 309	S
South & N. Al. R. R. Co. v. Wood, 74 Ala. 449.....	49, 819	S
South Bend v. Hardy, 98 Indiana, 577.....	49, 792	S
South ada. State, 4 Dutcher, 28.....	lxv, 250	S
South Berwick v. Huntress, 53 Maine, 89.....	lxviii, 535	S
South Carolina Bank v. S. C. M. Co., 3 Strobb.		S
Law, 190.....	xlix, 640	S

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

State v. Hattaway, 2 Nott & McO. 118.x, 530
 State v. Hauss, 43 Indiana, 105.13, 334
 State v. Hawkins, 25 Georgia, 207.lxvi, 166
 State v. Hawkins, 3 Porter, 461.xxxiii, 294
 State ada. Hawkins, 1 Porter, 475.xxvii, 641
 State ada. Hawkins, 9 Alabama, 157.xlv, 431
 State v. Haymond, 20 West Virginia, 18.43, 787
 State v. Haynes, 66 Maine, 307.27, 569
 State ada. Haynes, 3 Humphreys, 490.xxix, 187
 State v. Hays, 50 Missouri, 34.11, 403
 State v. Hazard, 2 Rhode Island, 474.lx, 96
 State v. Hendrick, 3 Jones' Law, 375.lxvii, 249
 State v. Hearst, 13 Missouri, 268.R, 167
 State v. Heath, 30 Louisiana Annual, 172.xvii, 390
 State v. Hebrew Congregation, 31 La. An. 266.33, 717
 State ada. Hecker, 2 Missouri, 166.xxii, 454
 State v. Helfrid, 2 Nott & McO. 233.x, 591
 State v. Hennessy, 23 Ohio State, 539.13, 253
 State ada. Hess, 5 Ohio, 5.xxii, 767
 State v. Hayward, 2 Nott & McO. 312.x, 604
 State v. Hickling, 12 Vroom, 328.32, 198
 State v. Hicks, 3 Blackford, 336.xx, 118
 State v. Hicks, 9 Yergor, 486.xx, 423
 State v. Hildreth, 9 Iredell's Law, 439.11, 364
 State v. Hildreth, 9 Iredell's Law, 440.11, 369
 State v. Hill, 4 Dev. & Bak. Law, 491.xxiv, 396
 State v. Hill, 3 Hill (S. O.), 607.xxvii, 406
 State ada. Hill, 1 Yergor, 78.xxiv, 441
 State v. Hilton, 3 Richardson's Law, 434.xiv, 783
 State ada. Hipp, 5 Blackford, 149.xxviii, 463
 State v. Hitchcock, 1 Kansas, 173.lxvii, 503
 State v. Hodgkins, 19 Maine, 185.xxvii, 743
 State v. Holcomb, 68 Iowa, 107.56, 828
 State v. Holder, 51 North Carolina, 537.31, 517
 State v. Holland, 53 North Carolina, 634.35, 537
 State v. Hollyway, 41 Iowa, 200.90, 586
 State v. Holmes, 28 La. An. 765.26, 110
 State v. Holmes, 54 Iowa, 539.41, 121
 State v. Holt, 37 Missouri, 240.lxvii, 273
 State v. Holt, 30 North Carolina, 749.47, 544
 State v. Homes, 17 Missouri, 379.lvii, 269
 State v. Hoover, 4 Dev. & Bak. Law, 364.xxiv, 353
 State v. Horan, 32 Minnesota, 394.50, 553
 State v. Horn, 70 Missouri, 468.35, 437
 State v. Horne, 55 North Carolina, 305.53, 443
 State ada. Horne, 27 Georgia, 80.xvii, 49
 State ada. Horne, 1 Kansas, 42.lxvii, 499
 State v. Hornsby, 3 Robinson (La.), 554.xii, 305
 State v. Hornsby, 3 Robinson (La.), 583.xii, 314
 State v. House, 65 North Carolina, 315.6, 744
 State v. Houston, 73 Alabama, 578.56, 59
 State v. Howe, 28 Ohio State, 533.18, 321
 State v. Hoyt, 47 Connecticut, 513.36, 89
 State v. Hughes, 3 Alabama, 103.xxvii, 411
 State v. Hughes, 28 Kansas, 626.57, 195
 State v. Humphrey, 22 Vermont, 566.lxviii, 605
 State v. Hunter, 3 Iredell's Law, 360.xlv, 41
 State ada. Hunter, 1 Head, 160.lxviii, 164
 State v. Huntly, 3 Iredell's Law, 418.xl, 416
 State v. Hunsey, 60 Maine, 410.11, 206
 State v. Illinois Central R. R., 27 Illinois, 64.lxix, 396
 State v. Indianapolis, 50 Indiana, 375.35, 223
 State v. Ingold, 4 Jones' Law, 316.lxvii, 263
 State ada. Ingram, 39 Alabama, 247.lxvii, 723
 State v. Jackson, 27 Kansas, 561.41, 424
 State v. Jackson, 73 Maine, 51.40, 343
 State v. Jackson, 30 Missouri, 173.50, 499
 State v. Jackson, 17 Missouri, 544.lx, 351
 State v. Jackson, 7 South Carolina, 285.24, 476
 State v. Jenkins, 54 North Carolina, 512.37, 643

State v. Jenkins, 14 Richardson's Law, 315.xvii, 129
 State v. Jennings, 51 Missouri, 133.51, 326
 State v. Jericho, 40 Vermont, 121.xvii, 397
 State v. Jersey City, 3 Vroom, 378.lxvii, 249
 State v. John, 3 Iredell's Law, 330.xlix, 394
 State v. John, 5 Jones' Law, 163.lxix, 777
 State ada. Johns, 19 Indiana, 421.lxvii, 409
 State v. Johnson, 12 Alabama, 840.lxvi, 233
 State v. Johnson, 8 Iowa, 535.lxvii, 321
 State v. Johnson, 26 Iowa, 407.lxvi, 158
 State v. Johnson, 1 Iredell's Law, 354.xxv, 743
 State v. Johnson, 2 Jones' Law, 247.lxvii, 523
 State v. Johnson, 12 Minnesota, 476.xviii, 241
 State v. Johnson, 75 North Carolina, 123.32, 686
 State v. Johnson, Phillips' Law, 186.lxvii, 587
 State v. Johnson, 1 Winsl. L. 233.lxvii, 434
 State v. Joint School Dist., 65 Wis. 631.56, 686
 State v. Jolly, 3 Dev. & Bak. Law, 110.xxvii, 609
 State v. Jones, 50 New Hampshire, 386.2, 243
 State v. Jones, 53 North Carolina, 605.35, 586
 State v. Jones, 55 North Carolina, 599.36, 523
 State v. Jones, 4 Halsted, 387.xvii, 463
 State v. Jones, 1 McMullan's Law, 236.lxvii, 287
 State ada. Jones, 7 Missouri, 61.lxvii, 189
 State ada. Jones, 12 Texas, 168.lxii, 593
 State v. Judge, 28 Louisiana, 508.26, 115
 State v. Judge of O. D. Court, 23 La. An. 43.56, 189
 State v. Judge of T. J. Dist. 23 La. An. 23.6, 399
 State v. Justus, 11 Oregon, 178.50, 479
 State v. Kaufman, 51 Iowa, 378.53, 149
 State v. Kean, 10 New Hampshire, 347.xxvii, 193
 State ada. Keller, 12 Maryland, 323.lxvi, 594
 State v. Kelly, 76 Maine, 231.49, 639
 State v. Kennedy, 75 North Carolina, 281.27, 623
 State v. Kent, 22 Minnesota, 41.21, 764
 State v. Keyes, 8 Vermont, 67.xxx, 453
 State v. Kinney, 44 Connecticut, 183.26, 438
 State ada. Kirby, 9 Yergor, 363.xxx, 458
 State v. Kirk, 44 Indiana, 401.15, 329
 State v. Kirks, 12 Florida, 273.207, 314
 State v. Kitchens, 3 Hill, 613.lxvii, 419
 State v. Knapp, 6 Connecticut, 415.xvi, 68
 State v. Knotts, 2 Speers' Law, 602.xii, 305
 State v. Kube, 30 Wisconsin, 217.xvi, 360
 State v. Kupferle, 44 Missouri, 154.6, 235
 State ada. Lancaster, 3 Cold. 240.xvi, 399
 State v. Lantz, 23 Kansas, 723.33, 215
 State v. Lapage, 37 New Hampshire, 245.24, 69
 State v. Larkin, 49 New Hampshire, 32.6, 483
 State v. Lash, 1 Harrison (N. J.), 200.lxvii, 297
 State ada. Lawrence, 1 Humphreys, 298.lxvii, 644
 State v. Lawson, 7 Arkansas, 361.lxvi, 399
 State v. Lavaka, 26 Minnesota, 536.37, 418
 State v. Leabo, 54 Missouri, 163.54, 96
 State v. Leach, 7 Connecticut, 423.lxvii, 119
 State v. Leach, 60 Maine, 96.11, 173
 State v. Lee, 23 Minnesota, 407.21, 769
 State v. Lehre, 3 Brevard, 446.iv, 596
 State v. Levy, 23 Minnesota, 104.33, 679
 State v. Lewis, 2 Hawkins, 36.xl, 761
 State v. Lewis, 19 Kansas, 250.37, 113
 State v. Lewis, 48 Iowa, 375.36, 407
 State v. Lewis, 73 North Carolina, 128.31, 461
 State v. Libby, 44 Maine, 469.lxix, 115
 State v. Lindenthal, 5 Richardson's L. 237.lxvii, 743
 State v. Lindley, 51 Iowa, 343.33, 128
 State v. Linkhaw, 60 North Carolina, 314.12, 645
 State v. Littlefield, 70 Maine, 428.35, 235
 State v. Lockyear, 55 North Carolina, 632.56, 237
 State v. Long, 55 North Carolina, 523.56, 595

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

State v. Lerry, 7 Baxt. 35.....	33, 555	State v. Moor, Walker, 134.....	xli, 541
State ada. Lorton, 7 Missouri, 55.....	xxxvii, 179	State v. Moore, 31 Connecticut, 479.....	lxxxviii, 159
State v. Lowe, 21 West Virginia, 733.....	45, 570	State v. Moore, 35 Iowa, 126.....	xxv, 778
State v. Lupton, 64 Missouri, 415.....	37, 253	State v. Moore, 11 Iredell's Law, 160.....	lxi, 423
State v. Lymburn, 1 Brevard, 397.....	ii, 669	State v. Moore, 74 Missouri, 413.....	41, 323
State v. Lyman, 26 Ohio St. 400.....	29, 772	State v. Moore, 19 Missouri, 369.....	lxi, 553
State ada. Lynes, 5 Porter, 235.....	xxx, 557	State v. Moore, 26 New Hampshire, 443.....	lix, 354
State v. Lyon, 31 North Carolina, 606.....	31, 413	State v. Moore, 63 New Hampshire, 9.....	54, 473
State ada. Mahala, 10 Yerger, 533.....	xxxii, 591	State v. Moore, 24 South Carolina, 150.....	56, 261
State ada. Maher, 1 Porter, 353.....	xxvi, 379	State v. Morey, 2 Wisconsin, 494.....	lx, 439
State v. Maine Cent. R. R. Co., 76 Me. 337.....	49, 622	State v. Morgan, 3 Iredell's Law, 136.....	lxxxviii, 714
State v. Maine, 27 Connecticut, 641.....	lxxi, 89	State v. Morgan, 7 Iredell's Law, 357.....	xlvi, 339
State v. Mannel, 73 North Carolina, 301.....	31, 456	State v. Morphy, 33 Iowa, 270.....	11, 123
State v. Markins, 35 Indiana, 464.....	48, 733	State v. Morris Turnpike Co., 1 Southard, 163.....	vii, 579
State v. Marler, 2 Alabama, 43.....	xxxvi, 398	State v. Morton, 27 Vermont, 310.....	lxv, 303
State v. Martin, 14 Lea, 92.....	53, 167	State v. Mott, 61 Maryland, 297.....	43, 105
State v. Martin, 35 North Carolina, 508.....	39, 711	State v. Mott, 16 Minnesota, 473.....	10, 133
State v. Martin, 20 Wisconsin, 314.....	11, 567	State ada. Mount, 14 Ohio, 395.....	xliv, 548
State ada. Mary, 24 Arkansas, 44.....	lxxxi, 60	State v. Mugler, 23 Kansas, 232.....	44, 434
State v. Massey, 36 North Carolina, 656.....	41, 473	State ada. Mulvey, 43 Alabama, 316.....	xxiv, 594
State ada. May, 14 Ohio, 451.....	xiv, 548	State v. Mumford, 1 Devereux's Law, 519.....	lxvii, 673
State v. Mayor Jersey City, 2 Vroom, 578.....	lxxxvii, 240	State v. Mumford, 73 Missouri, 647.....	39, 533
State v. Mayor etc. of Mobile, 5 Porter, 279.....	xxx, 564	State v. Murphy, 6 Alabama, 765.....	xli, 79
State v. Mayor etc., 35 New Jersey, 157.....	10, 233	State v. Murray, 23 Wisconsin, 96.....	9, 499
State v. Mayor, 8 Vroom, 418.....	18, 739	State v. Myern, 23 Missouri, 533.....	53, 369
State v. Mayor, 49 N. J. L. 540.....	66, 648	State v. Nash, 35 North Carolina, 630.....	41, 473
State v. Mayor, 13 Lea, 145.....	47, 331	State v. Nebraska Tel. Co., 17 Nebraska, 126.....	53, 404
State v. Mayor, 15 Lea, 597.....	54, 427	State v. Neely, 74 North Carolina, 435.....	31, 494
State v. McBride, 4 Missouri, 303.....	xxix, 636	State v. Nell, 7 Ohio, Pt. I, 123.....	lxxxviii, 639
State v. McCall, 4 Alabama, 643.....	lxxxix, 314	State v. Nelson, 38 La. An. 943.....	53, 303
State v. McOarty, 2 Pinney, 513; 9 Chand. 139.....	lv, 180	State v. Nelson, 14 Richardson's Law, 169.....	xxiv, 139
State v. McClelland, 18 Nebraska, 236.....	53, 614	State v. New Orleans, 38 La. An. 119.....	56, 269
State v. McCoy, 34 Missouri, 531.....	lxxxvi, 121	State v. Newark, 36 New Jersey, 478.....	13, 464
State v. McCoy, 8 Robinson (La.), 548.....	xii, 301	State v. Newland, 7 Iowa, 242.....	lxxi, 444
State v. McCord, 8 Kansas, 233.....	12, 469	State v. Newman, 9 Nevada, 43.....	10, 3
State v. McCrellus, 4 Kan. 214.....	xvii, 169	State v. Newton, 1 G. Greene, 100.....	lxxxviii, 267
State v. McCune, 5 Rhode Island, 60.....	lxx, 178	State v. Nichols, 26 Arkansas, 74.....	7, 699
State ada. McDermott, 13 Ohio State, 233.....	lxxxii, 444	State v. Nichols, 23 Indiana, 238.....	43, 65
State v. McDonald, 1 McCord, 532.....	x, 691	State v. Nixon, 18 Vermont, 70.....	xlvi, 135
State v. McDuffie, 34 New Hampshire, 533.....	lxix, 516	State ada. Nixon, 2 Smodes & M. 497.....	xli, 601
State v. McGinnis, 30 North Carolina, 377.....	30, 90	State v. Norris, 1 Haywood, 439.....	i, 594
State v. McGinty, 41 Mississippi, 435.....	lxviii, 264	State ada. Norris, 3 Humphreys, 233.....	lxxxix, 173
State v. McGlynn, 20 California, 233.....	lxxxii, 118	State v. North-eastern R. R., 9 Rich. L. 247.....	lxvii, 552
State v. McGowan, 30 Connecticut, 245.....	li, 236	State v. Northrup, 49 Iowa, 533.....	30, 408
State ada. McGuire, 35 Mississippi, 365.....	lxxii, 124	State v. Norvell, 2 Yerger, 24.....	lxxxiv, 403
State v. McIntire, 1 Jones' Law, 1.....	lix, 596	State v. Noyes, 26 Connecticut, 80.....	4, 37
State v. McKean, 26 Iowa, 343.....	14, 530	State ada. Nugent, 4 Stewart & Forten, 72.....	lxxxv, 703
State v. McKee, 1 Bailey's Law, 631.....	xxi, 499	State v. Ober, 22 New Hampshire, 469.....	13, 65
State ada. McLain, 10 Yerger, 241.....	lxxxii, 573	State v. O'Connor, 66 Missouri, 374.....	37, 261
State v. McLaughlin, 15 Kansas, 228.....	33, 264	State v. Oliver, 26 West Virginia, 423.....	53, 79
State v. McMahon, 23 Connecticut, 407.....	55, 149	State v. Omaha, 14 Nebraska, 265.....	45, 269
State v. McNally, 34 Maine, 210.....	lvi, 630	State v. O'Hall, 26 Vermont, 140.....	54, 593
State v. McO'Brien, 24 Missouri, 403.....	lxix, 435	State v. Orrell, 1 Devereux Law, 129.....	svii, 693
State v. McPherson, 70 North Carolina, 239.....	16, 769	State v. Osawkee Township, 14 Kansas, 418.....	19, 99
State v. Mead, 4 Blackford, 309.....	xxx, 661	State v. O'Toole, 3 Holst. 165.....	8, 9
State v. Meagher, 44 Missouri, 356.....	c, 236	State v. Overton, 4 Zabrickie, 435.....	lxi, 671
State v. Meek, 70 Missouri, 353.....	35, 427	State v. Owen, 1 Murphy, 423.....	lv, 571
State v. Meerhouse, 34 Missouri, 244.....	lxxxvi, 109	State v. Page, 21 Missouri, 337.....	lxiv, 239
State v. Merrihue, 47 Iowa, 113.....	33, 464	State v. Page, 1 Speers' Law, 403.....	xi, 601
State v. Millard, 18 Vermont, 574.....	xlvi, 170	State v. Parker, 34 Arkansas, 158.....	36, 5
State v. Miller, 33 North Carolina, 511.....	53, 469	State v. Parker, 1 D. Chipman, 296.....	vi, 723
State v. Miller, 1 Vroom, 368.....	lxxxvii, 128	State v. Parker, 75 North Carolina, 269.....	32, 699
State v. Milwaukee Gas-light Co., 29 Wis. 454.....	9, 593	State v. Parnell, 16 Arkansas, 506.....	lxxxviii, 73
State ada. Mitchell, 3 Missouri, 253.....	xxv, 443	State v. Parrott, 71 North Carolina, 311.....	17, 3
State v. Mixer, 45 Iowa, 343.....	34, 769	State v. Partlow, 30 Missouri, 608.....	50, 21
State v. Mixer, 50 Iowa, 145.....	53, 123	State v. Partlow, 31 North Carolina, 596.....	43, 593
State v. Moline, 38 La. An. 331.....	54, 181	State v. Patrick, 79 North Carolina, 605.....	33, 269
State ada. Monroe, 23 Texas, 210.....	lxxvi, 58	State v. Patten, 10 Louisiana An. 239.....	lxxxviii, 394
State v. Moody, 2 Haywood, 31.....	ii, 616	State v. Patterson, 2 Iredell's Law, 346.....	lxxxviii, 699
State v. Mooney, 74 North Carolina, 58.....	31, 487	State v. Patterson, 7 Iredell's Law, 70.....	lxv, 593

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

State v. Patterson, 38 Missouri, 36.....	57, 374
State v. Patterson, 45 Vermont, 308.....	13, 200
State v. Patterson, 16 Vroom, 310.....	46, 772
State ada. Patterson, 2 English, 59.....	xliv, 530
State v. Paup, 13 Arkansas, 129.....	lvi, 303
State v. Pawtucket Turnpike Co., 5 R. I. 331.....	xcliv, 123
State v. Pandargran, 3 Dev. & Bat. Law, 305.....	xxxi, 416
State v. Pennington, 3 Head, 399.....	lxv, 771
State v. Pepper, 68 North Carolina, 259.....	12, 637
State v. Perry, 5 Jones' Law, 9.....	lxix, 768
State v. Pettie, 30 North Carolina, 337.....	36, 88
State v. Phelps, 11 Vermont, 116.....	xxiv, 672
State v. Philadelphia etc. R. R. Co., 45 Md. 351.....	24, 511
State v. Phillips, 63 Texas, 330.....	51, 646
State ada. Phipps, 23 Maryland, 350.....	lxxiv, 684
State v. Pickett, 11 Nevada, 255.....	21, 754
State ada. Pigman, 14 Ohio, 555.....	xiv, 558
State v. Pike, 49 New Hampshire, 299.....	6, 533
State v. Pitman, 1 Brevard, 23.....	ii, 645
State v. Pitts, 12 South Carolina, 190.....	32, 508
State v. Plants, 25 West Virginia, 119.....	53, 211
State v. Platt, 2 South Carolina, 260.....	16, 647
State v. Plasencia, 6 Robinson (La.), 441.....	xii, 271
State ada. Polk, 19 Indiana, 170.....	lxxxi, 323
State v. Poll, 11 Hawks, 442.....	ix, 655
State v. Pollok, 4 Iredell's Law, 305.....	xlii, 140
State v. Poor, 4 Dev. & Bat. L. 394.....	xxiv, 267
State v. Portland, 74 Maine, 203.....	43, 586
State ada. Portwood, 20 Texas, 47.....	xiv, 226
State v. Posey, 17 Louisiana An. 298.....	lxxvii, 535
State v. Potter, 63 Missouri, 313.....	21, 440
State v. Pottmayer, 23 Indiana, 402.....	5, 224
State v. Potts, 4 Hallett, 26.....	xvii, 449
State v. Powers, 12 Oregon, 145.....	45, 138
State v. Powell, 67 Missouri, 395.....	29, 513
State v. Pratte, 3 Missouri, 285.....	xi, 140
State v. Price, 12 Gill & J. 260.....	xxvii, 81
State ada. Price, 36 Mississippi, 531.....	lxix, 105
State v. Primer, 49 Iowa, 531.....	31, 155
State v. Pugh, 2 Haywood, 55.....	ii, 621
State v. Purdy, 26 Wisconsin, 213.....	17, 485
State v. Putman, 26 South Carolina, 173.....	44, 569
State v. Quarrel, 2 Bay, 150.....	i, 637
State v. R. E. Co., 24 West Virginia, 723.....	49, 290
State v. Rand, 51 New Hampshire, 361.....	12, 127
State v. Randall, 1 Strobhart's Law, 110.....	xlvii, 548
State v. Rankin, 2 South Carolina, 428.....	16, 737
State v. Rash, 12 Iredell's Law, 392.....	lv, 420
State v. Ray, 63 New Hampshire, 408.....	56, 529
State v. Ray, Rice's Law, 1.....	xxviii, 90
State v. Real Estate Bk., 5 Arkansas, 395.....	xii, 109
State v. Redemeter, 71 Missouri, 173.....	36, 463
State v. Reed, 26 Maine, 499.....	lviii, 727
State v. Reed, 26 Vermont, 417.....	xlv, 237
State v. Reid, 1 Alabama, 613.....	xxv, 44
State v. Reid, 1 Dev. & Bat. L. 277.....	xxviii, 672
State v. Reigart, 1 Gill, 1.....	xxix, 628
State v. Republican V. R. E. Co., 17 Neb. 647.....	52, 424
State v. Revella, 24 La. An. 351.....	44, 436
State v. Rhodes, 1 Phillips' Law, 498.....	xxviii, 78
State v. Richardson, 26 New Hampshire, 298.....	lxv, 173
State v. Richie, 26 La. An. 227.....	26, 100
State v. Richmond etc. R. E. Co., 73 N. C. 357.....	21, 473
State v. Ridgely, 2 Harr. & MoH. 130.....	i, 272
State ada. Riggs, 2 Cold. 85.....	xcl, 272
State v. Rivers, 26 Iowa, 303.....	43, 112
State v. Roach, 2 Haywood, 293.....	ii, 628
State v. Robbins, 4 Iredell's Law, 23.....	xliv, 64
State v. Roberts, 1 Hawks, 349.....	ix, 643
State v. Roberts, 7 Hallett, 114.....	xci, 62
State v. Roberts, 59 New Hampshire, 296.....	47, 199
State v. Roberts, 68 Missouri, 234.....	39, 738
State ada. Roberts, 14 Georgia, 8.....	lviii, 528
State v. Robertson, 23 La. An. 612.....	58, 201
State v. Robinson, 3 Dev. & Bat. L. 130.....	xxxi, 661
State v. Robinson, 20 West Virginia, 713.....	43, 799
State v. Rogers, 18 Kansas, 78.....	26, 754
State v. Rogers, 10 Nevada, 250.....	21, 738
State v. Rolle, 20 La. An. 961.....	31, 234
State v. Roper, 3 Devereux's L. 472.....	xxiv, 268
State v. Rora, 4 Jones' Law, 215.....	lxix, 751
State v. Rora, 76 North Carolina, 242.....	22, 679
State v. Rorer, 10 Nevada, 263.....	21, 745
State v. Rushing, 69 North Carolina, 29.....	12, 641
State v. Rutherford, 1 Hawks, 487.....	ix, 688
State v. Ryan, 4 McCord, 16.....	xvii, 708
State v. Ryan, 12 Nevada, 401.....	28, 802
State v. Saline Co. Court, 48 Missouri, 280.....	8, 108
State v. Sampson, 12 South Carolina, 567.....	32, 513
State v. Sammel, 3 Jones' Law, 74.....	lxv, 588
State v. Sanders, 68 Missouri, 203.....	26, 728
State v. Sanders, 63 Indiana, 563.....	24, 303
State v. Saunders, 19 Kansas, 127.....	27, 96
State v. Sauvino, 24 La. An. 119.....	13, 115
State v. Savannah, T. U. P. Charleston, 238.....	lv, 708
State v. Scott, 4 Iredell's Law, 409.....	xlii, 148
State v. Schulz, 55 Iowa, 628.....	32, 187
State v. Seagler, 1 Richardson's Law, 20.....	xlii, 404
State ada. Sealy, 1 Georgia, 212.....	xiv, 641
State v. Seay, 64 Missouri, 89.....	27, 306
State v. Seay, 3 Stewart, 123.....	xx, 69
State v. Sexton, 3 Hawks, 184.....	xviii, 584
State v. Shannon, 26 Ohio State, 423.....	38, 609
State v. Shelters, 51 Vermont, 102.....	21, 679
State v. Shelton, 3 Jones' Law, 300.....	lxiv, 267
State v. Sherwood, 15 Minnesota, 221.....	2, 116
State v. Shields, 13 Missouri, 236.....	liii, 147
State v. Shiffett, 20 Missouri, 415.....	lxv, 199
State v. Shimbora, 46 New Hampshire, 497.....	lxxviii, 224
State v. Shippey, 10 Minnesota, 223.....	lxxviii, 70
State v. Shoemaker, 63 Iowa, 343.....	49, 148
State v. Short, 23 New Jersey L. 308.....	24, 698
State v. Shupe, 16 Iowa, 36.....	lxv, 486
State v. Simpson, 23 Minnesota, 66.....	41, 269
State v. Siom, 25 Missouri, 291.....	lxix, 467
State v. Smart, 4 Richardson's Law, 286.....	lv, 692
State v. Smully, 27 Ohio State, 30.....	41, 487
State v. Smith, 12 Arkansas, 622.....	lv, 227
State v. Smith, 1 Bailey's L. 229.....	lix, 679
State v. Smith, 5 Day, 175.....	v, 128
State v. Smith, 6 Greenleaf, 463.....	xx, 294
State v. Smith, 3 Hawks, 278.....	xiv, 594
State v. Smith, 54 Iowa, 104.....	37, 128
State v. Smith, 11 Louisiana An. 698.....	lxvi, 202
State v. Smith, 23 Maine, 269.....	lv, 672
State v. Smith, 78 Maine, 269.....	57, 202
State v. Smith, Meigs, 99.....	xxviii, 123
State v. Smith, 26 Missouri, 226.....	lxix, 304
State v. Smith, 90 Missouri, 27.....	59, 4
State v. Smith, 49 New Hampshire, 153.....	6, 499
State v. Smith, 2 Strobhart's Law, 77.....	xlv, 689
State ada. Smith, 23 Maine, 48.....	lv, 607
State v. Smyth, 14 Rhode Island, 100.....	51, 24
State ada. Sneed, 5 Arkansas, 421.....	xii, 108
State v. Solomons, 6 Yerger, 260.....	xxvii, 469
State v. Somerville, 21 Maine, 14.....	lxxviii, 247
State v. Soper, 16 Maine, 293.....	xxviii, 635
State v. South, 4 Dutcher, 26.....	lxxv, 250
State v. Spalding, 19 Connecticut, 228.....	lxviii, 198
State v. Spencer, 64 Missouri, 268.....	27, 246

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

State v. Stair, 37 Missouri, 203.....	54, 449	State v. Wade, 43 Arkansas, 77.....	51, 609
State v. Stalcup, 1 Iredell's Law, 30.....	xxxv, 733	State v. Wagner, 78 Missouri, 644.....	47, 131
State v. Stanley, 36 North Carolina, 69.....	8, 498	State v. Walker, 36 Kansas, 297.....	50, 556
State v. Staples, 67 New Hampshire, 113.....	xo, 565	State ada. Wall, 18 Texas, 693.....	lxx, 303
State v. Start, 7 Iowa, 501.....	lxiv, 278	State v. Ward, 43 Connecticut, 490.....	51, 605
State v. State, 64 Mississippi, 644.....	60, 70	State ada. Ward, 3 Cold. 609.....	xl, 449
State v. State F'd of Assessors, 48 N. J. L. 1.....	57, 516	State ada. Ward, 3 Missouri, 130.....	xxi, 449
State v. State Med. Ex. Board, 30 Minnesota, 234.56, 675		State v. Warmoth, 23 La. An. 1.....	2, 712
State v. Steamship "Constitution," 63 Cal. 875.....	50, 303	State v. Warmouth, 34 La. An. 351.....	12, 120
State v. Stebbins, 29 Connecticut, 463.....	lxix, 233	State v. Washington, 1 Bay, 130.....	1, 651
State v. Steeley, 65 Missouri, 218.....	27, 271	State v. Washington, 39 North Carolina, 535.....	45, 700
State v. Stevens, 103 Indiana, 55.....	53, 483	State v. Washington, 19 Texas, 120.....	lxx, 303
State v. Stevens, 33 Kansas, 486.....	33, 175	State v. Watkins, 9 Connecticut, 67.....	xxi, 713
State ada. Stevens, 3 Arkansas, 261.....	xxv, 73	State v. Watts, 7 Louisiana, 440.....	xxvi, 607
State v. Stewart, 59 Vermont, 273.....	59, 710	State v. Weatherby, 43 Maine, 206.....	lxix, 30
State v. Stewart, 7 West Virginia, 731.....	53, 623	State v. Weaver, 34 North Carolina, 636.....	54, 647
State v. Stewart, 60 Wisconsin, 227.....	54, 283	State v. Webber, 106 Indiana, 21.....	50, 36
State ada. Stewart, 19 Ohio, 303.....	lxi, 436	State v. Weed, 21 New Hampshire, 321.....	xxi, 100
State v. St. Paul, M. & M. R'y Co., 35 Minn. 131.59, 313		State v. Weir, 33 Iowa, 124.....	11, 110
State v. Stoyell, 34 Maine, 24.....	lxix, 716	State v. Welsh, 36 Maine, 26.....	xiv, 94
State v. Stratton, 27 Iowa, 430.....	1, 269	State v. Welsh, 73 Missouri, 326.....	50, 615
State v. Strander, 11 West Virginia, 745.....	27, 606	State v. Wells, Conn. 424.....	1, 211
State v. Street, 1 Murphy, 156.....	lxi, 683	State v. Wells, 61 Iowa, 639.....	47, 623
State v. Street, Taylor, N. O., 126.....	1, 639	State v. Westworth, 65 Maine, 234.....	50, 633
State ada. Stringfellow, 36 Mississippi, 187.....	lix, 347	State ada. Wenley, 37 Mississippi, 327.....	lxv, 60
State v. Sumner, 3 Spencer's Law, 509.....	xli, 267	State v. West, 69 Missouri, 401.....	52, 306
State v. Sumner, 19 Vermont, 337.....	xxiii, 319	State v. Weston, 9 Connecticut, 327.....	lxv, 6
State ada. Sumner, 5 Blackford, 679.....	lxvi, 561	State ada. Wharton, 5 Cold. 1.....	xxv, 244
State v. Swalla, 8 Indiana, 624.....	lxv, 772	State v. Wheeler, 3 Vermont, 344.....	xxvi, 613
State ada. Swang, 3 Coldwell, 212.....	lxviii, 603	State ada. Whilden, 26 Georgia, 306.....	lxvi, 120
State v. Swift, 10 Nevada, 176.....	21, 721	State v. Whit, 5 Jones' Law, 236.....	lxvii, 639
State ada. Swindle, 2 Yorgor, 651.....	lxiv, 615	State v. Whitcomb, 23 Iowa, 36.....	52, 206
State v. Swinney, 60 Mississippi, 39.....	45, 406	State v. White, 63 Indiana, 278.....	45, 406
State v. Taberner, 14 Rhode Island, 273.....	51, 383	State v. White, 41 Iowa, 516.....	50, 602
State ada. Tackett, 3 Yorgor, 303.....	lxiv, 603	State v. White, 19 Kansas, 445.....	57, 157
State v. Tappan, 29 Wisconsin, 634.....	9, 622	State v. Whittemore, 30 New Hampshire, 265.....	9, 126
State v. Taylor, 3 Dutcher, 117.....	lxix, 347	State v. Whitting, 14 Connecticut, 627.....	xxvi, 639
State v. Taylor, 27 La. An. 323.....	51, 661	State v. Whittier, 21 Maine, 261.....	xxviii, 373
State v. Telephone Co., 36 Ohio State, 394.....	56, 683	State v. Wilbur, 1 Rhode Island, 199.....	xxvi, 205
State v. Terry, 33 North Carolina, 555.....	53, 473	State v. Wilburn, 7 Barb. 37.....	53, 603
State v. Thomas, 47 Connecticut, 545.....	50, 39	State v. Wilcox, 42 Connecticut, 304.....	53, 639
State v. Thomas, 111 Indiana, 515.....	60, 730	State v. Wilcox, 3 Yorgor, 278.....	lxix, 609
State v. Thompson, 9 Iowa, 128.....	lxiv, 343	State v. Wilfirth, 74 Missouri, 696.....	41, 329
State v. Thompson, 23 Kansas, 326.....	53, 165	State v. Wilkinson, 2 Vermont, 459.....	xxi, 609
State v. Thompson, 2 Strobhart's Law, 12.....	lxvii, 638	State v. Williams, 19 Alabama, 18.....	5v, 124
State ada. Thompson, 18 Indiana, 323.....	lxix, 364	State v. Williams, 4 Indiana, 224.....	lxvii, 607
State v. Thornburg, 6 Iredell's Law, 79.....	xlv, 67	State v. Williams, 7 Jones' Law, 446.....	lxviii, 609
State v. Thurnstin, 25 Maine, 205.....	lxviii, 606	State v. Williams, 23 La. An. 533.....	52, 273
State v. Tiedemann, 65 Missouri, 323.....	53, 498	State v. Williams, 30 North Carolina, 724.....	67, 641
State v. Tilletson, 7 Jones' Law, 114.....	lxv, 456	State ada. Williams, 2 Richardson's Law, 639.....	xlv, 741
State v. Tilman, 30 La. An. 1249.....	51, 236	State v. Williams, 14 Ohio, 222.....	xlv, 300
State v. Toole, 39 Connecticut, 342.....	lxvii, 603	State v. Williford, 36 Arkansas, 121.....	53, 34
State v. Topinka, 36 Kansas, 76.....	59, 639	State v. Wilson, Conn. 492.....	1, 200
State v. Tortura, 26 Minnesota, 1.....	57, 363	State v. Wilson, 30 Indiana, 497.....	53, 719
State v. Town of Jericho, 40 Vermont, 221.....	lxv, 367	State v. Wilson, 24 Kansas, 120.....	53, 207
State v. Trapp, 17 South Carolina, 497.....	43, 614	State v. Wilson, 48 New Hampshire, 626.....	lxviii, 120
State v. Trask, 6 Vermont, 286.....	lxvii, 654	State v. Wingo, 36 Missouri, 121.....	57, 209
State v. Trexler, 3 Carolina L. Repor. 90.....	vi, 606	State v. Winthrop, 43 Iowa, 513.....	53, 307
State v. Treasvant, 30 South Carolina, 396.....	47, 940	State v. Winston, 11 Oregon, 493.....	54, 609
State v. Trivna, 33 La. An. 1008.....	56, 283	State ada. Wiso, 2 Kansas, 419.....	lxvix, 639
State v. Tudor, 5 Day, 239.....	v, 168	State v. Wohlman, 34 Missouri, 491.....	lxvii, 117
State v. Tuit, 3 Bailey's Law, 44.....	xxi, 606	State v. Woodward, 39 Indiana, 120.....	66, 100
State v. Twitty, 3 Harris, 441.....	xi, 779	State v. Woodin, 5 Iredell's Law, 130.....	lxix, 120
State v. Turpin, 77 North Carolina, 478.....	54, 455	State v. Woodruff, 2 Day, 696.....	1, 120
State ada. Tyler, 3 Humphreys, 37.....	lxvii, 298	State v. Woram, 6 Hill (N. Y.), 86.....	xi, 370
State v. Underwood, 49 Maine, 131.....	lxvii, 254	State v. Worden, 46 Connecticut, 209.....	53, 37
State v. Vanderpool, 39 Ohio State, 273.....	45, 431	State v. Wright, 23 La. An. 1017.....	54, 374
State v. Van Houten, 2 Pennington, 673.....	iv, 407	State v. Wright, 41 Arkansas, 439.....	45, 43
State v. Vincent, 24 Iowa, 570.....	lxv, 783	State ada. Wright, 30 Georgia, 308.....	lxvii, 656
State v. Vines, 33 North Carolina, 492.....	53, 468	State ada. Wright, 5 Blackford, 636.....	lxv, 176

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

State ad. Wright, 5 Yenger, 184	.....xxvi, 268
State v. Wyman, 59 Vermont, 527	.....59, 753
State v. Yancy, 1 Carolina L. Repor. 519	.....vi, 553
State v. Yearby, 62 North Carolina, 561	.....33, 694
State v. Young, 46 New Hampshire, 264	.....lxxxviii, 212
State v. Younger, 1 Devereux Law, 357	.....xvii, 571
State Bank v. Aarsten, 3 Seamon, 135	.....xxvii, 535
State Bank v. Cox, 11 Rich. Equity, 344	.....lxxxviii, 458
State Bank v. Evans, 3 Green Law, 155	.....xxviii, 400
State Bank v. Fearing, 16 Pickering, 533	.....xxviii, 265
State Bank v. Holcomb, 2 Halsted, 193	.....xi, 540
State Bank v. Johnson, 1 Min. 404	.....xii, 645
State Bank v. McCoy, 69 Pennsylvania St. 304	.....8, 246
State Bank v. Napier, 6 Humphreys, 270	.....xlv, 308
State Bank v. State, 1 Blackford, 367	.....xii, 234
State Bank v. Sweeney, 3 Blackford, 447	.....xvi, 485
State Bank v. Young, 3 Indiana, 171	.....lii, 501
State Bank of ———. See name of State, or under word Bank.	
State Board v. Citizens' St. Ry Co., 47 Ind. 407	.....17, 702
State Board of Assessors ad. State, 48 N. J. L. 157	.....516
State ex rel. Conley v. Finn, 3 Blackford, 72	.....xxiii, 380
State ex rel. Cornwall v. Allen, 21 Ind. 514	.....lxxxiii, 257
State ex rel. Dux v. Board of Equalization of Johnson County, 10 Iowa, 157	.....lxiv, 381
State ex rel. Harvey ad. Pepper, 22 Ind. 300	.....lxxxv, 430
State ex rel. Hodgson v. Libbey, 44 New Hampshire, 281	.....lxxxii, 233
State ex rel. Jenkins v. Troutman, 7 Jones' Law, 169	.....lxxxv, 489
State ex rel. Knowlton v. Williams, 5 Wis. 308	.....lxvii, 65
State ex rel. Leal v. Jones, 19 Indiana, 355	.....lxxxii, 403
State ex rel. Mayne v. Baldwin, 1 Hale's Ch. 454	.....xiv, 399
State ex rel. McCarty ad. Louisville & New Albany R. R. Co., 25 Indiana, 177	.....lxxxvii, 358
State ex rel. McClellan v. Graves, 19 Md. 381	.....lxxxii, 639
State ex rel. Pearson v. Airdale, 2 Bailey, 401	.....xxiii, 145
State ex rel. White v. Winn, 19 Wis. 304	.....lxxxviii, 689
State for the Use of Arnold v. Linaweaver, 3 Head, 51	.....lxxxv, 757
State of ———. See name of State.	
State of Kansas ad. Wise, 3 Kansas, 419	.....lxxxiv, 595
State Med. Ex. Bd ad. State, 32 Minnesota, 294	.....50, 575
State Sav. Bank v. Kircheval, 65 Missouri, 683	.....27, 310
State Sav. Bank v. Shaffer, 9 Nebraska, 1	.....31, 394
State Township v. Powell, 67 Missouri, 395	.....29, 512
State Treasurer v. Cross, 9 Vermont, 289	.....xxxi, 636
State Treasurer v. Mann, 34 Vermont, 371	.....lxxx, 683
State, Use of Roe v. Thomas, 19 Missouri, 613	.....lxii, 580
State, Use of Browning v. Lawson, 6 Ark. 380	.....xviii, 728
Statham v. New York L. Ins. Co., 45 Miss. 681	.....7, 737
Staton ad. People, 73 North Carolina, 546	.....21, 479
Stauffer v. Commissioners, 1 Watts, 300	.....xxvi, 69
Stauffer ad. Commonw., 10 Penn. State, 380	.....ii, 489
Stayton v. Newcomer, 1 English, 451	.....xlv, 524
Stacey v. Rice, 27 Penn. State, 75	.....lxvii, 447
Steamboat Charlotte v. Hammond, 6 Mo. 88	.....xlili, 536
Steamboat Farmer v. McCraw, 26 Alabama, 199	.....lxii, 718
Steamboat Keystone v. Motes, 28 Missouri, 243	.....lxxxv, 123
Steamboat Lynx v. King, 13 Missouri, 372	.....xliz, 136
Steamer Petrel v. Dumont, 28 Ohio St. 602	.....72, 397
Steamship Constitution ad. State, 42 Cal. 578	.....19, 303
Stearns v. Barrett, 1 Pickering, 443	.....xi, 223
Stearns v. Burnham, 5 Greenleaf, 361	.....xvii, 328
Stearns v. Dillingham, 22 Vermont, 694	.....liv, 88
Stearns v. Doe, 13 Gray, 483	.....lxiv, 608
Stearns v. Handerman, 9 Oushing, 497	.....lvii, 65
Stearns v. Marsh, 4 Dando, 337	.....xviii, 248
Stearns v. Quincy M. F. Ins. Co., 124 Mass. 61	.....26, 647
Stearns v. Sampson, 59 Maine, 563	.....8, 442

Stearns v. Vincent, 50 Michigan, 309	.....45, 37
Stebbins v. Central V. R. Co., 54 Vermont, 464	.....41, 855
Stebbins v. Crawford Co., 22 Pennsylvania St. 239	.....37, 687
Stebbins v. Palmer, 1 Pickering, 71	.....xi, 146
Stebbins ad. State, 29 Connecticut, 463	.....lxxxix, 223
Stebbins v. Walker, 3 Green Law, 30	.....xxv, 498
Steckel v. First Nat. Bank, 33 Penn. St. 376	.....39, 758
Stedman v. McIntosh, 4 Iredell's Law, 291	.....xlii, 123
Steedman v. Weeks, 3 Strobhart's Eq. 148	.....xliz, 699
Steel v. Caneaux, 3 Martin, 213	.....xlii, 268
Steel v. Fife, 48 Iowa, 99	.....30, 263
Steele v. Atkinson, 14 South Carolina, 154	.....37, 726
Steele v. Bates, 3 Alabama, 538	.....xvi, 720
Steele v. Boyd, 6 Leigh, 547	.....xxix, 218
Steele v. Buck, 61 Illinois, 543	.....14, 69
Steele v. Burkhardt, 104 Massachusetts, 59	.....6, 191
Steele v. Lord, 70 New York, 280	.....28, 602
Steele v. Lowry, 4 Ohio, 72	.....xix, 651
Steele v. McTyer's Adm'r, 31 Alabama, 657	.....lxix, 516
Steele v. Renna, 50 Texas, 467	.....33, 608
Steele v. Steele, 64 Alabama, 438	.....35, 15
Steele v. Taylor, 3 A. K. Marshall, 298	.....xlii, 151
Steele v. Townsend, 37 Alabama, 247	.....lxxxix, 48
Steele v. Williams, Dudley's Law, 16	.....xxxi, 546
Steele v. Wyatt's Adm'r, 23 Alabama, 764	.....lviii, 217
Steele ad. State ex. rel. Mount, 21 Ind. 307	.....lxxxiii, 246
Stealey ad. State, 65 Missouri, 218	.....27, 271
Steelman v. Mattox, 9 Vroom, 247	.....30, 289
Steem v. Niagara F. I. Co., 69 New York, 215	.....42, 397
Steeples v. Newton, 7 Oregon, 110	.....33, 705
Steere v. Steere, 5 Johnson's Ch. 1	.....ix, 258
Steers v. Liverpool S. Co., 57 New York, 1	.....15, 453
Steffens v. Earl, 11 Vroom, 128	.....29, 219
Stegar v. State, 29 Georgia, 863	.....xxix, 473
Steigleman v. Jeffries, 1 Serg. & R. 477	.....vii, 698
Stein v. Burden, 24 Alabama, 139	.....lx, 459
Stein v. Burden, 29 Alabama, 127	.....lxv, 204
Stein v. Chambliss, 18 Iowa, 474	.....lxxxvii, 411
Stein v. Indianapolis B. L. F. & S. Association, 18 Indiana, 237	.....lxxxii, 398
Stein v. Hancock, 56 Indiana, 65	.....28, 19
Stein v. Mayor, 49 Alabama, 383	.....20, 263
Stein v. Steamboat Prairie Rose, 17 Ohio St. 471	.....xxiii, 631
Steinbach v. Relief F. I. Co., 77 New York, 498	.....33, 658
Steines v. Franklin Co., 49 Missouri, 167	.....8, 87
Steininger v. Hoch's Ex., 39 Penn. State, 363	.....lxxx, 521
Steinman, Ex. parte, 26 Pennsylvania St. 220	.....40, 637
Steinman v. Wilkins, 7 Watts & Serg. 466	.....xlii, 264
Steinmets v. Kelly, 72 Indiana, 442	.....37, 170
Steinweg v. Erie Railway, 43 New York, 123	.....3, 672
Stem's Appeal, 5 Wharton, 472	.....lxxxiv, 549
Sterman, Baker & Co. v. Harrison & Hooper, 48 Penn. State, 49	.....lxxxii, 481
Stephen v. Muir, 8 Indiana, 363	.....lxv, 764
Stephens v. Bichnell, 27 Illinois, 444	.....lxxxii, 243
Stephens v. Board of Education, 79 N. Y. 123	.....35, 511
Stephens v. Crawford, 1 Georgia, 574	.....xlv, 699
Stephens v. Graham, 7 Serg. & R. 506	.....2, 468
Stephens v. Jack, 3 Yenger, 403	.....lxxxiv, 685
Stephens v. Monongahela Nat. Bank, 33 Pennsylvania State, 157	.....32, 438
Stephens v. Shafer, 48 Wisconsin 54	.....33, 798
Stephens v. Sherrod, 6 Texas, 394	.....iv, 774
Stephens v. Vaughan, 4 J. J. Marshall 206	.....xx, 216
Stephenson ad. Commonwealth, 11 Oushing, 481	.....lxix, 154
Stephenson v. Dickson, 24 Penn. State, 148	.....lxii, 209
Stephenson v. Doe, 3 Blackford, 508	.....lxvi, 468
Stephenson v. Goff, 10 Robinson (La.) 99	.....xlili, 171
Stephenson v. King, 81 Kentucky, 425	.....56, 172
Stephenson v. Osborne, 41 Mississippi, 119	.....xx, 208

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Stephenson v. Pacific Mutual Ins. Co., 7 Allen, 233.....lxix, 681	Stewart v. City of New Orleans, 9 La. An. 461....xl, 213
Stephenson v. Primrose, 8 Porter, 155.....lxix, 261	Stewart v. Cooley, 23 Minnesota, 347.....23, 620
Stephenson v. State, 110 Indiana, 355.....59, 261	Stewart v. Coulter, 12 Serg. & R. 202.....xv, 620
Sterling's Appeal, 111 Penn. St. 25.....54, 246	Stewart v. Davis, 31 Arkansas, 518.....25, 578
Sterling v. Bender, 2 English, 201.....xliv, 630	Stewart v. Dugan, 4 Missouri, 245.....xxviii, 343
Sterling v. Brightbill, 5 Watts, 229.....xxx, 304	Stewart v. Eden, 2 Calnes, 121.....3, 223
Sterling v. Drake, 29 Ohio St. 457.....23, 763	Stewart v. Flowers, 44 Mississippi, 513.....7, 707
Sterling v. Klepattle, 24 Indiana, 94.....lxixvii, 319	Stewart v. Frink, 94 North Carolina, 427.....55, 613
Sterling v. Mercantile M. L. Co., 33 Pa. 64, 75.....lxix, 773	Stewart v. Garrett, 68 Maryland, 303.....57, 333
Sterling v. Stewart, 74 Penn. St. 445.....15, 669	Stewart v. Griffith, 23 Missouri, 13.....lxix, 149
Sterling v. Warden, 51 New Hampshire, 217.....12, 80	Stewart v. Harriman, 55 New Hampshire, 25.....22, 403
Stern v. State, 53 Georgia, 239.....21, 306	Stewart v. Huntington Bank, 11 Serg. & R. 267....xiv, 623
Stetson v. Paxton, 19 Pickering, 147.....xxxi, 123	Stewart v. Iglehart, 7 Gill & Johnson, 121.....xxviii, 320
Stetson v. Kempton, 13 Massachusetts, 378.....vii, 145	Stewart v. International etc. E. Co., 53 Tex. 229...37, 729
Stetson v. Mass. F. Ins. Co., 4 Mass. 330.....iii, 217	Stewart v. Jessup, 51 Indiana, 413.....29, 729
Stetson v. Patten, 2 Greenleaf, 358.....xi, 111	Stewart v. Kearney, 6 Watts, 453.....lxix, 423
Stoughton v. Oulp, 39 Ohio St. 13.....43, 417	Stewart v. Kelly, 16 Penn. State, 109.....iv, 427
Stevens v. Beach, 12 Vermont, 535.....xxvi, 399	Stewart v. Lang, 27 Penn. State, 201.....lxixviii, 414
Stevens v. Beale, 10 Cushing, 391.....lviii, 108	Stewart v. Long Island R. R. Co., 109 N. Y. 661...53, 844
Stevens v. Bonford, 10 Allen, 26.....lxixviii, 616	Stewart v. Loring, 5 Allen, 306.....lxix, 747
Stevens v. Briggs, 14 Vermont, 44.....lxix, 209	Stewart v. Mackey, 18 Texas, 55.....lxvii, 609
Stevens v. Brown, 3 Vermont, 420.....xxiii, 265	Stewart v. McClung, 13 Oregon, 431.....53, 374
Stevens v. Chadwick, 10 Kansas, 408.....15, 348	Stewart v. Magness, 2 Coldwell, 310.....lxixviii, 303
Stevens v. Chouteau, 11 Missouri, 323.....xlix, 92	Stewart v. Merchants' D. T. Co., 47 Iowa, 239...29, 478
Stevens v. Columbia Ins. Co., 3 Calnes, 43.....ii, 247	Stewart v. Mobile, 9 Alabama, 234.....xlix, 478
Stevens v. Cooper, 1 Johnson's Ch. 425.....vii, 499	Stewart v. Mollin, 5 Watts & Serg. 100.....lxix, 115
Stevens v. Cushing, 1 New Hampshire, 17.....viii, 37	Stewart v. Mordcaul, 40 Georgia, 1.....2, 385
Stevens v. Davison, 18 Gratt. 819.....xviii, 623	Stewart v. Murray, 22 Indiana, 543.....47, 167
Stevens v. Ellis, 48 Maine, 501.....lxixvii, 340	Stewart v. Nichols, 15 Alabama, 225.....1, 127
Stevens v. Gage, 55 New Hampshire, 175.....20, 191	Stewart v. People, 23 Michigan, 63.....9, 73
Stevens v. Hays, 1 Indiana, 247.....xviii, 399	Stewart v. Peetre, 55 New Hampshire, 621.....14, 323
Stevens v. Head, 9 Vermont, 174.....xxxi, 617	Stewart v. Preston, 1 Florida, 10.....xlix, 621
Stevens v. Hollister, 18 Vermont, 294.....xvi, 154	Stewart v. Roderick, 4 Watts & Serg. 128.....lxix, 71
Stevens v. Irwin, 15 California, 503.....lxixi, 500	Stewart v. Rogers, 25 Iowa, 328.....xov, 734
Stevens v. Kelley, 78 Maine, 445.....57, 813	Stewart v. Schall, 65 Maryland, 509.....57, 327
Stevens v. King, 78 Maine, 197.....49, 609	Stewart v. Severance, 43 Missouri, 222.....xvii, 323
Stevens v. Lockwood, 13 Wendell, 644.....xxviii, 623	Stewart v. Southard, 17 Ohio, 403.....xix, 423
Stevens v. McNamee, 35 Maine, 175.....lviii, 740	Stewart v. State, 19 Ohio, 302.....22, 425
Stevens v. Mechanics' Sav. Bank, 101 Mass. 109...2, 325	Stewart ada. State, 7 West Virginia, 731.....23, 623
Stevens v. Morse, 7 Greenleaf, 26.....xx, 337	Stewart ada. State, 59 Vermont, 273.....56, 719
Stevens v. Osmun, 1 Michigan, 62.....xviii, 606	Stewart ada. State, 50 Wisconsin, 587.....54, 323
Stevens v. Parish, 23 Indiana, 260.....xov, 636	Stewart v. Stearns, 63 New Hampshire, 26.....54, 493
Stevens v. Paterson etc. E. R. Co., 34 N. J. 523...3, 269	Stewart v. Stewart, 78 Maine, 542.....57, 623
Stevens v. Pillsbury, 37 Vermont, 305.....52, 121	Stewart v. Stewart, 7 J. J. Marshall, 143.....xviii, 323
Stevens v. Rowe, 59 New Hampshire, 578.....47, 231	Stewart v. Stocker, 13 Serg. & R. 139.....xv, 629
Stevens v. Smith, 4 J. J. Marshall, 64.....ix, 205	Stewart v. Stokes, 33 Alabama, 494.....lxix, 629
Stevens v. State, 2 Arkansas, 291.....xxiv, 72	Stewart v. Stringer, 41 Missouri, 400.....xxvii, 273
Stevens v. State, 31 Indiana, 425.....xix, 634	Stewart v. Supervisors c. Polk Co., 30 Iowa, 9.....1, 225
Stevens v. State, 28 Kansas, 459.....33, 175	Stewart v. Warner, 1 Day, 142.....ii, 61
Stevens v. State, 103 Indiana, 55.....53, 483	Stewart v. Waterloo Turn Verein, 71 Iowa, 236...66, 726
Stevens v. Stevens, 10 Allen, 144.....lxixvii, 630	Stewart v. Woodward, 50 Vermont, 78.....23, 423
Stevens v. Stevens, 11 Metcalf, 251.....xiv, 203	Stickney v. Jordan, 58 Maine, 106.....4, 251
Stevens v. West, 1 Howard, 308.....lxix, 630	Stigsen v. Brent, 50 Maryland, 214.....33, 217
Stevens v. Winship, 1 Pickering, 218.....xi, 178	Stiles v. Hitchcock, 47 Vermont, 419.....19, 121
Stevenson v. Balknap, 6 Iowa, 97.....lxix, 392	Stiles v. Laird, 5 California, 120.....lxviii, 119
Stevenson v. Loebr, 57 Illinois, 509.....11, 26	Stiles v. Stewart, 12 Wendell, 473.....xxvii, 143
Stevenson v. McLean, 5 Humphreys, 538.....xiii, 434	Stiles v. Western E. R. Co., 8 Metcalf, 44.....xii, 423
Stevenson v. McReary, 12 Smedes & M. 9.....ii, 102	Stiles v. White, 11 Metcalf, 356.....xiv, 214
Stevenson v. Miller, 3 Littell, 305.....xiii, 271	Stille v. McDowell, 2 Kansas, 374.....lxixv, 599
Stevenson v. Morris, 37 Ohio St. 10.....41, 481	Stilling v. Thorp, 54 Wisconsin, 528.....41, 60
Stevenson v. Mudgett, 10 New Hamp. 338.....xxiv, 155	Stillman v. Canales, 25 Texas, 313.....lxixviii, 539
Stevenson v. Belgart, 1 Gill, 1.....lxix, 623	Stillman v. Flanniken, 55 Iowa, 450.....43, 129
Stevenson v. Sherwood, 22 Illinois, 238.....lxiv, 140	Stillman v. Stillman, 39 Illinois, 126.....56, 21
Stevenson v. Smith, 28 California, 103.....lxixvii, 107	Stillwell v. Aaron, 69 Missouri, 539.....23, 517
Stewart v. Allison, 6 Serg. & R. 324.....ix, 433	Stillwell v. Knapper, 69 Indiana, 528.....34, 249
Stewart v. Brown, 37 New York, 350.....xciii, 573	Stilphen v. Stilphen, 58 Maine, 508.....4, 325
Stewart v. Brooklyn & O. R. Co., 90 N. Y. 538...43, 185	Stilwell v. Corwin, 55 Indiana, 433.....23, 673
Stewart v. Campbell, 58 Maine, 439.....4, 296	Stimson v. Conn. E. R. Co., 95 Mass. 23.....xcvii, 166
Stewart v. Cass, 16 Vermont, 663.....xiii, 534	Stinchfield v. Emerson, 53 Maine, 465.....lxixviii, 524
	Stinchfield v. Little, 1 Greenleaf, 231.....x, 65

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Stinson v. City of Guilford, 43 Maine, 348.....lxvi, 281
 Stinson v. N. Y. Central R. R. Company, 33
 New York, 333.....lxxviii, 332
 Stinson v. Ross, 51 Maine, 556.....lxxxi, 561
 Stinson v. Snow, 10 Maine, 263.....xxv, 238
 Stinson v. Sumner, 9 Massachusetts, 143.....vi, 43
 Stires v. Stires, 1 Halstead's Ch. 234.....xlili, 626
 Stith v. Barnes, 1 Carolina Law Repository, 484.....vi, 547
 Stittell v. Reynolds, 87 Pennsylvania State, 54.....5, 398
 Stirling v. Nevada Phosphate Co., 35 Md. 128.....6, 373
 St. Charles v. Nolle, 51 Missouri, 123.....11, 440
 St. Charles County v. Powell, 22 Missouri, 535.....lxvi, 637
 St. Clair v. Morris, 9 Ohio, 15.....xxiv, 415
 St. Clair v. Williams, 7 Ohio, Pt. II, 110.....xxx, 194
 St. Helena W. Co. v. Forbes, 62 Cal. 123.....43, 669
 St. James's Church v. Arrington, 26 Ala. 546.....lxxvi, 332
 St. John v. Am. M. I. Co., 13 New York, 31.....lxiv, 629
 St. John v. Garrow, 4 Porter, 223.....xxix, 280
 St. John v. Holmes, 20 Wendell, 609.....xxii, 603
 St. John v. McFarlan, 33 Michigan, 72.....29, 671
 St. John v. Roberts, 31 New York, 441.....lxxxviii, 287
 St. John's Parish v. Bronson, 40 Connecticut, 75.....16, 17
 St. Johnsbury & L. O. R. Co. v. Hunt, 58 Ver-
 mont, 570.....45, 639
 St. Johnsbury v. Thompson, 59 Vermont, 201.....59, 721
 St. Joseph v. Meritt, 26 Missouri, 253.....lxii, 207
 St. Joseph & D. O. R. Co. v. Ryan, 11 Kansas,
 602.....15, 357
 St. Joseph's Church v. Assessors of Taxes, 13
 Rhode Island, 19.....34, 597
 St. Joseph F. & M. Ins. Co. v. Leland, 90 Mo. 177.....9
 St. Leger's Appeal, 34 Connecticut, 434.....xvi, 735
 St. Louis v. Gorman, 29 Mo. 583.....lxxvii, 586
 St. Louis v. St. Louis E. R. Co., 39 Mo. 44.....58, 82
 St. Louis & S. F. R'y Co. v. Weaver, 26 Kan. 412.....57, 178
 St. Louis A. T. R. R. v. Linder, 29 Ill. 433.....lxxix, 319
 St. Louis County Court v. Sparks, 10 Mo. 117.....xiv, 335
 St. Louis etc. R. R. Co. v. South, 43 Ill. 176.....xvi, 103
 St. Louis etc. R. R. Co. v. Turbine, 50 Ill. 181.....xix, 504
 St. Louis, etc. R. R. Co. v. Mathers, 71 Ill. 532.....22, 122
 St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 519.....46, 105
 St. Louis, I. M. & S. R'y v. Leigh, 45 Ark. 368.....55, 568
 St. Louis Ins. Co. v. Glasgow, 8 Missouri, 713.....xii, 661
 St. Louis Ins. Co. v. Kyle, 11 Missouri, 273.....xix, 74
 St. Louis, K. C. & N. E. R. Co. v. Cleary, 77 Mis-
 souri, 634.....44, 13
 St. Louis N. S. Y. v. Wiggins F. Co., 112 Ill. 394.....54, 243
 St. Louis Public Schools v. Risley, 28 Mo. 415.....lxxv, 131
 St. Louis, V. etc. R. Co. v. Bell, 61 Ill. 76.....25, 269
 St. Luke's Church v. Mathews, 4 Denmansure, 578.....vi, 619
 St. Luke's Home v. An Association, etc., 22 New
 York, 191.....11, 697
 St. Martin v. Demoyor, 1 Minnesota, 156.....lxi, 494
 St. Patrick's R. O. Church v. Gavalon, 63 Ill. 170.....28, 305
 St. Patrick's Soc. ada. Commonw., 3 Blaney, 441.....iv, 453
 St. Paul, City of v. Smith, 27 Minnesota, 364.....38, 296
 St. Paul, City of v. Trager, 26 Minnesota, 248.....33, 462
 St. Paul v. Colter, 13 Minnesota, 41.....x, 278
 St. Paul v. Laddie, 3 Minnesota, 190.....lxii, 89
 St. Paul v. Setts, 3 Minnesota, 297.....lxiv, 753
 St. Paul & S. U. R. E. Co. v. Gardner, 19 Minne-
 sota, 133.....18, 334
 St. Paul & S. O. R. Co. v. Minneapolis & St.
 Louis R'y Co., 26 Minnesota, 243.....37, 404
 St. Paul M. & M. R'y Co., In re, 35 Minn. 13.....59, 313
 St. Peter v. Denison, 56 New York, 416.....17, 268
 St. Roman v. Blane, 26 Louisiana An. 434.....xvi, 415
 St. Victor v. Deubert, 9 Louisiana, 314.....xix, 447
 St. Vincent O. A. v. Troy, 76 New York, 108.....32, 236
 Steadard v. Steadard's Adm'r, 7 Humph. 203.....xvi, 79
 Steadbridge v. Crocker, 24 Maine, 246.....lvi, 689
 Steadale v. Ulley, 27 Penn. State, 498.....lxxviii, 446
 Steadest v. Watkins, 2 Gill & J. 282.....xx, 436
 Steadale v. Comaway, 14 Maryland, 99.....lxvii, 515
 Steadon v. Cook, 3 Munford, 68.....v, 504
 Steadon v. Demuth, 7 Watts, 39.....xxii, 736
 Steadon v. Farney, 10 West Virginia, 171.....27, 566
 Steadon v. Fireman's I. Co., 33 La. An. 877.....39, 277
 Steadon v. Frey, 4 Gill, 406.....xiv, 138
 Steadon v. Owings, Little's Sel. Ca. 266.....xii, 302
 Steadon & V. R. R. Co. ada. People, 45 Califor-
 nia, 306.....13, 178
 Steadwell v. Campbell, 29 Connecticut, 362.....19, 303
 Steadwell v. Dillingham, 50 Maine, 443.....lxxix, 621
 Steadwell v. Hunter, 11 Metcalf, 443.....xiv, 220
 Steadwell v. McHenry, 107 Pennsylvania St. 227.....52, 475
 Steadwell v. Marks, 17 Maine, 458.....lxvii, 266
 Steadwell v. Phelps, 34 New York, 263.....xx, 710
 Steadward v. Ham, 129 Massachusetts, 263.....37, 569
 Steadward v. Harrington, 100 Massachusetts, 67.....1, 82
 Steadward v. Harrington, 100 Mass. 67.....xxvii, 38
 Steadward v. Martin, 1 Rhode Island, 1.....xix, 643
 Steadward v. Looka, 43 Vermont, 574.....5, 306
 Steadward v. Penniman, 106 Massachusetts, 268.....11, 263
 Steadward Woolen M. v. Huntley, 6 N. H. 441.....xxii, 195
 Steadward ada. Commonwealth, 2 Oushing, 593.....lxviii, 679
 Steadert v. Ward, 31 Maryland, 263.....c, 85
 Steadhill v. Chicago etc. R. R. Co., 43 Iowa, 26.....22, 310
 Steever v. Rice, 3 Wharton, 21.....xxxi, 496
 Steffer v. State, 15 Ohio State, 47.....lxxvii, 470
 Stokes v. Payne, 58 Mississippi, 614.....28, 263
 Stokes v. People, 53 New York, 164.....13, 423
 Stokes v. Skipper, 42 Alabama, 258.....xv, 646
 Stokes v. State, 5 Bant. 619.....26, 72
 Stokes v. State, 46 Georgia, 412.....12, 583
 Stokes v. Tift, 64 Georgia, 312.....27, 78
 Stokes v. Upton, 40 Michigan, 581.....29, 569
 Stolle v. Aline F. & M. I. Co., 10 West Vir-
 ginia, 548.....27, 583
 Stone v. C. & N. W. R. Co., 47 Iowa, 23.....29, 498
 Stone v. Chesire R. R. Co., 19 New Hamp. 427.....li, 122
 Stone v. Clark, 1 Metcalf, 378.....lxv, 370
 Stone v. Connelly, 1 Metcalf (Ky.), 663.....lxii, 499
 Stone v. Darnell, 25 Tams Supp. 430.....lxviii, 583
 Stone v. Dennison, 13 Pickering, 1.....xlii, 654
 Stone v. Dickinson, 5 Allen, 29.....lxxxi, 727
 Stone v. Fairbury P. & N. E. R. Co., 66 Ill. 394.....18, 556
 Stone v. Gardner, 20 Illinois, 304.....lxii, 265
 Stone v. Graves, 8 Missouri, 148.....xi, 131
 Stone v. Hale, 17 Alabama, 857.....li, 126
 Stone v. Hawks Ins. Co., 66 Iowa, 737.....56, 670
 Stone v. Hills, 45 Conn. 44.....29, 636
 Stone v. King, 7 Rhode Island, 368.....lxxvii, 597
 Stone v. Magruder, 10 Gill & Johnson, 262.....lxii, 177
 Stone v. Manning, 2 Scammon, 630.....lxv, 119
 Stone v. Massey, 2 Yeates, 363.....i, 246
 Stone v. Mayor, etc., 57 Alabama, 61.....29, 713
 Stone v. Myers, 9 Minnesota, 303.....lxxvi, 104
 Stone v. Patterson, 19 Pickering, 476.....xxii, 196
 Stone v. Sanborn, 104 Massachusetts, 219.....6, 268
 Stone v. Smith, 30 Texas, 136.....xv, 299
 Stone v. Stevens, 2 Connecticut, 219.....xxi, 611
 Stone v. Swift, 4 Pickering, 396.....xvi, 249
 Stone v. Varney, 7 Metcalf, 86.....lxxxi, 762
 Stone v. Walitt, 21 Maine, 409.....li, 621
 Stone v. Wood, 7 Cowen, 453.....xvii, 629
 Stone v. Yasoo & M. V. R. R. Co., 62 Minn. 607.....59, 193
 Stonebraker v. Zollickoffer, 23 Maryland, 154.....26, 264
 Stoneman v. Fyle, 25 Indiana, 103.....8, 427
 Stoner & Barr's Appeal, 2 Penn. State, 428.....xvi, 689

Roman letters [x] refer to volumes of American Decisions, and Arabic figures [48] to American Reports.

- Stoner v. Pennsylvania Co., 98 Indiana, 384.....49, 764
 Stonestreet v. Doyle, 75 Virginia, 356.....40, 731
 Stoney v. Beaubien, 3 McMullen's Law, 513.....xxxix, 128
 Stoney v. McNeil, Harper's Law, 557.....xviii, 666
 Stoney v. Shultz, 1 Hill Ch. 465.....xviii, 429
 Stoney v. Union Insurance Co., 3 McCord, 357.....xv, 634
 Stoops v. Commonwealth, 7 Serg. & R. 491.....x, 483
 Stoops v. Smith, 100 Massachusetts, 63.....xviii, 76
 Stoops v. Smith, 100 Massachusetts, 63.....1, 85
 Storer v. Eaton, 50 Maine, 219.....lxix, 611
 Storer v. Freeman, 6 Massachusetts, 435.....iv, 185
 Storer v. Brennan, 15 New York, 534.....lxix, 639
 Storey v. Keweenaw, 55 Indiana, 397.....83, 688
 Storey v. People, 79 Illinois, 45.....79, 188
 Stores v. Barker, 6 Johnson's Ch. 165.....x, 316
 Stores v. City of Ulster, 17 New York, 104.....lxix, 437
 Story v. Black, 5 Montana, 26.....51, 37
 Story v. Conger, 38 New York, 673.....xxiii, 546
 Story v. Elliott, 8 Cowen, 27.....xviii, 423
 Story v. Marshall, 24 Texas, 305.....lxixvi, 105
 Story v. New York E. R. Co., 80 New York, 123.....43, 146
 Story v. Odia, 12 Massachusetts, 187.....vii, 46
 Story v. Jersey City and Bergen Point Plank
 Road Company, 16 New Jersey Eq. 12.....lxixiv, 134
 Story v. Ware, 35 Mississippi, 399.....lxix, 126
 Story v. Walker, 11 Lea, 515.....47, 305
 Stose v. Heisler, 150 Illinois, 433.....60, 563
 Stouffer v. Latahaw, 3 Watts, 165.....xxvii, 297
 Stoughton v. Baker, 4 Massachusetts, 523.....lii, 236
 Stoughton v. Pasco, 5 Connecticut, 442.....xiii, 72
 Stoughton v. Swan, 4 California, 218.....ix, 605
 Stout v. Bendist, 39 Missouri, 377.....xv, 466
 Stout v. Colver, 6 Missouri, 354.....xxv, 438
 Stout v. City F. I. Co., 12 Iowa, 371.....lxix, 639
 Stout v. Folger, 34 Iowa, 71.....li, 138
 Stout v. Keyes, 2 Douglas, 184.....xliii, 465
 Stout v. McAdams, 2 Scammon, 67.....xxviii, 441
 Stout v. Shew, 1 Pinney, 438.....xlii, 679
 Stout v. Smith, 98 New York, 25.....54, 632
 Stout v. Wren, 1 Hawks, 420.....ix, 683
 Stovall v. F. & M. Bank, 8 Smedes & M. 305.....xvii, 85
 Stover v. Duren, 3 Strobbart's Law, 448.....li, 634
 Stover v. Herrington, 7 Alabama, 142.....xii, 86
 Stover v. Jack, 60 Pennsylvania, 339.....o, 566
 Stow v. Converse, 3 Connecticut, 325.....viii, 189
 Stow v. Stevens, 7 Vermont, 27.....xxix, 139
 Stow v. Tift, 15 Johnson, 458.....viii, 266
 Stow v. Wyse, 7 Connecticut, 214.....xviii, 99
 Stowe v. Bishop, 58 Vermont, 498.....56, 569
 Stowe v. Girard F. & M. I. Co., 127 Mass. 306.....34, 373
 Stowe v. Pinney, 78 Maine, 344.....57, 796
 Stowell v. Hastings, 59 Vermont, 494.....59, 748
 Stowell v. Read, 16 New Hampshire, 30.....xii, 714
 Stowers v. Milledge, 1 Iowa, 150.....lxiii, 434
 Stoyal v. Westcott, 3 Day, 418.....ii, 109
 Straffin v. Newell, T. U. P. Charlton, 163.....iv, 705
 Strahorn v. Union S. Y. & T. Co., 43 Ill. 426.....xvii, 142
 Strait v. Brown, 16 Nevada, 317.....40, 497
 Strang v. Beach, 11 Ohio State, 263.....lxviii, 308
 Straubach R. R. v. Kohternacht, 21 Penn. St. 230.....ix, 49
 Stratton ads. Commonwealth, 114 Mass. 303.....19, 350
 Stratton v. Ham, 8 Indiana, 84.....lxv, 754
 Stratton v. Sablin, 9 Ohio, 28.....xxiv, 418
 Stratton ads. State, 27 Iowa, 430.....1, 222
 Stratton v. Stratton, 77 Maine, 373.....59, 779
 Stratton v. Stratton, 38 New Hampshire, 473.....42, 604
 Strach v. Hathaway, 101 Illinois, 11.....40, 193
 Strander ads. State, 11 West Virginia, 745.....27, 605
 Stream v. Mortief, 64 Alabama, 296.....38, 8
 Strawbridge v. B. and O. R. R., 14 M. 260.....lxixiv, 641
 Strawbridge v. Robinson, 5 Gilman, 470.....1, 429
 Strayhorn v. Webb, 3 Jones' Law, 139.....lxiv, 589
 Streaper v. Fisher, 1 Rawle, 155.....xviii, 604
 Streep v. Eckart, 2 Wharton, 303.....xxx, 238
 Street v. Augusta Ins. Co., 12 Rich. L. 12.....lxv, 714
 Street v. Beal, 16 Iowa, 66.....lxixv, 504
 Street v. Holyoke, 105 Massachusetts, 62.....7, 509
 Street ads. State, 1 Murphy, 136.....lii, 682
 Street ads. State, Taylor (N. C.), 126.....1, 589
 Street E'y v. Eadie, 46 Ohio St. 51.....54, 803
 Street E'y Co. v. Bolton, 43 Ohio St. 234.....54, 803
 Stremback ads. Commonwealth, 3 Rawle, 341.....xvii, 351
 Stricker v. Tinkham, 35 Georgia, 176.....lxixix, 289
 Strickler v. Todd, 10 Serg. & R. 63.....xlii, 649
 Striker v. Mott, 2 Paige Ch. 387.....xlii, 646
 Strimpler v. Roberts, 18 Penn. State, 233.....lvii, 694
 Stringer v. Coombs, 63 Maine, 160.....16, 414
 Stringer v. Jacobs, 9 Arkansas, 437.....1, 221
 Stringfellow v. State, 26 Mississippi, 157.....lx, 247
 Strobe v. Downer, 13 Wisconsin, 16.....lxix, 709
 Strobe v. Chicago, M. & St. P. Ry Co., 70 Iowa,
 555.....59, 426
 Strode v. Strode, 3 Bush, 227.....xvii, 211
 Strober v. Elting, 97 New York, 102.....49, 515
 Strohn v. Detroit etc. R. Co., 21 Wis. 564.....xv, 564
 Strohn v. Detroit etc. R. R., 23 Wis. 126.....xix, 114
 Strohn v. Hartford F. I. Co., 37 Wisconsin, 685.....19, 777
 Strong v. Adams, 30 Vermont, 231.....lxixii, 305
 Strong v. Barnes, 11 Vermont, 221.....xxiv, 694
 Strong v. Clem, 12 Indiana, 37.....lxixiv, 309
 Strong v. Converse, 8 Allen, 567.....lxixv, 723
 Strong v. Grand Trunk R. R. Co., 15 Mich. 206.....xxii, 184
 Strong v. High, 2 Robinson (La.), 165.....xxxviii, 126
 Strong v. King, 35 Illinois, 1.....lxixv, 326
 Strong v. Jackson, 123 Massachusetts, 69.....23, 19
 Strong v. Manuf'rs' Ins. Co., 10 Pickering, 40.....xx, 697
 Strong v. Phoenix Ins. Co., 63 Missouri, 339.....31, 617
 Strong v. State, 36 Indiana, 206.....44, 293
 Strong v. Sun Mutual Ins. Co., 31 N. Y. 103.....lxixviii, 262
 Strong v. Williams, 12 Massachusetts, 390.....vii, 31
 Strong v. Willis, 3 Florida, 124.....lii, 304
 Strother v. Oathey, 1 Murphy, 163.....li, 689
 Stroud v. Casey, 25 Texas, 740.....lxixvii, 358
 Stroup v. Sullivan, 2 Georgia, 375.....xvii, 399
 Strouse's Ex. v. Becker, 38 Penn. State, 150.....lxix, 474
 Strout v. Packard, 76 Maine, 148.....49, 688
 Strubbee v. Trustees C. E'y, 78 Kentucky, 421.....39, 261
 Strupney ads. Commonwealth, 105 Mass. 523.....7, 559
 Struthers v. Kendall, 41 Penn. State, 214.....lxix, 619
 Stryker v. Cassidy, 76 New York, 60.....32, 269
 Stuart v. Allen, 16 California, 473.....lxixvi, 551
 Stuart v. Clark's Lessee, 2 Swan, 9.....lviii, 49
 Stuart v. Coalter, 4 Randolph, 74.....xv, 731
 Stuart v. Lander, 16 California, 372.....lxixvi, 539
 Stuart v. Luddington, 1 Randolph, 408.....x, 696
 Stuart v. Palmer, 74 New York, 153.....39, 269
 Stuart v. Supervisors, 83 Illinois, 341.....25, 397
 Stuart v. Walker, 73 Maine, 146.....39, 311
 Stuart v. Western U. Tel. Co., 66 Texas, 580.....59, 623
 Stub ads. Commonwealth, 11 Penn. State, 150.....li, 515
 Stubblesfield v. McRaven, 5 Smedes & M. 130.....xlii, 628
 Stubbs v. Lee, 64 Main, 195.....12, 261
 Stubbs v. Lund, 7 Massachusetts, 423.....v, 69
 Stucky v. Olyburn, Chever' Law, 125.....lxixiv, 599
 Studabaker v. White, 31 Indiana, 211.....xvix, 639
 Stuhv v. Curran, 15 Vroom, 181.....43, 353
 Stults v. Dickey, 5 Binney, 268.....vi, 411
 Stamp ads. Commonwealth, 53 Penn. St. 122.....xvi, 199
 Stamp v. Findlay, 2 Rawle, 166.....xix, 699
 Stamp v. Henry, 6 Maryland, 201.....lxii, 398

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Stamp v. McNairy, 5 Humphreys, 263.....xlii, 697
 Stappata v. Trans-Atlantic Fire Ins. Co., 43 Mich.
 273.....26, 186
 Sturdivant v. Hall, 59 Maine, 173.....2, 409
 Sturges v. Bank of Chilleville, 11 Ohio St. 183.....lxviii, 296
 Sturges v. Burton, 3 Ohio State, 215.....lxvii, 562
 Sturges v. Keith, 57 Illinoia, 451.....11, 38
 Sturges v. Theol. Ed. Society, 130 Mass. 414.....39, 463
 Sturges v. Williams, 9 Ohio State, 443.....lxv, 473
 Sturje v. Fay, 16 Indiana, 429.....lxix, 440
 Sturje v. Galindo, 59 California, 28.....43, 239
 Sturco, In the Matter of, 48 N. H. 429.....xvii, 636
 Sturtevant v. Ballard, 9 Johnson, 257.....vi, 261
 Sturtevant v. Goodie, 5 Leigh, 83.....xxvii, 586
 Sturtevant v. Orner, 34 New York, 535.....lxviii, 331
 Sturtevant ada. People, 9 New York (5 Seld.), 263.....lix, 536
 Sturtevant v. State, 15 Nebraska, 429.....8, 349
 Sturtevant v. Sturtevant, 29 New York, 39.....lxv, 371
 Sturtevant ada. Commonwealth, 117 Mass. 122.....19, 401
 Sturtevant v. Woodruff, 1 Zabrickie, 133.....xlvii, 156
 Styles v. McNell's Heirs, 6 Martin, N. S., 296.....xvii, 183
 Suttle v. Bedwell, 47 Mississippi, 263.....17, 236
 Succession of — See Name of Party.
 Succession of Alice Packwood, 9 Rob. (La.), 499.....xii, 341
 Succession of Christie, 20 La. An. 233.....xvi, 411
 Succession of Lewis, 10 Louisiana An. 799.....lxiii, 600
 Succession of Packwood, 12 Robinson (La.), 234.....lxiii, 230
 Suckley's Adm'r v. Rotchford, 12 Gratian, 60.....lxv, 240
 Suffern v. Johnson, 1 Paige Ch. 480.....xix, 440
 Sufield v. Hathaway, 44 Connecticut, 521.....29, 483
 Suffolk v. Parker, 79 Virginia, 680.....52, 649
 Suffolk Bank v. Kiddle, 12 Vermont, 464.....xxvi, 254
 Sullings v. Richmond, 5 Allen, 187.....lxvii, 743
 Sullings v. Shakespeare, 46 Michigan, 409.....41, 166
 Sullivan v. Conway, 31 Alabama, 183.....69, 143
 Sullivan v. Kykendall, 63 Kentucky, 453.....54, 901
 Sullivan v. Lewiston I. S., 60 Maine, 507.....xvi, 500
 Sullivan v. McLennan, 3 Iowa, 437.....lxv, 780
 Sullivan v. Mitchell, 1 Carolina L. Repos. 463.....vi, 546
 Sullivan v. Or. Ry & Nav. Co., 12 Oregon, 263.....53, 264
 Sullivan v. Philadelphia and Reading R. R. Co.,
 30 Penn. State, 234.....lxvii, 696
 Sullivan v. Smith, 15 Nebraska, 476.....43, 354
 Sullivan v. State, 6 Tex. Ct. App. 319.....33, 580
 Sullivan v. Sullivan, 106 Massachusetts, 474.....8, 356
 Sumner v. Hester, 20 Georgia, 689.....lxv, 639
 Sumners v. Bd. of Comm., 103 Indiana, 263.....53, 512
 Sumners v. Crescent C. R. Co., 34 La. An. 139.....44, 419
 Sumners v. Rice, 42 Mississippi, 749.....2, 653
 Sumners v. State, 5 Tex. Ct. App. 365.....33, 573
 Sumners v. Vaughan, 25 Indiana, 323.....9, 741
 Sumnersett v. Sumnersett's Administrator, 49
 Alabama, 596.....xci, 494
 Sumney v. Patton, Winst. Eq. 52.....lxvii, 481
 Summitt v. State, 3 Lea, 413.....41, 637
 Sumner v. Becker, 59 Indiana, 241.....19, 718
 Sumner v. Bialklee, 39 New Hampshire, 343.....47, 126
 Sumner v. Gray, 4 Arkansas, 467.....lxviii, 39
 Sumner v. Hampson, 8 Ohio, 223.....lxvii, 723
 Sumner v. Murphy, 2 Hill, 468.....lxvii, 297
 Sumner v. Southern R. Am'n, 7 Baxt. 345.....33, 568
 Sumner v. State, 5 Blackford, 579.....lxvii, 561
 Sumner ada. State, 3 Speers' Law, 599.....xlii, 287
 Sumner ada. State, 10 Vermont, 557.....lxviii, 219
 Sumner v. Williams, 3 Massachusetts, 162.....v, 83
 Sumner v. Woods, 67 Alabama, 139.....43, 104
 Sumpter Co. v. Nat. Bank, 62 Alabama, 464.....34, 30
 Sunderlin v. Bradstreet, 46 New York, 188.....7, 323
 Superintendent v. Bennett, 3 Dutcher, 513.....lxvii, 373
 Supervisors ada. People, 34 Illinois, 303.....25, 461
 Supervisors ada. People, 67 New York, 109.....22, 54
 Supervisors of Election, Case of, 114 Massachu-
 setts, 247.....19, 247
 Supervisors of Marshall County v. Cook, 28 Illi-
 nois, 44.....lxvii, 233
 Supreme Commandery Knights Golden Rule v.
 Ainsworth, 71 Alabama, 436.....46, 329
 Supreme Council Order Chosen Friends v. Gar-
 rigus, 104 Indiana, 153.....54, 236
 Surget v. Arighi, 11 Smedes & M. 37.....xlix, 46
 Surocco v. Geary, 3 California, 69.....lviii, 263
 Susong v. Valden, 10 South Carolina, 247.....39, 80
 Susquehanna R. Co. v. Gen. Ins. Co., 3 Md. 306.....lvi, 749
 Susquehanna C. Co. v. Bonham, 9 Watts & S. 27.....xli, 215
 Susquehanna C. Co. v. Wright, 9 Watts & S. 9.....xlii, 313
 Susquehanna Dep. v. Simmons, 113 Pennsylvania
 State, 264.....56, 217
 Susquehanna F. Co. v. White, 86 Maryland, 444.....59, 126
 Susquehanna M. Fire Ins. Co. v. Tunkhannock T.
 Co., 97 Pennsylvania State, 134.....39, 516
 Susquehanna V. Bank v. Loomis, 65 N. Y. 207.....39, 693
 Sussex v. Strader, 3 Har. (N. J.), 108.....xxv, 598
 Sutcliffe v. Atlantic Mills, 13 Rhode Island, 489.....43, 29
 Sutcliffe v. Dohrman, 18 Ohio, 151.....41, 489
 Sutcliffe v. State, 18 Ohio, 469.....41, 489
 Suter v. Hilliard, 129 Massachusetts, 412.....43, 446
 Sutherland v. Brush, 7 Johns. Ch. 17.....xi, 233
 Sutherland v. De Leon, 1 Texas, 250.....xvi, 106
 Sutherland v. Goodnow, 106 Illinois, 586.....43, 589
 Sutton v. Ashew, 86 North Carolina, 172.....8, 500
 Sutton v. Burrus, 9 Leigh, 361.....lxvii, 246
 Sutton v. Fox, 55 Wisconsin, 531.....43, 744
 Sutton v. Jervis, 31 Indiana, 263.....xvii, 631
 Sutton v. Mandeville, 1 Munford, 407.....iv, 549
 Sutton v. Reagan, 5 Blackford, 217.....lxvii, 466
 Sutton v. Schonwald, 86 North Carolina, 196.....41, 485
 Sutton v. Sutton, 7 Gratian, 234.....xvi, 289
 Sutton v. Tiller, 6 Cold. 523.....lxviii, 471
 Sutton v. Wauwatosa, 29 Wisconsin, 21.....9, 634
 Suydam v. Barber, 18 New York, 463.....lxv, 254
 Suydam v. Jones, 10 Wendell, 180.....xxv, 559
 Suydam v. Marine Ins. Co., 1 Johnson, 181.....iii, 301
 Swafford v. Ferguson, 3 Lea, 252.....31, 639
 Swafford v. Whipple, 3 G. Greene, 351.....lv, 496
 Swails ada. State, 8 Indiana, 524.....lxv, 772
 Swain v. Mizer, 6 Gray, 183.....lxix, 244
 Swain v. Rascoe, 3 Iredell's Law, 200.....lxviii, 729
 Swaine v. Perine, 5 Johns. Ch. 463.....lx, 513
 Swamscot Machine Co. v. Walker, 29 N. H. 457.....lv, 173
 Swan v. Bourne, 47 Iowa, 501.....29, 496
 Swan v. Despreaux, 7 Halsted, 123.....xli, 485
 Swan v. Hammond, 129 Massachusetts, 46.....53, 236
 Swan v. Manchester & L. R. R. 123 Mass. 116.....43, 693
 Swan v. Nesmith, 7 Pickering, 220.....xix, 246
 Swan's Lessee v. Parker, 7 Yerger, 490.....lxvii, 593
 Swang v. State, 2 Coldwell, 213.....lxviii, 609
 Swann v. Brown, 6 Jones' Law, 150.....lxvii, 598
 Swansay v. Moore, 29 Illinois, 63.....lxvii, 134
 Swansay v. Parker, 60 Pennsylvania St. 441.....lxviii, 549
 Swart v. Service, 21 Wendell, 26.....lxvii, 311
 Swarthout v. New Jersey S. Co., 48 N. Y. 296.....8, 541
 Swarthout v. Curtis, 5 N. Y. (1 Seld.), 301.....lv, 293
 Swarts v. Steen, 2 Kansas, 224.....lxvii, 233
 Swartwout v. Payne, 19 Johnson, 294.....xix, 246
 Swarts v. Ballou, 47 Iowa, 183.....29, 496
 Swarts v. Swartz, 4 Penn. State, 353.....xv, 697
 Swasey v. Jaques, 144 Massachusetts, 125.....23, 69
 Swasey v. Hull, 3 Halsted, 54.....xv, 289
 Sweet v. Shumway, 102 Massachusetts, 265.....8, 471
 Sweeney v. Baker, 13 West Virginia, 125.....21, 797

Roman letters [xlix] refer to volumes of American Decisions

Stephenson v. Pacific Mutual Ins. Co., 7 Allen,	881	Ste
233.....	lxxxiii, 681	Ste
Stephenson v. Primrose, 8 Porter, 188.....	xxxiii, 261	Ste
Stephenson v. State, 110 Indiana, 358.....	59, 261	Ste
Sterling's Appeal, 111 Penn. St. 35.....	56, 246	Ste
Sterling v. Bender, 2 English, 201.....	xliv, 539	Ste
Sterling v. Brightbill, 5 Watts, 229.....	xxx, 304	Ste
Sterling v. Drake, 29 Ohio St. 457.....	23, 763	Ste
Sterling v. Klepeattle, 24 Indiana, 94.....	lxxxvii, 319	Ste
Sterling v. Mercantile M. I. Co., 32 Pa. St. 78.....	lxxii, 773	Ste
Sterling v. Stewart, 74 Penn. St. 445.....	15, 589	Ste
Sterling v. Warden, 51 New Hampshire, 217.....	19, 80	Ste
Stern v. State, 53 Georgia, 229.....	21, 266	Ste
Stetson v. Faxon, 19 Pickering, 147.....	xxxi, 123	Ste
Stetson v. Kempton, 13 Massachusetts, 273.....	vii, 145	Ste
Stetson v. Mass. F. Ins. Co., 4 Mass. 330.....	iii, 217	Ste
Stetson v. Patten, 3 Greenleaf, 358.....	xi, 111	Ste
Stonbenville v. Culp, 33 Ohio St. 12.....	43, 417	Ste
Stevens v. Beach, 12 Vermont, 598.....	xxxvi, 359	Ste
Stevens v. Beals, 10 Cushing, 291.....	lxvii, 108	Ste
Stevens v. Bonford, 10 Allen, 35.....	lxxxviii, 616	Ste
Stevens v. Briggs, 14 Vermont, 44.....	xxxix, 260	Ste
Stevens v. Brown, 3 Vermont, 420.....	xxiii, 245	Ste
Stevens v. Chadwick, 10 Kansas, 406.....	15, 348	Ste
Stevens v. Chouteau, 11 Missouri, 282.....	xlix, 92	Ste
Stevens v. Columbia Ins. Co., 3 Calnes, 43.....	ii, 247	Ste
Stevens v. Cooper, 1 Johnson's Ch. 425.....	vii, 499	Ste
Stevens v. Cushing, 1 New Hampshire, 17.....	viii, 27	Ste
Stevens v. Davison, 18 Gratt. 819.....	xxviii, 692	Ste
Stevens v. Ellis, 48 Maine, 501.....	lxxxvii, 240	Ste
Stevens v. Gage, 55 New Hampshire, 178.....	29, 191	Ste
Stevens v. Hays, 1 Indiana, 267.....	xviii, 359	Ste
Stevens v. Head, 9 Vermont, 174.....	xxxi, 617	Ste
Stevens v. Hollister, 18 Vermont, 294.....	xli, 154	Ste
Stevens v. Irwin, 15 California, 503.....	lxxvi, 500	Ste
Stevens v. Kelley, 78 Maine, 445.....	57, 813	Ste
Stevens v. King, 76 Maine, 137.....	49, 609	Ste
Stevens v. Lockwood, 15 Wendell, 644.....	xxviii, 492	Ste
Stevens v. McNamara, 36 Maine, 178.....	lxviii, 740	Ste
Stevens v. Mechanic's Sav. Bank, 101 Mass. 109.....	3, 325	Ste
Stevens v. Morse, 7 Greenleaf, 26.....	xx, 337	Ste
Stevens v. Osman, 1 Michigan, 22.....	xlviii, 696	Ste
Stevens v. Parish, 29 Indiana, 260.....	xxv, 636	Ste
Stevens v. Paterson etc. E. R. Co., 34 N. J. 532.....	3, 269	Ste
Stevens v. Pillsbury, 57 Vermont, 306.....	53, 121	Ste
Stevens v. Rowe, 29 New Hampshire, 278.....	47, 231	Ste
Stevens v. Smith, 4 J. J. Marshall, 64.....	xx, 205	Ste
Stevens v. State, 2 Arkansas, 291.....	lxxxv, 73	Ste
Stevens v. State, 31 Indiana, 495.....	xxix, 634	Ste
Stevens v. State, 23 Kansas, 486.....	33, 175	Ste
Stevens ada. State, 103 Indiana, 55.....	53, 482	Ste
Stevens v. Stevens, 10 Allen, 148.....	lxxxviii, 630	Stokm
Stevens v. Stevens, 11 Metcalf, 251.....	xiv, 203	Stigev
Stevens v. West, 1 Howard, 308.....	lxix, 630	Stiles v
Stevens v. Winship, 1 Pickering, 318.....	xi, 178	Stiles v
Stevensson v. Balknap, 6 Iowa, 97.....	lxxi, 392	Stiles v
Stevensson v. Lochr, 57 Illinois, 509.....	11, 35	Stiles v
Stevensson v. McLean, 5 Humphreys, 232.....	xiii, 434	Stiles v
Stevensson v. McReary, 12 Smodes & M. 2.....	ii, 102	Stille v
Stevensson v. Miller, 3 Littell, 206.....	xiii, 271	Stillm
Stevensson v. Morris, 37 Ohio St. 10.....	41, 431	Stillma
Stevensson v. Mudgett, 10 New Hamp. 336.....	xxxiv, 155	Stillma
Stevensson v. Reigart, 1 Gill, 1.....	xxxix, 628	Stillma
Stevensson v. Sherwood, 22 Illinois, 238.....	lxix, 140	Stillwel
Stevensson v. Smith, 23 California, 103.....	lxxxvii, 107	Stillwel
Stewart v. Allison, 6 Serg. & R. 324.....	ix, 433	Stilpher
Stewart v. Brown, 37 New York, 350.....	xxdii, 573	Stilwell
Stewart v. Brooklyn & O. R. Co., 20 N. Y. 598.....	43, 185	Stimson
Stewart v. Campbell, 59 Maine, 439.....	4, 296	Stinchib
Stewart v. Cass, 16 Vermont, 663.....	xiii, 534	Stinchib

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Taylor v. Jaquett, 1 Harrington, 333.....xxvi, 369
 Tatro v. Tatro, 18 Nebraska, 365.....53, 821
 Tatum v. Kelley, 26 Arkansas, 809.....xlv, 717
 Taul v. Campbell, 7 Yeager, 312.....xxvii, 608
 Taunton T. Corp. v. Whiting, 10 Mass. 337.....vi, 134
 Tay v. Ladd, 15 Gray, 396.....lxvii, 364
 Taylor, Ex parte, 58 Mississippi, 478.....38, 336
 Taylor, In re, 48 Maryland, 25.....36, 461
 Taylor v. Adams, 3 Serg. & R. 534.....vii, 665
 Taylor v. Atchison, 54 Illinois, 198.....5, 118
 Taylor v. Baldwin, 27 Georgia, 438.....lxviii, 736
 Taylor v. Barron, 30 New Hampshire, 78.....lxiv, 281
 Taylor v. Blanchard, 13 Allen, 370.....x, 203
 Taylor v. Board of Health, 31 Penn. 84, 73.....lxviii, 724
 Taylor v. Boulware, 17 Texas, 74.....lxvii, 643
 Taylor v. Boyd, 3 Ohio, 337.....xvii, 603
 Taylor v. Bradley, 30 New York, 129.....c, 415
 Taylor v. Bradshaw, & T. R. Monroe, 145.....xvii, 133
 Taylor v. Branch, 1 Stewart & P. 349.....xxiii, 293
 Taylor v. Brown, 4 California, 188.....lx, 604
 Taylor v. Buckner, 2 A. K. Marshall, 18.....xii, 364
 Taylor v. Carpenter, 11 Paige, 292.....xiii, 114
 Taylor v. Cole, 4 Munford, 361.....vi, 826
 Taylor v. Comrs of Newberne, 2 Jones' Eq. 141.....lxiv, 566
 Taylor v. Conner, 41 Mississippi, 722.....xvii, 419
 Taylor v. Cooper, 10 Leigh, 517.....xxxiv, 737
 Taylor v. Cosart, 4 Humphreys, 433.....xi, 655
 Taylor v. Curry, 109 Massachusetts, 36.....12, 661
 Taylor v. Del. & H. C. Co., 113 Penn. 84, 188.....57, 446
 Taylor v. Drake, 4 Strobbard's Law, 431.....xiii, 680
 Taylor v. Fickas, 64 Indiana, 167.....31, 114
 Taylor v. Fowler, 18 Ohio, 567.....ii, 469
 Taylor v. French, 3 Lea, 237.....31, 609
 Taylor v. Galloway, 1 Ohio, 323.....xiii, 606
 Taylor v. Gillies, 59 New York, 331.....17, 333
 Taylor v. Graham, 18 Louisiana, 658.....lxxxix, 699
 Taylor v. Grand Trunk R'y Co., 48 N. H. 304.....9, 229
 Taylor v. Green, 37 Georgia, 600.....xv, 367
 Taylor v. Griswold, 2 Green Law, 323.....xxvii, 33
 Taylor v. Hampton, 4 McOord, 96.....xvii, 710
 Taylor v. Hargous, 4 California, 268.....lx, 606
 Taylor v. Harrison, 47 Texas, 454.....26, 304
 Taylor v. Henry, 48 Maryland, 559.....36, 486
 Taylor v. Hillier, 3 Blackwood, 433.....xxvi, 430
 Taylor v. Hutcheson, 25 Gratt. 536.....18, 699
 Taylor v. Jacoby, 3 Penn. State, 496.....xlv, 615
 Taylor v. Jenkins, 24 Arkansas, 337.....lxxxviii, 773
 Taylor v. Jeter, 33 Georgia, 196.....lxxxii, 202
 Taylor v. Kelly, 31 Alabama, 69.....lxviii, 150
 Taylor v. King, 6 Munford, 368.....viii, 746
 Taylor v. Lake Shore etc. R. Co., 45 Mich. 74.....40, 457
 Taylor v. Lanier, 3 Murphy, 96.....lx, 699
 Taylor v. Larkin, 12 Missouri, 103.....xlix, 119
 Taylor v. Lewis, 2 J. J. Marshall, 400.....xix, 136
 Taylor v. Little Rock, M. R. & T. R. R. Co., 39
 Arkansas, 393.....39, 1
 Taylor v. Lowell, 3 Massachusetts, 331.....li, 141
 Taylor v. Mayor etc. of Cumberland, 64 Md. 68.....54, 759
 Taylor v. Miami Exporting Co., 5 Ohio, 169.....xxii, 788
 Taylor v. Miles, 5 Kansas, 498.....7, 538
 Taylor v. Mitchell, 57 Pennsylvania State, 518.....36, 383
 Taylor v. Morrison, 26 Alabama, 723.....lxii, 747
 Taylor v. Mueller, 30 Minnesota, 343.....44, 199
 Taylor v. N. & O. R. R., 6 Cold. 646.....xxviii, 474
 Taylor v. Owen, 2 Blackford, 301.....ix, 115
 Taylor v. Peekham, 8 Rhode Island, 349.....8, 578
 Taylor v. Peekham, 8 Rhode Island, 349.....xci, 235
 Taylor v. Pennsylvania Co., 78 Kentucky, 348.....39, 244
 Taylor v. Porter, 1 Dana, 421.....xxv, 185
 Taylor v. Porter, 4 Hill (N. Y.), 140.....xi, 274
 Taylor v. Shaw, 39 California, 536.....9, 478
 Taylor v. Short, 27 Iowa, 361.....1, 269
 Taylor v. Shufford, 4 Hawks, 114.....xv, 512
 Taylor v. Snow, 47 Texas, 462.....26, 311
 Taylor v. Snyder, 3 Denio, 146.....xiv, 487
 Taylor v. Spears, 1 English, 381.....xlv, 519
 Taylor v. St. Louis, 14 Missouri, 20.....lv, 89
 Taylor v. Staples, 8 Rhode Island, 170.....8, 556
 Taylor v. State, 22 Texas Ct. App. 689.....58, 656
 Taylor ad. State, 3 Dutcher, 117.....lxvii, 347
 Taylor v. Sutton, 15 Georgia, 103.....lx, 682
 Taylor v. Swett, 3 Louisiana, 33.....xli, 186
 Taylor v. Taylor, 8 B. Monroe, 419.....xlviii, 400
 Taylor v. Taylor, 6 Iredell's Eq. 26.....li, 413
 Taylor v. Taylor, 23 North Carolina, 418.....53, 460
 Taylor v. Taylor, 63 Pennsylvania St. 421.....9, 565
 Taylor v. Townsend, 8 Massachusetts, 411.....v, 107
 Taylor v. Vincent, 12 Lea, 282.....47, 339
 Taylor v. Wilburn, 30 Missouri, 306.....lxiv, 186
 Taylor v. Wilson, 11 Metcalf 44.....xiv, 189
 Taylor v. Yonkers, 105 New York, 398.....59, 482
 Taylor v. Zapp, 14 Missouri, 422.....lv, 113
 Taylor ad. State, 27 La. An. 398.....31, 561
 Taswell v. Smith, 1 Randolph, 513.....x, 633
 Teaff v. Hewitt, 1 Ohio State, 511.....lix, 634
 Teagarden v. McLaughlin, 86 Indiana, 476.....44, 332
 Teague v. Dundy, 2 McCord's Ch. 207.....xvi, 643
 Teal v. State, 23 Georgia, 75.....lxviii, 483
 Teall v. Felton, 1 N. Y. (1 Const.) 537.....lxix, 398
 Teas v. McDonald, 15 Texas, 349.....lxv, 65
 Teasdale v. Charleston Ins. Co., 3 Brevard, 190.....lii, 705
 Teat v. State, 53 Mississippi, 439.....24, 706
 Tebbetts v. Pickering, 5 Cushing, 83.....li, 48
 Tebbetts v. Hamilton M. I. Co., 1 Allen, 305.....lxxxix, 740
 Tedder v. Odom, 2 Helak. 68.....5, 25
 Teeter v. Williams, 3 B. Monroe, 563.....lxxxix, 485
 Teetsman v. Clamagoran, 2 Louisiana, 196.....lxvii, 127
 Teevens ad. Commonwealth, 143 Mass. 210.....58, 131
 Tegler v. Shipman, 33 Iowa, 194.....11, 118
 Telegraph Co. v. Griswold, 37 Ohio St. 302.....41, 500
 Telephone Co. ad. State, 36 Ohio St. 296.....36, 583
 Telfair v. Howe, 3 Richardson's Equity, 228.....lv, 637
 Temple v. Commonwealth, 14 Bush, 769.....79, 442
 Temple v. Gove, 8 Iowa, 511.....lxv, 320
 Temple v. State, 15 Texas Ct. App. 304.....49, 300
 Temple v. Summer, 51 Mississippi, 13.....24, 615
 Templeton v. Voshoe, 72 Indiana, 134.....37, 150
 Templeton v. Walker, 3 Richardson's Eq. 543.....lv, 646
 Templin v. Iowa City, 14 Iowa, 69.....lxxxii, 455
 Ten Eyck v. Del. & B. O. Co., 3 Harr. (N. J.) 200.....xxvii, 233
 Tennant v. Stoney, 1 Richardson's Equity, 222.....xlii, 213
 Tennessee Bank v. Beatty, 3 Sneed, 306.....lxv, 58
 Tennessee Bank v. Hill, 10 Humphreys, 278.....li, 696
 Tennessee Bank v. Patterson, 8 Humph. 363.....lxvii, 618
 Tennessee C. R. R. Co. v. East Ala. R'y Co., 75
 Alabama, 516.....51, 678
 Tennessee Club v. Dwyer, 11 Lea, 462.....47, 296
 Tenney v. Berger, 33 New York, 634.....45, 262
 Tenney v. Evans, 13 New Hampshire, 462.....xi, 166
 Tenney v. Evans, 14 New Hampshire, 343.....xi, 194
 Tenney v. Poor, 14 Gray, 500.....lxvii, 346
 Tenney v. Prince, 4 Pickering, 385.....xvi, 247
 Terbell v. Downer, 27 Vermont, 502.....lxv, 212
 Terre Haute & I. R. R. Co. v. Buck, 96 Ind. 346.....49, 168
 Terre Haute & I. R. Co. v. Graham, 96 Ind. 286.....48, 719
 Terre Haute & I. R. R. Co. v. McMurray, 96 In-
 diana, 358.....49, 728
 Terre Haute & S. R. Co. v. Rodel, 89 Ind. 126.....46, 164
 Terre Haute Railroad v. Vanatta, 21 Ill. 189.....lxvii, 96
 Terrell's Heirs v. Cropper, 9 Martin, 360.....xlii, 308

Roman letters [xlx] refer to volumes of American Decisions, and Arabic figures [40] to American Reports.

- Terrill v. Rankin 2 Bush, 463.....xvii, 500
Territory v. Ah Wah, 4 Montana, 149.....47, 341
Territory v. McFarlane, 1 Martha, 311.....v, 706
Territory v. Nugent, 1 Martin, 103.....v, 708
Territory v. Ross, 1 Martin, 145.....v, 706
Terry v. Bleight, 3 T. B. Monroe, 270.....xvi, 101
Terry v. Buffington, 11 Georgia, 337.....lvi, 423
Terry v. Chandler, 16 New York, 354.....lxix, 707
Terry v. Balava, 1 Porter, 273.....xxvii, 626
Terry v. Foster, 1 Mass. 145.....li, 6
Terry v. Magerle, 24 California, 609.....lxxxv, 84
Terry ad. State, 33 North Carolina, 886.....53, 472
Terry v. Woods, 6 Smedes & M. 399.....xiv, 274
Tertogge v. First Germ. Ben. Soc., 32 Ind. 32.....47, 135
Terwilliger v. Wanda, 17 New York, 54.....lxvii, 430
Teschmacher v. Thompson, 18 California, 11.....lxxxix, 161
Tesson v. Atlantic Mut. Ins. Co., 40 Missouri, 33.....xviii, 293
Teter v. Teter, 101 Indiana, 129.....51, 743
Tetz v. Butterfield, 54 Wisconsin, 343.....41, 29
Tewcher v. Hiatt, 23 Iowa, 537.....xvi, 440
Tewis v. Randall, 6 California, 632.....lrv, 547
Tewis v. Young, 1 Metcalfe (Ky.), 197.....lxix, 474
Tew v. Tew, 60 North Carolina, 316.....36, 84
Tewada v. Beaman, 6 Louisiana, 84.....xxv, 304
Texas & P. R'y Co. v. Bradford, 66 Texas, 732.....59, 739
Texas & P. R. Co. v. Murphy, 46 Texas, 356.....96, 372
Texas & P. R'y Co. v. Bond, 62 Texas, 442.....56, 533
Texas & P. R'y Co. v. Rosedale St. R'y Co., 64 Texas, 80.....53, 739
Texas and St. L. R. Co. v. Roberts, 60 Tex. 545.....48, 398
Texas Bank Co. v. Hutchins, 53 Texas, 61.....87, 760
Texas Bank and Ins. Co. v. Cohen, 47 Tex. 406.....96, 398
Texas C. P. and M. Co. v. Mechanics' F. Co., 54 Texas, 319.....38, 627
Tector v. Baltimore and O. R. Co., 59 Md. 63.....43, 540
Thacher v. Dinmore, 5 Mass. 399.....iv, 61
Thacher v. Pray, 113 Massachusetts, 391.....18, 490
Thacher v. Stevens, 46 Connecticut, 561.....33, 39
Thacher ad. Commonwealth, 97 Mass. 583.....xviii, 125
Thacher ad. People, 55 New York, 625.....14, 313
Thacher v. Chambers, 5 Humphreys, 313.....xlii, 431
Thalhimer v. Brinkerhoff, 3 Owen, 633.....xv, 309
Thalhimer v. Brinkerhoff, 4 Wendell, 394.....xxi, 165
Thames Bank v. Lovell, 18 Connecticut, 500.....xvii, 333
Thames St. Co. v. Housatonic R. R., 34 Conn. 40.....lxvii, 154
Thatcher v. Mills, 14 Texas, 13.....lrv, 95
Thayer v. Augustine, 55 Michigan, 187.....54, 361
Thayer v. Bacon, 3 Allen, 163.....lxxx, 59
Thayer v. Boston, 124 Massachusetts, 132.....96, 660
Thayer v. Boston, 19 Pickering, 511.....xxxi, 157
Thayer v. Brooks, 17 Ohio, 499.....lxix, 474
Thayer v. Finnegan, 134 Massachusetts, 63.....45, 285
Thayer v. Hutchinson, 13 Vermont, 504.....xxvii, 607
Thayer v. Kelley, 29 Vermont, 19.....lrv, 220
Thayer v. King, 15 Ohio, 242.....xiv, 571
Thayer v. St. Louis etc. R. R. Co., 23 Ind. 26.....lxixv, 409
Thayer v. Thayer, 101 Massachusetts, 111.....c, 110
Thayer v. Thayer, 14 Vermont, 107.....xxxix, 211
Thayer v. Wellington, 9 Allen, 263.....lxxxv, 753
"The Count Joannes" v. Bennett, 5 Allen, 169.....lxvii, 738
Theall v. Theall, 7 Louisiana, 226.....xxvi, 501
Theilan v. Porter, 14 Lea, 623.....58, 173
Thielman v. Gueble, 33 La. An. 260.....36, 267
Third Nat. Bank v. Boyd, 44 Maryland, 47.....39, 35
Third Nat. Bank v. Lange, 51 Maryland, 138.....34, 304
Third National Bank v. Vicksburg Bank, 61 Mississippi, 113.....46, 75
Thirteenth & F. St. P. R. Co. v. Boudrea, 92 Penn. St. 678.....37, 707
Thomas v. Boston & Prov. R. R. Co., 10 Met. 472.....xlii, 444
Thomas v. Builders' F. Ins. Co., 119 Mass. 121.....96, 327
Thomas v. Burrus, 23 Mississippi, 589.....lvii, 154
Thomas v. Caulkett, 57 Michigan, 393.....58, 399
Thomas v. Croft, 3 Richardson's Law, 113.....lxix, 279
Thomas v. Crowell, 7 Johnson, 204.....v, 289
Thomas v. Davis, 76 Missouri, 73.....43, 754
Thomas v. Dike, 17 Vermont, 273.....xxiv, 699
Thomas v. Ervin, Chever's Law, 23.....lxixv, 536
Thomas v. Evans, 105 New York, 601.....50, 519
Thomas v. Folwell, 2 Wharton, 11.....xxx, 339
Thomas v. Ford, 63 Maryland, 346.....53, 513
Thomas v. Gain, 35 Michigan, 153.....94, 636
Thomas v. Garvan, 4 Devereux's Law, 223.....xxv, 708
Thomas v. Harrodsburg, 3 A. K. Marshall, 393.....xli, 185
Thomas v. Hesse, 34 Missouri, 13.....lxxxiv, 65
Thomas v. Hot Springs, 34 Arkansas, 553.....96, 329
Thomas v. Hubbell, 15 New York, 405.....lxix, 629
Thomas v. Kelly, 3 South Carolina, 214.....26, 716
Thomas v. Kennedy, 34 Iowa, 397.....xv, 749
Thomas v. Kerr, 3 Bush, 619.....xvi, 392
Thomas v. Knighton, 23 Maryland, 318.....lxxxvii, 671
Thomas v. Malcom, 39 Georgia, 239.....xix, 499
Thomas v. Mead, 6 Martin, N. S., 341.....lxix, 187
Thomas v. Orrell, 5 Ireland's Law, 569.....lxix, 83
Thomas v. People, 107 Illinois, 517.....47, 439
Thomas v. Record, 47 Maine, 500.....lxixv, 699
Thomas v. Sheppard, 2 McLeod's Ch. 21.....xvi, 632
Thomas v. Ship Morning Glory, 13 La. An. 293.....lxix, 699
Thomas ad. State, 47 Connecticut, 546.....96, 739
Thomas ad. State, 111 Indiana, 515.....96, 739
Thomas ad. State, use of Roe, 19 Missouri, 613.....lxix, 699
Thomas v. Stetson, 63 Iowa, 537.....49, 149
Thomas v. Taylor, 43 Mississippi, 651.....2, 699
Thomas v. Thomas, 1 Littlell, 63.....xvii, 329
Thomas v. White, 3 Littlell, 177.....lxix, 35
Thomas v. Winchester, 6 N. Y., (3 Selden) 397.....lvii, 435
Thomas v. Woodman, 23 Kansas, 217.....53, 158
Thomas v. Wyatt, 25 Missouri, 24.....lxix, 446
Thomas v. Wyatt, 31 Missouri, 126.....lxixvii, 649
Thomas, B. & W. M. Co. v. Wabash, St. L. & P. R'y Co., 63 Wisconsin, 643.....51, 735
Thomason v. Odum, 31 Alabama, 108.....lxvii, 179
Thompson's Case, 122 Massachusetts, 426.....39, 279
Thompson v. Allen, 103 Pa. 84.....49, 118
Thompson v. Bk of S. O., 3 Hill's L. 77.....xxx, 554
Thompson v. Boardman, 1 Vermont, 398.....xvii, 694
Thompson v. Bondurant, 15 Alabama, 246.....1, 136
Thompson v. Branch, Meigs, 390.....lxixvii, 159
Thompson v. Carpenter, 4 Penn. State, 132.....xiv, 621
Thompson v. Cartwright, 1 Texas, 87.....lxix, 95
Thompson v. Chauveau, 7 Martin, N. S., 391.....lxixvii, 295
Thompson v. Cochran, 7 Humphreys, 72.....lxix, 65
Thompson ad. Commonwealth, 6 Allen, 361.....lxixvii, 633
Thompson ad. Commonwealth, 11 Allen, 23.....lxixvii, 695
Thompson ad. Commonwealth, 3 Oshing, 692.....lxixvii, 679
Thompson ad. Commonwealth, 4 Leigh, 567.....lxixvii, 339
Thompson v. Clay, 3 T. B. Monroe, 399.....xvi, 108
Thompson v. Craigmyle, 4 B. Monroe, 391.....xli, 249
Thompson v. Fargo, 49 New York, 183.....10, 343
Thompson v. Garwood, 2 Wharton, 297.....lxixvii, 598
Thompson v. Gaffard, 3 Richardson's Law, 418.....lxix, 779
Thompson v. Glover, 78 Kentucky, 153.....59, 299
Thompson v. Gr. Gulf etc. Co., 3 How. 269.....lxixvii, 61
Thompson v. Gregory, 4 Johnson, 81.....lxixvii, 695
Thompson v. Guthrie, 9 Leigh, 101.....lxixvii, 399
Thompson v. Hamilton, 19 Pickering, 626.....lxixvii, 679
Thompson v. Haskell, 21 Illinois, 215.....lxixvii, 99
Thompson v. Hermann, 47 Wisconsin, 693.....33, 724
Thompson v. Jackson, 3 Randolph, 604.....lxixvii, 721
Thompson v. Julius D. Morton, St. 2 Ohio St. 26, 28, 629

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Thompson v. Kelly, 101 Massachusetts, 391.....	3, 353	Thorp v. Wagstaff, 56 Penn. St. 63.....	xclii, 798
Thompson v. Ketchum, 4 Johnson, 190.....	v, 332	Thorp v. Missouri P. R'y Co., 89 Missouri, 620.....	58, 138
Thompson v. Kilbourn, 28 Vermont, 750.....	lxvii, 743	Thorp v. N. Y. C. & H. R. R. Co., 76 N. Y. 403.....	39, 326
Thompson v. Lay, 4 Pickering, 48.....	xvi, 325	Thorp v. Rankin, 4 Harrison (N. J.), 36.....	xxxviii, 531
Thompson v. Lincoln, 2 Greenleaf, 186.....	xi, 57	Thorp v. Rutland & B. R. R. Co., 37 Vt. 140.....	lxii, 625
Thompson v. Lusk, 2 Watts, 17.....	xxvi, 91	Thoren v. Schooner J. B. Martin, 26 Wis. 438.....	7, 91
Thompson v. Lyon, 30 Missouri, 153.....	lxi, 599	Thoubboron v. Lewis, 43 Michigan, 635.....	38, 213
Thompson v. Mankin, 26 Arkansas, 586.....	7, 628	Thrall v. Lathrop, 30 Vermont, 307.....	lxix, 308
Thompson v. Marshall, 36 Alabama, 504.....	lxvii, 328	Thrall v. Newell, 19 Vermont, 202.....	lxvii, 682
Thompson v. Mawhinney, 17 Alabama, 263.....	lii, 178	Thrall v. Omaha Hotel Co., 5 Nebraska, 295.....	25, 483
Thompson v. McCullough, 31 Missouri, 224.....	lxvii, 644	Thrall v. Waller, 13 Vermont, 231.....	xxxvii, 502
Thompson v. Missis. etc. Ins. Co., 2 La. 228.....	xvii, 129	Threlkelds v. Campbell, 2 Gratian, 198.....	xiv, 334
Thompson v. Monroe, 2 California, 99.....	lvi, 318	Throckmorton v. Price, 26 Texas, 606.....	xc, 334
Thompson v. Morrow, 5 Serg. & R. 289.....	lx, 358	Thrower v. Cureton, 4 Strobhart's Eq. 185.....	liii, 600
Thompson v. Muger, 15 Texas, 523.....	lxv, 176	Thrower v. McIntire, 4 Dev. & Bat. Law, 269.....	xxxiv, 332
Thompson v. Murray, 3 Hill's Ch. 204.....	xxix, 68	Thunder Bay Co. v. Speechly, 31 Michigan, 336.....	18, 154
Thompson v. N. O., J. & G. N. R. R. Co., 80 Mississippi, 315.....	19, 12	Thurber v. Martin, 2 Gray, 304.....	lxi, 408
Thompson v. Newlin, 3 Ireland's Eq. 338.....	xiii, 168	Thuret v. Jenkins, 7 Martin, 318.....	xii, 506
Thompson v. North Missouri R. R. Co., 61 Missouri, 190.....	11, 443	Thurmond v. Reese, 3 Georgia, 449.....	lxvi, 440
Thompson v. Patton, 5 Little, 74.....	xv, 44	Thurmond v. Trammell, 26 Texas, 373.....	xvi, 381
Thompson v. Phoenix Ins. Co., 75 Me. 55.....	46, 357	Thurston ad. State, 35 Maine, 205.....	lxix, 685
Thompson v. Rose, 16 Connecticut, 71.....	xii, 131	Thurston v. Blanchard, 22 Pickering, 18.....	xxxiii, 700
Thompson v. Sanborn, 11 New Hampshire, 201.....	xxiv, 490	Thurston v. Dickinson, 2 Richardson's Eq. 317.....	lxvi, 86
Thompson v. Schermerhorn, 6 N. Y. (2 Selden), 32.....	lv, 385	Thurston v. Hancock, 12 Massachusetts, 230.....	vii, 87
Thompson v. Schlater, 13 Louisiana, 115.....	xxxvii, 686	Thurston v. Ludwig, 6 Ohio State, 1.....	lxvii, 360
Thompson v. Shephard, 12 Metcalf, 311.....	lxvi, 678	Thurston v. Rosenfeld, 42 Missouri, 474.....	xxvii, 351
Thompson v. Sloan, 23 Wendell, 71.....	xxxv, 546	Thurston v. St. Joseph, 61 Missouri, 516.....	11, 463
Thompson v. Smith, 7 Serg. & R. 209.....	x, 453	Thurston v. Wolfborough Bank, 18 N. Hamp. 381.....	xiv, 333
Thompson v. Snow, 4 Greenleaf, 364.....	xvi, 263	Thwaitt v. Jones, 1 Randolph, 238.....	x, 338
Thompson v. South Car. Bank, 3 Hill's (S. C.) L. 77.....	xxx, 384	Thwing v. Great Western Ins. Co., 130 Mass. 401.....	6, 567
Thompson v. Sprague, 69 Georgia, 409.....	47, 760	Tibbets v. Gerrish, 25 New Hampshire, 41.....	lvii, 307
Thompson v. State, 47 Alabama, 106.....	42, 101	Tibbeau v. Tibbeau, 19 Missouri, 78.....	lx, 360
Thompson v. State, 18 Indiana, 396.....	lxxxi, 364	Tichenor v. Hayes, 12 Vroom, 193.....	38, 186
Thompson ad. State, 9 Iowa, 189.....	lxxiv, 342	Ticknor v. Roberts, 11 Louisiana, 14.....	xxx, 706
Thompson ad. State, 23 Kansas, 336.....	33, 165	Ticknor v. Harris, 14 New Hampshire, 272.....	x, 186
Thompson ad. State, 2 Strobhart's Law, 12.....	lxvii, 588	Ticonic Bank v. Stackpole, 41 Maine, 321.....	lxvi, 248
Thompson v. Stewart, 3 Connecticut, 171.....	viii, 168	Ticonic Bank v. Smiley, 27 Maine, 225.....	lxvi, 500
Thompson v. Tate, 1 Murphy, 97.....	lii, 678	Tide Water Co. v. Coaster, 18 N. J. Eq. 518.....	xx, 634
Thompson v. Thompson, 9 Indiana, 223.....	lxviii, 638	Tidwell v. Witherspoon, 21 Florida, 369.....	58, 688
Thompson v. Thompson, 19 Maine, 225.....	xxxvi, 751	Tiedemann ad. State, 69 Missouri, 306.....	33, 480
Thompson v. Waters, 25 Michigan, 214.....	12, 243	Tiemeyer v. Turnquist, 85 New York, 516.....	39, 474
Thompson v. Western U. Tel. Co., 64 Wis. 531.....	54, 644	Tier v. Lamson, 35 Vermont, 179.....	lxxvii, 634
Thompson v. Wharton, 7 Bush, 563.....	3, 306	Tiernan v. Beam, 2 Ohio, 383.....	xv, 557
Thompson v. White, 1 Dallas, 484.....	i, 222	Tiernan v. Commercial Et., 7 Howard (Miss.), 648.....	xi, 63
Thoms v. Dingley, 70 Maine, 100.....	35, 310	Tiernan v. Poor, 1 Gill & J. 216.....	lxix, 226
Thoms v. Southard, 3 Dana, 478.....	xxvi, 467	Tierney v. Minneapolis & St. L. R. R. Co., 23 Minnesota, 311.....	53, 35
Thomson v. Porter, 4 Strobhart's Eq. 89.....	liii, 653	Tiffany v. St. John, 65 New York, 314.....	79, 612
Thomson v. People, 24 Illinois, 60.....	lxvii, 733	Tiffin v. McCormack, 24 Ohio St. 638.....	37, 465
Thomson v. Winchester, 19 Pickering, 214.....	xxxii, 136	Tift v. Horton, 53 New York, 377.....	13, 537
Thorn v. Knapp, 42 New York, 474.....	i, 561	Tift v. Harden, 22 Georgia, 623.....	lxviii, 612
Thorn v. Morgan, 4 Martin, N. S., 293.....	xvii, 173	Tilden v. Bernard, 43 Michigan, 276.....	38, 197
Thorn v. Newton, 64 Texas, 161.....	53, 747	Tilden v. Johnson, 32 Vermont, 628.....	34, 760
Thorn v. Thoma, 14 Iowa, 49.....	lxxxi, 451	Tilden v. Rosenthal, 41 Illinois, 285.....	lxxix, 308
Thorn v. Wilson, 110 Indiana, 235.....	59, 209	Tillettson ad. State, 7 Jones' Law, 114.....	lxix, 487
Thornberry v. Churchill, 4 T. B. Monroe, 29.....	xvi, 125	Tilley v. Hudson River R. R. Co. 29 N. Y. 292.....	lxxvi, 287
Thornburg ad. State, 6 Ireland's Law, 78.....	xiv, 67	Tillinghast v. Champlin, 4 Rhode Island, 173.....	lxvii, 516
Thorncliffe v. Bath, 114 Massachusetts, 116.....	19, 318	Tillinghast v. Wheaton, 8 Rhode Island, 538.....	5, 621
Thorne v. Traveler's Ins. Co., 80 Penn. St. 15.....	31, 89	Tillinghast v. Wheaton, 8 R. I. 538.....	xv, 126
Thorne v. Turek, 94 New York, 90.....	126, 136	Tilman v. Allee, 5 Smedes & M. 373.....	lxiii, 630
Thorne v. Bakery, 41 Maryland, 593.....	70, 74	Tilman v. Davis, 26 Georgia, 494.....	lxvii, 786
Thornston v. Devonport, 1 Somerset, 586.....	xxxix, 307	Tilman v. Davis, 36 New York, 17.....	47, 1
Thornston v. Dean, 19 South Carolina, 539.....	45, 796	Tilman v. Shackleton, 15 Michigan, 447.....	xviii, 198
Thornston v. Grant, 10 Rhode Island, 477.....	14, 701	Tillotson v. Orestham, 3 Johnson, 56.....	lii, 450
Thornston v. Mulquhine, 12 Iowa, 546.....	lxxix, 548	Tillotson v. Kennedy, 5 Alabama, 407.....	xxxix, 330
Thornston v. Rankin, 19 Missouri, 198.....	lx, 332	Tillotson v. Millard, 7 Minnesota, 513.....	lxxvii, 112
Thornston v. Thornston, 27 Missouri, 302.....	lxvii, 366	Tillotson v. Smith, 32 New Hampshire, 90.....	lxv, 363
Thorp v. Bateman, 27 Michigan, 63.....	70, 497	Tilson v. Robbins, 68 Maine, 295.....	36, 50
Thorp v. Thorp, 30 New York, 602.....	43, 189	Tilman ad. State, 30 La. An. 1249.....	31, 298
		Tilton v. Am. Bible Socy, 60 N. H. 277.....	49, 321

COPY

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Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Town Council of Akron v. McComb, 18 Ohio, 239...li, 483
 Towne v. Fiske, 137 Massachusetts, 128.....iv, 34, 353
 Towne v. Jaquith, 6 Massachusetts, 68.....iv, 84
 Towne v. Wiley, 23 Vermont, 288.....lvi, 85
 Townes v. Durbin, 3 Met. (Ky.) 363.....lxvii, 174
 Townes v. Nims, 5 New Hampshire, 259.....xx, 578
 Towns v. Pratt, 33 New Hampshire, 345.....lxvi, 735
 Towns v. Vicksburg, S. & P. R. R. Co., 37 Louisiana An. 630.....55, 508
 Townsend v. Board of Water Comm'rs, 68 Ill. 28...14, 109
 Townsend v. Davis, 1 Georgia, 495.....xlv, 675
 Townsend v. Goewey, 19 Wendell, 424.....xxii, 514
 Townsend v. Houston, 1 Harrington, 583.....xxvii, 732
 Townsend v. Kendall, 4 Minnesota, 412.....lxvii, 534
 Townsend v. Long, 77 Pennsylvania St. 143.....18, 438
 Townsend v. McDonald, 12 N. Y. (3 Kernan), 281...lxiv, 508
 Townsend v. N. Y. Cent. etc. R. R. Co., 54 New York, 285.....15, 419
 Townsend v. Smith, 1 Beasley's Ch. 360.....lxii, 403
 Townsend v. Smith, 20 Texas, 465.....lx, 400
 Townsend v. Smith, 47 Wisconsin, 633.....32, 793
 Townsend v. Star Wagon Co., 10 Nebraska, 615...33, 493
 Townsend v. Tallant, 33 California, 45.....xci, 617
 Townsend v. Townsend, 4 Cold. 70.....xciv, 185
 Townsend v. Townsend, 1 Peck, 1.....xiv, 722
 Townsend's Appeal, 106 Pennsylvania St. 266.....51, 523
 Township of —, See Name of Township.
 Towney v. Shock, 3 Blackford, 267.....xv, 108
 Towley v. Moore, 20 Ohio St. 135.....27, 434
 Townon v. Havre de Grace Bk. 6 Harris & J. 47...xiv, 354
 Trahan v. Mays, 3 Dana, 138.....xxviii, 61
 Tracy v. Albany Ex. Co., 7 N. Y. (3 Selden), 472...lvii, 536
 Tracy v. Asherton, 35 Vermont, 32.....lxixi, 621
 Tracy v. Sacket, 1 Ohio State, 54.....lx, 610
 Tracy v. Talmage, 14 N. Y. (4 Kernan), 163...lxvii, 128
 Tracy v. Troy & R. R. R., 26 New York, 433...xxviii, 54
 Tracy v. Williams, 4 Connecticut, 107.....x, 102
 Trade Ins. Co. v. Barradell, 16 Vroom, 543.....46, 792
 Trader v. Childster, 41 Arkansas, 242.....48, 36
 Traflet v. Hawes, 103 Massachusetts, 533.....3, 494
 Trafford v. Hall, 7 Rhode Island, 104.....lxixii, 569
 Train v. Boston D. Co., 144 Massachusetts, 523...59, 113
 Trainor v. Morrison, 78 Maine, 160.....57, 790
 Transell v. Russellville, 34 Arkansas, 105.....34, 1
 Transatlantic F. Ins. Co. v. Dorsey, 56 Md. 70...46, 403
 Transfer Co. v. Kelly, 28 Ohio St. 86.....58, 588
 Transylvania Univ. v. Lexington, 3 B. Mon. 22...xxviii, 173
 Trapnell v. McAfee, 3 Met. (Kentucky), 34.....lxvii, 152
 Trapnell v. Richardson, W. & Co., 13 Ark. 543...lviii, 338
 Trapnell, Ex parte, 6 Arkansas, 9.....xiii, 676
 Trask v. State F. & M. Ins. Co., 29 Penn. St. 198...lxix, 623
 Trask ada. State, 6 Vermont, 363.....xxvii, 554
 Trask v. Milliken, 57 Maine, 63.....2, 14
 Traver v. Merrick County, 14 Nebraska, 327.....45, 111
 Travis v. Brown, 48 Penn. State, 9.....lxixii, 540
 Travis v. Smith, 1 Penn. State, 234.....xlv, 125
 Traynham v. Jackson, 15 Texas, 170.....lv, 152
 Treadwell v. Balkley, 4 Day, 395.....iv, 225
 Treadwell v. Davis, 34 California, 601.....xciv, 770
 Treadwell v. Marden, 123 Massachusetts, 230...35, 108
 Treadwell v. Salisbury Mfg. Co., 7 Gray, 363...lxvi, 490
 Treasurer of Vermont v. Mann, 24 Va. 371.....lxix, 698
 Treasurers v. McDowell, 1 Hull, 184.....xxvi, 166
 Treat v. Browning, 4 Connecticut, 406.....x, 186
 Treat v. Hiles, 66 Wisconsin, 344.....60, 558
 Treat v. Lord, 42 Maine, 532.....lxvi, 296
 Treat v. Union Insurance Co., 56 Maine, 231...xvii, 447
 Tremala v. Cohoes Co., 2 New York (2 Comst.) 163...li, 284
 Tremoulet v. Oona's Heirs, 6 Martin, N. S., 541...xvii, 195
 Trumpet v. Hamphill, 8 Leigh, 623.....xxxi, 673
 Trenholm v. Charleston, 3 South Carolina, 247...16, 728
 Trent v. Trent, Gilmer, 174.....ix, 394
 Trenton etc. Co. v. Perrine, 2 Zeh. 402.....lvii, 409
 Treven v. Maddox, 11 Louisiana An. 206.....lxvi, 199
 Trevor v. Wood, 36 New York, 307.....xxiii, 611
 Trexler ada. State, 2 Carolina Law Repos. 92...vi, 508
 Tribble v. Frame, 7 J. J. Marshall, 592.....xxiii, 439
 Trice v. Cockran, 8 Grattan, 442.....lvi, 151
 Trieber v. Knabe, 12 Maryland, 491.....lxvi, 607
 Trigg v. Read, 5 Humphreys, 529.....xlii, 447
 Trigg v. St. Louis, K. O. & N. R. Co., 74 Mo. 147...41, 305
 Trigg v. Taylor, 27 Missouri, 245.....lxix, 263
 Trim v. Commonwealth, 18 Gratt. 363.....xxviii, 768
 Trimble v. Boothby, 14 Ohio, 109.....xiv, 608
 Trimble v. Coons, 2 A. K. Marshall, 376.....xii, 611
 Trimble v. Foster, 37 Missouri, 49.....56, 440
 Trimble v. Spiller, 7 T. B. Monroe, 394.....xviii, 198
 Trimble v. Thorne, 16 Johnson, 122.....viii, 99
 Trimble v. Turner, 13 Smedes & M. 348.....xii, 99
 Trimm v. Marsh, 54 New York, 599.....13, 622
 Trimmer v. Viss, 17 South Carolina, 489.....43, 634
 Trinkle v. Reeves, 25 Illinois, 214.....lxvii, 798
 Triplett v. Allen, 26 Gratt. 721.....21, 329
 Tripp v. Curtemus, 36 Michigan, 494.....34, 616
 Tripp v. Hascoll, 20 Michigan, 264.....4, 308
 Trialer v. Williamson, 4 Harris & McH. 219.....1, 608
 Trosvart v. Decker, 51 Wisconsin, 46.....37, 809
 Trotter v. Cassidy, 3 A. K. Marshall, 288.....xii, 129
 Trotter v. Curtis, 19 Johnson, 169.....x, 212
 Trotter v. Howard, 1 Hawks, 230.....ix, 409
 Trotter v. Hughes, 12 N. Y. (3 Kernan), 74.....lxii, 137
 Troughton v. Johnston, 3 Haywood, 238.....ii, 629
 Trout v. Emmons, 29 Illinois, 433.....lxixi, 308
 Troutman ada. Jenkins, 7 Jones' L. 169.....lxv, 429
 Trovillo v. Tilford, 6 Watts, 468.....lxixi, 484
 Trow v. Vermont C. R. R. Co., 24 Vermont, 487...lviii, 192
 Trowbridge v. Means, 5 Arkansas, 126.....xxix, 368
 Trowbridge v. True, 23 Connecticut, 120.....53, 579
 Troy v. Cheshire R. R. Co., 23 New Hamp. 53...iv, 177
 Troy & R. R. Co. v. Foster, 43 Vermont, 265...1, 326
 Trubee v. Miller, 48 Connecticut, 247.....49, 177
 Trudo v. Anderson, 10 Michigan, 357.....lxixi, 738
 True v. International Tel. Co., 60 Maine, 9.....11, 159
 True v. Ranney, 21 New Hampshire, 62.....xii, 164
 Trueblood v. Trueblood, 8 Indiana, 156.....lv, 758
 Truth Brothers & Co. v. Caldwell, 3 Minn. 264...lxixiv, 764
 Trull v. Bigelow, 16 Massachusetts, 406.....viii, 144
 Trull v. Eastman, 3 Metcalf, 151.....xxvii, 126
 Trull v. Howland, 10 Cushing, 109.....lvii, 83
 Trullinger v. Koford, 7 Oregon, 228.....33, 708
 Truly v. Lane, 7 Smedes & M. 325.....xiv, 308
 Trumbo v. Sorrensen, 3 T. B. Monroe, 394.....xvi, 103
 Trumbull v. Gibbons, 3 Zabrickie, 117.....ii, 269
 Truss v. Old, 6 Randolph, 556.....xviii, 748
 Trussel v. Lewis, 13 Nebraska, 615.....43, 767
 Trustees v. Garvey, 63 Illinois, 401.....5, 51
 Trustees v. Kirk, 84 New York, 215.....36, 606
 Trustees v. Lynch, 70 New York, 440.....38, 618
 Trustees of Brooke Academy v. George, 14 West Virginia, 411.....35, 788
 Trustees of Columbia Coll. v. Thacher, 57 New York, 311.....42, 385
 Trustees of Exempt F. F. v. Rooms, 23 N. Y. 212...45, 227
 Trustees of First Evang. Church v. Walsh, 57 Illinois, 363.....11, 21
 Trustees of Griswold Coll. v. State, 46 Iowa, 275...20, 128
 Trustees of Howard Coll. v. Turner, 71 Ala. 426...46, 323
 Trustees of Int. Imp. F. v. Bailey, 10 Fla. 112...lxixi, 194
 Trustees of I. & M. Canal v. People, 12 Ill. 248...iii, 426
 Trustees of Jacobs v. Bull, 1 Watts, 376.....xxvi, 73

Roman letters (xlix) refer to volumes of American Decisions, and Arabic figures (49) to American Reports.

- Tilton v. Beecher, 20 New York, 178.....17, 337
 Tilton v. Miller, 65 Pennsylvania State, 290.....5, 373
 Tilton v. Wright, 74 Maine, 214.....43, 578
 Timmerman v. Dever, 52 Michigan, 34.....54, 240
 Timmons v. State, 24 Ohio State, 498.....32, 376
 Timms v. Shannon, 19 Maryland, 236.....lxix, 632
 Timrod v. Shoolbred, 1 Bay, 284.....i, 620
 Tindal v. Touchberry, 3 Strobhart's Law, 177.....xlix, 637
 Tindal ada. Den ex dem. Conover, 1 Spenser, 214.....i, 220
 Tindal ada. People, 19 California, 588.....lxix, 77
 Tindley v. Salem, 137 Massachusetts, 171.....54, 239
 Tingus v. Meale, 25 Maryland, 450.....x, 73
 Tinkum F. Co. v. Carter, 90 Pennsylvania St. 80.....25, 632
 Tinkum Fishing Co. v. Carter, 61 Penn. St. 21.....c, 597
 Timber v. Merrill, 20 Vermont, 477.....xlv, 345
 Timen v. Mebane, 10 Texas, 248.....lx, 205
 Timney v. Ashby, 15 Pickering, 546.....xxvi, 630
 Timman v. Belvidere Del. R. R. Co., 1 Dutch, 228.....lxv, 415
 Timman v. Belvidere D. R. R., 2 Dutcher, 148.....lxix, 565
 Tio v. Vance, 11 Louisiana, 150.....xxx, 715
 Tios v. Radovich, 10 Louisiana An. 101.....xlii, 592
 Tippet v. Mize, 20 Texas, 261.....xlv, 213
 Tisdale v. Conn. M. L. Ins. Co., 20 Iowa, 170.....xvi, 136
 Tisdale v. Tisdale, 2 Speed, 594.....lxiv, 775
 Tisher v. Beckwith, 20 Wisconsin, 55.....ii, 544
 Tlame v. Baltimore & O. R. R. Co., 113 Pennsyl-
 vania State, 61.....54, 310
 Tison v. Bowden, 8 Florida, 61.....lxix, 101
 Tison v. Yawn, 15 Georgia, 491.....lx, 708
 Tiltow v. Tiltow, 54 Penn. St. 218.....xxiii, 601
 Tiltworth v. Stout, 40 Illinois, 78.....xv, 577
 Title v. Thomas, 20 Mississippi, 122.....lxiv, 154
 Titus ada. Commonwealth, 115 Massachusetts, 43.....17, 138
 Titus v. Inhab. of Northbridge, 27 Mass. 259.....xxiii, 91
 Titus v. Morse, 40 Maine, 248.....lxiii, 665
 Titus v. Whitney, 1 Harrison, 88.....xxxi, 228
 Titman ada. Commonwealth, 8 Gray, 378.....lxix, 248
 Tobey v. Barber, 8 Johnson, 68.....iv, 236
 Tobey v. Wood, 123 Massachusetts, 68.....25, 27
 Tobies v. Francis, 2 Vermont, 435.....xlii, 217
 Tobies v. Linberger, 105 New York, 484.....59, 609
 Tobin v. Bass, 55 Missouri, 654.....55, 392
 Tobin ada. Commonwealth, 125 Mass. 208.....28, 220
 Tobin v. Deal, 60 Wisconsin, 57.....54, 345
 Tobin v. Portland S. & P. R. R. Co., 68 Maine, 128.....8, 415
 Tobin v. Shaw, 45 Maine, 331.....lxix, 547
 Tod v. Gallagher, 16 Serg. & R. 261.....xvi, 571
 Todd v. Birdell, 1 Cowen, 280.....xiii, 522
 Todd v. Flournoy, 68 Alabama, 29.....28, 758
 Todd v. Landry, 5 Martin, 459.....xii, 479
 Todd v. Old Colony & F. R. R. R., 2 Allen, 18.....lxix, 49
 Todd v. Old Colony etc. R. R. Co., 7 Allen, 207.....lxix, 679
 Todd v. Summers, 2 Gratian, 187.....xlv, 370
 Todd v. Weber, 25 New York, 181.....47, 90
 Tognini v. Kyle, 17 Nevada, 259.....44, 442
 Tolar v. Tolar, 1 Deveraux's Eq. 498.....xviii, 586
 Tolar v. Tolar, 3 Hawley, 74.....xlv, 575
 Toledo etc. R. R. Co. v. Harmon, 47 Ill. 284.....xv, 499
 Toledo etc. R. R. Co. v. Rodriguez, 47 Ill., 128.....xv, 484
 Toledo, P. & W. Ry Co. v. Pinder, 68 Ill. 447.....5, 57
 Toledo P. & W. Ry Co. v. Marshall, 68 Ill. 123.....4, 580
 Toledo W. etc. R. R. Co. v. Baddeley, 54 Illi-
 nois, 19.....5, 71
 Toledo, W. & W. R. Co. v. Bagg, 65 Ill. 68.....22, 613
 Toledo W. & W. R. Co. v. Grush, 67 Illi-
 nois, 221.....16, 612
 Toledo, W. & W. R. Co. v. Hammond, 20 In-
 diana, 379.....5, 221
 Toledo, W. & W. R. Co. v. Jacksonville, 67 Illi-
 nois, 67.....16, 611
 Toledo, W. & W. R. Co. v. Wright, 90 Ind. 284.....24, 377
 Tolson v. Tolson, 2 Blackford, 407.....xli, 78
 Tolle v. Corroth, 21 Texas, 322.....xviii, 56
 Tolle v. Orth, 75 Indiana, 296.....22, 19
 Tolliver ada. Commonwealth, 5 Gray, 528.....lxix, 20
 Tolman v. Syracuse, R. & N. Y. R. R. Co., 98
 New York, 198.....59, 69
 Tombesbee Bank v. Goddard, 3 Stewart, 228.....xx, 9
 Tombesbee Bank v. Strong, 1 Stew. & P. 127.....xii, 67
 Tombs v. Alexander, 161 Massachusetts, 258.....8, 29
 Tome v. Parkersburg R. R. Co., 20 Maryland, 28.....17, 59
 Tomkins v. Tomkins, 1 Bailey's Law, 28.....lxix, 59
 Tomlin v. Dubuque, R. & M. R. R. Co., 28
 Iowa, 186.....7, 126
 Tomlin v. Ellard, 43 Illinois, 280.....xxii, 12
 Tomlinson v. Roberts, 25 Connecticut, 427.....lxviii, 27
 Tompkins v. Batts, 11 Nebraska, 147.....28, 26
 Tompkins v. Dudley, 25 New York, 372.....lxix, 29
 Tompkins v. Hallock, 123 Massachusetts, 22.....42, 49
 Tompkins v. Sands, 8 Wendell, 463.....xxix, 4
 Tompkins v. Vintroux, 3 West Virginia, 148.....4, 12
 Tompsett v. Tompsett, 13 Bush, 224.....28, 27
 Tonawanda R. R. Co. v. Mungar, 5 Denio, 228.....lxix, 29
 Tone v. Columbus, 20 Ohio State, 221.....48, 49
 Toner v. Collins, 67 Iowa, 299.....54, 29
 Tongue v. Nutwell, 17 Maryland, 212.....lxix, 69
 Toole v. Beckett, 67 Maine, 544.....24, 2
 Toole ada. State, 29 Connecticut, 242.....lxix, 62
 Tooley v. Gridley, 3 Smedes & M. 498.....xii, 69
 Toomer v. Purby, 1 Mill, 222.....xi, 62
 Toomer v. Rutland, 57 Alabama, 379.....28, 72
 Toomas, Estate of, 54 California, 599.....24, 2
 Tootle v. Clifton, 22 Ohio State, 247.....28, 72
 Tootle v. Hightler, 14 Nebraska, 128.....42, 29
 Topham v. Chapman, 1 Mill, 208.....xi, 67
 Topham v. Loviston, 74 Maine, 238.....42, 29
 Topham v. Roche, 2 Hill, 207.....xxvii, 67
 Torbush v. Norwich, 25 Connecticut, 298.....9, 29
 Torinus ada. State, 25 Minnesota, 1.....27, 29
 Torre v. Summers, 2 Holt & McC. 207.....2, 67
 Torrence v. Davidson, 22 North Carolina, 427.....53, 69
 Torrence v. Irwin, 2 Yeates, 219.....1, 29
 Torrent v. Common Council, 47 Michigan, 125.....41, 715
 Torrey v. Burnett, 9 Vroom, 457.....28, 61
 Totten v. Cole, 23 Missouri, 128.....lxix, 27
 Touchard v. Crow, 20 California, 198.....lxix, 29
 Tourne v. Lee, 8 Martin, N. S., 548.....xx, 29
 Tour v. Canin, 1 Holt & McC. 173.....ix, 69
 Tours v. Vreelandt, 2 Halsted, 222.....xi, 68
 Towell v. Gatewood, 2 Seamen, 22.....xxviii, 67
 Tower v. President, Directors and Company of
 Appleton Bank, 2 Allen, 207.....lxix, 679
 Tower v. Ulton etc. R. R. Co., 7 Hill (N. Y.), 47.....xi, 6
 Tower's Appropriation, 9 Watts & Serg. 128.....xii, 29
 Towle v. Eastern R., 15 New Hampshire, 547.....xvii, 12
 Towle v. Ewing, 20 Wisconsin, 221.....xix, 27
 Towle v. Leavitt, 20 New Hampshire, 228.....iv, 29
 Towle v. Marrett, 3 Greenleaf, 61.....xv, 29
 Towle v. Pierce, 12 Metcalf, 229.....xvi, 67
 Towle v. Wood, 60 New Hampshire, 624.....42, 29
 Towles v. Burton, Rich. Eq. Cases, 148.....xix, 69
 Town of —. See Name of Town.
 Town v. Needham, 2 Paige's Ch. 548.....xix, 29
 Town v. Syndics of Morgan, 2 Louisiana, 122.....xx, 29
 Town v. Washburn, 14 Minnesota, 298.....4, 69
 Town of East Kingston v. Towle, 42 N. H. W., xxvii, 29
 Town of Grafton v. Fellansbee, 15 N. Hamp. 428.....x, 72
 Town of Hinesburgh v. Sumner, 9 Vermont, 28.....xix, 69
 Town of Jericho ada. State, 40 Vermont, 121.....xv, 27
 Town of St. Albans v. Bush, 4 Vermont, 28.....xxvi, 29

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Town Council of Akron v. McCook, 18 Ohio, 229...ii, 483
 Towne v. Flake, 127 Massachusetts, 128.....34, 253
 Towne v. Jaquith, 6 Massachusetts, 45.....iv, 84
 Towne v. Wiley, 23 Vermont, 355.....lvi, 85
 Townes v. Durbin, 3 Met. (Ky.) 353.....lxvii, 178
 Towns v. Nina, 5 New Hampshire, 259.....xx, 578
 Towns v. Pratt, 33 New Hampshire, 345.....lxvi, 736
 Towns v. Vicksburg, S. & P. R. R. Co., 37 Louisiana An. 630.....55, 608
 Townsend v. Board of Water Comm'rs, 68 Ill. 26...14, 109
 Townsend v. Davis, 1 Georgia, 495.....xlv, 678
 Townsend v. Goewey, 19 Wendell, 424.....xxxii, 514
 Townsend v. Houston, 17 Harrington, 282.....xxvii, 732
 Townsend v. Kendall, 4 Minnesota, 412.....lxvii, 534
 Townsend v. Long, 77 Pennsylvania St. 143.....18, 438
 Townsend v. McDonald, 12 N. Y. (2 Kernan), 351...lxiv, 508
 Townsend v. N. Y. Cent. etc. R. R. Co., 54 New York, 395.....15, 419
 Townsend v. Smith, 1 Bensley's Ch. 350.....lxvii, 403
 Townsend v. Smith, 20 Texas, 465.....lxx, 400
 Townsend v. Smith, 47 Wisconsin, 623.....32, 793
 Townsend v. Star Wagon Co., 10 Nebraska, 615...35, 493
 Townsend v. Tallant, 33 California, 45.....xci, 617
 Townsend v. Townsend, 4 Cold. 70.....xciv, 185
 Townsend v. Townsend, 1 Peck, 1.....xviii, 722
 Townsend's Appeal, 106 Pennsylvania St. 368.....51, 523
 Township of —, See Name of Township.
 Towsey v. Shock, 3 Blackford, 257.....xxv, 198
 Towley v. Moore, 20 Ohio St. 125.....37, 434
 Townon v. Havre de Grace Bk., 6 Harris & J. 47...xiv, 264
 Trahe v. Mays, 3 Dana, 126.....lxviii, 61
 Tracy v. Albany Bk. Co., 7 N. Y. (3 Selden), 472...lvi, 538
 Tracy v. Atherton, 25 Vermont, 62.....lxviii, 621
 Tracy v. Sackett, 1 Ohio State, 54.....lxix, 610
 Tracy v. Talmage, 14 N. Y. (4 Kernan), 163.....lxvii, 128
 Tracy v. Troy & R. R. Co., 36 New York, 433.....xviii, 84
 Tracy v. Williams, 4 Connecticut, 107.....x, 102
 Trade Ins. Co. v. Barradill, 16 Vroom, 543.....46, 793
 Trader v. Childster, 41 Arkansas, 242.....48, 86
 Traflet v. Hawes, 102 Massachusetts, 533.....3, 494
 Trafford v. Hall, 7 Rhode Island, 104.....lxviii, 589
 Train v. Boston D. Co., 144 Massachusetts, 523...59, 113
 Trainor v. Morrison, 78 Maine, 160.....57, 730
 Transall v. Russellville, 34 Arkansas, 105.....36, 1
 Transatlantic F. Ins. Co. v. Dorney, 56 Md. 70...46, 403
 Transfer Co. v. Kelly, 26 Ohio St. 86.....33, 558
 Transylvania Univ. v. Lexington, 3 B. Mon. 25...xxviii, 173
 Trapnell v. McAfee, 3 Met. (Kentucky), 34.....lxviii, 152
 Trapnell v. Richardson, W. & Co., 13 Ark. 543...lviii, 438
 Trapnell, Ex parte, 6 Arkansas, 9.....xiii, 676
 Trask v. State F. & M. Ins. Co., 29 Penn. St. 198...lxvii, 623
 Trask ada. State, 6 Vermont, 355.....xxvii, 554
 Traub v. Miliken, 57 Maine, 63.....2, 14
 Traver v. Merrick County, 14 Nebraska, 327.....45, 111
 Travis v. Brown, 43 Penn. State, 9.....lxviii, 540
 Travis v. Smith, 1 Penn. State, 234.....xlv, 123
 Trayham v. Jackson, 15 Texas, 176.....lxv, 155
 Treadwell v. Bulkeley, 4 Day, 336.....iv, 225
 Treadwell v. Davis, 24 California, 601.....xciv, 770
 Treadwell v. Marden, 123 Massachusetts, 260.....25, 108
 Treadwell v. Salisbury Mfg. Co., 7 Gray, 393.....lxvi, 490
 Treasurer of Vermont v. Mann, 24 Va. 371.....lxxx, 688
 Treasurers v. McDowell, 1 Hill, 184.....xxvi, 166
 Treat v. Browning, 4 Connecticut, 408.....x, 188
 Treat v. Hiles, 66 Wisconsin, 344.....64, 858
 Treat v. Lord, 42 Maine, 522.....lxvi, 298
 Treat v. Union Insurance Co., 58 Maine, 231.....xvii, 447
 Treudaia v. Coboes Co., 2 New York (2 Comst.) 163...ii, 284
 Tremoulet v. Oenar' Heira, 6 Martin, N. S., 541...xvii, 195
 Tremper v. Hamphill, 8 Leigh, 623.....xxxi, 673
 Trenholm v. Charleston, 3 South Carolina, 247...16, 728
 Trent v. Trent, Gilmer, 174.....ix, 894
 Trenton etc. Co. v. Perrina, 3 Zab. 402.....lvii, 409
 Tresca v. Maddox, 11 Louisiana An. 306.....lxvi, 196
 Trevor v. Wood, 36 New York, 307.....xxiii, 611
 Trezler ada. State, 2 Carolina Law Repos. 92.....vi, 526
 Tribble v. Frame, 7 J. J. Marshall, 392.....xxiii, 439
 Trice v. Cockran, 8 Grattan, 442.....lvi, 151
 Trieber v. Knabe, 12 Maryland, 491.....lxvi, 607
 Trigg v. Read, 5 Humphreys, 529.....xliii, 447
 Trigg v. St. Louis, K. O. & N. R. Co. 74 Mo. 147...41, 305
 Trigg v. Taylor, 27 Missouri, 245.....lxvii, 263
 Trim v. Commonwealth, 18 Gratt. 982.....xxviii, 755
 Trimble v. Boothby, 14 Ohio, 109.....xiv, 826
 Trimble v. Coons, 2 A. K. Marshall, 378.....xii, 411
 Trimble v. Foster, 37 Missouri, 49.....56, 420
 Trimble v. Spiller, 7 T. B. Monroe, 394.....xviii, 139
 Trimble v. Thorne, 16 Johnson, 122.....viii, 268
 Trimble v. Turner, 13 Smodes & M. 242.....xii, 99
 Trimma v. Marsh, 54 New York, 599.....13, 622
 Trimmer v. Vise, 17 South Carolina, 499.....43, 624
 Trinkle v. Reeves, 25 Illinois, 214.....lxvii, 779
 Triplett v. Allen, 26 Gratt. 721.....21, 229
 Tripp v. Curtiss, 36 Michigan, 494.....34, 616
 Tripp v. Haseg, 20 Michigan, 354.....4, 328
 Trisler v. Williamson, 4 Harris & McH. 219.....1, 268
 Troewert v. Decker, 51 Wisconsin, 46.....37, 808
 Trotter v. Casidy, 3 A. K. Marshall, 268.....xiii, 129
 Trotter v. Curtis, 19 Johnson, 169.....x, 212
 Trotter v. Howard, 1 Hawke, 230.....lx, 609
 Trotter v. Hughes, 12 N. Y. (2 Kernan), 74.....lxii, 127
 Troughton v. Johnston, 2 Haywood, 229.....ii, 622
 Trout v. Hummons, 29 Illinois, 433.....lxvii, 628
 Troutman ada. Jenkins, 7 Jones' L. 109.....lxv, 499
 Trovillo v. Tilford, 6 Waite, 468.....xxxi, 494
 Trow v. Vermont C. R. R. Co., 24 Vermont, 487...lviii, 191
 Trowbridge v. Meana, 5 Arkansas, 126.....xxix, 268
 Trowbridge v. True, 23 Connecticut, 199.....52, 879
 Troy v. Cheshire R. R. Co. 23 New Hamp. 83...iv, 177
 Troy & R. R. Co. v. Foster, 42 Vermont, 298...1, 325
 Trubee v. Miller, 48 Connecticut, 347.....46, 177
 Trudo v. Anderson, 10 Michigan, 297.....lxvii, 708
 True v. International Tel. Co., 60 Maine, 9.....ii, 126
 True v. Ranney, 21 New Hampshire, 62.....xii, 164
 Trueblood v. Trueblood, 5 Indiana, 196.....lxv, 779
 Truitt Brothers & Co. v. Caldwell, 3 Minn. 264...lxvii, 764
 Trull v. Bigelow, 16 Massachusetts, 408.....viii, 144
 Trull v. Eastman, 3 Metcalf, 121.....xxvii, 126
 Trull v. Howland, 10 Cushing, 109.....lvii, 62
 Trullinger v. Kotced, 7 Oregon, 222.....32, 702
 Truly v. Lana, 7 Smodes & M. 325.....xiv, 308
 Trumbo v. Sorrencoy, 3 T. B. Monroe, 394.....xvi, 103
 Trumbull v. Gibbons, 2 Zabrickie, 117.....ii, 263
 Truss v. Old, 6 Randolph, 555.....xvii, 748
 Trussel v. Lewis, 13 Nebraska, 415.....42, 767
 Trustees v. Garvey, 53 Illinois, 401.....5, 61
 Trustees v. Kirk, 24 New York, 215.....33, 606
 Trustees v. Lynch, 70 New York, 440.....26, 615
 Trustees of Brooks Academy v. Georgia, 14 West Virginia, 411.....32, 789
 Trustees of Columbia Coll. v. Theodor, 27 New York, 311.....41, 265
 Trustees of Exempt F. F. v. Rooms, 23 N. Y. 212...45, 227
 Trustees of First Evang. Church v. Walsh, 27 Illinois, 363.....11, 21
 Trustees of Griswold Coll. v. State, 46 Iowa, 275...26, 126
 Trustees of Howard Coll. v. Turner, 71 Ala. 429...46, 266
 Trustees of Int. Imp. F. v. Bailey, 10 Fla. 112...lxvii, 194
 Trustees of I. & M. Canal v. People, 12 Ill. 248...iii, 498
 Trustees of Jacobs v. Bull, 1 Waite, 276.....xxvi, 72

Til—Tow

TABLE

Roman letters [xliv] refer to volumes of American D

Tilton v. Beecher, 33 New York, 178.....	17, 337	
Tilton v. Miller, 66 Pennsylvania State, 388.....	5, 573	
Tilton v. Wright, 74 Maine, 214.....	43, 678	
Timmerman v. Dever, 33 Michigan, 34.....	50, 240	
Timmone v. State, 34 Ohio State, 438.....	32, 376	
Tinams v. Shannon, 19 Maryland, 298.....	lxviii, 632	
Tinrod v. Schoolbred, 1 Bay, 334.....	1, 620	
Tindal v. Touchberry, 3 Strobhart's Law, 177.....	xliv, 637	
Tindal ada. Den ex dem. Conover, 1 Spencer, 214.....	xi, 220	
Tinder ada. People, 19 California, 288.....	lxviii, 77	
Tindley v. Salem, 137 Massachusetts, 171.....	50, 239	
Tinges v. Moale, 25 Maryland, 430.....	xc, 73	
Tinicum F. Co. v. Carter, 30 Pennsylvania St. 35.....	35, 632	
Tinicum Fishing Co. v. Carter, 31 Penn. St. 21.....	c, 597	
Timber v. Merrill, 30 Vermont, 477.....	xciv, 345	
Tinnes v. Mahana, 10 Texas, 246.....	lx, 205	
Tinney v. Ashley, 15 Pickering, 544.....	xxvi, 620	
Timman v. Belvidere Del. R. R. Co., 1 Dutch, 258.....	lxiv, 415	
Timman v. Belvidere D. R. R., 2 Dutcher, 148.....	lxix, 565	
Tio v. Vance, 11 Louisiana, 199.....	xxx, 715	
Tios v. Radovich, 10 Louisiana An. 101.....	lxviii, 692	
Tippet v. Mine, 30 Texas, 261.....	xciv, 213	
Tisdale v. Conn. M. L. Ins. Co., 26 Iowa, 170.....	xvii, 136	
Tisdale v. Tisdale, 2 Speed, 386.....	lxiv, 775	
Tisher v. Beckwith, 30 Wisconsin, 65.....	11, 546	
Tissue v. Baltimore & O. R. R. Co., 112 Pennsylv-		
ania State, 31.....	56, 310	
Tison v. Bowden, 6 Florida, 61.....	lxvi, 101	
Tison v. Yawn, 15 Georgia, 481.....	lx, 708	
Titlow v. Titlow, 54 Penn. St. 216.....	xxviii, 691	
Titworth v. Stout, 49 Illinois, 78.....	xov, 577	
Title v. Thomas, 30 Mississippi, 123.....	lxiv, 154	
Titus ada. Commonwealth, 116 Massachusetts, 43, 17, 138		
Titus v. Inhab. of Northbridge, 37 Mass. 263.....	xxviii, 91	
Titus v. Morse, 40 Maine, 348.....	lxviii, 685	
Titus v. Whitney, 1 Harrison, 85.....	xxxi, 228	
Tivnon ada. Commonwealth, 8 Gray, 276.....	lxix, 248	
Tobay v. Barber, 5 Johnson, 68.....	lv, 326	
Tobay v. Wood, 123 Massachusetts, 38.....	35, 27	
Tobias v. Francis, 3 Vermont, 429.....	lxviii, 217	
Tobias v. Limberger, 105 New York, 404.....	59, 509	
Tobin v. Bass, 35 Missouri, 654.....	55, 392	
Tobin ada. Commonwealth, 126 Mass. 294.....	28, 220	
Tobin v. Deal, 60 Wisconsin, 67.....	54, 345	
Tobin v. Portland S. & P. R. R. Co., 30 Maine, 123.....	6, 415	
Tobin v. Shaw, 45 Maine, 331.....	lxvi, 547	
Tod v. Gallagher, 16 Serg. & R. 261.....	xvi, 571	
Todd v. Birdsell, 1 Cowen, 250.....	lxviii, 522	
Todd v. Flournoy, 56 Alabama, 50.....	28, 758	
Todd v. Landry, 5 Martin, 459.....	xii, 479	
Todd v. Old Colony & F. R. R. R., 3 Allen, 18.....	lxix, 49	
Todd v. Old Colony etc. R. R. Co., 7 Allen, 237.....	lxviii, 679	
Todd v. Summers, 2 Grattan, 167.....	lxiv, 379	
Todd v. Weber, 33 New York, 151.....	47, 20	
Tognini v. Kyle, 17 Nevada, 209.....	45, 443	
Tolar v. Tolar, 1 Devereux's Eq. 484.....	lxviii, 598	
Tolar v. Tolar, 3 Hawk, 74.....	lxiv, 575	
Toledo etc. R. R. Co. v. Harmon, 47 Ill. 288.....	xov, 489	
Toledo etc. R. R. Co. v. Rodriguez, 47 Ill., 128.....	xov, 484	
Toledo, P. & W. Ry Co. v. Pinder, 63 Ill. 447.....	5, 57	
Toledo P. & W. Ry Co. v. Merriman, 63 Ill. 123.....	4, 590	
Toledo W. etc. R. R. Co. v. Baddley, 54 Ill-		
nois, 19.....	5, 71	
Toledo, W. & W. R. Co. v. Begg, 35 Ill. 38.....	23, 613	
Toledo W. & W. R. R. Co. v. Grush, 47 Ill-		
nois, 262.....	14, 618	
Toledo, W. & W. R. R. Co. v. Hammond, 33 In-		
diana, 379.....	5, 221	
Toledo, W. & W. R. R. Co. v. Jacksonville, 47 Ill-		
nois, 37.....	16, 611	
Tilton v. Beecher, 33 New York, 178.....	17, 337	
Tilton v. Miller, 66 Pennsylvania State, 388.....	5, 573	
Tilton v. Wright, 74 Maine, 214.....	43, 678	
Timmerman v. Dever, 33 Michigan, 34.....	50, 240	
Timmone v. State, 34 Ohio State, 438.....	32, 376	
Tinams v. Shannon, 19 Maryland, 298.....	lxviii, 632	
Tinrod v. Schoolbred, 1 Bay, 334.....	1, 620	
Tindal v. Touchberry, 3 Strobhart's Law, 177.....	xliv, 637	
Tindal ada. Den ex dem. Conover, 1 Spencer, 214.....	xi, 220	
Tinder ada. People, 19 California, 288.....	lxviii, 77	
Tindley v. Salem, 137 Massachusetts, 171.....	50, 239	
Tinges v. Moale, 25 Maryland, 430.....	xc, 73	
Tinicum F. Co. v. Carter, 30 Pennsylvania St. 35.....	35, 632	
Tinicum Fishing Co. v. Carter, 31 Penn. St. 21.....	c, 597	
Timber v. Merrill, 30 Vermont, 477.....	xciv, 345	
Tinnes v. Mahana, 10 Texas, 246.....	lx, 205	
Tinney v. Ashley, 15 Pickering, 544.....	xxvi, 620	
Timman v. Belvidere Del. R. R. Co., 1 Dutch, 258.....	lxiv, 415	
Timman v. Belvidere D. R. R., 2 Dutcher, 148.....	lxix, 565	
Tio v. Vance, 11 Louisiana, 199.....	xxx, 715	
Tios v. Radovich, 10 Louisiana An. 101.....	lxviii, 692	
Tippet v. Mine, 30 Texas, 261.....	xciv, 213	
Tisdale v. Conn. M. L. Ins. Co., 26 Iowa, 170.....	xvii, 136	
Tisdale v. Tisdale, 2 Speed, 386.....	lxiv, 775	
Tisher v. Beckwith, 30 Wisconsin, 65.....	11, 546	
Tissue v. Baltimore & O. R. R. Co., 112 Pennsylv-		
ania State, 31.....	56, 310	
Tison v. Bowden, 6 Florida, 61.....	lxvi, 101	
Tison v. Yawn, 15 Georgia, 481.....	lx, 708	
Titlow v. Titlow, 54 Penn. St. 216.....	xxviii, 691	
Titworth v. Stout, 49 Illinois, 78.....	xov, 577	
Title v. Thomas, 30 Mississippi, 123.....	lxiv, 154	
Titus ada. Commonwealth, 116 Massachusetts, 43, 17, 138		
Titus v. Inhab. of Northbridge, 37 Mass. 263.....	xxviii, 91	
Titus v. Morse, 40 Maine, 348.....	lxviii, 685	
Titus v. Whitney, 1 Harrison, 85.....	xxxi, 228	
Tivnon ada. Commonwealth, 8 Gray, 276.....	lxix, 248	
Tobay v. Barber, 5 Johnson, 68.....	lv, 326	
Tobay v. Wood, 123 Massachusetts, 38.....	35, 27	
Tobias v. Francis, 3 Vermont, 429.....	lxviii, 217	
Tobias v. Limberger, 105 New York, 404.....	59, 509	
Tobin v. Bass, 35 Missouri, 654.....	55, 392	
Tobin ada. Commonwealth, 126 Mass. 294.....	28, 220	
Tobin v. Deal, 60 Wisconsin, 67.....	54, 345	
Tobin v. Portland S. & P. R. R. Co., 30 Maine, 123.....	6, 415	
Tobin v. Shaw, 45 Maine, 331.....	lxvi, 547	
Tod v. Gallagher, 16 Serg. & R. 261.....	xvi, 571	
Todd v. Birdsell, 1 Cowen, 250.....	lxviii, 522	
Todd v. Flournoy, 56 Alabama, 50.....	28, 758	
Todd v. Landry, 5 Martin, 459.....	xii, 479	
Todd v. Old Colony & F. R. R. R., 3 Allen, 18.....	lxix, 49	
Todd v. Old Colony etc. R. R. Co., 7 Allen, 237.....	lxviii, 679	
Todd v. Summers, 2 Grattan, 167.....	lxiv, 379	
Todd v. Weber, 33 New York, 151.....	47, 20	
Tognini v. Kyle, 17 Nevada, 209.....	45, 443	
Tolar v. Tolar, 1 Devereux's Eq. 484.....	lxviii, 598	
Tolar v. Tolar, 3 Hawk, 74.....	lxiv, 575	
Toledo etc. R. R. Co. v. Harmon, 47 Ill. 288.....	xov, 489	
Toledo etc. R. R. Co. v. Rodriguez, 47 Ill., 128.....	xov, 484	
Toledo, P. & W. Ry Co. v. Pinder, 63 Ill. 447.....	5, 57	
Toledo P. & W. Ry Co. v. Merriman, 63 Ill. 123.....	4, 590	
Toledo W. etc. R. R. Co. v. Baddley, 54 Ill-		
nois, 19.....	5, 71	
Toledo, W. & W. R. Co. v. Begg, 35 Ill. 38.....	23, 613	
Toledo W. & W. R. R. Co. v. Grush, 47 Ill-		
nois, 262.....	14, 618	
Toledo, W. & W. R. R. Co. v. Hammond, 33 In-		
diana, 379.....	5, 221	
Toledo, W. & W. R. R. Co. v. Jacksonville, 47 Ill-		
nois, 37.....	16, 611	
Tilton v. Beecher, 33 New York, 178.....	17, 337	
Tilton v. Miller, 66 Pennsylvania State, 388.....	5, 573	
Tilton v. Wright, 74 Maine, 214.....	43, 678	
Timmerman v. Dever, 33 Michigan, 34.....	50, 240	
Timmone v. State, 34 Ohio State, 438.....	32, 376	
Tinams v. Shannon, 19 Maryland, 298.....	lxviii, 632	
Tinrod v. Schoolbred, 1 Bay, 334.....	1, 620	
Tindal v. Touchberry, 3 Strobhart's Law, 177.....	xliv, 637	
Tindal ada. Den ex dem. Conover, 1 Spencer, 214.....	xi, 220	
Tinder ada. People, 19 California, 288.....	lxviii, 77	
Tindley v. Salem, 137 Massachusetts, 171.....	50, 239	
Tinges v. Moale, 25 Maryland, 430.....	xc, 73	
Tinicum F. Co. v. Carter, 30 Pennsylvania St. 35.....	35, 632	
Tinicum Fishing Co. v. Carter, 31 Penn. St. 21.....	c, 597	
Timber v. Merrill, 30 Vermont, 477.....	xciv, 345	
Tinnes v. Mahana, 10 Texas, 246.....	lx, 205	
Tinney v. Ashley, 15 Pickering, 544.....	xxvi, 620	
Timman v. Belvidere Del. R. R. Co., 1 Dutch, 258.....	lxiv, 415	
Timman v. Belvidere D. R. R., 2 Dutcher, 148.....	lxix, 565	
Tio v. Vance, 11 Louisiana, 199.....	xxx, 715	
Tios v. Radovich, 10 Louisiana An. 101.....	lxviii, 692	
Tippet v. Mine, 30 Texas, 261.....	xciv, 213	
Tisdale v. Conn. M. L. Ins. Co., 26 Iowa, 170.....	xvii, 136	
Tisdale v. Tisdale, 2 Speed, 386.....	lxiv, 775	
Tisher v. Beckwith, 30 Wisconsin, 65.....	11, 546	
Tissue v. Baltimore & O. R. R. Co., 112 Pennsylv-		
ania State, 31.....	56, 310	
Tison v. Bowden, 6 Florida, 61.....	lxvi, 101	
Tison v. Yawn, 15 Georgia, 481.....	lx, 708	
Titlow v. Titlow, 54 Penn. St. 216.....	xxviii, 691	
Titworth v. Stout, 49 Illinois, 78.....	xov, 577	
Title v. Thomas, 30 Mississippi, 123.....	lxiv, 154	
Titus ada. Commonwealth, 116 Massachusetts, 43, 17, 138		
Titus v. Inhab. of Northbridge, 37 Mass. 263.....	xxviii, 91	
Titus v. Morse, 40 Maine, 348.....	lxviii, 685	
Titus v. Whitney, 1 Harrison, 85.....	xxxi, 228	
Tivnon ada. Commonwealth, 8 Gray, 276.....	lxix, 248	
Tobay v. Barber, 5 Johnson, 68.....	lv, 326	
Tobay v. Wood, 123 Massachusetts, 38.....	35, 27	
Tobias v. Francis, 3 Vermont, 429.....	lxviii, 217	
Tobias v. Limberger, 105 New York, 404.....	59, 509	
Tobin v. Bass, 35 Missouri, 654.....	55, 392	
Tobin ada. Commonwealth, 126 Mass. 294.....	28, 220	
Tobin v. Deal, 60 Wisconsin, 67.....	54, 345	
Tobin v. Portland S. & P. R. R. Co., 30 Maine, 123.....	6, 415	
Tobin v. Shaw, 45 Maine, 331.....	lxvi, 547	
Tod v. Gallagher, 16 Serg. & R. 261.....	xvi, 571	
Todd v. Birdsell, 1 Cowen, 250.....	lxviii, 522	
Todd v. Flournoy, 56 Alabama, 50.....	28, 758	
Todd v. Landry, 5 Martin, 459.....	xii, 479	
Todd v. Old Colony & F. R. R. R., 3 Allen, 18.....	lxix, 49	
Todd v. Old Colony etc. R. R. Co., 7 Allen, 237.....	lxviii, 679	
Todd v. Summers, 2 Grattan, 167.....	lxiv, 379	
Todd v. Weber, 33 New York, 151.....	47, 20	
Tognini v. Kyle, 17 Nevada, 209.....	45, 443	
Tolar v. Tolar, 1 Devereux's Eq. 484.....	lxviii, 598	
Tolar v. Tolar, 3 Hawk, 74.....	lxiv, 575	
Toledo etc. R. R. Co. v. Harmon, 47 Ill. 288.....	xov, 489	
Toledo etc. R. R. Co. v. Rodriguez, 47 Ill., 128.....	xov, 484	
Toledo, P. & W. Ry Co. v. Pinder, 63 Ill. 447.....	5, 57	
Toledo P. & W. Ry Co. v. Merriman, 63 Ill. 123.....	4, 590	
Toledo W. etc. R. R. Co. v. Baddley, 54 Ill-		
nois, 19.....	5, 71	
Toledo, W. & W. R. Co. v. Begg, 35 Ill. 38.....	23, 613	
Toledo W. & W. R. R. Co. v. Grush, 47 Ill-		
nois, 262.....	14, 618	
Toledo, W. & W. R. R. Co. v. Hammond, 33 In-		
diana, 379.....	5, 221	
Toledo, W. & W. R. R. Co. v. Jacksonville, 47 Ill-		
nois, 37.....	16, 611	
Tilton v. Beecher, 33 New York, 178.....	17, 337	
Tilton v. Miller, 66 Pennsylvania State, 388.....	5, 573	
Tilton v. Wright, 74 Maine, 214.....	43, 678	
Timmerman v. Dever, 33 Michigan, 34.....	50, 240	
Timmone v. State, 34 Ohio State, 438.....	32, 376	
Tinams v. Shannon, 19 Maryland, 298.....	lxviii, 632	
Tinrod v. Schoolbred, 1 Bay, 334.....	1, 620	
Tindal v. Touchberry, 3 Strobhart's Law, 177.....	xliv, 637	
Tindal ada. Den ex dem. Conover, 1 Spencer, 214.....	xi, 220	
Tinder ada. People, 19 California, 288.....	lxviii, 77	
Tindley v. Salem, 137 Massachusetts, 171.....	50, 239	
Tinges v. Moale, 25 Maryland, 430.....	xc, 73	
Tinicum F. Co. v. Carter, 30 Pennsylvania St. 35.....	35, 632	
Tinicum Fishing Co. v. Carter, 31 Penn. St. 21.....	c, 597	
Timber v. Merrill, 30 Vermont, 477.....	xciv, 345	
Tinnes v. Mahana, 10 Texas, 246.....	lx, 205	
Tinney v. Ashley, 15 Pickering, 544.....	xxvi, 620	
Timman v. Belvidere Del. R. R. Co., 1 Dutch, 258.....	lxiv, 415	
Timman v. Belvidere D. R. R., 2 Dutcher, 148.....	lxix, 565	
Tio v. Vance, 11 Louisiana, 199.....	xxx, 715	
Tios v. Radovich, 10 Louisiana An. 101.....	lxviii, 692	
Tippet v. Mine, 30 Texas, 261.....	xciv, 213	
Tisdale v. Conn. M. L. Ins. Co., 26 Iowa, 170.....	xvii, 136	
Tisdale v. Tisdale, 2 Speed, 386.....	lxiv, 775	
Tisher v. Beckwith, 30 Wisconsin, 65.....	11, 546	
Tissue v. Baltimore & O. R. R. Co., 112 Pennsylv-		
ania State, 31.....	56, 310	
Tison v. Bowden, 6 Florida, 61.....	lxvi, 101	
Tison v. Yawn, 15 Georgia, 481.....	lx, 708	
Titlow v. Titlow, 54 Penn. St. 216.....	xxviii, 691	
Titworth v. Stout, 49 Illinois, 78.....	xov, 577	
Title v. Thomas, 30 Mississippi, 123.....	lxiv, 154	
Titus ada. Commonwealth, 116 Massachusetts, 43, 17, 138		
Titus v. Inhab. of Northbridge, 37 Mass. 263.....	xxviii, 91	
Titus v. Morse, 40 Maine, 348.....	lxviii, 685	
Titus v. Whitney, 1 Harrison, 85.....	xxxi, 228	
Tivnon ada. Commonwealth, 8 Gray, 276.....	lxix, 248	
Tobay v. Barber, 5 Johnson, 68.....	lv, 326	
Tobay v. Wood, 123 Massachusetts, 38.....	35, 27	
Tobias v. Francis, 3 Vermont, 429.....	lxviii, 217	
Tobias v. Limberger, 105 New York, 404.....	59, 509	
Tobin v. Bass, 35 Missouri, 654.....	55, 392	
Tobin ada. Commonwealth, 126 Mass. 294.....	28, 220	
Tobin v. Deal, 60 Wisconsin, 67.....	54, 345	
Tobin v. Portland S. & P. R. R. Co., 30 Maine, 123.....	6, 415	
Tobin v. Shaw, 45 Maine, 331.....	lxvi, 547	
Tod v. Gallagher, 16 Serg. & R. 261.....	xvi, 571	
Todd v. Birdsell, 1 Cowen, 250.....	lxviii, 522	
Todd v. Flournoy, 56 Alabama, 50.....	28, 758	
Todd v. Landry, 5 Martin, 459.....	xii, 479	
Todd v. Old Colony & F. R. R. R., 3 Allen, 18.....	lxix, 49	
Todd v. Old Colony etc. R. R. Co., 7 Allen, 237.....	lxviii, 679	
Todd v. Summers, 2 Grattan, 167.....	lxiv, 379	
Todd v. Weber, 33 New York, 151.....	47, 20	
Tognini v. Kyle, 17 Nevada, 209.....	45, 443	
Tolar v. Tolar, 1 Devereux's Eq. 484.....	lxviii, 598	
Tolar v. Tolar, 3 Hawk, 74.....	lxiv, 575	
Toledo etc. R. R. Co. v. Harmon, 47 Ill. 288.....	xov, 489	
Toledo etc. R. R. Co. v. Rodriguez, 47 Ill., 128.....	xov, 484	
Toledo, P. & W. Ry Co. v. Pinder, 63 Ill. 447.....	5, 57	
Toledo P. & W. Ry Co. v. Merriman, 63 Ill. 123.....	4, 590	
Toledo W. etc. R. R. Co. v. Baddley, 54 Ill-		
nois, 19.....	5, 71	
Toledo, W. & W. R. Co. v. Begg, 35 Ill. 38.....	23, 613	
Toledo W. & W. R. R. Co. v. Grush, 47 Ill-		
nois, 262.....	14, 618	
Toledo, W. & W. R. R. Co. v. Hammond, 33 In-		
diana, 379.....	5, 221	
Toledo, W. & W. R. R. Co. v. Jacksonville, 47 Ill-		
nois, 37.....	16, 611	

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Town Council of Akron v. McComb, 19 Ohio, 239...li, 483
 Towne v. Flato, 137 Massachusetts, 128.....34, 263
 Towne v. Jaquith, 6 Massachusetts, 46.....iv, 84
 Towne v. Wiley, 23 Vermont, 395.....iv, 85
 Townes v. Durbin, 3 Met. (Ky.) 263.....lxvii, 179
 Towns v. Nina, 5 New Hampshire, 269.....xx, 578
 Towns v. Pratt, 33 New Hampshire, 245.....lxvi, 736
 Towns v. Vicksburg, S. & P. E. R. Co., 37 Louisiana An. 630.....55, 806
 Townsend v. Board of Water Comm'rs, 69 Ill. 36...14, 109
 Townsend v. Davis, 1 Georgia, 495.....xlv, 675
 Townsend v. Goewey, 19 Wendell, 424.....xxxii, 614
 Townsend v. Houston, 1 Harrington, 582.....xxvii, 732
 Townsend v. Kendall, 4 Minnesota, 412.....lxvii, 534
 Townsend v. Long, 77 Pennsylvania St. 143.....18, 439
 Townsend v. McDonald, 13 N. Y. (3 Kernan), 361...xiv, 508
 Townsend v. N. Y. Cent. etc. R. R. Co., 54 New York, 298.....15, 419
 Townsend v. Smith, 1 Bosley's Ch. 350.....lxix, 403
 Townsend v. Smith, 20 Texas, 465.....lxx, 400
 Townsend v. Smith, 47 Wisconsin, 623.....32, 793
 Townsend v. Star Wagon Co., 10 Nebraska, 615...35, 493
 Townsend v. Tallant, 33 California, 45.....xcl, 617
 Townsend v. Townsend, 4 Cold. 70.....xclv, 185
 Townsend v. Townsend, 1 Peck, 1.....xiv, 722
 Townsend's Appeal, 106 Pennsylvania St. 268.....51, 523
 Township of —, See Name of Township.
 Towsey v. Shock, 3 Blackford, 267.....xv, 166
 Towsey v. Moore, 30 Ohio St. 155.....27, 434
 Towson v. Havre de Grace E't, 6 Harris & J. 47...xiv, 264
 Trabee v. Mays, 3 Dana, 128.....xxviii, 61
 Tracy v. Albany R. Co., 7 N. Y. (3 Selden), 471...lvii, 536
 Tracy v. Atherton, 25 Vermont, 62.....lxixii, 631
 Tracy v. Becket, 1 Ohio State, 54.....lix, 616
 Tracy v. Talmaage, 14 N. Y. (4 Kernan), 163.....lxvii, 128
 Tracy v. Troy & B. R. R., 26 New York, 453.....xviii, 84
 Tracy v. Williams, 4 Connecticut, 107.....x, 102
 Trade Ins. Co. v. Barradell, 16 Vroom, 543.....46, 792
 Trader v. Oldstedt, 41 Arkansas, 242.....48, 38
 Traffon v. Hawes, 103 Massachusetts, 632.....3, 494
 Trafford v. Hall, 7 Rhode Island, 104.....lxixii, 589
 Train v. Boston D. Co., 144 Massachusetts, 523...59, 113
 Trainor v. Morrison, 78 Maine, 160.....57, 780
 Transmilled v. Russellville, 34 Arkansas, 105.....36, 1
 Transatlantic F. Ins. Co. v. Dorsey, 56 Md. 70...46, 403
 Transfer Co. v. Kelly, 39 Ohio St. 66.....38, 558
 Transylvania Univ. v. Lexington, 3 B. Mon. 28...xxviii, 173
 Trapnall v. McAfee, 3 Met. (Kentucky), 34.....lxvii, 152
 Trapnall v. Richardson, W. & Co., 13 Ark. 543...lviii, 336
 Trapnall, Ex parte, 6 Arkansas, 9.....xiii, 676
 Trask v. State F. & M. Ins. Co., 39 Penn. St. 198...lxix, 632
 Trask ada. State, 6 Vermont, 265.....lxvii, 554
 Traub v. Miliken, 57 Maine, 63.....2, 14
 Traver v. Merrick County, 14 Nebraska, 327.....45, 111
 Travis v. Brown, 43 Penn. State, 9.....lxixii, 540
 Travis v. Smith, 1 Penn. State, 294.....xlv, 125
 Traynham v. Jackson, 15 Texas, 170.....lxv, 152
 Treadwell v. Bulkley, 4 Day, 296.....iv, 225
 Treadwell v. Davis, 34 California, 601.....xclv, 770
 Treadwell v. Marden, 123 Massachusetts, 260.....25, 108
 Treadwell v. Salisbury Mfg. Co., 7 Gray, 303.....lxvi, 430
 Treasurer of Vermont v. Mann, 34 Vt. 371.....lxxx, 688
 Treasurers v. McDowell, 1 Hill, 184.....lxvi, 166
 Treat v. Browning, 4 Connecticut, 408.....x, 126
 Treat v. Hiles, 68 Wisconsin, 344.....60, 858
 Treat v. Lord, 42 Maine, 522.....lxvi, 296
 Treat v. Union Insurance Co., 56 Maine, 231...xvii, 447
 Tremata v. Cohoes Co., 2 New York (2 Comst.) 163...ii, 234
 Tremoulet v. Omar Heira, 6 Martin, N. S., 541...xvii, 195
 Tremper v. Hamphill, 8 Leigh, 623.....xxxi, 673
 Trenholm v. Charleston, 3 South Carolina, 247...16, 738
 Trent v. Trent, Gilmer, 174.....ix, 804
 Trenton etc. Co. v. Perrine, 3 Zab. 402.....lvii, 409
 Treva v. Maddox, 11 Louisiana An. 206.....lxvi, 198
 Trevor v. Wood, 36 New York, 307.....xclii, 611
 Trexler ada. State, 2 Carolina Law Repos. 92.....vi, 698
 Tribble v. Frame, 7 J. J. Marshall, 599.....xxxiii, 439
 Trice v. Cockran, 8 Grattan, 442.....lvii, 151
 Trieber v. Knabe, 13 Maryland, 491.....lxvi, 607
 Trigg v. Read, 5 Humphreys, 829.....xlii, 447
 Trigg v. St. Louis, K. C. & N. R. Co., 74 Mo. 147...41, 305
 Trigg v. Taylor, 27 Missouri, 245.....lxixii, 263
 Trim v. Commonwealth, 18 Gratt. 263.....xviii, 768
 Trimble v. Boothby, 14 Ohio, 109.....xiv, 536
 Trimble v. Coons, 2 A. K. Marshall, 378.....xii, 411
 Trimble v. Foster, 57 Missouri, 49.....54, 449
 Trimble v. Spiller, 7 T. B. Monroe, 394.....xviii, 189
 Trimble v. Thorne, 16 Johnson, 123.....viii, 208
 Trimble v. Turner, 13 Smodes & M. 248.....lxi, 99
 Trimma v. Marsh, 54 New York, 599.....13, 622
 Trimmer v. Vies, 17 South Carolina, 499.....43, 624
 Trinkle v. Reeves, 25 Illinois, 214.....lxvi, 798
 Triplett v. Allen, 26 Gratt. 721.....51, 329
 Tripp v. Curtin, 36 Michigan, 494.....34, 619
 Tripp v. Haseg, 30 Michigan, 351.....4, 589
 Trisler v. Williamson, 4 Harris & M.H. 219.....1, 266
 Troswart v. Decker, 51 Wisconsin, 46.....37, 608
 Trotter v. Cassidy, 3 A. K. Marshall, 385.....xiii, 123
 Trotter v. Curtis, 19 Johnson, 169.....x, 312
 Trotter v. Howard, 1 Hawin, 280.....ix, 649
 Trotter v. Hughes, 12 N. Y. (3 Kernan), 74.....lxii, 137
 Troughton v. Johnston, 2 Haywood, 329.....ii, 628
 Trout v. Hammons, 29 Illinois, 433.....lxixi, 326
 Troutman ada. Jenkins, 7 Jones' L. 198.....lxv, 499
 Trovillo v. Tifford, 6 Watts, 468.....lxix, 484
 Trow v. Vermont C. R. R. Co., 24 Vermont, 687...lviii, 191
 Trowbridge v. Means, 5 Arkansas, 135.....lxix, 268
 Trowbridge v. True, 53 Connecticut, 190.....52, 679
 Troy v. Cheshire R. R. Co., 23 New Hamp. 33...lv, 177
 Troy & B. R. R. Co. v. Foster, 43 Vermont, 265...1, 528
 Trubee v. Miller, 48 Connecticut, 247.....46, 177
 Trudo v. Anderson, 10 Michigan, 367.....lxixii, 798
 True v. International Tel. Co., 60 Maine, 9.....11, 126
 True v. Ranney, 21 New Hampshire, 62.....lxii, 144
 Trueblood v. Trueblood, 8 Indiana, 196.....lxv, 798
 Truitt Brothers & Co. v. Caldwell, 3 Minn. 264...lxixiv, 764
 Trull v. Bigelow, 16 Massachusetts, 406.....viii, 144
 Trull v. Eastman, 3 Metcalf, 121.....lxvii, 126
 Trull v. Howland, 10 Cushing, 109.....lvii, 82
 Trullinger v. Koford, 7 Oregon, 828.....33, 708
 Truly v. Lane, 7 Smodes & M. 335.....xiv, 308
 Trumbo v. Sorrensen, 3 T. B. Monroe, 294.....xvi, 103
 Trumbull v. Gibbons, 2 Zabrickie, 117.....ii, 263
 Truss v. Old, 6 Randolph, 556.....xviii, 748
 Trussel v. Lewis, 13 Nebraska, 415.....43, 767
 Trustees v. Garvey, 53 Illinois, 401.....5, 61
 Trustees v. Kirk, 64 New York, 215.....38, 606
 Trustees v. Lynch, 70 New York, 440.....26, 618
 Trustees of Brooke Academy v. George, 14 West Virginia, 411.....23, 789
 Trustees of Columbia Coll. v. Thacher, 57 New York, 311.....41, 308
 Trustees of Exempt F. v. Roome, 23 N. Y. 212...45, 212
 Trustees of First Evang. Church v. Walsh, 57 Illinois, 363.....11, 21
 Trustees of Griswold Coll. v. State, 46 Iowa, 275...26, 128
 Trustees of Howard Coll. v. Turner, 71 Ala. 439...44, 596
 Trustees of Int. Imp. F. v. Bailey, 10 Fla. 112...lxixi, 194
 Trustees of I. & M. Canal v. People, 12 Ill. 248...lii, 498
 Trustees of Jacobs v. Bull, 1 Watts, 276.....xvii, 79

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Trustees of Methodist Church v. Hoboken, 33 N. J. L. 13.....	xviii, 694
Trustees of New Gloucester v. Bradbury, 11 Me. 118.....	xvii, 515
Trustees of N. O. Univ. v. Fay, 1 Murphay, 58.....	iii, 672
Trustees of Phillips E. Acad. v. Exeter, 58 New Hampshire, 306.....	43, 869
Trustees of Schools v. People, 87 Illinois, 303.....	39, 85
Trustees of Schools v. Schroll, 120 Illinois, 509.....	60, 875
Trustees of Schools v. Sheik, 119 Illinois, 579.....	53, 630
Trustees of Schools v. Small, 19 Illinois, 155.....	lxviii, 598
Trustees of Vernon v. Hills, 6 Cowen, 23.....	xvi, 429
Trustees of Watertown v. Cowen, 4 Paige's Ch. 510.....	xvii, 80
Tutach v. Bunnell, 11 Oregon, 53.....	50, 456
Tryon v. Whitmarsh, 1 Metcalf, 1.....	xxv, 339
Tubbs v. Richardson, 6 Vermont, 442.....	xvii, 570
Tubbs v. Tubby, 3 Cushing, 438.....	i, 744
Tuckahoe C. Co. v. Tuck R. R., 11 Leigh, 42.....	xxvii, 374
Tucker v. Atkinson, 1 Humphreys, 300.....	xxiv, 650
Tucker v. Baldwin, 13 Connecticut, 126.....	xxiii, 394
Tucker v. Donald, 60 Mississippi, 460.....	45, 416
Tucker v. Frederick, 23 Missouri, 574.....	lxv, 130
Tucker v. Harris, 13 Georgia, 1.....	lviii, 468
Tucker v. Kenniston, 47 N. H. 367.....	xxiii, 426
Tucker v. New Hampshire Sav. B'k, 68 N. H. 63.....	42, 680
Tucker v. Tower, 9 Pickering, 109.....	xix, 350
Tucker v. Welch, 17 Massachusetts, 160.....	ix, 137
Tucker v. Williams, Dudley's Law, 329.....	xxxi, 561
Tucker v. Woods, 13 Johnson, 190.....	vii, 305
Tuckerman v. Brown, 33 New York, 297.....	lxxxviii, 298
Tuckerman v. Hartwell, 3 Greenleaf, 147.....	xiv, 225
Tudor ada. State, 5 Day, 329.....	v, 163
Tuesley v. Robinson, 103 Massachusetts, 558.....	4, 876
Tufts v. McOlintock, 23 Maine, 434.....	xlviii, 501
Tug Boat Dorr v. Waldron, 63 Illinois, 231.....	14, 86
Tuig v. Sheehan, 101 Pennsylvania St. 363.....	47, 727
Tukey v. Smith, 18 Maine, 126.....	xxvii, 704
Tull v. David, 45 Missouri, 444.....	c, 385
Tuller v. Talbot, 23 Illinois, 357.....	lxxvi, 698
Tuller, In re, 79 Illinois, 99.....	32, 169
Tully, Ex parte, 4 Arkansas, 220.....	lxxxviii, 83
Tully v. Davis, 30 Illinois, 103.....	lxxxiii, 179
Tully v. Harlow, 85 California, 302.....	xv, 102
Tumlinson v. Swinney, 23 Arkansas, 400.....	lxxvi, 438
Tunstall v. Christian, 60 Virginia, 1.....	56, 361
Tunis v. Withrow, 10 Iowa, 305.....	lxxvii, 117
Tunno v. Lague, 2 Johns. Cases, 1.....	i, 141
Tupper v. Cadwell, 12 Metcalf, 539.....	xvi, 704
Turbett v. Turbett, 3 Yeates, 187.....	ii, 369
Turbeville v. Ryan, 1 Humphreys, 112.....	lxxxiv, 622
Turk v. Funk, 65 Missouri, 18.....	30, 771
Turk v. Turk, 3 Georgia, 423.....	xvi, 434
Turley v. Tucker, 6 Missouri, 553.....	xxv, 449
Turman, Ex parte, 26 Texas, 708.....	lxxxiv, 598
Turnage v. Greene, 3 Jones & Equity, 63.....	lxii, 208
Turnbull v. Bowyer, 40 New York, 458.....	c, 522
Turnbull v. Riven, 3 McCord, 131.....	xv, 622
Turner v. Baker, 64 Missouri, 218.....	37, 226
Turner v. Buchanan, 23 Indiana, 147.....	42, 495
Turner v. Chambers, 10 Smodes & M. 306.....	lxviii, 751
Turner v. Child, Devereux's Law, 25, 123, 231.....	xvii, 558
Turner v. Commonwealth, 98 Pennsylvania St. 54.....	37, 653
Turner v. Cool, 23 Indiana, 85.....	lxxxv, 449
Turner v. Davis, 7 Leigh, 227.....	xxx, 503
Turner v. Egerton, 1 Gill & J. 430.....	xix, 236
Turner v. Estabrook, 129 Massachusetts, 425.....	37, 371
Turner v. Gaither, 83 North Carolina, 357.....	35, 574
Turner v. Grangers' L. and H. Ins. Co., 68 Ga. 649.....	38, 801
Turner v. Hawkeye Tel. Co., 41 Iowa, 408.....	34, 605
Turner v. Holzman, 54 Maryland, 143.....	30, 364
Turner v. Hubbell, 2 Day, 437.....	ii, 118
Turner v. Huff, 46 Arkansas, 223.....	55, 589
Turner v. King, 3 Iredell's Eq. 123.....	lxxxviii, 679
Turner v. Miller, 43 Texas, 418.....	19, 4
Turner ada. People, 1 California, 143.....	ii, 235
Turner v. Peoria and S. E. Co., 95 Illinois, 134.....	35, 118
Turner v. Plowden, 5 Gill & Johnson, 52.....	lxiii, 538
Turner v. Protection Ins. Co., 25 Maine, 515.....	lxiii, 734
Turner v. State, 60 Mississippi, 351.....	45, 412
Turner v. Street, 2 Randolph, 404.....	xv, 732
Turner v. Thompson, 58 Georgia, 285.....	34, 567
Turner v. Vicksburg S. & P. E. R. Co., 27 La. An. 648.....	53, 614
Turner v. Walker, 3 Gill & Johnson, 377.....	lxii, 229
Turner v. Webster, 24 Kansas, 35.....	34, 321
Turner v. Young, 27 Indiana, 373.....	lxxxix, 608
Turney v. State, 8 Smodes & M. 104.....	lxvi, 74
Turney v. Wilson, 7 Yarger, 340.....	lxxxvi, 618
Turnipseed v. Cunningham, 16 Alabama, 594.....	i, 129
Turnipseed v. Hudson, 50 Mississippi, 459.....	19, 15
Turnham v. Shouse, 8 Dana, 3.....	lxxxii, 473
Turnpike Road Co. v. Loonala, 23 N. Y. 127.....	lxxxviii, 211
Turpin v. Booth, 56 California, 65.....	33, 4
Turpin v. Thomas, 2 Hening & M. 159.....	51, 615
Turrell v. Morgan, 7 Minnesota, 248.....	lxxxii, 124
Tutela v. Hurley, 96 Massachusetts, 211.....	xxviii, 114
Tutbill v. Scott, 43 Vermont, 535.....	5, 391
Tutts v. Brown, 5 Littlell, 1.....	xv, 3
Tutts ada. State, 3 Bailey's Law, 44.....	xxxi, 608
Tuttle v. Bigelow, 1 Root, 108.....	i, 39
Tuttle v. Brown, 4 Gray, 457.....	lxv, 89
Tuttle v. Catlin, 1 D. Chipman, 286.....	xxi, 691
Tuttle v. Everett, 51 Mississippi, 27.....	34, 622
Tuttle v. Hong, 46 Missouri, 38.....	2, 422
Tuttle v. Howe, 14 Minnesota, 148.....	c, 265
Tuttle v. Jackson ex Dem. Hills, 6 Wendell, 213.....	xxi, 398
Tuttle v. Russell, 2 Day, 501.....	ii, 89
Tuttle v. Standish and Trustees, 4 Allen, 481.....	lxxxii, 712
Tuttle v. Strout, 7 Minnesota, 458.....	lxxxii, 166
Tuttle v. Travellers' Ins. Co., 124 Mass. 175.....	45, 235
Tuttle v. Tuttle, 12 Metcalf, 551.....	lxvi, 702
Tuttle v. White, 46 Michigan, 455.....	41, 175
Tuxworth v. Moore, 9 Pickering, 247.....	xx, 479
Tweed v. Lacombe, 60 New York, 598.....	19, 211
Tweedy ada. State Bank, 8 Hackford, 447.....	lxvi, 426
Twelves v. Williams, 3 Wharton, 498.....	lxxxii, 541
Twigg v. Ryland, 63 Maryland, 395.....	50, 226
Twitchell v. Shaw, 10 Cushing, 46.....	lvii, 80
Twitty ada. State, 2 Hawks, 441.....	xi, 777
Twomley v. Central Park etc. R. Co., 69 New York, 188.....	33, 163
Twyman v. Hawley, 24 Gratt. 512.....	13, 651
Tyler v. Beecher, 44 Vermont, 648.....	8, 326
Tyler v. Carlton, 7 Greenleaf, 178.....	xx, 237
Tyler v. Green, 28 California, 406.....	lxxxvii, 130
Tyler v. Hammersley, 44 Connecticut, 263.....	36, 471
Tyler v. Hammersley, 44 Connecticut, 418.....	36, 479
Tyler v. Morris, 4 Dev & Bat. L. 487.....	lxxxiv, 396
Tyler v. People, Breese, 293.....	xx, 176
Tyler v. State, 3 Humphreys, 37.....	lxxxvi, 286
Tyler v. Stevens, 4 New Hampshire, 114.....	xvii, 464
Tyler v. Young, 2 Scammon, 444.....	lxxxv, 116
Tyler v. Western U. Tel. Co., 60 Illinois, 421.....	14, 3
Tyler v. Thompson, 44 Texas, 497.....	33, 600
Tymannus v. Williams, 7 Humphrey, 69.....	lxix, 69
Tynan v. Paschal, 27 Texas, 286.....	lxxxiv, 612
Tynan v. Walker, 35 California, 634.....	xv, 128
Tyner v. Stoops, 11 Indiana, 21.....	lxvi, 342
Tyree v. Williams, 3 Bibb, 262.....	vi, 613

Roman letters [xliz] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Tyree v. Wilson, 9 Grant, 59.....xliz, 213
 Tyson v. North and S. Ala. R. Co., 61 Ala. 554.....32, 8
 Tyson v. Pamunkey, 3 Penn. State, 123.....xliv, 181
 Tyson v. Richard, 3 Harris & J. 109.....v, 494
 Tyson v. State Bank, 6 Blackford, 225.....xxviii, 139
 Tyus v. Rust, 37 Georgia, 574.....xv, 365
 Uecker v. Koehn, 21 Nebraska, 559.....59, 949
 Uhl v. Dillon, 10 Maryland, 500.....lxix, 173
 Uline v. N. Y. C. & H. R. R., 53 Am. Rep. 123.....54, 661
 Ullman v. Lion, 8 Minnesota, 351.....lxxviii, 783
 Ullman v. State, 1 Texas Ct. App. 230.....26, 405
 Ulmer v. Leland, 1 Greenleaf, 135.....x, 46
 Ulster Co. Sav. Ins. v. Leake, 79 New York, 161.....29, 115
 Umblauf v. Umblauf, 117 Illinois, 590.....57, 690
 Underhill v. Gibson, 3 New Hampshire, 253.....lx, 83
 Underwood v. Brockman, 4 Dana, 209.....xliz, 407
 Underwood v. French, 6 Oregon, 66.....25, 500
 Underwood v. McDuffie, 15 Michigan, 351.....xviii, 194
 Underwood v. Newport Lyceum, 5 B. Monroe, 139.....xii, 900
 Underwood v. People, 22 Michigan, 1.....29, 633
 Underwood v. Stuyvesant, 19 Johnson, 151.....x, 215
 Underwood ada. State, 49 Maine, 181.....lxxvii, 254
 Unger v. Mooney, 63 California, 586.....49, 100
 Union Bank v. Hyde, 7 Robinson (La.), 418.....xii, 230
 Union Bank v. Knapp, 3 Pickering, 96.....xv, 181
 Union Bank v. Lee, 7 Robinson (La.), 76.....xii, 275
 Union Bank v. Meeker, 4 Louisiana An. 159.....l, 559
 Union Bank v. Planters' B't etc., 9 Gill & J. 439.....xxxi, 113
 Union Bank v. Powell, 3 Florida, 175.....lii, 367
 Union Bank v. Stone, 50 Maine, 595.....lxxix, 631
 Union Bank v. Willis, 8 Metcalf, 504.....xii, 541
 Union Bank of La. v. Coester, 3 N. Y. (3 Com.) 303.....liii, 280
 Union Canal Co. v. Young, 1 Wharton, 410.....xxx, 215
 Union Cen. L. I. Co. v. Oshever, 36 Ohio St. 301.....38, 573
 Union Central L. I. Co. v. Potlacher, 33 O. St. 489.....31, 555
 Union Ch. of Africans v. Sanders, 1 House, 100.....lxviii, 187
 Union Depot, etc. Co. v. Brunswick, 21 Minn. 297.....47, 789
 Union Dime Savings Ins. v. Whitot, 94 N. Y. 221.....44, 127
 Union Fire Ins. Co. v. Commonwealth, 5 Mass. 260.....iv, 80
 Union Hotel Co. v. Hersey, 79 New York, 454.....35, 536
 Union Ins. Co. v. Grant, 63 Maine, 236.....23, 42
 Union Ins. for Savings v. Boston, 129 Mass. 52.....37, 205
 Union Locks and Canal Co. v. Towne, 1 N. H. 44.....viii, 23
 Union Mut. Ins. Co. v. Campbell, 56 Illinois, 267.....35, 106
 Union Mut. L. I. Co. v. Frear Stone Manuf. Co.,
 97 Illinois, 537.....37, 129
 Union Mut. Fire Ins. Co. v. Keyser, 32 N. H. 313.....lxiv, 375
 Union Mut. L. I. Co. v. Reif, 36 Ohio St. 396.....38, 613
 Union Nat. Bank v. Oceanic Co. Bank, 80 Ill. 212.....22, 185
 Union Nat. Bank v. Rowan, 23 S. O. 539.....54, 28
 Union Nat. Bank v. Sixth Nat. Bank, 43 New
 York, 462.....3, 718
 Union P. Ry Co. v. Beatty, 35 Kansas, 265.....57, 180
 Union P. Ry Co. v. Nichols, 8 Kansas, 505.....12, 478
 Union S. Co. v. Nottinghams, 17 Grant, 115.....xvi, 378
 Union T. v. Smith, 30 Iowa, 9.....18, 39
 Union, Town of v. Bermea, 15 Vroom, 269.....43, 399
 Union Trust Co. v. Monticello etc. R. R. Co., 63
 New York, 311.....96, 541
 Union Water Company v. Cray, 25 Cal. 504.....lxxv, 145
 United Companies v. Weldon, 47 N. J. L. 59.....54, 114
 United L. F. etc. Ins. Co. v. Foote, 23 Ohio State,
 240.....16, 735
 United Soc. of S. v. Underwood, 11 Bush, 269.....31, 214
 United Soc. of S. v. Underwood, 9 Bush, 609.....15, 731
 United States v. Cottingham, 1 Rob. (Va.), 615.....xi, 710
 United States v. Guitman, 1 Mackey, 498.....47, 247
 U. S. v. Ferguson, 16 Missouri, 258.....lvii, 232
 U. S. v. Lee, 4 Mackey, 498.....54, 293
 U. S. v. Morgan, Morris, 241.....xii, 234
 U. S. v. Murdock, 18 Louisiana, 305.....lxxix, 681
 United States v. Murphy, MacArthur and Mack,
 375.....48, 754
 U. S. v. Sacramento, 2 Mont. 239.....25, 746
 U. S. v. Simpson, 3 Penrose & Watts, 437.....xliv, 231
 U. S. v. Vaughan, 3 Binney, 394.....v, 375
 U. S. v. White, 2 Hill (N. Y.), 69.....lxxvii, 274
 U. S. Bank v. Betnes, 1 Grant, 234.....xiii, 551
 U. S. Bank v. Fleckner, 3 Martin, 200.....xiii, 227
 U. S. Bank v. Lane, 3 Hawks, 482.....xiv, 695
 U. S. Bank v. Marie, 3 Robinson (La.), 117.....lxxviii, 201
 U. S. Bank v. Patton, 5 Howard, 300.....lxxv, 428
 U. S. Bank v. Still, 8 Connecticut, 105.....xiii, 44
 U. S. Bank v. Southard, 3 Harrison (N. J.), 473.....lxxv, 581
 United States F. & M. Ins. Co. v. Kimberly, 34
 Maryland, 234.....6, 282
 United States R. S. Co. v. Atlantic & G. W. R. R.
 Co., 24 Ohio State, 450.....32, 295
 U. S. Tel. Co. v. Glendale, 29 Maryland, 223.....xvii, 519
 U. S. Tel. Co. v. Wenger, 55 Penn. St. 262.....xviii, 751
 United States Trust Co. v. Lee, 73 Illinois, 142.....24, 296
 Universal L. Ins. Co. v. Whitehead, 89 Minn. 226.....24, 298
 Universalist Church v. Trustees, 6 Ohio, 448.....lxxvii, 267
 University v. North Carolina R. R. Co., 76 North
 Carolina, 169.....22, 671
 University of Des Moines v. Livingston, 97 Iowa,
 207.....42, 68
 University of Md. v. Williams, 9 Gill & J. 268.....xxxi, 73
 University of Va. v. Reynolds's Ex'r, 3 Va. 542.....xviii, 294
 Unknown Heirs v. Kimball, 4 Indiana, 546.....lvviii, 626
 Upham v. Hamill, 11 Rhode Island, 565.....23, 536
 Upchurch ada. Commonwealth, 3 Gray, 434.....lxviii, 769
 Upshaw v. Upshaw, 2 Hening & M. 360.....li, 626
 Upson v. Arnold, 19 Georgia, 190.....lxviii, 302
 Upson v. Horn, 3 Strobhart's Law, 106.....lxix, 626
 Upson v. Archer, 41 California, 85.....16, 266
 Upson v. Hubbard, 26 Connecticut, 274.....lxviii, 679
 Upson v. Suffolk Co. Mills, 11 Cushing, 594.....lix, 169
 Upton v. Vall, 6 Johnson, 181.....v, 216
 Ulrich's Appeal, 66 Pennsylvania State, 294.....37, 707
 Urney's Executors v. Wooden, 1 Ohio State, 160.....lx, 615
 Urquhardt v. City of Ogdensburg, 91 N. Y. 67.....43, 655
 Urquhardt v. Robinson, 1 Martin, 236.....v, 719
 Usher v. Haseltine, 5 Greenleaf, 471.....lxvii, 253
 Usher v. Pease, 116 Massachusetts, 440.....27, 169
 Usher v. Severance, 20 Maine, 9.....lxxvii, 23
 Utica Bank v. Bender, 21 Wendell, 649.....lxxiv, 251
 Utica Bank v. City of Utica, 4 Paige, 200.....lxxvii, 71
 Utica Bank v. Finch, 3 Barb. Ch. 293.....lxix, 175
 Utica Bank v. Mercereau, 3 Barb. Ch. 582.....lxix, 169
 Utica Bank v. Smaller, 3 Cowen, 770.....xiv, 698
 Utica Ins. Co. ada. People, 15 Johnson, 263.....viii, 243
 Utica etc. R. R. v. Brinknerhoff, 21 Wend. 139.....lxxiv, 231
 Utley v. Smith, 94 Connecticut, 290.....lxviii, 165
 Utley v. Smith, 7 Vermont, 154.....lxix, 166
 Uzzell v. Mack, 4 Humphreys, 219.....xi, 648
 Vall v. Durant, 7 Allen, 408.....lxxviii, 686
 Vall v. Lewis, 4 Johnson, 450.....iv, 205
 Vall v. Long Island R. R. Co., 106 N. Y. 269.....69, 449
 Valrin v. Hobson, 8 Louisiana, 80.....lxxviii, 126
 Valencia v. Couch, 33 California, 239.....xvi, 589
 Valentine v. Boston, 23 Pickering, 75.....lxxviii, 711
 Valentine v. Conner, 40 New York, 248.....x, 476
 Valentine v. Wheeler, 123 Massachusetts, 586.....33, 404
 Valentine v. Cooley, Meigs, 613.....lxxviii, 168
 Valentine v. Foster, 1 Metcalf, 520.....lxxv, 377
 Valentine v. Piper, 23 Pickering, 85.....lxxviii, 718
 Valle v. Cerre's Administrator, 36 Mo. 575.....lxxviii, 151
 Valle v. Fleming, 19 Missouri, 454.....lxii, 598
 Valle v. Fleming, 29 Missouri, 153.....lxvii, 557

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Valle v. State, 9 Tex. Ct. App. 37.....35, 719
 Valparaiso, City of v. Gardner, 37 Indiana, 1.....49, 416
 Valentin v. Cloutier, 3 Louisiana, 170.....xlii, 179
 Vane v. Hopkins, 1 J. J. Marshall, 285.....xix, 98
 Van Allen v. Rogers, 1 Johnson's Cases, 251.....i, 113
 Van Allen v. Vanderpool, 6 Johnson, 69.....v, 198
 Van Amburg v. Vicksburg S. & P. R. R. Co., 37
 La. An. 650.....55, 817
 Van Amringe v. Morton, 4 Wharton, 232.....xxiv, 617
 Vananhan v. Hornbeck, 3 Green's Law, 178.....xv, 609
 Van Antwerp v. Newman, 4 Cowen, 82.....xv, 340
 Van Benschoten v. Lawson, 6 Johns. Ch. 313.....x, 333
 Van Bergen v. Van Bergen, 3 Johns. Ch. 263.....viii, 611
 Van Beuren v. Wilson, 9 Cowen, 158.....xviii, 491
 Vanbibber v. Sawyer, 10 Humphreys, 31.....ii, 694
 Vanbibber & Co. v. Bank of La., 14 La. An. 451.....lxiv, 442
 Van Bliet v. People, 16 Illinois, 364.....lxiii, 316
 Van Bracklin v. Fonda, 13 Johnson, 463.....vii, 339
 Van Bramer v. Hoffman, 2 Johnson's Cases, 200.....i, 103
 Van Brunt v. Pike, 4 Gill, 270.....xiv, 126
 Van Brunt v. Vaughn, 47 Iowa, 145.....39, 698
 Vanbuskirk v. Hart, F. Ins. Co., 14 Conn. 141.....xxvi, 473
 Vanbuskirk v. Murden, 23 Illinois, 446.....lxix, 163
 Van Campen v. Snyder, 3 How. (Mss.), 66.....xxxii, 311
 Vance v. State, 18 Ohio, 533.....lxv, 467
 Vance v. Erie, 23 New Jersey L. 334.....x, 695
 Vance v. Throckmorton, 5 Bush, 41.....xvi, 327
 Vance's Heirs v. McFady, 3 Yerger, 171.....xxiv, 533
 Vaneh v. Hall, 2 Pennington, 578.....iv, 369
 Van Cleave ada. People, 1 Michigan, 362.....liii, 69
 Vandegrass v. Medlock, 3 Porter, 389.....xxix, 256
 Vandegriff v. Beddier, 3 Zabriskie, 186.....lxviii, 263
 Vandenberg v. Trux, 4 Denio, 444.....lxiv, 268
 Vandenhuevel v. United Ins. Co., 2 Johns. Cas. 480, i, 180
 Vanderhills v. Richm. T. Co., 2 N. Y. (2 Comst.), 478, ii, 315
 Vanderheyden v. Vanderheyden, 3 Paige Ch. 287, xli, 86
 Vanderhorst v. Bacon, 38 Michigan, 669.....31, 326
 Vanderhorst v. McTaggart, 1 Brevard, 369.....ii, 667
 Vanderpool v. O'Hanlon, 53 Iowa, 246.....34, 216
 Vandermolen and Wife, Ex parte, 5 Rich. Eq. 519, ix, 103
 Vandervee v. McGregor, 12 Wendell, 545.....xxvii, 156
 Vandervee v. Slingerland, 103 New York, 47.....57, 701
 Van Dusen v. Blum, 18 Pickering, 229.....xxix, 532
 Vandover's Appeal, 8 Watts & Serg. 405.....xlii, 305
 Vandover's Adm'r v. Freeman, 20 Texas, 333.....lxix, 391
 Vandine v. Burpee, 13 Metcalf, 238.....lxiv, 733
 Vandine, Petitioner, 6 Pickering, 187.....xvii, 351
 Van Doran v. Tyader, 1 Nevada, 380.....x, 498
 Van Doran v. Everett, 3 Southard, 490.....viii, 615
 Van Doran v. Olden, 19 New Jersey Eq. 176.....xviii, 650
 Van Doran v. Van Doran, 2 Pennington, 697.....iv, 408
 Van Dresher v. King, 34 Penn. State, 301.....lxix, 643
 Van Dusen v. Star Quartz M. Co., 26 California, 571.....xv, 209
 Van Dusen v. Van Dusen, 6 Paige's Ch. 368.....xxxi, 257
 Van Dyke v. Johns, 1 Delaware Ch. 33.....xii, 76
 Van Epps v. Harrison, 5 Hill (N. Y.), 63.....xi, 314
 Van Epps v. Van Dusen, 4 Paige Ch. 64.....xxv, 516
 Van Eps v. Sebenotady, 13 Johns. 438.....vii, 330
 Van Etta v. Evenson, 26 Wisconsin, 33.....9, 496
 Van Etten v. Hurst, 6 Hill (N. Y.), 311.....xii, 748
 Van Every v. Fitzgerald, 21 Nebraska, 26.....59, 835
 Van Fossen v. State, 37 Ohio State, 217.....41, 507
 Van Horn v. Taylor, 7 Robinson (La.), 301.....xii, 279
 Van Housen v. Radcliffe, 17 New York, 580.....lxix, 480
 Van Hook v. Selma, 70 Alabama, 261.....45, 25
 Van Hook v. Simmons, 25 Texas Supp. 333.....lxviii, 573
 Van Hook v. Somerville M. Co., 1 Hale Ch. 633.....xiv, 401
 Van Hook v. Whitlock, 26 Wendell, 43.....xxvii, 246
 Vanhoozer v. Logan, 3 Scammon, 280.....xxviii, 90
 Van Horn v. Bell, 11 Iowa, 465.....508
 Vanhorn v. Des Moines, 63 Iowa, 447.....54, 759
 Vanhorn v. Harrison, 1 Dallas, 137.....i, 239
 Van Horn v. People, 46 Michigan, 183.....41, 159
 Van Horn v. Bucher, 23 Missouri, 351.....lxixiv, 88
 Van Horn v. Taylor, 3 Louisiana An. 557.....xli, 558
 Van Horne v. Campbell, 100 New York, 287.....53, 168
 Van Horne v. McLaren, 8 Paige, 235.....xxiv, 698
 Van Houten v. State, 46 New Jersey Law, 14.....54, 357
 Van Houten ada. State, 3 Pennington, 672.....iv, 407
 Van Houten, Matter of, 2 Green's Ch. 229.....lxix, 707
 Van Kouron v. Parmelee, 2 N. Y. (2 Comst.), 523.....4, 322
 Van Kirk v. Pennsylvania R. R. Co., 76 Pennsylv-
 vania St. 60.....13, 494
 Van Leuven v. Lyba, 1 N. Y. (1 Comst.), 515.....xlix, 249
 Vann v. Hargett, 2 Dev. & Bat. Eq. 31.....xxxi, 699
 Vannice v. Bergen, 16 Iowa, 555.....lxixv, 632
 Vanorden v. Johnson, 1 McCarter, 376.....lxixii, 264
 Van Orden v. Van Orden, 10 Johnson, 36.....vi, 314
 Van Orden v. Sarvinet, 24 Louisiana An. 119.....13, 115
 Vannoy v. Martin, 6 Iredell's Eq. 169.....ii, 418
 Van O'Linda v. Lothrop, 21 Pickering, 282.....xxxi, 252
 Van Pelt v. Davenport, 41 Iowa, 306.....39, 623
 Van Raugh v. Van Arndain, 3 Calnes, 154.....xi, 289
 Van Rensselaer v. Bradley, 3 Denio, 128.....xiv, 481
 Van Rensselaer v. Clark, 17 Wendell, 26.....xxxi, 289
 Van Rensselaer v. Hays, 19 New York, 63.....lxixv, 273
 Van Rensselaer v. Jewett, 6 Hill (N. Y.), 273.....xi, 719
 Van Rensselaer v. Jewett, 2 N. Y. (2 Comst.), 259.....ii, 275
 Van Rensselaer v. Radcliff, 10 Wendell, 639.....xxv, 699
 Van Riper v. Parsons, 11 Vroom, 123.....39, 219
 Van Riper v. Van Riper, 1 Southard, 186.....vii, 375
 Van Sandt v. Dow, 63 Iowa, 594.....54, 759
 Van Steenburgh v. Tobias, 17 Wendell, 582.....xxxi, 219
 Van Sikel v. Buffalo, 13 Nebraska, 203.....42, 733
 Van Slyke v. Trumpealean Ins. Co., 39 Wis. 390.....29, 59
 Van Steenwyck v. Washburn, 59 Wisconsin, 453.....42, 632
 Van Storch v. Whalow, 13 Rhode Island, 23.....43, 19
 Van Tassel v. Capron, 1 Denio, 260.....xlii, 657
 Van Tuij ada. Commonwealth, 1 Metcalf, 1.....lxix, 457
 Vanuxem v. Hazlehurst, 1 Southard, 132.....vii, 592
 Van Vactor v. Flack, 1 Smedes & M. 393.....xi, 100
 Van Valkenburgh v. Brown, 43 California, 43.....13, 135
 Van Valkenburgh v. Watson, 13 Johnson, 480.....vii, 335
 Van Vechten v. Hopkins, 3 Johnson, 211.....iv, 339
 Van Vechten v. Paddock, 12 Johnson, 179.....vii, 313
 Van Vleet v. Olin, 4 Nevada, 33.....xxvii, 513
 Van Vleet v. Jones, 1 Spencer, 340.....xlii, 639
 Van Voorhis v. Brintnall, 86 New York, 18.....49, 698
 Van Wert, Board of Education, v. Edson, 28
 Ohio State, 211.....xxviii, 114
 Van Winkle v. Johnson, 11 Oregon, 498.....54, 498
 Van Wormer v. Crane, 51 Michigan, 263.....47, 639
 Van Wyck v. Allen, 69 New York, 61.....35, 139
 Van Zandt v. Mutual B. L. Ins. Co., 65 N. Y. 289, 14, 225
 Varble v. Bigley, 14 Bush, 638.....39, 498
 Varden v. Mount, 78 Kentucky, 86.....39, 299
 Vargas v. Newhall, 15 Maine, 514.....xxxi, 617
 Varick v. Jackson, 2 Wendell, 166.....xix, 671
 Varick v. Smith, 5 Paige Ch. 157.....xxviii, 617
 Varnedoe v. State, 75 Georgia, 151.....54, 698
 Varner v. Nobleborough, 3 Greenleaf, 121.....xi, 48
 Varney v. Manchester, 26 New Hampshire, 432.....42, 632
 Varney v. Varney, 26 Wisconsin, 126.....39, 735
 Varnum v. Abbot, 12 Massachusetts, 671.....vii, 315
 Varnum v. Camp, 1 Green Law, 295.....xxv, 678
 Vasquez v. Ewing, 24 Missouri, 21.....lxixv, 694
 Vass v. Commonwealth, 3 Leigh, 798.....lxixv, 698
 Vass v. Freeman, 3 Jones' Eq. 221.....lxix, 724
 Vasser v. Henderson, 40 Mississippi, 518.....39, 28

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Vastine v. Wilking, 45 Missouri, 39.....c, 347
 Vater v. Lewis, 26 Indiana, 296.....10, 29
 Vaughan v. Bacon, 18 Maine, 485.....xxviii, 628
 Vaughan v. Craven, 1 Head, 108.....lxviii, 163
 Vaughan v. Fowler, 14 South Carolina, 255.....37, 731
 Vaughan v. Murfreesboro, 96 North Carolina, 517.66, 413
 Vaughan v. Phoebe, 1 Mart. & Yerg. 1.....xvii, 770
 Vaughan v. Rhodes, 2 M'Cord, 227.....xiii, 713
 Vaughan v. Haldeman, 33 Penn. State, 522.....lxv, 623
 Vaughn v. Barret, 8 Vermont, 233.....xxvi, 806
 Vaughn v. Brown, 9 Arkansas, 20.....xiv, 730
 Vaughn v. Congdon, 56 Vermont, 111.....48, 753
 Vaughn v. Perine, 2 Pennington, 726.....iv, 411
 Vaughn v. Tracy, 25 Missouri, 518.....lxix, 471
 Vause v. Lee, 1 Hill (S. O.), 137.....xxvi, 168
 Vawter v. Missouri Pac. R'y Co., 84 Missouri, 679.54, 108
 Veasey v. Graham, 17 Georgia, 96.....lxviii, 228
 Veatch v. State, 56 Indiana, 584.....96, 44
 Veerkamp v. Hulburd C. & D. Co., 58 Cal. 229....41, 265
 Venable v. Beachamp, 3 Dana, 321.....xxviii, 74
 Vendice v. Woodruff, 62 New York, 428.....20, 495
 Verdier v. Youngblood, Rich. Eq. Co. 220.....xxiv, 417
 Vermilya v. Chicago, M. & St. P. R'y Co., 65 La. 606.55, 379
 Vermont Bank v. Porter, 6 Day, 315.....v, 187
 Vermont University v. Reynolds, 3 Vt. 542.....xxiii, 234
 Vermont & Mass. R. R. Co. v. Fitchburg R. R. Co., 14 Allen, 428.....xvii, 795
 Vernon, County of v. Stewart, 64 Missouri, 408.....37, 260
 Vernon ada. People, 35 California, 49.....xv, 49
 Vernon's Trustees v. Hills, 6 Cowen, 23.....xvi, 629
 Verplank v. Sterry, 12 Johnston, 536.....vii, 248
 Verry v. McClellan, 6 Gray, 535.....lxvi, 423
 Verry v. Robinson, 26 Indiana, 14.....lxviii, 248
 Versailles v. Hall, 5 Louisiana, 261.....xxv, 178
 Vest v. Mohie, 31 Gratt. 149.....31, 722
 Vicary v. Moore, 2 Watts, 451.....xxvii, 523
 Viek v. Mayor of Vicksburg, 1 How. (Miss.), 379.xcxi, 167
 Viek v. N. Y. O. & H. R. R. Co., 96 New York, 267.47, 36
 Viek v. Percy, 7 Smodes & M. 288.....xiv, 303
 Vickery v. Hobbs, 21 Texas, 570.....lxviii, 238
 Vicksburg & M. R. Co. v. Lowry, 61 Miss. 103....48, 76
 Vicksburg, City of v. Hennessy, 64 Miss. 301.....78, 364
 Vicksburg & J. R. R. Co. v. Patton, 21 Miss. 156..lxvi, 552
 Vicksburg & M. R. Co. v. McGowan, 62 Miss. 682..52, 305
 Vile v. Germania Ins. Co., 26 Iowa, 9.....xvii, 83
 Vierheller's Appeal, 24 Penn. State, 105.....lxii, 366
 Viets v. Union Nat. B'k, 101 New York, 563.....54, 743
 Vigers v. Carlen, 14 Louisiana, 86.....xxxiii, 675
 Vigers v. Ocean Ins. Co., 12 La. 263.....xxvii, 118
 Vigo Agric. Soc. v. Brumfield, 102 Indiana, 146....59, 657
 Vigoreaux v. Lime Rock Ins. Co., 69 Maine, 487... 8, 428
 Vilas v. New York C. Ins. Co., 72 New York, 580....28, 188
 Vilas ada. People, 36 New York, 459.....xxvii, 620
 Village of —. See Name of Village.
 Village of Manhattan v. Willard, 13 Minn. 1.....xvii, 306
 Villard v. Robert, 2 Strobhart's Equity, 40.....xix, 664
 Final v. Gilman, 21 West Virginia, 301.....45, 563
 Vincent, Ex parte, 26 Alabama, 145.....lxii, 714
 Vincent v. Cornell, 13 Pickering, 294.....xxiii, 683
 Vincent v. Michel, 7 Louisiana, 88.....xxvi, 496
 Vincent v. Rafter, 21 Texas, 77.....xxviii, 516
 Vincent v. Stinehour, 7 Vermont, 62.....xxix, 145
 Vincent ada. State, 24 Iowa, 570.....xv, 783
 Vinson v. Beveridge, 3 McArthur, 507.....36, 113
 Vinson's Appeal, 80 Pennsylvania State, 434.....44, 116
 Vinton v. Baldwin, 68 Indiana, 104.....45, 447
 Vinton v. Bradford, 13 Massachusetts, 113.....vii, 119
 Vinton v. Middlesex R. R. Co., 11 Allen, 304.lxxvii, 714
 Violet v. Powell, 10 B. Monroe, 267.....lxii, 548
 Viola v. Jacob, 86 California, 434.....53, 206
 Vinherada. People ex rel. McKillan, 9 Cal. 262...lxx, 658
 Vixian v. Ota, 24 Wisconsin, 518.....1, 199
 Vogel v. Mayor etc. of New York, 92 N. Y. 10....44, 349
 Vogel v. Malma, 31 Wisconsin, 306.....11, 608
 Vogel's Succession, 16 Louisiana An. 139.....lxix, 571
 Vogle v. Ripper, 34 Illinois, 100.....lxxxv, 298
 Volans v. Owen, 74 New York, 526.....30, 337
 Voltz, Ex parte, 37 Indiana, 175.....10, 86
 Von Baumbach v. Bada, 9 Wisconsin, 558.....lxxvi, 283
 Von Phul v. Sloan, 2 Robinson (La.) 148.....lxxxviii, 207
 Voorhees v. Earl, 2 Hill (N. Y.), 298.....lxxxviii, 588
 Voorhees v. Voorhees, 39 New York, 463.....c, 466
 Voorhies v. Chicago, R. I. & P. R'y Co., 71 La. 736.60, 823
 Voorhies v. Frisbie, 26 Michigan, 476.....12, 221
 Voorhis v. Freeman, 2 Watts & Serg. 118.....lxxxvii, 498
 Vore v. Hurst, 13 Indiana, 551.....lxxxiv, 298
 Vosburgh v. Lake Shore & M. S. R. Co., 94 New York, 374.....46, 148
 Vosburgh v. Moak, 1 Cushing, 453.....lxviii, 612
 Voss v. Dolan, 108 Massachusetts, 125.....11, 321
 Voss v. Handy, 2 Greenleaf, 322.....xi, 169
 Voss v. Morton, 4 Cushing, 27.....1, 722
 Voss v. Singer, 4 Allen, 227.....lxxxi, 696
 Voss v. German Amer. B'k, 83 Illinois, 599.....25, 415
 Voss v. Richmond, 18 Gratt. 533.....xxviii, 648
 Vossel v. Cole, 10 Missouri, 634.....lxvii, 123
 Vroom v. Van Horne, 10 Paige, 549.....xiii, 94
 Vrooman v. McKaig, 4 Maryland, 480.....lxix, 85
 Vrooman v. Turner, 69 New York, 280.....25, 156
 W — v. W —, 141 Massachusetts, 498.....55, 491
 Wabash, St. L. & P. R'y Co. v. Farver, 111 Indiana, 126.....60, 698
 Wabash, St. L. & P. R'y Co. v. Peyton, 106 Ill. 534.46, 708
 Wabash, St. L. & P. R'y Co. v. Shacklet, 108 Illinois, 364.....44, 791
 Wabash & E. O. Co. v. Spears, 16 Ind. 441.....lxxix, 444
 Wachstetter v. State, 93 Indiana, 290.....50, 94
 Wachtel v. Noah W. & O. Soc., 84 N. Y. 28.....38, 478
 Wack v. Sorber, 2 Wharton, 387.....xxx, 360
 Waddell v. Cook, 2 Hill (N. Y.), 47.....lxxxvii, 373
 Waddell v. Glassell, 18 Alabama, 561.....lv, 179
 Waddingham v. Loker, 44 Missouri, 133.....c, 280
 Wade v. American Col. Soc., 7 Smodes & M. 683..xv, 334
 Wade v. Chaffee, 6 Rhode Island, 224.....5, 573
 Wade v. Clark, 32 Iowa, 158.....35, 262
 Wade v. Culvert, 2 Minn. 27.....xii, 622
 Wade v. Greenwood, 2 Robinson (Va.), 474.....xl, 799
 Wade v. Johnson, 5 Humphreys, 117.....lxiii, 622
 Wade v. Jones, 20 Missouri, 75.....lxii, 594
 Wade v. Kalbfleisch, 58 New York, 283.....17, 299
 Wade v. Mason, 12 Gray, 335.....lxxiv, 607
 Wade v. Moffett, 21 Illinois, 110.....lxxiv, 79
 Wade v. N. O. Canal etc. Co., 8 Rob. (La.), 140.....xii, 296
 Wade v. Pettibone, 11 Ohio, 57.....lxxxvii, 408
 Wadleigh v. Gilman, 12 Maine, 403.....lxxxviii, 188
 Wadleigh v. Glines, 6 New Hampshire, 17.....lxiii, 705
 Wadleigh v. Jaavrin, 41 New Hamp. 503.....lxxvii, 780
 Wadleigh v. Town of Sutton, 6 New Hamp. 18.....lxvii, 704
 Wadsworth v. Allen, 8 Grattan, 174.....lvi, 137
 Wadsworth v. Lyon, 93 New York, 201.....45, 190
 Wadsworth v. Sharpscom, 8 N. Y. (4 Selden), 388..lix, 499
 Wadsworth v. Smith, 11 Maine, 273.....lxxvi, 686
 Wadsworth v. Tillotson, 15 Connecticut, 208.....lxxxix, 391
 Wadsworth v. Walliker, 45 Iowa, 395.....24, 798
 Wafer v. Pratt, 1 Robinson (La.), 41.....lxxxvi, 681
 Waffle v. N. Y. Central R. R. Co., 83 N. Y. 11....13, 467
 Wagers v. Dickey, 17 Ohio, 439.....lxix, 467
 Waggoner v. Jermaine, 3 Dando, 304.....xiv, 674
 Wagner v. Cleveland etc. R. R. Co., 22 Ohio 84. 563.....20, 370

Roman letters [xliv] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Wagner v. Cohen, 6 Gill, 97.....xlvi, 680
Wagner v. Ellis, 7 Penn. State, 411.....xlvi, 515
Wagner v. Hanna, 38 California, 111.....xv, 354
Wagner v. State, 107 Indiana, 71.....57, 79
Wagoner v. State, 5 Lea, 322.....49, 36
Wainwright v. Straw, 15 Vermont, 215.....xl, 675
Wainwright v. Webster, 11 Vermont, 575.....xxiv, 707
Walt v. Maxwell, 5 Pickering, 217.....xvi, 391
Walt v. Richardson, 33 Vermont, 190.....lxviii, 622
Walt v. Pomeroy, 20 Michigan, 425.....4, 395
Walt, Appellant, 7 Pickering, 100.....xix, 262
Walt v. Leggett, 8 Cowen, 195.....xviii, 441
Walte v. Merrill, 4 Greenleaf, 102.....xvi, 239
Walte ad. Commonwealth, 11 Allen, 264.....lxviii, 711
Walt v. Thompson, 43 New Hampshire, 161.....lxix, 136
Walden v. Campbell, 20 Maine, 383.....xxvii, 60
Walden v. Conn. etc. R. R. Co., 37 Vt. 330.....lxviii, 711
Walden v. Newell, 12 Rhode Island, 75.....34, 596
Walden v. Chambers, 69 Iowa, 169.....56, 218
Walden v. Dalley, 51 New York, 27.....19, 651
Walden v. Wheeler & W. Mfg. Co., 101 New York, 205.....54, 676
Walbridge v. Day, 21 Illinois, 379.....lxviii, 227
Waldele v. New York O. & Hudson R. R. Co., 96 New York, 274.....47, 41
Walden v. Davison, 11 Wendell, 65.....xxv, 602
Walden v. La. Ins. Co., 12 Louisiana, 134.....xxii, 116
Walden v. Leroy, 2 Calnes, 263.....ii, 236
Walden v. Murdock, 23 California, 540.....lxviii, 135
Walden v. Peters, 2 Robinson (La.), 331.....lxviii, 213
Walden v. Phoenix Ins. Co., 5 Johnson, 310.....iv, 399
Waldron v. Chase, 37 Maine, 414.....lix, 56
Waldron v. Turpin, 15 Louisiana, 592.....xxv, 210
Wales v. Stetson, 2 Massachusetts, 143.....iii, 39
Walker v. Brown, 3 Bush, 698.....xvii, 277
Walker v. Brown, 23 Illinois, 378.....lxviii, 267
Walker v. Caseway, 4 La. Ann. 19.....l, 551
Walker v. Chidmest, 21 Ohio St. 14.....8, 24
Walker v. Coleman, 61 Illinois, 290.....25, 285
Walker v. Comm., 18 Grati, 13.....xviii, 631
Walker v. Crawford, 56 Illinois, 444.....8, 701
Walker v. Dunbar, 7 Martin, N. S., 398.....xviii, 248
Walker v. Dunlop, 5 Haywood, 271.....lx, 787
Walker v. Egbert, 29 Wisconsin, 194.....9, 543
Walker v. Emerson, 20 Texas, 703.....lxviii, 207
Walker v. Forbes, 25 Alabama, 129.....lx, 498
Walker v. Furbush, 11 Cushing, 396.....lix, 148
Walker v. Geime, 4 Wharton, 222.....lxviii, 60
Walker v. Hall, 15 Ohio State, 353.....lxviii, 423
Walker v. Herring, 21 Gratt. 678.....8, 616
Walker v. Hunt, 2 West Virginia, 491.....xviii, 779
Walker v. Lide, 1 Richardson's Law, 249.....xlv, 222
Walker v. Lovell, 23 New Hampshire, 138.....lxv, 605
Walker v. Marshall, 7 Iredell's Law, 1.....xiv, 502
Walker v. McDowell, 4 Smedes & M. 118.....xlvi, 476
Walker v. McKnight, 15 B. Monroe, 467.....lxv, 190
Walker v. Old Colony & N. E'y Co., 103 Mass. 10., 4, 509
Walker v. Osgood, 98 Massachusetts, 343.....xciii, 168
Walker v. Quigg, 6 Waite, 87.....xxxi, 423
Walker v. Queen Ins. Co. 127 Massachusetts, 206.34, 373
Walker v. Rogers, 40 Illinois, 278.....lxviii, 343
Walker v. Shepardon, 2 Wisconsin, 394.....lx, 423
Walker v. Shepardon, 4 Wisconsin, 483.....lxv, 324
Walker v. Simpson, 7 Waite & Serg. 83.....xlii, 216
Walker v. Skipwith, Meigs, 502.....lxviii, 161
Walker v. State, 63 Alabama, 49.....35, 1
Walker v. State, 7 Texas Ct. App. 245.....32, 535
Walker v. Stetson, 19 Ohio St. 400.....2, 405
Walker v. Stetson, 14 Ohio State, 89.....lxviii, 362
Walker v. Swartwout, 12 Johnson, 444.....vii, 334
Walker v. Tirrel, 101 Massachusetts, 257.....2, 233
Walker v. U. S. Insurance Co., 11 Serg. & R. 61.....xiv, 629
Walker v. Walker, 42 Illinois, 311.....lxviii, 448
Walker v. Walker, 63 New Hampshire, 321.....54, 514
Walker v. Walker, 14 Ohio State, 157.....lxviii, 614
Walker v. Watrous, 8 Alabama, 493.....xlv, 645
Walker v. Wells, 17 Georgia, 547.....lxviii, 223
Walker v. Wells, 25 Georgia, 141.....lxviii, 244
Walker v. Wilkinson, 35 Alabama, 725.....lxviii, 313
Walker v. Woolen, 54 Indiana, 164.....23, 629
Wall, Ex parte, 48 California, 279.....17, 425
Wall's Appeal, 111 Pennsylvania St. 490.....54, 228
Wall v. Hill, 1 B. Monroe, 220.....lxviii, 576
Wall v. Hinds, 4 Gray, 256.....lxiv, 61
Wall v. Robson, 2 Nott & McO. 498.....x, 688
Wall v. Simpson, 6 J. J. Marshall, 155.....xxii, 71
Wall v. Schneider, 69 Wisconsin, 322.....42, 599
Wall v. State, 51 Mississippi, 296.....24, 649
Wall v. State, 18 Texas, 682.....lxv, 322
Wall v. Wall, 30 Mississippi, 91.....lxv, 147
Wall v. Williams, 28 North Carolina, 287.....53, 498
Wallace v. Ah Sam, 71 California, 197.....60, 524
Wallace v. Bartle, 21 Iowa, 346.....lxviii, 594
Wallace v. Brown, 22 Arkansas, 112.....lxviii, 42
Wallace v. Canaday, 4 Sneed, 394.....lxv, 229
Wallace v. Cannon, 28 Georgia, 139.....xv, 385
Wallace v. City of Muscatine, 4 G. Green, 373.....lxv, 131
Wallace v. Clarke, 2 Overton, 93.....v, 654
Wallace v. Collins, 5 Arkansas, 41.....lxviii, 39
Wallace v. De Pau, 1 Breward, 222.....lxv, 628
Wallace v. De Young, 26 Illinois, 638.....26, 168
Wallace v. Duffield, 2 Serg. & R. 521.....vii, 699
Wallace v. Finnegan, 14 Michigan, 179.....20, 243
Wallace v. Floyd, 29 Penn. State, 194.....lxviii, 639
Wallace v. Gwin, 15 Louisiana, 223.....lxviii, 223
Wallace v. Hannum, 1 Humphreys, 443.....lxviii, 659
Wallace v. Harmstad, 15 Penn. State, 492.....lii, 603
Wallace v. Holly, 13 Georgia, 399.....lxviii, 513
Wallace v. Jewell, 21 Ohio St. 163.....8, 46
Wallace v. Lawyer, 54 Indiana, 801.....23, 621
Wallace v. Lark, 12 South Carolina, 576.....23, 515
Wallace v. Long, 105 Indiana, 582.....53, 222
Wallace v. Matthews, 39 Georgia, 617.....lxv, 473
Wallace v. Maxwell, 10 Iredell's Law, 110.....lx, 389
Wallace v. Menasha, 48 Wisconsin, 72.....33, 504
Wallace v. Merriman R. & N. E. Co., 124 Massachusetts, 95.....45, 301
Wallace v. Shaffer, 12 Leigh, 622.....lxviii, 627
Wallace v. Townsend, 43 Ohio St. 527.....54, 629
Wallace v. Walker, 37 Georgia, 263.....lxv, 79
Wallace v. Wortham, 25 Mississippi, 119.....lxviii, 197
Wallen v. Huff, 3 Sneed, 82.....lxv, 69
Waller v. Armistead, 2 Leigh, 11.....lxv, 694
Waller v. Demint, 1 Dana, 92.....lxv, 134
Waller v. Harris, 20 Wendell, 598.....lxviii, 580
Waller v. Todd, 3 Dana, 603.....lxviii, 94
Waller v. Walker, 1 Gratian, 464.....lxviii, 564
Wallerstein v. Columbian Ins. Co., 44 N. Y. 204.....4, 694
Walley v. Schr. Liberty, 12 Louisiana, 98.....lxviii, 114
Walling v. Kinnard, 10 Texas, 508.....lx, 216
Walling v. Mayor, 5 Louisiana An. 690.....lxv, 608
Wallis v. Wallis, 4 Massachusetts, 135.....lxv, 219
Wallis v. Bailey, 49 New York 464.....16, 427
Wallis v. Walker, 37 California, 424.....lxv, 228
Wally's Heirs v. Kennedy, 3 Yerger, 554.....lxv, 611
Walmsley v. Robinson, 63 Illinois, 41.....24, 111
Wain v. Shearman, 8 Serg. & R. 357.....xi, 696
Wain v. Thompson, 9 Serg. & R. 115.....xi, 673
Walpole v. Elliott, 18 Indiana, 256.....lxviii, 228
Walradt v. Brown, 1 Gilman, 297.....xli, 119

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Walrod v. Manson, 23 Wisconsin, 393.....xix, 187
 Walsh v. Atlas Life Ins. Co., 30 Iowa, 133..... 6, 664
 Walsh v. Blachley, 6 Wisconsin, 421.....lxix, 469
 Walsh v. Chicago etc. Ry Co., 42 Wis. 23.....24, 376
 Walsh v. Commonwealth, 89 Penn. St. 419.....33, 771
 Walsh v. Dart, 23 Wisconsin, 334.....xix, 177
 Walsh v. Gilmer, 3 Harris & J. 363.....vi, 603
 Walsh v. Homer, 10 Missouri, 6.....xiv, 342
 Walsh v. Kirkpatrick, 30 California, 302.....lxix, 85
 Walsh v. Lennon, 26 Illinois, 27.....38, 75
 Walsh v. People, 26 Illinois, 58.....16, 669
 Walsh v. Powers, 43 New York, 23..... 3, 634
 Walsh v. Walsh, 116 Massachusetts, 277.....17, 162
 Walsh's Lessee v. Ringer, 2 Ohio, 327.....xv, 665
 Walter, Will of, 64 Wisconsin, 467.....54, 640
 Walter v. Commonwealth, 89 Penn. St. 137.....33, 429
 Walter v. Ford, 74 Missouri, 194.....41, 313
 Walter v. Garman, 13 Penn. State, 515.....xiii, 491
 Walter A. Wood M. M. Co. v. Caldwell, 64 Indiana, 270.....33, 641
 Walters v. Brown, 15 Maryland, 265.....lxiv, 596
 Walters v. Jordan, 13 Iredell's Law, 351.....lvii, 558
 Walters v. Junkins, 16 Serg. & R. 414.....xvi, 835
 Walters v. Kraft, 23 South Carolina, 578.....55, 44
 Walters v. Munroe, 17 Maryland, 154.....lxvii, 326
 Walters v. People, 18 Illinois, 194.....lxv, 730
 Walters v. State, 17 Texas Ct. App. 226.....50, 126
 Walters v. Stm. Mollie Doster, 24 Iowa, 128.....xv, 722
 Walters v. Walters, 13 Iredell's Law, 28.....iv, 401
 Walters v. Washington Ins. Co., 1 Iowa, 404.....lxviii, 451
 Walters & Walker v. Whitlock, 9 Florida, 85.....lxvii, 607
 Walther v. Kemper, 25 Illinois, 246..... 8, 662
 Walton v. Bethune, 2 Brevard, 453.....iv, 507
 Walton v. Hargroves, 43 Mississippi, 18.....xvii, 420
 Walton v. Manderville, 26 Iowa, 597.....41, 123
 Walton v. Singleton, 7 Serg. & R. 451.....x, 472
 Walton v. Sugg, Phill. Law, 96.....xviii, 580
 Walton v. Walton, 7 Johns. Oh. 226.....xi, 456
 Walworth v. Seaver, 20 Vermont, 738.....lxviii, 322
 Wamsutta Mills v. Old Colony Steamboat Co., 137 Massachusetts, 471.....50, 325
 Wamemaker v. Van Buskirk, 1 Saxton's Ch. 685.....xviii, 748
 Wann v. McNulty, 3 Gilman, 358.....xviii, 88
 Wann v. W. U. T. Co., 27 Missouri, 472.....x, 366
 Wasipelo County v. Bigham, 10 Iowa, 30.....lxiv, 270
 Ward v. Allen, 2 Metcalf, 63.....lxv, 387
 Ward v. Arredondo, Phelps' Oh. 212.....xiv, 543
 Ward v. Atlantic & P. Tel. Co., 71 N. Y. 21.....27, 10
 Ward v. Bevil, 10 Alabama, 197.....xiv, 472
 Ward v. Blackwood, 41 Arkansas, 296.....48, 41
 Ward v. Brandt, 11 Martin, 231.....xiii, 262
 Ward v. Brewer, 19 Illinois, 291.....lxviii, 596
 Ward v. Brown, 24 Illinois, 307.....16, 661
 Ward v. Buell, 18 Indiana, 104.....lxviii, 349
 Ward v. Charleston City Ry Co., 19 S. O. 521.....45, 734
 Ward v. Churn, 18 Gratian, 801.....lxviii, 749
 Ward v. Clark, 2 Johnson, 10.....xi, 263
 Ward v. Cole, 32 New Hampshire, 462.....lxiv, 672
 Ward v. Dick, 45 Connecticut, 236.....29, 277
 Ward v. Dick, 47 Connecticut, 208.....26, 75
 Ward v. Flood, 49 California, 20.....17, 405
 Ward v. Green, 6 Cowen, 173.....xvi, 437
 Ward v. Hackitt, 30 Minnesota, 120.....44, 127
 Ward v. Henry, 5 Connecticut, 506.....xiii, 119
 Ward v. Henry, 19 Wisconsin, 76.....lxviii, 672
 Ward v. Johnson, 6 Munford, 6.....viii, 729
 Ward v. Kelsey, 26 New York, 80.....xvii, 773
 Ward v. Kirkpatrick, 26 New York, 413.....39, 674
 Ward v. Little Rock, 41 Arkansas, 226.....48, 46
 Ward v. Mayor, 8 Bank 226.....35, 700
 Ward v. McKenna, 23 Texas, 297..... 7, 292
 Ward v. N. Y. C. R. R. Co., 47 New York, 29..... 7, 468
 Ward v. Proctor, 7 Metcalf, 212.....lxviii, 722
 Ward v. Ringo, 2 Texas, 430.....xviii, 684
 Ward v. Buckman, 36 New York, 26.....xviii, 479
 Ward v. School District, 10 Nebraska, 298.....35, 477
 Ward v. Sheppard, 2 Haywood, 283.....ii, 626
 Ward v. State, 48 Alabama, 161.....17, 31
 Ward v. State, 2 Cold. 605.....xvi, 279
 Ward v. State, 31 Maryland, 279..... 1, 69
 Ward v. State, 2 Missouri, 120.....xvii, 449
 Ward v. Stow, 2 Dev. Eq. 509.....xvii, 320
 Ward v. Williams, 26 Illinois, 443.....lxix, 325
 Ward v. Willis, 6 Jones' Law, 123.....lxvii, 679
 Ward v. Wilson, 100 Indiana, 82.....50, 768
 Ward's Cent. & P. L. Co. v. Elkins, 24 Michigan, 439.....27, 544
 Ward v. Manchester, 54 New Hampshire, 608.....22, 604
 Wardell v. Fiedick, 13 Johnson, 226.....vii, 262
 Warden v. Nelson, 1 Murphy, 275.....xi, 621
 Warden v. Tucker, 7 Massachusetts, 449.....v, 68
 Warden v. Arell, 2 Washington, 222.....i, 498
 Warden v. Newdigate, 11 R. Monroe, 174.....xi, 607
 Wardlaw v. Buzzard, 15 Rich. L. 122.....xv, 148
 Wardrobe v. California Stage Co., 7 Cal. 118.....lxviii, 321
 Ware v. Allen, 64 Mississippi, 548.....60, 67
 Ware v. Barataria & Laf. Canal Co., 15 La. 199.....xxxv, 129
 Ware v. Bradford, 2 Alabama, 676.....xxxvi, 427
 Ware v. Cartledge, 24 Alabama, 628.....lx, 499
 Ware v. Collins, 35 Mississippi, 223.....lxviii, 128
 Ware v. Cowles, 24 Alabama, 448.....lx, 498
 Ware v. Hewey, 57 Maine, 261.....xix, 708
 Ware v. Houghton, 41 Mississippi, 270.....xviii, 269
 Ware v. Murph. Rice's Law, 54.....lxviii, 67
 Ware v. Owens, 43 Alabama, 212.....xv, 645
 Ware v. Perduval, 61 Maine, 261.....14, 628
 Ware v. Richardson, 3 Maryland, 505.....lxvi, 769
 Ware v. Russell, 57 Alabama, 43.....29, 719
 Ware v. Russell, 70 Alabama, 174.....45, 82
 Ware v. Street, 2 Head, 609.....lxv, 748
 Warfield's Will, 23 California, 51.....lxviii, 49
 Warfield v. Campbell, 26 Alabama, 537.....lxviii, 734
 Warfield v. Dorsey, 30 Maryland, 269.....17, 698
 Warfield v. Lindell, 30 Missouri, 272.....lxvii, 614
 Warfield v. Lindell, 28 Missouri, 561.....x, 449
 Waring v. Indemnity F. Ins. Co., 45 N. Y. 608..... 6, 148
 Waring v. Orana, 2 Paige's Ch. 79.....xvi, 79
 Waring v. Georgia Med. Soc'y, 33 Ga. 606.....xv, 490
 Waring v. Grady, 49 Alabama, 445.....20, 262
 Waring v. Smyth, 2 Barbours' Ch. 119.....xvii, 229
 Warlick v. Barnett, 1 Jones' Law, 639.....lxii, 189
 Warlick v. White, 26 North Carolina, 120.....41, 420
 Warncke v. Lembo, 71 Illinois, 91.....22, 68
 Warner v. Bacon, 8 Gray, 397.....lxix, 268
 Warner v. Burlington etc. R. R. Co., 23 Iowa, 108.....xv, 269
 Warner v. Commonwealth, 1 Penn. State, 184.....xv, 114
 Warner v. Conant, 24 Vermont, 251.....lxviii, 179
 Warner v. Helden, 23 Wisconsin, 517..... 9, 512
 Warner v. Hopkins, 111 Penn. St. 328.....56, 268
 Warner v. Jaffray, 26 New York, 248.....48, 616
 Warner v. Miltenberger, 21 Maryland, 264.....lxviii, 672
 Warner v. New York Cent. R. R. Co., 28 New York, 437.....11, 734
 Warner v. Page, 4 Vermont, 221.....xv, 607
 Warner v. People, 2 Denio, 272.....xviii, 749
 Warner v. Robinson, 1 Root, 194.....i, 28
 Warner v. Wheeler, 1 D. Chipman, 199.....vi, 717
 Warner v. Whitaker, 6 Michigan, 128.....lxvii, 68
 Warren v. Aller, 1 Pinney, 479.....xv, 406
 Warren v. Blake, 54 Maine, 276.....lxviii, 748

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Warren v. Brown, 26 Mississippi, 66.....	lvii, 191	Waters v. Riley, 2 Harris & G. 235.....	lviii, 335
Warren v. Chambers, 25 Arkansas, 130.....	xvi, 533	Waters v. Stevenson, 13 Nevada, 157.....	xx, 330
Warren v. Chambers, 25 Arkansas, 130.....	4, 23	Waters v. Stickney, 13 Allen, 1.....	xx, 120
Warren v. Crabtree, 1 Greenleaf, 167.....	x, 51	Waters v. Van Winkle, 2 Pennington, 307.....	lv, 207
Warren v. Davenport Fire Ins. Co., 31 Iowa, 464.....	7, 180	Waters v. Waters, 20 Iowa, 263.....	lxviii, 549
Warren v. Edgerton, 23 Vermont, 190.....	lv, 66	Waters v. Young, 11 Rhode Island, 1.....	xx, 406
Warren v. Fitchburg R. R. Co., 8 Allen, 227.....	lxix, 700	Watertown v. Gatchell, 5 Greenleaf, 408.....	xvii, 221
Warren v. Mass. Ins. Co., 13 Pickering, 512.....	xxv, 341	Watertown v. Mayo, 109 Massachusetts, 312.....	xx, 604
Warren v. Ocean Ins. Co., 16 Maine, 469.....	xxviii, 674	Watertown Fire Ins. Co. v. Grover & R. S. M. Co., 41 Michigan, 131.....	xx, 106
Warren v. Pierce, 6 Greenleaf, 9.....	xix, 139	Watertown Fire Ins. Co. v. Shannons, 121 Massachusetts, 85.....	xl, 126
Warren v. Pres. of Jacksonville, 15 Ill. 206.....	lviii, 610	Watertown's Tr. v. Cowen, 4 Paige Ch. 552.....	xxvii, 30
Warren v. Shale, 22 Michigan, 1.....	9, 70	Watkins v. Baird, 6 Massachusetts, 508.....	lv, 170
Warren v. Smith, 24 Texas, 694.....	lxvii, 115	Watkins v. Dean, 10 Yerges, 330.....	xxxi, 539
Warren v. State, 9 Texas, Ct. App. 619.....	xx, 745	Watkins v. Eaton, 20 Maine, 233.....	l, 67
Warren v. State, 19 Arkansas, 214.....	lxviii, 214	Watkins v. Martin, 24 Arkansas, 14.....	lxviii, 107
Warren v. Thompson, 75 Maine, 230.....	44, 297	Watkins v. Peck, 12 New Hampshire, 200.....	xl, 126
Warren v. United Ins. Co., 2 Johns. Cases, 292.....	l, 164	Watkins v. State, 66 Indiana, 627.....	xx, 323
Warren v. Wagner, 75 Alabama, 122.....	xi, 446	Watkins ada. State, 9 Connecticut, 47.....	xxii, 712
Warren v. Whitney, 24 Maine, 561.....	xii, 406	Watkins v. Taylor, 2 Munford, 424.....	v, 609
Warren, Inh. of v. Inh. of Thompson, 43 Ma. 484.....	lxix, 69	Watkins v. Walker County, 18 Texas, 596.....	lxix, 293
Warrior v. State, 3 Tex. Ct. App. 104.....	56, 124	Watkins v. Wyatt, 9 Barb. 320.....	44, 90
Warrington v. Pollard, 24 Iowa, 261.....	xv, 737	Watkinson v. Bank of Penn., 4 Wharton, 403.....	xxiv, 621
Warwick v. Mammoth Co. Mut. F. Ins. Co., 15 Vroom, 43.....	63, 343	Watles v. First Nat. Bank, 124 Mass. 571.....	xx, 604
Warwick v. State, 73 Alabama, 496.....	49, 89	Watrous v. Allen, 67 Michigan, 208.....	58, 336
Warwick v. Underwood, 3 Head, 238.....	lxv, 767	Watrous v. Steel, 4 Vermont, 620.....	xxiv, 648
Washburn v. Bd. of Comm'rs, 104 Indiana, 221.....	54, 323	Watry v. Furber, 18 Wisconsin, 500.....	lxixvi, 789
Washburn v. Deoch, 63 Wisconsin, 436.....	66, 373	Watson v. Bagaley, 13 Penn. State, 164.....	li, 693
Washburn v. Gilman, 64 Maine, 163.....	13, 246	Watson v. Bailey, 1 Binney, 470.....	xx, 603
Washburn v. Merrill, 1 Day, 139.....	li, 89	Watson v. Billings, 26 Arkansas, 273.....	42, 1
Washburn v. Nashville R. R. 3 Head, 638.....	lxv, 784	Watson v. Blom, 1 Serg. & R. 237.....	vii, 617
Washburn v. Tracy, 3 D. Chipman, 139.....	xv, 601	Watson v. Blaine, 12 Serg. & R. 131.....	xiv, 600
Washington v. Planters' Bank, 1 Howard, 230.....	xxviii, 333	Watson v. Bourne, 10 Massachusetts, 287.....	vi, 129
Washington v. Sanders, 2 Devereux's Law, 242.....	xxi, 336	Watson v. Cheuvre, 18 Iowa, 263.....	lxixvii, 293
Washington v. State, 60 Alabama, 10.....	31, 26	Watson v. Cressap, 1 B. Monroe, 125.....	lxixvi, 673
Washington v. State, 63 Alabama, 135.....	35, 8	Watson v. Gregg, 10 Watts, 293.....	lxixvi, 178
Washington v. State, 75 Alabama, 522.....	51, 679	Watson v. Hunter, 5 Johnson's Ch. 160.....	ix, 235
Washington v. State, 19 Tex. Ct. App. 221.....	53, 267	Watson v. McCarthy, 2 Georgia, 67.....	xlvi, 339
Washington ada. State, 1 Bay, 120.....	i, 601	Watson v. Mercer, 6 Serg. & R. 49.....	ix, 411
Washington ada. State, 19 Texas, 128.....	lxix, 223	Watson v. Muirhead, 67 Penn. St. 161.....	lxixviii, 213
Wash. Alex. & G. R. R. v. Alex. & Wash. R. R., 19 Gratt. 526.....	4, 710	Watson v. Pennsylvania, 106 Illinois, 21.....	58, 26
Washington Ave., 69 Pennsylvania 84.....	32, 325	Watson v. Phoenix Bank, 5 Metcalf, 217.....	xii, 609
Washington R. R. Am's v. Wood, 4 Mackay, 19.....	54, 261	Watson v. People, 67 New York, 661.....	41, 207
Washington Fire Ins. Co. v. Kelly, 89 Md. 621.....	3, 149	Watson v. Prop'r Lisbon Bridge, 14 Ma. 201.....	xxxi, 49
Washington Ice Co. v. Eborall, 161 Illinois, 46.....	48, 196	Watson v. Reising, 24 Illinois, 261.....	lxixvi, 768
Washington Ice Co. v. Webster, 63 Maine, 261.....	16, 462	Watson v. Stone, 40 Alabama, 461.....	xci, 604
Washington Ins. Co. v. Hayes, 17 Ohio St. 623.....	xxvii, 623	Watson v. State, 70 Alabama, 13.....	44, 79
Washington Ins. Co. v. White, 103 Mass. 323.....	4, 543	Watson v. Templeton, 11 Louisiana An. 137.....	lxvi, 194
Washburn, In re, 4 Johnson's Ch. 106.....	viii, 548	Watson v. Tindal, 24 Georgia, 494.....	lxix, 168
Wassmer v. Del. L. & W. R. Co., 60 N. Y. 212.....	36, 606	Watson v. Trask, 6 Ohio, 531.....	lxixvii, 271
Wassell v. Reardon, 11 Arkansas, 705.....	lv, 245	Watson v. Tripp, 11 Rhode Island, 98.....	xx, 426
Wassum v. Feeney, 121 Massachusetts, 93.....	33, 298	Watson v. Watson, 9 Connecticut, 149.....	xxviii, 294
Waterbury v. Lockwood, 4 Day, 357.....	lv, 215	Watson v. Watson, 63 Michigan, 168.....	51, 111
Water Com. of J. City, Matter of, 2 Vroom, 71.....	lxixvii, 199	Watson v. Watson, 24 South Carolina, 292.....	56, 98
Waterman v. Chicago, M. & St. P. R. R. Co., 61 Wisconsin, 464.....	54, 145	Watson v. Wilcox, 39 Wisconsin, 643.....	36, 93
Waterman v. Conn. and P. R. R. 30 Va. 616.....	lxixviii, 326	Watson v. Williams, 4 Blackford, 26.....	lxixviii, 249
Waterman v. Hall, 17 Vermont, 123.....	xiii, 484	Watson v. Wilson, 3 Dana, 406.....	lxixvi, 60
Waterman v. Lawrence, 19 California, 216.....	lxixix, 213	Watterson v. Reynolds, 66 Pennsylvania St. 674.....	44, 672
Waterman v. Treat, 49 Maine, 309.....	lxixvii, 261	Watts v. Griswold, 20 Georgia, 732.....	lxv, 667
Waterman v. Whitney, 11 N. Y. (1 Kernan) 187.....	lxix, 71	Watts v. Kinney, 3 Leigh, 371.....	lxixviii, 267
Waters' Appeal, 35 Penn. State, 523.....	lxixviii, 354	Watts v. Savannah & O. C. Co., 64 Georgia, 82.....	37, 53
Waters v. Devall, 11 Gill & J. 37.....	lxixviii, 698	Watts ada. State, 7 Louisiana, 440.....	lxixvi, 227
Waters v. Good, 6 J. J. Marshall, 506.....	xxiii, 108	Watts v. Steele, 19 Alabama, 608.....	lv, 297
Waters v. Jones, 3 Porter, 442.....	lxix, 261	Watts v. Ward, 1 Oregon, 86.....	lxix, 229
Waters v. Lilley, 4 Pickering, 145.....	xvi, 333	Waugh v. Beck, 114 Pennsylvania St. 426.....	66, 264
Waters v. Mattingly, 1 Bibb, 244.....	lv, 631	Waugh v. Waugh, 84 Pennsylvania St. 293.....	54, 121
Waters v. Moss, 12 California, 535.....	lxixviii, 561	Waux v. W. U. Tel. Co., 27 Missouri, 473.....	
Waters v. Reuber, 16 Nebraska, 99.....	49, 710	Wauxen v. Moore, 34 Wisconsin, 460.....	17, 446
		Way v. Bragaw, 16 New Jersey Eq. 213.....	lxixv, 147

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Way v. Chicago, R. I. & P. R. R. Co. 64 Iowa, 48.....53, 431	Webster v. Morris, 66 Wisconsin, 366.....57, 379
Way v. Davidson, 12 Gray, 468.....lxiv, 604	Webster v. Newbold, 41 Penn. State, 483.....lxvii, 467
Way v. Howe, 108 Massachusetts, 503.....11, 396	Webster v. Phoenix Ins. Co., 26 Wisconsin, 67.....17, 479
Way v. Richardson, 3 Gray, 413.....lxiii, 760	Webster v. Rose, 6 Hefak, 83.....19, 663
Way v. Sperry, 6 Cushing, 338.....lxii, 779	Webster v. Singley, 53 Alabama, 308.....25, 608
Wayland v. Mosely, 5 Alabama, 430.....xxix, 335	Webster v. Supt's of Election, 1 McArthur, 169.....29, 583
Wayland v. Tucker, 4 Grattan, 367.....1, 76	Webster v. Wade, 19 California, 391.....lxix, 218
Wayne Cir. Court ada. People, 11 Mich. 368.....lxviii, 754	Webster v. Webster, 33 New Hampshire, 18.....lxvi, 706
Wayne Co. v. Waller, 90 Pennsylvania St. 90.....33, 636	Webster v. Webster, 53 Maine, 139.....4, 253
Wayne Co. Sav. Bank v. Low, 31 N. Y. 386.....37, 833	Webster v. Wray, 19 Nebraska, 568.....56, 754
Waynesboro M. F. Ins. Co. v. Conover, 26 Penn- sylvania State, 394.....43, 618	Weekler v. First Nat. Bank, 43 Maryland, 561.....26, 96
Waynesburg College, Appeal of, 111 Pa. St. 130.....54, 323	Weed v. Barney, 45 New York, 344.....6, 96
Wead v. Larkin, 64 Illinois, 438.....5, 149	Weed v. Black, 2 McArthur, 263.....29, 618
Weekland v. Hoffman, 60 Penn. State, 513.....lxviii, 560	Weed v. Boutelle, 56 Vermont, 570.....48, 321
Weekly v. Bell, 9 Watts, 273.....lxvii, 116	Weed v. Jewett, 2 Metcalf, 606.....lxvii, 116
Weekly v. Hall, 13 Ohio, 167.....xlii, 194	Weed v. Panama R. R. Co., 17 New York, 363.....lxvii, 474
Weemer v. Junt, 29 Penn. State, 367.....lxvii, 627	Weed ada. State, 21 New Hampshire, 392.....xlii, 194
Weir v. Etkner, 46 Maryland, 367.....34, 517	Weed v. Terry, 4 Douglas, 344.....xiv, 397
Weire v. Van Meter, 41 Iowa, 128.....26, 616	Weed v. Van Houten, 4 Halsted, 189.....xvii, 468
Weathered v. Smith, 9 Texas, 623.....lx, 186	Weeden v. Richmond, 9 R. I. 128.....novii, 373
Weatherford v. Weatherford, 30 Alabama, 548.....lvi, 306	Weeks v. Haas, 3 Watts & Berg, 680.....lxix, 39
Weatherhead v. Stoddard, 58 Vermont, 612.....56, 673	Weeks v. Hull, 19 Connecticut, 375.....1, 260
Weatherby v. Covington, 3 Strobhart's L. 27.....xlix, 633	Weeks v. N. Y., N. H. & H. R. Co., 72 N. Y. 50.....28, 161
Weatherby v. Smith, 40 Iowa, 131.....6, 663	Weeks v. Patten, 13 Maine, 43.....lxvii, 606
Weatherby ada. State, 43 Maine, 268.....lxix, 89	Weeks v. Weeks, 5 Iredell's Eq. 111.....lxvii, 396
Weatherly v. Weatherly, 40 Minn. 468.....30, 344	Weems v. McCaughan, 7 Smedes & M. 623.....xiv, 314
Weaver v. Bachert, 3 Penn. State, 30.....lxiv, 159	Wehlitz, In re, 16 Wisconsin, 443.....lxviii, 708
Weaver v. Carnall, 36 Arkansas, 198.....37, 33	Wehn v. Commissioners, 5 Nebraska, 464.....25, 607
Weaver v. Fugely, 29 Penn. State, 27.....lxix, 181	Weichselbaum v. Curlett, 20 Kansas, 709.....27, 304
Weaver v. Gregg, 6 Ohio, 547.....lxvii, 366	Weider v. Maddox, 66 Texas, 373.....59, 627
Weaver v. Lapsley, 43 Alabama, 601.....xlv, 671	Well v. Tyler, 26 Missouri 545.....30, 441
Weaver v. Lynch, 25 Penn. State, 449.....lxiv, 713	Welmer v. Clement, 37 Penn. State, 147.....lxviii, 411
Weaver v. State, 19 Texas Ct. App. 547.....53, 369	Weir v. Weir, 3 B. Monroe, 648.....lxix, 467
Weaver v. White, 25 Penn. State, 270.....lxiv, 696	Weire v. Davenport, 11 Iowa, 49.....lxvii, 128
Webb v. Baird, 27 Indiana, 368.....lxviii, 507	Wels v. Madison, 75 Indiana, 241.....59, 185
Webb v. Bumpass, 9 Porter, 301.....lxviii, 310	Welsh v. Chicago, etc. Ry Co. 19 Wis. 36.....lxvii, 743
Webb v. Cecil, 9 B. Monroe, 198.....lxviii, 423	Welsinger v. Taylor, 1 Bush, 275.....lxix, 698
Webb v. Conn, 1 Little, 83.....xlii, 325	Welser v. Welser, 5 Watts, 279.....lxix, 313
Webb v. Duckingfield, 13 Johnson, 360.....vii, 388	Wels v. Devlin, 67 Texas, 507.....66, 26
Webb v. Fleming, 30 Georgia, 608.....lxvii, 675	Welse v. Smith, 3 Oregon, 445.....8, 621
Webb v. Fulchire, 3 Iredell's Law, 485.....xl, 419	Welsenberg v. Appleton, 26 Wisconsin, 55.....7, 36
Webb v. Granthamville Manuf. Co., 11 B. C., 398.....32, 679	Welsmer v. Douglas, 64 New York, 91.....21, 596
Webb v. Hazleton, 4 Nebraska, 308.....19, 633	Welsmer v. Denton, 10 N. Y. (6 Selden), 68.....lxii, 721
Webb v. Laird, 59 Vermont, 108.....59, 689	Welch v. Adams, 63 New Hampshire, 344.....56, 621
Webb v. Miller, 24 Mississippi, 638.....lvii, 139	Welch v. Barber, 53 Conn. 147.....53, 567
Webb v. Pease, 7 Pickering, 347.....lxix, 394	Welch v. Clark, 13 Vermont, 681.....lxvii, 607
Webb v. Rome etc. R. R. Co., 49 New York 420.....16, 369	Welch v. Durand, 26 Connecticut, 123.....4, 66
Webb v. Townsend, 1 Pickering, 31.....xl, 133	Welch v. Frost, 1 Michigan, 30.....lxviii, 623
Webber v. Blunt, 19 Wendell, 128.....lxvii, 448	Welch v. Goodwin, 123 Massachusetts, 71.....35, 24
Webber v. Chapman, 43 New Hampshire, 368.....lxix, 111	Welch v. Hloka, 6 Cowen, 504.....xvi, 448
Webber v. Cox, 6 T. B. Monroe, 110.....xvii, 127	Welch v. Hotchkiss, 26 Connecticut, 140.....12, 323
Webber v. Davis, 44 Maine, 147.....lxix, 87	Welch v. Jugenheimer, 55 Iowa, 11.....41, 77
Webber v. Howe, 26 Michigan, 180.....34, 690	Welch v. Lawson, 32 Mississippi, 170.....lxvi, 606
Webber v. Minor, 6 Bush, 463.....lxix, 638	Welch v. Rice, 31 Texas, 688.....lxviii, 506
Webber v. Townley, 43 Michigan, 324.....38, 213	Welch v. Sage, 47 New York, 143.....7, 423
Webbs v. Hynes, 9 B. Monroe, 285.....1, 515	Welch v. State, 50 Georgia, 128.....25, 609
Weber v. Couch, 124 Massachusetts, 26.....45, 374	Welch ada. State, 36 Maine, 30.....xiv, 94
Weber v. Hartman, 7 Colorado, 13.....49, 339	Welch v. Sykes, 3 Gilman, 197.....lxv, 626
Weber v. Morris & E. R. R. Co., 26 N. J. 408.....16, 353	Welch v. Wadsworth, 30 Connecticut, 149.....lxix, 236
Weber v. Reinhard, 73 Pennsylvania St. 370.....13, 747	Welch v. Welch, 2 T. B. Monroe, 63.....xv, 126
Webster v. Anderson, 61 Michigan, 554.....36, 452	Welch v. Wilcox, 101 Massachusetts, 168.....2, 113
Webster v. Buss, 61 New Hampshire, 40.....66, 317	Welch v. Thompson, 30 Georgia, 559.....lxix, 677
Webster ada. Commonwealth, 5 Cushing, 288.....lii, 711	Weld v. Walker, 120 Massachusetts, 423.....39, 460
Webster v. Conley, 46 Illinois, 13.....xvii, 234	Weld v. Sabin, 20 New Hampshire, 683.....1, 269
Webster v. Drinkwater, 5 Greenleaf, 219.....xvii, 233	Welland Can. Co. v. Hathaway, 8 Wend. 499.....lxiv, 81
Webster v. Hall, 2 Harris & McH. 19.....1, 570	Wellborn v. Weaver, 17 Georgia, 367.....lxvii, 235
Webster v. Haworth, 8 California, 21.....lxviii, 387	Wellborn v. Williams, 9 Georgia, 26.....28, 657
Webster v. Hildreth, 33 Vermont, 497.....lxviii, 632	Weldon v. Colquitt, 62 Georgia, 449.....25, 129
Webster v. Mann, 56 Texas, 119.....49, 688	Weller v. Rames, 15 Minnesota, 461.....2, 189
	Weller v. McCormick, 47 New Jersey Law, 397.....54, 176

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Wells ad. People ex. rel. McKim, 11 Cal. 49.....lxix, 754	West v. Moore, 14 Vermont, 467.....xxix, 328
Wells v. Cowles, 4 Connecticut, 183.....x, 115	West v. Thornton, 7 Grant, 177.....lv, 134
Wellington v. Small, 3 Cushing, 145.....l, 719	West B. Ins. Co. v. Helfenstein, 40 Penn. St. 282.....lxxx, 873
Wellington, City of v. Grayson, 31 Kansas, 99.....47, 482	West Branch Bank v. Chester, 11 Penn. State, 293.....li, 567
Wellington et al., Petitioners, 16 Pickering, 87.....xxvi, 631	West Branch Bank v. Fulmer, 3 Penn. State, 329.....xiv, 681
Wells v. American Ex. Co., 55 Wisconsin, 23.....43, 635	West Cambridge v. Lexington, 1 Pickering, 505.....xi, 321
Wells v. Archer, 10 Serg. & R. 412.....xiii, 682	West Chester etc. R. R. Co. v. Miles, 65 Penn. St. 209.....xxiii, 744
Wells v. Bain, 75 Pennsylvania St. 39.....15, 563	West Feliciana R. R. v. Thornton, 12 La. An. 736.....lxviii, 778
Wells v. Bridgeport H. Co., 30 Conn. 316.....lxix, 250	West Mahanoy Township of v. Watson, 113 Pa. St. 574.....53, 339
Wells v. Brigham, 6 Cushing, 6.....lii, 750	West Orange v. Field, 37 N. J. Eq. 600.....45, 679
Wells v. City of Weston, 23 Missouri, 394.....lxvi, 627	West Virginia T. Co. v. Ohio R. P. L. Co., 23 West Virginia, 600.....46, 687
Wells v. Cook, 16 Ohio St. 67.....lxixviii, 436	West Winstead B. R. Ass'n v. Ford, 27 Conn. 269.....lxvi, 68
Wells v. Caiman, 107 Massachusetts, 514.....9, 65	Westbrook v. McKim, 1 HEN (S. O.), 317.....xxvi, 187
Wells v. Higgins, 1 Little, 299.....xiii, 235	Westbrook Mfg. Co. v. Grant, 60 Maine, 69.....11, 121
Wells v. J. I. M. Co., 47 N. H. 235.....xv, 575	Westchester, Boro' of, v. Appia, 35 Pa. S. 294.....lxviii, 338
Wells v. Mann, 45 New York, 327.....6, 93	Westcott v. Oady, 5 Johns. Ch. 334.....ix, 398
Wells v. Mitchell, 1 Iredell's Law, 484.....lxixv, 787	Westcott v. Fargo, 61 New York, 542.....19, 339
Wells v. Smith, 13 Gray, 307.....lxixv, 631	Westfield, Ex parte, 55 California, 580.....36, 67
Wells v. Smith, 7 Paige's Ch. 23.....xxxi, 274	Westorio v. De Wint, 38 New York, 241.....xxiii, 517
Wells ad. State, Conn. 434.....1, 211	Western & A. R. R. v. Turner, 73 Georgia, 392.....53, 643
Wells v. Thomas, 27 Missouri, 17.....lxixii, 228	Western Ins. Co. v. Cropper, 23 Penn. St. 351.....lxix, 582
Wells v. Thompson, 15 Alabama, 798.....lxviii, 76	Western Md. R. R. v. Berryman, 15 Md. 190.....lxixiv, 608
Wells v. Wells, 4 T. R. Moore, 122.....xvi, 150	Western Md. R. R. v. Owings, 15 Md. 190.....lxixiv, 603
Wells v. Wilmington R. R. Co., 6 Jones' Law, 47 lxixii, 556	Western M. R. Co. v. Stanley, 61 Maryland, 298.....48, 96
Welsh v. Hannibal & St. J. R. Co., 73 Mo. 451.....37, 440	Western R. v. Thomas, 60 Georgia, 312.....37, 411
Welsh v. Carter, 1 Wendell, 185.....xix, 473	Western S. F. S. v. Philadelphia, 31 Pa. St. 175.....lxixii, 739
Welsh v. Cochran, 63 New York, 181.....39, 519	Western Stage Co. v. Walker, 3 Iowa, 504.....lxv, 769
Welsh v. Davis, 3 South Carolina, 110.....16, 690	Western Transp. Co. v. Newhall, 24 Ill. 464.....lxixvi, 769
Welsh v. German Am. Bank 73 New York, 424.....39, 175	Western T. Co. v. Hoyt, 69 New York, 220.....28, 175
Welsh v. Phillips, 54 Alabama, 309.....25, 679	Western U. Tel. Co. v. Adams, 98 Indiana, 593.....44, 776
Welsh v. Pittsburgh F. & C. R. R., 10 O. St. 65.....lxixv, 490	Western U. Tel. Co. v. American U. Tel. Co. 65 Georgia, 180.....36, 728
Welsh v. Rutland, 58 Vermont, 228.....48, 763	Western U. Tel. Co. v. Blanchard, 68 Georgia, 299.....43, 499
Welsh v. Usher, 3 Hill's Ch. 167.....xxix, 63	Western U. Tel. Co. v. Brown, 55 Texas, 170.....44, 619
Welsh v. Wilson, 101 New York, 254.....54, 698	Western U. Tel. Co. v. Buchanan, 26 Indiana, 429.....9, 744
Welton v. Adams & Co., 4 Cal. 37.....lx, 679	Western U. Tel. Co. v. Chicago & P. R. Co., 66 Illinois, 246.....29, 99
Wells v. Connecticut Mut. L. Ins. Co., 45 New York, 34.....8, 518	Western U. Tel. Co. v. Cobb, 47 Arkansas, 244.....58, 798
Wels v. Rhodius, 67 Indiana, 1.....44, 747	Western U. Tel. Co. v. Dickinson, 40 Indiana, 444.....53, 395
Wemple v. Knopf, 15 Minnesota, 440.....2, 147	Western U. Tel. Co. v. Feltman, 73 Georgia, 393.....54, 677
Wendell v. Jackson, ex d. People, 8 Wend. 183.....xxii, 635	Western U. Tel. Co. v. Foster, 64 Texas, 120.....53, 576
Wendell v. Johnson, 8 New Hampshire, 230.....xxix, 648	Western U. Tel. Co. v. Graham, 1 Colorado, 298.....9, 128
Wendlinger v. Smith, 75 Virginia, 309.....49, 727	Western U. Tel. Co. v. Jones, 98 Indiana, 228.....42, 713
Wenman v. Mohawk Ins. Co., 13 Wendell, 267.....lxixvii, 464	Western U. Tel. Co. v. McGuire, 104 Indiana, 139.....54, 299
Wentworth v. Day, 3 Metcalf, 362.....lxixvii, 145	Western U. Tel. Co. v. Meyer, 61 Alabama, 188.....32, 1
Wentworth v. Ramick, 47 New Hamp. 236.....xv, 573	Western U. Tel. Co. v. Neill, 67 Texas, 262.....44, 599
Wentworth v. Smith, 44 N. H. 419.....lxixvii, 228	Western U. Tel. Co. v. Pendleton, 26 Indiana, 13.....48, 603
Wentworth v. Wentworth, 2 Minnesota, 277.....lxixii, 97	Western U. Tel. Co. v. Reynolds, 77 Virginia, 173.....46, 715
Wentz v. Fincher, 12 Iredell's Law, 297.....lv, 416	Western U. Tel. Co. v. Rich, 19 Kansas, 617.....27, 199
Wenzlik v. McCotter, 87 New York, 123.....41, 358	Western U. Tel. Co. v. State, 9 Exr. 599.....46, 99
Wesely v. Parsons, 28 New York, 344.....lxixiv, 346	Western U. Tel. Co. v. State Board of Amusement, 80 Alabama, 273.....69, 99
Werner v. Bergman, 23 Kansas, 60.....42, 122	Western U. Tel. Co. v. Tyler, 74 Illinois, 168.....24, 279
Wernwag v. Brown, 3 Blackford, 467.....xxvi, 433	Western Union Telegraph Co. v. Ward, 23 Indiana, 377.....lxixv, 608
Wernwag v. Pawling, 5 Gill & Johnson, 800.....xrv, 317	Westervelt v. Dumarest, 46 N. J. L. 37.....59, 680
Wertheimer v. Howard, 30 Missouri, 420.....lxixvii, 623	Westervelt v. Gregg, 12 N. Y. (3 Kernan), 298.....lxii, 169
Wesley v. State, 37 Mississippi, 327.....lxixv, 63	Westervelt v. Pinkney, 14 Wendell, 128.....lxixvii, 526
Wessel v. Rathjohn, 89 North Carolina, 377.....45, 698	Westfall v. Bralcy, 10 Ohio State, 128.....lxixv, 508
Wesson v. Garrison, 8 Louisiana An. 128.....lxviii, 674	Westfield Bank v. Cornen, 37 New York, 260.....xxiii, 573
Wesson v. W. I. Co., 13 Allen, 95.....xv, 181	Westfield v. Mayo, 128 Massachusetts, 109.....23, 295
West v. Anderson, 9 Connecticut, 107.....xvi, 737	Westlake v. Westlake, 24 Ohio State, 621.....32, 287
West v. Bagby, 12 Texas, 34.....lxii, 512	Westlake v. B. v. St. Louis, 77 Missouri, 67.....64, 6
West v. Citizens' Ins. Co., 37 Ohio St. 1.....37, 294	Westmoreland v. Dixon, 4 Haywood, 223.....lx, 763
West v. Colquhitt, 71 Georgia, 559.....51, 277	Weston v. Barker, 12 Johnson, 276.....vii, 323
West v. Cunningham, 9 Porter, 104.....lxixviii, 300	Weston v. Bear River Etc. Co., 5 California, 128.....lxii, 117
West v. Drawhorn, 20 Georgia, 170.....lxv, 614	Weston v. Dorr, 25 Maine, 179.....lxixv, 599
West v. Emery, 17 Vermont, 583.....lxiv, 356	
West v. Flemming, 18 Illinois, 248.....lxviii, 539	
West v. Hughes, 1 Harris & J. 874.....li, 539	
West v. Kelly, 19 Alabama, 363.....lv, 192	
West v. Martin, 31 Missouri, 375.....lxix, 107	
West v. McConnell, 8 Louisiana, 494.....lxixv, 192	

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Weston v. Grand Trunk R'y Co., 54 Maine, 376, xcii, 5	Wherry v. McCammon, 12 Richardson's Eq. 337, xci, 246
Weston v. Hight, 17 Maine, 287.....xxxv, 260	Whidden v. Seelye, 40 Maine, 247.....lxiii, 661
Weston v. Sampson, 8 Cushing, 347.....liv, 764	Whilden v. Merchants' & P. Nat. Bank, 64 Ala-
Weston ada. State, 9 Connecticut, 537.....xxv, 46	bama, 1.....38, 1
Westover v. Etta L. Ins. Co., 99 N. Y. 56.....52, 1	Whilden v. State, 25 Georgia, 396.....lxxi, 181
Wetherbee v. Dunn, 35 California, 147.....xcv, 166	Whipp v. State, 34 Ohio St. 87.....32, 359
Wetherbee v. Green, 22 Michigan, 311.....7, 653	Whipple v. Farrar, 3 Michigan, 436.....lxiv, 99
Wetherbee v. Marsh, 20 New Hampshire, 561.....li, 244	Whipple v. Foot, 2 Johnson, 418.....lii, 442
Wetherill v. Nelson, 20 Penn. State, 448.....lx, 741	Whipple v. Fuller, 11 Connecticut, 582.....xxix, 330
Wetmore v. McMillan, 57 Iowa, 344.....42, 45	Whipple v. Kent, 2 Gray, 410.....lxi, 470
Wetmore v. Mell, 1 Ohio State, 26.....lix, 607	Whipple v. Robbins, 97 Massachusetts, 107.....xciii, 64
Wetmore v. Mellinger, 64 Iowa, 741.....52, 465	Whipple v. Thayer, 16 Pickering, 25.....xxvi, 626
Wetmore v. Tracy, 14 Wendell, 250.....xxviii, 625	Whipple v. Whitman, 13 Rhode Island, 512.....43, 42
Wetmore v. White, 3 Caines' Cas. 87.....li, 323	Whisler v. Hicks, 5 Blackford, 100.....xxxiii, 454
Wetter v. Kiley, 95 Pennsylvania State, 461.....40, 670	Whiston v. Stodder, 8 Martin, 95.....xiii, 281
Weyh v. Boylan, 85 New York, 394.....39, 669	Whit ada. State, 5 Jones' Law, 224.....lxiii, 633
Weymouth v. Chicago etc. Railway Co., 17	Whitaker v. Hartford etc. R.R.Co., 8 R. I., 47, lxxxvi, 614
Wisconsin, 550.....lxxxiv, 763	Whitaker v. Hartford etc. R. R. Co., 8 R. I., 47.....5, 547
Weymouth ada. Commonwealth, 2 Allen, 144, lxxix, 776	Whitaker v. Hawley, 25 Kansas, 674.....37, 277
Weymouth v. Sanborn, 43 New Hamp., 171.....lxxx, 144	Whitaker v. Morrison, 1 Florida, 25.....xliv, 627
Whalen v. Layman, 2 Blackford, 194.....xviii, 157	Whitaker v. Rice, 9 Minnesota, 13.....lxxxvi, 78
Whaley v. Elliot, 1 A. K. Marshall, 343.....x, 737	Whitaker v. Smith, 81 North Carolina, 340.....31, 508
Whaley v. Whaley, 1 Speers' Law, 225.....xi, 594	Whitaker v. Sumner, 7 Pickering, 51.....xix, 296
Wharton v. Moore, 84 North Carolina, 479.....37, 627	Whitaker v. Warren, 60 New Hampshire, 20.....49, 302
Wharton v. State, 5 Cold. 1.....xciv, 214	Whitaker v. Whitaker, 52 New York, 368.....11, 711
Wheat v. Cross, 31 Maryland, 99.....1, 28	Whitall v. Brig William Henry, 4 La. 223.....xxii, 483
Wheat v. Owens, 15 Texas, 241.....lxv, 164	Whitbeck v. Cook, 15 Johnson, 483.....viii, 273
Wheatley v. Baugh, 25 Penn. State, 628.....lxiv, 721	Whitbeck v. Van Ness, 11 Johnson, 409.....vi, 383
Wheatley v. Chrisman, 24 Penn. State, 298.....lxiv, 657	Whitbeck v. Whitbeck, 9 Cowen, 266.....xviii, 508
Wheatley v. Harris, 4 Sneed, 468.....lxx, 258	Whitcher v. Town of Benton, 48 N. H. 187.....xcvii, 667
Wheatley v. Strobe, 2 Blackford, 92.....lxiii, 522	Whitcher v. Whitcher, 49 New Hamp. 176.....6, 486
Wheatly v. Calhoun, 12 Leigh, 264.....xxxvii, 654	Whitcomb's Case, 120 Massachusetts, 118.....21, 602
Wheaton v. East, 5 Yerger, 41.....xxvi, 261	Whitcomb v. Converse, 119 Massachusetts, 38.....20, 311
Wheaton v. Hibbard, 20 Johnson, 290.....xi, 284	Whitcomb v. Joslyn, 51 Vermont, 79.....31, 678
Wheaton v. Pike, 9 Rhode Island, 132.....xcviii, 377	Whitcomb v. Reld, 31 Mississippi, 567.....lxvi, 576
Wheaton v. Pike, 9 Rhode Island, 132.....11, 227	White, Ex parte, 15 Nevada, 146.....37, 466
Wheeler v. Cincinnati, 19 Ohio State, 19.....2, 368	White v. Albertson, 3 Devereux L., 241.....xxii, 719
Wheeler v. City of Chicago, 24 Illinois, 105.....lxxvi, 736	White v. Atkinson, 2 Washington, 94.....i, 470
Wheeler v. Connecticut M. L. Ins. Co., 82 New	White v. Attorney General, 4 Iredell's Eq. 19.....xliv, 92
York, 513.....37, 594	White v. Banks, 21 Alabama, 705.....lvi, 283
Wheeler v. Constantine, 39 Michigan, 62.....33, 355	White v. Beard, 5 Porter, 94.....xxx, 502
Wheeler v. Earle, 5 Cushing, 31.....li, 41	White v. Bird, 20 Louisiana Annual, 186.....xcvi, 308
Wheeler v. Guild, 20 Pickering, 545.....xxxii, 231	White v. Bond Co., 56 Illinois, 297.....11, 66
Wheeler v. Hollis, 19 Texas, 522.....lxx, 363	White v. Canfield, 7 Johnson, 117.....v, 249
Wheeler v. Mather, 56 Illinois, 241.....8, 683	White v. Carr, 71 Maine, 555.....36, 533
Wheeler v. Mayfield, 31 Texas, 395.....xcviii, 545	White v. Carroll, 42 New York, 161.....1, 508
Wheeler v. Patterson, 1 New Hampshire, 88.....viii, 41	White v. Casten, 1 Jones' Law, 197.....lix, 586
Wheeler v. Robb, 1 Blackford, 330.....xii, 245	White v. Commonwealth, 6 Binney, 179.....vi, 443
Wheeler v. Ruthven, 74 New York, 428.....30, 315	White v. Comm'rs of Chowan, 90 N. C. 437.....47, 534
Wheeler v. S. F. & A. R. R., 31 Cal. 46.....lxxxix, 147	White v. Comm'rs of Mtnomah Co., 13 Or. 317.....57, 20
Wheeler v. State, 34 Ohio State, 394.....32, 372	White v. Conly, 14 Lea, 31.....52, 154
Wheeler ada. State, 3 Vermont, 344.....xxiii, 212	White v. Continental Nat. Bank, 64 N. Y. 316.....21, 612
Wheeler v. Warner, 47 New York, 519.....7, 478	White v. Crenshaw, 5 Mack, 113.....60, 370
Wheeler v. Walker, 2 Connecticut, 196.....vii, 264	White v. Davidson, 8 Maryland, 169.....lxiii, 699
Wheeler v. Wheeler, 53 Iowa, 511.....36, 240	White v. Ditson, 140 Massachusetts, 351.....54, 473
Wheeler v. Wheelock, 33 Vermont, 144.....lxxviii, 617	White v. Dolliver, 113 Massachusetts, 400.....18, 502
Wheeler v. Winn, 53 Pennsylvania State, 122.....xci, 186	White v. Dougherty, 1 Mart. & Yerg. 809.....xvii, 802
Wheeler & W. M. Co. v. Boyce, 36 Kansas, 350.....59, 571	White v. Dresser, 135 Massachusetts, 150.....46, 454
Wheeler's Ex'rs v. Wheeler, 2 Met. (Ky.), 474, lxxiv, 421	White v. Duggan, 140 Massachusetts, 18.....54, 437
Wheeler v. Second Nat. Bank, 1 Paxt. 469.....25, 783	White v. Elwell, 48 Maine, 360.....lxxvii, 231
Wheelers v. Williams, 62 Mississippi, 369.....52, 190	White v. Equitable N. B. Union, 76 Ala. 261.....52, 325
Wheeling Ins. Co. v. Morrison, 11 Leigh, 354, xxxvi, 385	White v. Fisher, 77 Indiana, 65.....40, 287
Wheeling etc. Trans. Co. v. Wheeling, 9 West	White v. Flannigan, 1 Maryland, 525.....liv, 668
Virginia, 170.....27, 552	White v. Fox, 1 Bibb, 369.....lv, 643
Wheelock v. Doolittle, 18 Vermont, 440.....xlvi, 163	White v. Gay, 9 New Hampshire, 126.....xxxi, 224
Wheelock v. Freeman, 13 Pickering, 165.....xxlii, 674	White v. Graves, 107 Massachusetts, 825.....9, 38
Wheelwright v. Depeyster, 1 Johnson, 474.....lii, 345	White v. Hale, 3 Pickering, 291.....xv, 209
Wheelwright v. Wheelwright, 2 Mass., 447.....lii, 66	White v. Hapeman, 43 Michigan, 267.....35, 178
Whelan v. Lynch, 60 New York, 469.....19, 202	White v. Hass, 32 Alabama, 430.....lxx, 648
Whelpley v. Van Epps, 9 Paige, 332.....xxxvii, 400	White v. Heffner, 30 Louisiana An. 1280.....31, 238

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- White v. Hermann, 51 Illinois, 243.....xix, 543
 White v. Hopkins, 3 Watts & Serg. 99.....xxvii, 542
 White v. Howland, 9 Massachusetts, 314.....vi, 71
 White v. Hutchings, 40 Alabama, 253.....lxxxviii, 766
 White v. Hutchinson, 48 Maine, 360.....lxxvii, 231
 White v. Jones, 4 Call, 253.....li, 564
 White v. Lang, 128 Massachusetts, 596.....35, 402
 White v. Life Ass'n of America, 63 Ala. 419.....33, 45
 White v. Martin, 1 Porter, 215.....xxvi, 365
 White v. Mary Ann, The, 6 California, 463.....lv, 523
 White v. Maynard, 111 Massachusetts, 250.....15, 28
 White v. Merritt, 7 N. Y., (3 Selden), 352.....lvii, 627
 White v. Miller, 71 New York, 118.....27, 13
 White v. Miller, 78 New York, 393.....34, 544
 White v. Milwaukee City R. R. Co., 61 Wis. 636.....50, 154
 White v. Morton, 22 Vermont, 15.....lii, 75
 White v. Murland, 71 Illinois, 250.....29, 100
 White v. Nellie, 31 New York, 405.....lxxxviii, 282
 White v. Parish, 20 Texas, 688.....lxxviii, 204
 White v. People, 90 Illinois, 117.....39, 12
 White v. Phelps, 14 Minnesota, 27.....190
 White v. Philbrick, 5 Greenleaf, 147.....xvii, 214
 White v. Polley, 20 Wisconsin, 503.....xcl, 432
 White v. Republic Fire Ins. Co., 57 Maine, 51.....2, 22
 White v. Rowland, 67 Georgia, 546.....44, 731
 White v. Simonds, 33 Vermont, 175.....lxviii, 620
 White v. Skinner, 13 Johnson, 307.....vii, 381
 White v. Smith, 77 Illinois, 351.....20, 251
 White v. Smith, 23 Penn. State, 186.....lxxv, 589
 White v. Smith, 15 Vroom, 105.....43, 247
 White v. St. Guirens, Minor, 831.....xli, 56
 White v. Stender, 24 West Virginia, 615.....49, 283
 White v. Stoddard, 11 Gray, 253.....lxxi, 711
 White v. St. Philip's Ch., 2 McMullan's L. 906.....xxix, 125
 White v. Thomas, 12 Ohio State, 312.....lxxx, 247
 White v. Todd's V. W. Co., 8 California, 443.....lxviii, 338
 White v. Trotter, 14 Smedes & M. 80.....liii, 112
 White v. Trumbull, 3 Green Law, 314.....xxix, 687
 White v. Tudor, 24 Texas, 639.....lxxvi, 126
 White v. Twitchell, 25 Vermont, 620.....lx, 294
 White v. Union Ins. Co., 1 Nott & McC. 556.....lx, 736
 White v. Vann, 6 Humphreys, 70.....xliv, 294
 White v. Wagner, 4 Harris & J. 373.....vii, 674
 White v. Westport Mfg. Co., 1 Pickering, 215.....xi, 168
 White v. White, 16 Gratt, 264.....lxxx, 706
 White v. White, 1 Harrison, 202.....xxxi, 232
 White v. White, 105 Massachusetts, 325.....7, 526
 White v. Wilson, 6 Blackford, 448.....xxxix, 437
 White's Bank v. Myles, 73 New York, 538.....29, 157
 Whitesacre v. Rector, 29 Gratt, 714.....26, 420
 Whited v. Germania Fire Ins. Co., 76 N. Y. 415.....32, 330
 Whitefield v. McLeod, 2 Bay, 380.....i, 650
 Whiteford v. Burckmyer, 1 Gill, 127.....xxxix, 640
 Whiteford v. Commonwealth, 6 Randolph, 721.....xviii, 771
 Whitehall v. Pettis, 13 Vermont, 395.....xxvii, 600
 Whitehead v. Herron, 15 Texas, 127.....lxv, 145
 Whitehead v. Keyes, 3 Allen, 495.....lxxxii, 672
 Whitehead v. N. Y. Life Ins. Co., 102 N. Y. 143.....55, 787
 Whitehill v. Wilson, 3 Penrose & W. 403.....xxiv, 326
 Whitehurst v. Gaskill, 69 North Carolina, 449.....13, 655
 Whitehurst v. Hickey, 3 Martin, N. S., 539.....xv, 167
 Whitehurst v. N. C. M. I. Co., 7 Jones L. 433.....lxxviii, 246
 Whitehurst v. Pettipfer, 87 North Carolina, 179.42, 520
 Whitley v. Allen, 55 Iowa, 224.....41, 99
 Whiteman v. Wilgton R.R., 2 Harr. (Del.), 514.....xxviii, 411
 Whitesides v. Hunt, 97 Indiana, 191.....49, 441
 Whitesides v. Northern Bank, 10 Bush, 501.....19, 74
 Whitesides v. Thurkild, 12 Smedes & M. 599.....li, 128
 Whitford v. Laidler, 94 New York, 145.....46, 131
 Whitefield v. Rogers, 26 Mississippi, 84.....lix, 244
 Whitefield v. Whitefield, 8 Iredell's L. 163.....xvii, 389
 Whiting v. Barney, 30 New York, 330.....lxxvi, 308
 Whiting v. Earle, 3 Pickering, 301.....xv, 297
 Whiting v. Johnson, 11 Serg. & R. 398.....xv, 523
 Whiting v. Massachusetts Ins. Co., 129 Mass. 240.27, 217
 Whiting v. Nicholl, 46 Illinois, 230.....xvi, 248
 Whiting v. Ohlert, 53 Michigan, 462.....50, 26
 Whiting v. Sheboygan R. R. Co., 25 Wis. 167.....3, 26
 Whiting v. State, 14 Connecticut, 457.....xxvi, 439
 Whiting v. Story Co., 54 Iowa, 81.....27, 159
 Whitledge v. Wait, Sneed, 335.....2, 72
 Whitley v. Black, 2 Hawke, 179.....xi, 728
 Whitley v. Foy, 6 Jones' Eq. 34.....lxxviii, 236
 Whitley v. Murphy, 5 Oregon, 323.....20, 741
 Whitlock v. Heard, 13 Alabama, 776.....xviii, 71
 Whitmarsh v. Conway F. I. Co., 16 Gray, 389.....lxxvii, 414
 Whitmire v. Wright, 22 South Carolina, 446.....53, 726
 Whitmore v. Nickerson, 125 Massachusetts, 495.....26, 237
 Whitney v. Atlantic etc. R. R. Co., 44 Maine, 302.lxxx, 182
 Whitney v. Bacon, 9 Gray, 206.....lxix, 381
 Whitney v. Black River Ins. Co., 72 N. Y. 117.....28, 116
 Whitney v. Butterfield, 13 California, 335.....lxxvii, 524
 Whitney v. Chambers, 17 Nebraska, 90.....53, 239
 Whitney v. Clifford, 46 Wisconsin, 138.....52, 703
 Whitney v. Dutch, 14 Massachusetts, 457.....vii, 229
 Whitney v. Elliot Nat. Bk., 137 Massachusetts, 351.50, 216
 Whitney v. Eason, 80 Massachusetts, 308.....xxvi, 703
 Whitney v. First Nat. Bank, 50 Vermont, 388.....23, 608
 Whitney v. First Nat. Bank, 55 Vermont, 135.....43, 589
 Whitney v. Goddard, 20 Pickering, 304.....xxxii, 216
 Whitney v. Higgins, 10 California, 547.....lxx, 748
 Whitney v. Huntington, 34 Minnesota, 458.....57, 62
 Whitney v. Lee, 1 Allen, 198.....lxxix, 727
 Whitney v. Ludington, 17 Wisconsin, 140.....lxxiv, 734
 Whitney v. Merchants' Un. Ex. Co., 104 Mass. 192.6, 207
 Whitney v. Monroe, 19 Maine, 42.....xxxvi, 132
 Whitney v. Ocean Ins. Co., 14 Louisiana, 485.....xxviii, 806
 Whitney v. Ragdale, 33 Indiana, 107.....8, 195
 Whitney v. Stark, 8 California, 514.....lxviii, 389
 Whitney v. Sweet, 22 New Hampshire, 10.....liii, 239
 Whitney v. Union Railway Co., 11 Gray, 359.....lxxi, 715
 Whitney v. Walsh, 1 Cushing, 29.....xviii, 689
 Whitney Arms Co. v. Barlow, 63 New York, 62.....20, 504
 Whitney's Adm'r v. Clarendon, 18 Va. 252.....xvi, 159
 Whiton v. Chicago & N. W. Ry Co., 25 Wis. 424... 2, 101
 Whiton v. Meers, 11 Metcalf, 563.....xiv, 233
 Whitson v. Fowkes, 1 Head, 533.....lxxviii, 184
 Whittaker v. Collins, 34 Minnesota, 239.....57, 85
 Whittaker v. Dink, 5 Howard, 296.....xxxv, 438
 Whittaker v. State, 50 Wisconsin, 518.....26, 658
 Whittmore v. Coster, 3 Green's Ch. 433.....xii, 749
 Whittenton Mills v. Upton, 10 Gray, 582.....lxvi, 681
 Whittier v. Cochecho Mfg. Co., 9 N. H. 454.....xxxii, 392
 Whittier v. Hartford Ins. Co., 55 N. H. 141.....20, 185
 Whittier v. Hemmway, 22 Maine, 238.....xxviii, 309
 Whittier v. Town of Franklin, 46 N. H. 23.....lxxviii, 185
 Whittier ada. State, 21 Maine, 341.....lxxviii, 275
 Whittington v. Flint, 43 Arkansas, 504.....51, 672
 Whittlesey v. McMahon, 10 Connecticut, 137.....xxvi, 363
 Whittou v. Whittou, 38 New Hampshire, 127.....lxv, 169
 Whitwell v. Crebore, Exr., 8 Louisiana, 540.....lxxviii, 141
 Whitwell v. Emory, 3 Michigan, 84.....lix, 228
 Whitwell v. Johnson, 17 Massachusetts, 449.....ix, 165
 Whitwell v. Vincent, 4 Pickering, 449.....xvi, 329
 Wicke v. Lake, 21 Wisconsin, 410.....xlv, 689
 Wicker v. Hotchkiss, 63 Illinois, 107.....24, 72
 Wicker v. Pope, 12 Richardson L. 397.....lxv, 73
 Wickersham v. Chicago Zinc Co., 15 Kansas, 451.....20, 524
 Wickersham v. Nicholson, 14 Serg. & R. 118.....xvi, 478
 Wickersham v. Orr, 9 Iowa, 253.....lxvii, 248

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

- Wickman v. Robinson, 14 Wisconsin, 493.....lxix, 789
 Wicks v. Smith, 21 Kansas, 412.....30, 433
 Widgery v. Haskell, 5 Massachusetts, 144.....iv, 41
 Widoe v. Webb, 20 Ohio State, 431.....5, 664
 Wiegand v. Thomson, 102 Illinois, 156.....40, 571
 Wieland v. Kobick, 110 Illinois, 16.....51, 676
 Wieman v. Maboe, 45 Michigan, 494.....40, 477
 Wiener v. Whipple, 53 Wisconsin, 298.....40, 775
 Wiggin v. Amory, 14 Massachusetts, 1.....vii, 178
 Wiggin v. Bush, 13 Johnson, 306.....vii, 324
 Wiggin v. Suffolk Ins. Co., 18 Pickering, 145.....xxix, 576
 Wiggin v. Sweet, 6 Metcalf, 194.....xxix, 716
 Wiggin v. Wiggin, 43 New Hampshire, 561.....lxix, 192
 Wiggins F. Co. v. Chicago & A. B. Co., 73 Mis-
 souri, 389.....39, 519
 Wightworth v. Steers, 1 Henning & M. 70.....lii, 602
 Wight v. Hale, 2 Oshing, 498.....xiv, 677
 Wight v. Shalby R. R. Co., 16 R. Monroe, 4.....lxiii, 623
 Wight v. Springfield & N. L. R. R. Co., 117 Mas-
 sachusetts, 228.....19, 412
 Wightman v. Coates, 15 Massachusetts, 1.....viii, 77
 Wilhoft v. Appeal, 15 Penn. State, 261.....liii, 697
 Wilbur ada. State, 1 Rhode Island, 199.....xxvi, 245
 Wilbur v. Flood, 16 Michigan, 40.....xxvii, 208
 Wilbourn v. Shell, 59 Mississippi, 205.....42, 263
 Wilbur v. Lynde, 40 California, 290.....19, 645
 Wilcocks v. Union Ins. Co., 2 Binney, 974.....iv, 480
 Wilcombe v. Dodge, 3 California, 260.....lviii, 411
 Wilcox v. Antkman, 64 Georgia, 544.....37, 89
 Wilcox v. Chicago, 107 Illinois, 234.....47, 424
 Wilcox v. Draper, 12 Nebraska, 128.....41, 763
 Wilcox v. Ellis, 14 Kansas, 583.....19, 107
 Wilcox v. Emerson, 10 Rhode Island, 270.....14, 663
 Wilcox v. Hamming, 58 Wisconsin, 144.....40, 625
 Wilcox v. McNutt, 2 Howard, 776.....xxxi, 304
 Wilcox v. Matteson, 53 Wisconsin, 23.....40, 754
 Wilcox v. Morris, 1 Murphy, 116.....lii, 678
 Wilcox v. Roma, W. & Oj. R. R., 89 N. Y. 252.....c, 440
 Wilcox v. Smith, 5 Wendell, 231.....xvi, 212
 Wilcox v. State, 6 Lea, 571.....49, 53
 Wilcox ada. State, 3 Yerges, 273.....xxiv, 509
 Wilcox v. Steamboat Philadelphia, 9 La. 80.....xxix, 426
 Wilcoxson v. Burton, 27 California, 228.....lxvii, 66
 Wilcoxson v. Stitt, 65 California, 598.....53, 310
 Wilcoxson v. McGhee, 12 Illinois, 261.....liv, 409
 Wild v. Davenport, 48 N. J. L. 129.....57, 582
 Wild v. Delg, 43 Indiana, 465.....13, 369
 Wild v. Merchants' D. T. Co., 47 Iowa, 247.....29, 479
 Wilde ada. Commonwealth, 5 Gray, 83.....lxvi, 350
 Wilde v. McKee, 111 Pennsylvania 84 235.....50, 271
 Wilder's Succession, 22 La. An. 219.....2, 721
 Wilder v. Abernethy, 54 Alabama, 644.....23, 734
 Wilder v. Brooks, 10 Minnesota, 50.....lxviii, 49
 Wilder v. Keeler, 3 Paige Ch. 167.....xxii, 781
 Wilder v. Maine Cent. R. R. Co., 65 Maine, 328.....20, 698
 Wilder v. Mayor etc. of Savannah, 70 Ga. 761.....42, 598
 Wilder v. Collier, 7 Maryland, 273.....lxii, 346
 Wilds v. Layton, 1 Delaware Ch. 225.....xii, 91
 Wilds Laundering Co. v. Hahlo, 105 N. Y. 234.....59, 496
 Wilds v. Wilds, 3 Maryland, 1.....lvi, 733
 Wiley v. Baumgardner, 97 Indiana, 66.....49, 427
 Wiley v. First Nat. Bank, 47 Vermont, 546.....19, 122
 Wiley v. Holmes, 26 Missouri, 286.....lxv, 126
 Wiley v. Moor, 17 Serg. & R. 438.....xvii, 696
 Wiley v. Pavey, 61 Indiana, 457.....28, 677
 Wilhelm v. Fimple, 21 Iowa, 131.....7, 117
 Wilkerson v. State, 13 Missouri, 91.....liii, 137
 Wilkes v. Farris, 5 Johnson, 335.....iv, 364
 Wilkie v. Roosevelt, 3 Johnson's Cases, 206.....ii, 149
 Wilkins v. Barie, 44 New York, 172.....4, 665
 Wilkins v. Gillis, 20 Louisiana Annual, 288.....xvi, 426
 Wilkins v. Ordway, 89 New Hampshire, 273.....47, 215
 Wilkins v. Phillips, 3 Ohio, 49.....xvii, 679
 Wilkins v. Reed, 6 Greenleaf, 220.....xix, 211
 Wilkins v. Rug, 4 Blackford, 263.....xxix, 368
 Wilkins v. Stidger, 22 California, 231.....lxix, 64
 Wilkins v. Tobacco Ins. Co., 30 Ohio St. 217.....27, 428
 Wilkinson ada. Commonwealth, 16 Pickering, 178.....xxvi, 654
 Wilkinson v. Conn. Mut. L. Ins. Co., 30 Iowa, 119. 6, 687
 Wilkinson v. Denning, 89 Illinois, 343.....27, 126
 Wilkinson v. First Nat. F. Ins. Co., 72 N. Y. 699.....28, 128
 Wilkinson v. Flowers, 37 Mississippi 579.....lxv, 78
 Wilkinson v. Getty, 13 Iowa, 157.....lxix, 428
 Wilkinson v. Gill, 74 New York, 63.....30, 264
 Wilkinson v. Heavenrich, 56 Michigan, 574.....52, 708
 Wilkinson v. Jett, 7 Leigh, 112.....xxx, 490
 Wilkinson v. State, 59 Indiana, 414.....24, 84
 Wilkinson ada. State, 2 Vermont, 699.....xvi, 625
 Wilkinson v. Toussley, 16 Minnesota, 292.....10, 129
 Wilkinson v. Wall, 44 Vermont, 503.....3, 221
 Wilkowiak v. Hall, 27 Georgia, 678.....xxv, 274
 Wilks v. Fitzpatrick, 1 Hampshire, 84.....xxiv, 612
 Wilks v. Walker, 22 South Carolina, 582.....53, 706
 Will of —. See Name of Testator.
 Will of Wardfield, Matter of, 23 California, 21.....lxviii, 46
 Willard v. Bassett, 27 Illinois, 27.....lxix, 268
 Willard v. Comstock, 89 Wisconsin, 288.....40, 287
 Willard v. Heatham, 15 Gray, 328.....lxvii, 596
 Willard v. Kimball, 10 Allen, 211.....lxviii, 628
 Willard v. Rice, 11 Metcalf, 493.....xiv, 288
 Willard v. Stone, 7 Cowen, 23.....xvii, 426
 Willard v. Strong, 14 Vermont, 522.....xxix, 240
 Willard v. Willard, 6 Bart. 297.....27, 299
 Willocks, Ex parte, 7 Cowen, 408.....xvii, 626
 Willet v. Brown, 65 Missouri, 123.....27, 285
 Willets v. Sun Mut. Ins. Co., 45 New York, 45.....6, 21
 Willett v. Overton, 2 Root, 328.....4, 73
 Willett v. Rich, 142 Massachusetts, 266.....54, 684
 Willey v. Day, 51 Penn. State, 51.....lxviii, 598
 William B. S. Works v. Atkinson, 68 Illinois, 421.18, 889
 Williams, Ex parte, 4 Arkansas, 537.....lxviii, 66
 Williams v. Albany City Ins. Co., 19 Mich. 451.....2, 95
 Williams v. Allen, 10 Humphreys, 237.....li, 709
 Williams v. Andross, & Ken. R. R. Co., 26 Mo. 301.1viii, 742
 Williams v. Babbitt, 14 Gray, 141.....lxvii, 670
 Williams v. Ball, 52 Texas, 603.....34, 730
 Williams v. Bellanca, 23 Illinois, 193.....lxvii, 187
 Williams v. Bemis, 106 Massachusetts, 81.....11, 212
 Williams v. Bowers, 15 California, 221.....lxvii, 429
 Williams v. Branson, 1 Murphy, 617.....iv, 598
 Williams v. Brickell, 37 Mississippi, 682.....lxv, 818
 Williams v. Briggs, 11 Rhode Island, 476.....23, 512
 Williams v. Brooks, 59 Connecticut, 278.....47, 648
 Williams v. Buchanan, 1 Ireland's Law, 538.....xxv, 708
 Williams v. Carmack, 27 Mississippi, 209.....lx, 598
 Williams v. Carpenter, 26 Alabama, 9.....lxvii, 316
 Williams v. Oash, 27 Georgia, 507.....lxviii, 739
 Williams v. C. F. College, 29 Missouri, 260.....lxvii, 598
 Williams v. Chapman, 17 Illinois, 423.....lxv, 669
 Williams v. Churchill, 127 Massachusetts, 243.....54, 304
 Williams v. Commonwealth, 2 Gratton, 507.....xlv, 428
 Williams v. Co. Court, 26 West Virginia, 428.....53, 94
 Williams v. Cowden, 13 Missouri, 211.....liii, 145
 Williams v. Crutcher, 5 Howard, 71.....xxv, 428
 Williams v. Dickerson, 2 Root, 191.....4, 68
 Williams v. Durr, 25 Texas, 667.....lxviii, 548
 Williams v. Ealing, 4 Penn. State, 486.....xiv, 710
 Williams v. Field, 2 Wisconsin, 421.....lx, 428
 Williams v. Firemen's Fund Ins. Co., 54 N. Y. 569.12, 628
 Williams v. Getty, 31 Penn. State, 451.....lxix, 708

Roman letters [xlix] refer to volumes of American Decisions, and Arabic figures [49] to American Reports

- Williams v. Glenn, 22 North Carolina, 228.....53, 416
 Williams v. Grant, 1 Connecticut, 487.....vii, 235
 Williams v. Gray, 3 Greenleaf, 307.....xiv, 234
 Williams v. Hadley, 21 Kansas, 350.....30, 430
 Williams v. Haig, 3 Richardson's Law, 363.....xiv, 774
 Williams v. Harrell, 8 Iredell's Equity, 123.....iv, 442
 Williams v. Harrington, 11 Iredell's Law, 616.....112, 421
 Williams v. Hartford Ins. Co., 54 California, 442-35, 77
 Williams v. Haynes, 27 Iowa, 251.....1, 268
 Williams v. Helme, 1 Devereux's Equity, 151.....xviii, 590
 Williams v. Henshaw, 11 Pickering, 79.....xxii, 306
 Williams v. Henshaw, 12 Pickering, 373.....xxii, 614
 Williams v. Herndon, 12 B. Monroe, 494.....liv, 551
 Williams v. Hicks, 2 Vermont, 36.....xix, 693
 Williams v. Hilton, 35 Maine, 547.....lviii, 729
 Williams v. Hodgson, 2 Harris & J. 474.....iii, 563
 Williams v. Hollingsworth, 1 Strobb. Eq. 103.....xvii, 637
 Williams v. Hugunin, 69 Illinois, 214.....18, 607
 Williams v. Hunter, 3 Hawks, 545.....xiv, 597
 Williams v. Hutchinson, 3 N. Y. (3 Comm.), 312.....111, 301
 Williams v. Johnson, Littell's Sel. Cases, 34.....xii, 273
 Williams v. Johnson, 30 Maryland, 500.....xvii, 613
 Williams v. Johnston, 22 North Carolina, 532.....53, 428
 Williams v. Judy, 3 Gilman, 263.....xiv, 699
 Williams v. Keyser, 11 Florida, 236.....lxxxix, 243
 Williams v. Lane, 2 Carolina Law Reps. 365.....vi, 661
 Williams v. Love, 2 Head, 80.....lxviii, 191
 Williams v. McKay, 40 New Jersey Eq. (13 Stew.)
 129.....53, 775
 Williams v. McManus, 26 Louisiana An. 161.....54, 171
 Williams v. Maus, 6 Watts, 278.....xxxi, 468
 Williams v. Merie, 11 Wendell, 80.....xxv, 604
 Williams v. Merritt, 103 Massachusetts, 134.....4, 621
 Williams v. Mich. Cent. R. Co., 2 Mich. 269.....iv, 59
 Williams v. Moray, 74 Indiana, 25.....39, 78
 Williams v. Morton, 33 Maine, 47.....lxi, 229
 Williams v. Mut. Gas Co., 22 Michigan, 499.....50, 268
 Williams v. Neal, 10 Richardson's Eq. 338.....lxviii, 94
 Williams v. Nelson, 23 Pickering, 141.....xxiv, 48
 Williams v. N. Y. Cent. R. Co., 16 N. Y. 97.....lxix, 651
 Williams v. Okey, 8 Humphreys, 563.....xvii, 633
 Williams ada. People, 4 Hill (N. Y.), 9.....xi, 206
 Williams v. Perry, 30 Indiana, 437.....lxxxiii, 327
 Williams v. Planters' Ins. Co., 57 Mississippi, 730-34, 494
 Williams v. Powell, 66 Alabama, 20.....41, 742
 Williams v. Powell, 101 Massachusetts, 467.....3, 296
 Williams v. Preston, 3 J. J. Marshall, 600.....xx, 179
 Williams v. Putnam, 14 New Hampshire, 540.....xi, 204
 Williams v. Robbins, 16 Gray, 77.....lxvii, 296
 Williams v. Robinson, 73 Maine, 186.....48, 232
 Williams v. Robinson, 42 Vermont, 638.....1, 269
 Williams v. Roger Williams Ins. Co., 107 Massachusetts, 377.....9, 41
 Williams v. Sadler, 4 Jones Equity, 378.....lxxxv, 424
 Williams v. School Dist. No. 1, 21 Pickering, 75.....xxii, 243
 Williams v. Shaw, N. O. Term Rep. 197.....vii, 706
 Williams v. Smith, 2 Caines, 1.....ii, 309
 Williams v. State, 54 Alabama, 151.....25, 665
 Williams v. State, 51 Alabama, 1.....40, 133
 Williams v. State, 60 Georgia, 367.....27, 412
 Williams v. State, 61 Georgia, 417.....34, 102
 Williams v. State, 64 Indiana, 553.....31, 135
 Williams v. State, 15 Lea, 129.....54, 404
 Williams v. State, 32 Mississippi, 369.....lxvi, 615
 Williams v. State, 14 Ohio, 223.....xiv, 536
 Williams v. State, 1 Tex. Ct. App. 90.....28, 352
 Williams v. State, 14 Tex. Ct. App. 102.....46, 237
 Williams v. State, 43 Texas, 182.....23, 590
 Williams ada. State, 19 Alabama, 15.....liv, 184
 Williams ada. State, 4 Indiana, 334.....lviii, 627
 Williams ada. State, 7 Jones' Law, 448.....lxxxviii, 368
 Williams ada. State, 2 Richardson's Law, 418.....xiv, 741
 Williams ada. State ex rel. Knowlton, 5 Wis. 308. lxviii, 65
 Williams v. Steamboat David Tatum, 33 Missouri, 461.....lxxxiv, 57
 Williams v. Stein, 23 Indiana, 89.....10, 9
 Williams v. Stoll, 79 Indiana, 30.....41, 69
 Williams v. Storrs, 6 Johns. Ch. 353.....x, 349
 Williams v. Tipton, 5 Humphreys, 66.....xli, 430
 Williams v. Urnston, 35 Ohio State, 296.....35, 611
 Williams v. Vail, 9 Michigan, 163.....lxxx, 76
 Williams v. Vance, 9 South Carolina, 344.....30, 35
 Williams v. Vanderbilt, 28 New York, 217.....lxxxiv, 332
 Williams v. Vanmeter, 8 Missouri, 339.....xii, 644
 Williams v. Veach, 17 Ohio, 171.....lxix, 453
 Williams v. Walker, 2 Richardson's Eq. 231.....xiv, 51
 Williams v. Walton, 8 Yerger, 357.....lxix, 129
 Williams v. Williams, 2 Devereux's Eq. 69.....xxii, 729
 Williams v. Williams, 79 North Carolina, 417.....28, 339
 Williams v. Williams, 45 Wisconsin, 464.....32, 722
 Williams v. Williams, 55 Wisconsin, 300.....42, 708
 Williams v. Williams, 63 Wisconsin 58.....58, 223
 Williams v. Williamson, 6 Iredell's Law, 261.....xiv, 494
 Williams v. Worthington, 49 Maryland, 672.....33, 296
 Williams' & Harding's Appeals, 106 Penn. St. 116-51, 595
 Williamson's Case, 26 Penn. State, 9.....lxvii, 274
 Williamson v. Branch Bank, 7 Alabama, 906.....xli, 617
 Williamson v. Chicago, R. I. and P. R. Co. 63
 Iowa, 126.....30, 206
 Williamson v. Culpepper, 16 Alabama, 211.....i, 175
 Williamson v. Farrow, 1 Bailey's Law, 611.....xii, 462
 Williamson v. Foreman, 23 Indiana, 540.....lxxxv, 475
 Williamson v. Harris, 57 Alabama, 40.....29, 707
 Williamson v. McGinnis, 11 B. Monroe, 74.....11, 561
 Williamson v. Smart, Conference Rep. 146.....ii, 636
 Williamson v. Smith, 1 Coldwell, 1.....lxviii, 479
 Williamson v. Smoot, 7 Martin, 31.....xii, 494
 Williamson v. Snowhill, 1 Green, 32.....xxii, 496
 Williamson v. Steele, 3 Lea, 627.....31, 609
 Williamson v. Tunno, 1 Brevard, 151.....ii, 654
 Williamson v. Turner, 2 Bay, 410.....i, 659
 Williamson v. Walker, 34 Georgia, 297.....lxvi, 119
 Williamson v. Williamson, 3 Smedes & M. 715.....xii, 616
 Williamsport v. Commonwealth, 84 Penn. St. 467-94, 298
 Willingham v. Hooven, 74 Georgia, 233.....56, 436
 Willis v. Freeman, 35 Vermont, 44.....lxxxii, 619
 Willis v. Gay, 48 Texas, 463.....34, 326
 Willis v. Green, 5 Hill, 232.....xi, 203
 Willis v. Henderson, 4 Scammon, 13.....lxxxviii, 129
 Willis v. Missouri P. R. Co., 61 Texas, 628.....46, 302
 Willis v. Moore, 50 Texas, 628.....46, 294
 Willis v. Morris, 63 Texas, 468.....51, 655
 Willis v. Morris, 66 Texas, 628.....50, 634
 Willoughby v. Irish, 35 Minnesota, 63.....50, 297
 Willoughby v. Lawrence, 116 Illinois, 11.....56, 736
 Wilmaer v. Continental Life Ins. Co., 66 Ia. 417-53, 277
 Willmarier v. McGaughey, 30 Iowa, 205.....6, 673
 Wills v. Hill, 2 Dev. & Bat. Law, 251.....xxxi, 413
 Wills v. Home Ins. Co., 28 Iowa, 545.....4, 169
 Wills v. Ross, 77 Indiana, 1.....40, 279
 Wilson v. Force, 6 Johnson, 110.....v, 125
 Wilson v. Wilson, 26 New Hampshire, 229.....lvii, 299
 Willy v. Mulledy, 73 New York, 330.....34, 638
 Willyard v. Hamilton, 7 Ohio, Pt. II, 171.....xxx, 196
 Wilmington & Reading R. R. Co. v. Stauffer, 60
 Pennsylvania State, 374.....c, 574
 Wilmington, City of v. Maeks, 26 N. C. 89.....41, 443
 Wilmington etc. R. Co. v. Greenville etc. R. Co.,
 9 South Carolina, 323.....30, 21
 Wilnot v. Howard, 26 Vermont, 467.....lxv, 27

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures (40) to American Reports.

- Wilson v. Talbot, 3 Harris & McH. 2.....i, 374
 Wilson v. Joss, 34 Illinois, 464.....34, 343
 Wilson v. White, 26 Maryland, 289.....xx, 113
 Wilson's Assessee, 4 Penn. State, 450.....xiv, 701
 Wilson's Appeal, 108 Pennsylvania State, 344.....56, 214
 Wilson v. Armstrong, 49 Alabama, 108.....xlv, 635
 Wilson v. Butler, 3 Strobhart's Eq. 293.....i, 678
 Wilson v. Barryman, 5 California, 44.....lxiii, 78
 Wilson v. Branch, 77 Virginia, 65.....46, 709
 Wilson v. Brown, 55 Alabama, 63.....59, 727
 Wilson v. Browles, 24 Arkansas, 508.....xcl, 523
 Wilson v. Campbell, 23 Alabama, 249.....lxz, 586
 Wilson v. Chalfant, 15 Ohio, 249.....xiv, 574
 Wilson v. City of Charleston, 5 Allen, 127.....lxxxv, 693
 Wilson v. Cochran, 45 Penn. State, 107.....lxxxvii, 574
 Wilson v. Cochran, 21 Texas, 677.....xxviii, 583
 Wilson v. Commonwealth, 10 Penn., 688.....19, 76
 Wilson v. Crockett, 43 Missouri, 514.....xxvii, 369
 Wilson v. Cunningham, 3 California, 261.....lviii, 407
 Wilson v. Dubois, 25 Minnesota, 471.....59, 235
 Wilson v. Fleming, 18 Vermont, 649.....xlii, 631
 Wilson v. Fordaz, 20 Ohio State, 59.....5, 637
 Wilson v. Foshol, 6 Metcalf, 400.....xxxix, 736
 Wilson v. Gen. Mkt. Ins. Co., 13 Osh. 300.....lix, 186
 Wilson v. Granby, 47 Connecticut, 59.....36, 51
 Wilson v. Grand Trunk Railway, 55 Maine, 60.....xvi, 435
 Wilson v. Grand Trunk Ry., 57 Maine, 128.....2, 28
 Wilson v. Green, 25 Vermont, 480.....lx, 379
 Wilson v. Henderson, 9 Smedes & M. 375.....xviii, 716
 Wilson v. Herbert, 12 Vroom, 454.....32, 243
 Wilson v. Holmes, 23 Massachusetts, 543.....iv, 75
 Wilson v. Hooper, 13 Vermont, 683.....xxxvi, 366
 Wilson v. Hunter, 14 Wisconsin, 663.....lxxx, 795
 Wilson v. Huston, 13 Missouri, 146.....xlii, 138
 Wilson v. King, 3 Littlell, 457.....xiv, 84
 Wilson v. Lemon, 23 Indiana, 433.....lxxxv, 471
 Wilson v. Linsberger, 24 North Carolina, 641.....55, 628
 Wilson v. Little, 2 N. Y. (2 Comst.), 443.....ii, 207
 Wilson v. Mayor of N. Y., 1 Denio, 508.....xliii, 719
 Wilson v. Mackenzie, 7 Hill, 95.....xli, 51
 Wilson v. McOullough, 23 Penn. State, 440.....lxli, 347
 Wilson v. McMillan, 62 Georgia, 18.....34, 115
 Wilson v. Miller, 30 Maryland, 92.....xvii, 563
 Wilson v. Myers, 4 Hawin, 73.....xv, 510
 Wilson v. New Bedford, 108 Massachusetts, 261.....11, 363
 Wilson v. Northern P. R. Co., 23 Michigan, 278.....37, 410
 Wilson v. Ohio & M. R. R. Co., 64 Illinois, 542.....16, 565
 Wilson v. Polk, 13 Smedes & M. 131.....ii, 151
 Wilson v. Randall, 27 Alabama, 74.....lxxxvi, 347
 Wilson v. Russell, 13 Maryland, 496.....lxci, 645
 Wilson v. Rybolt, 17 Indiana, 301.....lxxxix, 496
 Wilson v. Soper, 13 R. Monroe, 411.....lvi, 873
 Wilson v. Sparkman, 17 Florida, 371.....35, 110
 Wilson v. Spencer, 1 Randolph, 76.....x, 491
 Wilson v. State, 23 Arkansas, 687.....34, 52
 Wilson v. State, 18 Tex. Ct. App. 270.....51, 309
 Wilson v. State, 45 Texas, 78.....33, 602
 Wilson ad. State, Conn. 430.....i, 216
 Wilson ad. State, 43 N. Hampshire, 415.....lxxxii, 163
 Wilson v. Stillwell, 9 Ohio State, 407.....lxxxv, 477
 Wilson v. Stoner, 9 Serg. & R. 39.....xi, 664
 Wilson v. Straps, 4 G. Greene, 551.....lxii, 138
 Wilson v. Taylor's Executors, 9 Ohio State, 568.....lxxxv, 498
 Wilson v. Tobbette, 29 Arkansas, 573.....31, 165
 Wilson v. Torbert, 3 Stewart, 298.....xxi, 633
 Wilson v. Troup, 3 Cowen, 126.....xiv, 458
 Wilson v. Twitty, 3 Hawin, 44.....xiv, 569
 Wilson v. Webster, Morris, 312.....xii, 230
 Wilson v. Wheeling, 19 West Virginia, 598.....42, 780
 Wilson v. White, 71 Georgia, 504.....51, 269
 Wilson v. Williams, 14 Wendell, 144.....xxviii, 529
 Wilson v. Willimantic L. Co., 80 Conn. 623.....47, 628
 Wilson v. Wilson, 26 California, 447.....xv, 194
 Wilson v. Wilson, 8 Gill, 192.....i, 699
 Wilson v. Wilson, 28 Maine, 18.....lxii, 227
 Wilson v. Wilson, 37 Maryland, 1.....11, 618
 Wilson v. Wilson, 17 Ohio State, 100.....xcl, 128
 Wilson v. Wood, 2 C. R. Green, 218.....lxxxviii, 531
 Wilson v. Woodruff, 5 Missouri, 40.....xxxi, 194
 Wilson & Jones' Appeal, 3 Watts & Serg. 287.....xlii, 308
 Wilsons v. Bibb, 1 Dana, 7.....xxv, 118
 With v. Franklin, 1 Binney, 502.....ii, 474
 Withbank's Appeal, 64 Pennsylvania St. 258.....3, 266
 Wilson v. Middlesex R. R. Co., 107 Mass. 108.....9, 11
 Wimberly v. Hurst, 33 Illinois, 168.....lxxxiii, 598
 Winans v. Christy, 4 California, 70.....lx, 207
 Winborn v. Gorrell, 3 Iredell's Eq. 117.....xi, 488
 Winchell v. Carey, 115 Massachusetts, 550.....15, 151
 Wincher v. Shrewsbury, 3 Scammon, 283.....lxxxv, 108
 Winchester v. Beardin, 10 Humphreys, 247.....ii, 708
 Winchester v. Capron, 63 New Hampshire, 605.....54, 854
 Winchester v. Howard, 97 Massachusetts, 203.....xvii, 98
 Winchester v. Nutter, 20 New Hampshire, 87.....12, 38
 Winchester v. Union Bank, 3 Gill & J. 73.....lx, 283
 Winchester v. Union Bank, 3 Gill & J. 79.....lx, 283
 Winchester Wag. Wks. & M. Co. v. Carman, 109
 Indiana, 31.....53, 289
 Windham v. Rhame, 11 Richardson's L. 283.....lxviii, 118
 Windham Bank v. Norton, 23 Connecticut, 213.....lv, 297
 Windle v. Canaday, 21 Indiana, 245.....lxxxviii, 248
 Wineland v. Oconee, 5 Missouri, 298.....lxxxii, 309
 Windfeld v. Dodge, 45 Michigan, 288.....44, 476
 Wing ad. Commonwealth, 9 Pickering, 1.....lxv, 247
 Wing v. Chick, 55 Iowa, 473.....41, 118
 Wing v. Hurlbut, 15 Vermont, 607.....xi, 608
 Wing v. Wing, 66 Maine, 61.....32, 646
 Winick v. Goleb, 107 Pennsylvania St. 287.....52, 472
 Winkley v. Foy, 33 New Hampshire, 171.....lxvi, 715
 Winkley v. Hill, 9 New Hampshire, 31.....xxxi, 218
 Winn v. Abeles, 35 Kansas, 65.....57, 128
 Winn v. Boh, 3 Leigh, 140.....lxxxix, 268
 Winn v. Young, 1 J. J. Marshall, 51.....lxix, 89
 Winn ad. State ex rel. White, 19 Wis. 304.....lxxxviii, 608
 Winne v. Elderkin, 3 Finn. 245, 1 Chand. 219.....14, 189
 Winner v. Hoyt, 66 Wisconsin, 227.....57, 287
 Winner v. Penniman, 25 Maryland, 163.....6, 268
 Winneshiek Ins. Co. v. Holsgrafe, 63 Illinois, 516.....5, 64
 Winona R. R. Co. v. Waldron, 11 Minn. 518.....lxxxviii, 109
 Winoskie Turp. Co. v. Ridley, 3 Vermont, 404.....xxx, 476
 Winslow v. Anderson, 3 Dev. & Bat. Law, 9.....lxxxii, 661
 Winslow v. Brown, 7 Rhode Island, 95.....lxxx, 628
 Winslow & Cannon v. Stokes, 3 Jones' Law, 298.....lxvii, 248
 Winslow v. Fletcher, 53 Connecticut, 390.....55, 123
 Winslow v. Marsh. Ins. Co., 4 Metcalf, 208.....lxxxviii, 269
 Winslow v. Minn. & Pac. R. R., 4 Minn. 213.....lxxxvi, 519
 Winslow v. Norton, 29 Maine, 419.....i, 601
 Winslow v. Vermont R. R. Co., 43 Vermont, 700.....1, 265
 Winslow, Lanier & Co. v. Leonard, 24 Penn. St. 14.....lxii, 354
 Winstead v. Reid, Busbee's Law, 76.....lvii, 871
 Winsted Bank v. Webb, 20 New York, 266.....4, 488
 Winston v. Erving, 1 Alabama, 129.....lxxxiv, 708
 Winston v. Franklin Academy, 28 Min. 118.....lxii, 549
 Winston v. Taylor, 26 Missouri, 62.....lxxxv, 112
 Winston v. Vaughn, 23 Arkansas, 72.....lxxxvi, 418
 Winston v. Webb, Phillips Eq. 1.....xxvii, 580
 Winston v. Westfield, 23 Alabama, 700.....lviii, 278
 Winter v. Colt, 7 N. Y. (3 Selden), 208.....lvii, 583
 Winter v. Jones, 10 Georgia, 190.....lv, 579
 Winter v. Peterson, 4 Zabrickie, 594.....lxii, 678
 Winter v. Stock, 29 California, 407.....lxviii, 57

Roman letters [xiv] refer to volumes of American Decisions, and Arabic figures [48] to American Reports.

- Winthrop v. Curtis, 3 Greenleaf, 110.....xiv, 516
 Winthrop v. Huntington, 3 Ohio, 227.....xvii, 601
 Winthrop, Inhab. of, v. Benson, 21 Maine, 251.....lii, 618
 Winthrop Savings Bank v. Jackson, 67 Maine, 570.24, 56
 Wintz v. Morrison, 17 Texas, 373.....lxvii, 655
 Wireback v. First Nat. Bank, 97 Penn. St. 543.....39, 821
 Wires v. Briggs, 5 Vermont, 101.....xxvi, 284
 Wisconsin R. I. Co. v. Manson, 43 Wisconsin, 252.23, 543
 Wise v. Frey, 7 Nebraska, 134.....59, 590
 Wise v. State of Kansas, 2 Kansas, 419.....lxixv, 595
 Wise v. Wynn, 39 Mississippi, 588.....42, 361
 Wiseloy v. Findlay, 3 Randolph, 261.....xv, 712
 Wiseman v. Leckinger, 84 New York, 21.....38, 679
 Wiseman v. May, 30 Indiana, 239.....lxviii, 516
 Wiseman v. Wiseman, 73 Indiana, 112.....38, 115
 Wistar v. McManes, 54 Penn. St. 212.....xviii, 700
 Wistar v. Philadelphia, 30 Pennsylvania St. 605.....31, 112
 Wistar v. Scott, 105 Pennsylvania State, 200.....51, 197
 Wiswall v. Stewart & Easton, 23 Alabama, 433.....lxv, 549
 Witbeck v. Holland, 45 New York, 13.....6, 23
 Witham v. Osburn, 4 Oregon, 212.....18, 267
 Witham v. Witham, 57 Maine, 447.....xviii, 787
 Witherington v. McDonald, 1 Housing & M. 285.....lii, 603
 Withers' Appeal, 14 Serg. & R. 185.....xvi, 498
 Withers v. Baird, 7 Watts, 227.....xxxii, 754
 Withers v. Carter, 4 Gratian, 407.....1, 78
 Withers v. Fincen, 40 Indiana, 131.....13, 283
 Withers v. Patterson, 37 Texas, 491.....lxixvi, 643
 Withers v. Richardson, 5 T. B. Monroe, 94.....xvii, 44
 Witherspoon v. Farmers' Bank, 3 Duval, 498.....lxixvii, 803
 Witherspoon v. Spring, 3 Howard (Miss.) 60.....xxxi, 310
 Witherspoon v. Minnecman, 14 Bush, 314.....39, 404
 Withen v. Lee, 17 Serg. & R. 66.....xvii, 644
 Witmer's Appeal, 48 Penn. State, 455.....lxixiv, 505
 Witt v. Emery, 10 Humphreys, 208.....lii, 701
 Witte v. Williams, 8 South Carolina, 260.....38, 294
 Witter v. Harvey, 1 McLeod, 61.....x, 650
 Withams v. Braun, 44 Maryland, 303.....32, 44
 Wittich v. First Nat. Bank, 20 Florida, 642.....51, 631
 Wittich v. Traun, 27 Alabama, 562.....lxii, 778
 Wittkowski v. Smith, 84 North Carolina, 671.....37, 632
 Wtader v. Collins, 70 Maine, 290.....35, 227
 Wixson v. Stephens, 17 Michigan, 513.....lxvii, 208
 Wixon v. Bear River and Auburn Water and Mining Company, 94 California, 367.....lxixv, 69
 Wixon v. Newport, 13 Rhode Island, 464.....43, 28
 Woart v. Winkick, 3 New Hampshire, 473.....xiv, 364
 Woburn v. Henshaw, 101 Massachusetts, 193.....3, 333
 Wodall v. Coggeshall, 3 Metcalf, 59.....lxixv, 391
 Woolper ada. Commonwealth, 3 Serg. & R. 29.....viii, 628
 Wolford v. McKinnis, 23 Texas, 35.....lxixvi, 53
 Wohlfahrt v. Becker, 93 New York, 460.....44, 406
 Wohlman ada. State, 34 Missouri, 422.....lxixvi, 117
 Wolbert v. Lucas, 10 Penn. State, 73.....lxix, 678
 Wolbert ada. Commonwealth, 6 Binney, 229.....vi, 452
 Wolcott v. Friesell, 134 Massachusetts, 1.....45, 273
 Wolcott v. Hall, 6 Massachusetts, 514.....iv, 173
 Wolcott v. Hodge, 15 Gray, 547.....lxixvii, 321
 Wolcott v. Malick, 3 Stockton's Ch., 204.....lxvi, 790
 Wolcott v. Mount, 38 New Jersey, 262.....13, 438
 Wolcott v. Mount, 38 New Jersey, 498.....39, 425
 Wolcott v. Van Sandwood, 17 Johnson, 242.....viii, 396
 Wolf v. American Express Co., 43 Missouri, 421.....lxvii, 408
 Wolf v. Beales, 6 Serg. & R. 242.....ix, 425
 Wolf v. Fink, 1 Penn. State, 435.....xlv, 141
 Wolf v. Fieschacker, 5 California, 244.....lxiii, 121
 Wolf v. Fogarty, 6 California, 224.....lxv, 509
 Wolf v. Kilpatrick, 101 New York, 144.....54, 673
 Wolf v. Western Un. Tel. Co., 62 Penn. St. 53.....1, 387
 Wolf v. Wolf, 2 Harris & G. 382.....xviii, 313
 Wolfe v. Barnett, 24 Louisiana An. 97.....22, 111
 Wolfe v. Doe ex dem. Dowell, 13 Sweden & M. 263.11, 147
 Wolfe v. Hovos, 20 New York, 197.....lxixv, 308
 Wolff v. Central R. Co., 66 Georgia, 622.....45, 592
 Wolff v. Koppel, 2 Dende, 268.....lxviii, 721
 Wolfe v. Kherlein, 74 Alabama, 89.....49, 599
 Wolfe v. State, 79 Alabama, 201.....52, 599
 Wolfe v. Wolf, 69 Alabama, 549.....44, 599
 Wolford v. Andrews, 29 Minnesota, 622.....43, 592
 Wolford v. Barber, 23 Minnesota, 11.....53, 1
 Wolford v. Harrington, 74 Pennsylvania St. 211.....15, 648
 Wolford v. Powers, 65 Indiana, 294.....44, 16
 Wolthamer v. Rivinus, 64 Maryland, 229.....54, 709
 Wolke v. Fleming, 105 Indiana, 105.....53, 695
 Wolverson v. State, 15 Ohio, 171.....lxixv, 373
 Womack v. McQuarry, 23 Indiana, 102.....xviii, 298
 Womack v. Smith, 11 Humphreys, 421.....lv, 61
 Womack v. Western U. Tel. Co., 39 Texas, 176.....44, 624
 Womack v. Womack, 3 Texas, 397.....lxviii, 119
 Wonder v. Baltimore & O. R. R. Co., 22 Md. 411.....3, 148
 Wonsen v. Sayward, 12 Pickering, 422.....lxviii, 621
 Wood's Appeal, 92 Pa. St. 379.....37, 621
 Wood v. Barker, 37 Alabama, 69.....lxixvii, 245
 Wood v. Boylston, Nat. Bank, 129 Mass. 262.....37, 245
 Wood v. Boynton, 64 Wisconsin, 255.....54, 619
 Wood v. Broadway, 76 Missouri, 22.....43, 714
 Wood v. Chambers, 25 Texas, 247.....lxv, 592
 Wood v. Chapin, 19 New York 3 Kansas, 599.....lxvii, 69
 Wood v. Chicago, M. & St. P. Ry Co., 69 Ia. 421.....54, 621
 Wood v. Cohen, 6 Indiana, 455.....lxviii, 328
 Wood v. Colvin, 3 Hill (N. Y.), 294.....lxixvii, 626
 Wood v. Crocker, 13 Wisconsin, 255.....lxixvii, 719
 Wood v. Detroit O. St. R. R. Co., 25 Mich. 422.....54, 29
 Wood v. Erie Ry Co., 72 New York, 102.....39, 125
 Wood v. Evans, 113 Illinois, 194.....55, 629
 Wood v. Fales, 24 Penn. State, 244.....lxix, 625
 Wood v. Fink, 63 New York, 245.....34, 329
 Wood v. Fleet, 38 New York, 424.....lxviii, 629
 Wood v. Foster, 8 Allen, 24.....lxixvii, 621
 Wood v. Fowler, 25 Kansas, 522.....49, 629
 Wood v. Gale, 16 New Hampshire, 247.....lxixv, 129
 Wood v. Gamble, 11 Cushing, 8.....lxv, 125
 Wood v. Goodridge, 6 Cushing, 117.....lxv, 771
 Wood v. Goodwin, 49 Maine, 300.....lxixvii, 629
 Wood v. Graves, 144 Massachusetts, 351.....52, 39
 Wood v. Hartford Fire Ins. Co., 13 Conn. 202.....lxixvii, 325
 Wood v. Hartford Ins. Co., 13 Conn. 533.....lxixvii, 92
 Wood v. Ingraham, 3 Strobhart's Eq. 101.....lii, 671
 Wood v. Jackson, ex d. Genet, 6 Wendell, 9.....lxviii, 626
 Wood v. Kingston Coal Co., 46 Illinois, 222.....lxv, 524
 Wood v. Lincoln Ins. Co., 6 Massachusetts, 479.....iv, 129
 Wood v. McCain, 7 Alabama, 592.....lxviii, 622
 Wood v. McGuire's Children, 17 Georgia, 321.....lxvii, 345
 Wood v. Meers, 12 Indiana, 515.....lxixvii, 229
 Wood v. Milwaukee & St. P. Ry Co., 27 Mo. 542.....3, 495
 Wood v. New England Ins. Co., 14 Mass. 21.....vii, 129
 Wood v. Rabe, 94 New York, 414.....43, 649
 Wood v. Roach, 3 Dallas, 122.....1, 229
 Wood v. Robbins, 11 Massachusetts, 594.....vi, 129
 Wood v. Sheldon, 13 Vroom, 421.....39, 599
 Wood v. State, 24 Arkansas, 341.....34, 13
 Wood v. State, 46 Georgia, 122.....13, 624
 Wood v. State, 12 Tex. Ch. App. 121.....44, 721
 Wood v. Stone, 3 Coldwell, 325.....lxixviii, 621
 Wood v. Sugg, 21 North Carolina, 95.....68, 629
 Wood v. Tipton Co., 7 Bax. 112.....32, 621
 Wood v. Trask, 7 Wisconsin, 294.....lxixvii, 599
 Wood v. Waters, 1 Littlell, 178.....lxviii, 229
 Wood v. Watkinsen, 17 Connecticut, 599.....lxvii, 599
 Wood v. White, 22 Maine, 245.....lii, 624

Roman letters [xlii] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

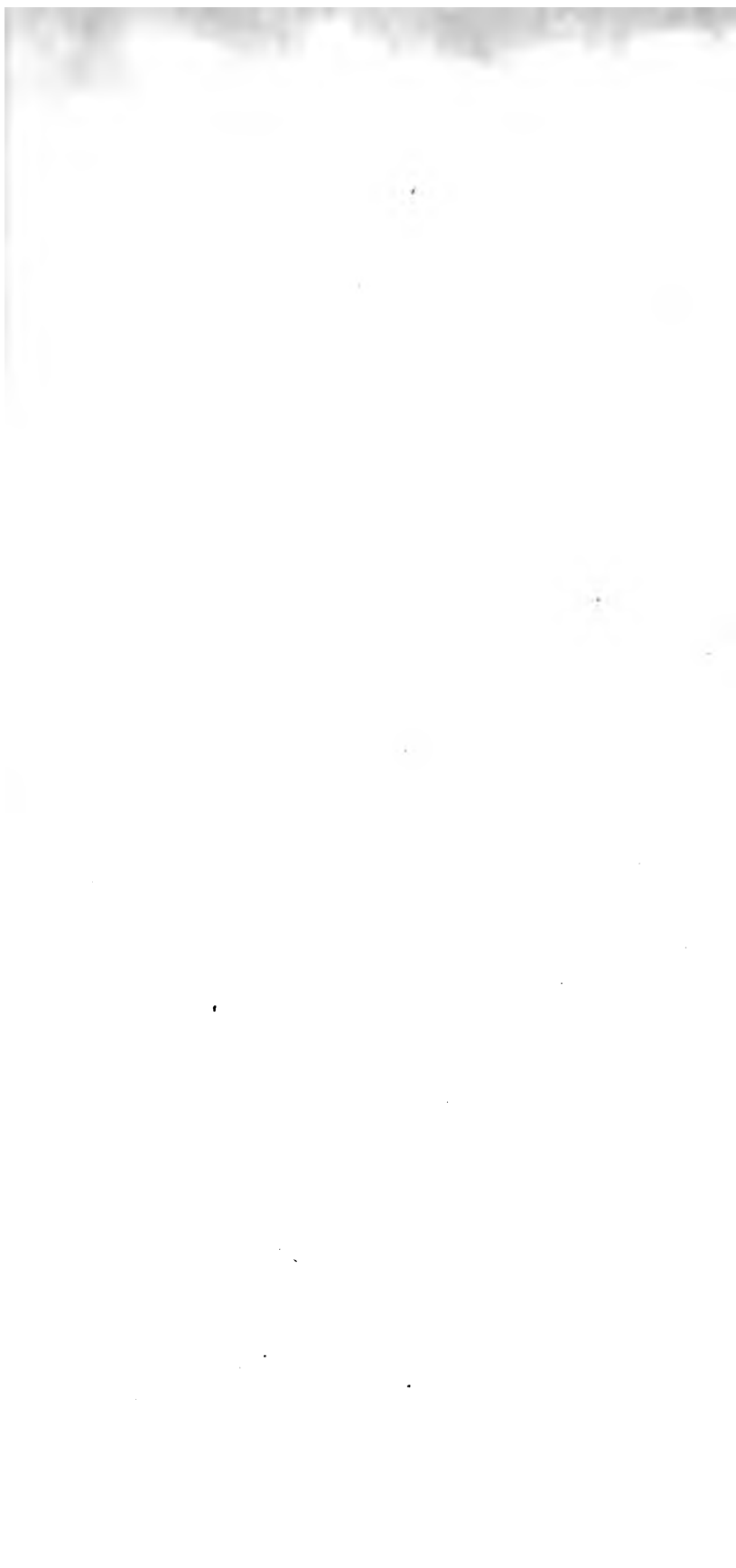
- Wood v. Willard, 36 Vermont, 82.....lxixiv, 639
 Wood v. Willard, 37 Vermont, 377.....lxixvi, 718
 Wood v. Wood, 5 Paige Ch. 598.....lxviii, 451
 Wood Co. Pet. Co. v. W. Va. Trans. Co. 26 West
 Virginia, 310.....57, 639
 Wood R. & M. M. Co. v. Smith, 50 Mich. 535.....45, 57
 Woodard v. Spiller, 1 Dana, 180.....lxv, 139
 Woodbridge v. Austin, 2 Tyler, 364.....iv, 740
 Woodbridge v. Brigham, 12 Massachusetts, 403.....vii, 65
 Woodbridge v. Obillothe, 7 Ohio, 31.....xxx, 185
 Woodbridge v. Conner, 49 Maine, 353.....lxixvii, 263
 Woodbury v. Bowman, 14 Maine, 154.....xxxi, 40
 Woodbury v. Fisher, 20 Indiana, 357.....lxixxiii, 325
 Woodbury v. Long, 8 Pickering, 543.....xix, 345
 Woodbury v. Luddy, 14 Allen, 1.....xxii, 731
 Woodbury v. Northy, 3 Greenleaf, 85.....xiv, 414
 Woodbury v. Parker, 19 Vermont, 353.....lxixvii, 695
 Woodbury v. Parishley, 7 New Hampshire, 257.....xxvi, 739
 Woodbury v. Perkins, 50 Cushing, 88.....ii, 51
 Woodbury v. Roberts, 59 Iowa, 345.....44, 695
 Woodbury v. Short, 17 Vermont, 357.....xliv, 344
 Woodbury v. State, 69 Alabama, 242.....44, 515
 Woodbury v. Woodbury, 141 Massachusetts, 329.....55, 479
 Woodbury v. Woodbury, 47 N. H. 11.....x, 553
 Woodcock v. Bennet, 1 Cowen, 711.....xiii, 568
 Wooddy v. Old Dominion Ins. Co., 31 Gratt. 363-31, 732
 Woodfill v. Patton, 76 Indiana, 875.....46, 269
 Woodfin ada. State, 53 Iredell's Law, 129.....xiii, 161
 Woodfolk v. Blount, 3 Haywood, 147.....ix, 736
 Woodford v. Darwin, 3 Vermont, 82.....xxi, 573
 Woodford v. People, 62 New York, 117.....36, 464
 Woodin v. Phoenix, 41 Michigan, 655.....33, 173
 Woodie v. Whitney, 23 Wisconsin, 55.....xvix, 102
 Woodman v. Howell, 45 Illinois, 357.....xcli, 221
 Woodman v. Hubbard, 35 New Hampshire, 67.....lvii, 310
 Woodman v. Nottingham, 49 N. H. 367.....6, 536
 Woodring v. Forks Township, 23 Penn. St. 355.....lxx, 134
 Woodruff v. Adams, 5 Blackford, 317.....lxixv, 122
 Woodruff v. Buno, 9 Paige, 443.....lxixviii, 559
 Woodruff v. Chapin, 3 Zabrickie, 556.....lvii, 416
 Woodruff v. Halsey, 2 Pickering, 333.....xix, 329
 Woodruff v. Hinman, 11 Vermont, 552.....lxixiv, 712
 Woodruff v. Johnson, 4 Haldsted's Ch. 739.....iv, 247
 Woodruff v. Logan, 6 Arkansas, 375.....xlii, 685
 Woodruff v. Garner, 27 Indiana, 4.....lxixix, 477
 Woodruff v. Scruggs, 37 Arkansas, 26.....li, 777
 Woodruff ada. State, 3 Day, 504.....ii, 123
 Woodruff S. & P. O. Co. v. Dishl, 84 Indiana, 474-43, 102
 Woods v. Armstrong, 54 Alabama, 150.....35, 671
 Woods v. Ayres, 39 Michigan, 345.....33, 396
 Woods v. Brown, 33 Indiana, 164.....47, 369
 Woods v. Devin, 13 Illinois, 747.....lvii, 483
 Woods v. Farmers, 7 Watts, 382.....lxixii, 772
 Woods v. Hilderstrand, 46 Missouri, 264.....2, 513
 Woods v. Keyes, 14 Allen, 236.....xcli, 766
 Woods v. Kirk, 28 New Hampshire, 264.....lxi, 614
 Woods v. McGee, 7 Ohio, Pt. II, 127.....lxvi, 202
 Woods v. Miller, 55 Iowa, 168.....39, 170
 Woods v. Naumkeag S. O. Co., 134 Mass. 357.....45, 344
 Woods v. Nixon, Addison, 131.....i, 364
 Woods v. North, 6 Humphreys, 309.....xliv, 312
 Woods v. North, 84 Pennsylvania State, 407.....24, 201
 Woods v. People, 55 New York, 515.....14, 309
 Woods v. State, 76 Alabama, 35.....53, 315
 Woods v. State, 36 Arkansas, 36.....38, 22
 Woods v. Wilder, 43 New York, 164.....3, 584
 Woodson v. Barrett, 2 Henning & M. 80.....xlii, 612
 Woodson v. Gordon, 1 Peck, 196.....xiv, 743
 Woodstock Bank v. Downer, 27 Vermont, 463.....lxv, 210
 Woodward v. Aborn, 26 Maine, 371.....lviii, 699
 Woodward v. Barnes, 46 Vermont, 323.....14, 636
 Woodward v. Cowing, 41 Maine, 9.....lxvi, 211
 Woodward v. Harbin, 4 Alabama, 534.....lxixvii, 733
 Woodward v. James, 3 Strobhart's Law, 322.....ii, 649
 Woodward v. Lazar, 21 California, 443.....lxixxi, 751
 Woodward v. Leavitt, 107 Massachusetts, 423.....9, 49
 Woodward v. Powers, 105 Massachusetts, 103.....7, 538
 Woodward v. Seely, 11 Illinois, 157.....i, 445
 Woodward v. Thatcher, 21 Vermont, 590.....xli, 73
 Woodward v. Towne, 127 Massachusetts, 41.....34, 337
 Woodward v. Winalow, 18 B. Monroe, 431.....lxviii, 739
 Woodward v. Woodward, 4 Haldsted, 118.....xvii, 463
 Woodworth v. Bank of America, 19 Johns. 391.....i, 239
 Woodworth v. Bennett, 43 New York, 273.....3, 706
 Woodworth v. Downer, 13 Vermont, 522.....lxixvii, 611
 Woodworth v. Hutton, 40 Illinois, 131.....lxixix, 340
 Woodworth v. Mills, 61 Wisconsin, 44.....50, 126
 Woodworth v. Payne, 74 New York, 158.....36, 258
 Woodyear v. Shaefer, 57 Maryland, 1.....46, 419
 Woolbridge v. State, 13 Texas Ct. App. 463.....44, 706
 Woolery v. Louisville N. A. & O. R'y Co., 137 In-
 diana, 381.....57, 114
 Woolery v. Woolery, 29 Indiana, 248.....xv, 629
 Wooler v. Stewart, 26 Ohio St. 146.....36, 583
 Woolley v. Carter, 3 Haldsted, 85.....xix, 520
 Woolley v. Constant, 4 Johnson, 54.....iv, 346
 Woolley v. Lyon, 117 Illinois, 344.....57, 687
 Woolley v. Sergeant, 3 Haldsted, 363.....xiv, 419
 Woolf v. Chalker, 31 Connecticut, 131.....lxixd, 176
 Woolfolk v. Overton, 3 A. K. Marshall, 68.....xlii, 134
 Woolford v. Dugan, 2 Arkansas, 151.....xxiv, 62
 Woolfolk's Adm'r v. Sullivan, 23 Alabama, 548.....lviii, 365
 Woolen v. Hillen, 9 Gill, 185.....li, 699
 Woolsey v. Cade, 54 Alabama, 373.....25, 711
 Wooster v. Blossom, 5 Jones' Law, 344.....lxixii, 549
 Wooster v. Page, 54 New Hampshire, 125.....26, 126
 Wooster v. Tarr, 3 Allen, 370.....lxixv, 707
 Wooster Bank v. Stevens, 1 Ohio State, 258.....lix, 619
 Wooten v. Wilkins, 39 Georgia, 233.....xix, 498
 Woram ada. State, 6 Hill (New York), 23.....xi, 378
 Worcester v. Eaton, 13 Massachusetts, 571.....vii, 155
 Worcester v. Great Falls Mfg. Co., 41 Me. 159.....lxvi, 217
 Worcester v. Lord, 56 Maine, 253.....lxvii, 498
 Worcester v. Worcester, 116 Massachusetts, 193.....17, 129
 Worcester Bank v. Reed, 9 Massachusetts, 267.....vi, 65
 Worcester B'k v. Harif. F. I. Co., 11 Cush. 265.....lix, 145
 Worcester Co. B'k v. Dorchester and Milton B'k,
 10 Cushing, 438.....lvii, 129
 Worcester T. P. Corp. v. Willard, 5 Mass. 80.....iv, 25
 Word v. Vance, 1 Nott & McO. 197.....ix, 653
 Worden v. Dodge, 4 Denio, 159.....lxixvii, 267
 Worden v. New Bedford, 131 Massachusetts, 23.....41, 185
 Wordin v. Bemis, 22 Connecticut, 263.....lxixv, 253
 Worford v. Isabel, 1 Bibb, 247.....lxixvii, 633
 Worgang's Adm'r v. Clipp, 21 Indiana, 119.....lxixxiii, 343
 Work v. Corrington, 34 Ohio St. 64.....37, 348
 Work v. Harper, 31 Mississippi, 107.....lxvii, 549
 Work v. State, 2 Ohio State, 396.....lix, 671
 Workingmen's B. Co. v. Rautenberg, 103 Ill. 460-43, 26
 Workman v. Guthrie, 29 Penn. State, 466.....lxixii, 654
 Workman v. Insurance Co., 2 Louisiana, 807.....xcli, 141
 Workman v. Wright, 33 Ohio St. 405.....31, 546
 Worland v. Kimberlin, 6 B. Monroe, 808.....xliv, 788
 Wormley ada. Commonwealth, 8 Grattan, 712.....lvii, 168
 Wormouth v. Cramer, 3 Wendell, 395.....xx, 708
 Worrall v. Munn, 5 N. Y. (1 Belden), 239.....lv, 239
 Worrall v. Parmelee, 1 N. Y. (1 Comst.) 519.....xlix, 285
 Worrall v. Rhoads, 2 Wharton, 427.....xxx, 274
 Worsley v. Second Municipality, 9 Rob. (La.), 284-xii, 538
 Worton v. Howard, 2 Smedes & M. 357.....xii, 698

Roman letters [xlx] refer to volumes of American Decisions, and Arabic figures [49] to American Reports.

Worth v. Comm'rs of Ashe Co., 82 N. C., 420.....	33, 692	Wylie v. Lewis, 7 Connecticut, 301.....	xviii, 108
Worth v. Wilmington & W. R. R. Co., 89		Wyman v. Campbell, 6 Porter, 219.....	xxxi, 677
North Carolina, 291.....	45, 679	Wyman v. Colorado Nat. Bank, 5 Colo. 30.....	40, 133
Worthen v. Pearson, 33 Georgia, 385.....	lxxxii, 213	Wyman v. Flake, 3 Allen, 238.....	lxxx, 68
Worthing v. Webster, 45 Maine, 270.....	lxxi, 543	Wyman v. Hallowell Bank, 14 Massachusetts, 57.....	vi, 194
Worthington v. Bearse, 12 Allen, 382.....	xc, 152	Wyman v. Hurlburt, 12 Ohio, 81.....	xl, 461
Worthington v. Charter Oak L. I. Co., 41 Con-		Wyman v. Leavitt, 71 Maine, 227.....	36, 393
necticut, 372.....	19, 495	Wyman v. People's E. I. Co., 1 Allen, 301.....	lxxxix, 737
Worthington v. Scribner, 109 Mass. 487.....	12, 736	Wyman v. Rae, 11 Gill & Johnson, 416.....	xxxvii, 70
Worthington v. State, 68 Maryland, 403.....	42, 338	Wyman v. Robinson, 73 Maine, 384.....	40, 366
Worthy v. Johnson, 8 Georgia, 238.....	lii, 399	Wyman v. Winslow, 11 Maine, 398.....	xxvi, 542
Worthy v. Johnson, 10 Georgia, 358.....	liv, 393	Wynkoop v. Niagara F. Ins. Co., 91 N. Y. 478.....	43, 684
Worthy v. Jones, 11 Gray, 168.....	lxxi, 696	Wynkoop v. Wynkoop, 42 Penn. State, 293.....	lxxxii, 506
Worthy v. Worthy, 36 Georgia, 45.....	xci, 758	Wynn v. Garland, 19 Arkansas, 23.....	lxviii, 190
Wragg v. Penn. T., 94 Illinois, 11.....	34, 199	Wynne v. Alexander, 7 Iredell's Law, 237.....	xlvi, 325
Wren, Ex parte, 63 Mississippi, 512.....	56, 825	Wynne v. Allen, 7 Bart. 312.....	32, 562
Wren v. Wardlaw, Minor, 363.....	xii, 60	Wynne v. The Governor, 1 Yerger, 149.....	xxiv, 446
Wright v. Andrews, 70 Missouri, 85.....	35, 308	Wynne v. Wynne, 23 Mississippi, 251.....	lvii, 139
Wright v. Arnold, 14 B. Monroe, 638.....	lxi, 172	Wynne v. Wynne, 2 Swan, 405.....	lviii, 66
Wright v. Bircher, 72 Missouri, 179.....	37, 433	Wyse v. Dandridge, 35 Mississippi, 672.....	lxxxii, 149
Wright v. Bowden, 1 Jones' Equity, 15.....	lix, 600	Yale, Ex parte, 24 California, 241.....	lxxxv, 42
Wright v. Boynton, 37 New Hampshire, 9.....	lxxii, 319	Yale v. Dederer, 18 New York, 265.....	lxxxii, 508
Wright v. Brown, 4 Indiana, 95.....	lviii, 622	Yale v. Dederer, 22 New York, 450.....	lxxxviii, 246
Wright v. Butler, 6 Wendell, 284.....	xxi, 333	Yale v. Yale, 13 Connecticut, 185.....	xxxiii, 303
Wright v. Chicago, B. & Q. R. Co., 19 Neb. 175.....	56, 747	Yancey v. Downer, 5 Littell, 8.....	xv, 36
Wright v. Clark, 50 Vermont, 130.....	38, 496	Yancey ada. State, 1 Carolina Law Repos. 519.....	vi, 363
Wright v. Crockery Ware Co., 1 N. Hamp. 281.....	viii, 68	Yancy v. Yancy, 5 Heisk. 353.....	13, 5
Wright v. Dunning, 46 Illinois, 271.....	xclii, 257	Yandes v. Wright, 66 Indiana, 319.....	32, 109
Wright v. Ft. Howard, 60 Wisconsin, 119.....	50, 350	Yandle v. Kingsbury, 17 Kansas, 195.....	32, 282
Wright v. Geer, 6 Vermont, 151.....	xxvii, 638	Yanes v. State, 6 Tex. Ct. App. 429.....	32, 368
Wright v. Guler, 9 Watts, 172.....	xxxvi, 108	Yaple v. Titus, 41 Penn. State, 195.....	lxxx, 694
Wright v. Hamilton, 2 Bailey's Law, 51.....	xxi, 513	Yarborough v. Thompson, 3 Smedes & M. 291.....	xii, 626
Wright v. Hays, 10 Texas, 130.....	lx, 200	Yarborough v. Wood, 43 Texas, 51.....	18, 44
Wright v. Hicks, 12 Georgia, 155.....	lvi, 481	Yard v. Pacific Mutual Insurance Co., 28 Lock-	
Wright v. Hicks, 15 Georgia, 160.....	lx, 687	ton's Chancery, 480.....	lxiv, 467
Wright v. Holbrook, 82 New Hampshire, 120.....	13, 12	Yardley v. Cuthbertson, 106 Penn. St. 368.....	56, 216
Wright v. Lathrop, 2 Ohio, 33.....	xv, 629	Yardley v. Raub, 5 Wharton, 117.....	xxxiv, 636
Wright v. Lewis, 5 Richardson's L. 212.....	lv, 714	Yarmouth v. North Yarmouth, 34 Maine, 411.....	lvi, 666
Wright v. Marks, 21 Louisiana An. 268.....	xcix, 725	Yarnall's Will, 4 Rawle, 46.....	xxvi, 116
Wright v. Miller, 8 N. Y. (4 Selden), 9.....	lix, 438	Yates v. Cole, 1 Jones' Eq. 110.....	lix, 608
Wright v. Moore, 33 Alabama, 593.....	lxxxii, 731	Yates v. Donaldson, 5 Maryland, 399.....	lxi, 253
Wright v. Morse, 9 Gray, 337.....	lxix, 291	Yates v. Lansing, 9 Johnson, 396.....	vi, 290
Wright v. Paine, 62 Alabama, 340.....	34, 24	Yates v. Squires, 19 Iowa, 36.....	lxxxvii, 416
Wright v. Pipe Line Co., 101 Penn. St. 204.....	47, 701	Yawkey v. Richardson, 9 Michigan, 629.....	lxxxii, 709
Wright v. Rawson, 52 Iowa, 829.....	35, 275	Yeackel v. Litchfield, 13 Allen, 417.....	xc, 287
Wright v. Remington, 12 Vroom, 48.....	32, 180	Yeager v. Carpenter, 8 Leigh, 454.....	xxxi, 668
Wright v. Ryder, 36 California, 342.....	xcv, 186	Yeaker's Heirs v. Yeaker's Heirs, 4 Metcalf	
Wright v. Solomon, 19 California, 64.....	lxxxix, 196	(Kentucky), 33.....	lxxxii, 539
Wright v. Spencer, 1 Stewart, 576.....	xviii, 76	Yealy v. Fink, 43 Penn. State, 212.....	lxxxii, 506
Wright v. State, 5 Blackford, 358.....	xxxv, 126	Yeargain v. Johnston, Taylor, N. O., 56.....	i, 561
Wright v. State 30 Georgia, 325.....	lxxxvi, 656	Yeates v. Reed, 4 Blackford, 463.....	xxxii, 42
Wright v. State, 5 Indiana, 290.....	lxi, 90	Yeatman v. Woods, 6 Yerger, 20.....	xxvii, 483
Wright v. State, 69 Indiana, 163.....	35, 212	Yeomans v. Chatterton, 9 Johnson, 295.....	vi, 277
Wright v. State, 7 Tex. Ct. App. 574.....	32, 599	Yerkes v. National Bank, 69 New York, 363.....	25, 266
Wright v. State, 5 Yerger, 154.....	xxvi, 258	Yerkes v. Sabin, 97 Indiana, 141.....	49, 434
Wright v. Turner, 1 Stewart, 29.....	xviii, 35	Yerrington v. Greene, 7 Rhode Island, 599.....	lxxxiv, 578
Wright v. West, 2 Lea, 78.....	31, 586	Yetzser v. Thoman, 17 Ohio St. 130.....	xci, 122
Wright v. Wilcox, 19 Wendell, 343.....	xxxii, 507	Yick Wo, Matter of, 68 California, 294.....	53, 12
Wright v. Winningham, 2 Heisk. 254.....	5, 35	Yoakum v. Tilden, 3 West Virginia, 167.....	c, 736
Wright v. Wright, 2 Maryland, 429.....	lvi, 723	Yocum v. Bullit, 6 Martin, N. S., 324.....	xvii, 184
Wright v. Wright, 2 Halsted, 175.....	xi, 546	Yocum v. Polly, 1 B. Monroe, 358.....	xxxvi, 563
Wright v. Yell, 13 Arkansas, 503.....	lviii, 336	Yocum v. Smith, 63 Illinois, 321.....	14, 120
Wright v. Young, 6 Wisconsin, 127.....	lxx, 453	Yonge & Bryan v. McCormick, 6 Florida, 366.....	lxviii, 214
Wyatt v. Ham, 23 Georgia, 201.....	lxviii, 518	Yonoski v. State, 79 Indiana, 393.....	41, 614
Wyatt's Adm'r v. Rambo, 29 Alabama, 510.....	lxviii, 89	York v. McNutt, 16 Texas, 13.....	lxvii, 607
Wyckoff v. Gardner, 1 Spencer, 556.....	xiv, 388	York Co. v. Watson, 15 South Carolina, 1.....	40, 673
Wyckoff v. Queens Co. F. Co., 52 N. Y. 52.....	11, 650	York Co. Bank v. Carter, 36 Penn. State, 448.....	lxxx, 494
Wyer v. Andrews, 13 Maine, 163.....	xxix, 497	Yorton v. Milwaukee, L. S. & W. R. Co., 64	
Wyer v. Dorch, and Milton Bank, 11 Cushing, 51.....	lix, 157	Wisconsin, 234.....	41, 23
Wyckoff v. Irvine, 6 Minnesota, 496.....	lxxx, 461	Yost v. Conroy, 92 Indiana, 464.....	47, 126

Roman letters [xix] refer to volumes of American Decisions, and Arabic figures [48] to American Reports.

Yost v. Devenish, 3 Iowa, 345.....	lxvi, 82	Younger v. State, 2 West Virginia, 579.....	xviii, 791
Yost v. Shaffer, 3 Indiana, 321.....	lvi, 509	Younger ada. State, 1 Deveraux's Law, 357.....	xvii, 571
Yost v. Smith, 105 Penn. St. 628.....	51, 219	Youngs' Appeal, 39 Penn. State, 115.....	lxxx, 513
Yost v. Stout, 4 Cold. 205.....	xciv, 194	Youse v. Norcross, 13 Missouri, 549.....	ii, 175
Youle v. Richards, 1 Barton Ch. 534.....	xxiii, 723	Yowell v. Dodd, 3 Bush, 551.....	xvi, 258
Young v. Adams, 14 B. Monroe, 137.....	lviii, 654	Yorlheimer v. Keyser, 11 Penn. State, 364.....	ii, 558
Young v. Bank of Alabama, 5 Alabama, 179.....	xxxix, 322	Yundt's Appeal, 13 Penn. State, 375.....	iii, 496
Young v. Broher, 31 Missouri, 136.....	lxxvii, 638	Zabrickie v. H. & N. Y. R. R., 19 New Jersey Eq. 173.....	xc, 617
Young v. City Council of Charleston, 20 S. C. 116.47, 327		Zabrickie v. Meade, 2 Nevada, 285.....	xx, 542
Young v. Cleveland, 33 Missouri, 128.....	lxxxiii, 155	Zabrickie v. Smith, 13 N. Y. (3 Kernan), 322.....	lxiv, 551
Young v. Covell, 8 Johnson, 23.....	v, 316	Zabrickie v. State, 14 Vroom, 640.....	39, 510
Young v. Dake, 5 N. Y. (1 Selden), 463.....	lv, 266	Zacharie v. Godfrey, 50 Illinois, 128.....	xcix, 508
Young v. Daniels, 2 Iowa, 126.....	lxiii, 477	Zachary v. Pace, 9 Arkansas, 212.....	lxvii, 744
Young v. De Bruhl, 11 Richardson's L. 638.....	lxxiii, 137	Zaleski v. Clark, 44 Connecticut, 218.....	96, 446
Young v. Eagle Fire Ins. Co., 14 Gray, 150.....	lxxiv, 673	Zann v. Haller, 71 Indiana, 139.....	36, 193
Young v. Glendinning, 6 Watts, 809.....	xxxi, 492	Zebach v. Smith, 3 Binney, 69.....	v, 222
Young v. Gregoria, 3 Cal. 446.....	ii, 556	Zecharie v. Bowers, 1 Smedes & M. 504.....	xi, 111
Young v. Harris, 14 B. Monroe, 556.....	lxi, 170	Zeigler v. Eckert, 6 Penn. State, 13.....	lxvii, 428
Young v. Hartford Fire Ins. Co., 45 Iowa, 277.....	24, 784	Zeigler v. Scott, 10 Georgia, 369.....	lv, 396
Young v. Hill, 67 New York, 168.....	23, 99	Zeigler v. Bentimer, 8 Gill & J. 180.....	xxix, 534
Young v. Jones, 64 Maine, 363.....	18, 279	Zeigler v. Wells, Fargo & Co., 23 Cal. 179.....	lxxxiii, 57
Young v. Lathrop, 67 North Carolina, 61.....	12, 603	Zelwains v. James, 63 Penn. St. 465.....	3, 629
Young v. Loran, 11 Illinois, 694.....	iii, 463	Zetter v. Zetter, 4 Watts, 212.....	lxviii, 628
Young v. Paul, 2 Stockton's Ch. 451.....	lxiv, 456	Zemp v. Wilmington & M. R. R., 9 Richardson's Law, 64.....	lxiv, 768
Young v. Rathbone, 16 N. J. Eq. 394.....	lxxiv, 151	Zerby v. Wilson, 3 Ohio, 42.....	lxvii, 577
Young v. Rummel, 3 Hill (N. Y.), 478.....	xxxviii, 594	Zickafone v. Hallik, 1 Morris, 178.....	xxxix, 428
Young v. Ship Princess Royal, 23 Ca. Ann. 523.....	2, 731	Zier v. Hoffman, 33 Minnesota, 66.....	53, 9
Young v. Smith, 3 Dana, 91.....	lxviii, 57	Zimmerman v. Anders, 6 Watts & Berg, 212.....	xi, 528
Young v. Smith, 23 Missouri, 98.....	lxxv, 109	Zimmerman v. Anderson, 67 Penn. St. 451.....	5, 447
Young v. Smith, 33 Texas, 590.....	lxxvi, 21	Zimmerman v. Cowan, 107 Illinois, 621.....	47, 476
Young v. State Bank, 4 Indiana, 301.....	lviii, 630	Zimmerman v. Erhard, 68 New York, 74.....	36, 296
Young ada. State, 46 New Hampshire, 266.....	lxxviii, 212	Zimmerman v. McMakin, 23 South Carolina, 372.53, 739	
Young v. Stevens, 48 New Hampshire, 128.....	2, 202	Zink v. People, 77 New York, 114.....	33, 589
Young v. Stevens, 48 New Hampshire, 128.....	xvii, 503	Zinn v. New Jersey Steamboat Co., 48 N. Y. 442.....	16, 403
Young v. Templeton, 4 Louisi ^a An. 354.....	1, 563	Zosbisch v. Tarbell, 10 Allen, 368.....	lxxvii, 669
Young v. Thomas, 17 Florida, 289.....	25, 93	Zoeller v. Riley, 100 New York, 108.....	58, 187
Young v. Young, 39 New York, 423.....	33, 634	Zollar v. Janvin, 46 New Hampshire, 114.....	6, 468
Young v. Wiseman, 7 T. B. Monroe, 270.....	lxviii, 176	Zottmann v. San Francisco, 20 California, 94.....	lxxxi, 56
Young v. Wright, 4 Wisconsin, 144.....	lxv, 303	Zuchtmann v. Roberts, 103 Massachusetts, 38.....	12, 623
Youngblood v. Lowry, 2 McCord, 39.....	lxii, 698	Zule v. Zule, 14 Wendell, 78.....	lxix, 609
Youngblood v. Sexton, 22 Michigan, 404.....	96, 654	Zulke v. Wing, 20 Wisconsin, 403.....	34, 429
Youngblood v. Vantine, 46 Missouri, 129.....	2, 509		
Younger v. Duffie, 54 N. Y. York, 366.....	46, 126		





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